

CHAPTER 6: Child's right to identity in surrogacy

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Abstract

This Chapter explains the different issues linked to the child's right to identity in surrogacy arrangements by examining multiple country contexts. Knowing who you are and where you come are fundamental existential considerations rooted in one's identity. Lack of, or loss of, one's identity can severely impact one's sense of self-knowledge, well-being and belonging. In surrogacy matters in particular, given the multiple contributors to the child's identity, it is of utmost importance that all elements are preserved pre- and post-birth. At the outset, it should be noted, that the right to identity is independent of the circumstances relating to the child's birth and to any subsequent discriminatory practices. All issues related to identity that may arise in the short or longer term should likewise be part of the best interest assessment and determination in any surrogacy matters. Given the importance of identity issues, that may be of legal, medical and/or psychosocial nature, which have a life-long impact, it is equally necessary to include its consideration as part of any pre-surrogacy arrangements. This Chapter will specifically focus on birth registration, name and family relations as constitutive elements of the child's identity, while nationality will be addressed in a separate Chapter. Following an introduction to international and regional frameworks relevant to the child's right to identity in surrogacy, this Chapter deals with five distinct aspects: the creation, modification, falsification, preservation and restoration of the child's identity. These five sections represent key phases for protecting the right to identity and/or addressing the risk of its not being adequately accounted for.

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Knowing who you are and where you come are fundamental existential considerations rooted in one's identity. Lack of, or loss of, one's identity can severely impact one's sense of self-knowledge, well-being and belonging. In surrogacy matters in particular, given the multiple contributors to the child's identity, it is of utmost importance that all elements are preserved pre- and post-birth.

International standards are clear that States have an obligation to record every child's identity, notably in terms of birth registration, nationality, name and family relations, and to speedily re-establish that identity when elements are missing or have been unlawfully modified (Articles 7- 8 UN Convention on the Rights of the Child (CRC)). Not only is the child's right to identity a stand-alone right, it is closely linked with the realisation of other rights such as the child's development (Article 6 CRC), keeping families together (Article 9 CRC), facilitating contact with families across countries (Article 10 CRC) and continuity in a child's ethnic, religious, cultural and linguistic background (Article 20 CRC).

To comply with these standards, all identity information must be preserved in a truthful and transparent manner, including in surrogacy arrangements. The UN Special Rapporteur on Sale and Sexual Exploitation of Children (UN SR on sale) provides a summary of the issues related to identity that are at risk in surrogacy in her thematic report to the UNGA in 2019.¹

32. Although surrogacy changes the constitutive elements of identity, by breaking the link between genetic, gestational and social parenthood, the fundamental rights of the child remain the same. From the child's perspective, genetics, gestation and the exercise of parental responsibility are all a part of the constitutive elements of identity. ...

At the outset, it should be noted, that the right to identity is independent of the circumstances relating to the child's birth and to any subsequent discriminatory practices (Chapter XXX). All issues related to identity that may arise in the short or longer term should likewise be part of the best interest assessment and determination in any surrogacy matters (see Chapter XXX). Given the importance of identity issues, that may be of legal, medical and/or psychosocial nature, which have a life-long impact it is equally necessary to include its consideration as part of any pre-surrogacy arrangements (Chapter XXX).

This Chapter will specifically focus on birth registration, name and family relations as constitutive elements of the child's identity, while nationality will be addressed in Chapter XXX. Following an introduction to international and regional frameworks relevant to the child's right to identity in surrogacy, this Chapter deals with five distinct aspects: the creation, modification, falsification, preservation and restoration of the child's identity.² These five sections represent key phases for protecting the right to identity and/or addressing the risk of its not being adequately accounted for.

Frameworks relevant to the child's right to identity in surrogacy

International framework

Although surrogacy is a relatively recent explicit concern at global level, there exists a range of both hard and soft international law sources relevant to the child's identity right in surrogacy. Article 24 of the [International Covenant on Civil and Political Rights 1976](#) (ICCPR) sets out the right of the child to be registered at birth, and to have a name and nationality. These three elements are mentioned along with family relations in articles 7-8 of the [Convention on the Rights of the Child 1989](#) (CRC) to indicate the scope of "identity".

The inclusion of "family relations" in Article 8 of the CRC was prompted by Argentina's experience under the dictatorship of the 1970s and early 1980s, when children were illegally removed from families linked to the

¹ UN Human Rights Council, *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography – Note by the Secretariat A/HRC/34/55* (2016) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/440/24/PDF/G1644024.pdf?OpenElement>

² Christina Baglietto, Laurence Bordier, Mia Dambach, and Cécile Jeannin, *Preserving "family relations": an essential feature of the child's right to identity* (Child Identity Protection 2022)

opposition and stripped of their identity.³ Noting the advocacy efforts in this context, particularly by the children’s grandmothers, the term “family relations” arguably goes beyond nuclear ties.⁴ The UN Committee on the Rights of the Child (CRC Committee) defines the family as “a variety of arrangements that can provide for young children’s care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community based arrangements, provided these are consistent with children’s rights and best interests.”⁵

In surrogacy arrangements, the potential iterations of what can be included as family relations is broad – when one considers genetic, gestational, social and legal origins. As parentage and/or parental responsibility may change in surrogacy arrangements and given that there are multiple people who can stake a claim to being a “parent”, it is essential to consider Article 20(c) which notes that, whenever a family environment is changed, “*due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.*” Attention to these factors is necessary to fully capture the child’s right to identity. It implies keeping a record about the establishment of the surrogacy arrangement, including details of the surrogate mother.

To this end, the CRC Committee has issued a number of recommendations linked to the issue of assisted reproductive technology (ART) including surrogacy, specifically on preserving the child’s identity as mentioned throughout this Chapter. The UN SR on sale recommends that States protect rights to identity and access to origins, in her 2018 report on surrogacy to the Human Rights Council.⁶ She further draws attention to access to origins in her 2019 UNGA report, calling upon States to:⁷

(...) (d) Preserve, in all cases, all pertinent information, and establish and maintain registers and national records containing information about the genetic and gestational origins of surrogate-born children, through which children can seek to access (...) there should be comprehensive safeguards to ensure that records of the surrogate arrangement are kept in order to enable the surrogate-born children to have access to information about their origins;

(e) Ensure the right of surrogate-born children to access information about their identity and origin, including their cultural, ethnic, religious and linguistic background, in line with their evolving capacity and in accordance with the legal regulations of the given country.

The Hague Conference on Private International Law (HCCH) is working on the issue of identity in surrogacy matters, addressing legal parentage in cross-border contexts, as discussed in Chapter XXX.

In parallel, Principles for the protection of the rights of the child born through surrogacy, referred to as the Verona Principles, were launched in 2021 by International Social Service where, for example, principle 11 is dedicated to the protection of identity and access to origins, emphasising the holistic nature of the child's identity and the importance of its full preservation.⁸

In 2022, UNICEF and Child Identity Protection published a briefing note on key considerations for children’s rights and surrogacy.⁹ The note recommends among other things that “civil registration and vital statistic

³ Ibid; Office of the United Nations, High Commissioner for Human Rights. (2007). *Legislative history of the Convention on the Rights of the Child* (United Nations 2007). Vol. 1, p. 435 https://resourcecentre.savethechildren.net/sites/default/files/documents/legislativehistorycrc1en_1.pdf Rachel Hodgkin and Peter Newell, *Implementation handbook for the Convention on the Rights of the Child* (., p. 114). (3rd ed, UNICEF 2007) 114 Accessed [https://www.unicef.org/Implementation Handbook for the Convention on the Rights of the Child.pdf](https://www.unicef.org/Implementation%20Handbook%20for%20the%20Convention%20on%20the%20Rights%20of%20the%20Child.pdf).

⁴ Hodgkin and Newell, *Ibid*

⁵ CRC/C/GC/7/Rev.1 2005, para 15.

⁶ Human Rights Council, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material A/HRC/37/60* (United Nations 2018). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement>

⁷ UN Human Rights Council (n1)

⁸ International Social Service, *Surrogacy* (International Social Service 2021) Accessed <https://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy>.

