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

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Answering the “Who am I?” Question

Protecting the Right of Children Born Through International Commercial Surrogacy to Preserve Their Identity Under Article 8 of the United Nations Convention on the Rights of the Child

Abstract

This Chapter deals with the child’s right to identity preservation as established by Article 8 CRC, in the context of ICS. Like the child’s right to nationality, the right to identity preservation is one of the child’s rights most at risk in ICS and is at the heart of the child rights challenges arising through ICS, given the wider impact identity has on the child’s lifetime outcomes. Although nationality is an element of identity, it is just one of many elements in this respect. This Chapter identifies other elements of child identity endangered in ICS, as well as examining why identity preservation is so important in the ICS context. This discussion is grounded in Article 8 CRC, regional human rights jurisprudence, and draws on lessons from adoption, donor-conception and domestic surrogacy. This Chapter therefore provides the closest examination yet of the child’s identity preservation right in ICS situations. Measures are proposed to implement Article 8, to be undertaken by states and other key actors in ICS. It is made clear that unless these are actioned, children born through ICS may never be able to answer the fundamental question of ‘Who am I?’, leaving them in a position contrary to their rights under international human rights law, in particular, the CRC.

Main Findings

- The elements of a child’s identity are not limited to those explicitly mentioned in Article 8(1) CRC. As demonstrated through relevant jurisprudence, as well as nationality, the genetic and biological, personal narrative, and cultural elements of the child’s identity are particularly at risk in ICS.
- Key lessons from donor-conception, adoption and domestic surrogacy indicate that in the context of ICS, it is crucial that identity information is collected and preserved on behalf of children conceived and born through ICS, and that such children are made aware of the existence of that identity information and have access to it in line with their evolving capacities.
- Commissioning parents have a significant first-line-of-defence role to play in upholding the child’s Article 8 right in ICS, given that they can make

- decisions in the preconception, prenatal and post-birth stages of ICS consistent with safeguarding the child's rights and best interests.
- Medical professionals also occupy a powerful position regarding the safeguarding of the child's Article 8 right in ICS. Most significantly, in order to protect the future child's identity preservation right, only identifiable gamete donors and surrogate mothers (both who are willing to be contacted by a future child) should be permitted to be involved in ICS arrangements.
 - CRC States Parties should take care to protect and promote the right to identity preservation for children conceived and born through ICS. A practical way that States can do so is by facilitating the compilation and provision of an identity dossier for children born through ICS; longer-term, an inter-state cooperation system of identity protection would give children born through ICS the best chance of having their identity preservation right effectively protected.

Contextual notes

- Children are continuing to be born through ICS, including through the use of anonymous donor gametes, and in some instances, the involvement of anonymous surrogate mothers; as long as ICS continues to be practised in ways that do not seek to protect the child's right to identity preservation, the issues raised in this Chapter will persist.

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1 INTRODUCTION

The birth of children through international commercial surrogacy (ICS) has developed over the last decade as a distinctly twenty-first century phenomenon.¹ It presents challenges to human rights and to the concept of 'family'. Particular challenges exist to the rights of the child conceived and born as a

1 For the purposes of this paper, International Commercial Surrogacy is the practice involving the conception and birth of a child intended for a person or persons (commissioning parents) in one state (demand state) but born in another state (supply state) to a surrogate mother. In all instances ICS involves a transfer of money between some of the parties involved. The child may or may not be genetically related to one or both of the commissioning parents or to the surrogate. For further background context on ICS, see Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, Preliminary Document No. 3 C, March 2014, available at: www.hcch.net/upload/wop/gap2015pd03c_en.pdf [last accessed 01 June 2015]; Achmad, 'Contextualising a 21st century challenge: Part One, Understanding international commercial surrogacy and the parties whose rights and interests are at stake in the public international law context' (2012) 7 *New Zealand Family Law Journal* 190-198.

result of ICS arrangements. Challenges to the child's right to preserve their identity, established under Article 8 of the United Nations Convention on the Rights of the Child (CRC),² are at the heart of these. Identity is a broad concept constituted of many different and often overlapping elements; for children in ICS, identity is complicated by the circumstances of their conception and birth. In some cases, children are born through ICS without an identity recognised under law, due to gaps in legal regulation and the application of conflicting domestic laws. Children are also being born through ICS who, despite having a legal identity, are unable to preserve specific elements of their identity. Consequently, such children are unlikely to be able to fully preserve their identity. It appears that in many ICS arrangements, limited thought is given by the multiple adults involved to the child's future identity and how to protect it. This occurs despite all children having an explicit right to preserve their identity under Article 8 of the CRC, leaving this group of children highly vulnerable regarding their ability to exercise this right.

Taking a public international law perspective and a child rights approach, this paper argues for the protection of the child's Article 8 right in the context of ICS. Whilst Article 7 of the CRC is also relevant to this discussion and is touched upon, it has been dealt with by the author comprehensively in a separate paper,³ and therefore this paper takes Article 8 as its primary framework to examine issues relating to the child's identity in ICS. This is given the explicit focus of Article 8 on the child's right to preserve their identity and its broader framing of identity which is helpful in the ICS context. Section 2 hones in on three elements of identity that are particularly at risk in ICS situations. This analysis provides an entrée to the discussion presented in Section 3, highlighting why the child's right to preserve identity is of such importance in the ICS context.

Section 4 then provides a framework through which to view the child's right to preserve their identity under international law. The main focus here is analysis of Article 8 of the CRC. This forms the basis for an overview of the broader human rights law framework pertinent to the child's right under Article 8. Reference is included to relevant work of the Committee on the Rights of the Child and jurisprudence from regional human rights systems elaborating on the nature and content of the child's right to identity preservation. Emphasis is placed on the child's identity from a genetic and biological perspective, given the reality that these are elements of identity that children conceived and born through ICS are likely to face challenges in preserving.

2 United Nations Convention on the Rights of the Child 1989, 1577 UNTS 3.

3 Achmad, "Securing children's right to a nationality in a changing world: the context of international commercial surrogacy and twenty-first century reproductive technology", accepted for publication in Laura van Waas, Melanie Khanna and Mark Manly (eds.), *Solving Statelessness*, Wolf Legal Publishers, forthcoming 2016.

Section 5 places the legal framework in context, focusing on case examples demonstrating how children conceived and born through ICS have had their right to preserve identity placed at risk and in some instances, violated. Section 6 considers key lessons from donor-conception, adoption and domestic surrogacy relevant to the child's identity preservation right in ICS. These key lessons stress the potential implications of not upholding the child's Article 8 right in ICS. Drawing on these lessons as well as the international human rights legal framework and some of the challenges faced by children in exercising their Article 8 right in the ICS context to date, Section 7 clarifies what the child's right to preserve identity looks like when upheld in ICS situations, suggesting practical measures of implementation of Article 8 in this specific context. Section 8 concludes by making clear that as is the case for children as a group in general, the right to preserve identity is essential for all children who are conceived and born through ICS as an alternative method of family formation.

2 THE ELEMENTS OF CHILD IDENTITY AT PARTICULAR RISK IN INTERNATIONAL COMMERCIAL SURROGACY

The concept of identity is potentially broad and by nature, multifaceted. Indeed, one definition of 'identity' contained in the Oxford English Dictionary is 'Who or what a person or thing is; a distinct impression of a single person or thing presented to or perceived by others; a set of characteristics or a description that distinguishes a person or thing from others.'⁴ Considering the situation of children conceived and born through ICS, it is first necessary to highlight which of their facets of identity are particularly at risk. This section introduces three specific elements of identity: the genetic and biological; personal narrative; and cultural elements. Although other elements of identity exist (for example, nationality) and fall under Article 8 (as discussed later in section 4(C)), these three elements are distinguished in this paper because of their particular relevance to child identity in ICS and the vulnerability of these elements within this context.⁵ Highlighting these three elements of identity in this section begins to illustrate how the child's identity preservation right is at risk in ICS, allowing for these elements to then inform the discussion of the child's right to identity preservation in the ICS context in the remaining sections of this paper.

4 Oxford English Dictionary Online, 'Identity, n.' March 2015, available at: www.oed.com/view/Entry/91004?redirectedFrom=identity [last accessed 01 June 2015].

5 Given the focus of this paper on the genetic and biological, personal narrative and cultural elements of the child's identity in ICS situations, this paper does not discuss the child's right to a nationality. This topic is being addressed separately in a chapter by the author in the forthcoming book, *Solving Statelessness*, van Waas, Manly and Khanna (eds) (Cambridge).

2.1 Genetic and biological

From the point at which a child is conceived through ICS and continuing after their birth, his or her identity rights are potentially at heightened risk of breach. The likely complexity of the child’s genetic makeup and biological antecedents is the root of the precariousness of the child’s identity preservation right. This is because it is not unusual to have a factual scenario such as the following example (where different states could be substituted): a child is conceived and born through ICS resulting from an ICS arrangement initiated by commissioning parents (either same-sex or heterosexual) from New Zealand using donor sperm originating from a sperm donor in Denmark, donor eggs originating from an egg donor in the United States, and a surrogate mother in India. Consequently, establishing parentage in both fact and at law in ICS situations is often the first challenge to the child’s identity preservation right, given their birth to a surrogate and the reality that they are unlikely the full genetic child of the person(s) intending to socially parent the child (due to the use of donor gametes). Furthermore, in some cases the child will have no genetic relationship to their commissioning parents, and when donor eggs or embryo are used, no genetic relationship to their surrogate mother (indeed, many ICS children are conceived using the sperm of the commissioning father, along with donor eggs).⁶ When ICS arrangements involve anonymous donor conception (meaning the full identity of one or two gamete donors or embryo donors are unknown), the child’s preservation of identity becomes impossible from a genetic perspective. Therefore, depending on the exact circumstances of an individual ICS arrangement, the impact of the complexity of the child’s genetic parentage on their ability to exercise their Article 8 right varies.

Moreover, even in instances when identity information is available about the child’s genetic parentage *vis-à-vis* donors, the preservation of this information and the child’s access to it largely depends on commissioning parents disclosing the child’s conception and birth circumstances to them and this identity information being safeguarded for the child’s future reference. The extent to which such information is preserved will also impact the child’s identity preservation right; for example, whether health history information about genetic parent(s) is preserved. Not preserving information about this sub-element of a child’s genetic identity may have long-term negative impacts for the child, such as not being aware of genetic markers placing them at higher risk of a hereditary disease or medical condition.

6 Whilst no data exists on how many children have been conceived and born through ICS as a result of the sperm of the commissioning father being combined with donor eggs to form an embryo and transplanted into the surrogate mother, a survey of reported judgments in ICS matters in the Australian, New Zealand and England and Wales jurisdictions indicates that this happens in a high proportion of ICS situations.

Additional to risks raised through donor genetic parentage, children conceived and born through ICS may face challenges in preserving the biological element of their identity relating to their birth mother. She is the person who is the child's biological carrier and who sustains their development from foetus to child. This includes the transfer of bodily fluids such as blood and other nutrients; research has demonstrated that the period in utero has a direct impact on the child's health outcomes.⁷ Yet this woman is not intended to assume the role of mother to the child in a social sense; often she is not intended to have any ongoing involvement with the child. If commissioning parents do have knowledge as to the identity of and identifying information about the child's surrogate mother, they may still chose not to disclose this to the child. Even if a child knows about their ICS arrangement and the identity of their birth mother, it will be difficult to access or obtain further information about her if it has not been preserved. Not preserving this biological element of the child's identity (despite the likely importance of a birth narrative and understanding of who gave birth to them) means that later in life, children may search for information relating to their birth mothers to try to preserve this element of their identity. Such efforts may encounter further practical difficulties due to the birth taking place in a different country (and perhaps a different culture) than the one they are growing up or have grown up in; tracing their surrogate mother is unlikely to be straightforward, and more so if her current contact information is not maintained in the years following the child's birth. At the extreme, when surrogates act completely anonymously,⁸ it will be impossible for children to know who their birth mother was.

Ironically, the child's right to preserve their identity in ICS may be further challenged by decisions and actions taken to establish the child's legal parentage following their birth. This can happen when the child's legal parentage is established (for example, through domestic law mechanisms such as adoption orders and parentage orders), but no concurrent action is taken to protect information about their genetic and biological parentage and to therefore preserve the genetic and biological elements of their identity relating to donors and/or their surrogate mother. Establishing the child's legal parentage provides them legal certainty and status. But depending on the child's genetic makeup and given their birth to a surrogate mother, it does not provide the full picture regarding their parentage and family relations. Unless information about these elements of their identity is preserved, children in ICS may have a false or only

7 E.g. Gluckman et al., 'Effect of In Utero and Early-Life Conditions on Adult Health and Disease' (2008) 359 *The New England Journal of Medicine*, 61-73; Pembrey et al, 'Human transgenerational responses to early-life experience: potential impact on development, health and biomedical research' (2014) 51 *Journal of Medical Genetics*, 563-572.

8 In some ICS situations, surrogates are kept completely separate from the commissioning parents and the ICS arrangement is premised on this anonymity, i.e. they never meet each other and commissioning parents only get provided with limited information about the surrogate, such as age, ethnic background and number of previous children.

partial understanding of the elements of their identity relating to their genetic and biological parentage and family relations.

2.2 Personal narrative

Connected to whether children have the option of knowing about their birth mother and genetic parents and accessing information about their genetic and biological elements insofar as it enables them to preserve their own identity, the child’s opportunity to form their own personal narrative may also be at risk in ICS situations. Identity is often shaped by the question ‘Who am I?’. A central aspect involved in answering this and preserving one’s identity is being able to know about one’s own birth; information such as where, when, how and who was present. Therefore, personal narrative as an element of identity is broader than the genetic and biological element discussed previously. Genetic and biological aspects can form part of the child’s personal narrative, but personal narrative as a distinct element of identity draws in many other aspects connected to a child’s identity, such as their circumstances of birth and key care decisions made concerning them in their infancy. These are aspects contributing to a child’s personal narrative that the child themselves has no agency to know independently. Whilst personal narrative is an element of identity which is added to over the course of an individual’s lifetime, aspects which are accumulated early in life through events or actions from that time can be said to form a crucial basis for one’s personal narrative, given their formative impact.

For example, if a surrogate in an ICS arrangement does not share personal information (for example such as name, age, ethnicity, language, contact details) about herself with the child’s commissioning parents or allow this to be collected and stored for the child’s future access, it is likely that any questions the child has in future regarding their birth circumstances will be left unanswered or not be fully representative of the reality. This is a real risk in ICS given the high incidence of ICS arrangements conducted through third parties such as surrogacy brokers or agencies, meaning commissioning parents may have inaccurate or no knowledge of the identity of the surrogate mother. This gap in a child’s personal narrative will therefore have the effect of preventing some children born through ICS from preserving this aspect of their identity.

