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

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# 6 Unconceived, Unborn, Uncertain

## Is Pre-Birth Protection Necessary in International Commercial Surrogacy for Children to Exercise and Enjoy Their Rights Post-Birth?

*Abstract*

Certain rights of children under the UN Convention on the Rights of the Child may be negatively impacted once they 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 must be taken to protect the future child's rights both preconception and prenatally in all ICS arrangements. 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 born through ICS can exercise and enjoy their CRC rights. Together with the preceding chapters and the ones that follow, this Chapter ensures this study treats the rights of the child in ICS holistically, considering the ICS timeline from before birth, during the child's gestation, and following the child's birth.

*Main Findings*

- 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.
- The CRC should be interpreted dynamically, in light of ICS as a current-day child rights challenge.
- Decisions and actions taken in the preconception and prenatal stages of ICS arrangements can impact on the rights of future children born through individual ICS arrangements.
- Preconception and prenatal decisions and actions taken by commissioning parents and other actors in ICS arrangements should be taken in line with an *in eventu* approach to protect the rights of potential future children, so

that such children can exercise and enjoy their full range of CRC rights, if and when they are born through ICS.
- A three-pronged set of strategic safeguards is proposed, to help ensure preconception and prenatal actions and decisions in ICS preserve the opportunity for future children to exercise and enjoy their rights. These safeguards can be practically implemented by ICS actors, despite the lack of international regulation or agreement concerning ICS as a method of family formation or of ICS.

*Contextual notes*

- This Chapter presents new and novel analysis in the ICS context, from a child rights perspective.
- It is highly relevant to the contemporary child rights challenges arising in ICS, given that ICS case law across many jurisdictions (both domestic and regional) continues to reflect the reality that preconception and prenatal decisions and actions taken in ICS are having significant impacts on the ability of children to exercise and enjoy their rights once born.

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## 1 Introduction

Human reproduction has experienced marked shifts over the past 40 years, with medical and technological advances enabling the birth of children in new ways via assisted reproductive technology (ART). International Commercial Surrogacy (ICS) is one distinct new method of family formation emerging over the past decade. Children are created through ICS to fulfil the wishes of 'commissioning parents' and brought to term by a surrogate 'mother' outside the commissioning parents' home country. Such children may be genetically related to one or both commissioning parents, to their surrogate mother or to none of these parties, instead related to third-party gamete donors (sometimes in combination with a commissioning parent). ICS blends surrogacy practice with ART methods in a cross-border setting. The supply-side practice of ICS is situated in a small number of less developed states and some states in the United States of America,[1] responding to demand from prospective parents

1 E.g. the state of California allows commercial surrogacy and grants pre-birth parentage.

predominantly from the more-developed world.[2] Aside from the involvement of a surrogate, common factors in all ICS arrangements are their international nature; the conception of children in a highly intentional, planned way; and the involvement of multiple parties with potential parentage claims over resulting children. Furthermore, at the outset, such arrangements are premised on commissioning parents' intentions to assume care for the child(ren) once born and remove them to a different state to reside.

ICS arrangements centre on children that 'will be'; as such, the practice of ICS raises questions pertaining to the protection of children's future rights during the preconception[3] and prenatal[4] stages of such arrangements. The issue of the treatment of unborn children in ICS deserves special attention from an international human rights law perspective because medical and technological advances have outstripped national laws and policies, and no international regulation of ICS currently exists.[5] Consequently, children born through ICS are sometimes born into situations of heightened vulnerability, in part due to their enjoyment of some of their rights under the United Nations Convention on the Rights of the Child (CRC) being restricted by decisions and actions taken preconception and prenatally.

This paper considers whether children require some level of human rights protection in ICS before birth, so they can exercise and enjoy the full range of CRC rights once they are born. It considers how preconception and prenatal decisions and actions impact the rights of children born through ICS. Focusing on the specific context of ICS, this paper crucially addresses a gap in scholarship regarding linkages between decisions and actions concerning children occurring before they are born and their ability to realise their CRC rights once born. Given this focus on issues arising preconception and prenatally that can impact the child's ability once born to enjoy and exercise their CRC rights, right to

2 E.g. according to some sources, as at 2014 the greatest demand per capita for ICS comes from commissioning parents in Australia. See: Cooper, M., *et al* (eds.), *Current Issues and Emerging Trends in Medical Tourism*, (Hershey: Medical Information Science Reference, 2015), 147.

3 For the purposes of the discussion in this paper, 'preconception stage' refers to the time before a child is conceived in ICS; commissioning parents may be researching, seeking advice (for example from medical professionals, legal advisors, surrogacy brokers), making decisions, and even taking actions to conceive a child through ICS (such as purchasing gametes), but conception has not yet occurred and therefore the future child is only an idea.

4 For the purposes of the discussion in this paper and given that ICS arrangements are usually ART-based, 'prenatal stage' refers to the period from which a pre-embryo exists for use in the ICS arrangement and once the foetus is in utero up until child birth.

5 The Permanent Bureau of the Hague Conference on Private International Law has appointed an Experts Group with 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.

life issues fall largely out of scope.[6] However, it is acknowledged that decisions and actions sometimes occur in ICS leading to children not being born. Despite being outside the scope of this paper, these do raise significant human rights issues from a child rights perspective.[7]

A main feature of ICS is its intentional, planned nature as a method of creating a child. Unlike intercountry adoption – a practice with its roots in providing pre-existing children in need of care and protection with a family environment across borders – ICS is a method of family-building centred on creating new children across borders to meet the desire and demand of commissioning parents. The fact that ICS also involves multiple parties and occurs across borders makes it the most complex, risky method of having a child. Therefore, this paper proceeds from the hypothesis that due to the intentional, planned nature of ICS, the involvement of multiple possible parents and the potential impact of preconception and prenatal decisions and actions on the rights of children born through ICS arrangements, preconception and prenatal protection of the unborn future child is required in all ICS situations.

To explore this hypothesis, firstly the potential impact of decisions and actions taken during the preconception and prenatal stages on the CRC rights of children who are born through ICS are highlighted. This provides a snapshot of the problem to be addressed. This is followed by analysis of whether international human rights law provides a basis for protecting the unborn child, and selected regional human rights jurisprudence and domestic approaches concerning protection of the unborn (non-ICS) child are analysed. Following this, the intentional, planned nature of ICS and the associated responsibilities of the actors involved in ICS are discussed. Based on the foregoing discussion, focus shifts to the areas in which protection is required preconception and prenatally in ICS to ensure that particular CRC rights are not an empty promise for children born through ICS, but rather that they can exercise and enjoy their CRC rights from birth. Informed throughout by a public international law child rights framework, this paper concludes by recommending particular preconception and prenatal protective safeguards for the rights of future children in ICS, highlighting the roles and obligations of various parties in this highly contentious area of children's rights.

6 Given that in instances where the child does not end up being born as a result of an ICS arrangement, their enjoyment and exercise of rights becomes moot point in the context of the focus of this paper.

7 The child rights issues arising from decisions and actions in ICS arrangements leading to children not being born e.g. as a result of multiple embryo transfer and subsequent foetal reduction, sex selection or abortion on other non-medically necessary grounds merit separate future research, centring on issues raised under Articles 2 (non-discrimination) and 6 CRC (right to life, survival and development).

## 2 The impact of actions and decisions in the prenatal and preconception stages of ICS on the rights of children once born

In ICS, preconception and prenatal decisions and actions can trigger implications for the child's enjoyment and exercise of their CRC rights once born. Figure 1 below provides a snapshot of the core rights of the child that can be impacted negatively by problems arising during the prenatal and preconception stages of ICS. As illustrated, these cluster around issues relating to the child's identity and their protection and participation rights. These core rights at risk are discussed further below in the contexts of the preconception and prenatal stages of ICS, highlighting some of the ways these rights impacts are triggered by actions and decisions before the child is even born.

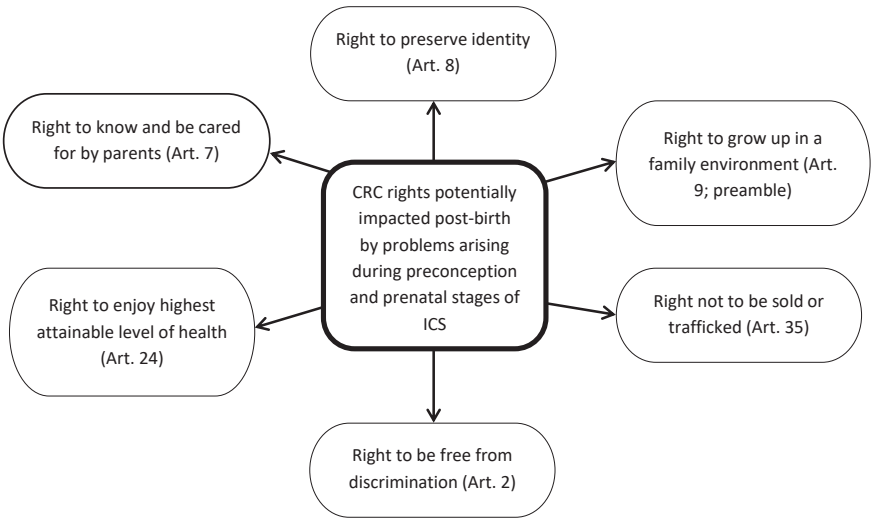


*Figure 1*

### 2.1 Key child rights impacts triggered during the preconception stage of ICS

During the preconception stage of ICS, the future child is only an abstract thought, desired by the commissioning parents. Therefore, to start thinking about the future child's rights can appear to stretch the concept of human rights. However, in the ICS context, it is necessary to do so given the reality that decisions and actions taken before conception can have a clear and significant impact on the child's enjoyment and exercise of their rights from birth onwards. Regarding some CRC rights, if they are not given forethought and some protection before birth, they will be rendered meaningless for the child once born. Decisions made by commissioning parents to use anonymous

gametes to conceive a child in ICS, and/or an anonymous surrogate mother to bring the child to term are preconception decisions with far-reaching impacts on the future child's rights. Most significantly, these decisions can trigger severe restrictions on the child's Article 8 CRC right to preserve their identity once they are born. In ICS arrangements using anonymous gametes, the child will not be able to preserve their genetic identity and will be unable to know their genetic parents, raising an additional breach of their right to know their parents under Article 7 of the CRC. When anonymous surrogates are involved in ICS, this has a similar impact on the child's Article 7 and 8 rights, except in relation to the biological aspect of the child's identity (and therefore, their ability to know the person who carried them to term and gave birth to them).