⁹ UNICEF and Child Identity Protection, *Key Considerations: Children’s Rights & Surrogacy Briefing Note* (UNICEF and CHIP 2022) Accessed <https://www.unicef.org/media/115331/file>

(CRVS) systems include and preserve identity information relating to each child born through surrogacy. (...) Specifically, the identity of surrogate mothers and donor(s) should be known.”

Other international initiatives that are relevant but have not yet explicitly addressed the issue of surrogacy include the work of the [UN Legal Identity Agenda](#) (UNLIA), which promotes an all-inclusive approach to vital registration, vital statistics and identity management with the achievement of Sustainable Development Goal 16.9.¹⁰ In cases where a State refuses to register a child born through surrogacy on their territory and/or connected to one of its nationals, the legal identity of the child is at risk.

Regional frameworks

While the previous section focuses on legal instruments and guidance at an international level, this section focuses on regional trends by way of jurisprudence and other initiatives. This is because there has been little movement related to standard-setting at regional level, aside from the ongoing discussions on reforming the 1975 the European Convention on the Legal Status of Children born out of Wedlock and the European Commission’s 2021-2022 study aimed at supporting the preparation of an impact assessment on a possible Union legislative initiative on the recognition of parenthood between Member States.

It appears that only the European Court of Human Rights (ECtHR) has explicitly dealt with the issue of surrogacy, including the child’s right to identity. The court has primarily dealt with the recognition of foreign birth certificates and/or legal parentage in countries prohibiting such arrangements.¹¹ These cases have been brought due to alleged interference in the right to respect for private and family life under Art. 8 of the European Convention on Human Rights as discussed. The Court has yet to consider the establishment (i.e. creation of identity) or recognition of legal parentage for a surrogate mother who is married and/or who seeks legal parentage and/or uses her own egg.

The African Committee, ASEAN Commission on the promotion and protection of the rights of women and children (ASEAN Commission) and the Inter-American Court of Human Rights do not appear to have directly addressed the issue of surrogacy. The closest case law that has been considered by the latter was *Atarvia Murillo v Costa Rica*, which dealt with the State’s arbitrary interference in private life, the right to start a family, and the right to equality by prohibiting access to in vitro fertilisation. Nevertheless there are initiatives that could arguably be relevant such as [General Comment on Article 6 of The African Charter On The Rights And Welfare Of The Child: "Right To Birth Registration, Name And Nationality"](#).¹² Members of the ASEAN Commission have discussed the issue of surrogacy and participated in a regional consultation for the drafting of the Verona Principles. The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have specifically explored the child’s right to identity in family relations in the context of intercountry adoptions.¹³

1. Creation of the child’s identity in surrogacy arrangements

In light of international and regional frameworks, the first opportunity to protect the child’s right to identity in surrogacy occurs at the time the surrogacy arrangement is entered into. This moment provides an occasion to start collecting elements that will eventually feed into the creation of the child’s identity, which officially starts with the granting of legal identity to the child through birth registration and certification. While legal identity requires at a minimum the name, sex, and place and date of birth of the child,¹⁴ it is argued that a

¹⁰ United Nations Sustainable Development Goals, *Goal 16: Peace, justice and strong institutions*. (United Nations nd) Accessed <https://www.un.org/sustainabledevelopment/peace-justice/>

¹¹ European Court of Human Rights Press Unit, *Gestational Surrogacy* (European Court of Human Rights Press Unit 2022) Accessed https://www.echr.coe.int/Documents/FS_Surrogacy_ENG.pdf

¹² For example paragraph 7 in African Committee of Experts on the Rights and Welfare of the Child, *General Comment On Article 6 Of The African Charter On The Rights And Welfare Of The Child: "Right To Birth Registration, Name And Nationality"* (ACERWC 2014) Accessed https://www.acerwc.africa/wp-content/uploads/2018/04/General-Comment_Art6_ACRWC_English.pdf

¹³ For example, *Ramírez Escobar v. Guatemala* [2018] Inter-American Court Of Human Rights, Accessed https://www.corteidh.or.cr/docs/casos/articulos/seriec_351_esp.pdf

¹⁴ Economic and Social Council, *Introduction of the United Nations Legal Identity Agenda: a holistic approach to civil registration, vital statistics and*

broader definition of identity includes the element of family relations to be compliant with international standards (Art. 8 CRC). As such, the recording of potential “family relations” that can arise from surrogacy practices should be collected at the soonest possible opportunity, including all relevant biological, gestational, legal and social information.¹⁵

In terms of fulfilling the child’s right to identity, there may be systemic challenges to birth registration that are not unique to surrogacy. These include discrimination, poverty, costs, weak CRVS systems that are not set up to record all family information, and where systemic gaps are accentuated in emergency situations, as observed in multiple country contexts and most recently in Ukraine.¹⁶ Indeed, UNICEF has observed that more than 100 countries do not have fully functioning civil registration systems.¹⁷

Certain challenges may be specifically relevant to surrogacy, particularly in international arrangements. For example, gender discrimination can lead to lack of birth registration and statelessness,¹⁸ marriage certificates may be a pre-requisite to birth recognition (e.g. Indonesia), and the child of an unknown father cannot be recorded (e.g. Bhutan).¹⁹ Similarly, it seems that with the banning of surrogacy in Cambodia in 2016, some children were not provided birth certificates due to the status of the surrogate mothers.²⁰ Other discrimination-related issues are discussed in Chapter XX and should be ruled out prior to any surrogacy arrangement being entered into.

In terms of the biological origins of the child, this includes any provider of human reproductive material including the intending parent(s), surrogate mother when she is an egg donor and/or third party. Gestational origins encompass all parties involved in the conception of the child, whether there is a genetic link or not. The UN SR on sale points out that “*from the point of view of the child, genetics, gestation and the exercise of parental authority are all constituent elements of identity*”.²¹

In practice, it seems that the child’s right to identity in surrogacy is often compromised primarily because of the lack of information preserved and/or the express exclusion from birth records of key persons contributing to the child’s identity. This may equally lead to the exclusion of potential family relations, such as siblings and grandparents. The UN SR on sale has noted that “*a blanket enforcement of anonymity for gamete donors, and/or the surrogate, including by only recording the intending parents on the birth certificate, will prevent the child born from a surrogacy arrangement from having access to his or her origins.*”²²

Identity of surrogate mother and/or intending parent(s) which contributes to the child’s identity in countries that allow surrogacy

Principle 11.3 of the Verona Principles notes that “surrogacy arrangements should only involve surrogate mothers who provide verified and accurate identifying information about themselves, and who agree that their identifying information may be transmitted to persons to whom they gave birth.” Such conditions are essential for ensuring comprehensive information is available about biological and gestational origins.

identity management E/CN.3/2020/15 (United Nations 2019) Accessed <https://unstats.un.org/unsd/statcom/51st-session/documents/2020-15-CRVS-E.pdf>

¹⁵ Verona Principles at 12.4 (n 8)

¹⁶ Baglietto, Bordier, Dambach and Jeannin (n2)

¹⁷ UNICEF, *Birth registration* (UNICEF nd) Accessed <https://www.unicef.org/protection/birth-registration>

¹⁸ UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness (UNHCR 2021) Accessed <https://www.refworld.org/docid/604257d34.html>.

¹⁹ UNICEF, *Every Child’s Birth Right: inequities and trends in birth registration* (UNICEF 2013) Accessed <https://www.unicef.org/media/73661/file/Every-Childs-Birth-Right-2013.pdf.pdf>.

²⁰ Cambodia to allow foreigners to leave with surrogate babies (Medical Xpress 2017) Accessed <https://medicalxpress.com/news/2017-04-cambodia-foreigners-surrogate-babies.html>

²¹ UNGA, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* A/74/162 (UN General Assembly 2019) Accessed https://www.un.org/en/ga/search/view_doc.asp?symbol=A/74/162.

