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Artificial Womb Technology and the Safeguarding of Children's Rights Through an Analysis of the Right to Identity

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Advanced L.L.M in International Children's
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Executive Summary

Advances in the field of assisted reproductive technology (hereinafter ART) has enabled many couples and single persons to grow a family while they would not have been able to do otherwise. The rising number of persons who wish to have access to such technology further increases the development of new forms of ART to satisfy the demand. One future advancement might be the full gestation of a child from conception until birth in an artificial womb instead of a human womb. The possibility that such technology becomes a reality will raise many questions concerning children's rights.

This thesis will focus on the right to identity of children that may be born through artificial womb technology (hereinafter AWT) and the research question that will guide this thesis is as follows: How can the child's right to identity be protected in the situation where a child is born through AWT? This thesis will present a child's rights based perspective and will review academic legal literature for most of it. The framework will be set at the international level. It will not aim to point to a specific country but rather to encompass all legal differences that countries may present. This thesis aims to ensure that the interests of children born via AWT, and their right to identity specifically, is the first priority of countries over the interests of parents, gamete donors and medical clinics supervising the technology. It will advocate for the setting of a legal framework that would ensure the protection of those children's right to identity.

In chapter 2, this thesis will present the concept of identity through the analysis of its meaning and what it encompasses in other fields of study: philosophy, anthropology and sociology. It will hold that children have multiple identities and that the addition of those identities forms the child's unique identity. It will also explore why the concept of identity and the right to identity are so meaningful for children. Afterwards, this chapter will explore the right to identity as it is protected at the international level and by the Convention on the Rights of the Child specifically. It will argue that the right to identity is not holistically protected and only some aspects of the child's right to identity are protected, leaving uncertain the enhancement of other aspects of the child's right to identity.

In chapter 3, this thesis will identify the different child's identities that might be impacted due to AWT. It will first look into the child's right to family identity and will hold that if no change are made in the law before AWT becomes a reality, children born via this technology will be parentless at birth. It will argue that those children should necessarily be genetically related to at least one of their social parents. It will also state that one aspect of children's right to family identity is the right to bond with their mother through gestation and that children born via AWT will be deprived of such right. Next, the child's right to biological identity will be analysed and it will state that children born via AWT, who happen to have a genetic parent distinct from one of their social parents, should have the right to have access to identifying information about their genetic parent and to their potential genetic siblings. Subsequently, the child's right to conceptional identity is explored and this thesis will hold that children born through AWT should have the right to know how they were conceived and gestated. It will further demonstrate that to ensure disclosure of such information by parents, a social worker could be appointed and a specific mention of 'extra information' should be added on the child's birth certificate and should refer to the child's biological and conceptional identity.

In chapter 4, this thesis will explore the moment from which children born through AWT should be entitled to the protection of their right to identity. It will demonstrate that recognising a right to life from conception will not necessarily ensure the enhancement of other rights and thus, it may not protect the right to identity from conception but only from birth. It will further present that the only way to protect the right to identity of children gestated within an artificial womb from conception will be the transposition of a Latin adage used to protect unborn children's right to inheritance to the protection of unborn children's right to identity. This Latin adage can be translated as considering an unborn child to be born every time it is in his interest. It will explain that this Latin adage will be applicable just after conception and on the condition that the child will later be born viable.

In chapter 5, this thesis will analyse how the right to identity could be protected in practice both at a national and an international level. First, it will explore the child's right to a legal identity and will argue that such right should be protected both as a stand-alone right and also as a means to protect the child's right to identity in its entirety. It will demonstrate that if the birth certificate of children born via AWT can have a specific mention of 'extra information' informing the child that he may have access to further information on a specific register, it will ensure the protection of the child's right to biological and conceptional identity. It will also hold that if the birth certificate acknowledges the parents of the child, it will ensure the protection of the child's right to family identity. Second, it will present the issue arising in cases where a child is born in a country where he does not live or where he does not have a nationality. It will acknowledge that children born through AWT abroad may not be able to get a nationality and their birth certificate may not be transcribed, putting at risk the safeguarding of their right to identity in its entirety. It will therefore advocate for the ratification of a convention by the Hague Conference that would protect and enhance the right to identity of children born through an artificial womb.

In light of the conclusion, this thesis will hold that the right to identity of children born through ART in general, and through AWT specifically, should be the primary consideration of States over the interests of parents, gamete donors and medical clinics practising such technologies. If States are not able to fulfil all the different requirements put forward in this thesis, they should not allow AWT and access to AWT abroad should be prohibited.

Keywords

Artificial Womb – (Right to) Identity – Child – Parents – Gamete Donation – Conception – Gestation – Beginning of right – Birth certificate – Birth registration

Overview of Main Findings

This thesis aims to advocate for the protection of the right to identity of children born via AWT. It presents a complete child's rights approach, which has not been done yet through academic literature in the context of AWT. By using such perspective, this thesis offers four main findings and contributions. First, this thesis presents a holistic understanding of the child's right to identity by analysing the concept of identity from different fields of study. It reaffirms the existence of two types of right to identity, the fixed identity and the dynamic identity. It also notes that the violation of one aspect of the child's right to identity leads to the violation of the child's right to identity in its entirety.

Second, this thesis focuses on the different aspects of the child's right to identity that may be impacted in the context of AWT and it reaffirms the importance of the child's genetic parents, both in the context of the child's right to a family identity and the child's right to biological identity. It also highlights the importance of siblings, and genetic siblings specifically. While academic discussion in the context of ART tends to focus on the importance of the child's right to know his genetic parents, it overlooks the importance of the child's right to know his genetic siblings as part of the child's right to biological identity. Furthermore, this thesis introduces the importance of the child's right to know how he was conceived and gestated as a stand-alone right, and not only as a means to ensure the disclosure of the child's right to biological identity.

Third, this thesis provides an understanding of which rights unborn children are entitled to. It also demonstrates that the right to life of unborn children neither guarantees that unborn children are granted other rights, nor that it is a prerequisite to be awarded other rights. This thesis rediscovers the use of a Latin adage for the unborn child's right to inheritance and expands its application for the unborn child's right to identity.

Fourth, this thesis highlights the importance of the protection of the child's right to a legal identity in order to protect the child's right to identity in its entirety. It also contributes by advocating for a Hague Convention which would enhance the rights of children born through ART in general and also through AWT specifically, and which would set in place an international register compiling all relevant information that those children should be aware of.

List of Abbreviations

ART	Assisted reproductive technology
AW	Artificial womb
AWT	Artificial womb technology
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discriminations against Woman
UN	United Nations
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
ADRDM	American Declaration on the Rights and Duties of Man
ACHR	American Convention on Human Rights
ACtHR	American Court on Human Rights
HCCH	The Hague Conference

1. Introduction

Having a child, having a family, has been seen by many as a goal in life that needs to be achieved to consider one's life fulfilled. However, for many reasons, some persons are not able to conceive or gestate a child on their own. It might be due to the pathological infertility of one or both partners,¹ or to the social infertility of a same-gender couple or a single person.² Medical science has tried to overcome those situations via assisted reproductive technologies (hereinafter ART). ART has been defined as "all treatments or procedures that include the in-vitro handling of both human oocytes and sperm or of embryos for the purpose of establishing a pregnancy."³ There exist various forms of ART which have been developed over the years. In 1973, it was the start of sperm donation. In 1978, doctors successfully implanted an embryo in a woman's womb,⁴ and it was the beginning of *in vitro* fertilisation (hereinafter IVF). In 1984, oocyte donation was permitted.⁵ In the 1980s, the practice of both traditional and gestational surrogacy started to rise and to be the object of different legislations.⁶ In the meantime, doctors were able to freeze embryos and gametes to use them upon request of the couple.⁷ Such technique, called cryopreservation, is also used to alleviate the consequences of cancer and other diseases which might destroy the gametes. The latest form of ART developed is referred to as mitochondrial transfer, where the child is conceived with two female gametes and one male gamete.⁸

The practice of ART has led to legal difficulties regarding children's rights, especially with regards to the recognition of the child's parents. While the child is normally legally and socially cared for by those who provided the gamete essential to his conception, the development of ART has made this simple matter a complicated one. For the purpose of this thesis, the legal parent is understood as the parent who is registered on the child's birth certificate and who has custody of the child. If any decision has to be taken in the name of the child, it is the legal parent who has the final say. The genetic parent, also called the biological parent, is understood as the parent who provided its gamete in order to conceive the child. The social parent refers to the parent who takes care of the child on a daily basis, even though he may neither be the child's legal nor genetic parent. The commissioning parent, also called the

¹ One of the partners might not be able to produce its gamete, those gametes are damaged, or the partner cannot gestate a child. See J. Huang & Z. Rosenwaks, In vitro fertilisation treatment and factors affecting success, *Best Practice and Research Clinical Obstetrics and Gynaecology* 26, at 778-780 (2012).

² One of the gametes necessary to conceive a child is missing and/or the couple cannot gestate a child. See M. Johnson, The biology of donation, in M. Richards et al. (Ed.), *Reproductive Donation*, at 13 (2012).

³ F. Zegers-Hochschild et al., International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology, *Fertility and Sterility*, Vol. 92, No. 5, at 1521 (2009), available at http://www.who.int/reproductivehealth/publications/infertility/art_terminology2.pdf?ua=1 (last accessed 31-05-2017).

⁴ E. Basatemur & A. Sutcliffe, Follow-up of Children Born after ART, *Placenta* 29, at S135 (2008).

⁵ N. Elster, Egg Donation for Research and Reproduction: The Compensation Conundrum, in M. Bratcher Goodwin (Ed.), *Baby Markets, Money and the New Politics of creating families*, at 226 (2010).

⁶ Surrogacy refers to the practice where a woman gestates a child who will not be raised by her but by another person. In traditional surrogacy, the surrogate is also the genetic mother. Gestational surrogacy refers to the implantation of an embryo which has no genetic link with the surrogate mother. See A. Nakash & J. Herdman, Surrogacy, *Journal of Obstetrics and Gynaecology*, Vol. 27:3, at 246-248 (2007).

⁷ S. Reinblatt et al., Fertility preservation for cancer patients: a review of current options and their advantages and disadvantages, in J. Schenker (Ed.), *Ethical Dilemmas in Assisted Reproductive Technologies*, at 223 (2011). See also T. Mukaida et al., Vitrification of oocytes, embryos and blastocysts, *Best Practice and Research Clinical Obstetrics and Gynaecology* 26, at 790 (2012).

⁸ J. McCandless & S. Sheldon, Genetically challenged: the determination of legal parenthood in assisted reproduction, in T. Freeman et al. (Eds.), *Relatedness in Assisted Reproduction*, at 71 (2014). See also I. Sample, World's first baby born from new procedure using DNA of three people, *The Guardian* (2016) available at <https://www.theguardian.com/science/2016/sep/27/worlds-first-baby-born-using-dna-from-three-parents> (last accessed 09-06-2017).

intended parent, is understood as the parent who solicited the use of one form of ART in order to have a child. Due to gamete donation, genetic and social parents are distinguished and the law recognises the social parents as the child's legal parents.⁹ With surrogacy, the legal parent at birth is not the one who will socially care for the child. It is via a judgment or a contract that the social parent becomes the child's legal parent.¹⁰ Thus, the recognition of the child's legal parents is not based on genetics anymore, but on intention.¹¹ The parents who intended to have a child, who commissioned a child, are recognised as the child's legal parents.

The fast growth in the area of ART over the last decades tends to suggest that other advances are to be expected, bringing with them other legal problems that will have to be overcome in order to protect children's rights. One of the next advancements in the field of ART might be the creation of an artificial womb to gestate children from conception until birth. If the artificial womb technology (hereinafter AWT) becomes a reality, the unborn child will not be gestated within a human being but within a machine, an incubator.¹² The use of AWT, also called ectogenesis, would have three purposes:

- To avoid miscarriage and premature birth: if a mother is about to have a miscarriage or to give birth prematurely, the child would be taken from the mother's womb and placed in the artificial womb until the child has grown enough, as with a normal pregnancy term, to be able to live on his own.¹³
- To avoid abortion: the embryo would be taken from the womb of the woman who wants to abort and placed in the incubator to gestate. An adoption process could be started.¹⁴
- To avoid surrogacy: infertile couples or persons who cannot gestate a child naturally would go through IVF and the child would be gestated in the artificial womb from conception until he can live without the assistance of the machine.¹⁵ It will be referred to as commissioned AWT.

There are reasons to believe that this technology will become a reality sooner rather than later as doctors have recently been able to gestate lamb fetuses for 4 weeks in an incubator and believe that such technology will be available to unborn children within three to five years.¹⁶ Considering that doctors will try to go further in this particular field, the full gestation of an unborn child outside a human womb, but within an artificial womb (hereinafter AW), may become possible. It will also potentially replace surrogacy. Surrogacy has been one of the forms of ART that has brought the most problems and left many children born through surrogacy in legal limbo. Due to its connection with surrogacy, it is commissioned AWT that appears as the most crucial form of AWT to be analysed. Thus, commissioned AWT will be the particular focus of this study. This form of AWT has already been commented on by scholars and doctors but few, if none, have done it from a children's rights perspective. Hence, this thesis will only approach this technology through a children's rights perspective. For the purpose of this work, the child conceived and born via AWT will be referred to as Arthur. The use of AWT will therefore be analysed through the perspective of Arthur's rights.

⁹ J. Harper et al., The end of donor anonymity: how genetic testing is likely to drive anonymous gamete donation out of business, *Human Reproduction*, Vol. 31, No. 6, at 1135 (2016).

¹⁰ E. Nelson, Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy, *The Journal of Law, Medicine & Ethics*, Vol. 41(1), at 243 (2013).

¹¹ Although some countries base it on genetics for at least one parent and on intention for both parents. See for example in South Africa, Constitutional Court of South Africa, *AB and Another v. Minister of Social Development*, ZACC 43, Case CCT 155/15, para. 122 (2016) [hereinafter AB case].

¹² J. Hendricks, Not of Woman Born: A Scientific Fantasy, *Case Western Reserve Law Review*, Vol. 62:2, at 403 (2011) [hereinafter Hendricks].

¹³ M. Lupton, The role of the artificial uterus in embryo adoption and neonatal intensive care, *Medicine and Law*, Vol. 18, at 623-624 & 626 (1999) [hereinafter Lupton].

¹⁴ P. Singer & D. Wells, Ectogenesis, in S. Gelfand & J. Shook (Eds.), *Ectogenesis, Artificial Womb Technology and the Future of Human Reproduction*, at 12 (2006).

¹⁵ *Id.*, at 11.

¹⁶ H. Devlin, Artificial womb for premature babies successful in animal trials, *The Guardian* (2017) available at <https://www.theguardian.com/science/2017/apr/25/artificial-womb-for-premature-babies-successful-in-animal-trials-biob-ag> (last accessed 09-06-2017).

Without a governing legal framework set in place when AWT becomes a reality, possible problems and questions may arise: From which moment will Arthur be considered as human's rights bearer? From conception? When he is released from the incubator? At another point? To which rights is Arthur entitled before his birth? Will Arthur develop normally in the artificial womb? If Arthur presents an impairment while in the artificial womb, would Arthur's parents or doctors be allowed to stop his gestation? Will Arthur be discriminated against based on his birth status? Is it in Arthur's best interests to be born from AWT? Should Arthur's parents go through an approval process for suitability by the national authorities or by a court, as is the case for adoption and in some countries that allow surrogacy? Will the permission to be born via AWT lead to the exploitation and sale of Arthur by allowing 'baby industries'? When would Arthur be considered to be born? When would his birth be registered? Who would be the parents of Arthur? Will Arthur have the right to know all his parents involved in his conception? How will Arthur's right to identity be assessed?

In the context of surrogacy, the child's right to identity has been the right most at stake due to several reasons, one of them being that the Convention on the Rights of the Child (hereinafter CRC) has not been able to catch up with medical advances, science being faster than legislation. This has led countries to decide on their own how they wanted to handle the rights of children born through surrogacy. The risks that the child's right to identity will also be infringed in the context of AWT are even higher. Thus, this thesis will concentrate exclusively on the child's right to identity in the context of commissioned AWT.

This thesis focuses on the question of how the child's right to identity can be protected in the situation where a child is born through AWT. In order to be able to answer this question, several subsidiary questions need to be answered first: What does the right to identity encompass? Which aspect of the AW born child's right to identity will be impacted? How will the right to identity be impacted in the context of commissioned AWT? From which moment should the AW born child's right to identity be protected? How will the right to identity be impacted in the context of international AWT? How can the child's right to identity be secured in a legal instrument before AWT actually exists?

This research aims to ensure that the child's right to identity will be safeguarded in the event that AWT becomes a reality. This thesis will advocate for the setting of a legal framework from a child's rights perspective in the matter of AWT. Such a framework would aim to prevent that the legal limbo situation where surrogate born children were, and are still left in, does not occur in the case of children born through AWT.

As AWT does not exist yet, it will be necessary to analyse the actual international legal framework, with regards to the child's right to identity, and determine if Arthur would actually be protected or which steps would need to be achieved in order to actually protect Arthur. The right to identity will be addressed in the framework of international law and the CRC specifically. The regional and national level will exclusively be analysed when relevant. Because AWT does not exist yet, this thesis will refer to the existing framework on ART, including IVF, cryopreservation and surrogacy. Parallels with adoption and natural pregnancy will also be made when relevant. Comparisons will be carried out in order to assess whether Arthur's right to identity should be protected the same way as it was done in those different contexts or whether an original approach should be initiated. The child's right to identity encompasses many aspects but only those that might be affected by AWT will be explored in this thesis. Hence, this thesis will focus on Arthur's right to family, biological, conceptional, and legal identities. To some extent, Arthur's right to genetic and national identity will also be touched upon. Explanation of those different aspects will be one of the foci of chapter 2. Research undertaken for this thesis has been based on relevant legal and non-legal reports, laws, and academic literature. While most of the academic literature read is legal, some is also philosophical, anthropological, social and medical. Bringing other disciplines into this work was essential in order to holistically embrace the child's right to identity, its meaning and to fully comprehend the rights at stake in the context of ART, and AWT specifically.