In instances where the child is born through ICS using anonymous gametes, an associated implication of being unable to preserve the genetic element of their identity is that the child will not be able to access health history information relating to their genetic parents. This may mean the child remains unaware of their risk of developing medical conditions or diseases detectable through genetic health history, and they will remain unable to take preventative measures relating to such conditions and diseases. This prevents the child from full enjoyment of their Article 24 right to the highest attainable standard of health. This may also be the case from a biological perspective regarding the child's surrogate mother, in instances where she remains anonymous. The negative impacts of these preconception decisions and actions on the child's Articles 7, 8 and 24 rights will have a lifetime impact on the child once born, and will be inconsistent with the child's right under Article 3 CRC to have their best interests treated as a primary consideration in all actions concerning them and the principle that all CRC rights must be implemented consistent with the best interests principle.[8]

The use of incorrect gametes or embryo is a further problematic situation which can arise during the preconception stage of ICS, triggering impacts on the child's rights once born. This can occur when the gametes or embryo intended by the commissioning parents for use in the ICS arrangement are mixed-up with those intended for use in a different ICS or ART arrangement, leading to a child being born with a genetic makeup different to that intended. In ICS arrangements where this occurs and the future child was intended to have a genetic link to one or two of their commissioning parents, this will mean the child is born without such a link. In mix-up situations where the child's genetic parents are unable to be traced, this will lead to a breach of the child's Article 8 identity right, their Article 7 right to know their parents (regarding genetic parents), and in turn, their Article 24 right. Furthermore, when incorrect gametes or embryo are used in ICS and it is established that

8 Committee on the Rights of the Child, *General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration*, UN Doc. CRC/C/GC/14 (29 May 2013), [1].

the child is not of the genetic make-up intended, this raises the potential of commissioning parents abandoning the child following his or her birth. If this occurs, this will arguably breach the non-discrimination principle (Article 2 CRC); the child's right to grow up in a family environment (established by Article 9 CRC and in the CRC preamble) may also be at risk; and the abandoned child may be at risk of child trafficking or sale, which is prohibited under Article 35 CRC.

### 2.2 Key child rights impacts triggered during the prenatal stage of ICS

Once the child is in-utero, many actions and decisions may be taken by parties to and involved with an ICS arrangement leading to negative impacts on the future child's rights once born. The child's enjoyment and exercise of their CRC rights under articles 2, 7, 8, 9, 24 and 35 will potentially be impacted by the decisions and actions occurring in each of the following scenarios which may arise during the prenatal stage of ICS:

- A multiple pregnancy occurs and commissioning parents decide they will not take one (or more) of the future children in the event they are born.
- Prenatal testing detects the unborn child does not fulfil the particular intent of the commissioning parents (for example, a different sex to that intended; disability or serious health condition), and as a result commissioning parents decide to abandon the ICS arrangement while the child is in-utero or once the child is born.
- A decision is made by commissioning parents and/or the surrogate to not prenatally screen for disabilities and serious health conditions, and upon birth, a disability or serious health condition is detected; the commissioning parents abandon the child as a result.
- The surrogate and commissioning parents disagree regarding the surrogate's control/autonomy over health and lifestyle decisions during pregnancy, leading to commissioning parents reneging on the ICS arrangement and abandoning the child before or after birth.
- Commissioning parents decide to renege on the ICS arrangement for any other reason before or after birth, and in doing so, abandon the child.

One further problematic situation which can arise during the prenatal stage of ICS is the surrogate reneging on the ICS arrangement and deciding during pregnancy that she wants to keep the child or children once born. This raises potential implications for the child's enjoyment and exercise of their rights under Articles 7, 8 and 24 once born, if the child is unable to know their commissioning parents and their genetic parents.

Three factors often determine if the preconception and prenatal problems highlighted in the above sections arise in an ICS arrangement: the intent and preparedness of the commissioning parent(s) regarding the ICS arrangement;

the surrogate mother's wishes and control over her reproductive autonomy; and the nature of the agreement between the parties. However, it is essential to introduce the rights and best interests of the future child as another determining factor during the preconception and prenatal stages of every ICS arrangement. This is crucial given the future child's centrality to all such arrangements and their vulnerability regarding their rights and status due to being conceived and born through ICS.

## 3 Does international human rights law provide a basis for protecting the unborn child?

Having outlined the significant challenges to child rights in ICS triggered by actions and decisions taking place before the child is conceived and born, it is necessary to consider whether international human rights law provides a basis for protecting unborn future children in ICS. This section primarily focuses on whether unborn children have rights under the CRC, before briefly considering other international human rights law instruments.

### 3.1 United Nations Convention on the Rights of the Child

None of the CRC's operative clauses explicitly address whether unborn children have rights. Article 1, defining 'child' is silent on this; Nolan notes "this 'silence' of the CRC reflects the absence of a universally agreed-upon age when childhood begins" (Nolan, 2011, 3); and as Cornock and Montgomery note, "Given the controversy of deciding when life begins […] this deliberate lack of definition is not surprising. […] to gain the maximum number of ratifications, such a contentious issue was always likely to be deliberately obscured in the drafting process." (Cornock and Montgomery, 2011, 11) The CRC's lack of a definition regarding the start of childhood leaves open the option of interpreting the CRC as extending to the unborn child; Dorscheidt asserts given Article 1 "does not mention a minimum age limit, it remains possible that the Convention also includes the unborn child." (Dorscheidt, 1999, 309) Janoff elaborates that "The Article 1 definition allows for several interpretations of when childhood might begin under the Convention: at fertilisation, at conception, at birth, or at some other point between conception and birth." (Janoff, 2004, 164)

The CRC preamble includes some guidance regarding the CRC's application pre-birth. Preambular paragraph nine includes a statement referencing the prenatal child, using wording directly lifted from the Declaration of the Rights of the Child (1924): "Bearing in mind that, as indicated in the Declaration of the Rights of the Child […] the child, by reason of his physical and mental

immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". Interpreting preambular paragraph nine consistent with Article 31, Vienna Convention on the Law of Treaties (VCLT),[9] it appears the special protection afforded to children applies before and after birth; the preamble's wording relating to the unborn child is unambiguous, providing an arguable basis for interpreting the CRC as providing that some prenatal protection of the unborn child is necessary. This is despite there being no explicit mandatory requirement of pre-birth protection in preambular paragraph nine or anywhere else in the CRC. Interpreted in light of the object and purpose of the CRC – which broadly speaking is the establishment of standards and norms on the protection, participation and promotion of the rights of the child – this meaning also holds.

However, in the context of the wider CRC text, it is necessary to analyse the extent to which preambular paragraph nine can be relied on as establishing a position at international law that rights should be protected pre-birth. This is especially so given the lack of further explicit mention of 'before birth' in the CRC's operative provisions. Articles 6 and 24 are the only operative CRC provisions which can be read as explicitly connecting to "before birth". Article 6 recognises the child's inherent right to life and that the child's survival and development will be protected to the maximum extent possible by States Parties. But as Dorscheidt notes, as with Article 1, Article 6(1) "does not indicate at what point life begins and because of this it is unclear at what moment the enjoyment of the inherent right to life starts." (Dorscheidt, 1999, 311)

In establishing the child's right to the enjoyment of the highest attainable standard of health, Article 24 requires States Parties (in pursuing full implementation of this right) to, among other things, take appropriate measures to diminish infant and child mortality (Art. 24(2)(b)) and to ensure appropriate prenatal health care for mothers (Art. 24(2)(d)). As Grover posits, the inclusion of these provisions indicate that "the *child's* right to health encompasses also the right to proper care prior to birth". (Grover, 2015, 128). Kilty, arguing in favour of children knowing the identities of their genetic parents given the associated health benefits of knowing about health conditions and diseases they may be genetic carriers of or pre-disposed to, says "one may only decide to make lifestyle changes when one knows they are required. Information about one's predisposition to suffer genetic health problems is easier to obtain when one knows the identities of one's genetic parents. For this reason, children who have been misled or denied information about their genetic parents, [as a result of the circumstances of their birth] lack information about their genetic

9 Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) 1969 requires that treaties are interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

health history and, as a result, are at risk of having their welfare choices compromised." (Kilty, 2013, 5)

Furthermore, Articles 7 and 8 of the CRC have an implied connection to the "before birth" reference in preambular paragraph nine. Article 7(1) establishes the child's right to know and be cared for by his or her parents as far as possible, and Article 8(1) stipulates the child's right to preserve his or her identity. The object and purpose of these provisions is arguably to ensure that the child can know their parents and understand where they came from, and have the opportunity to be able to answer the fundamental human question, 'who am I?' (Achmad, 2016). In the ICS context, such provisions only become meaningfully operative if decisions and actions occurring during the preconception and prenatal stages are consistent with these rights, protecting them for the future child. If not, the child may experience difficulties exercising and enjoying their Article 7 and 8 rights once born. For example, these rights become meaningless in ICS situations where donor gametes are used, if there is no obligation at the preconception stage to safeguard and preserve donors' identity information. If such steps are not taken before the child is born to protect their future rights under Articles 7 and 8, once born, the child will never be able to know their genetic identity and genetic parents, therefore unable to exercise and enjoy these CRC rights.

Article 31(1) VCLT states that 'context' for the purpose of interpretation of treaties comprises, "in addition to the text, including its preamble and annexes", among other things "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" (Article 31(2)(a) VCLT). Regarding the CRC, O'Rourke asserts "The preamble counts. It gives context, weight and importance to what follows. It established the framework, values and aspirations of those who framed the document." (O'Rourke, 2012, 4) Alston tempers this view, stating that the preamble does not have obligatory force in its own right (Alston, 1990, 169), a view confirmed by the International Court of Justice that alone, preambular provisions do not generally amount to rules of law (*South-West Africa Cases (Second Phase)* ICJ Rep. 1966, at [50]). Regarding other agreements made between all parties connected with the conclusion of the CRC, it is notable that the Open-Ended Working Group (O-EWG) drafting the CRC adopted the following interpretative statement regarding inclusion of the ninth preambular paragraph: "In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by States Parties."[10] Consequently, the door was left open to interpretations extending CRC protection pre-birth, despite the Convention itself not requiring it. Given this possibility, a small number of States Parties

10 Commission on Human Rights, *Report of the Working Group on a draft convention on the rights of the child*, (2 March 1989), E/CN.4/1989/48, [43]-[47].

have lodged reservations or declarations regarding the CRC's application to pre-birth issues.[11]

### *3.1.1 Convention the Rights of the Child – Travaux Préparatoires*

The *travaux préparatoires* provide further insight regarding the weight to be accorded to preambular paragraph nine when interpreting the CRC.[12] During negotiation of the CRC, the issue of whether rights should accord before and after birth divided the states involved (Detrick, 1992, 26); even amongst those states arguing for rights before birth, there was disagreement over the exact point at which such protection should commence.[13]

However, as Detrick outlines, this did not prevent some level of agreement being reached:

> '… there was just one relevant point on which all could agree: that, as stated in the Preamble of the 1959 Declaration on the Rights of the Child, the child "needs special safeguards and care, including appropriate legal protection, both before as well as after birth." Such legal protection could include, but would not require, the prohibition of abortion. Not without difficulty, the Working Group finally came to a consensus that explicit reference to the formulation in the Declaration would be made in the Preamble to the Convention, and that there would be no mention of minimum age in Article 1.' (Detrick, 1992, 26)

Despite the wording of preambular paragraph nine, Copelon argues that "This reflects, at most, recognition of a state's duty to promote, through nutrition, health and support directed to the pregnant woman, a child's capacity to survive and thrive after birth" (Copelon, 2005, 122), and asserting that the limited purpose of the words 'before as well as after birth' is reinforced by the O-WEG's statement regarding interpretation (Copelon, 2005, 122). However, the fact remains that the possibility of pre-birth protection is in no way ruled

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11 Argentina and Guatemala declare an interpretation of Article 1 CRC as applying to human beings from the moment of conception; the Holy See declares it recognises the CRC as safeguarding the child's rights before birth, moreover stating that preambular paragraph nine is the "perspective through which the rest of the Convention will be interpreted." Conversely, China and the United Kingdom's declarations state that they interpret the CRC as only applying following a live birth. See: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (accessed 28 June 2016).