²² Ibid

In countries such as Australia, Thailand and the UK,²³ that allow altruistic surrogacy, there is a requirement to register the details of the surrogate mother. For example, in NSW, Australia, the law requires the ART provider to record:²⁴

- (i) the [full name](#), residential address and date of birth of the woman, and
- (ii) any other information required to be [obtained](#) under [section 30](#) (3) about the woman, the woman's [spouse](#) (if any) and any [offspring](#) of the woman

Yet, in Thailand, the details of the surrogate mother must be recorded only in the hospital records and not in the birth records, perhaps due the fact the intending parent(s) are considered legal parents at birth.²⁵

In other countries that allow altruistic surrogacy, such as in Greece,²⁶ South Africa,²⁷ and Vietnam,²⁸ there seems to be no formal requirement to register the details of the surrogate mother. For instance, in Greece, only the intending mother is recorded on the birth certificate, independently of whether there is a genetic link.²⁹ In Viet Nam, it can even be argued that the law actively creates an environment where the surrogacy is veiled in secrecy, since it states that:

*3(2). Couples asking for gestational surrogacy, gestational surrogates and children born through gestational surrogacy shall have their privacy, personal secrets and family secrets kept confidential and be respected and protected by law.*³⁰

Countries that allow commercial surrogacy also display a wide array of practices. In some, general parentage rules apply, in that the person who gives birth to the child is recorded as the birth mother. For example, in the State of Tabasco in Mexico, the surrogate mother is initially recorded as the birth mother and parentage is transferred through adoption.³¹ In others, including Georgia, Ukraine, and some states in the USA, such as California³² and New York,³³ only the intending parents are recorded on the birth certificate.³⁴ In Georgia, their framework further suggests that “indicating a donor or ‘a surrogate mother’ as a child’s parent in a civil birth record shall not be permitted.”³⁵ Similarly in Ukraine, intending parents are registered as legal parents at birth (Article 123(2) Family Code), with the law going further, in prohibiting the surrogate mother from ever contesting any maternal parentage.³⁶

Article 139 (2). Contesting Maternal Affiliation which reads that “A woman who claims to be the child’s mother may bring an action against the woman registered as the child’s mother to establish

²³ Human Fertilisation and Embryology Act 2008, Art. 33 accessed <https://www.legislation.gov.uk/ukpga/2008/22/contents>

²⁴ Assisted Reproductive Technology Act 69 of 2007 NSW, Ss 30B and 30B(1) accessed https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/arta2007367/s31.html

²⁵ The Protection of Children Born from Assisted Reproductive Technologies Act, B.E. 2558 (2015), S 29

²⁶ Civil Code, Art. 1464(1). See also Haroula Constandinidou and Konstantinos Stavropoulos, Family Law in Greece: Overview (Thomas Reuters 2020) accessed <https://www.cslawfirm.gr/en/family-law-chapter-for-greece-by-haroula-constandinidou-and-konstantinos-stavropoulos-first-edition-2020-family-law-global-guide-from-practical-law-thomson-reuters-to-be-published/> and Aristides Hatzis, The Regulation of Surrogate Motherhood in Greece (SSRN 2010). Accessed https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689774

²⁷ Children's Act 38 of 2005, Chapter 19 accessed <https://justice.gov.za/legislation/acts/2005-038%20childrensact.pdf>

²⁸ Law on Family and Marriage, Arts. 94-100 and Law on Children, Art.6 (<http://ilo.org/dyn/natlex/docs/ELECTRONIC/103522/125796/F-1725767197/VNM103522%20Eng.pdf>) and Decree on giving birth through in vitro fertilization and conditions for altruistic gestational surrogacy <https://vanbanphapluat.co/decree-no-10-2015-nd-cp-on-giving-birth-through-in-vitro-fertilization> ; Yuri Hibino, *Non-commercial surrogacy among close relatives in Vietnam: policy and ethical implications* (2018) 22(4) Human fertility 273– 276. <https://doi.org/10.1080/14647273.2018.1461936> and Yuri Hibino, Implications of the legalization of non-commercial surrogacy for local kinship and motherhood in Vietnamese society, (2015) 30(2) Reproductive BioMedicine Online, 113– 114 accessed <https://doi.org/10.1016/j.rbmo.2014.10.015>

²⁹ Civil Code Arts. 1464(1) and 1458, as amended by Law 3089-2002 on Medically Assisted Human Reproduction. Constandinidou and Stavropoulos (n 26)

³⁰ Decree on giving birth through in vitro fertilization and conditions for altruistic gestational surrogacy, Art. 3(4) <https://vanbanphapluat.co/decree-no-10-2015-nd-cp-on-giving-birth-through-in-vitro-fertilization>

³¹ Tabasco Civil Code – Part 6 Assisted Reproductive Technology and Surrogacy, Arts. 380(2) and 380(6)

³² Uniform Parentage Act, the CA Assembly Bill 1217 https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB1217

³³ Judgments of Parentage of Children Conceived Through Assisted Reproduction or Pursuant to Surrogacy Agreements Family Court Act (FCT) Ch 686, Art. 5-C <https://www.nysenate.gov/legislation/laws/FCT/581-205>

³⁴ Georgia’s Law on Health Care, Art. 143(2) states that “if a child is born, the couple shall be deemed as parents, with the responsibilities and authorities proceeding from this fact; the donor or the ‘surrogate mother’ shall not have the right to be recognised as a parent of the born child.”

³⁵ Decree of the Minister of Justice on Approval of the Procedures for Civil Registration (birth registration of a child born as a result of in vitro fertilization), Art. 19(4)

³⁶ Family Code <https://www.refworld.org/docid/4c4575d92.html>

her maternal affiliation. Contesting maternal affiliation is not allowed in cases set forth in Article 123, paragraphs 2 and 3, of the present Code.”

The child may only ever know their gestational origins if they access records kept with the Civil Registry and Vital Statistics Office where an entry of the mother according to the medical certificate of birth may exist, as in Ukraine.³⁷

Section 22(2) of Ghana’s new Registration of Births and Deaths Act 2020 (ACT 1027) appears to be suppress the details of the surrogate mother and/or providers of human reproductive material, even more by allowing a pre-birth parental order “within twelve weeks after introducing an embryo or gamete into the surrogate mother” for the intending parent(s) to be named as the legal parent(s).

On the other hand, there are situations where the intending parent(s) may not be recorded at all. For example, in Russia, if the surrogate mother chooses to keep the child, she is recorded on the child’s birth certificate as well as her husband, if she is married. This in practice means that the integral origins of the child will not be recorded, including information about the intending parents, even if they are genetically linked.³⁸

Thus, as the above examples illustrate, the right of children to know their origins is in different ways frequently at best jeopardised, at worst made impossible, under current laws and practice in many countries.

Identity of surrogate mother and/or intending parent(s) which contributes to the child’s identity in countries that prohibit and/or do not explicitly allow surrogacy

Countries which explicitly prohibit surrogacy (e.g. France, Germany, Italy, Spain and Switzerland) may be placed in a situation where they have to recognise legal filiation without having any origins information. The EU launched an initiative to facilitate the recognition of legal parentage within member States in 2021³⁹ although it is not clear what minimum safeguards will be in place to protect the rights of the child, which is in parallel to work of HCCH (Introduction and Chapter XXX). The UNICEF and Child Identity Protection briefing note recognises the specific challenges faced by prohibitive countries by stating that “although it is in the best interests of children to have legal parentage established as soon as possible after birth, the integrity of a child’s legal parentage in surrogacy needs to be protected through minimum standards. These include, for example, pre-surrogacy safeguards, best interest determinations (BID), consents of all parties to the arrangement, and protecting the child’s right to access their origins.”⁴⁰

In countries that have yet to take a position, existing generalist frameworks are applied. For example in Cambodia - awaiting the approval of a draft surrogacy law - the Civil Code states that the woman who gives birth to a child is the child’s mother (Article 987) and that a child conceived by the wife during the marriage shall be presumed to be the child of the husband (Article 968, para. 1). As such, the surrogate mother and her husband are recorded as the child’s parents where legal parentage is transferred through adoption. In countries like the Philippines, the lack of legal safeguards results in the rights of the child born through the arrangement, the surrogate mother, providers of human reproductive material, and intending parents remain unsettled, with the status and identity of the child precarious.⁴¹

³⁷ Rules of State Registration of Civil Status Acts in Ukraine enacted by the decree of the Ministry of Justice of Ukraine №52/5 of October 18, 2000. OHCHR, Questionnaire on Safeguards for the protection of the rights of children born from surrogacy arrangements (OHCHR nd) accessed <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2FDocuments%2FIssues%2FChildren%2FSR%2FSurrogacy%2FStates%2FUkraine.docx&wdOrigin=BROWSELINK>

³⁸ Olga Khazova, *Surrogacy in Russia* in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan. *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019) 281-306.