This thesis has been divided in 6 chapters. After the introduction, chapter 2 will introduce the concept of identity based on different disciplines. It will further be explained why the child's identity should be entitled to protection and how the child's right to identity is comprehended at the international level. This chapter will finish by explaining how such right might be impacted in the context of AWT and which aspects of the right to identity are particularly at stake. Chapter 3 will explore how the use of AWT will impact on different aspects of the child's right to identity. A particular focus will be given to the child's right to family identity, to biological identity and to conceptional identity. For each of those aspects of the child's right to identity, it will be explained why those elements are so important and deserve protection, how the international framework currently takes into account and protects those aspects, how AWT can impact the safeguarding of such right, and what should be done to ensure that those aspects of the right to identity of children born through AWT are protected. Chapter 4 will analyse when children conceived via AWT should be entitled to the protection of their right to identity. It will start by considering the child's right to life as a starting point to be awarded other rights but will not be able to draw conclusion from there. Rights and/or specific protections given to unborn children will therefore be scrutinized and will help to determine how the right to identity could be protected from conception without calling into question the beginning of the child's right to life. Chapter 5 will be divided between the use of AWT at a national or at an international level. Regarding the former, the child's right to a legal identity will be identified as both a right of children and as a means to protect the right to identity of children born via AWT. Regarding the international level, further possible violations will be evaluated, which will lead to the conclusion that an international Convention should be ratified in order to ensure that the right to identity of children born through AWT will be protected and enhanced worldwide. Finally, chapter 6 will conclude this thesis by highlighting its main findings.

2. What is the Child's Right to Identity?

2.1. Introductory Elements

Etymologically, the word 'identity' originates from the Latin language and would characterise the "quality or condition of being the same."¹⁷ Nowadays, the meaning of identity has expanded. Not only does it still refer to its original meaning, but it also signifies "the state of having unique identifying characteristics held by no other person or thing."¹⁸ While the first meaning tends to relate to 'similarities', its second meaning relates to 'differences'. Identity hence reflects antipodal concepts, which makes it difficult to exhaustively grasp it. Over history, the concept has evolved and is still not set in stone. Each study – philosophy, anthropology, sociology – has its own interpretation of the concept of 'identity'. This diversity in acknowledging what identity is necessarily has consequences at a legal level. The right to identity is safeguarded in some legal instruments¹⁹ but it is not always clear what they refer to because the concept of identity itself is not clear. Hence, the need to understand more holistically this concept is fundamental to further be able to discern which elements of identity are covered within the right to identity and which elements of identity are protected by law. Indeed, how can the right to identity be protected if no one knows what the concept of 'identity' is and what it embraces? In the context of AWT, it will also help to find out which elements of identity are triggered, are at risk of being violated and how they should be protected. Hence, an insight of each different field will enable a more comprehensive understanding of the concept of identity, and thus, a better understanding of the right to identity.

¹⁷ Oxford English Dictionary, "identity, n.", *Oxford University Press* (2017), available at <http://www.oed.com/view/Entry/91004?redirectedFrom=identity> (last accessed 04-05-2017).

¹⁸ M. Giroux & M. De Lorenzi, "Putting the child first": A necessary step in the recognition of the right to identity, *Canadian Journal of Family Law*, Vol. 27, at 59 (2011) [hereinafter Giroux & De Lorenzi].

¹⁹ United Nations, General Assembly, *Convention on the Rights of the Child*, articles 7 & 8 (1989) [hereinafter CRC]. See also United Nations, General Assembly, *International Covenant on Civil and Political Rights*, articles 16 and 24 (1966) [hereinafter ICCPR]. See further part 2.4.

2.2. Definition and Scope of the Concept of Identity

2.2.1. Identity within the Different Fields of Study

2.2.1.1. Identity and Philosophy

In philosophy, the first study on identity goes back to Socrates who analysed 'identity' as "to know thyself."²⁰ This approach was compared to other concepts, and in particular to the concepts of mortality and finitude.²¹ At that time, the necessity to 'know who you are' would relate to the time being and to what each one can achieve from that time being. Later on, Descartes understood the concept of identity as compared to things and in the abstract, the question turning from "who am I?" to "what can I know for certain?".²² One can only identify with the things one knows. Other philosophers go back to the first idea of identity, but have different opinions with regards to what identity needs to be compared to. For Locke, identity and 'knowing who you are' is compared to the consciousness of the person. A person acts and thinks by echoing its past actions and thoughts.²³ By extension, this process builds a person's identity. For Hegel, identity has to be compared to others. For him, identity is constructed by assimilating oneself as part of a group, a society, and thus also by identifying oneself as being different from other groups.²⁴ Kant believes that the construction of this identity vis-à-vis others must be through communication, while Nietzsche considers that it must be through history and social relations,²⁵ and Marx through politics and ethics.²⁶

In contemporary philosophy, Erikson defines two categories of identity. Personal identity refers to the idea of being the same as others, and thus being part of a group at a specific time. Ego identity refers to being conscious of one's personal identity, which helps one to interact with others in one's own way.²⁷ The concept of identity is therefore a continuous process which need to be achieved.²⁸ For Taylor, identity is a developing process which flourishes due to dialogue and struggles with others, from early childhood through a lifetime.²⁹ From there, he gives a comprehensive approach to the concept of identity as he takes into account three perspectives: self-knowledge, self-affirmation, and national identity.³⁰ Self-knowledge refers to the values a person relates to. Self-affirmation refers to the position and role of someone within society, which relates to what a person wants to achieve during his life. National identity refers to the common identity of a specific group, like a language within one country or a particular behaviour within one community. For Korsgaard, the interrelation between oneself and others enables people to know who they are in practice, consciously.³¹ Parfit and Nagel have a different approach of the concept of identity. For them, everyone is unique simply due to his or her genetic and

²⁰ E. Ramsey, Philosophical History of Identity, in R. Jackson (Ed.), *Encyclopedia of Identity*, at 556 (2010) [hereinafter Ramsey].

²¹ *Id.*, at 557.

²² *Id.*

²³ K. Barber & J. Gracia, *Individuation and Identity in Early Modern Philosophy: Descartes to Kant*, Albany N.Y.: State University of New York Press, at 116 (1994).

²⁴ Ramsey, *supra* note 20, at 558.

²⁵ *Id.*

²⁶ *Id.*, at 559.

²⁷ E. Erikson, *Identity, Youth and Crisis*, New York, N.Y.: Norton, at 50 (1968).

²⁸ T. Luhrmann, Identity in Anthropology, in J. Wright (Ed.), *International Encyclopedia of the Social & Behavioral Sciences*, 2nd ed., Vol. 11, at 532 (2001) [hereinafter Luhrmann].

²⁹ Y. Ronen, Redefining the child's right to identity, *International Journal of Law, Policy and the Family* 18, at 149 (2004) [hereinafter Ronen].

³⁰ S. Langlois, Identity Movements, in J. Wright (Ed.), *International Encyclopedia of the Social & Behavioral Sciences*, 2nd ed., Vol. 11, at 544 (2015) [hereinafter Langlois].

³¹ H. Lillehammer, Who cares where you come from? Cultivating virtues of indifference, in T. Freeman et al. (Eds.), *Relatedness in Assisted Reproduction*, at 100 (2014) [hereinafter Lillehammer].

biological origins. In order for one to be able to answer the question “who am I?”, it is absolutely fundamental to know “the basic facts about my genealogical origins,” including “my conception and gestation.”³²

Overall, the understanding of identity within the field of philosophy is quite diverse but also already shows elements of convergence. Identity involves two dimensions: a fixed one and a dynamic one. The first dimension is unique to a person and is not susceptible to change over time. The second dimension is fed by the former and by interactions with others or within a group, conferring a feeling of sameness or difference. Such dimensions have been characterised by Ronen as “the need to be” and “the need to become”.³³ These interactions aim to resolve the equation of knowing “who am I?” and can only be achieved if one is conscious of this process.

2.2.1.2. Identity and Anthropology

In anthropology, identity was rarely understood as the identity of oneself but as the identity of a group.³⁴ Identity was mostly understood as the consciousness of having similar characteristics within a group.³⁵ In Roman society, the group was understood as the society at large and the wish to be promoted within the elite group. It was also embracing a group sharing one common culture, religion or traditions.³⁶ In Greek society, the group was understood as those sharing citizenship rights, and thus, those participating in the political life of the city. Historically, individuals were sharing a unique identity that would define the group and not the individual.³⁷ Over time, the question of the self has also been incorporated within anthropological research, but the central role of the group is still predominant in the understanding of identity in anthropology. With globalisation, individuals are able to discover other values, cultures, traditions, with which they may want to identify.³⁸ Instead of starting from the group which will define individuals, it is now individuals who want to share something who create and define the group. Individuals may also identify themselves in more than one group or, on the contrary, identify themselves as being different from one group.

The concept of identity has slipped from a unique identity, shared within a group, to multiple identities, some of them being purely specific to one person. While it is acknowledged that individuals can have more than one identity, it is also defended that individuals construct their identity based on their interactions with their social environment – such as their families – and with the society at large.³⁹ This further implicates that even though individuals can determine some elements of their identity, they are also constrained by the environment they are born in. If individuals want to identify with another group, culture, or tradition, they necessarily have to be aware of it and they have to take actions themselves.⁴⁰ Luhmann goes even further as she interprets the concept of identity as the fact of being conscious of one’s differences from others and being active in the process.⁴¹ Her view is much more approximate to the philosophical views of identity.

Overall, the comprehension of identity within anthropology does not differ too much from philosophy.

³² Lillehammer, *supra* note 31, at 103.

³³ Ronen, *supra* note 29, at 150.

³⁴ M. Sökefeld, Debating Self, Identity, and Culture in Anthropology, *Current anthropology*, Vol. 40, No. 4, at 419 (1999) [hereinafter Sökefeld].

³⁵ *Id.*, at 417.

³⁶ K. Vandorpe, Identity, in C. Riggs (Ed.), *The Oxford Handbook of Roman Egypt*, at 18 (2012) [hereinafter Vandorpe].

³⁷ Luhmann, *supra* note 28.

³⁸ C. Troup, Civil Identity, in R. Jackson (Ed.), *Encyclopedia of Identity*, at 80 (2010).

³⁹ L. Frey & S. Konieczka, Group Identity, in R. Jackson (Ed.), *Encyclopedia of Identity*, at 317 (2010).

⁴⁰ M. Sabatello, Children’s Bioethics In The Convention On The Rights Of The Child: Historical Overview Of The Drafting Process, in M. Sabatello, *Children’s Bioethics*, at 180 (2009) [hereinafter Sabatello].

⁴¹ Luhmann, *supra* note 28, at 534-535.

The idea of the group is still predominant, with the idea of being the same or different from others. However, anthropology brings a new perspective on identity as it does not constrain the concept with two dimensions but on the contrary, allows multiple possible identities for oneself.

2.2.1.3. *Identity and Sociology*

In sociology, identity was mostly focused on oneself but slightly refocused the concept within the group.⁴² Nowadays, identity also refers to “knowing who you are.”⁴³ As in anthropology, it is considered in sociology that individuals have multiple identities. Kidd distinguishes three forms of identity: individual identity, social identity and cultural identity.⁴⁴ Individual identity refers to how one sees oneself as unique. Social identity is how one identifies with a specific group. Cultural identity is how one belongs to a specific ethnic or cultural group. While the individual needs to be active in defining the first two forms of identity, the latter is fixed. In other respects, Langlois considers that the two dimensions of identity – fixed and dynamic – are so linked nowadays that they cannot be separated from one another.⁴⁵ Deaux believes that individuals have as many identities as there are characteristics or categories.⁴⁶ She defines each identification to a category as a social identity. It is the identification to each of those characteristics that further defines a person as unique. Hence, both the fixed and the dynamic dimension of identity are intertwined. Moreover, a person can identify himself with one category of social identity at one moment and identify with another one at another moment.⁴⁷ Therefore, identity is not only a continuous process but is also a fluctuating one. It is also acknowledged that depending on who the individual is interacting with, he may put one (or more) identity forward.⁴⁸

Overall, the sociologist movement follows what has been said in philosophy and anthropology but also brings the reasoning even further in completely diversifying the number of identities an individual has.

2.2.1.4. *Holistic Comprehension of Identity*

From the different views that were expounded, identity should be defined as the recognition of an individual for who he is, acknowledging all his moral, physical, psychological, cultural, societal – and so on – characteristics. The concept of identity tends to recognise as many identities a person could possibly have so that the collection of all of them provides a unique identity that would characterise one person. Hence, a person – and by extension, a child – should have a cultural identity, an ethnic identity, a religious identity, a family identity,⁴⁹ a political identity, a biological identity,⁵⁰ a genetic identity,⁵¹ a national identity,⁵² a civic identity,⁵³ a social identity,⁵⁴ a gender identity, among others.⁵⁵ All those

⁴² Vandorpe, *supra* note 36, at 2.

⁴³ W. Kidd, *Culture and Identity*, Basingstoke: Palgrave/MacMillan, at 2 (2002).

⁴⁴ *Id.*, at 26.

⁴⁵ Langlois, *supra* note 30, at 543.

⁴⁶ For instance, everyone identifies with an ethnicity, a gender, a nationality, a culture, etc. If someone does not identify in one category, it is also a marker of not belonging. See K. Deaux, Social Identity in Sociology, in J. Wright (Ed.), *International Encyclopedia of the Social & Behavioral Sciences*, 2nd ed., Vol. 22, at 319 (2015) [hereinafter Deaux].

⁴⁷ Sökefeld, *supra* note 34, at 423.

⁴⁸ Deaux, *supra* note 46, at 322. See also Langlois, *supra* note 30, at 543.

⁴⁹ It refers to knowing who cares for one and to who one identifies as one's family.

⁵⁰ It refers to knowing who is biologically and genetically related to one.

⁵¹ It refers to knowing one's genetic particularities, which can have medical consequences.

⁵² It refers to having a nationality.

⁵³ It refers to having citizenship and being a citizen of one country.

⁵⁴ It refers to how oneself interacts with the society at large he is living in.

⁵⁵ For a non-exhaustive list of elements of identity, see R. Hodgkin & P. Newell, Article 8, *Implementation Handbook*

identities can be re-categorised in broader categories as long as no identity is left out. For such re-categorisation, the division between a fixed identity and a dynamic identity is particularly relevant. For one to be able to build one's identity, it is necessary to be aware of all elements of one's own identity that cannot be changed.

Furthermore, while the importance of conception and gestation has been highlighted as being an important element of the child's biological identity,⁵⁶ Bayle goes even further as he acknowledges conception and gestation has being one full distinct identity of the child. He refers to it as "identité conceptionnelle", which can be translated as the child's "conceptional identity."⁵⁷ According to him, the way the child was conceived and gestated will necessarily impact on the child's identity and his relationship to the world and society. Hence, it can be said that everything related to what happened before birth forms another identity of the child which will be referred to as the child's conceptional identity.

If the three fields of study – philosophy, anthropology and sociology – have acknowledged diverse identities, none has touched upon an individual's legal identity. However, it is the author's opinion that if individuals have as many identities as there are categories, individuals also have a legal identity. An individual would identify with such identity depending on whether a society legally recognises him or not. By taking into account all aspects of a person's identity, it actually acknowledges the person's existence.⁵⁸ If an individual is recognised in the world as being born and as being on earth, he should thus enjoy a legal identity. Such identity mostly lies in the delivery of birth certificates.

2.2.2. Necessity to Know One's Own Identity

The need for an individual to know his identity lies in the second question that was raised by philosophers: "what can I do during my lifetime?" Individuals need to answer such questions to give meaning to their life. However, individuals can only answer this question if they are given all the keys to answer the first question: "who am I?" Keys are all the characteristics that define an individual. Missing one of the keys may not automatically have consequences for the individual to be able to decide what he wants to achieve during his lifetime. But missing one of the keys can also, on the contrary, have detrimental consequences for a person. Hence, no one should be deprived of the possibility to know all the characteristics and elements that (may) define a person.

The necessity to know one's own identity has shown to be particularly relevant in the context of adoption and ART. Research on adopted children proved that the less information they were given on their origins, the more problems they had; the later they were told about their origins, the worse the consequences for their life were.⁵⁹ It has also been acknowledged that adopted children who knew about their origins were more positive about themselves, which necessarily influenced their identity.⁶⁰ Research on children who were born from IVF with donor insemination felt "shock" and "grief" when they were told about their origins. They also felt they were missing parts of their biological identity.⁶¹ Those who were refused the possibility to know about their origins suffered psychologically.⁶² On the contrary,

for the *Convention on the Rights of the Child*, 3rd ed., at 115 (2007) [hereinafter Hodgkin & Newell].

⁵⁶ See the views of Parfit and Nagel in that regard in part 2.2.1.1. See Lillehammer, *supra* note 31, at 103.

⁵⁷ B. Bayle, La société procréatique, entre mythe et réalité. Apport de la psychopathologie de la conception humaine, *Neuropsychiatrie de l'enfance et de l'adolescence* 55, at 335 (2007).

⁵⁸ C. Henaghan, *The genealogical jigsaw puzzle – a missing piece? The right to know for A.I.D. children*, PhD Thesis, Durham University, at 43-44 (2004) [hereinafter Henaghan].

⁵⁹ G. Stewart, Interpreting the Child's Right to Identity in the U.N. Convention on the Rights of the Child, *Family Law Quarterly*, Vol. 26 No. 3, at 227-228 (1992) [hereinafter Stewart].

⁶⁰ C. Breen, Human-assisted reproduction and the child's right to identity, in C. Breen, *Age discrimination and Children's rights, Ensuring Equality and Acknowledging Differences*, at 85 (2006) [hereinafter Breen].

⁶¹ Henaghan, *supra* note 58, at 43.

⁶² AB case, *supra* note 11, para. 14 (c).

children that were told about their origins could “complete” their identity more entirely.⁶³ Consciously not telling a child about his origins can possibly seriously affect his ability to construct his dynamic identity.⁶⁴ Hence, no elements that characterise a child and that will help him build his identity should ever be kept secret or vague from him.

Knowing one’s own identity is also relevant at a health level. It has been acknowledged that individuals also have a genetic identity, encompassing any genetic information that might be detrimental to their health.⁶⁵ Such identity is fixed. In cases where children are denied that information because one of their biological parents is unknown, it might affect their health and by extension their genetic identity.