12 Art 32 VCLT states that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or reasonable."

13 E.g. Portugal favoured clear definition of the rights of the child applying before birth (Detrick, S., 1992, 49); Malta and Senegal were more specific, seeking protection of the child's rights to begin from conception (a proposal the Holy See would have supported if it had not been withdrawn) (Detrick, S., 1992, 118).

out by the final CRC text. In the context of ICS, Copelon's framing of States Parties' duties does not go far enough to protect the child's wider rights under the CRC; without active protection of the future child's rights before birth and conception by both States Parties and other actors in ICS (such as commissioning parents and medical professionals), a number of their rights (as already discussed) are at risk of not being able to be enjoyed and exercised once born. Copelon's position is also inconsistent with the Committee on the Rights of the Child's long-standing position of requiring States Parties to ensure children born through ART can know their origins,[14] which necessarily requires actions to be taken preconception to protect the future child's identity rights so they are realisable by children in the event they are born.

Given this paper's focus on ICS, it is significant to note that many O-EWG delegations supported including a CRC article governing medical experimentation in the ART context (Alston, 1990, 166). Although no such provision appears in the final text, one idea discussed was a provision that "would have extended any protection accorded to children in general to "the conceived, unborn child" who would have been protected from "genetic experiments and manipulations injurious this physical, moral or mental integrity or to his health." (Alston, 1990, 166) However, applying this idea of post-conception, prenatal protection to the ICS context, it would not go far enough to protect the child's rights in situations already identified as arising preconception, negatively impacting the child's exercise and enjoyment of rights once born. Despite this, the CRC framers' consideration of pre-birth protection in the ART context indicates that some protection pre-birth is important in the overall child rights rubric. The fact this was considered over 25 years ago indicates the urgency for the CRC to now be interpreted in an evolutive and dynamic way[15] in light of contemporary developments such as ICS, as a living instrument (McGonagle and Donders, 2015, 153) to ensure children's rights are protected in such contexts.

On balance, the CRC text reflects compromises on pre-birth protection to achieve a position acceptable to all states. It achieves this through including preambular paragraph nine, therefore leaving open the option of prenatal rights protection; consequently, "The Convention is neutral in neither requiring nor forbidding formal legal protection of the fetus." (Hodgson, 1994, 375) Dorscheidt argues, therefore, that states parties to international human rights treaties

> 'are at liberty to hold whatever view on the unborn child's legal position they consider appropriate. Generally, States Parties give substance to this liberty by

14 E.g. see Committee on the Rights of the Child, *Concluding observations regarding Norway*, (25 April 1994), CRC/C/15/Add.23, [10]. However, to date the Committee has not invoked premabular paragraph nine to support its positon.

15 Committee on the Rights of the Child, *General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, UN. Doc. CRC/C/GC/8 (7 March 2007), [18].

> holding the view that the unborn child derives no legal protection from these human rights instruments. It is my impression, however, that this prevailing view has emerged from the fact that during the drafting of many human rights treaties the legal position of the unborn child was exclusively considered in relation to abortion. Other prenatal matters were hardly discussed, probably because they were not identified yet, or simply not familiar to the States' delegates. Meanwhile, there is much evidence to the fact that the legal position of the unborn child is not a one-item issue and needs further elaboration in many other contexts as well.' (Dorscheidt, 2010, 453)

Taking up Dorscheidt's call, ICS should be treated as one of these 'other prenatal matters'; by elaborating on the CRC's application to the child's situation both preconception and prenatally in ICS, this paper adds to the body of scholarship on the possibility of rights protection before birth under international human rights law.

### *3.1.2 Other international human rights law instruments*

There is no explicit mention of pre-birth rights in the UDHR, ICCPR or the International Covenant on Economic, Social and Cultural Rights (ICESCR). Nor are prenatal rights addressed by the Universal Declaration on Bioethics and Human Rights. However, both the UDHR and the ICCPR establish the right to life (Articles 3 and (1) respectively), and the ICCPR explicitly prohibits carrying out the death penalty on pregnant women (Article 6(5)). The ICESCR states that "special protection should be accorded to mothers during a reasonable period before and after childbirth" (Article 10(2)), and that States Parties should take steps necessary for "the provision for the reduction of the stillbirth-rate and infant mortality and for the healthy development of the child" (Article 12(2)(a)). Beyond these provisions and the CRC as already discussed, there is little guidance to be gleaned from international human rights law instruments regarding how to approach the future child's rights pre-birth.

Moreover, pre-birth issues have received scant attention in the general comments of treaty bodies,[16] and the Human Rights Committee ('the HRC', receiving communications under the ICCPR) has dealt with very few cases

16 Of the few instances existing are the Human Rights Committee's observation of the "high incidence of prenatal sex selection and abortion of female foetuses" in its General Comment No. 28 on Equality, and its statement in its General Comment No. 6 that "The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy" (para. 5).

concerning the situation of the child pre-birth.[17] However, notably the Human Rights Committee recently published a new draft General Comment on Article 6: Right to life,[18] including a number of statements regarding the pre-birth phase, for example emphasising "the Covenant does not explicitly refer to the rights of unborn children" ([7]) and asserting that "This omission is deliberate, since proposals to include the right to life of the unborn within the scope of article 6 were considered and rejected during the process of drafting the Covenant." ([7]fn9) The Committee elaborates that

> 'In the absence of subsequent agreements regarding the inclusion of the rights of the unborn within Article 6 and in the absence of uniform State practice which establishes such subsequent agreements, the Committee cannot assume that Article 6 imposes on State parties an obligation to recognize the right to life of unborn children. Still, States parties may choose to adopt measures designed to protect the life, potential for human life or dignity of unborn children, including through recognition of their capacity to exercise the right the life [sic], provided that such recognition does not result in violation of other rights under the Covenant, including the right to life of pregnant mothers and the prohibition against exposing them to cruel, inhuman and degrading treatment or punishment.' ([7])

This statement aligns with the practice of the Committee on the Rights of the Child regarding pre-birth issues, in which it has acknowledged the need for some protection of the unborn child's rights (for example regarding their right to know their origins and the recommendation that States Parties "introduce and strengthen prenatal care"[19] for children with disabilities), expressed disapproval of practices such as abortion as a form of birth control,[20] "discrim-

17 A communication made to the Human Rights Committee concerning the situation of unborn children in the context of abortion in general in Canada was decided as being inadmissible for consideration by the Committee. (Communication No. 1379/2005 CCPR/C/84/D/1379/2005). Of those communications concerning pre-birth issues the Committee has considered on their merits have been communications concerning, e.g., the situation of a rape victim who was refused an abortion (Communication No. 1608/2007 CCPR/C/101/D/1608/2007) and the refusal of a therapeutic abortion for a pregnant adolescent despite medical opinions that her life was in danger as a result of the continued pregnancy (Communication No. 1153/2003 CCPR/C/85/D/1153/2003).

18 Human Rights Committee, *Draft General Comment No. 36 Article 6: Right to Life,* UN Doc. CCPR/C/GC/R.3 (1 April 2015).

19 Committee on the Rights of the Child, *General Comment No. 9: The Rights of Children with Disabilities*, UN Doc. CRC/C/GC/9, (27 February 2007), [53].

20 E.g. Committee on the Rights of the Child, *Concluding Observations: Greece*, UN Doc. CRC/C/15/Add.170 (2 April 2002), [60]; Committee on the Rights of the Child, *Concluding Observations*: *Russian Federation*, UN Doc. CRC/C/15/Add. 110, (10 November 1999), [46]; Committee on the Rights of the Child, *Concluding Observations*: *Latvia*, UN Doc. CRC/C/ LVA/CO/2, (28 June 2006), [44].

inatory elimination of girls before birth"[21] and sex-selection,[22] but also made clear its view that in situations where the physical or mental health and well-being of a pregnant woman is at risk, her rights must be given precedence over the unborn child's right to life.[23] The draft statement of the Human Rights Committee also reinforces the CRC's position of leaving open the option for States Parties to choose whether to actively protect the child pre-birth.

The Human Rights Committee explicitly clarifies in this draft General Comment that "the Covenant does not directly regulate questions relating to the right to life of frozen embryos, eggs or sperms, stem cells or human clones. States parties may regulate the protection of these forms of life or potential life, while respecting their other obligations under the Covenant." ([8]) However, the Committee also states that the special protection provided by the prohibition in Article 6(5) ICCPR on carrying out the death sentence on pregnant women "stems from an interest in protecting the rights and interests of affected family members, including the unborn foetus and the foetus's father." ([50]) By making clear the position at international human rights law that although not required absolutely, some level of pre-birth protection is important in some contexts and certainly possible, this draft statement of interpretation is progressive given its acknowledgement that there is an interest in protecting the rights and interests of the unborn foetus.

## 3.2 Treatment of the unborn child in regional human rights instruments and national constitutions

### *3.2.1 Regional human rights instruments*

Regional human rights instruments focus on pre-birth issues through provisions protecting the right to life. The right to life as established by the ICCPR is reflected in the African Charter on Human and People's Rights, the African Child Welfare Charter and the European Convention on the Protection of

21 Committee on the Rights of the Child, *General Comment No. 13: The right of the child to freedom from all forms of violence,* UN Doc. CRC/C/GC/13, (18 April 2011), [16]: "The social costs arising from a demographic imbalance due to the discriminatory elimination of girls before birth are high and have potential implications for increased violence against girls including abduction, early and forced marriage, trafficking for sexual purposes and sexual violence". The Committee also notes at para 11(i) of General comment 7 early childhood that "Discrimination against girl children is a serious violation of rights. […] They may be victims of selective abortion..."

22 E.g. Committee on the Rights of the Child, Concluding Observations: China, UN Doc. CRC/C/CHN/CO/2, (24 November 2005), [28]-[29].

23 E.g. Committee on the Rights of the Child, *Concluding Observations: Chad*, UN Doc. CRC/C/15/Add.107, (24 August 1999), [30]. Janoff argues this indicates a developing international norm that the rights of pregnant mothers supersede the unborn child's right to life. (Janoff, 2004, 165)

Human Rights and Fundamental Freedoms, but none of these key regional human rights instruments mention pre-birth rights. However, the American Convention on Human Rights (ACHR) takes a different approach; as Schabas notes, "the majority of Member States felt that the life of the unborn should be protected" (Schabas, 2008, 1059). Therefore, Article 4(1) ACHR says the right to life "shall be protected by law and, in general, from the moment of conception." This provision remains unique within international law.