³⁹ Commission’s initiative on the recognition of parenthood between Member States accessed https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12878-Cross-border-family-situations-recognition-of-parenthood_en.

⁴⁰ UNICEF and Child Identity Protection (nd 9)

⁴¹ Elizabeth Aguilin-Pangalangan. *Parents and children: When law and technology unbundle traditional identities*. Paper presented at the Foundation for Liberty and Prosperity Professorial Chair, University of the Philippines 2019. <https://libpros.com/wp-content/uploads/2019/06/final-paper-lp-lecture-adoptionsurrogacy.-6.2019.pdf>.

These challenges become more complex in cross-border situations, since most national CRVS systems are not set up to communicate with other systems. This is particularly problematic in international surrogacy arrangements where the child's birth records may not be recognised by the country where the child will eventually live, or in emergency situations, such as in Ukraine with many intending parent(s) coming from countries that prohibit the practice. The work of the International Commission on Civil Status (ICCS), with its 34 International Conventions, arguably provides an opportunity to facilitate portability of identity documents, including through cooperation and direct communication between civil status authorities.⁴²

To avoid the situation of intending parent(s) forum shopping and undertaking an international surrogacy arrangement, contrary to their own national laws and placing the rights of the child at risk, the UNICEF and Child Identity Protection briefing note states that "children born through surrogacy can enjoy their rights from birth. States that permit surrogacy should prohibit ISAs involving foreign intending parents from States that prohibit such arrangements."⁴³ Such a provision will maximise the child's opportunities to access all their rights, as provided for in surrogacy friendly States. Forum shopping may nevertheless occur when choosing countries that are not part of the CRC or who do not keep full records despite their convention obligations.

Identity of providers of human reproductive material which contributes to the child's identity

In terms of providers of human reproductive material, there is an obligation to collect as much information as possible relevant to the child's identity, as this arguably falls within the scope of "family relations" in Article 8 CRC.⁴⁴ Recommendation 2156 on Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children,⁴⁵ adopted by the Parliamentary Assembly of the Council of Europe in 2019, provides helpful guidance. Recommendation 7.1 from this report states that "*anonymity should be waived for all future gamete donations in Council of Europe member States, and the use of anonymously donated sperm and oocytes should be prohibited. This would mean that (except in exceptional cases, when the donation is from a close relative or friend) the donor's identity would not be revealed at the time of the donation to the family, but would be revealed to the donor-conceived child upon his or her 16th or 18th birthday. The donor-conceived child would be informed at that time (ideally by the State) that there was supplementary information available on the circumstances of his/her birth. The donor-conceived person could then decide whether and when to access this information containing the identity of the donor, and whether to initiate contact (ideally after having had access to appropriate guidance, counselling and support services before making a decision).*"

Despite this information collecting obligation, the country examples below show just how varied are the approaches to the rules around provision of human reproductive material in ART/surrogacy.

In some countries, like Madagascar,⁴⁶ the provision of human reproductive material to third parties and/or for the purpose of surrogacy is prohibited. In Switzerland, the donation of anonymous sperm is prohibited.⁴⁷ The law provides additional protections by allowing the child to have access to biological origins, and counselling services may be offered to parents having recourse to a sperm donor, covering issues such as the impact of missing the genetic link with the child.⁴⁸ In Australia, where the law varies by State, NSW legislation allows for the voluntary giving of information about private assisted reproductive arrangements.⁴⁹ Consent for the use of gametes is not compulsory and the ART provider must collect identifying information about the donor, i.e. full name and date and place of birth.⁵⁰

⁴² Baglietto, Bordier, Dambach and Jeannin (n2)

⁴³ UNICEF and Child Identity Protection (nd 9)

⁴⁴ Verona Principles at 11.4 (n 8)

⁴⁵ Parliamentary Assembly of the Council of Europe, *Recommendation 2156. Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children (PACE, 2019)* Accessed <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=27680&lang=en>

⁴⁶ Health law Number 2011-002 (Loi n°2011-002 portant code de la santé) Art. 271 bis. Accessed <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/97799/116199/F1071917999/MDG-97799.pdf>

⁴⁷ *Procréation médicalement assistée: Quelles règles?* (Swiss Authorities online nd) accessed <https://www.ch.ch/fr/fecondation-assistee/>

⁴⁸ *Counselling psychologique. Quand le désir d'enfant peine à se concrétiser* (CHUV nd) accessed <https://www.chuv.ch/fr/fertilite/umr-home/procreation-medicalement-assistee/soutien/counselling-psychologique>

⁴⁹ Assisted Reproductive Technology Act 69 of 2007, Sec 33A, https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/arta2007367/

⁵⁰ Assisted Reproductive Technology Act 69 of 2007, Sec 31(C) https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/arta2007367/

In France, the bioethics law of 29 June 2021 recognises for the first time the right of people born through donor conception to know their personal origins (identifying information of donors of gametes or embryos). However, until a date set by decree, it will remain possible to conceive children using donations under the previous regime. For these individuals and those already born from a donation, access to their origins will continue to be subject to the donor's consent at the time of the request.⁵¹

While these laws are promising in terms of identity protection for future children, it seems that the trend is not uniform in ongoing reforms. For example, in Russia, draft provisions currently under discussion allow oocytes and sperm donors to be either anonymous or non-anonymous.⁵² Identifying information for oocyte and sperm donors is limited to phenotypic characteristics such as his/her appearance (height, weight, skin color, hair color, etc.), race and nationality. Personal details about the donor are not envisaged.⁵³ Another illustration is a motion in Uganda, which accepts anonymous donations.⁵⁴ The Reproductive Healthcare Bill, 2019 in the Kenya Gazette Supplement allows for the recording of multiple identifying characteristics of donors in a Register (article 12) for the purpose of sharing with intending parent(s), but does not cover access to this information for children.

Moreover, in practice it seems that many countries continue to permit anonymous donation of human reproductive material, which leads to gaps in identity creation. For example, anonymous donation of sperm is allowed in countries such as Belgium, Czech Republic, Greece and Spain and anonymous donation of oocytes is allowed in Belgium, Bulgaria, Hungary, Latvia, Romania, and Slovenia.⁵⁵ In Greece, anonymity is practiced save exceptions, such as a medical need.⁵⁶ Anonymity is equally practiced in California⁵⁷ and in New York⁵⁸ where commercial surrogacy is permitted. Likewise in Ukraine, anonymous use of gametes and confidentiality are encouraged in surrogacy arrangements under the guise of "medical confidentiality."⁵⁹ Only anonymous donors are allowed in altruistic arrangements in Viet Nam, even if some characteristics are indicated :

*4. The donation and receipt of sperm or embryos shall be conducted on the principle of anonymity of donors and recipients, sperm and embryos of donors shall be encoded to ensure confidentiality while characteristics of donors, particularly their race, shall be clearly indicated.*⁶⁰

This anonymity situation – by default - equally occurs in countries where there seems to be a formal requirement to register the details the providers of human reproductive material. This may be explicable in countries such as South Africa, where there is a requirement that the genetic origins of the child are linked to at least one of the intending parent(s).⁶¹ Similarly in Canada, consent is required but the law is silent on anonymity, which therefore creates a permissive environment for such practices and limits access to

⁵¹ See petition <https://www.change.org/pacteprésidentielorigine>

⁵² RF Ministry of Health Decree (Prikaz) No 803H of 31 July 2020 – "Order on the Use of Assisted Reproductive Technologies, Contradictions to and Restrictions of its Usage", Paras 44 and para 54

⁵³ Khazova (n 38) 281-306.