The necessity to know one’s own identity is even more crucial during childhood. The construction of identity is a continuous process that starts from the child’s conception until his death. It explains why the concept of identity is usually understood from a lifetime perspective. However, such building process is even more fundamental and prominent during childhood for two reasons.⁶⁶ First, it is during childhood that individuals develop the most. Second, everything that happens during childhood will have an impact through the person’s lifetime. Therefore, not only should the concept of identity be understood from a lifetime perspective, but it should also be comprehended from a children’s perspective. It is fundamental to be aware that all elements which can affect a person’s identity should never be kept secret or unknown during childhood because it can have an impact later on. Not telling a child about an information that may affect him during his childhood and that may impact the construction of his identity is said not to be in the child’s best interests.⁶⁷

2.2.3. Identity in the context of AWT

The different fields of study explored have highlighted that individuals may rely upon, or put forward, one or some of their identities specifically depending on what or who they are confronted with. For instance, Arthur will necessarily identify with a gender, and thus construct his gender identity. However, the use of AWT does not affect Arthur’s gender identity because such technology does not have any impact on it. Therefore, only Arthur’s identities that might be affected due to AWT will be explored.

Being born through AWT is a fact relating to Arthur’s conception and gestation. Hence, it is necessarily a characteristic of Arthur’s identity that is impacted by AWT. It will affect Arthur’s conceptional identity as he will not be born within a human uterus. It will also affect Arthur’s family identity because, as will be demonstrated, Arthur will be born without legal parents. Being born from such technology could also have an influence on other elements of Arthur’s identity. Indeed, it could affect Arthur’s religious identity if such technology is accepted by it or, on the contrary, if it is not. It could affect Arthur’s biological identity if his social parents are not his biological parents. It could affect Arthur’s genetic identity if one of his biological parents has a disease, for instance. It could affect Arthur’s social identity if the society sees him as different because he was born differently. Similarly, it could also affect Arthur’s social identity if he sees himself as different. It could affect Arthur’s legal identity if his birth certificate does not transcribe the truth about his origins and about his parents. It could also affect Arthur’s national identity if he is born in a country where his parents do not have the nationality of that country.

If those identities are affected, there is a risk that Arthur will have difficulties in constructing his

⁶³ M. Crawshaw et al., Can the UK’s birth registration system better serve the interests of those born following collaborative assisted reproduction?, *Reproductive BioMedicine and Society Online* 4, at 2 (2017) [hereinafter Crawshaw et al.].

⁶⁴ Lillehammer, *supra* note 31, at 104.

⁶⁵ Stewart, *supra* note 59, at 231.

⁶⁶ M. Bissoli, Development of children’s personality: the role of early childhood education, *Psicologia em Estudo*, Vol. 19(4), at 593-594 (2014).

⁶⁷ C. Breen, Poles apart? The best interests of the child and assisted reproduction in the antipodes and Europe, *The International Journal of Children’s Rights* 9, at 165 (2001). See also Giroux & De Lorenzi, *supra* note 18, at 71.

identity. From those identities, two will necessarily be impacted: his conceptional and family identities. Hence, those identities will be examined in more depth through this thesis.⁶⁸ All other identities may only be affected if they apply to Arthur in particular. Indeed, if Arthur does not identify with any religion or his religion does not strictly prohibit AWT, AWT will not affect Arthur's religious identity. The same goes for Arthur's social identity. If Arthur's social and biological parents are the same, his biological identities will not be impacted. The author believes that Arthur's biological identity has more chances to be negatively affected than Arthur's religious and social identity. This identity has shown to be really important for adopted children and children born from IVF with donor insemination, and there are chances that such identity will be as important for Arthur. Therefore, Arthur's biological identity will be examined.⁶⁹ Arthur's genetic identity might also be affected if he does not know who his biological parents are and if he has no access to a file registering the potential genetic particularities he could have. Because Arthur's genetic identity follows from his biological identity, it appears more interesting to focus on his biological identity. Thus, genetic identity will not be explored in more depth in this thesis. Moreover, the author believes that a satisfactory way for Arthur to know about his conceptional, genetic and biological identities, and to protect his family identity, can be achieved through his legal identity. Therefore, Arthur's legal identity also deserves attention through this thesis.⁷⁰ Finally, if AWT is performed abroad, it might also affect Arthur's national identity, because he might be denied the granting of a nationality. National identity is intrinsically linked to legal identity,⁷¹ which is why national identity will not be dedicated a specific section in this thesis in order to put more emphasis on Arthur's legal identity.

The two dimensions of identity are also fundamental for Arthur and will thus be touched upon through this thesis in order to highlight the important role that identity plays in Arthur's life. Indeed, Arthur will construct his dynamic identity based on what and who he interacts with, but also based on his fixed identity. While the dynamic dimension of identity might not be so relevant for unborn and new-born Arthur, his fixed identity is of utmost importance as it will have an impact on his dynamic identity while he grows up. Hence, if elements of his fixed identity are kept secret from him, he will necessarily not be able to completely and harmoniously build his dynamic identity when he matures. Hence, the fixed identity of Arthur needs to be protected from conception.

2.3. From Concept to Right: A Need for Protection

Concepts are transcribed as rights whenever they are so important for an individual to flourish and develop.⁷² When a concept is intrinsic to a person, it needs to be protected; this is achieved through law and human rights. Indeed, human rights are the "protection of our human standing."⁷³ Individuals can comprehensively know who they are and know what they want to achieve during their lifetime through the concept of identity. It is therefore necessary to raise the concept of identity to a right – the right to identity – in order to ensure its protection.

Everyone has the exact same entitlement to the protection of rights. It is also sometimes understood that those who have "specific threats" are entitled to special human rights.⁷⁴ In the case of Arthur, his conceptional identity would be specifically threatened, as well as his biological, family, genetic, legal and national identities. Like any other child, Arthur has a right to identity; a right which also needs to be protected if it is violated. The difference between Arthur and any other child is that Arthur may need

⁶⁸ See parts 3.2 and 3.4.

⁶⁹ See part 3.3.

⁷⁰ See chapter 5.

⁷¹ For instance, the grant of a nationality to a child usually follows from the issuance of his birth certificate. See J. Doek, *The CRC and the Right to Acquire and to Preserve a Nationality*, *Refugee Survey Quarterly*, Vol. 25, Iss. 3, at 27 (2006) [hereinafter Doek 2006 (1)].

⁷² R. Floyd, *Why we need needs-based justifications of human rights*, *Journal of International Political Theory*, Vol. 7, No. 1, at 110 (2011).

⁷³ *Id.*, at 105.

⁷⁴ *Id.*, at 111.

more protection in order for him to ensure that his right to identity is safeguarded at the same level as his peers. According more protection to Arthur's right to identity would not implicate that other children's right to identity would not have to be protected, but that the specificity of each child necessarily has to be taken into account to ensure that every children's right to identity is respected equally. Hence, Arthur should not be granted a special right to identity but a special protection of his right to identity.

2.4. Definition and Scope of the Child's Right to Identity

The right to identity is protected by international law. It is explicitly mentioned in article 8 of the CRC. Article 7 of the CRC and article 24 (2) (3) of the International Covenant on Civil and Political Rights (hereinafter ICCPR) implicitly refer to it because they touch upon birth registration and nationality, which respectively refer to legal and national identities. The Human Rights Committee (hereinafter HRC) establishes that article 24 (2) (3) of the ICCPR "is designed to promote recognition of the child's legal personality,"⁷⁵ which acknowledges the child's legal identity. Article 7 of the CRC also takes into account the child's right to know and be cared for by his parents, which refers to biological and family identities. Article 16 of the ICCPR introduces the right of everyone to "recognition everywhere as a person before the law," which should be interpreted as a legal identity.⁷⁶ The presentation of those different articles highlights two elements. First, while the right to a legal identity is recognised as a right for anyone, all other aspects of the right to identity are only recognised for children. The right to identity is unique to children,⁷⁷ which shows how crucial the concept of identity is during childhood. Second, the right to identity is recognised by international legal instruments, but it is mostly done implicitly. Due to that, it is not absolutely clear what the right to identity encompasses. Consequently, articles 7 and 8 of the CRC will be closely analysed through this section in order to have a better understanding of which aspect of the child's right to identity international law protects. Because the ICCPR reflects upon the same aspect of the child's right to identity as the CRC⁷⁸ but to a lesser extent, only the CRC will thus be explored.

Article 7 of the CRC⁷⁹ finds its origins in the right to a name and nationality. While those are elements of children's identity, they only embrace a narrow concept of identity. Nationality was the most debated element and states finally agreed on the right to acquire a nationality in order to follow the letter of article 24 (3) of the ICCPR.⁸⁰ Afterwards, the right to registration was introduced and accepted.⁸¹ Subsequently, Muslim countries introduced the idea of the "right from birth to know and belong to his parents." The right to know parents was justified by Egypt as being as important as the right to a name and a nationality for children because it ensures "psychological stability" and the development of children's personality. The justification made by the State of Egypt is interesting because it reflects what most philosophers and anthropologists understand of the concept of identity.⁸² This justification appears

⁷⁵ R. Hodgkin & P. Newell, Article 7, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd ed., at 97 (2007) [hereinafter Hodgkin & Newell].

⁷⁶ J. Doek, Article 8: The Right to Preservation of Identity, Article 9: The Right Not to Be Separated from His or Her Parents, *A Commentary on the United Nations Convention on the Rights of the Child*, Brill, at 5 (2006) [hereinafter Doek 2006 (2)].

⁷⁷ S. Besson, Enforcing the Child's Right to Know her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights, *International Journal of Law, Policy and the Family* 21, at 143 (2007). See also Sabatello, *supra* note 40, at 57.

⁷⁸ Hodgkin & Newell, *supra* note 75.

⁷⁹ CRC, *supra* note 19, article 7 (1); which reads:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

⁸⁰ Doek 2006 (1), *supra* note 71, at 26.

⁸¹ S. Detrick & J. Doek, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"*, Nijhoff, at 127 (1992) [hereinafter Detrick & Doek]. See also Doek 2006 (1), *supra* note 71.

⁸² For an explanation of the philosophical and anthropological views of the conception of identity, see parts 2.2.1.1 and 2.2.1.2.

accurate. However, other States argued that such right could not always be claimed because they recognised the mother's right to secret adoption and IVF with anonymous donor insemination, among others.⁸³ Those States were in favour of a balance between the rights of parents and the rights of children. An agreement was found in adding the phrasing "as far as possible,"⁸⁴ but it did not solve the issue because it is specifically children at risk of not knowing their parents who may be denied the right to know them. Finally, the term 'belonging' was rejected by some States because it implied the idea of property, and was replaced by the right to be cared for by parents.⁸⁵ Overall, the concept of identity is well expressed in this article but is too narrow and does not embrace a full comprehension of the concept of identity. The phrasing used by the CRC does not leave room for interpretation and is exhaustive. It is therefore impossible to advocate for a wider child's right to identity based on this article.

Article 8 of the CRC⁸⁶ was introduced by Argentina after many Argentinian children had been abducted from their families and given up for adoption.⁸⁷ Some children were discovered but it was impossible to find their families afterwards. Hence, Argentina proposed the draft of article 8 of the CRC in order to find a tool that would help those children build their identity and to prevent that a similar situation would ever happen again.⁸⁸ Such proposition was mostly made to include and protect the child's right to biological identity in any circumstances.⁸⁹ Such inclusion can appear quite contradictory with article 7 of the CRC because article 7 of the CRC recognises the child's right to biological identity only "as far as possible." The first text suggested by Argentina was acknowledging the child's "inalienable right to retain his true identity and genuine personal, legal and family identity."⁹⁰ This phrasing was said to be too broad and many States did not know how to define family identity.⁹¹ It was therefore decided that the wording "family relations as recognised by law" would be added. Such wording implicates that when a child's family relations are not recognised by law, article 8 of the CRC cannot protect the child's right to identity. For instance, if the child's right to biological identity is not recognised within one State because of anonymous birth and the child/biological parent relationship is not recognised by national law, article 8 of the CRC will not be applicable. It will therefore be legally impossible to protect the child's right to biological identity. Such wording clearly restricts the child's right to identity. Moreover, the wording "without unlawful interference" is somehow weak because any lawful interference with the child's right to identity would be justified,⁹² even though the interference would be discretionary or unnecessary. It would have been wiser to write "without unlawful or arbitrary interference". Besides, it was also decided during the drafting of the article that only some important elements of identity would specifically be acknowledged in the article – nationality, name, family relations.⁹³ Article 8 (1) of the CRC was intentionally written in a non-exhaustive way so that the article

⁸³ Giroux & De Lorenzi, *supra* note 18, at 75-76. See also Hodgkin & Newell, *supra* note 75, at 105.

⁸⁴ Detrick & Doek, *supra* note 81, at 128.

⁸⁵ *Id.*, at 128.

⁸⁶ CRC, *supra* note 19, article 8; which reads:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

⁸⁷ Doek 2006 (2), *supra* note 76, at 7. See also Doek 2006 (1), *supra* note 71, at 29; Children's Rights International Network, Article 8: Preservation of identity, available at <https://www.crin.org/en/home/rights/convention/articles/article-8-preservation-identity> (last accessed 04-05-2017).

⁸⁸ Henaghan, *supra* note 58, at 61. See also Doek 2006 (2), *supra* note 76, at 8.

⁸⁹ Sabatello, *supra* note 40, at 58.

⁹⁰ Detrick & Doek, *supra* note 81, at 292. See also Doek 2006 (1), *supra* note 71, at 29.

⁹¹ Detrick & Doek, *supra* note 81, at 292. See also Doek 2006 (1), *supra* note 71, at 29.

⁹² Hodgkin & Newell, *supra* note 75, at 116. See also Doek 2006 (1), *supra* note 71, at 29.

⁹³ *Id.*, at 294.

would also encompass other aspect of identities, if justified.⁹⁴ Overall, the non-exhaustive phrasing of article 8 of the CRC is a true benefit in the enhancement of children's right to identity because it leaves room to acknowledge other aspects of the child's right to identity. The CRC is a living instruments which should evolve with the needs of children and take into account other characteristics of identity if the needs of children command it.⁹⁵ Unfortunately, the wordings "as recognised by law" and "without unlawful interference" considerably restrict the potential of this non-exhaustive formulation. Advocacy for a wider comprehension of the child's right to identity through article 8 of the CRC is therefore not so evident.

From the analysis of those two articles of the CRC, four remarks can be made. First, the characteristics of identity which are raised as a child's right under article 7 of the CRC are exhaustive while they are not under article 8 of the CRC. Hence, the child's right to identity is more broadly comprehended under article 8 of the CRC. Second, while both articles 7 and 8 of the CRC acknowledge the child's right to identity, only article 8 of the CRC introduces the possibility for the child's right to identity to be violated and consequently, to be protected.⁹⁶ Third, article 7 reflects the fixed dimension of the right to identity by recognising the child's right to a legal identity and to a national identity from birth. Article 7 also reflects the dynamic dimension of the right to identity by safeguarding the child's right to biological identity and to family identity. Article 8 only reflects the dynamic dimension of the right to identity because it acknowledges the active role of the child to "preserve" his identity. Fourth, both articles only recognise a child's right to identity and not to identities. However, it has been demonstrated above that children have multiple identities.⁹⁷ It could thus be possible to acknowledge a child's right to identities instead of a child's right to identity. As the addition of all those identities results in a child's unique identity, there is only a need to protect the child's right to identity. The condition *sine qua none* to such recognition is to defend that whenever only one of the child's identities is not respected, it negatively affects the child's right to identity in its entirety. For instance, if a child lacks a birth certificate, his right to a legal identity is violated and consequently, his holistic right to identity is violated. The child's right to identity should be protected comprehensively.

The concept of identity as supported by the CRC differs to some extent from how it is understood by other fields of study.⁹⁸ First, because the concept of identity is not completely clear in the first place, it is necessarily difficult to truly grasp what the child's right to identity encompasses. The CRC mostly focuses on the child's legal identity, as compared to the other disciplines. The idea that the child needs to be conscious of all his characteristics to understand who he is and to be able to achieve what he wants in his life is barely touched upon, with the exception of the verb "preserve" in article 8 (1) of the CRC. Second, another way for the child to be conscious of his identity is to be told about necessary information that could influence his understanding of his own identity. Thus, the child's right to identity also embraces the idea of the child's right to have access to any information concerning him;⁹⁹ however, articles 7 and 8 of the CRC are lacking in that respect. It is not clear how the child should be told about characteristics that may influence his identity. Third, the idea that the child's right to a legal identity can be a tool to achieve the safeguarding of the child's right to identity as a whole is not expressed at all in the CRC. Nonetheless, it is the author's opinion that such recognition would be beneficial to the preservation of the holistic child's right to identity in order for the child to have access to all characteristics and elements of his identity. Fourth, while it was shown above that children's right to biological identity is essential to their development and to know who they are,¹⁰⁰ the CRC should sustain such right in all

⁹⁴ Doek 2006 (2), *supra* note 76, at 8.

⁹⁵ Giroux & De Lorenzi, *supra* note 18, at 78.

⁹⁶ Doek 2006 (2), *supra* note 76, at 8.

⁹⁷ See part 2.2.1.4.

⁹⁸ For an explanation of the concept of identity through other fields of study, see part 2.2.1.

⁹⁹ Doek 2006 (2), *supra* note 76, at 12.

¹⁰⁰ See part 2.2.2.

circumstances.¹⁰¹ The idea that the CRC is a living instrument and that it should thus evolve according to the needs of the child is particularly relevant in terms of the child's right to identity.¹⁰² The spreading of new technologies to conceive and gestate children weakens the already fragile recognition of the child's right to biological identity. Nonetheless, the recognition of the child's right to identity by international law is already true progress in the field of children's rights and the next step should be a more comprehensive acknowledgment of the child's right to identity.

2.5. Particularities of AW Born Children's Right to Identity

As with any other child, Arthur's right to identity encompasses the possibility to preserve his identity and to build his identity through all the necessary aspects of his identity. In the context of AWT, the relevant aspects of Arthur's right to identity that might be impacted are based on the different characteristics of identity that were presented in part 2.2.3. It essentially includes the right to family identity, the right to biological identity, the right to genetic identity, the right to conceptional identity, the right to a legal identity and the right to a national identity. Because the CRC is not sufficiently protecting the child's right to identity in a holistic understanding and is not always up-to-date with medical advances, the particularity of Arthur's conception and gestation may not be fully taken into consideration and there is thus a risk that some aspects of Arthur's right to identity will not be safeguarded. If such situation ever becomes a reality, Arthur's right to identity in its entirety would be at stake.

