

CRIN submission for the report of the UN Special Rapporteur on the sale and sexual exploitation of children to the UN General Assembly on safeguards for the protection of the rights of children born from surrogacy arrangements

This contribution is based on CRIN's discussion paper 'A Children's Rights Approach to Assisted Reproduction' published in May 2018¹ and responds to the questionnaire providing the safeguards that a child rights approach would recommend; these are based on international standards as established by the Convention on the Rights of the Child ('the Convention') itself or by the relevant general comments and/or recommendations that the Committee on the Rights of the child ('the Committee') has provided to States parties in that regard.

Whenever possible, this questionnaire has been answered taking concrete examples of legislative, judicial and administrative procedures in place in States parties to the Convention.

Identity, origins and parentage

- *Describe safeguards protecting identity rights (CRC art. 7 and 8) that are currently being implemented in your State. Safeguards include laws, judicial and administrative procedures, enforcement actions, and other practices intended to prevent or remedy violations of human rights norms. Note whether and how such general safeguards protecting identity rights apply in the context of surrogacy arrangements.*

Registering each child and making sure they have a name, a nationality and their parentage established in law are core elements of all individuals' identity. Without them, children remain invisible into adulthood: they have no legal identity, no voice and are at greater risk of other rights abuses.

Article 7 of the Convention sets out children's right to be registered immediately after birth, the right to a name, a nationality and - as far as possible - to know and be cared for by their parents. It requires States parties to fulfil these rights in accordance with other national and international obligations, especially where children would otherwise be stateless.

This article is closely connected to article 8 which protects children's right to preserve their identity, including their nationality, name and family relations, without unlawful interference. In addition, States are required to help children regain any aspect of their identity that has been taken away from them illegally.

Furthermore, the CRC recognises that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".

¹ The full paper is accessible on CRIN's website at:
<https://home.crin.org/issues/assisted-reproductive-technologies>

Right to a nationality

In many cases, the status of children born of third-party reproduction is left unclear, and in some cases they may not be recognised as citizens of any of the countries with which they have a connection.² The Committee on the Rights of the Child has confirmed that decisions about nationality fall within the scope of CRC article 3, which requires States to ensure that the best interests of children be a “primary consideration” in “all actions” concerning them.³ In particular, the best interests of the child clearly lie in ensuring that a newborn child acquires a nationality as soon as possible and is not left stateless for an extended period.

National laws should adopt an inclusive definition of parentage reflecting the fact that children’s experience of ‘family’ and ‘parents’ varies between cultural, political and social systems. Examples include households with a single parent, same-sex parents, adoptive families, extended families, and children born from ARTs.

Where a child is born through a surrogate abroad but will be living with the intending parents in their own country, the best interests of the child would typically lie in passing on the intending parents’ nationality to the child. Where single citizenship may not be secure (in Australia and in the US, for example, citizenship can be revoked and individuals sent back to their country of origin) then dual citizenship may be preferable.⁴

A legislative proposal in India offered one possible solution to establishing safeguards in that regard. It would require citizens of other countries seeking a surrogacy arrangement in India to establish first that the child would be granted citizenship in the country of the intending parents and that they would be recognised as the legal parents.⁵

The right to have and be cared for by one’s parents

Article 7 is clear that a child “shall have... as far as possible, the right to know and be cared for by his or her parents”. In view of these requirements, it is in the best interests of the child to establish his or her parentage in law, as early as possible. Whenever conflict or confusion

² An estimated 2,000 children in France were lacking French birth certificates and nationality because they were born through surrogacy, a practice that is not legal in the country. In January 2013, the Ministry of Justice issued a circular to facilitate the delivery of birth certificates confirming filiations recognised abroad in cases of children born abroad from a surrogate mother. For details, see http://www.textes.justice.gouv.fr/art_pix/JJUSC1301528C.pdf (in French).

³ UN Committee on the Rights of the Child, 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), CRC/C/GC/14, para. 30. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14_&Lang=en.

⁴ Sang-Hun, C, ‘Deportation a “Death Sentence” to Adoptees After a Lifetime in the U.S.’, New York Times, 2 July 2017. Available at: <https://www.nytimes.com/2017/07/02/world/asia/south-korea-adoptions-phillip-clay-adam-crapser.html?mcubz=0>.