⁵⁴ Motion Seeking Leave Of Parliament To Introduce A Private Members Bill Entitled The Surrogacy And Assisted Reproductive Technology Act, 2021

⁵⁵ PMA : Quels droits en Europe? (*Toute l'Europe.eu* 2020) Accessed <https://www.touteurope.eu/actualite/pma-quels-droits-en-europe.html> and European Commission, *Commission Staff Working Document on the implementation of the principle of voluntary and unpaid donation for human tissues and cells (EC 2016)* https://ec.europa.eu/health/sites/health/files/blood_tissues_orqans/docs/swd_2016_128_en.pdf

⁵⁶ L.3305/2005, Art. 1460(1b) and CC, Art.8(6)and 20(2c); Maria Milapidou and Kalioppi Kipouridou, Deficiencies and Shortcomings In the Greek Legal Framework On Medically Assisted Reproduction (Rivista IUS and SALUS 2019); See also: <https://www.ivfathenscenter.gr/en/regulation/>

⁵⁷ Uniform Parentage Act, the CA Assembly Bill 1217, Art. 7962 (a)2, accessed

https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB1217

⁵⁸ Proceeding for judgment of parentage of a child conceived through assisted reproduction, accessed

<https://www.nysenate.gov/legislation/laws/FCT/581-202>

⁵⁹ Instruction on Procedures for Assisted Reproductive Technologies', Order of the Ministry of Health No. 787 of 09/09/2013, Para 5.1 (see unofficial translation) https://tasiyici-annelik.com/pdf/surrogate_motherhood_law.pdf

⁶⁰ Decree on giving birth through in vitro fertilization and conditions for altruistic gestational surrogacy, Art. 3(4)

<https://vanbanphapluat.co/decree-no-10-2015-nd-cp-on-giving-birth-through-in-vitro-fertilization>

⁶¹ Children's Act 38 of 2005, Art. 294 and Ch. 19 Accessed <https://justice.gov.za/legislation/acts/2005-038%20childrensact.pdf>

records.⁶² This also appears to be the case in the State of Tabasco in Mexico, where the Civil Code does not actively require the registration of details.

2. Modification of the child's identity in surrogacy arrangements

International standards allow a child's original identity at birth (section 1) to be legally modified in certain contexts (e.g. following adoption under Articles 20 and 21 CRC). Other situations, such as child brides and child soldiers, can result in an improper modification of the child's identity, prohibited by international law. In surrogacy arrangements, a formal modification of the child's identity may occur when legal parentage and/or parental responsibility is transferred from the surrogate mother to the intending parent(s). This may result in a change to the "family relations" element of the child's identity. A specific modification process may exist for surrogacy arrangements and, in some cases, the change in original identity may occur subsequently through another avenue, such as adoption (e.g. Cambodia and in State of Tabasco in Mexico).

As a general principle, any decision that leads to the modification of the child's identity at birth should be subject to a best interests assessment and determination (BIA/BID) process, as discussed in Chapter XXX. When any modification of a child's identity at birth is considered, the best interests of the child born should be "the paramount consideration."⁶³ This is essential for avoiding arbitrary decisions by persons who lack competency to ensure that the child's full range of rights are upheld. Both the UNHCR guidelines on such processes updated in 2021⁶⁴ and CRC Committee's General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)⁶⁵ are excellent sources of guidance in this context.

Some countries that allow surrogacy have specific legislation for the modification of the child's identity in surrogacy arrangements. For example, Ghana specifically allows for the modification of any pre-birth orders establishing legal parentage through an application to the High Court for a post birth order, where changes occur through an adoption.⁶⁶ It is however most concerning that the original birth records will be deleted (Section 22(11)) as stated below :

(11) The District Registrar shall, on receipt of a sealed substitute parentage order from the High Court, strike out or cause to be struck out the original birth record, and open or cause to be opened a new birth record with the intended parent or surrogate mother named as the parent of the child, in accordance with the order of the High Court.

In the UK, parental orders can be made by either one or two applicants transferring legal parentage to the intending parent(s).⁶⁷

The ECtHR has likewise confirmed adoption as a valid option for the transfer of legal parentage. Following the French cases of *Labassée v. France* and *Menesson v. France*,⁶⁸ *Foulon v. France*⁶⁹ and *Bouvet v. France*⁷⁰ and *Laborie v. France*,⁷¹ (section 1) the Court held in 2019 and 2020 that the acknowledgement of legal parentage is not necessarily confined to a birth certificate. The court noted that the family relation with the "non-genetic" intending parent can be acknowledged through an adoption order.⁷² However, a Norwegian

⁶² Assisted Human Reproduction Act 2004, Art. 8 Accessed <https://www.cbc.ca/documentaries/cbc-docs-pov/when-it-comes-to-sperm-donor-anonymity-canada-is-behind-the-curve-1.5744558>

⁶³ Baglietto, Bordier, Dambach and Jeannin (n2)

⁶⁴ UNHCR, Best Interests Procedure Guidelines: Assessing And Determining The Best Interests Of The Child (UNHCR 2021) Accessed <https://www.refworld.org/pdfid/5c18d7254.pdf>

⁶⁵ UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (United Nations 2013)* Accessed https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_GC_14_ENG.pdf

⁶⁶ Ghana's Registration of Births and Deaths Act 2020 (ACT 1027), Ss 22(8) and 22(10) and HCCH country profile ICA proceedings in Ghana (HCCH 2020) <https://assets.hcch.net/docs/fc3cb91b-7ce6-418e-a078-b4d4b924143d.pdf>

⁶⁷ Human Fertilisation and Embryology Act 2008, Arts. 54-55 Accessed <https://www.legislation.gov.uk/ukpga/2008/22/contents>

⁶⁸ *Menesson v. France*, App. No 65192/11; *Labassée v. France*, App. No 65941/11

⁶⁹ *Foulon v. France*, App. No 9063/14

⁷⁰ *Bouvet v. France*, App. No 10410/14

⁷¹ *Laborie v. France*, App. No 44024/1

⁷² *C and E v. France*, App. nos 1462/18 and 17348/18 and *D v. France*, App. no 11288/18

case⁷³ pending before the ECtHR alleges that authorities are refusing to allow an intending mother to adopt a child born through a gestational international surrogacy arrangement. It should be noted that the HCCH has explicitly stated that the framework of the 1993 Hague Adoption Convention should not be used in surrogacy arrangements, and therefore established the working group on parentage/surrogacy to consider the feasibility of a private international law instrument (Chapter XXX).

In other cases, the ECtHR has provided guidance as to when countries that prohibit surrogacy may not necessarily formally recognise the family relations of the child to include intending parent(s) when there is no genetic link. In *Paradiso and Campanelli v. Italy*⁷⁴ the Italian authorities removed a nine-month-old surrogate born child from an Italian couple, where there was no genetic relationship, and placed the child in a foster family. Interestingly in this case, the court held that “family” includes those who are de facto and not necessarily limited to where filiation has been established. The Court equally acknowledged the ties with the new foster family environment that the child had now been placed for a couple of years, and therefore did not make it mandatory to place the child with the intending parent(s). A similar decision to not formally recognise the family relations of a child with his or her intending parents without a genetic link has occurred in *Valdís Fjölfnisdóttir and Others v. Iceland*.⁷⁵

3. Falsification of child’s identity in surrogacy arrangements

The child’s right to identity is compromised in surrogacy arrangements whenever full and transparent information is not recorded at birth (section 1) and/or whenever it is modified without the best interests of the child being the primary consideration (section 2). It may be equally jeopardised when the child’s identity is tarnished by illicit practices that allow for falsification of birth certificates (e.g. changing the date of birth, misrepresentation of family relations) as discussed below. Falsification may also include sale, as alluded to by the CRC Committee which refers to the hidden nature of certain activities where “... there is no appropriate procedure for screening prospective parent(s) of children born to surrogate mothers abroad, aimed at preventing the hidden sale of children and/or possible sexual abuse” as recommended to Israel in 2015. The sale of the child will occur whenever legal parentage and/or parental responsibility (i.e. family relations of the child) is transferred for remuneration or any other consideration, as addressed in Chapter XXX.