It was stated above that Arthur deserves more protection in order for his right to identity to be as respected as is the case for any other child.¹⁰³ If no change in acknowledging a more comprehensive child's right to identity is undertaken, there is a high chance that Arthur's right to identity will not be as protected as other children. Hence, Arthur is at risk of facing discrimination in his right to identity.¹⁰⁴ The differentiation between the fixed and the dynamic dimension of identity is also relevant regarding Arthur's right to identity. Indeed, if information and elements of his identity are kept secret from him at his birth, this would violate his right to identity in its fixed dimension. This would also necessarily affect his right to identity in its dynamic dimension over his lifetime. Hence, both dimensions of Arthur's identity are at risk of being violated. There is a need to ensure that Arthur's right to a fixed identity is protected so that when he grows older, he can rely on fixed aspects of his identity to build and process his right to identity in its dynamic dimension.

2.6. Concluding Remarks

The concept of identity is not set in stone and may be subject to change within the near or far future. Individuals have many identities which they can rely on to know who they are and how they want to build their life. The addition of all those identities forms the individual's unique identity. The right to identity is thus the right to identify, without restriction, with all the different characteristics that an individual can have and it is also the protection of each aspect of identity. The violation of one of those elements leads to the violation of the right to identity as a whole. The right to identity has been protected by international law but without necessarily following what is commonly understood as identity by other fields of study. Indeed, the CRC does not embrace a comprehensive understanding of the concept of identity. Not all aspects of identity are protected and the division between fixed identity and dynamic identity is not really clear within the CRC. It can be said that according to international law, the right to identity encompasses the full protection of a right to a legal identity, and more tempered protection of the right to a national identity, a biological identity and a family identity. Other identities are not explicitly protected but a justification to raise one identity to a right would be possible because of the phrasing of article 8 of the

¹⁰¹ This point will be explained in further detail in part 3.3.

¹⁰² Giroux & De Lorenzi, *supra* note 18, at 78.

¹⁰³ See part 2.3.

¹⁰⁴ Breen, *supra* note 60, at 101.

CRC and also because the CRC is a living instrument. The possibility that AWT will become a reality shows how important it is for the rights protected within the CRC to adjust to new situations in order to not leave any children behind. Indeed, AW born children's right to diverse identities is at stake: legal, family, genetic, biological, conceptional, and national identities. It will be necessary to explore AW born children's right to such identities in order to provide an answer on how to protect AW born children's right to identity in its entirety.

3. Impact of AWT on AW Born Children's Right to Identity

3.1. Introductory Elements

The identities that are particularly at stake for AW born children are their family identity, their conceptional identity, and their biological identity. Those different identities are defined here in the context of this thesis. The child's family identity refers to who is caring for the child on a daily basis: is it one parent? Two parents? A third person? The child's conceptional identity refers to how was the child conceived: was it naturally, or via AWT, IVF, surrogacy? The child's biological identity refers to who the genetic parents of the child are: is it his social parents? A donor? Both? This chapter will analyse how those three different aspects of identity are impacted and how they should be addressed in the context of AWT.

3.2. Child's Right to Family Identity

3.2.1. Importance of Protecting the Child's Right to Family Identity

The child's family identity refers to who is caring for the child on a daily basis, who is taking the appropriate decisions in the name of the child, who ensures that the child's best interests are taken into account in any decision affecting the child.¹⁰⁵ Thus, the child's right to family identity refers to the child's right to be cared for by his parents.

The child's right to family identity affects both the dynamic and the fixed dimension of identity. On the one hand, the child should be involved in the decision-making process for any decision that directly or indirectly affects him. Being able to take decisions and decide for oneself necessarily builds the person's identity.¹⁰⁶ Over the years and according to the child's age and maturity, the child's voice should be more and more important.¹⁰⁷ In order for the child to be able to give his opinion and to be part of such decision-making process, he needs to be helped and guided. This is mostly the role of parents. Depending on the child's parents, on how they behave with the child, and how they involve him, it will affect the child's identity, who he is, and what he wants to be.¹⁰⁸ Hence, the person caring for the child – the parent(s) – is of utmost importance for the child's identity. This refers to the dynamic dimension of identity. On the other hand, the child is supposed to have the same parents from the moment he has rights until he dies. Parents are not meant to change over the years. There are cases where children's parents change, such as the case of adoption and surrogacy.¹⁰⁹ However, this refers to specific cases and it is not the norm. The norm is thus for a child to have the same parents. There is an element of stability that transpires with the child's parents and this refers to the child's fixed identity.

¹⁰⁵ Stewart, *supra* note 59, at 226.

¹⁰⁶ Sabatello, *supra* note 40.

¹⁰⁷ CRC, *supra* note 19, article 5.

¹⁰⁸ A. Langston, Why Parents Matter, in L. Abbott & A. Langston (Eds.), *Parents Matter, Supporting the Birth to Three Matters Framework*, at 6 (2006) [hereinafter Langston].

¹⁰⁹ D. Smolin, Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children, *Pepperdine Law Review*, Vol. 43, Iss. 2, at 310 (2016) [hereinafter Smolin]. See also Stewart, *supra* note 59.

Overall, the child's right to family identity is – regardless of the exceptions – a fixed right that is not meant to change, that affects the child's right to identity as a whole, and thus affects the child's right to a dynamic identity. Arthur's right to family identity needs to be protected because parents have a prominent role to play in Arthur's identity and the construction of his identity.

3.2.2. Protection of the Child's Right to Family Identity

The child's right to family identity is protected both at the international and regional level. At the international level, the CRC protects the child's right to family identity in article 7 as it refers to the child's "right to [...] be cared for by his or her parents" and article 5 ensures that parents provide "appropriate direction and guidance" in a "manner consistent with the evolving capacities of the child." The combination of those two articles gives a holistic understanding of what the child's right to family identity at the international level is: it is the child's right to have parents that will take care of him in the best possible ways. At the regional level, the right to family identity also finds protection.¹¹⁰ This right does not find particular barriers to its recognition because the important role that parents play in a child's life is recognised worldwide. The difficulty that arises with the child's right to family identity is not whether children should be awarded such right or not, but who should be responsible for such right to be safeguarded. In order to understand such point, it is necessary to understand how children born through a normal pregnancy are awarded a right to family identity.

The child's right to family identity is usually based on pregnancy. During pregnancy, the only person that can possibly care for the child is the mother. The father has no say in what is best for the child and only the mother can take decisions regarding the unborn child.¹¹¹ Once the child is born, the certain parent is usually the mother who delivered the child. She is always awarded custody of the child and she is usually the one who will have to care for the child and take the most appropriate decisions in the name of the child.¹¹² As for the other parent, it depends whether the mother is married or not. In most countries, if the mother of the child is married, her spouse will automatically be registered as the second parent.¹¹³ However, if the mother is not married, the second parent will have to register his name on the child's birth certificate.¹¹⁴ This parent or those two parents will have to care for the child and take the appropriate decisions for him. Hence, before and after birth, it is the same parent that cares for the child and after birth, one parent might be added.

In some specific cases, the child's right to family identity is not simply based on pregnancy. Indeed, when a child is a victim of violence, abuse, neglect, among others, the State may take over parents' role. The child's parents will remain but they will not care for the child on a daily basis anymore.¹¹⁵ In the case of adoption, a child is cared for by his mother through pregnancy and until she relinquishes the child to the authorities. The State will take over until a new family is found to take care of the child. Once new parents are found, the child's parents will be replaced and the new parent will be responsible for

¹¹⁰ European Court of Human Rights (hereinafter ECtHR), *R.M.S v. Spain*, Application No. 28775/12, para. 86 & 93 (2013). See also Organisation of American States, *American Convention on Human Rights*, article 17 (1) (1969); Organisation of African Unity, *African Charter on the Rights and Welfare of the Child*, article 19 (1) (1990); Langston, *supra* note 108, at 3.

¹¹¹ A. Alghrani & M. Brazier, What is it? Whose it? Re-positioning the foetus in the context of research?, *The Cambridge Law Journal*, 70(1), at 60 (2011) [hereinafter Alghrani & Brazier]. See also E. Steiger, Not of woman born: how ectogenesis will change the way we view viability, birth and the status of the unborn, *Journal of Law and Health*, Vol. 23, at 164 (2010) [hereinafter Steiger].

¹¹² N. Gamble, A better legal framework for United Kingdom surrogacy?, in S. Golombok et al. (Eds.), *Regulating Reproductive Donation*, at 146 (2016) [hereinafter Gamble].

¹¹³ *Id.*, at 147.

¹¹⁴ J. Duncan, *Birth of Identity: Understanding the value and policy considerations of using birth certificates for identity resolution*, PhD Thesis, University of Utah, at 30 (2015).

¹¹⁵ J. Fortin, An abused child's right to state protection, in J. Fortin, *Children's Rights and the Developing Law*, at 554 (2009).

taking care of the child and taking the appropriate decisions for him.¹¹⁶ In the case of surrogacy, the person taking care of the child during pregnancy is the surrogate mother and the commissioning parents have no say in whatever the surrogate mother wants to do.¹¹⁷ Once the child is born, it is still the surrogate mother who takes care of the child, and through a contract or a judgment, custody of the child is transferred to the commissioning parents and the surrogate mother will no longer be the parent taking care of the child.¹¹⁸ In all those cases presented here, even though the parents may change, it still appears that the child's right to family identity advances a character of stability and permanence once the change has occurred.

The fact that it is always the mother who gestated the child who is awarded custody of the child and who always takes care of the child at birth – even though she might be relieved of her obligation later on – shows that the child's right to family identity is very much linked to pregnancy. While there is a debate on whether unborn children are awarded rights,¹¹⁹ the protection of the child's right to family identity clearly implies that the protection of unborn children should not be neglected. Furthermore, studies have shown that the unborn child connects with the mother while in the womb.¹²⁰ If a mother does not take good care for her unborn child, it does impact on the future life of the child and can therefore affect the child's right to identity. Hence, even if a child's right to family identity is not recognised for the unborn child, there is enough evidence showing that the unborn child should still be awarded some form of protection during that period. In fact, the CRC's Preamble does follow this approach.¹²¹

3.2.3. Potential Issues Arising with regard to AW Born Children's Right to Family Identity

In the context of AWT, Arthur's right to family identity could not be based on pregnancy. Indeed, the main difference between a child born through pregnancy and Arthur is that Arthur would not experience pregnancy within a human being. The gestation would be realized through an incubator. Hence, what was certain for children born through pregnancy would be completely uncertain for Arthur. Contrary to children born through pregnancy, Arthur would not have a mother caring for him during pregnancy and after birth. Arthur's right to family identity would legally be impossible to fulfil in the absence of a mother caring for him during pregnancy and giving birth to him. Unborn and born Arthur would be left in a complete legal limbo as regards to his right to family identity. This would have tremendous consequences for Arthur, the construction of his identity and his right to family identity. It would necessarily call into question the way in which Arthur's right to family identity is understood nowadays. It would further not be possible to translate what is done in surrogacy to AWT because there is neither a pregnancy nor a birth. Indeed, even in surrogacy, the child's right to family identity is safeguarded as the surrogate mother cares for the child through pregnancy and until the contract is given effect to or

¹¹⁶ In cases of simple adoption, the name of the previous parents is not removed. However, it is still the new parent(s) that will be responsible for the safeguarding of the child's right to be cared for. See E. Neil, Adoption and Contact: A research Review, in Bainham et al. (Eds.), *Children and their Families, Contacts, Rights and Welfare*, at 294 (2003).

¹¹⁷ Smolin, *supra* note 109, at 314.

¹¹⁸ *Id.* See also E. Blyth, Parental Orders and identity registration: one country three systems, *Journal of Social Welfare & Family Law*, Vol. 32, No. 4, at 345 (2010) [hereinafter Blyth 2010].

¹¹⁹ For more details, see parts 4.2.

¹²⁰ R. Sullivan et al., Infant Bonding and Attachment to the Caregiver: Insights from Basic and Clinical Science, *Clinics in perinatology* 38(4), at 2 (2011) [hereinafter Sullivan et al.]. See also E. Hisano, Gestational surrogacy maternity disputes: refocusing on the child, *Lewis & Clark Law Review*, Vol. 15:2, at 531 (2011) [hereinafter Hisano]; C. May, *The Sacred Womb: The Evolution of the Psyche Through Pregnancy and Childbirth*, PhD Thesis, Faculty of Pacifica Graduate Institute, at 70 (2016); Alghrani & Brazier, *supra* note 111.

¹²¹ The Preamble points at the need to (legally) protect and care for the child "before as well as after birth." While it does not expressly state how such protection and care should intervene, the fact that it refers to it is worth highlighting and shows that unborn children should not be left without any form of protection. See CRC, *supra* note 19, at 1.

until a judgment transfers the custody of the child from the surrogate mother to the commissioning parents.¹²² However, it is not juridically conceivable, as per today, that a child's right to family identity would be safeguarded through a contract that would be given effect from conception or birth. If AWT was to become a reality tomorrow, and taking into account the legal framework as it is today, unborn and born Arthur would be parentless; he would have neither a legal parent caring for him since conception, nor possible protection of his right to family identity. It is therefore absolutely necessary to find a solution in order to protect unborn and born Arthur's right to family identity before AWT becomes a reality in order to avoid that Arthur is parentless and left without anyone legally caring for him.

Another aspect of Arthur's right to family identity will also be at stake. Because Arthur will not be gestated within a human womb, he will not be able to bond with his mother.¹²³ On the contrary, it has also been argued that because Arthur would not be within a human womb and depending on the composition of the incubator, it might be easier for the parent that is not gestating Arthur to bond with him.¹²⁴ Even if the bond is different than with the mother, there are ways to bond with unborn children,¹²⁵ and it is not the author's opinion that a better bonding with the other parent via AWT should be enough of an argument to justify AWT. However, what is certain is the loss of bond with the mother during pregnancy. The actual effect on Arthur of a lack of pregnancy cannot be known yet because AWT has never been experienced up until now; but there are concerns that it could negatively impact Arthur's right to family identity, and more extensively, Arthur's right to identity as a whole. Unborn children do not enjoy many rights nor protection (if any at all), but they at least enjoy bonding with their mother. Hence, they at least enjoy a form of protection of a right to family identity. If unborn Arthur is deprived of this only form of protection, he will be left without any form of protection during gestation, which does not comply with the CRC's Preamble.

3.2.4. Analysis of AW Born Children's Right to Family Identity

As a preliminary point, even if children's rights are not protected before birth, there still exists some form of protection¹²⁶ and it will be demonstrated in chapter 4 that it is in Arthur's best interests to be awarded his right to identity no later than 14 days after his conception. As with regard to the protection of Arthur's right to family identity, only one option appears feasible. It should be based on a genetic link between him and at least one of his social parent.

The debate around the importance of a genetic link for the child's right to family identity has already been raised in the broader context of ART. Due to rise in ART, genetic and social parents can now be different. Before ART existed, such scenario was only possible in few cases.¹²⁷ In cases of ART where the child's legal parents are subject to change, such as in surrogacy, countries tend to rely on the intention of parents and not on a genetic link between them and the child.¹²⁸ The law will recognise the intended parents as the child's legal parents. However, a genetic link still has a fundamental importance because most countries allow surrogacy on the condition that at least one parent is genetically related

¹²² Smolin, *supra* note 109, at 314. See also Hisano, *supra* note 120, at 542.

¹²³ Hendricks, *supra* note 12, at 442.

¹²⁴ M. Sander-Staudt, Of machine born? A feminist assessment of ectogenesis and artificial wombs, in S. Gelfand & J. Shook (Eds.), *Ectogenesis, Artificial Womb Technology and the Future of Human Reproduction*, at 125 (2006).

¹²⁵ Sullivan et al., *supra* note 120, at 4.

¹²⁶ CRC, *supra* note 19, at 1. See also parts 3.2.2 and 4.3.

¹²⁷ It was mostly possible in three cases: in adoption, in cases where a mother is married and the father is not her husband, and in cases where a mother does not know who the father is – or the father does not want to recognise the child as his own – and the mother's partner recognise the child as his own, creating situations where the genetic and social parents are not the same. See P. Laufer-Ukeles, The Lost Children: When the Right to Children Conflicts with the Rights of Children, *Law & Ethics of Human Rights*, Vol. 8(2), at 260 (2014) [hereinafter Laufer-Ukeles].

¹²⁸ Hisano, *supra* note 120, at 541-542. See also Lupton, *supra* note 13, at 627.

to the child.¹²⁹ In cases of ART where there is no change of parents, such as in IVF with donor insemination, the law will rely on who delivers the child, no matter whether the social parents are also the genetic parents.¹³⁰ In the case of AWT, it will not be in Arthur's best interests to change parents and it will be impossible to rely either on pregnancy or birth. Because genes are part of Arthur's identity from conception, the best solution to enhance Arthur's right to family identity will be to rely on his genetic parents. Arthur's genetic parents should thus be recognised as Arthur's legal parents from conception and they should be the ones caring for Arthur from his conception.¹³¹

Even if Arthur's right to family identity implies that Arthur's genetic parents are recognised as his legal parents, other problems could arise. Indeed, parents who have recourse to AWT are probably parents that would have a pathologic or a social infertility. Hence, there is a chance that they would need sperm or egg donation in order for them to conceive Arthur. Two scenarios are thus feasible. First, the law would follow the rule and recognise the genetic parents as the legal parents. Afterwards through a contract, the custody of Arthur would be transferred from the genetic parent to the social parent. The law should determine from which moment the transfer could be possible and whether the genetic parent could withdraw his consent or not, and subsequently be recognised as the legal parent of Arthur. If such option was chosen, it means that the gamete donor could not be anonymous. Second, the law would only recognise the genetic parent who also has the intention of caring for Arthur. This implies that at least one intended parent should be genetically related to Arthur. The other parent that is not genetically related to Arthur could still be registered as the legal parent because of his relationship with the genetic parent.¹³² The second option appears more feasible because it means that Arthur would at least be genetically related to one of his social parents; while in the first scenario, Arthur could potentially not be genetically related to any of his social parents. If the first option was chosen, it could be possible to still oblige at least one social parent to have a genetic link with Arthur; but the issue with the first option is that it is based upon a contract, making Arthur the object of the contract. Arthur is a person and should be recognised as such. It is in no circumstances in Arthur's interests to be the subject of a contract.¹³³ The second option presents the advantages of relying on biological identity instead of a contract to safeguard Arthur's right to family identity and thus appears as a better solution. Besides, not recognising the donor as being Arthur's legal parent does not mean that the donor should be anonymous.¹³⁴

As for the bond between unborn Arthur and his mother, there is absolutely no possibility to protect Arthur's right to family identity in that regard. Such right would necessarily be at stake; the nature and extent of the consequences for Arthur and for his right to identity as a whole cannot be known. The only recommendation and precaution that can be made so far in that regard are that the incubator should be made in such a way that allows Arthur to hear voices, to feel when his parents would touch him,¹³⁵ to ensure various nutrients, and to ensure that Arthur could move in the same way he would if he was in a human womb. If the incubator would allow that, it would have the benefit of minimising the potential negative effects of not bonding with the mother through the womb, but it can never be argued that Arthur's right to family identity would be safeguarded in that regard.