In the European context, the European Convention on Human Rights and Biomedicine (Oviedo Convention) provides some guidance relating to the preconception and prenatal stages. Although the Oviedo Convention focuses on the 'human being' and (as per its preamble) is aimed at respect for the human being and ensuring human dignity, it does not define 'human being', and some of its provisions indicate limited prenatal protection should be afforded to organisms with potential to develop into human beings. For example, Article 12 restricts the use of predictive genetic tests to health purposes or scientific research linked to health purposes. Article 14 prohibits the practice of sex selection and refers to the 'future child', requiring that "The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided." Article 21 of the Ovideo Convention is also explicit that "The human body and its parts shall not, as such, give rise to financial gain". Relevant to the preconception stage, Article 18(1) states that "Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo."[24]

### 3.2.2 *National constitutions*[25]

A small number of states take a constitutional approach to the issue of whether the child receives protection pre-birth. Some constitutions protect unborn

24 The Oviedo Convention does not define what amounts to 'adequate protection of the embryo'; however, the Council of Europe's Working Party on the Protection of the Human Embryo and Foetus stated in its *Report on the Protection of the Human Embryo In Vitro* said that "Even if positions differ on the status of the embryo and the creation of embryos *in vitro,* there is general agreement on the need for protection. Measures taken to ensure that protection and the level of protection may however vary […] measures provided usually offer protection of the embryo *in vitro* from the fertilisation stage onwards. The aim in general is to ensure optimal conditions for fertilisation and embryo culture, and respect for good medical practice. One of the aims of protection is to ensure that the embryo is not subjected to experimental procedures that could damage it or put at risk its developmental potential." (19 June 2003, 8).

25 Initial research for this section was undertaken through keyword searches for the terms 'abort'; 'abortion'; 'child'; 'children'; 'conception'; 'foetus'; 'human'; 'life'; 'terminate'; 'termination'; 'unborn' in the national constitutions available at https://www.constituteproject.org/search?lang=en

children by prohibiting termination (Uganda;[26] Zambia;[27] Zimbabwe[28]) or by protecting the health of mothers once a child is conceived (Venezuela[29]). Others protect unborn children alongside the mother's right to life (Ireland,[30] the Philippines[31]). However, the most common approach to constitutional pre-birth protection is a statement that life or the right to life begins[32] or state protection of human life applies from conception.[33] Within this group various nuances are apparent. The Hungarian Constitution (also protecting life from the moment of conception) is the only national constitution including the term 'foetus';[34] El Salvador explicitly "recognizes as a human person every human being since the moment of conception";[35] whereas Madagascar frames pre-birth recognition within the right to health from conception.[36] Beyond these approaches, the Chilean Constitution uniquely protects "the life of those about to be born",[37] which Couso et al assert leaves room for regulating abortion through law (Couso, 2011, 185). Peru has a more extreme position, constitutionally recognising "the unborn child is a rights-bearing subject in all cases

26 Article 22(2), Chapter 4, Constitution of the Republic of Uganda (amended by the Constitution (amendment) (No. 2) Act, 2005): "No person has the right to terminate the life of an unborn child except as may be authorised by law."

27 Article 12(2), Part III, Constitution of Zambia (1991) "No person shall deprive an unborn child of life by termination of pregnancy except in accordance with the conditions laid down by an Act of Parliament for that purpose."

28 Article 48(2), Part 2, Chapter 4, Constitution of Zimbabwe (2013): "An Act of Parliament must protect the lives of unborn children, and that Act must provide that pregnancy may be terminated only in accordance with that law."

29 Article 76, Chapter V, Title III, Constitution of the Bolivarian Republic of Venezuela (1999) "The State guarantees overall assistance and protection for motherhood, in general, from the moment of conception".

30 Article 40(3)(3), Constitution of Ireland (last amended 29 August 2015), 1937.

31 Section 12, Article II, Constitution of the Republic of the Philippines (1987).

32 Article 4, Chapter I, Title II, Constitution of the Republic of Paraguay (as amended 2011), 1992; Article 37, Section I, Chapter I, Title II, Constitution of the Dominican Republic (2010); Article 26(2), Part 2, Chapter 4, Constitution of Kenya (2010).

33 Article 3, Constitution of the Republic of Guatemala (as amended to 1993), 1985; Article 45, Section 5, Chapter 3, Title II, Constitution of the Republic of Ecuador (2008); also similar, although not expressed constitutionally, Polish legislation states that every human being "shall have a natural life as from the time of his conception" (Section 1(1), Law of 7 January 1993 on family planning, protection of human foetuses and the conditions under which pregnancy is possible) and "The life and health of the child shall be placed under the protection of the law, as from the time of its conception." (Section 1(2), Law of 7 January 1993 on family planning, protection of human foetuses and the conditions under which pregnancy is possible)

34 Article 2, Constitution of the Republic of Hungary (2011): "Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception."

35 Article 1, Title I, Constitution of the Republic of El Salvador (as amended to 2003), 1993.

36 Article 19, Title II, Sub Title II, Constitution of the Republic of Madagascar (2010): "recognises and organises for all individuals the right to the protection of health from their conception through the organisation of free public health care".

37 Article 19(1), Constitution of the Republic of Chile (as amended up to 2010), 1980.

that benefit him",[38] whilst the Honduran Constitution equates the unborn with the born (similar to El Salvador's recognition of the unborn as human persons from the moment of conception) for the purposes of all rights accorded within limits established by law.[39]

Some constitutional courts have, however, held that protection of the foetus must be balanced with the rights of the pregnant woman. For example, the Colombian Constitutional Court ruled unconstitutional a law giving complete pre-eminence to the foetus, thereby extinguishing the woman's fundamental rights and violating her dignity "by reducing her to a mere receptacle for the foetus, without rights or interests of constitutional relevance worthy of protection." (*Sentencia* C-355/06, [10.1]) Article 15 of the Slovak Constitution states that "Human life is worthy of protection even prior to birth", however the Slovak Constitutional Court held this must not be interpreted as trumping the right of a pregnant woman to exercise her rights over her personal autonomy and bodily integrity. (*PL. US 12/01 from 4 December, 2007,* [10])

The constitutional approaches highlighted above evidence in practice states' ability to choose whether and to what extent they protect unborn children, consistent with the margin left open to them by the CRC.

## 4 Jurisprudential approaches to pre-birth issues

This section highlights leading regional human rights jurisprudence addressing (albeit limitedly) whether human rights protection can attached pre-birth, followed by analysis of leading regional and domestic jurisprudence and statutory approaches to specific preconception and prenatal issues. These jurisprudential approaches to pre-birth issues provide further insight relevant when approaching the ICS context.

### 4.1 Leading regional human rights jurisprudence

The leading regional human rights jurisprudence of most relevance to the discussion in this paper comes from the Inter-American and the European Courts of Human Rights respectively; these are briefly discussed below.

#### *4.1.1 Inter-American Court of Human Rights*

In the Inter-American Court of Human Rights (I-ACHR), *Artavia Murillo et al ("In Vitro Fertilisation") v. Costa Rica* (Inter-Am. Ct. H.R. (ser. C) No. 257, No-

38 Article 2(1), Constitution of the Republic of Peru (as amended up to 2009), 1993.
39 Article 67, Constitution of the Republic of Honduras (as amended to 1991), 1982.

vember 28, 2012) is the leading case on this issue. The Court explicitly states that an embryo is not a person for the purposes of Article 4(1) of the ACHR (Inter-Am. Ct. H.R. (ser. C) No. 257, [264]) and clarifies that the protection of the right to life from 'the moment of conception' under the ACHR only has effect from the time "the embryo becomes implanted in the uterus"(therefore, Article 4 ACHR is inapplicable prior) (Inter-Am. Ct. H.R. (ser. C) No. 257, [264]). The Court adopted a gradualist view of pre-birth rights, finding "it can be concluded from the words "in general" that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails understanding that exceptions to the general rule are admissible." (Inter-Am. Ct. H.R. (ser. C) No. 257, [264]) De Jesus argues the I-ACHR erred in its interpretation of Article 4(1) in *Artavia Murillo* (De Jesus, 2014, 227), asserting it has "interpreted the right to life from conception in the most restrictive possible manner, holding that, before implantation, the human embryo is not a person entitled to human rights protection under the American Convention, while redefining the term "conception" as implantation, not fertilisation." (De Jesus, 2014, 226)

Indeed, if we were to apply this ruling to ICS situations, it would mean that the rights of the child affected by actions or decisions preconception would be outside the scope of protection as defined by the Court; this would clearly have a negative impact on the rights of the child to identity preservation, and to know their parents once born (depending on the circumstances, their commissioning parents, genetic parents, and/or their surrogate mother). The I-ACHR has not dealt with another case on its merits concerning the issue of when rights attach pre-birth since *Artavia Murillo,* however De Jesus may well be correct that "It is unlikely that *Artavia* will be deemed to be the final word on the interpretation [of] the right to life from conception." (De Jesus, 2014, 248) It would certainly be useful if the Court outlines its reasoning underpinning its position further; until then, *Artavia Murillo* arguably stands as the most forthright contemporary judgment on this topic.