Furthermore, illicit practices, including falsification of birth records concerning name, nationality and/or family relations, may be more likely to occur in specific situations. An enabling environment may include, for example, contexts where there is an emergency situation and existing frameworks collapse, or where corruption exists⁷⁶ and can result in the issuance of fraudulent birth certificates – for example in Guatemala⁷⁷ and, recently, in Guinea.⁷⁸ Likewise, simulation of civil registries may occur where birth records are tampered with to make it appear in the record of birth that a child was born to a person who is not the child’s biological mother, causing the loss of the true identity and status of such child (e.g. Philippines).⁷⁹ This can be highly problematic as filiation is established by “the record of birth appearing in the civil register or a final judgment.”⁸⁰ It may also occur where a birth certificate with the names of intending parent(s) is presumed to reflect the genetic parents of the child (see section 1). This façade will continue to be possible until States make it compulsory to use only human reproductive material that is identifiable and society, including intending parents, understands the importance of the child knowing the truth about their origins.

⁷³ A.M. v. Norway, App. no 30254/18

⁷⁴ *Paradiso and Campanelli v. Italy* App. No 25358/12

⁷⁵ *Valdís Fjölfnisdóttir and Others v. Iceland* App. no 71552/17

⁷⁶ UNODC defines corruption “as a crime committed by officials (public or private) abusing of their role to procure gain for themselves or somebody else. Several forms of corruption exist: bribery, embezzlement, abuse of power, just to name a few” in *Statistics on Corruption*. (United Nations Office on Drugs and Crime nd) Accessed <https://www.unodc.org/unodc/en/data-and-analysis/statistics/corruption.html>

⁷⁷ *Report on Players Involved in the Illegal Adoption Process in Guatemala since the Entry into Force of the Adoption Law* (CICIG 2010) http://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC05_20101201_EN.pdf

⁷⁸ CRC Committee, *Concluding observations and recommendations*, CRC/C/GIN/CO/3-6 (CRC Committee 2019) https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=GIN&Lang=EN

⁷⁹ Republic Act 112222 2019, S 3(f)

⁸⁰ Family Code (1988) Art. 172

A notable case currently pending before the ECtHR⁸¹ involves a child born through commercial surrogacy in France, where the surrogate mother chose to transfer the child to a third party couple for 15 000 euros instead of to the intending parent(s), one of whom was the biological father. The third party was registered as the child's birth parent(s). The biological father/intending parent has requested authorities to establish their filiation and to enable the child's name to be changed.

It is worth mentioning that in cases where legal parentage is modified through an adoption (see section 2), national law may explicitly allow for the falsification of the child's identity. In Ukraine, where commercial surrogacy is permitted, Art. 252(1) of the Civil Code of Procedure⁸² gives adopters the right to change information on the place and date of birth of the child, stating :

- 1. A person that applied for an adoption may wish to change information on the place and date of birth of the child.*
- 2. Date of birth may be changed not more than by six months.*
- 3. In its decision to grant the adoption, the court changes information on the place and date of birth of the child if this is in the interest of the child.*

These are fundamental elements of the child's legal identity. If intending parent(s) have recourse to this provision, their actions are tantamount to falsification of the child's identity.

4. Preservation of, and access to, identity in surrogacy arrangements

The need for robust frameworks in the creation of identity, its modification and preventing its falsification, has been outlined in sections 1 to 3. Such a framework must also include procedures that will "preserve" the child's identity (Art. 8(1) CRC) as outlined in this section.⁸³ Generally, the holistic preservation of the child's identity requires the recording of all elements concerning the origins of the child in terms of legal identity as well as family history (section 1). The latter may be difficult if the CRVS are not set up to fully record all information at birth (section 1) and do not include potential modifications with full transparency (section 2). In practice, this requires information on the child's origins to be collected and stored in a safe place indefinitely so that he or she has access to it throughout their life, including access for descendants. To be safe, it must comply with relevant data protection considerations in a way that corresponds to children's rights.⁸⁴ UNICEF's 2021 publication on The Case for Better Governance of Children's Data: A Manifesto provides additional guidance on identity data management, including collection, storage and processing.⁸⁵

As such, the practice of surrogacy raises specific considerations about ensuring the holistic preservation of information on the child's origins and potentially those of the family. In Israel, the Ministry of Justice has appointed a Registrar to collect information about the parenthood decree. However, the law seems to be limited in terms of comprehensive collection of all information, as excludes information about third party providers of human reproductive material.⁸⁶ A central registry has been established in NSW (Australia) to collect information on all ART procedures through the Secretary of the Department of Health, who may later share information with the Registry of Births, Deaths and Marriages.⁸⁷ It is compulsory for providers of ART to provide this information to the central registry whenever a child has been born using this medical procedure. Likewise, the role of the District Registrar in Ghana is to collect information limited to the intending parent(s) and surrogate mother.⁸⁸

⁸¹ A.L. v. France, App. no 13344/20

⁸² *Civil Procedure Code of Ukraine* 2004. Accessed <https://www.wipo.int/edocs/lexdocs/laws/en/ua/ua025en.pdf>

⁸³ Verona Principles at 11.7 (n 8)

⁸⁴ See CRC Committee (n 65)

⁸⁵ UNICEF, The Case for Better Governance of Children's Data: A Manifesto (UNICEF 2021) Accessed

<https://www.unicef.org/globalinsight/media/1741/file/UNICEF%20Global%20Insight%20Data%20Governance%20Manifesto.pdf>

⁸⁶ Agreements for the Carriage of Fetuses (Approval of Agreement and Status of the Newborn) Law, 5756-1996, Art. 16.

⁸⁷ Assisted Reproductive Technology Act 69 of 2007 NSW, Part 3 accessed https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/arta2007367/s31.html

⁸⁸ Registration of Births and Deaths Act 2020 (ACT 1027), S 22

In Thailand, two forms of records are kept. The first is a birth certificate issued by the hospital which will then be used for civil registration with the official registrar.⁸⁹ This will involve a normal civil registration if the child is a Thai citizen, i.e. first and last names, address of resident, 13 digit number for identification of having Thai citizenship, date and place of birth, sex, nationality, names of intending parents. The name of the surrogate mother is excluded. If the child is not a Thai citizen (both intending parents are foreigners) the child will have only a birth certificate where civil registration will be done at the Embassy. As to the second form, Thai records include all the details concerning the surrogacy (i.e. surrogate mother, the gamete donor and the intending parents) that must be kept confidentially by the hospital according to the regulation promulgated by the Thai Committee dedicated to surrogacy.⁹⁰

Such a recording requirement for providers of surrogacy services is crucial as it is often the medical clinics, law firms and/or intermediaries that have initial knowledge of and/or access to identity information (e.g. details about surrogate mother, providers of human reproductive material and intending parents). Indeed, in NSW, Australia, there is a legislative requirement that the provider of ART keep a record of the following:⁹¹

- (1) An ART provider must keep a record in relation to each of the following in an approved form:*
- (a) for any gamete or embryo that is in the ART provider's possession:*
 - (i) the information required to be obtained under section 30 (1) or (2), and*
 - (ii) the provenance of any such gamete or embryo (including the provenance of the gametes used to create the embryo), and*
 - (iii) the gamete provider's consent (within the meaning of Division 3) in relation to any such gamete or embryo, and*
 - (iv) the uses that have been made of any such gamete or embryo, including exporting the gamete or embryo from this State or supplying the gamete or embryo to another ART provider, and*
 - (v) the period during which any such gamete or embryo has been in storage,*

Similarly in the UK, a register is set up with different conditions outlined for accessing information and what would be made available.⁹²

Yet, it seems that some States that allow surrogacy practices do not systematically oblige clinics to register all relevant information. In all situations where frameworks are not in place to ensure that medical clinics, law firms and/or intermediaries are obliged to collect information, identity gaps for the child may exist. For example, Canada has not set up a centralised database.⁹³ It is not clear what information is to be collected by authorities in Canada's Assisted Human Reproduction Act 2004 (AHR Act). There is however a reference in the AHR Act to the Access to Information Act (R.S.C., 1985, c. A-1)⁹⁴ which notes in article 1 that every citizen or permanent resident of Canada "has a right to and shall, on request, be given access to any record under the control of a government institution."