¹²⁹ For example, see AB case, *supra* note 11, para. 122.

¹³⁰ V. Ravitsky, The right to know one's genetic origins and cross-border medically assisted reproduction, *Israel Journal of Health Policy Research*, Vol. 6:3, at 2 (2017) [hereinafter Ravitsky]. See also Smolin, *supra* note 109, at 314; Gamble, *supra* note 112.

¹³¹ See part 4.4 for an explanation on how the recognition should operate.

¹³² Such as in marriage, the husband is automatically recognised as the child's father. This possibility could be extended to partners in order to ensure the protection of Arthur's right to family identity.

¹³³ Although contracts have predominantly been used in cases of surrogacy to secure who shall be recognised as the surrogate born children's parents and, by extension, secure surrogate born children's right to family identity, the use of contract in such circumstances is seen as the sale of children. Being sold cannot be said as being in children's interests and the right not to be sold is protected under article 35 of the CRC. See Smolin, *supra* note 109, at 317.

¹³⁴ This point will be further elaborated upon in part 3.3.3.

¹³⁵ On the contrary, doctors should not be allowed to touch Arthur without the permission of the parents.

3.3. Child's Right to Biological Identity

3.3.1. Introductory Elements

The child's biological identity refers to who the genetic parents of the child are, who provided the gamete – the sperm and the egg – in order to conceive the child.¹³⁶ Thus, the child's right to biological identity refers to the child's right to know who his genetic parents are, and more extensively, who are all the persons who were involved in his conception or more or less related to his conception.

The right to biological identity in the context of AWT will present the same issues as ART. If AWT was to become a reality, it would necessarily involve the practice of IVF because the conception would not occur within a human womb.¹³⁷ AWT would be a new form of ART, and for any form of ART that involves gamete donation, the same problems would occur. In terms of the child's right to biological identity, there is no need to distinguish AWT from ART, and from IVF or surrogacy specifically, because the same issues are at stake. The same legal framework should be applied for any form of ART. Thus, this section will explore the right to biological identity of children born through AWT as if this form of ART already existed and it will tackle the same questions that arise for any ART born children's right to biological identity.

3.3.2. Importance of Protecting the Child's Right to Biological Identity

The distinction between genetic and social parents has therefore led to the recognition of the child's right to biological identity. Due to social and/or pathological infertility, some persons are unable to conceive a child on their own.¹³⁸ Because those individuals do not want to stop their project of starting a family, they have recourse to gamete donors.¹³⁹ This happens through ART and may happen through AWT. Once the child is conceived and born, it is the intended parents that legally care for him and are recognised as his legal parents, whether one, none, or both are genetically related to him.¹⁴⁰

The importance of the child's right to biological identity has been minimized based on debate between nurture and nature. The legality and ethics of gamete donation has mostly relied on the idea that nurture is more fundamental than nature.¹⁴¹ Even if nurture has a really important role in the child's development and identity, it does not mean that the importance of nature should be overlooked and that nurture should prevail over nature. Even in cases where genetic parents do not take care of their children in an appropriate way, those children will usually love their parents and will usually want to go back to them, even if it will do them more harm than good, which truly shows the importance of nature.¹⁴² Thus, the significance of nature should not be undervalued. The distinction between an AWT case as compared to a child protection case is that in the former, the parents choose to have a child, Arthur, that is not conceived yet. Arthur is meant to stay with his intended parents, the ones that had the project of starting a family, and is not meant to change families.¹⁴³ But at no time Arthur is asked whether he wants to live with his social or genetic parents. Because Arthur has no say on whether nurture or nature is

¹³⁶ Stewart, *supra* note 59, at 232.

¹³⁷ J. Schultz, Development of ectogenesis: How will artificial wombs affect the legal status of a fetus or embryo, *Chicago-Kent Law Review*, Vol. 84:3, at 880 (2010).

¹³⁸ It is the case when one or both parents lack one of the gametes and/or a womb.

¹³⁹ T. Freeman, Introduction, in T. Freeman et al. (Eds.), *Relatedness in Assisted Reproduction: Families, Origins and Identities*, at 1-2 (2014).

¹⁴⁰ Hisano, *supra* note 120, at 541-542. See also Ravitsky, *supra* note 130; Gamble, *supra* note 112.

¹⁴¹ J. Hendricks, Of Woman Born? Technology, Relationship, and the Right to a Human Mother, *College of Law Faculty Scholarship*, at 43 (2011). See also Hisano, *supra* note 120, at 540.

¹⁴² Ahmed et al., In their own words: abused children's perceptions of care provided by their birth parents and foster carers, *Adoption & Fostering*, Vol. 39 (1), at 25 (2015).

¹⁴³ Hisano, *supra* note 120, at 541-542. See also Ravitsky, *supra* note 130; Gamble, *supra* note 112.

more important for his identity building, he should at least have the right biological identity.

The importance of the right to biological identity for children born through ART is slightly but increasingly being recognised based on research. It has been demonstrated that the child's right to biological identity is also very much connected with the child's right to have access to information about his birth and/or genetic parents/family. While it is nowadays commonly accepted and understood that it is in the adopted child's best interests to have access to such information, it is still not understood as such for children born through ART.¹⁴⁴ However, studies have shown that for children born via ART, it is really important for their identity building to have access to information about their donors.¹⁴⁵ Only a few would like to have a parent-child relationship, but almost all would like to have some kind of relation or at least to know who their genetic parent is.¹⁴⁶ Being deprived of such right can have detrimental effects on children, on their identity, on who they are and who they want to be.¹⁴⁷ Research has highlighted the importance to recognise the child's right to biological identity. In the same way as adopted children, Arthur should have access to information about his genetic parents in order to protect his right to biological identity.

The child's right to biological identity affects both the fixed and the dynamic dimension of identity. Because genetic parents can never change, biological identity refers to the child's fixed identity. However, if the child is not aware of his biological identity or his biological identity cannot be disclosed to him – because he is too young to have access to the register or because it is legally not possible – it can affect his dynamic identity.

Overall, Arthur's right to biological identity needs to be protected in order to protect Arthur's right to identity as a whole and to enable him to build his own identity.

3.3.3. Analysis of AW Born Children's Right to Biological Identity

At the international level, the CRC protects the child's right to biological identity in article 7 as it refers to the child's "right to know [...] his or her parents." However, the CRC does not recognise an absolute right to biological identity because it is mentioned that such right is only protected "as far as possible." The inclusion of this disclaimer was made in order to protect anonymous birth and IVF with anonymous donor insemination.¹⁴⁸ Since then, the Committee on the Rights of the Child (hereinafter CRC Committee) has evolved and is now recommending countries to disclose such information to children in order to protect their right to biological identity.¹⁴⁹ The issue is that countries are bound by the CRC but not by other documents released by the CRC Committee; thus, States parties are under no legal obligation to ensure that children's right to biological identity is always protected.

Most human's rights are not absolute and the right to biological identity is no exception. The child's right to biological identity can sometimes be restricted or impossible to fulfil. However, a distinction

¹⁴⁴ S. Varnado, *Who's Your Daddy?: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology*, *Louisiana Law Review*, Vol. 66, at 654 (2006).

¹⁴⁵ A. Draghici et al., *The Right of Children to Know their Parents – a Constitutive Element of the Child's Identity*, *Acta Universitatis Danubius*, Vol. 9, No. 1, at 118 (2013). See also J. Appleby et al., *Is disclosure in the best interests of children conceived by donation?*, in M. Richards et al. (Eds.), *Reproductive Donation, Practice, Policy and Bioethics*, at 233-234 (2012) [hereinafter Appleby et al.]; L. Blake et al., *Thoughts and feelings about the donor: a family perspective*, in S. Golombok et al. (Eds.), *Regulating Reproductive Donation*, at 297 (2016) [Hereinafter Blake].

¹⁴⁶ Blake, *supra* note 145, at 299.

¹⁴⁷ S. Golombok, *Donor conception families*, in S. Golombok, *Modern Families, Parents and Children in New Family Forms*, at 115 (2015) [hereinafter Golombok]. See also Henaghan, *supra* note 58, at 46; Blake, *supra* note 145; Crawshaw, *supra* note 63; Ravitsky, *supra* note 130.

¹⁴⁸ Detrick & Doek, *supra* note 81, at 128.

¹⁴⁹ Committee on the Rights of the Child (hereinafter CRC Committee), *Concluding observations on the combined second to fourth periodic reports of Switzerland*, para. 33 (2015) [hereinafter CO Switzerland]. See also CRC Committee, *Concluding observations on the fifth periodic report of France*, para. 33 (2016).

should be made between material and legal impossibility to respect the child's right to biological identity.¹⁵⁰ For instance, a mother gives birth to a child but does not want to raise him and leaves the child near an institution where she knows the child will be taken care of. No one saw her dropping off the child and there is no way she can be tracked down. The child will most probably go to child protection services and be adopted in order for him to be cared for by parents. In that example, it is materially impossible to track the child's genetic mother and know who she is. In that case, it is understandable that the child's right to biological identity cannot be fulfilled. In cases of ART, it is the State that deliberately chooses to leave information about genetic parents anonymous in order to ensure that there are enough gamete donors to fulfil the intended parents' wishes.¹⁵¹ This is a legal impossibility that can be overturned by changing the law. The author believes that the protection of the right to biological identity "as far as possible" in the CRC should only refer to material impossibility. Legal impossibility should be fully protected under article 7 (1) of the CRC.

There are two ways of respecting the child's right to biological identity, which are based on the two types of information about the gamete donors that can be disclosed to the child: non-identifying information and identifying information.¹⁵² Going back to the previous example, the country where the mother is living only allows mothers to give birth to their children and abandon them on the condition that they give identifying information in order to safeguard the child's right to biological identity. For many reasons, the mother does not want her child to be able to know or recognise her. She prefers to give birth on her own and later drop off the child near an institution. In that case, not only will the child have no identifying information about his mother after all, but he will actually have no information at all. If the mother has had the possibility to give birth to her child and abandon him while only providing non-identifying information about herself to the child's file, she probably would have chosen to give birth in hospital instead of on her own. She would be leaving her child with at least non-identifying information rather than no information at all. In that case, it appears that even if not completely satisfying, the child's right to biological identity is better taken into account by being restricted to non-identifying information than if giving identifying information was mandatory in all circumstances. This is the position of the CRC Committee in recent concluding observations which urges countries to stop using baby boxes.¹⁵³ In the case of AWT, there is no risk that Arthur will be abandoned and left alone by his social parents if having identifying information about his genetic parent is mandatory. Therefore, Arthur's right to biological identity should encompass the right to have identifying information about his genetic parent.

Three arguments can be raised against the child's right to biological identity and to have identifying information about his genetic parent. The arguments provided are the necessity to protect the parents' and/or donor's private life, and the decreases in donations if donors were not anonymous.¹⁵⁴ First, it is argued that intended parents' private life should be protected.¹⁵⁵ Those parents want to raise their child by themselves and do not want anyone else to interfere with their life. Social parents may also fear that their child would choose their genetic parents over them. Such argument disregards their child's best

¹⁵⁰ Giroux & De Lorenzi, *supra* note 18, at 74.

¹⁵¹ T. Glennon, Legal regulation of family creation through gamete donation: access, identity and parentage, in S. Golombok et al. (Eds.), *Regulating Reproductive Donation*, at 72 (2016) [hereinafter Glennon].

¹⁵² E. Blyth, To Be or not to Be? A Critical Appraisal of the Welfare of Children Conceived through New Reproductive Technologies, *International Journal of Children's Rights* 16, at 512-513 (2008) [hereinafter Blyth 2008]. See also S. Graham et al., Regulating the 'good' donor: the expectations and experiences of sperm donors in Denmark and Victoria, Australia, in S. Golombok et al. (Eds.), *Regulating Reproductive Donation*, at 208 (2016).

¹⁵³ The CRC Committee held such position as a measure of last resort. See CRC Committee, *Concluding observations on the combined third and fourth periodic reports of Germany*, para. 31 (2014). See also CRC Committee, *Concluding observations on the combined third and fourth periodic reports of Poland*, para. 21 (2015); CO Switzerland, *supra* note 149, para. 35.

¹⁵⁴ E. Amorós, Donor anonymity, or the right to know one's origins?, *Catalan Social Sciences Review*, Vol. 5, at 6 (2015) [hereinafter Amorós]. See also Appleby et al., *supra* note 145, at 244; Henaghan, *supra* note 58, at 104.

¹⁵⁵ Appleby et al., *supra* note 145, at 244.

interests, needs and views. While social parents truly want to start a family and have a child, it is also because they believe they will take the best decisions that are needed for their children. But by advancing such argument, social parents place their own interests before their child's. This claim overlooks children's right to biological identity and can furthermore impact children's right to identity as a whole. The law should not deny children's right to biological identity in the name of parent's right to private and family life. Second, regarding the donor's private life argument, it can be counter argued that if a donor does not want to be identified, he should thus not donate. By donating his gamete, the donor acknowledges the possibility that the child who will be born may want to meet him. Donors should be prepared for such eventuality and should not donate their gamete if they cannot satisfy this responsibility. Third, with regards to the decrease in donation if donors could not be anonymous, it does not appear to be enough of a substantive argument. Gamete donations are allowed by law in some countries in order to respond to an infertility problem but at no point are gamete donations allowed to satisfy a wish or to fulfil a right to have a child.¹⁵⁶ Doctors and clinics might also be reluctant because a decrease in donors could mean a decrease in the use of ART, which is a profitable business.¹⁵⁷ Nonetheless, solutions to infertility cannot go beyond reason, nor should profit motives outweigh a children's right to biological identity. Hence, there is no valid justification to only allow non-identifying information. In cases of ART, Arthur's right to biological identity should prevail and he should have a full access to identifying information concerning his genetic parents.

In practice, the child's right to biological identity is extensively restricted in the context of ART. The anonymity of gamete donors is the rule in most countries.¹⁵⁸ Some countries give the choice to the donor who can choose to stay anonymous or to disclose information; but it appears that most choose to stay anonymous.¹⁵⁹ A few countries allow non-identifying information,¹⁶⁰ and a few allow identifying information.¹⁶¹ Two remarks can be made. First, parents are more willing to tell their children that they have different genetic parents when the child himself is able to get information on his genetic parent(s).¹⁶² Second, it has been shown that in countries where identifying information about the donor is mandatory, parents tend to have recourse to ART in countries where no information about the donor is disclosed. However, it is not clear whether parents do so because they do not want their child to have information on their genetic parent or because access to ART will be faster in those countries. From those two remarks, the conclusion that can be drawn is that to ensure that Arthur is told about his genetic parents, it is important that identifying information about the donor exists. Moreover, to ensure that parents will do so, all countries allowing gamete donation should follow the same rule and should all make it compulsory to give identifying information about the genetic parent to Arthur.

Besides, the child's right to biological identity also refers to the child's genetic siblings in two aspects.

¹⁵⁶ For example, see M. Warnock, *Report of the Committee of inquiry into human fertilisation and embryology*, at 4 (1988).

¹⁵⁷ However, studies have shown that in countries that changed their law about anonymity did not see a decrease in donation. See D. Adams et al., Does the removal of anonymity reduce sperm donors in Australia?, *Journal of Law and Medicine* 23, at 634 (2016). See also Henaghan, *supra* note 58, at 104; L. Mundy, Shortage? What shortage? How the sperm donor debate missed its mark, *The Guardian* (2010), available at <https://www.theguardian.com/commentisfree/2010/sep/19/sperm-donors-shortage-market-forces> (last accessed 01-06-2017); D. Spar, *The Baby Business*, Boston : *Harvard Business School Press* (2006) cited in Glennon, *supra* note 151, at 92-93.

¹⁵⁸ L. Frith, Gamete donation and anonymity, The ethical and legal debate, *Human Reproduction*, Vol. 16, No. 5, at 819 (2001) [hereinafter Frith]. See also K. Daniels, Anonymity and openness and the recruitment of gamete donors. Part I: semen donors, *Human Fertility*, Vol. 10:3, at 151 (2007) [hereinafter Daniels]; Glennon, *supra* note 151.

¹⁵⁹ Glennon, *supra* note 151.

¹⁶⁰ Laufer-Ukeles, *supra* note 127, at 251. See also Blyth 2008, *supra* note 152.

¹⁶¹ Frith, *supra* note 158. See also Daniels, *supra* note 158; Glennon, *supra* note 151.

¹⁶² J. Appleby, Regulating the provision of donor information to donor-conceived children: is there room for improvements?, in S. Golombok et al. (Eds.), *Regulating Reproductive Donation*, at 340 (2016) [hereinafter Appleby].

First, the child has a right to know who his genetic siblings, with who he shares the same donor, are. Indeed, gamete donors are usually used to conceive more than one child. Studies have shown that it is also important for children born via ART to know who their genetic siblings are in order to build their identity.¹⁶³ They may connect better with them than with their genetic parents and they can share their experiences, which can help them build their identity. However, disclosing such information to Arthur, if applicable, is not enough, and does not mean it could (nor should) replace disclosing information about the donor. Both information about the donors and the siblings are important to enhance Arthur's right to biological identity. Second, children raised by the same social parents should have the right to share the same genetic parent.¹⁶⁴ Indeed, when adults want to start a family, they usually expect to have more than one child. It is highly plausible that parents who have recourse to AWT once will have recourse to it at least a second time in order to grow their family. Because the social parents needed to have recourse to a gamete donor, they will most probably need to have recourse to another gamete donor. If no track of Arthur's genetic parent is kept, it can mean that Arthur's siblings may not have the same genetic parent as him. Sibling relationships are really important and actively contribute to the construction of the child's identity.¹⁶⁵ Arthur's right to biological identity should be preserved to the maximum extent possible. This therefore means that if parents want to have recourse to AWT multiple times, it should be mandatory by law that Arthur and his siblings share the same gamete donor, and thus the same genetic parents.