### *4.1.2 European Court of Human Rights*

Despite being issued ten years ago, *Vo v. France* (App. no. 53924/00, Judgment (Merits), Court (Grand Chamber) 08/07/2004) remains the leading European Court of Human Rights (ECtHR) judgment directly concerning whether Article 2 ECHR (right to life) applies pre-birth. A medical mix-up led to a procedure being undertaken on the wrong pregnant woman (the applicant), during which an act of medical negligence occurred, leading to a therapeutic abortion being necessary to protect her health. As Wicks observes, *Vo v. France* is unusual as it does not concern a fact scenario where the interests of the pregnant woman conflict with the foetus' interests; rather, the applicant asserted her deceased unborn child's rights (Wicks, 2009, 184). As the Court said "the

dispute concerns the involuntary killing of an unborn child against the mother's wishes, causing her particular suffering. The interests of the mother and the child clearly coincided." ([87])

The Grand Chamber held Article 2 ECHR inapplicable; it said even assuming Article 2 applied, no violation of the right to life occurred. ([95]) However, of particular relevance to the issue of pre-birth protection in ICS is the ECtHR's treatment of the issue of whether ECHR protection covers the embryo or foetus. The ECtHR noted the silence of the ECHR regarding the temporal limitations of the right to life, and said it was "yet to determine the issue of the "beginning" of "everyone's right to life" within the meaning of [Article 2 ECHR] and whether the unborn child has such a right." ([75])[40] Observing no consensus exists in Europe regarding the nature and status of the embryo or foetus, the ECtHR said European states do hold a common view that the embryo/foetus belongs to the human race. ([84]) Importantly, the ECtHR asserted "The potentiality of that being and its capacity to become a person […] require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2." ([84]) Furthermore, the ECHR said the possibility that "in certain circumstances safeguards may be extended to the unborn child" ([80]) remains open. Therefore, it is possible the ECtHR will reach a view in future (on particular facts and balancing the rights of other parties involved) that human rights protection should be afforded to unborn children under the ECHR. Indeed, should an ICS situation raising such questions form the subject of an application to the ECtHR in future, the possibility of reaching such a view remains open to the Court. Judge Rozakis further asserted in his separate opinion:

> 'Even if one accepts that life begins before birth, that does not automatically and unconditionally confer on this form of human life a right to life equivalent to the corresponding right of a child after its birth. This does not mean that the unborn child does not enjoy any protection by human society, since – as the relevant legislation of European States, and European agreements and relevant documents show – the unborn life is already considered to be worthy of protection. But as I read the relevant legal instruments, this protection, though afforded to a being considered worthy of it, is, as stated above, distinct from that given to a child after birth, and far narrower in scope.' (Separate opinion of Judge Rozakis, *Vo v. France,* App. no. 53924/00, Judgment (Merits), Court (Grand Chamber) 08/07/2004)

Finally regarding *Vo v. France,* the dissenting judgments are significant when considering the preconception and pre-birth situation of the rights of children in ICS. Judge Ress notes that the majority in *Vo* deviates from the prior approach of the ECtHR's case law on this issue, which has been based on the

40 Moreover, the Grand Chamber said it was not desirable or possible to "answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention." ([85])

*in eventu* or "assuming that" argument. (Dissenting opinion of Judge Ress, *Vo v. France,* App. no. 53924/00, Judgment (Merits), Court (Grand Chamber) 08/07/2004, [3]) Judge Ress therefore argues that a foetus may enjoy protection under the ECHR, especially under Article 8(2) (Dissenting judgment of Judge Ress, [4]) and that Article 2 is applicable to children even before birth. (Dissenting judgment of Judge Ress, [9]) Judge Mularoni cites the fact that all European states have special legislative provisions regarding abortion means consensus exists that the foetus does have some kind of rights requiring protection (Dissenting opinion of Judge Mularoni joined by Judge Strážnická, *Vo v. France,* App. no. 53924/00, Judgment (Merits), Court (Grand Chamber) 08/07/2004).

The preceding discussion highlights the differences existing within regional human rights law and constitutional approaches to the unborn child. Some states explicitly assert via constitutional provisions that the unborn child receives protection pre-birth, whilst others, despite also granting such protection, balance this with protecting the competing rights of others to avoid human rights violations. Regional human rights law jurisprudence, albeit limited in this area, shows that where instruments are not explicit regarding protection of the unborn child, this does not rule out the possibility of pre-birth protection; this is consistent with the basis left open by the CRC. Of particular relevance to this paper's hypothesis is the fact that base level commonality exists between many states that unborn life is worthy of some sort of protection (for example as highlighted in *Vo v. France* amongst European states). This is the case even if the protection is much narrower in scope than the protection attaching to a child once born, and acknowledging that in some instances it will raise a conflict with the rights of other parties (for example, the child's surrogate mother) necessitating a rights-balancing exercise weighing the competing rights to identify the approach to be taken.

Two concepts raised by the regional human rights jurisprudence discussed are also relevant for approaching the child's pre-birth situation in ICS, insofar as it impacts on their rights once born. The first is the concept of human dignity, and the idea that given the potentiality of a being once in-utero, pre-birth protection of the rights it will be entitled to once born is necessary based on human dignity. This accords with the position that despite not being a person, a foetus is a being worthy of some protection (despite this not being absolute), given its potentiality to become a human being. Although this would only cover the prenatal stage of ICS (that is, once a child is conceived), the second concept – viewing the future child's rights through an *in eventu* argument – could extend to the preconception stage of ICS. This would lead to framing the child's rights pre-birth in ICS (including the preconception stage) with an approach based on the position that 'assuming that the child will be born', it is in the future child's best interests that they receive pre-birth protection that secures, to the greatest extent possible, their ability to exercise and enjoy their CRC rights once born. A clear example of this in ICS is that the

child's right to identity preservation should be protected through Article 8 consistent actions and decisions during the preconception stage of ICS, namely by using donor gametes which are identifiable.

It is also important to acknowledge that protecting the child's rights most at risk in ICS due to preconception and prenatal decisions and actions does not preclude abortion; protecting the child's rights pre-birth does not mean the child has an absolute right to life, but rather is directed towards leaving open the possibility of the child being able to exercise and enjoy their rights (which may otherwise be violated in ICS through decisions and actions occurring at the preconception and prenatal stages), in the event that they are born. If the child does not end up being born, this still does not mean that the child's other rights could not have been protected preconception and prenatally in ICS, given the particular child rights identified as being at risk in ICS, triggered through situations arising during these pre-birth stages. Protecting the future child's rights pre-birth (both preconception and prenatally) so that *in eventu* they are born, they can enjoy and exercise these rights, does not mean attributing rights pre-birth, but rather attributing future rights, given the risks triggered to the rights already discussed as being placed at risk pre-birth in ICS. On this basis, in ICS some protection of the child's future rights preconception and pre-birth is required, to prevent these rights being rendered empty upon birth.

## 4.2 Selected domestic and regional jurisprudence concerning specific non-ICS pre-birth issues

Domestic jurisprudential approaches to two non-ICS situations concerning the impact of actions and decisions during the prenatal stage on the rights of children once born are worth briefly highlighting, to assess if they might assist in addressing child rights impacts in ICS stemming from a lack of protection pre-birth.

### *4.2.1 Wrongful life legal actions, including those based on failures to undertake prenatal testing*

'Wrongful life' legal actions rest on arguments that a failure (for example, of a medical professional/organisation) to take an action prenatally (such as genetic screening tests) meant a birth was unable to be prevented, amounting to a negligent act. Such claims have been rejected by courts in domestic jurisdictions such as Australia, Germany and the UK. For example, the German Federal Constitutional Court ruled wrongful life claims unconstitutional because they conflict with the German human dignity principle (Article 1, German Basic Law), on the basis that a duty to prevent a child's birth because he/she will likely have a condition making his/her life appear valueless raises

a conflict with tort law duties (normally centring on protecting personal integrity) (Bundesgerichtshof (Sixth Civil Senate) BGHZ 86, 240, JZ 1983, 447).

However, wrongful life claims brought by children (or on their behalf) and claims brought by parents in their own right have succeeded in a few domestic jurisdictions, for example in the Netherlands and some US states. Of such successful claims, the reasoning of the Supreme Court of California in *Turpin v Sortini* (31 Cal 3d 220; 643 P 2d 954 (Cal 1982) is notable as it places great weight on the best interests of the child: "Although in deciding whether or not to bear such a child parents may properly, and undoubtedly do, take into account their own interests, parents also presumptively consider the interests of their future child. Thus, when a defendant negligently fails to diagnose a hereditary ailment, he harms the potential child as well as the parents by depriving the parents of information which may be necessary to determine whether it is in the child's own interests to be born with defects or not to be born at all." (*Turpin v Sortini,* [233]-[234]) This ruling therefore stands for the principle that some steps should be taken prenatally to protect the future child's best interests once born.

Recently, the South African Constitutional Court delivered a judgment considering whether "the child may have a claim for patrimonial damages against a medical expert in circumstances where a prenatal misdiagnosis of a medical condition or congenital disability deprived the child's mother of the informed choice to abort." (*H v. Fetal Assessment Centre* [2014] ZACC 34, [80]) With reasoning heavily emphasising the need to protect the rights and best interests of the child at birth (for example, at [48]-[52]), the Court held that wrongful life claims are not inconceivable under the South African Constitution ([52]), and a child's wrongful life claim may potentially be found to exist. ([81]) Consequently, the South African Constitutional Court has left open the possibility of successful wrongful life claims (with the case in question now returned to the High Court for determination).

The ECtHR has also given judgments in a number of applications concerning wrongful life claims regarding failures to provide prenatal testing. In *Costa and Pavan v. Italy* (App. no. 54270/10 Judgment (Merits and Just Satisfaction), Court, Second Section 28/08/2012), the Court held Article 8 applicable regarding refusal of preimplantation genetic diagnosis (PGD) screening of an embryo intentionally created from gametes of cystic fibrosis carriers ([57]). Finding a violation of Article 8, the Court rejected the Government's justification of refusing prenatal screening to protect the health of the child and the pregnant woman, the dignity and freedom of conscience of the medical professionals and to guard against eugenic selection ([61]). The Court said "While stressing that the concept of "child" cannot be put in the same category as that of "embryo", it fails to see how the protection of the interests referred to by the Government can be reconciled with the possibility available to the applicants of having an abortion on medical grounds if the foetus turns out to be affected by the disease, having regard in particular to the consequences of this both

for the foetus, which is clearly far further developed than an embryo, and for the parents, in particular the woman." ([62])

*R.R. v. Poland* (App. No. 27617/04 Judgment (Merits and Just Satisfaction), Court (Fourth Section) 26/05/2011) concerned the birth of a child born with Turner Syndrome after his mother (the applicant) was refused access to prenatal genetic testing to confirm foetal abnormalities existed, the likelihood of which had been detected by ultrasound. The refusal of prenatal testing prevented the applicant taking a decision regarding lawful abortion. The Court found a violation of Article 3 (prohibition of inhuman and degrading treatment) and Article 8 regarding the applicant's inability to access medical procedures enabling her "to acquire full information about the foetus' health" ([198]) in order to make a decision regarding abortion; the State was obliged to ensure unimpeded access to prenatal information and testing relating to the health of pregnant women and foetuses. ([156]-[157])[41]

These wrongful life cases show that courts have, in some instances, emphasised the need to consider the potential consequences of prenatal actions and decisions for the future child once born, and upheld the need to take prenatal actions consistent with protecting the future child's rights and best interests. Whilst the court's approach of emphasising the interests of the child in *Turpin* is certainly positive and can be extended to ICS situations, the extent to which commissioning parents "presumptively consider the [rights and] interests of their future child" during the preconception and prenatal stages in ICS remains, without empirical research, unclear. Certainly however, if commissioning parents did give greater consideration to this and take actions and decisions aligned with protecting the rights of their future child(ren), many of the problems identified as arsing during the prenatal stage of ICS and the associated rights implications for the child post-birth may be alleviated. For example, this could manifest in commissioning parents choosing not to abandon a child conceived through ICS in instances where a disability or serious medical condition is detected, or when a multiple birth occurs, given abandoning a child may not align with protecting the child's rights.