2.3 Cultural

Because ICS leads to children being born to surrogate mothers in supply states that they are not intended to remain in, the cultural element (including cultural heritage, ethnicity, language) of a child’s identity relating to their birth-place

may also be at risk. If children born through ICS are unable to have information preserved about these parts of their own personal history, it may prevent them from being able to fully exercise and realise their Article 8 identity preservation right. When children born through ICS learn later in life that they were intentionally born through ICS in a state with a different culture and language from the one that they are growing up in or have grown up in, they may experience a sense of cultural dislocation or questioning, similar to that which has been experienced by some children adopted intercountry. However, children born through ICS may also contend with the overlay of the fact they were intentionally born into the culture and heritage of one country, but always intended to be removed from the immediate culture and heritage of their birth-place. The culture and heritage disconnection may have greater bearing on the child's ability to preserve their identity consistent with Article 8 for children who remain in their birth country whilst waiting for their status to be recognised or regularised. During such a period – which can span beyond weeks into months and even years – children may become accustomed and grow attached to certain cultural aspects of their birth place. For example, this may include the local language, if they are exposed to it regularly during infancy.

The ethnicity aspect of the child's cultural identity element is also at risk of not being preserved in ICS. This happens if the ethnicity of one or both of their genetic parents is different to the ethnicity the child will grow up in, and biologically, regarding their surrogate mother. The preservation of this element of the child's identity is dependent on information being protected about the child's genetic and biological ethnicity and the child having the opportunity to access this information. The child may experience a sense of ethnic dislocation and questioning regarding their genetic and/or biological ethnicity; regarding their genetic ethnicity, the child may also experience a sense of dislocation regarding their culture and heritage relating to this and may search to preserve it.

The three elements of the child's identity discussed above as being central to how the child's Article 8 right is at risk in ICS situations are interrelated. These elements will be elaborated on throughout the forthcoming analysis in this paper. It is important to recognise that identity and what this constitutes for an individual evolves over time; the formation of identity takes place to some extent over the timespan of an individual's lifetime. Whilst some elements of identity remain static, such as those more closely linked to the origins of an individual, there will be others which are socially acquired through an individual's life and lived experiences. However, the static elements of identity and the elements of identity acquired over time may not be any harder to preserve than one another. For example, whilst a child conceived and born through ICS may face challenges in preserving their genetic and/or biological identity, they may also find themselves unable to preserve elements of their family life, such as who they were raised by for certain periods of time in their early life, depending on the circumstances they are in. Furthermore, from a

chronological perspective, timing itself can impact the child's ability to exercise their Article 8 right. Many elements of identity, including the genetic and biological and personal narrative elements can be preserved or begin to be preserved in relation to a child prior to their birth. Following birth, the preservation of these elements should continue, given they cut across the pre-birth and post-birth time periods. Some other elements of identity are attached to birth and should therefore start being preserved at that time, such as the circumstances of the child's birth, and the cultural elements of their identity.

3 THE CHILD'S PERSPECTIVE: WHY THE RIGHT TO IDENTITY PRESERVATION IS IMPORTANT IN INTERNATIONAL COMMERCIAL SURROGACY

Whilst all children, regardless of their situation have a right to identity preservation under Article 8 of the CRC, some children face situations making their ability to secure this right more challenging, heightening their vulnerability regarding a breach of their Article 8 right. Children born through ICS fall into this category; it is therefore necessary to examine the reasons why the right to identity preservation is of such importance for this group of children.

3.1 Potential impact of conception and birth circumstances through International Commercial Surrogacy on children

The potential impact of the child's conception and birth circumstances through ICS on their subsequent ability to preserve their identity is significant. A child born through ICS is likely to have conception and birth circumstances which are complex due to the involvement of multiple parties (some of whom may be anonymous), the nature of their conception and birth through surrogacy, and added to this, being born in one state but with the intention that they will be taken to live in another state during infancy. Therefore, the particular complexities of a child's conception and birth through ICS challenge the preservation of certain aspects of their identity.

In the first instance, this is due to the multiple possible parentage claims relating to the child, involving genetic, biological and commissioning (intending) parents. The situation is complicated further by conflicting domestic laws and laws which are out-dated and are ill-equipped to deal with multiple possible parentage claims in ICS. In situations where genetic parents (gamete or embryo donors) and/or biological parents (surrogates) act anonymously, or in instances where commissioning parents abandon a child in ICS pre or post-birth, the child may be left with a highly unclear picture of the parentage aspect of their identity. This may have ongoing, life-long implications for the child. As Van Hoof and Pennings note, in this context the identifiability of

parents essentially means contactability;⁹ without the ability to identify and contact their genetic, biological or commissioning parents, an element of the child's identity remains unable to be preserved. This may have an impact on the child's ability throughout their life to establish their own personal narrative and understand their own story of who they are. Indeed, stripping away a child's possibility of self-determinism in this regard concerning their identity positions the child in a potentially negative space, inconsistent with the best interests of the child principle.¹⁰ Eekelaar asserts that 'Self determinism is a mode of optimally positioning children to develop their own perceptions of their well-being as they enter adulthood: not of foreclosing on the potential for such development.'¹¹ When children born through ICS ask the question 'Who am I?', the circumstances of their conception and birth through ICS will likely impose some limitations on their ability to gain full answers, thereby preventing them from being optimally positioned for self-determinism regarding their identity, as their ability to preserve their identity consistent with Article 8 of the CRC will be restricted.

At the more practical level, this may impact the child's health rights, by limiting their knowledge of their personal health and medical history connected to their parents. In instances where a child is born through ICS and the genetic and biological aspects of their identity are not preserved through the collection and protection of associated information, their ability to establish whether they are, for example, predisposed to genetic diseases or at risk of specific medical conditions detectable through genetic and biological parentage will be curtailed. As Cowden notes,

'People have an interest in accessing genetic and medical information about their genetic parents. It is in a child's interests to have knowledge of congenital diseases or traits that run in her (genetic) family. This is important for diagnosing and treating disease, and also for making fully informed family-planning decisions. False assumptions regarding one's medical history can lead to an individual being misdiagnosed, unknowingly forgoing important care or undergoing unnecessary treatment. This concern seems to constitute an interest worthy of protection.'¹²

Moreover, anonymity in ICS removes the child's opportunity to preserve the wider family relations element of their right to preservation of identity under Article 8. Children who are in this situation will be unable to know if they

7 Van Hoof and Pennings, 'Cross-Border Reproductive Care Around the World: Recent Controversies', in Botterill, Pennings and Mainil (eds), *Medical Tourism and Transnational Health Care*, (2013) 98, at 106.

10 As established in Article 3 UN Convention on the Rights of the Child supra n 2.

11 Eekelaar, 'Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determination' (1994) 8 *International Journal of Law, Policy and the Family* 42 at 58.

12 Cowden, 'No Harm, No Foul: A Child's Right to Know Their Genetic Parents' (2012) 26(1) *International Journal of Law, Policy and the Family* 102 at 107.

have genetic half-siblings. Such siblings may well exist, also born through donor-conception ICS or non-surrogacy donor-conception ART, or as the natural children of donors involved in ICS. In instances where ICS children are abandoned by commissioning parents, it is unlikely that they will ever have knowledge of their intended siblings, if they already exist as previous children of commissioning parents.

3.2 The implications for the child of being removed from their state of birth

It is a common feature of all ICS arrangements that the child will be born in a state which they are never intended to live in – from before the child’s birth, it will be the intention of the commissioning parents that the child (once born) will travel with them to live in another state. This aspect of the child’s birth circumstances is, therefore, complicated and has the potential to impact negatively on the child’s ability to enjoy their Article 8 right. Given that in many cases, the supply of ICS flows from supply states in the less-developed world to more developed demand states, it is likely therefore that many children born through ICS will be born in a place and culture very different from that which they are intended to spend their childhood in. Even in ICS arrangements where the flow is between supply and demand states both located in the developed world, the fact remains that the child is intended to be born in one state and moved to another following birth. Whilst the cultural disjunction between the two states may not be as marked, differences will still exist. This cultural disconnect that is imposed on the child can have serious implications for the child’s right to preserve their identity.

This is especially so given that not only is the supply state the child’s place of birth and therefore of significance regarding their personal origins, but also the fact that the child is born to a surrogate who likely originates from and resides in that state. The links that the child has to their state of birth are important from a cultural rights and personal narrative perspective, regardless of whether the child has a link to the state through their genetic parentage.¹³ Therefore, it is the child’s likely double link to their state of birth through both the fact of their birth in that state, and their birth to a surrogate mother originating from that state that distinguishes children conceived and born through ICS from children who are not born through ICS, but who are born in a different state to that of their own natural parents.

Due to this reality, all children born through ICS may experience some level of identity dislocation or questioning if they learn (later in life) about their

13 However, in ICS situations where a child has a genetic link to a third (and potentially fourth) state which is not their state of birth (e.g. the state of a third-party egg or sperm donor), arguably that child has cultural elements of their identity relating to that state which should be preserved.

circumstances of birth to a foreign surrogate in a state distant from that which they are living and growing up in. The state in which the child has grown up in or is residing in will have become a part of their identity, yet learning they originated in a different state will introduce a new dimension of identity for the child and may cause them to question the extent to which the elements of their identity connected to their birth-state has been preserved. This experience may traverse the culture, language and ethnicity elements of the child's identity and may leave a child feeling uncertain of their identity. It is therefore extremely important to ensure that information about these aspects of the child's identity is preserved and made available for the child, to give them the option of knowing and help them in understanding and establishing these aspects of their identity.

Of course, this will not necessarily be a universal experience for children born through ICS. Some children may never question this aspect of their identity. Some children will never become aware of the circumstances of their conception and birth through ICS (because they are not told), whilst some may decide that this is not an element of their identity that they want to preserve through learning about their circumstances of birth and information regarding the cultural elements of their identity (given they are not interested, or do not feel this is necessary for their own identity preservation).

For children who end up spending an extended period of time in their birth-state after birth through ICS – that is, a number of months or years because they are stateless or for other reasons – the impact of being removed from their birth-state to another state part-way through their early childhood may have more significant implications. This is because during the first few formative months or years of the child's infancy, they will have grown accustomed to the culture, language and ethnic specificities of the state of their birth. They may therefore experience a greater cultural disconnect later in life which could impact on their identity. Whether the child is able and supported to preserve these elements of their identity once they are removed to the home state of their commissioning parents will be influential in this regard. This holds true for children who are not conceived and born through ICS, but who are born in one state and then move to another, or who move from state to state during their childhood. However, the situation of children born through ICS can be distinguished from these other situations based on two factors always present in ICS situations. The first is that in ICS, there is always an intentional decision made by commissioning parents to have a child born in a specific state. Secondly (as outlined above), there is always an intentional decision made to have a child born to a surrogate mother in that state. Taken together, these factors establish a link between the child and their birth-state, which is also likely to be the state of their surrogate mother.

4 THE CHILD’S RIGHT TO PRESERVE THEIR IDENTITY: ARTICLE 8 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD AND BEYOND

The child’s right to preserve their identity is explicitly established under international human rights law. Article 8 of the UN Convention on the Rights of the Child (CRC) is the crucial starting point in framing discussion of the child’s identity in the ICS context.¹⁴ As Doek observes, ‘Article 8 of the CRC is a unique international human rights provision. There is no other international (or regional) human rights treaty that contains a provision similar to Article 8.’¹⁵ Article 8(1) sets out the core of the right: ‘States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.’¹⁶

In situations when children are illegally deprived of identity, States Parties have additional obligations, set out in Article 8(2): ‘Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.’¹⁷

Article 8 was drafted and adopted in a very different time to our current-day context. Now, having a child through methods involving scientific intervention and in reliance on globalisation is a reality. The drafters of the CRC, whilst aware of some of the possibilities of assisted reproductive technology (ART), were only just beginning to imagine the potential implications of conception and birth via such methods for child rights.¹⁸ In drafting Article 8 (as well as the rest of the CRC), the drafters did not envisage a world where ICS – let alone the various permutations of ICS arrangements¹⁹ – would be something engaging the rights of the child and be dealt with under the Convention itself. Having acknowledged this, it is important to further consider the context in which Article 8 of the CRC was drafted and adopted, before turning to the content and interpretation of the child’s Article 8 right in the ICS context.

14 Article 8 United Nations Convention on the Rights of the Child *supra* n 2.

15 Doek, *A Commentary on the United Nations Convention on the Rights of the Child, Articles 8-9: The Right to Preservation of Identity and The Right Not to Be Separated From His or Her Parents* (2006) at 5. Detrick further characterises Article 8 as ‘an innovative international human rights provision’. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999) at 162.

16 Article 8(1) United Nations Convention on the Rights of the Child *supra* n 2.

17 Article 8(2) United Nations Convention on the Rights of the Child *supra* n 2.

18 As Hodgson notes, this was a time of experimentation in *in vitro* fertilisation techniques and genetic engineering in many States. Hodgson, ‘The International Legal Protection to of the Child’s Right to a Legal Identity and the Problem of Statelessness’ (1993) 7 *International Journal of Law, Policy and the Family* 255 at 265.

19 Achmad, *supra* n 1 at 191.

4.1 The development of the child's right to preserve identity

Article 8 was one of several new rights that the CRC established under international human rights law.²⁰ Cerda asserts that the text of Article 8 (as finally adopted) 'represents a negotiated compromise.'²¹ Cerda explains the tensions inherent in the negotiations of Article 8 saying that 'On the one hand, some countries attempted to include a new legal norm inspired by certain regrettable experiences. Other countries, however, while not denying this phenomenon, were chiefly concerned that the text should be acceptable in their national legislatures.'²²

The *travaux préparatoires* of the CRC provide a helpful supplementary means of interpretation when considering the development and content of Article 8.²³ The *travaux* assist, among other things, in understanding why the child's right to preserve their identity is included in the CRC as a specific right, separate to the child's Article 7 rights to nationality, birth registration and to know and be cared for by their parents. Article 7(1) of the final text of the CRC states that 'The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.'²⁴ It is evident from the final wording of the text of Articles 7 and 8 that although Article 8 deals explicitly with the child's right to preserve their identity, there is an intersection and to some extent overlap between the child's Article 7 and Article 8 rights, clear upon an ordinary meaning reading of the text of both articles. The aspects of the child's rights stated in Article 7(1) are certainly elements (or able to be construed as elements) of the child's identity, a concept which the child has a right to preserve under Article 8; indeed, some of these elements are explicitly mentioned again in Article 8(1). However, what is made clear by the distinction between the two Articles is that the aspects of the

20 For discussion of some of the other 'new' rights introduced by the CRC, see Cerda, 'The Draft Convention on the Rights of the Child: New Rights' (1990) 12 *Human Rights Quarterly* 115-119.