⁵ India’s draft Assisted Reproductive Technologies (Regulation) Bill 2010 at: <https://www.icmr.nic.in/sites/default/files/guidelines/ART%20REGULATION%20Draft%20Bill1.pdf>

arises, the resolution must be as swift and fair as possible, and the best interests of the child must always be a primary consideration.

By involving more than two adults with a potential claim to parenthood, and often involving individuals from different jurisdictions with differing cultural expectations, third-party reproduction increases the risk of disputes over parentage. Any difficulties in establishing legal parentage, if not settled quickly, are highly likely to have an impact on the critical early months of a child's life. National legislation should therefore be clear and not encourage, by omission, conflict between the people involved. States should also be clear on the principles by which such conflicts should be settled after they arise. Well-established processes, and a clear, written understanding between intending parents and third parties, may help to prevent conflicts from arising later.

States should set out, in law or policy, the principles according to which such conflicts may be settled. This must include a systematic impact assessment on the child's rights and interests, which must always be a primary consideration. For example, this consideration would favour a resolution that results in the best developmental environment for the child.

Recommendation: The existence of children's rights does not depend on the choices of their parents. Therefore, neither the method of conception used by a child's parents, nor the legality of the procedure used, should impede the child's enjoyment of his or her rights, including identity rights.

- *Describe safeguards protecting the access to origins (CRC art. 7 and 8) that are currently being implemented in your State. Note whether and how such general safeguards protecting the access to origins apply in the context of surrogacy arrangements.*

Article 7 of the CRC recognises a child's right, "as far as possible... to know his or her parents". Accordingly, the Committee on the Rights of the Child has been clear that children born of third-party reproduction have a right to know their origins.⁶ It has further stated that "due consideration of the child's best interests implies that children have [...] the opportunity

⁶ For example, the Committee recommended that Ireland ensure that children born through assisted reproduction technologies have access to information about their origins. See CRC/C/IRL/ Co/3-4, 1/03/2016, paras. 33-34. Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fCO%2fIRL%2fCO%2f3-4&Lang=en. In the context of adoption, the Committee also recommended that France put in place the necessary measures for all information about parent(s) to be registered, in order to allow the child to know, to the extent possible and at the appropriate time, his or her parents; see CRC/FRA/CO/5, 23/02/2016, para. 33. Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fCO%2fFRA%2fCO%2f5&Lang=en.

to access information about their biological family, in accordance with the legal and professional regulations of the given country”.⁷

The Convention on the Rights of the Child (CRC) is clear that ‘[in] all actions concerning children... the best interests of the child shall be a primary consideration’ (Art. 3). According to the Committee, the best interests of the child must be used ‘for interpreting and implementing all of the rights of the child’ and requiring ‘an assessment appropriate to the specific context’.⁸

With regard to the access to the origins in the context of a child born from a surrogacy arrangement, the Committee has not determined what kind of information should be disclosed or when/ how this should be made available to the child. But it has expressed concern about jurisdictions where the identities of “biological parents” are withheld from children in other contexts. Citing CRC articles 3 (best interest of the child) and 7 (the right to know one’s parents), the Committee has recommended several times that States should “...take all necessary measures to allow all children, irrespective of the circumstances of their birth, (...) to obtain information on the identity of their parents, to the extent possible.”⁹

Furthermore, article 8 of the Convention protects children’s right to preserve their identity, including their nationality, name and family relations as recognised in law, without unlawful interference. In specifying a right to “family relations” the article implicitly includes a right to know the identities of the wider family of a child’s “biological parents”, including any half-siblings and other genetic relatives.

In addition, article 24 of the Convention recognises the child’s right to the highest attainable standard of health. In the context of surrogacy, this concerns a child’s right to know whether the medical history of biological or genetic parents indicates a risk of genetically transferable disease. A child’s right to health implies a right to know whether he or she was born of third-party reproduction and, if so, what the risks of heritable disease may be, but not necessarily the identity of any third parties.

⁷ Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her interests taken as a primary consideration, CRC/C/GC/14, para. 56. Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en.

⁸ UN Committee on the Rights of the Child, 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), at para. 1.

⁹ Committee on the Rights of the Child, Concluding Observations to the UK, CRC/C/15/Add.188, 2002, para. 32. Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.188&Lang=en. See also Concluding Observations to France, CRC/C/FRA/CO/5, 2016, para. 33. Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fFRA%2fCO%2f5&Lang=en.