Drawing on the South African Constitutional Court's approach too, applying the need to protect the rights and best interests of the child at birth to the ICS context, protection of some rights at birth relies on these rights being protected and preserved before birth and even before conception. This is clear in relation to the potential impact of actions and decisions occurring preconception on the child's rights relating to identity, health and knowing his or her parents. Furthermore, by placing importance on the consequences of pre-birth

41 In *A.K. v. Latvia,* App. no. 33011/08, Judgment (Merits and Just Satisfaction), Court (Fourth Section) 24/06/2014, the ECtHR also found a violation of Article 8 in its procedural aspect. In this case, the denial of adequate and timely prenatal screening tests prevented the applicant making an informed decision regarding abortion; she subsequently gave birth to a child with Down Syndrome.

actions (or omissions) for the foetus as a future child in *Costa and Pavan v. Italy* and *R.R. v. Poland*, the ECtHR effectively emphasises the need to prioritise the future child's rights and best interests (while balancing them with the pregnant woman's rights), by requiring certain actions to be taken or avoided pre-birth to give the child the possibility of a life situation according with their best interests. In these two cases, a direct line is drawn between the consequences of what occurs pre-birth for the child's best interests and health-related rights post-birth; this is highly relevant to the ICS context regarding the need to protect the future child's rights pre-birth, for them to be enjoyed and exercised post-birth.

#### 4.2.2 *Actions of a pregnant woman detrimentally impacting on the unborn child and future child*

The Courts in many jurisdictions have considered the balance to be struck between the interests of the pregnant woman and her unborn child in instances concerning pregnant womens' prenatal decisions which may negatively impact foetal health or the child's health once born. *Winnipeg Child and Family Services (Northwest Area) v. G (D.F.)* (Canadian Supreme Court) is a leading authority, concerning whether legal grounds existed to require a pregnant woman to receive hospital treatment and counselling for drug addiction (without her consent). The Supreme Court held such actions would amount to forced treatment and detention, violating her constitutional rights. It held that the courts do not have authority to require a competent pregnant woman to receive medical treatment she does not want and that "a judicial intervention designed to improve the health of the foetus and the mother may actually put both seriously at risk […] In the end, orders made to protect a foetus' health could ultimately result in its destruction."

Whereas *Winnipeg* concerned decision-making powers over pregnant women directed towards protecting unborn children, the UK Court of Appeal recently dealt with a case brought by a child relating to her mother's actions during pregnancy. The child was born with severe brain damage, experiencing learning, memory, developmental and behavioural problems caused by foetal alcohol spectrum disorder (FASD) (*CP (A Child) v. First Tier Tribunal (Criminal Injuries Compensation) (British Pregnancy Advisory Service/Birthrights and another intervening)* [2014] EWCA Civ 1554, [2014] All ER (D) 48 (Dec)). The Court dismissed the child's claim, saying she was not entitled to compensation for the actions of her mother; her mother had not committed a criminal offence by excessively consuming alcohol while pregnant. ([44]-[45]) Furthermore, the Court said grievous bodily harm inflicted on a foetus does not amount to criminal activity, as grievous bodily harm on a person is required; a foetus is a "sui generis organism", not a person. Varney observes the judgment implies "that the right of pregnant women to make their own decisions about their pregnancies and their actions while pregnant is almost absolute." (Varney,

2014, 2) This decision clarifies that in the UK, children with FASD are unable to claim criminal injuries compensation, as they are not viewed under law as having been the victim of a criminal act.

However, this decision is questionable from a child rights perspective as the impacts of FASD experienced by the child have a clear causal link to her mother's alcohol abuse while pregnant; to undertake such actions as a parent undoubtedly runs counter to the child's best interests, as manifested in the child's life following birth. Indeed, some Canadian and US states have passed legislation or developed jurisprudence establishing that substance abuse during pregnancy amounts to child abuse.[42] Minnesota, South Dakota and Wisconsin provide examples of states that have gone further, passing legislation establishing substance abuse during pregnancy as grounds for authorising (forced) civil commitment to a treatment programme (to protect the foetus), (Guttmacher Institute, 2016, 1) while Tennessee has legislation establishing substance abuse during pregnancy as a criminal offence. (Guttmacher Institute, 2016, 1)

The above jurisprudential approaches to the situation of the unborn child show the continuing legal divergence in this area. However, they are relevant to the ICS context as they show the possibility for future claims by children born through ICS based on arguments that they have experienced harm resulting from the decisions and actions of their surrogate mothers while pregnant. In the ICS context, children could arguably also bring claims relating to pre-birth actions and decisions taken by their commissioning parents and other third parties, such as medical practitioners, detrimentally impacting on them once born. This could be envisaged regarding actions and decisions at both the preconception and prenatal stages. An argument could even be made by a child relating to the actions of a genetic parent who acted as an anonymous gamete donor, on the basis of detrimental impacts the child experiences relating to their identity and health rights and their right to know their parents. However, given the anonymity of the donor, in practice such claims would need to be made either against the state or a private actor, such as a fertility clinic/doctor, arguing they should not have allowed anonymous donor gametes to be used.

While the claims made in the domestic judgments discussed in this section have been confined to actions amounting to criminal offending, taking a progressive child protection approach, there is a strong argument in favour of ensuring the balance of protection rests in favour of the child's best interests in the ICS context, even in situations not constituting criminal offending but which have a potential lifetime impact on a child's development and best

42 Alabama, Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Michigan, Nevada, Oaklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Wisconsin. See also e.g. the Canadian cases of *Re Children's Aid Society for the District of Kenora and JL,* 134 DLR (3d) 249, 1982 WDFL 390 (Ont Prov Ct) and *M(J) v. Superintendent of Family and Child Services* [1983] 4 CNLR 41, (1983) 35 RFL (2d) 364 (BCCA).

interests. The human rights-based argument that children could make in future regarding detrimental pre-birth actions and decisions in ICS by surrogate mothers, commissioning parents and other third parties has the potential to be highly convincing.

### *4.2.3 Embryos created through ART*

Certain cases concerning embryos created through ART are relevant to the present focus on ICS. In *Evans v. United Kingdom* (App. no. 6339/05, Judgment (Merits), Court (Grand Chamber), 10/04/2007), the ECtHR held that an embryo does not have independent rights or interests and cannot claim (or have claimed on its behalf) a right to life under Article 2 of the ECHR (relying on *Vo v. France*: the embryo/foetus is not a person) (*Evans v. United Kingdom*, [54]; [56]). However, more recently in *Parrillo v. Italy* (App. no. 46470/11, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), 27/08/2015), the Grand Chamber observed that stored, unused embryos were part of the applicant's (the future child's genetic mother) identity because they contained her genetic material, therefore engaging Article 8 ([158]-[159]) (however, no violation was found). The ECtHR found Article 2 was not at issue on the facts of the case, but also said human embryos are not possessions.[43] The use and control of pre-embryos created through ART and stored gametes are relatively novel legal issues internationally,[44] continuing to develop. It is possible that the incidence of cases concerning disputes over the control and use of stored embryos (for example, by claimants seeking to use embryos against the wishes of their former partner) will increase. It remains to be seen whether courts will take into consideration the rights and best interests of the future child (for example, to know and be cared for by parents; to preserve their identity), or whether focus will predominantly rest on the wishes of the persons who created the embryo with their genetic material. In one such case, the Illinois Appellate Court recently ruled in favour of an appellant seeking to have her own genetic child against the wishes of her former partner, by using three cryopreserved pre-embryos created during their relationship (*Szafranski v. Dunston*, 2015 IL App (1st) 122975-B). The Court granted the appellant sole custody and control over the disputed pre-embryos, however, its reasoning for doing so focused on balancing the interests of the two disputing parties, without reasoning concerning the potential rights and best interests of any future children born via successful gestation of the pre-embryos.

43 Within the meaning of Protocol No. 1 to the Convention (personal property); therefore the Protocol did not apply.

44 For discussion, see: Schwartz, M., "Who owns pre-embryos?", *The New Yorker* 19 April 2015, http://www.newyorker.com/tech/elements/who-owns-pre-embryos (accessed 02 February 2016).

At a general level, while there remains a lot of work to be done to clarify the legal status of human embryos, the principle made clear in the European context, that human embryos are not possessions, recognises that some level of protection (as yet, undefined) is necessary in relation to actions impacting on embryos, despite their lack of independent personhood. The European approach appears to be underpinned by the concept of human dignity, given the potentiality of the embryo to become a future child. The approach of the Illinois Appellate Court illustrates the need to ensure that the rights and best interests of the potential future child that could result from the use of embryos are made central considerations in the ART and ICS context, given the lifelong impacts the child could experience resulting from decisions concerning the use of embryos in situations where the competing interests and intentional decisions of the adults involved may not align with the future child's rights and best interests.

## 5 Implications for the Future Child's Rights of the Intentional, Planned Nature of ICS and the Involvement of Multiple Possible Parents

Analysis in this paper has highlighted the potential impact of preconception and prenatal actions and decisions on the rights of children born through ICS arrangements, demonstrating these impacts are tied to the pre-birth actions and decisions of commissioning parents, surrogate mothers, genetic parents and other third parties involved in ICS (such as medical professionals). Indeed, without the involvement of all these parties in ICS, ICS would not have developed as an alternative method of family-building. In part, it is this involvement of multiple parties that distinguishes ICS from other methods of family-building, but more so it is the involvement of multiple potential parents to the child, combined with the intentional, planned nature of ICS that differentiates it from other forms of family-building. These factors complicate the future child's rights, given their enjoyment and exercise of the key rights already identified once born is dependent on actions and decisions taken preconception and prenatally by their multiple potential parents and other third parties to the ICS arrangement. As already outlined, in ICS it is possible for adult parties to purposely take pre-birth actions and decisions that contradict the future child's rights. Despite the parties to ICS arrangements having the choice whether to take actions and decisions which will uphold and safeguard the future child's rights, sometimes they chose not to. This underscores the need to actively build-in protection of the child's rights most at risk preconception and prenatally, so they have the opportunity to exercise and enjoy these rights once born. Also, given the complexity arising through the involvement of multiple potential parents, where conflicts arise between these parties pre-birth, these can have lifelong impacts on the future child.

The preconception intention and associated planning of the commissioning parents is the foundation of all ICS arrangements. This places strong responsibility on the commissioning parents, because they have a choice whether to take the future child's rights into account or not, and whether to take actions and decisions preconception and prenatally which align with the future child's best interests and rights. For example, unlike in traditional conception situations (where, although similar child rights issues such as identity preservation and the right to know and be cared for by one's parents may arise), in ICS a series of intentional and planned steps lead up to the conception and birth of a child, including many decision points within the control of commissioning parents in particular. Some examples of pre-birth decision points are whether to:

- use anonymous or identifiable gametes (preconception stage);
- involve an anonymous or known surrogate mother (preconception stage);
- take responsibility for a child even if they have a disability or serious medical condition (prenatal stage); and
- take responsibility for multiple children if a multiple pregnancy occurs (prenatal stage).

In all such instances, commissioning parents intentionally choose to take actions consistent or inconsistent with the future child's rights.