Even if all birth information is properly recorded, access by the child may not always be envisaged. If States were to fully comply with Article 8 CRC, it can be deduced that access to identity information should be free of financial, geographic or other obstacles. Information should in principle always be made available, while access to identity information may exceptionally be limited when the rights of other persons concerned may be significantly jeopardized.⁹⁵ In these situations, non-identifiable information should be made available,

⁸⁹ The Protection of Children Born from Assisted Reproductive Technologies Act, B.E. 2558 (2015), Ss 31 and 32

⁹⁰ The Protection of Children Born from Assisted Reproductive Technologies Act, B.E. 2558 (2015), S 7

⁹¹ Assisted Reproductive Technology Act 69 of 2007 NSW, S 31 accessed https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/arta2007367/s31.html

⁹² Human Fertilisation and Embryology Act 2008, Art. 24 accessed <https://www.legislation.gov.uk/ukpga/2008/22/contents>

⁹³ Vanessa Gruben, 'Donor Anonymity in Canada: Assessing the Obstacles to Openness and Considering a Way Forwards' (2017) Alberta Law Review 54(3) 665, 670 accessed https://www.researchgate.net/publication/330332928_Donor_Anonymity_in_Canada_Assessing_the_Obstacles_to_Openness_and_Considering_a_Way_Forward

⁹⁴ Access to Information Act (R.S.C., 1985, c. A-1) accessed <https://laws-lois.justice.gc.ca/eng/acts/A-1/>

⁹⁵ Child Identity Protection, Briefing note: aligning data protection rules with international standards (CHIP 2022) <https://child-identity.org/images/files/CHIP-BriefingNote-DataProtection-EN.pdf>

especially when of a medical nature. Legal and psychosocial support should also be freely available.⁹⁶ While accessibility is explicitly provided for in some jurisdictions, if all relevant information is not collected in the first place and/or if identity gaps at birth are allowed, such as through anonymous donations (section 1), “access” will simply compound the sense of identity loss for the child. For example, New York provisions allow the child to “make copies of the entire court record, including, but not limited to, the name of the person acting as surrogate and any known donors.”⁹⁷

The CRC Committee, through its Concluding Observations, often reminds States to guarantee full access to information on origins, with appropriate support for all concerned.⁹⁸ It is also important that Data Protection Rules not be interpreted contrary to the rights of children when “mixed information” is concerned.⁹⁹ Even when other interests should be considered, information about genetic and gestational origins enables donor conceived persons, including those born through surrogacy, to have a complete history and information about their genealogy.¹⁰⁰

In terms of accessibility examples, whenever the child’s identity is modified in a surrogacy arrangement in Ghana, according to section 22(12), original information is only accessible when the child is 21.¹⁰¹ In other cases, the surrogate mother’s details may be recorded but not immediately accessible. Indeed, the Russian Family Code notes that “a married couple, that has agreed to implantation of an embryo to another woman for the purpose of its gestation, can be registered as the child’s parents only if this woman (surrogate mother) gives her consent to such a registration.” (s. 51 (para. 4, pt 2)).” The name of the surrogate mother does not appear on the birth certificate, but it is reflected in the birth registry book and is available when the child reaches 18.¹⁰² Similarly in Thailand, information will be released only to the child at an appropriate time, based on his or her maturity.¹⁰³ In the UK, access is only available after the child reaches 16 years of age and would require that he or she be aware beforehand that they were born using third party human reproductive material, as there is no requirement to inform the child of the circumstances of his or her birth.¹⁰⁴ Another example is the central registry that has been set up in Greece to collect information that can only be accessed in exceptional cases.¹⁰⁵

Some reforms in the pipeline continue this approach of lack of clarity on accessing information. For example in India, as pointed out by UN SR on sale and sexual exploitation of children, “*the Surrogacy (Regulation) Bill 2016 proposes that the appropriate authority must preserve details of surrogacy arrangements, but there is no provision for children to access this information.*”¹⁰⁶ It seems that this concern remains valid since its new 2021 law states “the surrogacy clinic shall maintain all records, charts, forms, reports, consent letters, agreements and all the

⁹⁶ Cécile Jeannin and Juliette Roulez, *Access to origins: Panorama on legal and practical considerations* (International Social Service 2019), pps.46-49 accessed https://www.iss-ssi.org/images/Publications_ISS/ENG/ACCESS_ORIGINS_Paper2_ANG.pdf.

⁹⁷ Family Court Act <https://www.nysenate.gov/legislation/laws/FCT/581-205>

⁹⁸ See, for example, UN Committee on the Rights of the Child, *Concluding Observations to Australia*, 1 November 2019, CRC/C/AUS/CO/5-6 ; UN Committee on the Rights of the Child, *Concluding Observations to Belgium*, 1 February 2019, CRC/C/BEL/CO/5-6 ; UN Committee on the Rights of the Child, *Concluding Observations to Georgia*, 9 March 2017, CRC/C/GEO/CO/4; UN Committee on the Rights of the Child, *Concluding Observations to Ireland*, 1 March 2016, CRC/C/IRL/CO/3-4; UN Committee on the Rights of the Child, *Concluding Observations to Israel*, 4 July 2013, CRC/C/ISR/CO/2-4; and UN Committee on the Rights of the Child, *Concluding Observations to Switzerland*, CRC/C/CHE/CO/2-4, 26 February 2015.

⁹⁹ CLANN, *Submission to Oireachtas Justice Commission* (CLANN 2021) accessed <http://ifmresearch.com/wp-content/uploads/2021/03/Submission-to-Oireachtas-Justice-Committee-Re-GDPR-MOR-CMG-LON-26.3.21.pdf> and here <https://datasubject.ie/mbh/> and Child Identity Protection, *Submission to the DGD on alternative care (CHIP 2021)* <https://www.child-identity.org/index.php/en/resources/advocacy-and-policy/201-submission-to-the-crc-committee-s-dgd-on-16-and-17-september-2022.html>

¹⁰⁰ Petra De Sutter, *Anonymous donation of sperm and oocytes: Balancing the rights of parents, donors and children* (Doc. 14835) (Committee on Social Affairs, Health and Sustainable Development, Parliamentary Assembly 2019). Accessed <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25439&lang=en>

¹⁰¹ Section 22(12) The District Registrar shall keep the original birth record struck out under subsection (11) in a confidential place, and that birth record shall be made accessible to the child whose birth entry was made only when that child attains the age of twenty-one years.

¹⁰² The Registration of Civil Status Law s. 77

¹⁰³ The Protection of Children Born from Assisted Reproductive Technologies Act, B.E. 2558 (2015)

¹⁰⁴ Human Fertilisation and Embryology Act 2008, Art. 24 accessed <https://www.legislation.gov.uk/ukpga/2008/22/contents>

¹⁰⁵ Constandinidou and Stavropoulos, N 26

¹⁰⁶ UNGA, N 21

documents under this Act and they shall be preserved for a period of twenty-five years or such period as may be prescribed” but fails to regulate access by children born through surrogacy.¹⁰⁷

As some States do not provide for access, an increasing number of persons born through ART are turning to genealogical data bases to find their origins.¹⁰⁸ In a 2019 study “*We Are Donor Conceived Survey*,”¹⁰⁹ 86% of participants said that the emotional needs of persons conceived by donation were neither understood nor respected by those providing DNA database services.¹¹⁰ Since DNA databases are not designed to provide support, the latter is increasingly provided by self-help and other groups.

5. Restoration of the child’s identity in surrogacy arrangements

Article 8(2) CRC states that “*where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*” In surrogacy arrangements, these elements may be missing during the birth registration process (section 1), when identity is modified (section 2) or falsified (section 3) or due to lack of preservation frameworks (section 4). In all these situations, States have an obligation to speedily restore the child’s identity. All States have an obligation to ensure wide access to remedies (SDG 16.3). This requires political will, resources and active efforts to prevent the recurrence of identity loss.