While it has been demonstrated that Arthur is entitled to be given identifying information about his genetic parents and siblings, it is necessary to explore from which age Arthur should be able to claim his right to biological identity. Most countries only allow such access from 18 years old and a few from 16 years old.¹⁶⁶ Having no information disclosed to them before they reach 16 or 18 years old means that they are not given information about either their genetic parent or siblings. Studies have shown that it is during adolescence that children particularly question their identity.¹⁶⁷ It is a time in their life which is very important with regards to their dynamic identity and the fact that they have to wait until they reach 16 or 18 years old to be able to access such information might be really detrimental to their identity building. While decisions regarding children should always be made according to their age and maturity, it clearly appears that children's maturity is being completely disregarded in that matter. There has not been any argument developed to justify why such information should only be disclosed from 16 or 18 years old and it thus appears quite arbitrary to have chosen those ages. If consistent with article 5 of the CRC, such information should be disclosed according to Arthur's age and maturity, and also according to Arthur's needs. Such needs will probably grow during his adolescence. Depending on studies, adolescence does not start at the same age but it can be said that adolescence approximately starts around 11 years old.¹⁶⁸ Arthur may not develop and interact with his environment the same way as his peers; he may start questioning himself and his identity earlier or later than others. But if Arthur starts questioning himself at an early age, it appears arbitrary to not allow him to have access to such information from that age. Hence, because it is mostly during adolescence that Arthur will actively start questioning his identity, it is in the author's opinion that Arthur should have access to information about his genetic parents and siblings from the age of 10 and according to his maturity.

¹⁶³ Blake, *supra* note 145, at 299.

¹⁶⁴ Golombok, *supra* note 147, at 116.

¹⁶⁵ S. Bunch, *You be that and I'll be this - Sibling role assumption and identity formation within the family system*, PhD Thesis, Alliant International University, at 41 (2010).

¹⁶⁶ K. Daniels & A. Douglass, Access to genetic information by donor offspring and donors: medicine, policy and Law in New Zealand, *27 Medicine and Law* 131, at 5 (2008) [hereinafter Daniels & Douglass]. See also Doek 2006 (2), *supra* note 76, at 12; Glennon, *supra* note 151.

¹⁶⁷ Henaghan, *supra* note 58, at 43. See also Blake, *supra* note 145, at 299; Appleby, *supra* note 162.

¹⁶⁸ HealthyChildren, Stages of Adolescence, *HealthyChildren.org* (2015) available at <https://www.healthychildren.org/English/ages-stages/teen/Pages/Stages-of-Adolescence.aspx> (last accessed 01-06-2017)

3.3.4. Concluding Remarks

The AW born child's right to biological identity brings with it many questions that have not yet been answered with already existing forms of ART. The risk is thus that the development of AWT will not solve those issues and the child's right to biological identity will not be protected and will still be at risk of violations. There is therefore an absolute need to actively advocate for the protection of the child's right to biological identity before AWT becomes a reality.

3.4. Child's Right to Conceptional Identity

3.4.1. Importance of Protecting the Child's Right to Conceptional Identity

The child's conceptional identity refers to which method or proceeding was used to conceive and gestate the child.¹⁶⁹ Thus, the child's right to conceptional identity refers to the child's right to know how he was conceived and if any specific proceeding was used for that purpose. Because AWT would be a new form of ART, Arthur's right to conceptional identity will present the same issues as any other children born through ART. When exploring Arthur's right to conceptional identity, reference to the actual protection of such right for other children born via ART will be used. Four valuable reasons to consider the importance of the child's right to conceptional identity have been identified.

First, the child's right to conceptional identity can ensure the protection of the child's right to biological identity. Even though the right to biological identity is fundamental, it is difficult to ensure its protection as long as parents do not disclose to their children information about how they were conceived and gestated. If the child's right to biological identity is combined with the child's right to conceptional identity, the chances that both rights will be protected increases. Indeed, the first step to ensure that the child will know that his genetic parents are different from his social parents, and that he knows who his genetic parents are, is to disclose to the child the origins of his conception. It would seem unexpected to tell a child that he has different genetic parents without explaining the reason behind such difference. Therefore, it is fundamental to protect the child's right to conceptional identity in order to further protect the child's right to biological identity.

Second, the child's right to conceptional identity should also be protected in itself and not only because it will ensure that other children's rights will be safeguarded. Indeed, knowing the origin of his conception is important for the child's construction of his identity. Even if the child's genetic and social parents are the same, the way the child was conceived is part of who he is and may have influences on his life. Moreover, because it is impossible at the moment to know the psychological consequences of AWT on Arthur, it appears even more fundamental to disclose such information to him. Indeed, the fact that no direct bond can be created between Arthur and his mother is concerning and will not only affect Arthur's right to family identity but also his right to conceptional identity.¹⁷⁰ Everything that happens to or impacts on Arthur has consequences for his identity. Arthur will identify with the environment and elements around him to which he assimilates, or on the contrary, with which he differs.¹⁷¹ Being born through AWT is obviously a novel way of being conceived; thus, the chances that this different way of being conceived will impact on Arthur's construction of his identity are high. Furthermore, it has been illustrated in other research that when information is kept secret from children, it unconsciously still impacts them, usually negatively.¹⁷² It has also been acknowledged that secrets end up being disclosed at some point, intentionally or not.¹⁷³ If Arthur accidentally happens to know the origins of his conception,

¹⁶⁹ T. McCombs & J. Shull Gonzáles, *Right to Identity*, International Human Rights Law Clinic, University of California, at 11 (2007) [hereinafter McCombs & Shull Gonzáles]. See also Lillehammer, *supra* note 31, at 103.

¹⁷⁰ For an explanation of the bond between the unborn child and the mother, see part 3.2.

¹⁷¹ Luhrmann, *supra* note 28.

¹⁷² R. Berger & M. Paul, Family Secrets and Family Functioning: The Case of Donor Assistance, *Family Process*, Vol. 47, No. 4, at 554 (2008).

¹⁷³ Blake, *supra* note 145, at 299. See also Golombok, *supra* note 147.

it may not have any negative consequences on him, but it is also a possibility which needs to be taken into account. To avoid such harmful impact, Arthur should have a right to know how he was conceived, gestated, and under which conditions. Knowing such information will, in any case, help him to build his identity and know who he is. Finally, Arthur's conceptional identity is a fixed identity which has repercussions for Arthur's dynamic identity.

Third, the child's right to conceptional identity should also be protected because, as for the right to identity in its entirety, identity is inherent to a person and it is not for others to decide which characteristics of a person's identity are relevant to him or not. Going back to the example given in part 3.3.3, a child was abandoned near an institution without any information about his birth/genetic mother. The child is adopted later on. When the child gets older, he starts asking questions about where babies come from and how are they conceived. His adoptive parents have two options. First, they know that their child will never be able to find any information about his birth/genetic mother and believe that if they tell him he was abandoned, he may feel really sad and thus choose not to tell him that he was abandoned and then adopted. Second, even if the parents know their child will never be able to know his birth/genetic mother, they still think that the child should know he was adopted and everything they know about him before they adopted him because that information is private to their child and he is entitled to know it. In that example, most – if not all – would agree with the second option. This example shows that it is not for the parents or for anyone else to decide which information is relevant to the child and to the construction of his identity. It is for the child to decide by himself when he will be mature enough to deal with the information, which is in line with article 5 of the CRC. But no child can deal with information that he is not aware of. Hence, Arthur should be told about his conception and gestation no matter the circumstances.

Fourth, it does not appear that there exist any legitimate justification to disregard the child's right to conceptional identity. The same arguments used to not protect the child's right to biological identity can be put forward to disregard the child's right to conceptional identity. The possible counter arguments that were identified were the gamete donor and the social parents' right to private life, and the possible decrease in gamete donation.¹⁷⁴ It was explained that donors should not donate gametes if they want to protect their private life. Regarding the parents' private life, it clearly appears that Arthur's conceptional identity has to do with Arthur's private life and absolutely not with his parent's private life; or at least Arthur's private life should prevail over his parent's private life because it directly concerns him while it only concerns his parents indirectly. Finally, the argument about decreases in gamete donation should not be recognised as valid because the right of the child should prevail over the interests of clinics and doctors. Hence, there exist no legitimate grounds that could justify the possibility not to disclose to Arthur information about his conception and gestation.

Overall, Arthur's right to conceptional identity needs to be protected because it will have a likely positive direct or indirect impact on his identity – and his right to identity – as a whole, and also on his right to biological identity specifically.

3.4.2. Protection of the Child's Right to Conceptional Identity

The child's right to conceptional identity has not really been enhanced up until now. At the international level, the CRC explicitly mentions the child's right to family and biological identities but no mention is made of the child's right to conceptional identity. While article 7 is exhaustive, this is not the case of article 8 which establishes that the child's right to identity should be preserved.¹⁷⁵ Hence, if well substantiated, a violation of the child's right to conceptional identity could fall under article 8 of the CRC. However, in order to truly protect it, it would first mean that a Court should rule on that matter or that the CRC Committee should release a decision on that specific matter under its optional protocol No. 3. It does not appear to be a feasible solution in the near future and Arthur's right to conception's identity is

¹⁷⁴ See part 3.3.3.

¹⁷⁵ See part 2.4 for a more substantive explanation of those articles.

thus at stake. At the national level, most countries have not seemed to have found such right important enough to legislate on it. No country conditions parents' access to ART on an obligation to guarantee that they will disclose information to their children. The importance of disclosure has only been raised by professionals.¹⁷⁶ It clearly emerges that Arthur's right to conceptional identity is at stake and should be looked at more closely in order to ensure it is safeguarded.

In practice, parents do not protect their children's right to conceptional identity either. It appears that most parents do not disclose.¹⁷⁷ Research done on such issue has shown that most parents are afraid to disclose information to their children about the origins of their conception because they fear their children's reaction.¹⁷⁸ But the longer they wait, the more difficult it will be for children to handle it and for the parents to actually disclose.¹⁷⁹ The disclosure of such information is also very much linked to the child's right to biological identity. If the social parents are also the genetic parents, they have less issues about revealing such elements to their children, although it is not always the case in surrogacy.¹⁸⁰ On the contrary, social parents who are not the genetic parents – at least for one of them – explain that they fear their children's reaction and fear they would not be able to handle a situation where during a conflict, their child would say "you're not my real parent anyway."¹⁸¹ Those fears have lead parents to choose the path of non-disclosure.¹⁸² Others studies have however shown that when deciding not to reveal such information to their children, the situation will only get worse when their children accidentally find out the truth about their conception.¹⁸³ Scholars thus explain that parents need to deal with their fear in order to be able to reveal to their children how they were conceived.¹⁸⁴ They probably should deal with such fear before they actually engage a proceeding of ART. It is advised to parents to start talking with their children about their conceptional identity from the moment their children start questioning where babies are from and how they are conceived.¹⁸⁵ It is argued that when information is disclosed at such early age, children will accept their own conception much more easily and will usually acknowledge it more or less as the norm.¹⁸⁶ Any negative impact on their identity will be limited and their right to conceptional identity will be safeguarded. Hence, Arthur's parents should tell him how he was conceived and gestated from the moment Arthur starts questioning where children come from.

3.4.3. Enhancement of AW Born Children's Right to Conceptional Identity

Two reasons can be put forward to not enhance the child's right to conceptional identity. First, some scholars have defended the idea that an explicit distinction made on the child's birth certificate and/or mandatory disclosure could potentially lead to the discrimination against those children.¹⁸⁷ For instance,

¹⁷⁶ Henaghan, *supra* note 58, at 64. See also Ravitsky, *supra* note 130.

¹⁷⁷ E. Blyth et al., The Role of Birth Certificates in Relation to Access to Biographical and Genetic History in Donor Conception, *International Journal of Children's Rights* 17, at 215 (2009) [hereinafter Blyth et al.]. See also Golombok, *supra* note 147, at 98; Ravitsky, *supra* note 130, at 3.

¹⁷⁸ L. Bujan et al., Anonymat du don de gamètes, *Gynécologie Obstétrique & Fertilité*, Vol. 40, at 10 (2012) [hereinafter Bujan]. See also Ravitsky, *supra* note 130, at 3.

¹⁷⁹ Blake, *supra* note 145, at 296. See also Henaghan, *supra* note 58, at 46; Golombok, *supra* note 147, at 99.

¹⁸⁰ V. Jadva et al., Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins, *Human Reproduction*, Vol. 27, No. 10, at 3011 (2012).

¹⁸¹ Golombok, *supra* note 147, at 100.

¹⁸² Golombok, *supra* note 147, at 99.

¹⁸³ Blake, *supra* note 145, at 296-297. See also Golombok, *supra* note 147, at 115

¹⁸⁴ Bujan, *supra* note 178.

¹⁸⁵ S. Golombok et al., Children Conceived by Gamete Donation: Psychological Adjustment and Mother-Child Relationships at Age 7, *Journal of Family Psychology*, Vol. 25, No. 2, at 238 (2011). See also Appleby, *supra* note 162, at 344; Blake, *supra* note 145, at 296.

¹⁸⁶ Golombok, *supra* note 147, at 115. See also Blake, *supra* note 145, at 293.

¹⁸⁷ D. Stuckenbruck, *Advancing the rights of children deprived of parental care: Domestic adoption of children in Kenya*, LLM Thesis, University of Fribourg, at 97-99 (2013). See also C. Smart, Law and the regulation of family

such as any distinction between legitimate and illegitimate children, a distinction could be made by third persons between children who are genetically related to their parents and children who are not. While such argument is valid, it does not mean that the fear for discrimination should outweigh the child's right to biological identity. Instead of depriving the child of some aspects of his right to identity due to the discrimination he might be confronted with, solutions should be found to tackle the root causes behind such discrimination. Second, imposing on parents the obligation to disclose the origin of conception of their children clearly appears as an interference with the child's right to private and family life.¹⁸⁸ While Arthur has a right to conceptional identity, such right cannot be understood as being isolated from other rights and the disclosure of such right necessarily affects other rights. If Arthur's right to conceptional identity was to prevail over other rights, it could mean to some extent that only one way – or at least typical ways – of disclosure would be acceptable or possible in order to ensure that Arthur's right to conceptional identity is respected. However, choosing how to disclose such right should be the choice of Arthur's parents, who probably know better how to address different situations with him. Thus, it seems difficult to impose that Arthur's right to conceptional identity should prevail over Arthur's right to private and family life. A balance between those two rights should be found. Nevertheless, if the option of operating a balance between both rights appears appropriate, the risk is that it will be impossible to enforce Arthur's right to conceptional identity and his parents may choose not to disclose such information to him. If such option leads to the impossibility to safeguard Arthur's right to conceptional identity, it means that in practice, no balance is possible and Arthur's right to private and family life will have prevailed over his right to conceptional identity, a right that will have been completely overlooked. On the contrary, if Arthur's right to conceptional identity prevails over his right to private and family life, the former will interfere with the latter but it will not mean that his right to private and family life will be completely overlooked. Interference with the right to private and family life is legitimate so long as it is in accordance with the law, necessary in a democratic society and pursuing a legitimate aim.¹⁸⁹ It would thus be necessary to legislate on that matter. As per the necessity and the aim, part 3.4.1 has already demonstrated those points. Interference with Arthur's right to private and family life in order to safeguard Arthur's right to conceptional identity is proportionate and appropriate. Overall, if a balance between both rights leads to the impossibility to enforce one of the two rights, Arthur's right to conceptional identity should prevail over Arthur's right to private and family life.¹⁹⁰ To conclude, there is no reason to obstruct the enhancement of Arthur's right to conceptional identity.

In order to legally and in practice safeguard Arthur's right to conceptional identity, the first step is to ensure that in cases of gamete donation, identifying information about Arthur's genetic parent exists.¹⁹¹ This means that all countries that allow AWT should follow such rule. Furthermore, and in order to ensure that Arthur's right to conceptional identity is protected in both situations (with and without gamete donation), two options seem available. First, a social worker could be appointed to check whether Arthur's parents have disclosed information to him and if not, help them find a way to do it. In cases of adoption, a social worker is always appointed and regularly goes see the family to ensure that everything is going well.¹⁹² If any problem is detected, the social worker is supposed to help the parents and the

secret, *International Journal of Law, Policy and the Family*, Vol. 24(3), at 399-400 (2010); C. Smart, Family Secrets: Law and Understandings of Openness in Everyday Relationships, *Journal of Social Policy*, Vol. 38, at 564 (2009).

¹⁸⁸ The right to private and family is safeguarded by article 16 of the CRC, article 8 of the ECHR, article 17 (1) of the ACHR, and article 19 (1) of the ACRWC. Such argument has been put forward by scholars. See Doek 2006 (2), *supra* note 76, at 11. See also Amorós, *supra* note 154; Appleby et al., *supra* note 145, at 244.

¹⁸⁹ Council of Europe, *European Convention on Human Rights*, article 8 (2) (1950). U. Kilkelly, Child Protection and the European Convention on Human Rights, *Irish Journal of Family Law* 12, at 1 (2000).

¹⁹⁰ Giroux & De Lorenzi, *supra* note 18, at 72.

¹⁹¹ Parents are more inclined to disclose when identifying information about the genetic parent exists. See part 3.3.3. See also Golombok, *supra* note 147, at 101; Blake, *supra* note 145, at 294; Appleby, *supra* note 162.