21 *Ibid.* at 116.

22 *Ibid.* at 115.

23 Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (1992). Article 31(1) of the Vienna Convention on the Law of Treaties 1155 UNTS 331 sets out the general rule of treaty interpretation, namely that 'A treaty shall be 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.' Articles 31(2)-(4) further set out the context for the purpose of the interpretation of treaties, and Article 32 specifies supplementary means of interpretation. Article 32 covers the use of the *travaux préparatoires*, specifying 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 unreasonable.'

24 Article 7(1) United Nations Convention on the Rights of the Child supra n 2.

child's rights to which Article 7(1) focuses on protecting are important in their own right, independent of the child's right to preserve their identity under Article 8(1). Furthermore, the wording of Article 8 (as explored further below) regarding the child's right to preserve their identity is not a right which is tethered to a restricted concept of identity, but rather the Convention's drafters left open the possibility of a broadly characterised concept. Article 8 does, however, have a reinforcing and broadening effect in relation to Article 7. Article 8 reinforces the child's right to knowledge relating to their parents set down by Article 7(1), by establishing the child's right to identity and including in this the wider element of family relations, thereby having a broadening effect beyond a focus solely on parents.

The interrelationship between Articles 7 and 8 is important to note in the context of ICS, especially given the inherent limitations and challenges that a child may face when conceived and born through ICS in preserving, for example, the genetic and biological elements of their identity.²⁵ This may mean that they not only face challenges in exercising their Article 8 right to preserve their identity, but also their Article 7 right regarding its focus (in part) on the child's right to know and be cared for by their parents. For example, in the ICS context, as well as the child's commissioning parents, the child's genetic parents and birth mother may be understood as 'parents' on the basis of their genetic and biological links, yet they are not intended to have a legal child-parent relationship. Indeed, they may remain unknown. Tobin states that Article 7 "exists as recognition of the potential that the identity of a parent may be unknown for a variety of reasons and it is thus impossible for a child to know that parent or indeed parents. As a result, article 7 should be interpreted to create a presumption in favour of providing children with access to information about their biological parents before they turn 18 where this is logistically possible, that is, if the information is available."²⁶ However, as Buck notes, the term 'parents' in Article 7(1) is potentially contentious in nature and scope.²⁷ This may be particularly the case in ICS situations, given the multiple potential parents involved in the conception and birth of a child through ICS. Whereas Article 7(1) refers to the child's parents, Article 8(1) has an explicit focus on identity and instead of 'parents' includes the broader notion of 'family relations' as one of the explicitly stated elements of identity. Therefore whilst Article 7 is of relevance, this paper focuses on Article 8 as

25 Interestingly, Detrick noted in 1999 that '... the interpretation of this right, especially considering the qualifying phrase "as far as possible" may be subject to controversy, also given the developments in the application of biology and medicine.' Detrick, *supra* n 15 at 153.

26 Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (Victorian Law Reform Commission, August 2004) at 37, available at: www.lawreform.vic.gov.au/sites/default/files/Tobin%2Bpaper%2BFINAL.pdf [last accessed 01 June 2015].

27 Buck, *International Child Law*, 3rd edn (2014) at 154.

its primary framework for dealing with the child's identity in the ICS context. Situating the discussion within the Article 8 framework is a useful approach given it is not restricted to parents, which may be a contested notion in ICS arrangements.

Regarding the genesis of Article 8, the *travaux* shows the idea for the provision stemmed from the Argentinian delegation's proposal to the open-ended Working Group in 1985.²⁸ Argentina advocated for inclusion of a specific article securing the child's right to identity to cover what it described as 'the legal void which otherwise would exist in the convention on the rights of the child.'²⁹ However, a number of other countries viewed this proposal for a new right regarding identity as problematic;³⁰ through the revision process, the word 'family' was removed and further revisions made to avoid duplication with other draft Convention provisions. Article 8 as it appears in the Convention was adopted by the Working Group (at second reading) in 1989.³¹

The potential intersection of the child's rights with what were, at the time of the drafting of the CRC, new assisted reproductive technologies, proved a contentious issue during the negotiation of the text of Article 8. The tension largely arose between the primacy of adult interests regarding confidentiality and anonymity of parents on the one hand, and the interests of the child to know their origins (including genetic and biological elements) on the other. For example, Czechoslovakia said it would 'maintain confidentiality of the child's origin in cases involving artificial fertilisation and certain adoption procedures based on the principle of anonymity',³² whilst Mexico advocated

28 Detrick (ed), *supra* n 23 at 292. The proposal was introduced as article 9 bis, with the following text: 'The child has the inalienable right to retain his true and genuine personal, legal and family identity. In the event that a child has been fraudulently deprived of some or all of the elements of his identity, the State must give him special protection and assistance with a view to re-establishing his true and genuine identity as soon as possible. In particular, this obligation of the State includes restoring the child to his blood relations to be brought up.' As per *Considerations 1986 Working Group* (1986) E/CN.4/1986/39 at para 33.

29 Detrick (ed), *supra* n 23 at 293. Argentinian advocacy on this issue had its roots in the historical experience of children who had been forcibly disappeared during the Argentinian military junta in the late seventies and early eighties. As per *Considerations 1986 Working Group* (1986) E/CN.4/1986/39 at para 38.

30 Norway, the Netherlands, Austria, United States, Canada, Australia and Mexico raised concerns in reaction to the Argentinian proposal. See Detrick (ed), *supra* n 23 at 291-296. Argentina's original proposal focused on the protection of the child's 'true and genuine personal, legal and family identity.' A number of other state delegations submitted the view that the concept of 'family identity' was unknown in their legal systems. Australia was one such state and proposed deleting the word 'family' from appearing before the word 'identity'. As per *Considerations 1986 Working Group* (1986) E/CN.4/1986/39 at para 48.

31 Detrick (ed), *supra* n 23 at 296. as per UN Doc E/CN.4/1989/29/Rev.1 at 6.

32 Detrick, *supra* n 15 at 154.

from the child's perspective: 'The representative of Mexico stated that the wording should be more explicit as to the commitments made by the States under paragraph 1 and that the biological elements of the identity should also be included.'³³ Ultimately, Article 8 does not explicitly refer to the genetic and biological elements of a child's identity, given the concern of some states regarding the implication of applying such a provision to ART situations in practice, in a climate which was still widely premised on anonymity in both donor-conception and adoption.

Despite this, it is significant that the CRC drafters touched on issues about (then) new reproductive technologies in relation to the child's right to preserve identity. Whilst Hodgson describes the fact that the CRC text does not address questions of paternity and filiation as a somewhat curious omission,³⁴ he points out that the very reasoning for including Article 8 in the CRC serves as a foundation for understanding the provision as being applicable to those aspects of the child's identity based on biological and genetic links between children and adults:

'That the original Argentinian proposal was concerned with the protection of the child's 'true and genuine personal, legal and family identity' supports the proposition that the provision is also concerned with the biological or blood relationship of natural parent and child. Some reference might usefully have been made to possible procedures for the acknowledgment or recognition of parenthood. [...] Thus, a number of aspects of Article 8(1) remain open-ended, to be interpreted as a matter of discretion in light of national practices and needs.'³⁵

As will be discussed further in section 4.3.1 below, the Committee on the Rights of the Child has, in some of its concluding observations, elaborated on how elements of a child's identity such as the genetic element should be approached under the CRC.

4.2 The concept of 'preserving' identity under Article 8(1) of the Convention on the Rights of the Child

It is important to underscore that the child's Article 8(1) right is not to identify per se, but to preserve identity. Hodgkin and Newell state that 'preserve'

'implies both the non-interference in identity and the maintenance of records relating to genealogy, birth registration and details relating to early infancy that the child could not be expected to remember. Some of these are beyond the scope

33 Detrick (ed), supra n 23 at 296 as per *Considerations 1986 Working Group* (1986) E/CN.4/1986/39 at para 336.

34 Hodgson, supra n 18 at 265.

35 Ibid.

of the State, but measures should be taken to enforce detailed record-keeping and preservation of records (or, in the case of abandoned children, preservation of identifying items) where children are refugees, abandoned, fostered, adopted or taken into the care of the State. Equal care must be taken to ensure such records are confidential.³⁶

That Article 8 is a right to preserve identity is particularly relevant in the ICS context. While it is true that some children born through ICS will be precluded from establishing elements of their identity – such as nationality – it is the preservation of other elements of the child’s identity which can be effected through the maintenance of detailed and accurate records from the time of birth through their early infancy. Despite this, currently such an approach is not the norm in ICS situations, as will be made clear later in this paper. As already mentioned, identity is a broad concept which can evolve and grow over the course of a human lifetime. Preserving identity is, therefore, an ongoing exercise, but for children conceived and born through ICS, it is the preservation of identity from conception and post-birth that is most acutely at risk, especially given these are elements of their identity that children cannot be expected to independently preserve themselves.

4.3 The content of the right to preserve identity under Article 8(1) of the CRC

The CRC text gives some shape and content to the concept of identity through explicitly listing some elements of identity – nationality, name and family relations – in Article 8(1). That these constitute elements of the child’s right to preserve their identity is therefore not controversial. However, these elements are prefaced with the word ‘including’, indicating that Article 8(1) provides a non-exhaustive list of elements constituting identity, and that other elements are not excluded.³⁷ Hodgson notes that ‘The insertion of the word ‘including’ between ‘identity’ and ‘nationality’ in Article 8(1) demonstrates that these enumerated attributes are merely illustrative; other attributes of identity might fall within the ambit of the provision. [...]Indeed, the insertion of the word ‘including’ into the text of Article 8(1) was recommended by the United Nations Secretariat ‘so that other elements of identity will not be excluded.’³⁸ Both Cerda and Doek elaborate on this point. Cerda notes that concepts evolve and therefore Article 8 should extend to cover identity of

36 Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child* (United Nations Children’s Fund, 2007) at 115.

37 Detrick, *supra* n 15 at 163.

38 Hodgson, *supra* n 18 at 265 as per *Technical Review of the Text of the draft Convention on the Rights of the Child: Additional Comments and Clarifications by the Secretariat* E/CN.4/1989/WG.1/CRP.1/Add 1(14 November 1988) at 7 para 22.

children born in new ways;³⁹ Doek asserts that 'the Convention is a living instrument and its interpretation should reflect new developments that may arise in the area of children's rights'⁴⁰ and furthermore 'The Convention must be interpreted in the light of the present-day conditions.'⁴¹

Approaching the CRC as a living instrument to be interpreted in light of new developments in the area of children's rights (such as children being born in new ways, including through ICS), means it is necessary to consider what further elements of identity can fall within Article 8. It is now widely accepted that when read together, Article 8 and the wider Convention text actually protect a much broader array of elements constituting the child's identity, such as sexual orientation and the right to their own culture (for example in the intercountry adoption context).⁴² Hodgkin and Newell provide a comprehensive list of elements they see as fit for inclusion in what constitutes identity under the CRC, namely the child's personal history since birth (including information such as where the child lived, who they were in the care of, the reasons for crucial decisions relating to them); the race, culture, religion and language of the child (these aspects are also supported by Articles 20 and 30 of the CRC); and the physical appearance, abilities, gender identity and sexual orientation of the child.⁴³

Here it is further useful to note the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption,⁴⁴ an international child law instrument including explicit provisions relating to the child's identity right. Articles 16 and 30 focus on ensuring preservation of the child's identity under the Hague adoption process. Article 16 specifies that the Central Authority of the child's state of origin must, after being satisfied that a child is adoptable, prepare a report including 'information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child.'⁴⁵ The Central Authority must also 'give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background'.⁴⁶ Article 30 establishes the obligation on all contracting states to the Convention to 'ensure that information held by them concerning the child's origin, in particular concerning the identity of his or her parents, as well as

39 Cerda, *supra* n 20 at 116-117.

40 Doek, *supra* n 15 at 3.

41 *Ibid.* at 10.

42 CRIN, 'Article 8: Preservation of Identity' available at www.crin.org/en/home/rights/convention/articles/article-8-preservation-identity [last accessed 01 June 2015].

43 Hodgkin and Newell, *supra* n 36 at 115.

44 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993.

45 Article 16(1)(a), *supra* n 44.

46 Article 16(1)(b), *supra* n 44.

the medical history, is preserved.⁴⁷ Contracting states are required to ensure that the child (or their representative) 'has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.'⁴⁸

By placing emphasis on the child's identity and specific at-risk elements of identity, the Hague Convention highlights aspects of the child's identity requiring preservation in intercountry adoption. Taken together, these provisions of the Hague Convention set out a clear framework for preserving the child's identity in intercountry adoption situations, giving flesh to the bones of Article 8 and other identity-related provisions of the CRC. These identity-related provisions of the Hague Convention interact with the CRC, giving further shape to the content of the child's right to identity under Article 8 in practice along with Articles 7, 20 and 30 of the CRC.⁴⁹

The above discussion indicates that the child's Article 8(1) right to preservation of identity is certainly broader than the elements mentioned explicitly in the text of Article 8(1). Interpreting Article 8(1) of the CRC in this way applies a dynamic interpretative approach, in light of contemporary developments. The additional elements of identity highlighted throughout this section are potentially of relevance for a child conceived and born through ICS. However, personal history since birth, culture, ethnicity and language elements of identity are of increased importance for children born through ICS. This is because they may well be elements of their identity which they face difficulties in preserving, given the fact of their conception and birth through ICS. But what of the biological and genetic elements of the child's identity? These are further elements of identity which are acutely at risk of not being preserved in the case of children born through ICS, but are elements not explicitly mentioned in Article 8. Given this, it is important to more closely consider whether these can be said to constitute elements of identity of the child under Article 8(1) of the CRC.