Furthermore, applying the Article 18(1) CRC standard of the common responsibilities of parents "for the upbringing and the development of the child" and that "the best interests of the child will be their basic concern" in a dynamic and evolutive manner to the ICS context, commissioning parents should be seen as having an obligation to consider and act consistently with the future child's rights and best interests pre-birth, given their intention to parent the child. This obligation can arguably also apply to surrogates, given that they may be characterised as 'parents' in ICS, despite the fact they do not intend to socially parent the child once born. Extending Article 18(1) to its fullest potential extent in ICS, arguably genetic parents too, have parental responsibilities regarding the future child; by applying Article 18(1) to genetic parents in ICS it would, for example, follow that they should choose to only become genetic parents in ICS arrangements if they are willing to do so on an identifiable basis and be known by the future child (therefore safeguarding the child's rights to identity preservation, to know and be cared for by their parents and to health). Consistent with Article 18(1) CRC, during the preconception and pre-birth stages of ICS, commissioning parents, surrogate mothers and genetic parents should therefore take actions and decisions enabling the future child to exercise and enjoy their rights once born, consistent with their best interests. In doing so, they should, for example, avoid preconception and prenatal actions and decisions which may trigger the detrimental impacts on the child's identity, health, family environment, well-being and security rights once born, as discussed earlier in this paper.

Given the above, it is clear that this paper's hypothesis is convincing, that due to the intentional, planned nature of ICS, the involvement of multiple possible parents and the potential impact of preconception and prenatal decisions and actions on the rights of children born through ICS arrangements, preconception and prenatal protection of the unborn child is required in all ICS situations. Moreover, it is within the purview of parties to ICS – in particular, first and foremost, commissioning parents, as well as surrogate mothers and genetic parents – to ensure that their preconception and prenatal actions and decisions align with and uphold the child's future rights.

## 6 A PROPOSED APPROACH TO PRECONCEPTION AND PRENATAL PROTECTION OF THE RIGHTS OF THE FUTURE CHILD MOST AT RISK IN ICS

In order to protect the future child's rights which are at most at risk in ICS from the negative impacts of preconception and prenatal actions and decisions, and given that this is permissible under the public international law framework, what kind of pre-birth protection should be provided? While the law traditionally approaches human rights as attaching from the moment of birth given the legal parameters of the concept of 'personhood',[45] the various approaches discussed under international child rights law, regional human rights law, domestic legislation and jurisprudence show that the unborn child can and does benefit from protection before birth to some extent. This shows that despite no international human rights law instrument explicitly establishing that the unborn child has rights under law, this does not mean that the unborn child is not to be afforded any protection before birth. On the contrary, as indicated by the CRC *travaux préparatoires* and the views of the Committee on the Rights of the Child, the child can be protected prior to birth in ways that do not violate the rights of other persons when they potentially conflict (such as pregnant women); in some instances it is necessary for this protection to begin before a child's birth, to ensure certain rights are secured post-birth. Indeed, the inclusion of the ninth preambular paragraph in the CRC leaves open the option of pre-birth protection of children. Although state practice regarding protection of the unborn child is inconclusive as a result, a common thread running through much of the jurisprudence discussed is that it is possible for the child to be afforded some protection before birth (without conferring rights before birth). As has already been established, the problems and challenges to child rights in ICS triggered by actions and decisions preconception and prenatally are largely caused through involvement of multiple potential parents and the intentional, planned nature of ICS. Indeed, some of

45 For discussion, see Herring, J., 'The Loneliness of Status: The Legal and Moral Significance of Birth' in F. Ebtehaj and J. Herring *et al.* (eds.), *Birth Rites and Rights* (Hart: Oxford, 2011), 97-98.

the child rights problems triggered during these pre-birth stages have potential impacts for children's rights post-birth which are, to some extent, lifelong.

## 6.1 Framing the future child in ICS through an in eventu approach

It is suggested that a viable approach to protecting the future child's rights from impacts triggered during the preconception and prenatal stages of ICS is taking an *in eventu* approach to the future child in ICS. This is consistent with a child rights approach, meaning that the child's ability to exercise and enjoy their rights *in eventu* they are born is preserved, rather than curtailed by actions and decisions taken before their birth. Such an approach acknowledges that despite not being a legal person before birth, during the prenatal stage the unborn child is not a nothing, but is a being that could become a child, entitled to rights in the event that they are born. Moreover, in ICS situations, given the impact of actions and decisions preconception too, the future child's rights must be protected from this earlier stage in order for them to be able to enjoy and exercise their rights in the event they are born. Through framing preconception and prenatal actions and decisions in ICS with an *in eventu* approach, parties to ICS will be encouraged to consider the potential impact of these on the future child's rights and best interests and in turn, on the multiple potential parents themselves.

## 6.2 Basic safeguards for protecting the future child in ICS from rights impacts triggered preconception and prenatally

Informed by an *in eventu* approach, a three-pronged set of strategic safeguards is proposed, aimed at protecting the future child in ICS from the negative child rights impacts once born which have their roots in preconception and prenatal actions and decisions. These safeguards are informed and underpinned by international human rights law norms and standards, applying the CRC in a dynamic manner to ICS as a current-day challenge to children's rights, using the opening left by preambular paragraph nine CRC to ensure children born through ICS are afforded protection of their rights, including those potentially placed at risk in ICS preconception and prenatally. This set of safeguards is largely formulated through suggested practical measures which can strategically influence and shape preconception and prenatal choices and actions of parties to ICS arrangements, and therefore counter the otherwise negative implications for a child's rights once born through ICS. The suggested strategic safeguards centre on education; professional codes of practice/best practice guidance; and inserting the child's voice and perspective into ICS decision-making and actions.

### 6.2.1 *Education*

Educating parties to ICS arrangements about the child rights implications of their actions and decisions during the preconception and prenatal stages is a potentially strong safeguard for the future child's rights at risk under Articles 2, 3, 7, 8, 23, 24 and 35. Through education, parties can become attuned to how their actions and decisions preconception and prenatally can trigger negative impacts on the future child's rights; they may be more likely to take actions and decisions upholding and leaving open these rights, instead of curtailing them.

Education should strategically target some key actors in ICS arrangements who have a key influence on the child through their decisions and actions taken during the preconception and prenatal stages: medical professionals, legal advisors and prospective commissioning parents/commissioning parents. Education of medical professionals involved in ICS can usefully focus on developing their understanding of the CRC rights most at risk in ICS through preconception and prenatal actions and decisions, and the role they play guiding rights-based actions and decisions in this respect. For example, medical professionals must understand preconception child rights risks in ICS, particularly relating to identity preservation and why the use of anonymous gamete donors and surrogate mothers should be avoided in the best interests of the future child. During the prenatal stage, it is essential that medical professionals understand the child rights implications of non-medically necessary foetal reduction, so this practice does not occur in ICS. The responsibility of ensuring medical professionals are educated in this way largely rests with CRC States Parties and domestic and international medical governing bodies. States Parties and medical governing bodies should disseminate information about the CRC to medical professionals working in this area, with clear educational guidance around its relevance and application in the preconception and prenatal ICS context.

Similarly, educating legal advisors involved in ICS to ensure they understand the child rights risks arising preconception and prenatally in ICS is essential, so they can provide legal advice to commissioning parents covering potential child rights implications of preconception and prenatal actions and decisions for the future child and how this might impact them as parents. Once educated on the potential child rights implications, legal advisors are, for example, well-placed to guide and influence commissioning parents to avoid using anonymous gametes and involving anonymous surrogates. CRC States Parties and domestic and international legal governing bodies should ensure legal advisors dealing with ICS understand the CRC's application in the preconception and prenatal ICS context and their role in ensuring protection of future children born this way.

Education of prospective commissioning parents/commissioning parents should be undertaken to empower them with an understanding of their CRC

responsibilities (framed through Article 18(1)), the rights of the child at stake and how their decisions and actions preconception and prenatally will impact the child's rights and best interests once born. Regarding the preconception stage, education of prospective commissioning parents should focus primarily on Article 8 CRC, build their understanding of the principles of non-discrimination and the best interests of the child, and how they can act to uphold these rights and principles before conception and birth for the future child. Many actors have a role to play in educating commissioning parents: legal advisors, medical professionals and States Parties to the CRC. The provision of accurate information about the child's rights and ICS can usefully be disseminated via a range of methods: meetings, social media and message-boards and via public awareness campaigns. Such education will encourage commissioning parents to approach ICS arrangements in a more child-centric manner, considering the rights and best interests of the future child at all preconception and prenatal decision points, whilst yielding to the rights of the surrogate where her health or reproductive autonomy is endangered.

While education is proposed as an important safeguard, it is acknowledged it has limits as a measure to protect the rights of future children born through ICS preconception and prenatally. For example, although education can influence commissioning parents' decisions and actions, in states without clear regulation of ICS, they ultimately have broad decision-making freedom over many of the choices impacting on the future child's rights and best interests. This is why domestic legal frameworks and international regulation of ICS with child rights standards and protective safeguards at their heart must be developed and implemented in the long-term, to ensure the child's rights and best interests are paramount. Such child-centred regulatory approaches may in practice require that certain aspects of ICS, such as the use of anonymous gametes, are prohibited.

### *6.2.2 Professional codes of practice/best practice guidance*

In the absence of international agreement on ICS, national governments and national medical bodies/authorities can play an important role in ensuring the development and implementation of professional codes of practice/best practice guidance on processes involved in ICS raising preconception and prenatal risks to the future child. In particular, professional codes of practice/best practice guidance is are required to safeguard against situations whereby gametes and/or embryos are lost or mixed-up and incorrectly implanted in clinical settings, impacting on the child's Article 7 and 8 rights in particular once born. ICS supply-side states have a particular responsibility to ensure such codes of practice/best practice guidance is developed, establishing clear clinical standards and processes to be adhered to in ICS. States should do so working with medical bodies/authorities, and both have a role to play in ensuring the implementation of such standards and guidance by individual ICS clinics and

medical professionals. Demand-side states can also helpfully work with supply-side states to share best practice knowledge in the establishment of such codes of practice/best practice guidance.

### 6.2.3 *Inserting the child's voice and perspective into ICS decision-making and actions at the prenatal stage*

Explicitly inserting the future child's voice and perspective into ICS decision-making and actions prenatally is the third aspect of the suggested pre-birth safeguards for the future child's rights and best interests. To do so, CRC States Parties should ensure the appointment of a guardian representing the future child's rights and best interests in every ICS arrangement, from the time an ICS pregnancy is confirmed. It is at this point in time that the future child goes from being an abstract idea to a potential reality, and it is therefore practicable to involve a guardian for the future child in decision-making in the ICS arrangement. States Parties to the CRC may also be willing to fund the appointment of a guardian from this point in time, given the concrete possibility of a child eventuating from the ICS arrangement. The appointment of such a guardian for the future child's rights and best interests would not mean that the interests and rights of the commissioning parents, genetic parents and surrogate would be subordinated to the future child's, but rather that the future child's rights and best interests become a central focus of the actions and decision-making processes of these adult parties, and their rights and best interests are taken into account in relation to those of the adult parties. As the future child would not be able to instruct the guardian, the guardian would be appointed on the basis that they would advocate for and in the best interests of the future child and their rights. Wherever possible, this mechanism would therefore encourage the taking of prenatal ICS actions and decisions which protect and leave open the exercise and enjoyment of rights for the future child. The guardian can play a crucial role in ensuring that commissioning parents, genetic parents and surrogates understand why their taking of actions and decisions consistent with the future child's rights and best interests will also be of benefit to them once the child is born, as well as reminding them of their responsibilities in relation to the future child under Article 18(1) CRC.