¹⁹² K. Rotabi et al., International private law to regulate commercial global surrogacy practices: Just what are social work's practical policy recommendations?, *International Social Work*, Vol. 58(4), at 578 (2015).

child overcome those issues. Once the social worker feels that the situation is well handled, he eventually will stop visiting the family. This is an obvious interference with the right to private and family life, but it is legitimated by the necessity to protect the best interests of adopted children.¹⁹³ Such procedure could be applied in the situation of Arthur, born through AWT. The interference with Arthur's right to private and family life would also be legitimated for the same reasons and also to ensure the safeguarding of Arthur's right to conceptional identity, and more broadly, the safeguarding of Arthur's right to biological identity, and Arthur's right to identity as a whole. Second, such information could be specifically mentioned on Arthur's birth certificate. For instance, after referring to all the necessary mentions, such as 'name' and 'date of birth', the birth certificate could mention extra information which would refer to Arthur's conceptional identity. Birth certificates are a necessity in many instances and thus, most children – if not all – hold their birth certificate at least once in their life.¹⁹⁴ This way, Arthur would therefore necessarily discover the truth about his conception and gestation. Most probably, Arthur's parents would not take the risk that he discovers such identity by himself via his birth certificate and would prefer to disclose such information to him beforehand.¹⁹⁵ This option seems feasible and probably the most protective of all rights.¹⁹⁶ Indeed, interference with Arthur's right to private and family life would be restrained and it would help to ensure disclosure without dictating how and when to do it. Nevertheless, this second option does not mean that the first option should be ignored because a social worker could still be appointed in order to help Arthur's parents find the best approach to discuss his conceptional identity with Arthur.

3.5. Concluding Remarks

It was demonstrated that the right to identity of children born via AWT should be protected to ensure that those children can develop and know everything they need to know about themselves. With regards to identity, their rights most at risk of being impacted by AWT are their right to family, biological and conceptional identities. If no change is effected in the law by the time AWT becomes a reality, children born through AWT will be parentless. Thus, the law should provide for the recognition of AW born children's genetic parents as their legal parents. At least one of their social parents should also be genetically related to them. Moreover, while this element of AW born children's right to family identity can be protected to some extent, it will be impossible to ensure the protection of AW unborn children through bonding. If AW born children's genetic parent is different from their social parent, those children should be allowed to have access to identifying information about their genetic parent and potential genetic siblings. The safeguarding of AW born children's right to biological identity is of great concern as at present, only a few countries already protect this right. One way to ensure protection of AW born children's right to biological identity is to further protect AW born children's right to conceptional identity. Such right should also be protected in itself and not only as a means to protect other rights. To ensure disclosure, two solutions appear appropriate: the presence of a social worker and a specific mention of 'extra information' on AW born children's birth certificate which would specify the particularity of the child's conceptional identity. While mandatory disclosure can be assimilated to an interference in children's right to private and family life, it still appears as the only feasible option. But the protection of AW born children's right to identity encompasses the necessity to determine from which moment those children can claim such protection and safeguards, which will be explored in the next chapter.

¹⁹³ *Id.*

¹⁹⁴ Henaghan, *supra* note 58, at 56.

¹⁹⁵ J. Fortin, Children's right to know their parents – the significance of the blood tie, in J. Fortin, *Children's Rights in the Developing Law*, at 473 (2009).

¹⁹⁶ The feasibility of this option will be explored in chapter 5 and will thus not be detailed here.

4. Beginning of AW Born Children's Right to Identity

4.1. Introductory Elements

As was presented in part 2.2.1, the child's right to identity encompasses two dimensions of identity: a fixed identity and a dynamic identity. Being born through AWT necessarily impacts on the child's fixed identity, which will potentially influence his dynamic identity throughout his lifetime. As long as the child is not recognised as bearer of a right to identity, he cannot claim being entitled to the protection of such right.¹⁹⁷ If a child is granted a right to identity from birth, the unborn child does not have a right to identity. It is therefore necessary to know from which moment a child can claim his right to identity, which will be the purpose of this chapter. Indeed, if everything that is relevant to the fixed identity of AWT born children happens before those children can claim a right to identity, there is no need to claim a specific AWT born children's right to identity because there would be nothing to safeguard.

Only human beings are entitled to human rights. In order to be recognised as a human being, it is first necessary to have been alive, even if it was only for a second.¹⁹⁸ Hence, the right to life is the prerequisite to awarding human beings any other rights they are entitled to. Different positions have been adopted by different countries all over the world as to what the first element is that characterises a human being. For some countries, it is conception; for others, it is birth. In order to understand from which moment AW unborn children can be entitled to the right to identity, it is necessary to understand the debate around the right to life. The debate needs to be addressed at the international and regional level in the first place, but it will also be necessary to analyse it at the national level. Indeed, the positions held by countries are really diverse and the regional and international levels are trying to encompass all views and therefore, their views do not always reflect national views.

4.2. Beginning of the Right to Life and Status of the Unborn Child

The debate around the right to life has many implications. First, it implies that the right to life from conception is contrary to abortion rights as it puts children's rights over women's rights. Second, it implies that no research on embryos can be undertaken because it could potentially harm the embryos, thus harm a human being. Third, it touches upon the possibility or not of storing frozen pre-embryos. Indeed, research on pre-embryos and cryopreservation cannot be seen as protecting the life of embryos but more as damaging them.¹⁹⁹ Hence, those elements will have to be discussed next.

At the international level, the CRC has not settled the debate on acknowledging from which moment a child is entitled to rights. While the CRC recognises the child's right to life in article 6, it does not precisely determine from which moment this right is safeguarded. Article 1 of the CRC defines who is a child but only relative to the upper age and not the lower age. The CRC's Preamble acknowledges that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."²⁰⁰ Hence, the debate as to when a child is entitled to rights is based on the concept of birth. While there is a consensus that any child is awarded rights and protection, and is recognised as a person and a human being after birth, the debate is based on whether such rights and recognition should be awarded to a child before his birth. One of the CRC's strengths is the flexibility of its principles in order to fit any culture or countries' diversity.²⁰¹ The phrasing

¹⁹⁷ C. Tomuschat, *The Right to Life – Legal and Political Foundations*, in C. Tomuschat, E. Lagrange & S. Oeter (Eds.), *The Right to Life*, at 3 (2010).

¹⁹⁸ *Id.*

¹⁹⁹ D. Davey, *The Right to be Born*, *Med Law* 7, at 482 (1989) [hereinafter Davey].

²⁰⁰ CRC, *supra* note 19, at 1. See also M. Cornock & H. Montgomery, *Children's rights in and out of the womb*, *International Journal of Children's Rights* 19, at 11 (2011) [hereinafter Cornock & Montgomery].

²⁰¹ K. Arts, *Twenty-Five Years of the United Nations Convention on the Rights of the Child: Achievements and Challenges*, *Netherlands International Law Review*, at 279 (2014) [hereinafter Arts].

used by the CRC with regards to the beginning of life and protection of rights clearly coincides with the flexibility given by the Convention to States parties.²⁰² It still needs to be highlighted that even when referring to the child before and after birth, at no time does the CRC use the word 'foetus'; it only uses the words 'child' or 'human being'.²⁰³ The analysis of the CRC's concluding observations and general comments highlight some more findings:

- No reference is made to either the unborn child *per se*, or to embryos.
- Recommendations in recent concluding observations and in General Comment No. 20 are made to countries which do not allow adolescents to abort.²⁰⁴
- The only implicit reference to unborn children is in regard to the signature of contracts before birth in commercial surrogacy matters.²⁰⁵
- General Comment No. 7 establishes that "very young children [...] may require specialist health care if born to alcohol or drug-addicted mothers".²⁰⁶ Even though it is not completely explicit, this phrasing tends to suggest that a child victim of abuse can only be protected from birth. Unborn children do not seem to be protected.

On the other end of the spectrum, the Convention on the Elimination of All Forms of Discriminations against Woman (hereinafter CEDAW) and the ICCPR do not recognise a women's right to abortion. However, both the Committee on the Elimination of Discrimination against Women and the HRC recommend that countries allow abortion in cases of rape, endangerment to the life or health of the woman, and in cases of foetal impairment.²⁰⁷ There is no consensus, nor explicit explanation at the international level, with regards to which moment a child can claim the protection of his rights. This is probably due to the large diversity among States worldwide and the need to encompass as many possibilities as possible at the international level.

At the regional level, the European Commission on Human Rights first expressed that fetuses do not have an absolute right to life because it would question the legality of abortion which is allowed in most European countries and there was therefore no reason to prohibit abortion.²⁰⁸ The European Court of Human Rights (hereinafter ECtHR) later gave its position on the status of unborn children but it did not settle whether fetuses had no right to life at all or if they had a right to life with limitations. The ECtHR only held that fetuses do not amount to human beings protected under article 2 of the European Convention on Human Rights (hereinafter ECHR).²⁰⁹ The ECtHR has also never ruled on the legality or

²⁰² P. Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, *Human Rights Quarterly*, Vol. 12, at 157 (1990).

²⁰³ *Id.*, at 163.

²⁰⁴ CRC Committee, *Concluding observations on the combined third to fifth periodic reports of Malawi*, para. 35 (c) (2017); CRC Committee, *Concluding observations on the combined third and fourth periodic reports of Ireland*, para. 58 (a) (2016); CRC Committee, *Concluding observations on the fifth periodic report of Pakistan*, para. 52 (b) (2016); CRC Committee, *Concluding observations on the combined third and fourth periodic reports of India*, para. 66 (b) (2014) [hereinafter CO India]; CRC Committee, *Concluding observations on the combined third and fourth periodic reports of Ukraine*, para. 57 (2011); CRC Committee, *General Comment No. 20 on the implementation of the rights of the child during adolescence*, para. 60 (2016).

²⁰⁵ CRC Committee, *Concluding observations on the second periodic report of the United States of America submitted under article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography*, para. 30 (b) (2013).

²⁰⁶ CRC Committee, *General Comment No. 7 on Implementing child rights in early childhood*, para 36 (f) (2005) [hereinafter CRC GC No. 7].

²⁰⁷ Office of the United Nations High Commissioner for Human Rights (hereinafter OHCHR), *Abortion, Information series on sexual and reproductive health and rights*, available at http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf (last accessed 12-05-2017).

²⁰⁸ European Commission on Human Rights, *X v. the United Kingdom*, para. 20, Application No. 8416/79 (1980). See also D. Korff, *The right to life, A guide to the implementation of Article 2 of the European Convention on Human Rights*, *Human rights handbooks*, No. 8, at 10 (2006) [hereinafter Korff].

²⁰⁹ Article 2 of the ECHR recognises the right to life.

not of abortion and leaves it to the margin of appreciation of States. The ECtHR further explained that the right to life of foetuses is necessarily “limited by the mother’s rights and interests.”²¹⁰ Besides, the ECtHR acknowledged that even if foetuses do not amount to human beings, they are still human and deserve some protection in the name of human dignity.²¹¹ The ECtHR did not want to give a clear position and preferred to leave a large margin of appreciation to States as there is no consensus on the question at the regional level.²¹² In cases of cryopreservation, if one of the parents wants to stop it and the other one wants to continue it and later implant a frozen pre-embryo for gestation, the ECtHR ruled in favour of the parent who no longer wants to have recourse to cryopreservation.²¹³ However, the ECtHR did not rule on whether storage of pre-embryos should be allowed (or not) in the first place. This is left to the appreciation of each States. The ECtHR has never ruled on the possibility or not to undertake research on embryos either. The ECtHR follows, in a way, the position adopted by the CRC by leaving the debate open. The American Declaration of the Rights and Duties of Man (hereinafter ADRDM) protects the right to life but does not say from when.²¹⁴ The American Convention on Human Rights (hereinafter ACHR) protects the child’s right to life from conception and the American Court on Human Rights (hereinafter ACtHR) has reiterated such position in case law.²¹⁵ The American Commission on Human Rights established the compatibility of abortion with the right to life as expressed in the ADRDM.²¹⁶ The Commission also held that the right to life within the ACHR is not absolute and can be overruled by abortion when necessary to save the woman’s life or health.²¹⁷ The Commission also held that prohibiting IVF was in violation of the right to private and family life and the right to raise a family.²¹⁸ The diversity among States in the Americas in those domains must also be highlighted, North American countries allowing both abortion and cryopreservation, as compared to countries from Central and South America which restrict abortion and do not allow cryopreservation.²¹⁹ The status of unborn children is thus not perfectly clear in the Americas. Neither the African Committee of Experts on the Rights and Welfare of the Child, nor the African Commission on Human and People’s Rights have given their position on when life begins.²²⁰ However, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa explicitly mentions the right to abortion “in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.”²²¹ No mention is made of the storage of and research on pre-embryos. The status of unborn children is thus unclear at the African regional level.

²¹⁰ ECtHR, *Vo v. France*, para. 80, Application No. 53924/00 (2004) [hereinafter *Vo v. France*]. See also Korff, *supra* note 208, at 14.

²¹¹ *Vo v. France*, *supra* note 210, para. 84.

²¹² Korff, *supra* note 208, at 16.

²¹³ ECtHR, *Evans v. the United Kingdom*, para. 90, Application No. 6339/05 (2007). See also E. Steiner & A. Roşu, Medically Assisted Human Reproductive Technologies (ART) and Human Rights — The European Perspective, *Frontiers of Law in China*, Vol. 11, at 358 (2016) [hereinafter Steiner & Roşu]; R. Thornton, European Court of Human Rights: Consent to IVF treatment, *I.CON*, Vol. 6, No. 2, at 317 (2008).

²¹⁴ Article 1 of the ADRDM reads: “Every human being has the right to life, liberty, and the security of his person.”

²¹⁵ L. De Jesus, *Post Baby Boy v. United States* Developments in the Inter- American System of Human Rights: Inconsistent Application of the American Convention’s Protection of the Right to Life from Conception, *Law and Business Review of the Americas*, Vol. 17, at 439-440 (2011) [hereinafter De Jesus].

²¹⁶ Center for Reproductive Rights, *Whose Right to Life? Women’s Rights and Prenatal Protections under Human Rights and Comparative Law*, available at https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3%2014%2012.pdf (last accessed 12-05-2017) [hereinafter Center for Reproductive Rights].

²¹⁷ *Id.*

²¹⁸ A. Paul, *Controversial Conceptions: The Unborn and the American Convention on Human Rights*, *Loyola University Chicago International Law Review*, Vol. 9, Issue 2, at 235 (2012).

²¹⁹ *Id.*

²²⁰ P. Flood, *Does International Law Protect the Unborn Child?*, in *Life and Learning XVI: Proceedings of the Sixteenth University Faculty of Life Conference at Villanova*, at 30-31 [hereinafter Flood].

²²¹ *Id.*, at 31. See also Center for Reproductive Rights, *supra* note 216.

Asia does not have one regional framework but several. While not explicit, it seems that the Arab Charter on Human Rights recognises a right to life from conception.²²² Neither the Association of Southeast Asian Nations, nor the South Asian Association for Regional Cooperation, touch upon the status of unborn children and pre-embryos. Overall, it is not clear at the regional level either when the right to life begins. The status of unborn children is thus unclear.

At the national level, different positions are taken by States. Hence, only a couple of States that represent such diversity will be explored. In France, the right to life starts at birth and abortion is allowed for any reason.²²³ It is also possible to store frozen pre-embryos and to undertake research on them.²²⁴ In the United Kingdom, the right to life starts at birth and abortion is allowed for any reason.²²⁵ Research on pre-embryos and cryopreservation are allowed.²²⁶ In Germany, the right to life starts from conception and abortion is allowed for any reason.²²⁷ However, the storage of pre-embryos is not allowed, and research is prohibited except if it aims to ensure the survival of the embryos.²²⁸ In Switzerland, the right to life starts from conception and abortion is allowed for any reason.²²⁹ While cryopreservation is allowed, research is prohibited.²³⁰ In the United States, the right to life starts at birth and abortion is allowed for any reason.²³¹ It is also possible to store frozen pre-embryos and to undertake research on them.²³² In South Africa, the right to life starts at birth and abortion is allowed for any reason.²³³ Research and storage of pre-embryos is allowed.²³⁴ In the Philippines, the right to life starts at conception and abortion is strictly prohibited.²³⁵ It is not explicitly clear whether research on pre-embryos is allowed or not, but it is possible to store frozen pre-embryos.²³⁶

Overall, the status of unborn children is not clear in any State of the world. It is not because countries recognise the right to life from conception that they prohibit abortion or that they do not allow storage of pre-embryos, nor research. Most countries recognising the right to life from birth allow research and cryopreservation. However, not all countries recognising a right to life from conception prohibit research on pre-embryos and cryopreservation. Therefore, even if countries that would potentially allow AWT recognise a right to life from conception, it does not mean that Arthur's right to identity would be protected. Moreover, it would also mean that a distinction would be in place between children born through pregnancy who will not always be granted a right to life from conception, and Arthur who would

²²² Flood, *supra* note 220, at 24.

²²³ Article 318 of the French Civil Code. See also Law n° 75-17 relative à l'interruption volontaire de grossesse (1975).

²²⁴ Law n° 2011-814 relative à la bioéthique (2011).

²²⁵ Cornock & Montgomery, *supra* note 200. See also Abortion Act 1967; Sénat, l'interruption volontaire de grossesse, available at https://www.senat.fr/lc/lc68/lc68_mono.html#toc2 (last accessed 12-05-2017) [hereinafter Sénat 1].

²²⁶ Human Fertilisation and Embryology Act 1990. See also Sénat, l'assistance médicale à la procréation et la recherche sur l'embryon, available at https://www.senat.fr/lc/lc75/lc75_mono.html#toc6 (last accessed 12-05-2017) [hereinafter Sénat 2].

²²⁷ Germany Constitutional Court, 1975, 39 Entscheidungen des Bundesverfassungsgerichts. See also Steiner & Roşu, *supra* note 213, at 351; Korff, *supra* note 208, at 11; Sénat 1, *supra* note 225.

²²⁸ Sénat 2, *supra* note 226.

²²⁹ Steiner & Roşu, *supra* note 213, at 351.

²³⁰ Sénat 2, *supra* note 226.

²³¹ United States Supreme Court, *Roe v. Wade*, 410 U.S. 113 (1973). See also T. Pachman, Disputes over frozen preembryos & the "right not to be a parent", *Columbia Journal of Gender and Law*, Vol. 12, at 144 (2003); Steiger, *supra* note 111, at 162.

²³² K. Diamond, Cryogenics, Frozen Embryos and the Need for New Means of Regulation: Why the U.S. Is Frozen in its Current Approach, *New York International Law Review*, Vol. 11, No. 2, at 93 (1998).

²³³ Center for Reproductive Rights, *supra* note 216.

²³⁴ South Africa National Health Act, No. 61 (2004).

²³⁵ Center for Reproductive Rights, *supra* note 216.