4.3.1 *The child's identity from a biological and genetic perspective*

In considering whether the biological and genetic elements of a child's identity fall within the coverage of the right provided by Article 8(1) of the CRC, guidance can be drawn from a number of sources. The first is the United Nations Committee on the Rights of the Child (the Committee). Although there is no definitive, comprehensive interpretative guidance on Article 8 as the Committee has not issued a General Comment on Article 8, the Committee has made some

47 Article 30(1), *supra* n 44.

48 Article 30(2), *supra* n 44.

49 Article 20(3) United Nations Convention on the Rights of the Child *supra* n 2 states that care solutions for a child temporarily or permanently deprived of his or her family environment should pay due regard to 'the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'; Article 30 makes clear that children have a right to enjoy their own culture and to use their own language.

relevant references and observations regarding the concept of identity in the course of its work. A starting point is that the Committee has a long history of emphasising the importance of protection of information regarding a child's biological family, and the child's ability to access that information.⁵⁰ In some instances such as adoption, the Committee has directly stated the importance of the child's right to identity and articulated the 'right of the child to know his or her biological parents'.⁵¹ The Committee takes the position that under the CRC, the concept of knowledge of origins goes beyond a child knowing their legal parent(s), placing an emphasis on biology.⁵² Additionally, the Committee has extended the child's right to know their biological origins beyond parents to wider family relations. In its Concluding Observations regarding the Holy See in 2014, the Committee noted that the State party must take 'into full account the right of children to know their biological parents and siblings'.⁵³

Addressing the situation of children in the context of assisted reproductive technology (ART), the Committee has, since the mid-1990s, issued concluding observations containing statements regarding the child's right to identity preservation when conceived and born ART. Considering the early Danish approach to ART which was based on donor anonymity, the Committee responded that 'Concerning the right of a child to know his or her origins, the Committee notes a possible contradiction between this provision of the Convention and the policy of the State party with respect to artificial insemination'.⁵⁴ The Committee made similar remarks regarding Norway's then policy of keeping sperm donor identity secret, again referring to the child's 'right to know his or her origins'.⁵⁵ Moreover, the Committee in its 2002 Concluding Observations on the United Kingdom of Great Britain and Northern Ireland expressed concern that 'children born in the context of a medically assisted fertilization do not have the right to know the identity of their biological

50 E.g. Committee on the Rights of the Child, *General Guidelines for periodic reports* (1996) UN Doc. CRC/C/58) at para 24: 'having access to information concerning its biological family' is listed by the Committee as something the Committee wants to know about in periodic reporting under the Convention in relation to the minimum legal age defined by national legislation.

51 *Ibid.* at para 83.

52 Clark, 'A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins' (2012) 40(3) *Georgia Journal of International and Comparative Law*, 619 at 627.

53 Committee on the Rights of the Child, Concluding observations regarding the Holy See, 25 February 2014, CRC/C/VAT/CO/2, at para 36, addressing the situation of anonymous abandonment of babies in baby-boxes.

54 Committee on the Rights of the Child, Concluding observations regarding Denmark, 15 February 1995, CRC/C/15/Add.33, at para 11.

55 Committee on the Rights of the Child, Concluding observations regarding Norway, 25 April 1994, CRC/C/15/Add.23, at para 10.

parents.⁵⁶ Significantly, it recommended that ‘the State Party take all necessary measures to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible.’⁵⁷

Considering the Committee’s approach to the child’s right to preserve identity from a biological and genetic perspective, Clarke’s assessment that ‘The United Nations Committee on the Rights of the Child appears to interpret the CRC as bestowing a clear right to donor-conceived children to knowledge of their genetic identity’⁵⁸ is valid. Doek further asserts that ‘in the light of the present day developments and a dynamic interpretation of the CRC, it can be considered to include in the right to preserve your identity, the right to be informed about your (biological) origins. At the same time, it is a matter of respect for the rights of donors to protect them from any legal or financial responsibility for the child conceived with their assistance.’⁵⁹ It is this requirement for a balancing of rights and interests that is likely, therefore, to be the reason why the Committee has sometimes couched its position in the terms of ‘to the extent possible’.

Despite not having addressed the issue of child identity preservation in ICS, for the first time the Committee recently commented on the child’s right to identity in the context of domestic surrogacy. In Concluding Observations regarding Israel, the Committee expressed concern regarding the child’s identity rights when born through surrogacy in Israel.⁶⁰ It recommended that ‘... in the regulation of assisted reproduction technologies, particularly with the involvement of surrogate mothers, the State party ensure respect for the rights of children to have their best interests taken as a primary consideration and to have access to information about their origins.’⁶¹ The Committee did not elaborate as to the exact content of such information. However, based on its previous observations regarding the importance of biological origins, at a minimum it is reasonable to say that the Committee is expressing an expectation that children born through surrogacy will be ensured access to information about their biological origins – therefore information about their genetic parents and biological siblings. Interestingly, the Committee did not couch this expectation in terms of ‘to the extent possible’. This may signal a development in the Committee’s position on the provision of origin information to children conceived and born through alternative methods of family formation; arguably

56 Committee on the Rights of the Child, Concluding observations regarding the United Kingdom of Great Britain and Northern Ireland, 09 October 2002, CRC/C/15/Add.188, at para 31.

57 Ibid. at para 32.

58 Clark, *supra* n 52 at 628.

59 Doek, *supra* n 15 at 12.

60 Committee on the Rights of the Child, Concluding observations regarding Israel, 04 July 2013, CRC/C/ISR/CO/2-4, at para 33.

61 Ibid. at para 34.

the Committee is saying that in surrogacy situations, the child should have access to information about their origins. Furthermore, the open-ended nature of the wording chosen by the Committee allows an argument to be made that for children born through surrogacy, access to information about their origins should extend to identity information from a wider personal history perspective. For example, preserving and allowing the child to access information about the circumstances of their conception and birth through surrogacy, including who was involved (such as the surrogate, the commissioning parents, donor/genetic parents and medical professionals), where and why could form an important part of the child's personal narrative in later life, helping give shape to the child's right to preserve their identity under Article 8(1).

The above work of the Committee demonstrates that it is clearly of the view that the biological and genetic elements of identity fall within the child's Article 8 right. Tobin posits that 'on balance, international law supports a presumption in favour of allowing a child to receive information identifying his or her biological parents. This right is not absolute and must be balanced against a biological parent's right to privacy. It also remains subject to the overriding caveat that the release of identifying information must not be contrary to the child's best interests.'⁶² Given that the balancing of rights between the child and other parties involved in ICS is complex and such a significant issue from a rights perspective, it will be considered by the author in a separate paper. However, it is indeed true that the Committee makes clear that it is usually in the best interests of the child to protect and preserve the biological and genetic elements of all children's identities, including where the child is conceived and born outside of a natural conception and birth situation. Whilst the Committee has not yet directly commented on the child's right to preserve their identity in the context of ICS either in relation to Article 8 or 7, its comments in related contexts analysed above form a very strong indication that the Committee would likely take the position that in ICS situations, the child's right to preserve identity under Article 8(1) covers the biological and genetic elements of their identity (thereby reinforcing the child's Article 7 right to know and be cared for by their parents). Albeit made in the context of domestic surrogacy, the recent comment from the Committee on domestic surrogacy in the Israeli context is indicative of the importance the Committee places on the child's right to preserve their identity in surrogacy situations. It provides insight into the Committee's possible future approach to the child's preservation of identity in ICS situations.

62 Tobin, *supra* n 26 at 35.

4.4 The right to identity in regional human rights jurisprudence

Additional to the guidance from the Committee on the Rights of the Child, in order to further understand what constitutes a child's identity, reference to selected jurisprudence from regional human rights systems is elucidating. In the jurisprudence referred to below from the Inter-American Court of Human Rights and the European Court of Human Rights, the content of 'identity' has been confirmed and elaborated upon. This jurisprudence is of significant relevance to the focus of this paper on the child's right to preserve identity in the context of ICS, given that it confirms that identity is constituted of multiple elements and that it is an essential aspect of an individual's human rights with lifelong impact.

4.4.1 *Inter-American Court of Human Rights*

The American Convention on Human Rights⁶³ does not explicitly include the right to identity. Yet the Inter-American Court of Human Rights has addressed the right to identity in its jurisprudence, for example in *Serrano-Cruz Sisters v. El Salvador*,⁶⁴ a landmark case concerning children who were the victims of enforced disappearance by the Salvadoran army. Dissenting in *Serrano-Cruz*, Judge Cañado Trindade asserts the essential nature of identity to humans:

'Without a specific identity, one is not a person. The individual is constituted as a being that includes his supreme purpose within himself, and realizes this throughout his life, under his own responsibility. In this optic, safeguarding his right to an identity becomes essential.'⁶⁵

Judge Ventura Robles (also dissenting in *Serrano-Cruz*) further emphasises that as well as being essential in nature, the right to identity allows individuals to access personal and family information that can enable the construction of personal history and biography.⁶⁶ Judge Robles highlights the interrelated and symbiotic relationships between different members of a family and the importance of identity of each member of such a group in relation to the

63 American Convention on Human Rights 1969, OAS Treaty Series No. 36.

64 *Case of Serrano-Cruz Sisters v. El Salvador* IACTHR Series C 120 (2005).

65 *Ibid.* dissenting opinion of Judge Cañado Trindade, at para 15.

66 *Ibid.* dissenting opinion of Judge Ventura Robles on the Third Operative Paragraph at para 138, stating: 'Given that the exercise of the right to identity allows the individual to have access to personal and family information that will enable him to construct his own personal history and biography, the Court considers that the right to identity is an essential element of the life of all individuals and not only of children; moreover, its exercise is essential for establishing relationships with the different members of the family, and between each individual and society and the State.'

others,⁶⁷ observing that the Inter-American Court of Human Rights has recognised that everyone has a right to identity, and this is

'a complex right which, on the one hand has a dynamic aspect linked to the evolution of the personality of the individual, and includes a series of attributes and characteristics that allow each person to be individualized as unique. Personal identity starts from the moment of conception and its construction continues throughout the life of the individual, in a continuous process that encompasses a multiplicity of elements and aspects which exceed the strictly biological concept and correspond to the biographical and "personal reality" of the individual. These elements and attributes, which comprise personal identity, include such varied aspects as a person's origin or "biological reality," and his cultural, historical, religious, ideological, political, professional, family and social heritage, as well as more static aspects relating, for example, to physical traits, name and nationality.'⁶⁸

Concerning the elements of identity, Judge Cançado Trindade also identified various elements, saying that 'The right to identity presumes the right to know personal and family information, and to have access to this, to satisfy an existential need and safeguard individual rights. This right also has an important cultural (in addition to social, family, psychological and spiritual) content, and is essential for relationships between each individual and the rest of society, and even for his understanding of the outside world, and his place in it.'⁶⁹ All of these are highly relevant to the child's situation in ICS, as traversed earlier in Sections 2 and 3; indeed, giving effect to Article 8 CRC in practice amounts to ensuring the child is able to have a full picture of all the strands of their identity 'reality', based upon the various elements of identity.

4.4.2 *European Court of Human Rights*

The jurisprudence of the European Court of Human Rights is also helpful in understanding what can be said to constitute the various elements of identity from a human and child rights perspective under international law. Like the ACHR, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not explicitly include a right to preserve identity. However, Article 8 of the ECHR protects the right to respect for private and family life and the ECtHR has held, in a number of leading decisions, that

67 Ibid. dissenting opinion of Judge Ventura Robles on the Third Operative Paragraph at para 176, stating: 'Family relations and co-existence, and also the given name and surnames of a person, are essential for forming and preserving the identity of the individual. These elements of the right to identity are essential for both the children and the adult members of a family, given that the identity of each of the members affects and has an influence on that of the others, and also on their relationship with society and with the State.'

68 Ibid. dissenting opinion of Judge Ventura Robles on the Third Operative Paragraph at para 132.

69 Ibid. dissenting opinion of Judge Cançado Trindade at para 14.

the right to identity falls within the scope of the rights protected under Article 8 of the ECHR.⁷⁰ Viewing the right to identity as a matter of importance for all human beings in terms of their own personal development, the Grand Chamber of the European Court held in *Odievre v. France* that the Convention protects a vital interest ‘in obtaining information necessary to discover the truth concerning important aspects of one’s personal identity, such as the identity of one’s parents, birth, and in particular the circumstances in which a child is born, forms a part of a child’s, and subsequently the adult’s, private life guaranteed by Article 8 of the Convention.’⁷¹ The fact that the European Court specified as an element of identity ‘the circumstances in which a child is born’ is of particular relevance to children born through ICS. Of further significance in this context, the Court elaborated in *Odievre* that people ‘have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development.’⁷²

This emphasis on a person receiving a broad range of information as necessary to both know and understand these aspects of their identity is again significant. The Court’s judgment in *Odievre* was applied by the Court in *Phinikaridou v. Cyprus*, which underscored both the importance of the circumstances of birth and access to information ‘necessary to discover the truth concerning important aspects of one’s personal identity, such as the identity of one’s parents.’⁷³ Applying its earlier judgments in *Mikulic v. Croatia*⁷⁴ and *Gaskin v. The United Kingdom*,⁷⁵ the Court said that an individual’s entitlement to such information is of importance because of ‘its formative implications for his or her personality’.⁷⁶ The Court, however, has made clear that the right to identity is, in its view, not absolute. As the Court held in *SH and Others v. Austria*, a balance must be struck between private and public interests involved; in that particular case it found that the Austrian legislator could ‘find an appropriate and properly balanced solution between competing interests of donors requesting anonymity and any legitimate interest in obtain-

70 E.g. the Grand Chamber of the European Court of Human Rights in *Odievre v. France* Application No 42326/98, Merits and Just Satisfaction, 13 February 2003 at para 29 held that: “Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world.”

71 *Odievre v. France*, Application No 42326/98, Merits and Just Satisfaction, 13 February 2003 at para 29.

72 *Ibid.* at para 42.

73 *Phinikaridou v. Cyprus*, Application No 23890/02, Merits and Just Satisfaction, 20 December 2007 at para 45.

74 *Mikulic v. Croatia*, Application No 53176/99, Merits and Just Satisfaction, 07 February 2002.

75 *Gaskin v. United Kingdom*, Application No 10454/83, Merits and Just Satisfaction, 07 July 1989.

76 *Phinikaridou v. Cyprus*, Application No 23890/02, Merits and Just Satisfaction, 20 December 2007 at para 45.

ing information of a child conceived through artificial procreation with donated ova or sperm.⁷⁷

In this connection however, it is worth mentioning a decision outside the European Court context but which is notable given that it may represent a shift among European countries towards adopting a more progressive stance regarding the child's right to preserve their identity. Indeed, if it does signal a shift, it is a shifting of the balance strongly towards the child knowing their biological and genetic origins in all situations, outweighing competing interests. This is the recent decision of the Bundesgerichtshof (Federal Court of Justice of Germany) which held that all children, regardless of their age, have a right to know their origins, including the identity of anonymous sperm donor fathers.⁷⁸ The Court said that this information may be important for the development of the child's personality.⁷⁹ With regard to the balancing of interests involved, the Bundesgerichtshof held that in the majority of cases, the child's rights to know their origins and to know their parents will be greater than that of the donor's right to privacy.⁸⁰

Recently too, the European Court of Human Rights has begun to engage with the issue of the child's right to preservation of identity under the rubric of Article 8 of the ECHR in the specific context of ICS. The broader significance of these decisions have and will be dealt with elsewhere;⁸¹ for the purposes of this paper it is important to touch on the Court's approach to date in dealing with identity rights for children born through ICS. The judgments in *Mennesson v. France*⁸² and *Labassee v. France*⁸³ represent the first time the Court dealt with ICS matters. The Court in *Mennesson*, recalling its earlier jurisprudence relating to identity rights, held that respect for private life under the Convention requires that individuals can establish their personal identity, which includes their filiation.⁸⁴ Regarding the *Mennesson* twins, the Court found that France had erred in not recognising the biological link between the children and their commissioning fathers, and that the indeterminacy of this non-recognition (and resulting situation of non-recognition of French nationality, another important element of identity) would likely have a negative impact on the development of their identities.⁸⁵ It held that being deprived of a legal relationship with their proven biological fathers was incompatible with the

77 *SH and Others v. Austria*, Application No 57813/00, Merits and Justification, 03 November 2011 at para 84.