All domestic remedies available for human right violations, such as Ombudsman, mediation, criminal and civil proceedings, should encompass the issue of surrogacy.

In terms of **birth registration process**, countries would do well to ensure that full information is recorded and that they eliminate anonymity in ART. The CRC Committee has underscored to Georgia, (2017) and Israel, (2013) the need to “ensure that a child born through surrogacy motherhood will be able to get access to the information about his or her origin.”¹¹¹ Moreover, the Committee has recommended to Australia in 2019 that it “ensure that children born through assisted reproduction technologies, in particular through surrogacy, are able to access information about their origin and that all involved are provided with appropriate counselling and support.”¹¹²

To a certain extent, Australia has made some headway by retrospectively lifting the anonymity surrounding pre-1988 donor treatment procedures, giving access to public records.¹¹³ France’s 2021 bioethics law likewise moves in the right direction by ensuring that all providers of human reproductive material must consent to non-identifying data and to their identity being transmitted to the donor conceived person at their majority at their request (section 1).¹¹⁴

The lack of certainty surrounding the child’s origins becomes even more problematic in emergency situations, such as during COVID-19 when hundreds of children born through surrogacy were “stranded” in early 2020.¹¹⁵ While priority was given to ensuring that these children were able to live with their intending parent(s), less attention was given to ensuring that information on their origins was preserved and other rights protected.

¹⁰⁷ Surrogacy (Regulation) Act, 2021 (No. 47 Of 2021), Art. 46(1)

¹⁰⁸ An Ravelingien, Veerle Provoost and Guido Pennings, *Donor-conceived children looking for their sperm donor: what do they want to know?. Facts, views & vision (2013) ObGyn*, 5(4), 257–264. Accessed <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3987373/>

¹⁰⁹ We Are Donor Conceived, *We Are Donor Conceived 2019 Survey Results* (We Are Donor Conceived 2019) <https://www.wearedonorconceived.com/uncategorized/we-are-donor-conceived-2019-survey-results/>

¹¹⁰ *Donor-conceived Adult Network*, Victorian Assisted Reproductive Treatment Authority (VARTA nd). Accessed <https://www.varta.org.au/events-support-groups/donor-conceived-adult-network>

¹¹¹ UN Committee on the Rights of the Child, Concluding observations on the second to fourth periodic reports of Israel, 4 July 2013, CRC/C/ISR/CO/2-4 and UN Committee on the Rights of the Child, Concluding observations on the second to fourth periodic reports of Israel, 9 March 2017, CRC/C/GEO/CO/4

¹¹² UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, CRC/C/AUS/CO/5-6.

¹¹³ Assisted Reproductive Treatment Act Version 024 (No. 76/2008), Art. 56A accessed <https://content.legislation.vic.gov.au/sites/default/files/2020-07/08-76aa024%20authorised.pdf>

¹¹⁴ Association Origines, Bioethetics law and access to origins : a great step forward ... already outdated (Loi de bioéthique & Accès aux origines : une belle avancée...déjà dépassée ?) (Association Origines 2021) accessed <https://associationorigines.com/2021/07/07/loi-de-bioethique-acces-aux-origines-une-belle-avancee-deja-depasse/>

¹¹⁵ For example, see <https://www.nytimes.com/2020/05/16/world/europe/ukraine-coronavirus-surrogate-babies.html>

Birth registration considerations have likewise been deliberated by the ECtHR. The cases of *Labassée v. France* and *Mennesson v. France*¹¹⁶ considered the issue of legal parent-child relationships of children born through surrogacy in the USA. In the case of *Mennesson*, the court held that, given that the twins were genetically related to one of their parents, the refusal of the authorities to issue a French birth certificate unduly affected their right to legal identity and formal recognition of legal parentage (i.e. recognition of family relations).

The cases of *Foulon v. France*¹¹⁷ and *Bouvet v. France*¹¹⁸ involve intending fathers of children born through surrogacy in India, contesting the French authorities' refusal to inscribe them as parent(s) on the French birth certificates. The ECtHR extended its protection to children born through surrogacy, including those with same-sex parents, noting the need to acknowledge these legal relationships. In the case of *Laborie v. France*,¹¹⁹ the French authorities did not recognize the Ukrainian birth certificates of two children born through surrogacy. Given that it involved facts similar to the preceding French cases, the ECtHR followed with similar reasoning and conclusions.

Regarding **modification of a child's identity**, countries may decide to recognise other parent(s) of a child than those at birth. For example, the High Court of Australia has ruled that the provider of human reproductive material to a same-sex couple could be considered the child's legal parent.¹²⁰ In this situation, the lesbian couple were prevented from relocating to New Zealand as the biological father was involved in the daily life of the child.

The state of Victoria in Australia provides a promising practice for improving access to biological and gestational information. The Victorian Assisted Reproductive Treatment Authority (VARTA)¹²¹ has been set up to support donor conceived persons to access the Central Register for "*identifying information (name, date of birth, donor code and contact details) and/or non-identifying information (more general information e.g. height, eye colour, occupation etc.) about the donor.*"¹²² VARTA has been supporting children born through surrogacy by supplying information on surrogate mothers and providers of human reproductive material. While these types of services are developing, much work is required to ensure they are properly funded by States. The Donor Conception Network (DCN)¹²³ established in the United Kingdom is another promising practice that promotes openness and transparency in knowing one's origins, through workshops and various resources.

Once all potential national remedies have been exhausted, regional and international remedies may be considered. The different cases referred to the ECtHR have shown the effectiveness of this European mechanism for upholding the child's right to identity.

The CRC Optional Protocol communications procedure¹²⁴ provides an opportunity for the restoration of the child's identity, enabling children to bring complaints to the CRC Committee – and therefore complaints could be brought by children born through surrogacy about their Article 8 right. One constraint is the limited number of States that have ratified this Protocol so far.

Transitional justice may likewise be worth exploring for systemic cases of abuse of human rights, where the work of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-

¹¹⁶ *Mennesson v. France*, App. No 65192/11; *Labassée v. France*, App. No 65941/11

¹¹⁷ *Foulon v. France*, App. No 9063/14

¹¹⁸ *Bouvet v. France*, App. No 10410/14

¹¹⁹ *Laborie v. France*, App. No 44024/1

¹²⁰ *Masson v Parsons* [2019] HCA 21 S6/201

¹²¹ *About VARTA*. (Victorian Assisted Reproductive Treatment Authority nd) <https://www.varta.org.au/about>

¹²² <https://www.varta.org.au/donor-conception-register-services>

¹²³ *Donor Conception Network | Supporting families through donor conception*. Donor Conception Network. <https://www.dcnetwork.org/>

¹²⁴ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on a communications procedure (A/RES/66/138)* (2011) accessed <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/467/10/PDF/N1146710.pdf?OpenElement>

recurrence may be particularly helpful. In due time, this may include apologies¹²⁵ and memory processes,¹²⁶ noting the necessity of archives and accessibility.

Conclusion

The child's right to identity is of crucial importance – as a standalone right – given the grave legal, psychosocial and medical life-long implications when fundamental information is missing and/or falsified. Its protection is equally vital, given that it is the gateway to other basic rights.

This Chapter has sought to demonstrate the variety of ways in which the risks of rights violations are heightened in surrogacy arrangements, given that the great majority of decisions relevant for the child's identity occur pre-birth or shortly after. During this limited timeframe, an independent professional is rarely if ever at hand to advocate for the child's rights including identity. Clearly, much work is required to align laws, policies and practices with international standards, notably Art. 8(1) CRC to preserve genetic, gestational, social and legal origins of the child. The lack of compliance has led to much damage that will leave a generation of children with missing and/or falsified elements of their identities. States are urgently required to rectify this situation through proper safeguards as well as to introduce mechanisms to speedily re-establish the child's identity as required in Art. 8(2) CRC. Together, we have a small window to ensure that this takes place.

¹²⁵ UNGA, n 21

¹²⁶ HRC, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* (United Nations 2020). Accessed <https://undocs.org/A/HRC/45/45>