Recommendation: A children's rights position clearly recognises a child's right to access their origins and any half-siblings. No conditions such as 'legitimate interest' should be applied, and the information should be available as and when a child requests it, without any minimum age requirement, in line with their evolving capacities as per CRC Article 5.¹⁰ Non-identifying medical information should always be made available to descendants in support of their right to health.

- *Describe how the right to access origins is balanced with the right to privacy of parents and gamete donors. Indicate specifically how the best interests of the child are factored in.*

Balancing the child's right to access one's origins with the right to privacy of adults involved in surrogacy has until recently often tended to favour the adults' right to privacy, whether a gamete donor or a surrogate mother. However, an international trend towards recognising the right of children to know their origins has been displacing the right of donors to remain anonymous.

The Committee has said that, when the best interests of a child are in conflict with the rights of other people, relevant authorities must weigh the rights of all those concerned while bearing in mind their obligations to make the child's best interests a primary consideration.¹¹ For instance, in the context of adoption, the Committee called on France to remove the requirement of the biological mother's consent to reveal her identity and to increase its efforts to address the conditions that lead parents to use confidential birth.¹²

Donor-conceived children

The first country to remove donor anonymity was Sweden in 1984.¹³ The Swedish model was then followed by a number of jurisdictions including Austria, Germany, Switzerland, the Australian states of Victoria and Western Australia, the Netherlands, Norway, the United Kingdom (UK), and New Zealand.¹⁴

¹⁰ See CRIN's discussion paper, 'Age is Arbitrary: setting minimum ages', p. 12. Available at: www.crin.org/en/node/42535

¹¹ UN Committee on the Rights of the Child, 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), at para. 39. Available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

¹² Committee on the Rights of the Child, Concluding Observations to France, CRC/FRA/CO/5, 2016, para. 33. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fFRA%2fCO%2f5&Lang=en

¹³ Law No. 1140 allowed the child, when sufficiently mature, to find out the identity of their sperm donor (Sweden did not allow oocyte donation). See Daniels, K and Lalos, O, 'The Swedish Insemination Act and the availability of donors', 1995, Human Reproduction, 7, 1871–4.

¹⁴ Cohen, G; Coan, T; Ottey, M and Boyd, C, 'Sperm donor anonymity and compensation: an experiment with American sperm donors', Journal of Law and the Biosciences, 3(3), December 2016, pp. 468-488. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5570712>.

When the UK abolished donor anonymity, past donors were given the option to ‘re-register’ to enable children conceived with their donated material to discover their parentage and make contact on reaching the age of 18.¹⁵ More controversially, the Australian state of Victoria has passed a new law lifting anonymity retrospectively, irrespective of the donor’s consent or when they donated.¹⁶

The child’s right to know their origins is realised to varying degrees between jurisdictions, and the issue remains contentious.¹⁷ In its recommendation to the Committee of Ministers to the Council of Europe on anonymous donation of sperm and oocytes, the Parliamentary Assembly has recently recommended anonymity to be waived for all future gamete donations in Council of Europe member States, and the prohibition of the use of anonymously donated sperm and oocytes. It has further explained that, as a consequence of the previous recommendation, 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.¹⁸

Recommendation: As stated above under the previous question, in CRIN’s view, a children’s rights-based position clearly recognises a child’s right to know their “biological origins” and any half-siblings. No conditions such as ‘legitimate interest’ should be applied, and the information should be made available as and when a child requests it, without any minimum age requirement, in line with their evolving capacities as per CRC Article 5.¹⁹

To this end, States must ensure that complete records are properly archived. Decisions concerning requests for information should be taken on a case-by-case basis by an independent body, with consideration for the full range of children’s rights. For example, a civil servant may be authorised to make the initial decision, subject to a right of appeal to an information-commissioner (or similar) and eventually to the courts if necessary. A rejected request should also be subject to periodic review.

¹⁵ UK, Human Fertilisation & Embryology Authority, Re-register as an identifiable donor. Available at <http://www.hfea.gov.uk/1973.html>.

¹⁶ The amendment to the Assisted Reproductive Treatment Act 2015 entered into force in March 2017. It means that all donor-conceived people are now able to apply for identifying information, regardless of when the donations were made or whether the donor consents. See Bio News, ‘New law in Australian State ends donor anonymity’, 29 February 2016. Available at http://www.bionews.org.uk/page_621467.asp

¹⁷ Clark, B, ‘A balancing act? The rights of donors-conceived children to know their biological origins’, Georgia Journal of International and Comparative Law, 2002, 40(3), pp. 619-661. Available at <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1001&context=gjicl>.