78 Judgment of the XII. Civil Division from 28 January 2015 – XII ZR 201/13.

79 *Ibid.* at 16 at para 41.

80 *Ibid.* at 21-23 at paras 54-59.

81 E.g. see Achmad, 'Children's rights to the fore in the European Court of Human Rights' first international commercial surrogacy judgments' (2014) 6 *European Human Rights Law Review* 638-646.

82 *Mennesson v. France*, Application No 65192/11, Merits and Just Satisfaction, 26 June 2014.

83 *Labassee v. France*, Application No 65941/11, Merits and Just Satisfaction, 26 June 2014.

84 *Mennesson v. France*, supra n 81 at para 96.

85 *Ibid.* at para 97-98.

children's best interests, and that France had exceeded its margin of appreciation.⁸⁶

In its judgment in *Paradiso and Campanelli v. Italy*,⁸⁷ the Court has again dealt with the identity aspect of the child's right to private life in an ICS situation. In this case however, unlike the situations in *Mennesson* and *Labassee*, the Court was confronted with a child, Teodoro who was born through ICS but is not genetically related to either of his commissioning parents.⁸⁸ The Court in its judgment observes that as a result of this fact and the subsequent actions of the Italian government, Teodoro was effectively left without an identity for over two years.⁸⁹ In recognising this, it appears that the Court was referring to the child's legal identity. Of course, Teodoro's personal history developed during this time, contributing to his identity, although the extent to which these were preserved for him by the adults involved in his care is unclear. The Court said that at a practical level as well as a developmental level, his lack of (legal) identity caused Teodoro disadvantage,⁹⁰ inconsistent with his rights under the CRC. He had been issued with a new legal identity – in terms of his birth certificate and nationality – and placed in foster care. Since that time, the Court held that he had developed a bond with his foster family, and therefore Italy was not required to return him to his commissioning parents, who had no genetic relationship to him.⁹¹ This was despite his commissioning parents intending that there would be a paternal genetic link with Teodoro when they embarked on their ICS arrangement. The facts of Teodoro's situation are illustrative of the myriad complex risks to children who are conceived and born through ICS. Moreover, that a new legal identity was essentially created for Teodoro raises the question to what extent this identity was in sync with his original identity, and raises the spectre of elements of his original identity – such as his own personal narrative regarding his conception and birth and the fact his conception was instigated by his commissioning parents – having been erased at law through the creation of his new legal identity. However, the facts of Teodoro's personal history and therefore particular elements of his identity have been preserved through documentation in the various court judgments pertaining to his situation. Despite this, there is currently no guarantee that all children who end up in similar situations through ICS will have such elements of their identity preserved.

Taken together, the European judgments canvassed above provide a platform for recognising the importance of the child's right to preserve their identity, and that this right encapsulates the elements of genetic and biological

86 Ibid. at para 99-100.

87 *Paradiso and Campanelli v. Italy*, Application No 25358/12, Merits and Just Satisfaction, 27 January 2015.

88 Ibid. at paras 19, 22.

89 Ibid. at para 85.

90 Ibid.

91 Ibid. at para 88.

origins. The decisions largely indicate that from a rights balancing perspective, the right of the child to preserve their identity to the fullest extent possible is likely to outweigh the right of donors to privacy. This sends a strong message that from a best practice perspective, gamete donors involved in ICS should be identifiable to enable the child to preserve their identity. The Court's decision in *Paradiso and Campanelli* indicates that the Court views the concept of identity as evolving and adapting over time depending on the child's circumstances, but that some elements of identity remain static, such as genetic parentage. However, the Court in this case did not explicitly consider how the elements of a child's identity relating to the child's personal narrative about their origins should be preserved, such as the circumstances of their conception and birth as they relate to the intention of their commissioning parents.

5 HOW THE CHILD'S ARTICLE 8 RIGHT HAS BEEN BREACHED IN INTERNATIONAL COMMERCIAL SURROGACY SITUATIONS

The cases examined below place the preceding discussion in context and are illustrative of the ways various elements of the child's identity can fail to be protected in ICS, preventing the child from preserving their identity, inconsistent with their best interests.⁹² In some cases, based on the child's specific circumstances, a particular element of the child's identity is emphasised. However, in all the cases below, more than one of the child's elements of identity has failed to be preserved, impacting negatively on the child's ability to exercise their Article 8 right and to benefit from the protection it is intended to provide.

5.1 Volden twins

Twins Adrian and Mikael Volden were born in India in 2010 to an Indian gestational surrogate mother, commissioned by a single Norwegian woman.⁹³ The twin's genetic parents are allegedly an Indian egg donor and a Scandinavian sperm donor, both anonymous.⁹⁴ Conflicting Indian and Norwegian nationality and parentage laws left the twins stateless for their first 15 months, stranded in India; their Article 8 right has been breached in a number of ways because of the circumstances of their conception and birth through ICS. As

92 Article 3, Convention on the Rights of the Child *supra* n 2.

93 Roy, 'Stateless twins live in limbo' *Times of India* (2 February 2011) available at: www.timesofindia.indiatimes.com/city/mumbai/Stateless-twins-live-in-limbo/articleshow/7407929.cms [last accessed 01 June 2015].

94 *Ibid.* However, Melhuus states that the nationality of the gamete donors is unknown. See Melhuus, *Problems of Conception: Issues of Law, Biotechnology, Individuals and Kinship* (2012) at 84.

well as being stateless without a nationality for an extended period (one of the explicit elements of identity under Article 8), even since the twins gained Norwegian nationality, they remain unable to preserve their genetic identity, given their genetic parents donated gametes anonymously. This further means they are unable to preserve their genetic health history, culture and heritage. Regarding their culture and heritage related to their birth place and their birth mother, Adrian and Mikael remained in India, their birth country during their early infancy.⁹⁵ Although their commissioning mother cared for them in India during this time, they may have experienced the culture and language of their birth place and of their birth mother. They were then transferred to Norway, a state with a very different culture and language. Therefore, these identity elements associated with their birth place and birth mother may be challenging for them to preserve. Depending on how their commissioning mother approaches these issues later in their lives, these elements of their identity may be difficult for the twins to deal with as they seek to make sense of their identity and preserve it.

5.2 D and L (Surrogacy)⁹⁶

This case in the Family Division of the United Kingdom High Court concerns twin boys, D and L, born to a surrogate mother in India and a male same-sex couple residing in the UK.⁹⁷ Genetically, D and L are the children of one of their commissioning parents and an anonymous Indian egg donor.⁹⁸ Given their genetic mother's anonymity, the twins are unable to preserve half of their genetic identity and related sub-elements such as medical history, ethnicity, culture and heritage. However, *D and L (Surrogacy)* is particularly notable as it highlights the practical limitations in preserving biological identity elements relating to children's birth mothers in ICS. Whilst the twin's commissioning parents had information they believed was identifying information about the surrogate, they could not locate her following the twins' birth. An agent seeking to locate her told the Court:

'I am sorry to inform you that I could not locate Miss B. The address provided by the clinic where Miss B should be residing... is not the place where she lives. [...] Nobody there had any knowledge of Miss B or where she is living now. I have shown neighbours [identity] card of Miss B and they did not recognise her. I could not find out where she lives now.'⁹⁹

95 Lysvold, 'Kari Ann Volden får komme hjem' *NRK* (15 April 2011) available at: www.nrk.no/nordland/kari-ann-volden-far-komme-hjem-1.7596488 [last accessed 01 June 2015].

96 *D and L (Surrogacy)* [2012] EWHC 2631 (Fam).

97 *Ibid.* at paras 2 and 8.

98 *Ibid.* at para 6.

99 *Ibid.* at para 14.

This illustrates the precariousness of preserving this element of the child’s identity in ICS; the risks of surrogate mothers providing false or inaccurate identity information, failing to update contact information or simply acting anonymously and therefore placing this element of the child’s identity beyond reach are real.

5.3 Paradiso and Campanelli v. Italy¹⁰⁰

This case, already mentioned in section 4D(ii) above concerns a child, Teodoro, intended to be the genetic child of one of his commissioning parents, but who was born genetically unrelated to either. Teodoro’s genetic parents remain unknown; his birth mother has no on-going involvement with him; the Italian state has removed Teodoro from his commissioning parents and he is now the legal child of persons who were in no way involved in the ICS arrangement. The case therefore raises questions regarding the family relations element of Teodoro’s identity. Whilst the European Court of Human Rights found Teodoro’s removal from his commissioning parents violated Article 8 of the European Convention,¹⁰¹ it concluded he was attached to his new carers and should remain with them.¹⁰² Yet this child has particularly complex family relations given the multiple parties involved in his ICS arrangement from genetic, biological and social perspectives. They each form an important part of the family relations element of his identity; they relate to particular periods in his life and have a bearing on his personal narrative and other elements of his identity, all of which may have an enduring impact on his life. They are elements of his identity which should be preserved consistent with Article 8.

Furthermore, the judgment highlights that although Teodoro received a new identity under law, he was without a legal identity for over two years.¹⁰³ However, the judgment does not point out that elements of his identity such as genetic identity (including medical history, ethnicity, culture and heritage), biological identity (relating to his surrogate mother, such as her culture, ethnicity and medical history) and cultural identity relating to his birth place have not been preserved, and that consequently he will be unable to preserve his identity consistent with Article 8 CRC. At best, these elements of Teodoro’s identity have failed to have been preserved, and at worst, erased.

100 *Supra* n 87.

101 *Supra* n 87 at para 87.

102 *Supra* n 87 at para 88.

103 *Supra* n 87 at para 85.

5.4 In the Matter of an Application by DMW and KW to adopt a male child¹⁰⁴

In this New Zealand case, a child, A, was born to a surrogate mother in Thailand and to New Zealand commissioning parents DMW and KW. A was intended as the genetic child of Mr DMW and Mrs KW's niece, Ms KP, through an embryo created from their gametes.¹⁰⁵ However, DNA testing revealed A is genetically unrelated to Mr DMW and Ms KP (likely due to clinical error); his genetic parents remain unknown (testing also excluded A's surrogate mother as his genetic mother).¹⁰⁶

Mr DMW and Mrs KW indicated to the Court they committed to parenting A, despite sharing a genetic connection with him;¹⁰⁷ intercountry adoption was the only avenue which remained open to them to pursue to establish a parental relationship to A. Similarly to *Paradiso and Campanelli v. Italy*, this case demonstrates the precarious nature of the child's family relations and genetic identity preservation in ICS situations. A will never be able to preserve his genetic identity and related sub-elements; his birth certificate effectively confirms this lack of preservation, stating his surrogate mother as his mother, along with 'unknown' in the 'father' field. There will remain a large part of his personal narrative that will never be able to be preserved as a result of the impossibility of gaining information which preserves his genetic and associated cultural identity elements.

To date, relatively little explicit judicial attention has been given to the child's Article 8 right in situations concerning ICS children before domestic courts and regional human rights courts. That courts are seemingly not choosing to engage more extensively with this aspect of the child's rights is unfortunate. Article 8 provides a clear basis for Courts to do so, and given the centrality of the child's right to preserve their identity to their best interests in ICS, the child's Article 8 right should receive judicial attention in all ICS cases. Where possible, courts should seek reports on this issue from independent experts, and highlight the findings of such reports in judgments. This would emphasise the significance of the child's Article 8 right in this context and highlight the need to take steps to protect and uphold the child's identity preservation right. In the regional arena, the European Court of Human Rights has been the only court to engage with the issue in its *Mennesson, Labassee* and *Paradiso* judgments. In the domestic sphere, the Australian jurisdiction currently leads the way in terms of explicit judicial consideration of this issue. In a number of

104 *In the Matter of an Application by DMW and KW to adopt a male child* [2012] NZFC 2915.

105 *Ibid.* at para 2.

106 *Ibid.* at paras 5-6.

107 *Ibid.* at para 10.

recent ICS judgments, Australian courts have drawn attention to the issue, emphasising the importance of protecting the of the child's ability to preserve their identity in ICS situations. Three leading cases are illustrative in this connection.

*Mason & Mason and Anor*¹⁰⁸ is the leading authority in this respect, concerning E and W, twins born to an Indian surrogate in India and Australian male commissioning parents. The twins are genetically the children of one of the commissioning fathers and an anonymous egg donor. The Australian Family Court's judgment considers the twin's identity and their best interests from a number of perspectives, referencing the findings of a report by a family consultant to the Court (all of which the Court accepted). The consultant noted the twins may, at some stage in their life, have 'an intense, emotional identity crisis'¹⁰⁹ relating to the fact they were born through a surrogacy arrangement 'by mothers they are unlikely to know'.¹¹⁰ They will face issues in their lives 'however well-armed with positive parent-child relationships'.¹¹¹ Despite this, the consultant noted the commissioning parents commitment (at the time of her report) to openness regarding the children's situation may be 'a protective factor for the twins, alongside the development of secure and healthy parent-child relationships',¹¹² combined with the fact the commissioning parents had actively sought to connect with families in similar positions, which may lead to positive friendship groups over time.¹¹³ Amongst the issues the twins will face, however, the consultant identified 'the cultural issues from being genetically half Indian'¹¹⁴ and 'identity issues from having no or very limited contact with their donor mother and their surrogate mother'.¹¹⁵ Further relating to the twin's cultural identity, the family consultant said that they may benefit from spending time amongst Indian families in Australia, such as though Indian festivals and celebrations.¹¹⁶ The consultant stated '...The diversity of Indian culture means the different experience according to religious background, and this may be an issue the children will want to explore at some point.'¹¹⁷ She went on to observe that as in adoption,

'the twins may potentially face a more complicated task of making sense of their place in the world because they have grown up in a family whose parents faces do not look like theirs and without experiencing their "mother", and her culture. There may be times in the children's lives when they will be pre-occupied with

108 *Mason & Mason and Anor*, [2013] FamCA 424.

109 *Ibid.* at para 67.

110 *Ibid.*

111 *Ibid.* at para 64.

112 *Ibid.* at para 67.

113 *Ibid.*

114 *Ibid.* at para 64.

115 *Ibid.*

116 *Ibid.* at para 66.