It is acknowledged that the viability of implementing the mechanism of a guardian for the child's rights and best interests in every ICS situation has inherent challenges – for example, garnering funding for such a mechanism. However, appointing an independent person tasked with bringing the future child's voice and perspective into all decisions and actions prenatally in ICS arrangements has a powerful potential protective impact on the future child's rights and best interests. Specific focus of the guardian's attention is likely to centre on protecting the future child's rights under Articles 2, 3, 7, 8, 23, 24 and 35 CRC; for example, in relation to ICS situations where commissioning parents decide prenatally they do not want to take responsibility for children

from a multiple pregnancy or with a detectable disability or serious health condition, and where there is a disagreement between the parties to the ICS arrangement about the wellbeing or care of the future child. The guardian should be a person with expertise in child rights/child protection, appointed in the state in which the child is in utero and going to be born in. Locating the guardian here is the most practical approach, likely to maximise the benefit of such an appointment; the guardian can be an 'on-the-ground' bridge, mediating and communicating between third parties (such as medical professionals), the surrogate and the commissioning parents, the latter whom are most likely to be located in their own home state during the prenatal stage). The guardian's mandate will focus on ensuring the future child's voice and perspectives relating to their rights and best interests are infused into all ICS arrangements and guide all decisions and actions taken within ICS arrangements. Such a guardian's role will particularly come to bear in disputed situations between parties to an ICS arrangement, and would provide a safeguard against the more extreme possible child rights violations within the ICS context, such as child trafficking (given that the existence of a guardian appointed to the child would provide a potential obstacle to commissioning parents taking steps to traffick a child between countries). Such a guardian could play a useful role in ICS arrangements postnatally as well, by ensuring the child has someone representing their rights and best interests in the face of any remaining child rights challenges they may encounter post-birth, such as unclear legal status, abandonment, statelessness and multiple parentage claims. It is therefore envisaged that the guardian's mandate could either expire once the child's legal parentage is established, or alternatively after a post-parentage monitoring phase (focusing on an assessment of the child's rights and best interests in the care of their legal parents) is concluded by the guardian.

The implementation of the suggested three-pronged set of strategic safeguards preconception and prenatally in ICS is geared towards ensuring that actions and decisions taken in relation to the unconceived and unborn child do not have a negative bearing on the future child's post-birth exercise and enjoyment of their rights. This should enable the child's future to remain as open as possible (Feinberg, 2007), despite their conception and birth through ICS. If an *in eventu* approach and the safeguards suggested are implemented, this will lead to ICS arrangements that are more child-centric, respecting and upholding the rights and best interests of the future child, reflected in arrangements involving the following preconception and prenatally:

- Use of identifiable gametes and embryos from donors willing to be contacted by the child in the future
- Surrogates acting in a known capacity and willing to be contacted by the child in the future
- Application of professional codes of practice/best practice guidance in the clinical setting to guard against mix-up situations

- No foetal reduction, other than on the basis of medical opinion it is in the best interests or necessary for the protection of the mental and/or physical health and well-being of the pregnant woman or the unborn child
- Clear agreement between the surrogate and commissioning parents regarding decision-making and control over the surrogate's health care and lifestyle decisions during the pregnancy, and an agreement on the process for resolving disputes should they arise
- Clear agreement between the surrogate mother and commissioning parents regarding the point in time following the child's birth that commissioning parents will assume care of the child, and an undertaking from the commissioning parents that they will take responsibility for the child regardless of their sex, disability or health status, and that they will take responsibility for multiple birth children
- The automatic appointment of a guardian representing the child's rights and interests following a confirmed pregnancy, to ensure the future child's voice and perspective relating to their rights and best interests informs all decisions and actions during the ICS arrangement
- In all situations where a decision or action can be taken aligning with the future child's rights and best interests, it will be, as long as it does not lead to a violation of the rights of another party to the ICS arrangement (in such situations, the rights of the child, despite being paramount, will be appropriately balanced with the rights of other parties).

ICS arrangements as outlined above should, therefore, lead to the future child being able to preserve their identity, grow up in a family environment and know their parents, and grow up knowing their human dignity has been respected at all points prior to their birth. Without taking the protective steps prior to conception and birth in ICS as outlined in this paper, the child's rights most at risk from these stages in ICS may be empty upon birth. Leaving children in ICS without protection of their rights upon birth does not align with the intention of the CRC framers; therefore, the CRC must be applied before conception and birth to the future child's rights in ICS.

In addition to the specific responsibilities identified for CRC States Parties, legal advisors, medical practitioners and commissioning parents, the importance of implementing the preconception and prenatal measures outlined in this paper could be promoted by national medical association governing bodies, particularly those focusing on the practice of ART/surrogacy; they could also usefully be promoted by private actors providing commissioning parents with information about ICS or providing ICS services, for example, surrogacy brokers and companies. At the international level, the ideas proposed in this paper should inform thinking on a possible international regulatory approach

to ICS, through the work of the Permanent Bureau of the Hague Convention on Private International Law (including its Experts Group).[46]

Given the focus of the Permanent Bureau on a long-term approach and possible international agreement relating to ICS, in the short-term, a practice note drawing on the practical measures suggested in this paper would be a useful soft law tool, encouraging making the future child's rights and best interests the determining factor in ICS arrangements by implementing child-centric practices in the preconception and prenatal stages of ICS. It would be helpful if such a practice note includes a checklist for commissioning parents when considering entering into an ICS arrangement, in order to make sure they consider the full range of preconception and prenatal issues (as discussed in this paper) that can impact the future child's rights and best interests, and how they can choose to act in a child rights consistent manner. Such a practice note could be issued, for example, by the Committee on the Rights of the Child. The promotion of such preconception and prenatal safeguards by an international body such as the Committee would not necessarily be indicative of its approval of ICS, but would serve to encourage that when ICS is practiced, it is undertaken in a manner placing central focus on the future child preconception and prenatally to protect their rights and best interests once born.

## 7 Conclusion

Alston's statement over 25 years ago that "while there is no basis for asserting that the notion that human rights inhere in the unborn child had been authoritatively rejected by international human rights law, there has been a consistent pattern of avoiding any explicit recognition of such rights" (Alston, 1990, 161) still holds true in relation to international human rights law. However, given the CRC leaves open the possibility of protecting the unborn child (in some domestic jurisdictions, as discussed in this paper, protection is extended to the unborn child), and having identified negative impacts on the rights of the child in ICS that begin preconception and prenatally as traversed in this paper, a dynamic interpretation of the CRC must be taken in light of ICS as a current-day challenge to children's rights. This necessitates re-envisaging how and when some rights – such as the child's rights to preserve their identity, to know their parents and to attain the highest standard of health – need to be protected in the specific context of ICS. As illustrated, if the specific rights of the child discussed in this paper are not protected preconception and pre-birth in ICS, they may be rendered meaningless and unable to be exercised by the child post-birth.

46 See for an overview of the work of the Permanent Bureau in this regard: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

ICS is a distinctive way of family-building, in part given the multiple potential parents involved, which creates complex, high-risk situations not only for the adults involved, but the children who are born from these arrangements. Moreover, given the intentional nature of ICS, in ICS there are clear opportunities both preconception and prenatally for commissioning parents in particular to safeguard the future child's rights; after all, it is only due to the intention of commissioning parents that the surrogate and genetic parents become involved in ICS. Therefore, in ICS, some protection must be extended to the future child during the preconception and prenatal stages, so they can exercise and enjoy their CRC rights once born. As discussed, in ICS this protection must extend not only to the prenatal stage but also to the preconception stage, as during this stage key actions and decisions are taken which can shape the child's lifetime outcomes relating to their right to preserve their identity and to know and be cared for by their parents.

By taking an *in eventu* approach and through the range of ICS actors identified in this paper implementing the specific strategic preconception and prenatal safeguards proposed, the future child will have a better chance to exercise and enjoy their rights than they would have otherwise. This does not mean that rights are attributed before birth, but rather, the possibility of the child being able to exercise and enjoy their rights once born is left open for them, by taking decisions and actions preconception and prenatally that accord with and are protective of the future child's rights and best interests. Although children do not achieve legal personhood until birth, this does not prevent children being afforded some limited protection prior to birth that will assist in giving effect to their rights, in the event they are born. By focusing the suggested safeguards around education, codes of practice/best practice guidance and inserting the child's voice and perspective into actions and decision-making at the prenatal stage, despite remaining challenges to implementation, these are safeguards that are practical and which may have a far-reaching protective effect on children born through ICS. The aim is to ensure the future child's rights and best interests are considered and wherever possible protected preconception and prenatally (while being balanced with the rights of other parties), thereby leaving open the possibility of the future child exercising and enjoying their rights once born. Whilst this may limit the interests of adult parties to ICS some extent, such an approach is consistent with the spirit and intent of the CRC, despite the CRC's framers not envisaging the ICS context. The safeguards for the future child's rights and best interests proposed in this paper rely on a joint approach by actors involved in ICS to the protection of the future child before conception and birth. However, commissioning parents have a particularly strong role to play to protect the future child's rights and best interests, and to ensure the future child's human dignity is upheld. Commissioning parents should view taking preconception and prenatal actions and decisions consistent with the future child's rights and best interests as part of their parental responsibilities under Article 18(1), in order to leave the

child's exercise and enjoyment of rights as open as possible in the event they are born. Such an approach is consistent with a dynamic and evolutive reading of Article 18 CRC; moreover, in the CRC context, arguably parental responsibility to protect the future child pre-birth applies not only to the commissioning parents, but also the future child's surrogate mother and genetic parents. Such a reading provides a holistic approach to the widest possible concept of the child's potential parents in ICS.

Despite the fact that international agreement is yet to be reached regarding whether ICS is a practice that should be allowed to continue, ICS continues to be practiced (in some states without any regulation), meaning children are continuing to be conceived and born this way. In the face of this reality and regardless of the lack of international agreement regarding ICS, the rights of children born through ICS arrangements must be upheld. This paper has shown that there are practical mechanisms and practices which can be introduced now and implemented by a range of actors in ICS, leading to better protection of the child's rights. Making the rights of the future child discussed in this paper meaningful post-birth hinges on these prenatal and preconception protections outlined being implemented, to give children born through ICS the best possible chance to secure their rights. The safeguards suggested in this paper are intended to guide practice, so the detrimental impact of preconception and prenatal actions and decisions on future children born through ICS is limited. We must leap through the window left open by the CRC to ensure actions and decisions that are child rights consistent before conception and birth, to allow all future children in ICS to secure their rights once born, rather than having them curtailed before they achieve personhood in the eyes of the law.

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