¹⁸ *Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children*, PACE Recommendation 2156 (2019), 12 April 2019; available at: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=27680&lang=EN>

¹⁹ See CRIN’s discussion paper, ‘Age is Arbitrary: setting minimum ages’, p. 12. Available at: www.crin.org/en/node/42535

Furthermore, some information should be made available to descendants of people conceived with donor gametes to help them to re-establish elements of their identity which have been lost. Non-identifying medical information should always be made available to descendants in support of their right to health. This is already happening in the adoption context,²⁰ but there are no known cases brought by children conceived with donor gametes.

Surrogacy

For the same reasons given above, children born of surrogacy should have the right to know the identity of their gestational mother, and to make contact with her, if she is genetically related (i.e. if her own eggs were used in the conception).

In cases where there is no genetic relationship between a child and a surrogate (because the eggs used were provided by another woman), the child's right to health demands that at least some information about her be made available. During pregnancy, the exchange of maternal-foetal cells, epigenetic processes,²¹ and other factors can have a long-term effect on the health of both the surrogate mother and the child. Therefore, children should, as a minimum, have access to non-identifying medical information about the surrogate and contextual information about their environment during the period of the pregnancy. Even irrespective of the child's right to health, identifying information should also be made available in accordance with the child's right to establish their family identity.

Countervailing rights of parents

Occasionally, a donor or surrogate risks being ostracised by their community if their identity is made public. In cases where a child's right to know their parents could put them at serious risk, it may be that some information could be made available and some withheld.

Recommendation: Authorities should presume in favour of children when there are conflicts between their rights and those of adults, and where a compromise is unavoidable, it must still uphold children's best interests.

- *Describe safeguards protecting the family environment (CRC art. 7, 8, 9, 10, 20) that are currently being implemented in your State. Note whether and how such general*

²⁰ See Children in Court CRINmail, September 2014, available at: <https://www.crin.org/en/home/what-we-do/crinmail/children-court-crinmail-39-0#H>; and Constitutionality of Article 139 of the Family Code of Russian Federation and Article 47 of the Federal Law 'On the Acts of Civil Status' on account of complaint lodged by the citizens G. F. Grubich and T. G. Guschina, CRIN summary available at: <https://www.crin.org/en/library/legal-database/constitutionality-article-139-family-code-russian-federation-and-article-47>

²¹ Loike, J.D. & Fischbach, R., 'Gestational surrogacy: medical and bioethical implications of bidirectional maternal-fetal cell exchange and epigenetics' in Science-Based Bioethics: A Scientific Approach to Bioethical Decision-Making, 2014, Center for Bioethics, Columbia University; BBC Radio 4, 'All in the womb', 25 April 2016, available at: <http://www.bbc.co.uk/programmes/b077gd58>.

safeguards protecting the family environment apply in the context of surrogacy arrangements. Indicate specifically how the best interests of the child are factored in.

The CRC recognises that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”. Article 7 is clear that a child “shall have... as far as possible, the right to know and be cared for by his or her parents”. In view of these requirements, it is in the best interests of the child to establish his parentage in law, as early as possible.

Since a child has a legal right to a family environment and a loving atmosphere, which is especially critical for health and well-being in the early weeks and months of his or her life, legal confusion over parentage and interpersonal conflict between contending parents should ideally be prevented. Well-established processes, and a clear, written understanding between intending parents and third parties, may help to prevent conflicts from arising later.

Clearly, whenever conflict or confusion arises, resolution must be as swift and fair as possible, and in accordance with the best interests of the child. To this end, States should set out, in law or policy, the principles according to which such conflicts may be settled. This must include a systematic impact assessment on the child’s rights and interests, which must always be a primary consideration. For example, this consideration would favour a resolution that results in the best developmental environment for the child.

- *Provide information on existing laws, regulations or practices for the establishment, recognition and contestation of legal parentage. Indicate specifically how the best interests of the child are factored in.*

N/A

- *Specify how the establishment of parentage occurs in the context of surrogacy arrangements. Indicate specifically how the best interests of the child are factored in.*

N/A