117 *Ibid.*

this task. They may seek contact with their mothers at significant life cycle transitions. It is also possible that it may never be an issue for the twins.¹¹⁸

The consultant drew attention to the argument that ‘a child’s genetic identity forms part of a child’s history.’¹¹⁹ She said that

‘There may be medical advantages in the children knowing their parentage. The donor mother and [the birth mother] and their families will, apparently, be unlikely and/or unable to seek out [the children]. There may be significant class issues separating the families which may well be apparent to the children as they explore their Indian backgrounds further. The twins may realise that their mothers and any half siblings experienced life very differently to them.’¹²⁰

Regarding the latter point, the family consultant said that this was something the twin’s commissioning parents could help them to understand and approach.¹²¹

The second Australian case, *Ellison and Anor & Karnchanit*,¹²² although not including as extensive emphasis on identity issues as *Mason & Mason*, does focus on the significant nature of the impact of not preserving elements of the child’s identity in ICS situations. *Ellison* concerns twins born in Thailand to a Thai surrogate mother and Australian commissioning parents, Mr Ellison and Ms Solano. They are the genetic children of Mr Ellison and an anonymous egg donor. The Australian Family Court held that granting a declaration of legal parentage to Mr Ellison was appropriate as it recognised the reality of the children’s lives and their genetic link to their biological father¹²³ and ‘may well be of the greatest significance to the child in establishing his or her lifetime identity.’¹²⁴ Yet the Court acknowledged that the twins share half their genetic identity with their genetic mother, who it observed will most likely remain unknown.¹²⁵ The Court elaborated that ‘Although it is almost certain that the children will never know their biological or birth mother, it is not within the Court or the applicants’ power to coerce those women to establish or maintain a relationship with the children.’¹²⁶ However, the Court was clear in its view that this ‘may raise issues for the children as they mature’.¹²⁷

118 *Ibid.* at para 67.

119 *Ibid.*

120 *Ibid.*

121 *Ibid.*

122 *Ellison and Anor & Karnchanit* [2012] FamCA 602.

123 *Ibid.* at para 101.

124 *Ibid.* at para 91.

125 *Ibid.* at para 115.

126 *Ibid.* at para 129.

127 *Ibid.*

Honing in further on the twin's birth mother, the Court noted she

'has made it plain that it is her wish not to be involved in the children's upbringing. The applicants have her contact details and are committed to maintaining contact with her if this is what she wants. They have secured her agreement that she receive photographs of the children and to meet with the applicants and children when they visit Thailand.'¹²⁸

In this respect, it is positive that in this case the commissioning parents evidently gave thought to how to preserve the child's biological identity relating to their birth mother. Moreover, based on the report of a family consultant, the Court said it 'was clear that the applicants had given considerable thought to future issues, including those of identity and culture.'¹²⁹

Finally, the judgment of the Family Court of Australia in the case of *Fisher-Oakley v. Kittur*¹³⁰ is representative of the overriding judicial concern being expressed from a legal perspective by the Family Court of Australia regarding children being conceived and born through ICS in general,¹³¹ and explicitly in relation to the child's right to identity preservation in ICS situations. The case concerned a child born in India to an Indian surrogate mother and Australian commissioning parents, Mr X and Mr Y.¹³² Despite no DNA evidence being put before the Court, one of the commissioning parents is said to be the child's genetic father.¹³³ It is unclear who the child's genetic mother is, as there is no mention of her in the judgment. However, Justice Cronin described the child's Indian birth certificate as being 'curious and unusual',¹³⁴ given it cites the name of the child's mother as 'Mrs Not Known'.¹³⁵ Further regarding the child's identity, Justice Cronin pointedly stated that:

'Whatever things people say about the future and their intentions, one has to be somewhat cynical about just how those things will unfold for a child born into this commercial arrangement. This is a new area for the law in an environment where science is far ahead of what lawmakers seem to be contemplating. I have no idea what this child will face in 15 years time if cultural issues arise or his issues about identity become a crisis. I have no idea what would happen in the event that the birth mother suddenly changed her mind and wanted to have some involvement in the child's future. All of those questions remain unanswered.'¹³⁶

128 Ibid. at para 115.

129 Ibid. at para 122.

130 *Fisher-Oakley & Kittur* [2014] FamCA 123.

131 Ibid. at paras 5; 27.

132 Ibid. at para 1.

133 Ibid. at para 13.

134 Ibid. at para 16.

135 Ibid.

136 Ibid. at para 9.

6 LEARNING LESSONS FROM DONOR-CONCEPTION, ADOPTION AND DOMESTIC SURROGACY FOR THE CHILD'S RIGHT TO PRESERVE IDENTITY IN INTERNATIONAL COMMERCIAL SURROGACY SITUATIONS

Against the above discussion of the importance of the right to identity preservation for children born through ICS and the reality that children conceived and born this way are not always able to exercise their Article 8 right (or have it upheld for their protection), it is useful to draw out some key lessons from donor-conception, adoption and domestic surrogacy. These are relevant to the child's identity situation in ICS given the overlap between some of the challenges in common between these alternative methods of family formation. In some instances there are directly analogous lessons to be learnt, so children conceived and born through ICS avoid experiencing the same challenges as these other groups of children have experienced.

6.1 Domestic systems of donor-conceived children and lessons for the child's right to preserve identity in ICS

Studies focussing on the experiences of donor-conceived children highlight some central emergent themes relevant in the context of the child's right to preserve identity in ICS. One such theme is the role of secrecy and non-disclosure in donor-conceived peoples' lives and its impact. For donor-conceived people, secrecy and non-disclosure appears to function at two levels: regarding information about the nature of the child's conception, and information relating to the identity of gamete donors. As Cowden observes, 'Non-disclosure generates strong risks for the donor-conceived child [...] even if these risks could be mitigated, children have a right to be treated with respect and truth-telling about information regarding one's life course is intimately tied up with respect for an individual's identity.'¹³⁷ Cowden therefore rejects the argument that non-disclosure and secrecy relating to donor conceived children is acceptable on the basis of the 'no harm, no foul' rule, given the child rights rooted position that we should always engage in actions that respect the child.¹³⁸ The negative nature of secrecy and non-disclosure is borne out in empirical studies involving donor-conceived people,¹³⁹ and resonates strongly with

137 Cowden, *supra* n 12 at 103.

138 *Ibid.* at 116-118.

139 E.g. Turner and Coyle, 'What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counselling and therapy' (2000) 15 *Human Reproduction* 2041 at 2049 state that: 'A consistent finding within the study was the negative and ongoing effects of withholding secrets'; furthermore, a longitudinal study of donor-conceived people found that non-disclosure can lead to them never knowing they have genetic siblings. Golombok emphasises that research has shown the importance and significance of knowing siblings and their wider family relations for donor conceived

Freeman's assertion that the child's right to identity when born via ART is 'a right not to be deceived about one's true origins.'¹⁴⁰ Furthermore, a donor-conceived person's ability to seek and access information regarding their donor parent(s) hinges on an initial disclosure of information about the true nature of their conception.¹⁴¹ If children in ICS are not informed about the nature of their conception and birth, their ability to seek and access information to preserve their identity will be similarly compromised; Tobin observes that contemporary research 'appears to favour a climate of openness and honesty rather than secrecy and denial with respect to children who are raised in families where their social parents are not necessarily their biological parents.'¹⁴²

Access to identity information is the second level at which secrecy and non-disclosure function in the lives of donor-conceived people. Moreover, ensuring donor-conceived persons are able to access identifying information appears to be crucial so they can preserve their own identity.¹⁴³ Drawing

persons: Golombok, *Modern Families* (2015) 112-114. See also Golombok, 'Families created by reproductive donation' (2013) 7 *Child Development Perspectives* 61-65. Blyth notes that participants in one study of donor-conceived adults 'expressed very firmly that those who built their family using donor gametes should tell their child(ren) about their genetic heritage as early as possible.' See Blyth, 'Discovering the 'Facts of Life' Following Anonymous Donor Insemination' (2012) 26 *International Journal of Law, Policy and the Family* 143 at 153. However, Golombok's study showed that whilst increasing numbers of parents intend to tell their children about their donor conception, many never make the disclosure. As Adams notes, 'the rights of donors to anonymity can still override a donor conceived person's right to information, depending on what era and jurisdiction he or she was conceived in. Additionally, the right of parents to deceive a child of his or her origins is universal in all jurisdictions and eras. In effect, the offspring's postulated right is subject to various regulations and laws as well as the choices of the participating adults. Subsequently, the freedom of procreation in this context has the potential to adversely affect the rights of donor-conceived offspring.' Adams, 'Conceptualising a Child-Centric Paradigm: Do We Have Freedom of Choice in Donor Conception Reproduction?' (2013) 10 *Bioethical Inquiry* 369 at 370.

140 Freeman, 'The New Birth Right? Identity and the Child of the Reproduction Revolution' (1996) 4 *International Journal of Children's Rights* 273 at 291.

141 As Blyth and Frith note, 'Donor-conceived people's ability to access information to which they are entitled is entirely dependent on their awareness of the nature of their conception and this is clearly compromised if parents do not tell their children about their conception in the first place.' See Blyth and Frith, 'Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity' (2009) 23 *International Journal of Law, Policy and the Family* 174 at 185.

142 Tobin, *supra* n 26 at 43.

143 Turner and Coyle, *supra* n 139 at 2047. This study found that non-identifying information was insufficient, as without it donor-conceived participants experienced loss and grief about being prevented from knowing their biological origins and knowing their genetic fathers. They believed they had a right to search for and receive identifying information about their missing genetic parent, and also experienced a sense of abandonment and attributed responsibility to their donor fathers and medical professionals (at 2050).

on testimony from donor-conceived people,¹⁴⁴ Cowden further notes that preventing a child from accessing identifying information can lead to psychological harm and loss of identity, described as ‘genealogical bewilderment’ arising from being prevented from knowing the part of the identity they inherit through genetics and biology.¹⁴⁵ On the other hand, through enabling donor-conceived people to access identifying information about their donor parent(s), they can fill a void that was once empty and establish their own sense of identity.¹⁴⁶

There are strong parallels to be drawn between the lessons from donor-conception and the situation faced by children born through ICS regarding the protection of their Article 8 right. These clearly relate to the genetic and personal narrative elements of the child’s identity. The lesson from donor-conception that secrecy and non-disclosure regarding the child’s conception cuts against the concept of respect for children and their best interests – and may cause children harm – equally applies in ICS. As Tobin notes, the CRC Committee’s statements regarding the inconsistency between the child’s right to know their genetic origins and national regimes permitting anonymous gamete donation indicate the Committee’s ‘strong presumption in favour of the full disclosure of a child’s genetic/biological parents’.¹⁴⁷

Furthermore, the other lesson from donor-conception, that donor-conceived people should have identifying information about their genetic parents (or at least information which allows them to understand their genetic origins) protected for them so they can access it, is crucial to bear in mind in ICS. However, for children born through ICS, as well as information about their genetic parents, they should also be able to access information about the woman who carries them biologically and births them. As with donor-conception, in ICS it will be necessary for children to first learn about the circumstances of their conception and birth in order to then have the choice whether to seek access to information preserving their identity. Here, the child’s social parents (most likely their commissioning parents) and identity information protection and access systems will have critical roles to play.

144 Cowden, *supra* n 12 at 110.

145 *Ibid.* at 109-110.

146 *Ibid.* at 111. The findings of Blyth’s study involving donor-conceived adults support this view. This group strongly advocated for the use of gametes only from donors willing to be identified by their offspring. Some study participants advocated including relevant information about their donor parent(s) on birth registration documents in instances where privacy could be maintained and it would not preclude them from choosing to tell others about the nature of their conception on their own terms. See Blyth, *supra* n 139 at 153.

147 Tobin, *supra* n 26 at 37.

6.2 Adoption systems and lessons for the child's right to preserve identity in ICS

A sea-change has occurred over the past twenty years in adoption practice regarding child identity preservation, with a near world-wide shift from closed to open adoption systems.¹⁴⁸ Marshall, contrasting this openness with the fact that donor-conception systems in many states continue to be characterised by their closed, anonymous nature, says the global experience of adoption 'suggests a strong encouragement to tell children about the way they were conceived.'¹⁴⁹ Fortin elaborates that knowing about their birth circumstances as soon as possible provides the child a sense of continuity, their own biography, and alleviates the negative impact of bewilderment later in life caused by concealing the truth.¹⁵⁰ Fortin further notes that 'Research carried out in the context of adoption practice suggests that adopted children have a psychological need to know the true identity of those who brought them into the world.'¹⁵¹

Although there are limits to drawing analogies between adoption and ICS given that adoption is a protective measure concerning pre-existing children, whereas ICS is a practice which itself creates new children, such an approach based on openness is equally applicable to donor-conceived children and children born through ICS. The 'genealogical bewilderment' children can experience when they grow up in the care of people who are not their birth parents but discover the real circumstances of their birth and infancy was first articulated by Sants in 1964, continues to hold value in our current day context.¹⁵² The situation of children placed for adoption either from birth or early infancy is particularly relevant to the child's right to preserve identity in ICS. As Brodzinsky et al assert, 'When children are placed in infancy, they have no memory of the birth parents and may have little or no access to information about them. In these situations, what is lost is also unknown, which too often sets the stage for the development of distorted perceptions about one's background.'¹⁵³ For a child conceived with the gamete(s) of donors and born to a surrogate through ICS, and for whom these elements of their identity are

148 Richards notes that 'Adoption research and current practice recognise that acknowledging biological heritage is in a child's best interest. This contrasts with earlier held views, where many people believed it was best to hide children's origins'. See Richards, 'What the map cuts up the story cuts across: Narratives of belonging in intercountry adoption' (2012) 36 *Adoption and Fostering* 104 at 107.

149 Marshall, *Human Rights Law and Personal Identity* (2014) at 125.

150 Fortin, *Children's Rights and the Developing Law* (2003) at 383.

151 Ibid.

152 Sants, 'Genealogical bewilderment in children with substitute parents' (1964) 37 *British Journal of Medical Psychology*, 113-141.

153 Brodzinsky et al, *Children's Adjustment to Adoption: Developmental and Clinical Issues* (1998) at 99.

not preserved, creating this empty genealogical space may well lead to problems for the child regarding their identity preservation.

Brodzinsky et al highlight that many adoptees not only lack information about and a relationship with their birth parents, but are also negatively impacted by their perception of the circumstances surrounding the 'relinquishment decision'.¹⁵⁴ This may bear out in the experience of children born through ICS too, who may seek answers to questions such as 'why didn't my birth mother and my genetic parents want me?' or 'why did they choose to be involved with creating me, only for me to be given away?'. On the other hand, while it may be relatively common for children who were voluntarily placed for adoption to feel they were rejected or unwanted by their birth parents¹⁵⁵ and for this to have an impact on the preservation of their identity, this may actually be less likely or be experienced differently by ICS children. Unlike adopted children, children in ICS are intentionally conceived for the commissioning parents on the basis of their desire to have a child. Contrastingly, when a child is voluntarily placed for adoption, the child may in fact, for various reasons, be unwanted by his or her birth parents. In adoption, the child's ability to preserve a 'stable and consolidated identity'¹⁵⁶ in part relies on the manner in which adoptive parents 'portray the birth family and the circumstances of the relinquishment'.¹⁵⁷

The importance and impact of origin and biological narratives has also been highlighted in the adoption context. Regarding the concept of a biogenetic narrative, Lifton asserts that this 'is as much a part of them [a person] as their shadow; it develops with them over the years and cannot be torn away. Unless, of course, they are adopted.'¹⁵⁸ Lifton says that this not only removes a personal sense of identity, but also a sense of connection to the narratives of other people to whom that person is related.¹⁵⁹ Research has found that biological narratives are complicated by adoption; often constructed upon partial truths, speculation and regarding intercountry adoption, cultural assumptions.¹⁶⁰ The experience of adopted children also shows that such children may face challenges in preserving and developing personal identity given that they perceive themselves and are perceived as different.¹⁶¹ For example, in the context of intercountry adoption (the form of adoption drawing the closest parallels to ICS given the common transnational element) children can find themselves in an 'ambiguous' position, 'both inside the family and

154 Ibid.

155 Ibid. at 100.

156 Ibid. at 104.

157 Ibid.

158 Lifton, *Journey of the Adopted Self: A Quest for Wholeness* (1994) at 37.

159 Ibid.

160 Richards, *supra* n 148 at 106.

161 Brodzinsky et al, *supra* n 153 at 104.

nation and outside it – as culturally and racially different.¹⁶² Even once children receive the nationality of their adoptive country, such children often have a complicated experience in terms of their perceptions of self from cultural, social and ethnic perspectives.¹⁶³ Children born through ICS may also find it is beyond their grasp to preserve their origins from a biological, cultural, language and ethnic perspective, given the transnational dislocation they may experience.

As already highlighted in section 4.3 of this paper, the significance of the issue of identity preservation for intercountry adoptees is made clear in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.¹⁶⁴ Guidance from the Hague Conference Permanent Bureau¹⁶⁵ on Articles 16 and 30 of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption characterises the process of adoption as lifelong, and 'When a child grows up and seeks information about his or her origins the report [concerning the child's background] will be an important resource. If items such as photographs of the biological family and their home or community are included in the report, they will be treasured by an adopted person who is searching for his or her origins.'¹⁶⁶ Furthermore, the Permanent Bureau notes 'There are benefits in trying to gather as much information on the child's background as possible: it is in the child's best interests to have all relevant information in the social and medical reports; it improves matching for families; it allows prospective adoptive parents to make an informed decision about accepting the proposed child; it becomes a future resource for that specific child.'¹⁶⁷ It also states that the child, as well as their adoptive parents, has an interest in 'obtaining a full and accurate medical report on the child',¹⁶⁸ and steps should be taken by states parties to ensure the information gathered and included in the wider report about the child is as accurate as possible.¹⁶⁹ Completeness of information is important, given 'The demand by adult adoptees for information about their origins is significant. Those whose background information is incomplete or non-existent may never find the answers they seek.'¹⁷⁰

Whilst children born through ICS will face many of these challenges to identity preservation highlighted by the Permanent Bureau regarding inter-

162 Yngvesson, *Belonging in an Adopted World: Race, Identity and Transnational Adoption* (2010) at 9.

163 Howell, *The Kinning of Foreigners: Transnational Adoption in a Global Perspective* (2006) at 124.

164 *Supra* n 42.

165 Hague Conference on Private International Law, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice, Guide No. 1* (2008).

166 *Ibid.* at 84 para 340.

167 *Ibid.* at 84-85 at para. 342

168 *Ibid.* at 85 at para 346.

169 *Ibid.* at 85 at para 345.

170 *Ibid.* at 127 at para 589.

country adoption – including in relation to their cultural identity elements – no system of identity preservation and protection exists for children born through ICS. Yet the very fact of the existence and coverage of such a system in intercountry adoption is a strong signal that a system of identity information preservation, protection and access is necessary in the context of ICS, to uphold the child's Article 8 right under the CRC.

6.3 Domestic surrogacy and lessons for the child's right to preserve identity in ICS

Golombok observes that surrogacy presents some additional and sometimes different challenges to adoption or donor-conception; for example, 'it is not known how children will feel when they discover that their gestational mother, who may also be their genetic mother, had conceived them with the specific intention of relinquishing them to the commissioning parents.'¹⁷¹ However, unlike with adoption and donor-conception, little research exists regarding child identity in surrogacy. One longitudinal study has been conducted including the perspective of children born through domestic surrogacy.¹⁷² It presents limited findings regarding child identity; the authors acknowledge further research is needed before firm conclusions can be drawn, noting 'It is essential to explore how these children feel as they enter adolescence when issues relating to identity become of prime concern.'¹⁷³ However, the most recent findings from this study focus on the child's understanding of their surrogacy, parental disclosure decisions, and relationships between the surrogate mother, the child and their commissioning parents. Regarding disclosure, at age 10, 30 of 33 children had been informed of their birth circumstances; the parents of three children were still planning to disclose this.¹⁷⁴ All 19 children who were genetically related to their surrogate mother had been informed about their surrogacy and 11 of them had been informed their surrogate mother is their genetic mother.¹⁷⁵ Commissioning parents of six children still planned to disclose this fact to the child;¹⁷⁶ two children's

171 Golombok, 'Families created by reproductive donation' (2013) 7 *Child Development Perspectives* 61-65 at 62.

172 Jadva et al, 'Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins' (2012) 27 *Human Reproduction* 3008-3014.

173 *Ibid.* at 3013.

174 *Ibid.* at 3011.

175 *Ibid.*

176 *Ibid.* However, at 3013 the study's authors note that 'it remains to be seen whether parent's intention to tell their child will translate to actual disclosure in the future. By withholding this information, parents are creating a potentially difficult situation whereby they feel they have disclosed the nature of the child's birth but the child does not know the full story.'

parents' decided not to disclose this to them.¹⁷⁷ The study's authors state 'the fact that most parents who used a genetic surrogate mother had not yet disclosed the use of the surrogate mother's egg is notable, as children who later find out may wonder why this information was deliberately withheld from them.'¹⁷⁸

By the age of seven, the study found most children who know about their birth through surrogacy are able to show some understanding of this, and by age 10, 67 percent of the participant children felt neutral or indifferent about their birth through surrogacy.¹⁷⁹ This contrasts with seven year old donor-conceived children, who have been shown to have little understanding of their birth circumstances.¹⁸⁰ Considering the issue of contact with the surrogate mother, despite many families maintaining contact, it decreases over time;¹⁸¹ this is especially the case where the surrogate is the child's genetic mother but was unknown to the family prior to the surrogacy.¹⁸² However, children 'spoke of the surrogate's altruistic motivations for helping parents, which raises questions about how children will feel in situations where their surrogate mothers was (sic) reimbursed financially.'¹⁸³ One other study involving children born through domestic surrogacy is worth briefly mentioning in this connection.¹⁸⁴ It found at age seven, surrogate children experienced higher levels of adjustment problems than children conceived by gamete donation, 'suggesting that the absence of a gestational connection between parents and their child may be more problematic for children than the absence of a genetic relationship.'¹⁸⁵ In ICS too, for some children the absence of both a genetic and gestational connection, together with the overlay of the potential transnational disconnection imposed on the child, has potential to cause similar challenges to the child's Article 8 right.

177 Ibid. at 3011. One of the commissioning mothers said this information was irrelevant, and the other said the child would only be told in the future if they asked themselves.

178 Ibid. at 3013.

179 Ibid. at 3012.

180 Blake et al, 'Daddy ran out of tadpoles: how parents tell their children that they are donor conceived, and what their 7-year olds understand' (2010) 25 *Human Reproduction* 2527-2534.

181 Jadva et al supra n 172 at 3012.

182 Ibid.

183 Ibid. at 3013.

184 Golombok et al, 'Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (2013) 54 *Journal of Child Psychology and Psychiatry* 653-660. The study focuses on parenting and children's adjustment, examining 30 surrogacy families, as well as 31 egg donation families, 35 donor insemination families, and 53 families with naturally conceived children.

185 Ibid. at 653.

The key lessons highlighted in this section regarding identity preservation in donor-conception, adoption and domestic surrogacy signal that a cautionary approach is necessary in ICS to enable children to exercise their Article 8 right. The experiences of these three methods of alternative family formation emphasise the importance of children being able to preserve their identity, and show that the genetic and biological, personal narrative and cultural elements of identity are particularly important for children in these situations. Some direct parallels can be drawn with the child's identity preservation situation in ICS arrangements, given that ICS brings together these challenges to the child's identity right under Article 8 of the CRC, placing it in peril.

7 PROPOSING PRACTICAL MEASURES OF IMPLEMENTATION OF ARTICLE 8 FOR CHILDREN IN INTERNATIONAL COMMERCIAL SURROGACY

Article 8(1) CRC refers to 'the right of the child to preserve his or her identity', but because the child lacks agency to preserve their own identity during infancy (at least), and given that in ICS it is during the child's infancy that crucial steps to preserve the child's identity must be taken, the child is essentially reliant on others to safeguard and give effect to their Article 8 right. Indeed, children cannot remember elements of their identity at this time of their lives. For these reasons, this section focuses on actions for implementing Article 8 in ICS to be taken by persons other than the child themselves. These are framed drawing on the preceding discussion in section 6 regarding lessons from donor-conception, adoption and domestic surrogacy, and applying this to the specific context and challenges regarding the child's right to preserve their identity raised by ICS. The ideas outlined below centre around three actors: commissioning parents, medical professionals and the state.

Whilst these measures focus on enabling children to preserve their identities to the fullest extent possible in ICS, it is acknowledged that because of the nature of their conception and birth and the ways in which ICS is currently sometimes practised (involving anonymity), preserving some elements of identity will remain beyond the reach of some children in ICS, breaching their Article 8 right. However, through the commentary below, an ideal state is indicated regarding protection of the child's Article 8 right in ICS, thereby outlining what could constitute best practice.

7.1 Commissioning parents and medical professionals: a first line of defence in preserving child identity in International Commercial Surrogacy

A crucial first step in ensuring the child's Article 8 right is protected is educating commissioning parents and medical professionals about this aspect of the child's rights in ICS, and the role they can play in ensuring the child's Article

8 right is upheld. In ICS, commissioning parents and medical professionals are ideally placed to take actions contributing towards the child's ability to preserve their identity. In doing so, both parties can ensure actions and decisions relating to the child are consistent with the child's best interests.

Prior to a child's conception in ICS and prior to and following their birth, commissioning parents can advocate and take actions for the preservation of all elements of the child's identity. In doing so, commissioning parents will act in line with their responsibility under Article 18(1) to treat the best interests of the child as their basic concern.¹⁸⁶ If commissioning parents are educated about the child's Article 8 right, understand the importance of identity preservation for the child and the role they can play to enable this, they are powerfully positioned to ensure their ICS arrangement will uphold rather than risk breaching the child's Article 8 right. In practice, this ideally means:

- commissioning parents only enter into ICS arrangements enabling preservation of all elements of the child's identity, namely ICS arrangements involving the use of identifiable gamete donors, an identifiable surrogate mother, and medical professionals/surrogacy clinics with systems established and functioning to collect, store and protect information regarding elements of the child's identity, consistent with the child's Article 8 right; and
- commissioning parents advocate for all elements of the child's identity to be preserved through the collection, storage and protection of all identity-related information pertaining to the child, and wherever possible take steps to do this themselves.

Once a child is born through ICS, commissioning parents have an extremely influential role to play in preserving the child's identity in an on-going manner, in accordance with the child's evolving capacities.¹⁸⁷ As Lansdown states, "The concept of evolving capacities is central to the balance embodied in the Convention between recognising children as active agents in their own lives, entitled to be listened to, respected and granted increasing autonomy in the exercise of rights, while also being entitled to protection in accordance with their relative immaturity and youth."¹⁸⁸ Therefore, at times appropriate in line with the child's evolving capacities, commissioning parents can support

186 Article 18(1) CRC: "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

187 Article 5 CRC: "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

188 Lansdown, *The Evolving Capacities of the Child*, 2005, at 3.

the child in developing, understanding and thereby preserving their own identity. This can be done by sharing identity information with them or supporting the child to access this information. This may be a gradual process; for example, non-identifying information may in the first instance be the most important to protect for the child, if it relates to their health status in relation to their genetic parents. However, sharing identity information with the child should include informing the child about the nature of their conception and birth through ICS at a time when the child has the capacity to begin to understand this information, and supporting the child to understand this aspect of their identity. As Lansdown observes, direction and guidance provided to the child by their parents 'must be directed towards promoting respect for the rights of the child, and parents must respect the extent to which the child is capable of exercising those rights on his or her own behalf.'¹⁸⁹

Similar to commissioning parents, in ICS arrangements medical professionals occupy a powerful position regarding the child's right to identity preservation. Medical professionals should contribute their services and expertise to ICS arrangements in ways enabling, not precluding, the child's Article 8 right to be upheld. In ICS arrangements, aside from surrogacy brokers and agencies, medical professionals are likely to be the first point of potential collection of identity-related information about third parties relating to the child. How medical professionals involved in ICS collect, protect and store such information has long-term implications for the preservation of the child's identity and therefore their best interests.

To ensure all elements of the child's identity are preserved, medical professionals should only facilitate ICS arrangements involving the use of gametes and embryos from identifiable (that is, non-anonymous) donors who are willing to have contact with the child in future and identifiable surrogate mothers (acting non-anonymously and willing to be contacted by the child). This will mean the child's genetic identity and biological identity elements are preserved. Medical professionals should take the further steps of collecting, storing and facilitating the child's access¹⁹⁰ to the following information to enable the child to preserve their identity:

- Regarding the child's genetic parents (gamete donors/embryo donors):
 - Full name
 - Date of birth
 - Ethnicity and language spoken
 - Current physical address, phone number, email address where available
 - Significant health history (pertaining directly to the third party in question and their family history)
 - The age and sex of any pre-existing genetic children

¹⁸⁹ Ibid. at 6.

¹⁹⁰ Access to such information would only be available for the child, on a confidential basis.

- Regarding the child's birth mother:
 - Full name
 - Date of birth
 - Ethnicity and language spoken
 - Current physical address, phone number, email address where available
 - Significant health history relating to term of pregnancy and child-birth, insofar as it could impact the child's health, as well as any significant health history of pre-existing serious disease or medical condition

Whilst gamete and embryo donors and women acting as surrogate mothers have a right to privacy,¹⁹¹ in order for the child's right to preserve their identity to be upheld consistent with their best interests, ideally ICS arrangements should only take place on the basis that all donors and surrogates are involved having agreed to provide the above mentioned information to the medical professional/surrogacy clinic as well as directly to the commissioning parents, and to keep this update in future so it remains accurate for the child. The balance of competing rights in this respect will, consistent with protecting the child's rights, largely tip in favour of protecting the child's identity right over the privacy rights of adult parties involved in ICS.

Medical professionals should also collect, store and facilitate the child's access to all identity information available which is directly about the child themselves. A formal record should be created and made available to the child reflecting the particulars of their circumstances of birth, such as the place, time, date and the full names of every person present at their birth; the details of the child's genetic make-up and the medical procedures undertaken to conceive the child (for example, IVF, embryo implantation); and the particulars or a description of the child's health status at birth. This may be more comprehensive information than what a child born in non-ICS circumstances may have collected and protected on their behalf. However, the preservation of this kind of information about children born through ICS may be particularly important in helping preserve their identity, as they may face challenges in preserving their identity given their circumstances of conception and birth through ICS.

Medical professionals/surrogacy clinics should compile all the above information pertaining to the child's identity in an identity dossier for them, providing a copy to the child's commissioning parents as soon as practicable following the child's birth. A full copy of this identity dossier should be stored in perpetuity (or until such time that it is accessed by the child) at the surrogacy clinic/by the medical professional overseeing the ICS arrangement, in order to allow the child the opportunity to be able to access this information in future in order to preserve their identity in instances where this information is not made available to them by their commissioning parents. The medical

191 Article 17, International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

professional/surrogacy clinic should facilitate the child's access to this information.

By undertaking the actions outlined above, commissioning parents and medical professionals involved in ICS can significantly contribute to helping the child preserve their identity. Acting as a first line of defence, the actions they take could be the difference between elements of the child's identity being preserved or not, with implications for the child's best interests and lifelong impact. However, whilst commissioning parents and medical professionals can take steps to enable the preservation of a child's identity in ICS consistent with their Article 8 right, such actions will be difficult to universally implement. What has been discussed above is a best practice blueprint. For example, without an international regulatory system covering surrogacy clinics and medical professionals (including monitoring and enforcement measures), it is unlikely that protective measures of the nature outlined above will be taken in the ICS industry. This is given the unfortunate reality that the incentive of protecting the child's rights pales against the financial gains to be made through the ICS industry. Therefore, as long as the absence of international agreement and regulation of ICS persists, an important role remains for the state, in order to protect the Article 8 right of children conceived and born through ICS.

7.2 The state's role in protecting the child's right to preserve their identity in International Commercial Surrogacy

It is clear that under Article 8(1) CRC, the state is obliged to respect the child's right to preserve their identity. Furthermore, under Article 8(2), the state is obliged to provide children with appropriate assistance and protection to assist them in re-establishing their identity speedily in situations where they are illegally deprived of some or all the elements of their identity. Although an argument can be made that a child conceived and born through ICS who is unable to exercise their right to preserve their identity is subject to an illegal deprivation of some or all elements of their identity, it is a longbow to draw. However, the state does have a significant role to play in ICS situations to ensure that all elements of the child's identity are preserved. After all, 'The State is empowered to intervene to protect the rights of the child, in recognition that the best interests of children are not always identical with those of parents, and will not always be protected by parents.'¹⁹² It is wholly appropriate to interpret Article 8 in a dynamic manner taking into consideration the current-day context of ICS; in this respect, considering Article 8(2), it is not difficult envisage the possibility of persons currently being conceived and born through ICS mounting a legal challenge in 20 years' time against the states involved,

192 *Supra* n 188.

on the basis that they were unable to preserve their identity and deprived of some or all the elements of their identity. Such a challenge may have merit in ICS situations where the state omits to take actions to assist and protect the child's re-establishment of their identity.¹⁹³

To have the best possible chance of enabling the full preservation of the identity of all children born through ICS, building on the best practice blueprint discussed above regarding commissioning parents and medical professionals/clinics, ideally this would also involve individual state action outlawing the conception of children in ICS through the use of gametes or embryos from anonymous donors, as well as outlawing ICS arrangements involving anonymous surrogate mothers. If such laws are implemented and enforced through active monitoring of the ICS industry at the domestic and international levels, they will help ensure ICS occurs on the basis that children will, at a minimum, have the ability to know the identity of their genetic parents and the person who biologically brought them to term. However, realistically it must be acknowledged that this currently remains an unlikely prospect. Given the continued demand for ICS and the economic benefits to supply states, some states will continue to allow the practice of ICS to continue in their territory involving both the use of anonymous gametes and embryos and anonymous surrogate mothers. Therefore given the persisting status quo in the practice of ICS, ensuring the preservation of other aspects of the child's identity becomes even more important; the role to be played by the state in upholding the child's Article 8 right through the actions suggested below is essential.

7.2.1 *Facilitating an identity dossier for every child born through International Commercial Surrogacy as an interim measure of protection*

Continuing to build on the suggested blueprint actions for medical professionals/surrogacy clinics in ICS as discussed above, the state can play a role related to the creation, storage and access to an identity dossier for every child born through ICS. Supply-states should work with medical professionals and surrogacy clinics to ensure that an identity dossier including the identity related information discussed in the previous section above is compiled in relation to and for the child. The state's primary role here is to monitor and enforce implementation of these requirements; as discussed above, the obligation on medical professionals and surrogacy clinics involved in ICS situations to compile, store and protect this information should be established in legislation and policy at the state level in supply-states.

193 Whilst not writing on ICS, Doek, supra n 15 at 13 observes that 'para 2 of Article 8 of the CRC has not been written with artificial procreation in mind. But the obligation to respect the right of the child to preserve his or her identity, requires the State Party to undertake all legislative, administrative or other measures (Article 4 of the CRC) to implement that right, interpreting it in a dynamic manner and with the present day conditions in mind.'

In ICS arrangements where anonymity is involved, supply-states should ensure that a base level of non-identifying information should be made available and collected by medical professionals and surrogacy clinics as a mandatory minimum requirement of donors' and surrogates' involvement in and the practice of ICS. Where ICS arrangements take place involving gamete or embryo donors or surrogate mothers acting anonymously, and in the absence of an overarching state policy and legislation prohibiting such practice, supply-states should at the minimum require that an identity dossier is compiled, stored and protected for all children born through ICS, including all available non-identifying information regarding gamete/embryo donors and surrogate mothers, as well as any other information of the kind outlined in the list above. The protection of such information will be important in preserving elements of the child's identity which may still be able to be preserved without identifying information about the donors and/or surrogate involved. Moreover, birth certificates should be issued for all children born through ICS by their birth-state, including accurate and complete information as far as possible regarding the child's parentage and circumstances of birth. In order to provide the child with as accurate as possible record of their birth, states should explore whether they might include a note on the birth certificates of children born through ICS arrangements which reflects this fact. In situations where one or both parents are unknown, such an annotation may be of particular importance given there will always be persistent gaps in the child's personal narrative. However, this action could in practice lead to discrimination, on the basis of birth status and through implications arising from the disclosure of such birth certificates to third parties. In light of these risks, such an action requires further consideration in future. On the other hand, it does remain a possibility that an annotation on the child's birth certificate that they were born as a result of ICS could have a protective effect for the child of enabling them to preserve one aspect of this element of their identity.

Regardless of whether ICS operates on the basis of anonymity or not, at the same time as it is given to the child's commissioning parents, supply-states should require that a copy of a child's identity dossier is provided by the medical professionals/surrogacy clinics to the state itself in order for it to be stored in a state-level, centralised repository system, especially designed for storing and protecting these dossiers for the future access of children conceived and born through ICS in that state. A system of monitoring and enforcement would need to be established to support this mechanism to work, which would require long-term commitment from states and clear and transparent guidance in legislation and/or policy. Storing identity dossier at state-level will also act as a backstop in the event of closure of surrogacy clinics, ensuring the continuity and availability of this information to children who seek it. The state should ensure information about the existence of such a system is available to donors and surrogates and encourage them to update their contact

information so children can identify and know them in the future should they wish to.

7.2.2 *Facilitating a long-term, inter-state system of protection of identity information in the context of ICS*

Beyond the interim measure of state protection for child identity preservation through the steps suggested above, ideally a hybrid public international human rights law and private international law inter-state cooperation system of identity protection should be established in future, giving all children conceived and born through ICS the best possible chance of preserving their identity. Under such a future system, at the same time as the supply-state stores a copy of an identity dossier of a child born in that state, the supply-state should transmit a copy of the identity dossier to a formally designated state-level agency in the demand-state (the home state of the child's commissioning parents). The demand-state should receive, store and protect these identity dossier at the state-level and establish a system facilitating access to the identity dossier by the children they pertain to.

Such a system of identity information storage, protection and facilitated access is similar to systems established by many states over recent years regarding identity information of children conceived through domestic donor ART.¹⁹⁴ However, under the ideal system of identity information protection and facilitation suggested for future use in ICS, state responsibility for upholding the child's Article 8 right would rest on both the supply and demand states in individual ICS arrangements. In the first instance, this responsibility rests with the supply-state, which has the obligation to ensure that the identity information relating to the child is preserved through collection and creating a record of that information (the child's identity dossier) and storing it. To fully exercise its responsibility, it is envisaged that the supply-state must then ensure that this record is properly transmitted to the demand-state. It is at this point that responsibility also rests with the demand-state to store that information and to facilitate the child's access to it. Such information should ideally be stored by both states in perpetuity, given the variable nature of when and where a child may seek to find and access such information.

In order to ensure that such an inter-state system of identity protection for children in ICS is adequately established and regulated in both states, an international agreement would need to be concluded, setting out exact requirements and parameters of the system.¹⁹⁵ This should make provision for the

194 E.g. Some states in Australia, New Zealand, the United Kingdom, the Netherlands, Norway, Switzerland, Sweden.

195 Currently, the forum through which the only such work in this regard is taking place is the Hague Conference on Private International Law and the prospect of an international agreement remains very much in its infancy. However, the Permanent Bureau of the Hague

balancing of privacy rights of genetic and biological parents in ICS (that is, genetic donor parents and surrogate mothers) with the child's Article 8 right and best interests, and should be framed with reference to the concept of the evolving capacities of the child. Both demand and supply states that ratify such an international agreement should further enact domestic legislation reflecting their obligations pursuant to the international agreement, the rules under which information can be accessed within its jurisdiction and the limitations on sharing or amending the information contained in ICS identity dossier.

As with the experience of adoption and domestic donor-conception, such a system will only work in practice for children born through ICS if they know about their conception and birth through ICS. Otherwise, such a system of identity information protection and access will have little practical meaning for the children it aims to protect. In this connection it is important to once again acknowledge the powerful position occupied by commissioning parents in ICS arrangements; a choice by commissioning parents to share or not share identity related information with the child as their capacities evolve will likely have lifetime implications for the child's preservation of their identity.

8 CONCLUSION: ANSWERING THE "WHO AM I?" QUESTION IN INTERNATIONAL COMMERCIAL SURROGACY SITUATIONS

As discussed in this paper, the child's right to preserve their identity under Article 8 of the CRC is a right of central and heightened importance to all children conceived and born through ICS. Identity is a concept built from a range of elements, some evolving over time. The child's right to identity preservation is one of the child's rights most at-risk in the context of ICS, as illustrated through this paper by honing in on particularly at-risk elements of the child's identity: genetic and biological, personal narrative and cultural. Despite this, it is a right which has significant, lifetime implications for children and their understanding of their place in the world and how they make sense of who they are. For these reasons, we should understand the child's Article 8 right as being at the heart of the child's best interests when conceived and born through ICS. Although the practice of ICS was not foreseen by the CRC framers, the possibility of ICS being dealt with under the CRC was left open; we must interpret the CRC as living document, applying its safeguards to the

Conference has undertaken comprehensive work providing a platform for Hague Conference Member States to begin discussing the feasibility and viability of further work towards a possible international convention regarding international surrogacy. See Hague Conference, 'The private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements' available at: www.hcch.net/index_en.php?act=text.display&tid=178 [last accessed 01 June 2015].

child in the context of the contemporary practice of family formation through ICS.

Such an interpretative approach ensures we view the child's identity preservation rights holistically, with identity comprised of multifaceted elements spanning, for example, the genetic, biological, cultural, ethnic and social. Importantly, Article 8 of the CRC is about the preservation of identity; it seeks to ensure that pathways are open for the child to form their whole identity, through preserving all elements of their identity. Indeed, this approach is child rights-consistent, as has been signalled by the Committee on the Rights of the Child in its limited comments regarding ICS to date. In ICS, the experience of each child regarding identity preservation will be different and highly personal. To address the challenges of ensuring protection for the child's identity preservation right in ICS, there is a long-term need for a system of international regulation; this is a necessary goal given the challenges to the child's Article 8 right in ICS are international in nature, often with three or more states involved in ICS arrangements, requiring an ultimately international solution.

However, drawing on lessons from adoption, donor-conception and domestic surrogacy, it is clear that certain actions can be taken now, despite the current lack of a system of international regulation, through a range of actors in ICS taking steps contributing towards upholding the child's Article 8 right. Such actions can help to ensure that as many pathways as possible to the child's full preservation of identity remain open through the collection, storage of and access to identity related information. This will ensure such children are able to preserve their identity as far as possible at any time following their birth, should they wish to. A particular focus should rest on actions directed towards ensuring that children can know about and understand the reality of their childhood and how they came into existence, as elements of identity are established and forged during this time which can impact and influence the child's future. Such an approach seeks to protect the child's best interests; after all, children born through ICS have, as one judge observes, 'done nothing wrong'.¹⁹⁶ They did not choose the means of their conception and birth. Yet the reality remains that children conceived and born through ICS are intentionally conceived and born this way. The corollary of this intentional adult action should be that intentional, comprehensive steps are taken by those directly involved in ICS arrangements consistent with the best interests of the child and the evolving capacities of the child, as well as CRC States Parties, to uphold the child's Article 8 right in all ICS arrangements.

Already, children have been born through ICS who will never be able to preserve the genetic element of their identity; time will reveal the impact of this reality on these children, unable to know their family relations pertaining to their genetic parents and half-siblings. Now however, at the very least, we

196 *Ellison*, supra n 122 at para 92.

should be taking steps along the lines suggested in this paper to ensure that all future children born through ICS have their right to preserve their identity respected and given effect to in practice. Taking actions and decisions consistent with Article 8 of the CRC will give children born through ICS the opportunity to live lives built on an informed understanding of how they came to be, who they are, and how this has and may continue to shape their place in the world. Not taking such steps will lead to a globally-dispersed generation of children born through ICS who may find themselves asking “Who am I?” for the rest of their lives.