²³⁶ House Bill No. 212, An Act intensifying stem cell research and therapy in the Philippines and for other purposes, available at http://www.congress.gov.ph/legisdocs/basic_16/HB00212.pdf (last accessed 12-05-2017).

be granted such right because he would be born through AWT. Recognising the right to life of unborn children or not is thus of no help to understand their actual status and to award them all children's rights they could be entitled to.

4.3. Rights Awarded to the Unborn Child

It is necessary to investigate whether or not unborn children are entitled to other rights. It is also important to analyse whether countries which do not recognise the right to life of unborn children, still award them other rights.

At the international level, the CRC establishes that some rights can only be awarded from birth. Indeed, insofar as children are entitled to a birth certificate, it is only from birth that such certificate can be delivered. Moreover, except the right to protection of unborn children acknowledged in the Preamble, no other mention of unborn children is made in the CRC. At the regional level, the ECtHR does not acknowledge any rights of unborn children. The ACtHR recognised a right to health of unborn children in the case of *Miguel Castro-Castro Prison v. Peru*.²³⁷ The ACtHR also acknowledged a right to physical, mental, and moral integrity for the unborn child in the case of *Goiburti et al. v. Paraguay*, thus recognising a civil right.²³⁸ In other regions, no other rights have been expressed in the name of unborn children. At the national level, different rights have been put forward by States. In France, where the right to life is recognised from birth, an unmarried father can recognise, before birth, an unborn child as being his. After the birth of the child, the name of the father will be added to the child's birth certificate.²³⁹ The name of parents on birth certificate is a crucial element of birth certificate, safeguarding the right to identity, and the right to a legal identity specifically. Hence, the action undertaken by the father before birth necessarily has an impact on the child after his birth. It can therefore be interpreted that unborn children have a partial right to identity. In the United Kingdom, where the right to life is recognised from birth, recognition before birth is not possible.²⁴⁰ However, unborn children are awarded a right to protection from violence, abuse and neglect. Authorities can report unborn children as being likely to suffer significant harm.²⁴¹ While the authority cannot protect the unborn child because he is tied to his mother, a decision made before birth can impact a child after birth. Hence, it can be claimed that unborn children have a certain right to protection from violence. In the Philippines, which recognises a right to life from conception, recognition before birth by parents is not possible.²⁴² Moreover, unborn children suffering harm are not protected by law.²⁴³

The overview of the different rights that unborn children might be entitled to shows that except for recognition of an unborn child by his parents before birth, some forms of protection from violence, and protection of integrity and health, no other children's rights are put forward for unborn children. Neither laws nor case law recognises for the unborn child a right to non-discrimination,²⁴⁴ a right to religion, a right to refugee status,²⁴⁵ or a right to social security, for example. If countries were to accept the unborn child's right to have his best interests taken into account, it could be understood as meaning that the best interests of unborn children are to be allowed to live, and thus, to have a right to life from conception.

²³⁷ De Jesus, *supra* note 215, at 439.

²³⁸ De Jesus, *supra* note 215, at 440.

²³⁹ Article 316 of the French Civil Code.

²⁴⁰ Birth and Deaths Registration Act 1953.

²⁴¹ Children Act 1989, Section 47.

²⁴² Republic Act No. 10172 on Implementing Rules and Regulations.

²⁴³ For instance, there is no legal way to prevent a mother from using drugs or substance during pregnancy. See F. Estipona, *The baby addict, Exploring the liability of mothers for intrauterine drug exposure*, Unpublished Thesis, Manila University, at 80 (2016).

²⁴⁴ For example, down's syndrome is a foetal impairment which is a sufficient ground to allow abortion, thus creating differences between unborn children who have down's syndrome and unborn children who do not.

²⁴⁵ For instance, if a mother is granted refugee status, her unborn child will not automatically be granted such status.

Also, the right to survival and development might be understood as a safeguard for the unborn child. Interestingly, the right to life, survival and development are all safeguarded under the same article in the CRC.²⁴⁶ Only rights related to life are put forward by countries for unborn children. There is not one country in the world recognising children's rights equally for unborn and born children. It must be added that in all those countries, whether recognising a right to life from conception or from birth, any other right that is awarded to an unborn child can only be awarded on the condition that the child will eventually be born viable and alive. Indeed, if a child is not born both viable and alive, he will not be awarded any legal recognition.²⁴⁷ It clearly appears that birth is absolutely crucial, in any country, to be awarded all human rights. Taken alone, the right to life is not enough to recognise all other rights of a child. It is therefore not absolutely true that the right to life is the prerequisite to be awarded other rights. It is the combination of birth, being born alive, and viability that entitle a child to all his rights.

Another right is recognised for unborn children in France, Germany, Switzerland, the United States, South Africa, and the Philippines: the right to inheritance.²⁴⁸ More broadly, this right is recognised for unborn children in almost every country in the world and there is a wide consensus on its application. Such right is based on the Latin adage "*Nasciturus pro iam nato habetur, quotiens de commodis eius agitur*", which can be translated as "the unborn is deemed to have been born to the extent that its own benefits are concerned."²⁴⁹ Based on this adage, countries assume that an unborn child is considered to be born every time it is in the unborn child's interest. Such adage has only been used in the case of inheritance and it has specifically been established that in no circumstances can this adage grant unborn children a right to life.²⁵⁰ Such adage is particularly helpful for countries which recognise the right to life at birth. For countries which recognise the right to life from conception, this adage may not be necessary but the example of Germany, Switzerland, and the Philippines shows that the adage is still relevant. The principle recognised through the Latin adage in all countries – whether recognising the right to life from conception or from birth – is the same. For such adage to be applicable, the condition is that the child must be conceived at the time of death of the person from whom the child will inherit and the child must actually be born viable and alive later on.²⁵¹ For example, a couple with two children is expecting a third child. After three months of pregnancy, the father dies. At the time of death, the father had a partner and two children. Hence, in the event of no will, the father's estate should be divided between the mother and the two children. But because of the specific law explained above, it will be considered that at the time of death, the father had a partner and three children. Hence, the father's estate will be equally divided between the mother, the two children and the unborn child. The inheritance is in a way suspended until the birth of the child. On the day of the child's birth, he will inherit. However, if after seven months of pregnancy, the mother has a miscarriage and the child is not born alive, the father's estate will only be divided between the mother and the two children. Moreover, to be able to admit an unborn child's right to inheritance, it is obviously on the condition that the link between the unborn child and the person the child will inherit from is known. In most cases, the child will inherit from a parent or a grandparent, which implicates that the recognition of who the child's parents are is done before birth. Awarding unborn children a right to inheritance indirectly awards unborn children a right to identity and

²⁴⁶ CRC, *supra* note 19, article 6.

²⁴⁷ A. Rollings, *A Womb of One's Own? – The Legal Implications of Ectogenesis*, PhD Thesis, University of Manchester, at 69 (2013). See also Cornock & Montgomery, *supra* note 200, at 7.

²⁴⁸ K. Neumayer, Succession, in K. Zweigert & U. Drobnič (Eds.), *International Encyclopedia of Comparative Law*, Instalment 37, at 23 (2002). See also article 725 of the French Civil Code; article 742 of the Civil Code of the Philippines; article 2D (1) (c) of the South African Wills Act 7 of 1953; P. Linton, The Legal Status of the Unborn Child Under State Law, *St Thomas Journal of Law & Public Policy*, Vol. 1, at 153 (2011).

²⁴⁹ A. Fellmeth & M. Horwitz, *Guide to Latin in International Law*, Oxford University Press (2011). See also R. Paisley, The Succession Rights of the Unborn Child, *The Edinburgh Law Review*, Vol. 10, at 30-31 (2006) [hereinafter Paisley].

²⁵⁰ Indeed, countries recognising such Latin adage may allow abortion and specifically refer to such adage to award rights to the unborn child without having to question the legality of abortion.

²⁵¹ Paisley, *supra* note 249.

specifically, a right to legal and family identities.

Overall, it is not completely clear which rights unborn children are entitled to. Depending on the country, unborn children are not awarded the same rights and it clearly appears that the right to life as a prerequisite to be awarded other rights is not entirely true. It the combination of birth, being born alive, and viability that entitle a child to all his rights. The only right worldwide recognised for unborn children is the right to inheritance, which implicitly implicates the right to legal and family identity.

4.4. Application of the Latin adage to AW Born Children

As was demonstrated in part 3.2.3, Arthur does not automatically have legal parents at birth. He does have biological parents but this does not matter. Indeed, a child is not reputed to be the child of his biological parents but a child is reputed to be the child of the mother who gave birth to him. In the case of AWT, because no human womb is involved, no human being would give birth to Arthur. As was demonstrated through surrogacy, having a contract would not change such law. A surrogate born child is the child of the surrogate mother until a Court operates a change to transfer parental rights from the surrogate mother to the commissioning parents.²⁵² In the case of AWT, no transfer would actually be possible. No contract would have any value before the law. Therefore, if no change in the law is effected before AWT becomes a reality, Arthur will be born without legal parents and his right to identity, especially his fixed identity, will be violated. Being born without parent can never be perceived as in the interests of the child. It is therefore necessary to find a solution before Arthur is born in order to protect Arthur's right to identity.

It was demonstrated in part 4.2 that even if unborn children are recognised as having the right to life from conception, it does not guarantee their right to identity in any case. The closest thing to protection of the right to identity is the application of the Latin adage in national laws which consider an unborn child to be born if it will allow the unborn child to inherit. It will be argued that such adage could and should be extended to Arthur's right to identity. First, the Latin adage recognised in national laws does not confer on the unborn child a right to life. Therefore, every country in the world can recognise such adage without questioning the beginning of the right to life. Second, because most countries in the world recognise such adage, the extension of such adage to the right to identity would be accessible and not difficult for those countries that may allow AWT or may have to recognise the birth of Arthur, in the event that he would be born through AWT abroad. Third, recognising a right to inheritance for unborn children necessarily implies that the adage implicitly recognises a right to family identity, recognising that children have parents and recognising who the child's parents are. Hence, extending the recognition of the right to a family identity to the right to a legal identity should be possible and accessible to any country. Fourth, two scholars have already proposed to extend the Latin adage to the child's right to a nationality if the child would otherwise be stateless.²⁵³ Such proposition shows that the possibility of extending the Latin adage to the right to a legal identity is conceivable. Indeed, the right to identity also encompasses the right to a national identity, meaning the right to acquire a nationality. Both national identity and legal identity are part of the broader right to identity. While in the case of national identity, the child would be stateless, in the case of legal identity, the child would be parentless. Fifth, according to the adage, the child should be considered to be born every time it is in his interest. Not being parentless at birth due to recognition of the child's legal parents before birth clearly is in the child's interest. Those five arguments show that there is nothing that can prevent the extension of the Latin adage to Arthur. The extension of the Latin adage to the right to identity appears to be the most pragmatic solution to ensure the safeguarding of unborn Arthur's right to identity, on the condition that he has already been conceived.

²⁵² Smolin, *supra* note 109, at 314. See also Blyth 2010, *supra* note 118.

²⁵³ G. De Groot & E. Vrinds, La position des enfants relatives aux décisions prises par leurs parents en ce qui concerne leur nationalité, in Conseil de l'Europe, *Recueil de textes sur la 3^{ème} conférence européenne sur "la nationalité et l'enfant"*, at 44 (2004).

The full recognition of the right to identity without condition, and the recognition of all other rights of Arthur, should be met when Arthur is born both viable and alive. Those two conditions will be explored below.

First, the Latin adage will be applicable on the condition that the child is already conceived.²⁵⁴ It is not possible to protect the unborn child before he is actually conceived. Once conceived, unborn Arthur can be granted his right to identity. Research on embryos, if allowed, is usually allowed until the embryo reaches 14 days.²⁵⁵ Between conception and the 14th day, embryos are commonly called pre-embryos. Moreover, in most countries, IVF of embryos aimed at being implanted in the mother's womb must be implanted before the embryos reach the 14th day.²⁵⁶ It can be argued that a certain limit is reached at 14 days. Hence, it is the author's opinion that Arthur shall be awarded a right to identity between his conception and his placement in the incubator.²⁵⁷ If the conception would be done directly in the incubator, Arthur should be awarded a right to identity before he reaches 14 days. Such recognition should be in the law of the country which would allow AWT and should be applied mandatorily.

Second, the Latin adage will be application on the condition that the child is later born both viable and alive.²⁵⁸ While the notions of viability and aliveness can easily be applied to Arthur in the same way they are applied to any children, it will be more difficult to refer to the notion of birth for Arthur. Indeed, 'birth' is defined differently and there exist no clear legal definition of the term. According to the Black Law Dictionary, 'birth' is "the act of being born or wholly brought into separate existence."²⁵⁹ For others, 'birth' is "the complete extrusion of a new-born baby from the mother's body."²⁶⁰ It is also defined as the "beginning of individual existence."²⁶¹ The definition of birth thus implies two elements. First, birth is the fact of not being intrinsically linked to a human being, the mother. Second, birth means that the child is capable of being alive without the assistance of anyone or anything, by himself, on his own. It seems that those two elements are complementary in some way. A child might be capable of being alive without the assistance of anyone nor anything but because he is still linked to a human being, because he is still in the human womb, the child is not born. Indeed, unborn children are both viable and alive from 24 weeks approximately but they do not leave the human womb before 40 weeks approximately. The child will be considered born when he is outside the mother's womb, even though the child would have been viable and capable of being alive without the assistance of anyone or anything before that. In contrast, some premature children leave their mother's womb before they reach the 40 weeks of gestation. Some children even leave the womb before reaching 24 weeks of gestation, the limit to be considered viable.²⁶² Children leaving the human womb prematurely are viable but are not always capable of being alive without the assistance of anyone nor anything. Indeed, if doctors do not monitor them, do not give them medicine, do not operate surgically on them, they would most likely not be able to survive on their own. But in the eyes of law, those children are considered to be born from the moment they are not within their mother's womb. This highlights that three elements need to be put forward: the fact of being out of

²⁵⁴ Paisley, *supra* note 249.

²⁵⁵ Alghrani & Brazier, *supra* note 111, at 56. See also Sénat 2, *supra* note 226.

²⁵⁶ S. Morris, Human embryos cultured in vitro to 14 days, *Open Biology* 7, at 4 (2017).

²⁵⁷ Because embryos have to be implanted in the mother's womb before they reach 14 days, it is likely that embryos will have to be implanted within the incubator before they reach 14 days.

²⁵⁸ Paisley, *supra* note 249.

²⁵⁹ Black Law Dictionary, Birth, 2nd Ed., available at <http://thelawdictionary.org/birth/> (last accessed 12-05-2017).

²⁶⁰ Steiger, *supra* note 111, at 156.

²⁶¹ Oxford English Dictionary, "birth, n.", *Oxford University Press* (2017), available at <http://www.oed.com/view/Entry/19395?rskey=z1dBE8&result=1#eid> (last accessed 14-05-2017).

²⁶² With regards to 24 weeks of gestation as the minimum to be considered viable, see Davey, *supra* note 199, at 181. See also Cornock & Montgomery, *supra* note 200, at 7. With regards to children leaving the womb before 24 weeks of gestation, see Cornock & Montgomery, *supra* note 200, at 15. See also Anonymous, Record de la naissance la plus prématurée au monde égalé en Allemagne, *L'OBS* (2011), available at <http://tempsreel.nouvelobs.com/monde/20110423.OBS1800/record-de-la-naissance-la-plus-prematuree-au-monde-egale-en-allemande.html> (last accessed 14-05-2017).

a mother's womb, the fact of being viable and the fact of being capable of being alive without the assistance of anyone. Being in need of assistance to be alive and to further be considered born is not a necessity. Therefore, birth should legally be defined as the 'complete extrusion of a viable child from the mother's body.' With regards to Arthur, because he will never be within a human's body, he could be considered 'born' from conception. But because it is also necessary to be 'viable' to be considered 'born', Arthur's date of birth should be on the day he is viable or considered to be viable. Even if Arthur still needs the assistance of the incubator to be alive, it should not be an element used to postpone his birth.

Overall, unborn Arthur should be considered to be born no later than 14 days after his conception with regard to his right to identity in order to ensure the full protection of his right to identity, to ensure that he will have parents, and to ensure that he will have a full fixed identity that will further enable him to build his dynamic identity. Afterwards, Arthur should be considered to definitely be born from the moment he is viable, even though he would still be within the incubator. From that moment on, he should be awarded all rights that children are entitled to in accordance with the CRC and other legal standards.

4.5. Concluding Remarks

In order to protect AW born children's right to identity, it is necessary to know from which moment those children can actually be protected. While it would have seemed coherent to protect them from conception by recognising for them a right to life from conception, it appeared that such recognition would not guarantee the protection of AW born children's right to identity. Indeed, the right to identity is, for the most part, only protected from the time of birth. However, protecting AW born children only from birth also appeared to be really late because those children would not be entitled to any protection for approximately 9 months. Hence, the possibility of recognising the applicability of the Latin adage which safeguards a specific unborn children's right to identity from no later than the 14th day after conception, and the possibility of acknowledging AW born children's birth from the moment they are viable, appears as the most pragmatic solution. Between the 14th day after conception at the latest and viability, AW unborn children would be awarded a right to identity; and from viability, they would be entitled to all children's rights. It will therefore be required to explore how such right to identity could be protected in practice before and after birth. The recognition of a legal identity and a birth certificate from conception might be a solution.

5. The Safeguarding of AW Born Children's Right to Identity in Practice

5.1. Introductory Elements

After having exposed the different concerns with regards to AW born children's right to identity, it is necessary to examine how such right could be protected in practice. Whether AWT is performed at a national or an international level, different factors will have to be taken into account in order to protect AW born children's right to identity.

5.2. The Safeguarding of AW Born Children's Right to Identity at the National Level

5.2.1. AW Born Children's Right to a Legal Identity

Child's right to identity also encompasses the right to a legal identity. It is defined as the "legal civil status obtained through civil registration at birth and civil identification of unique attributes, such as a personal identification number and biometrics that recognise the individual as a subject of the law and protection of the state."²⁶³ The registration at birth normally leads to the issuance of a birth certificate,

²⁶³ M. Harbitz & K. Gregson, *Towards Universal Birth Registration, A Systemic Approach to the Application of ICT*,

which includes all important information about a person.²⁶⁴ Birth certificates always contain the name(s) of the child, his date and place of birth, the parents' names and information about them.²⁶⁵ Information about the child's parents is really fundamental because it attests to who is legally responsible for the child,²⁶⁶ thus acknowledging the child's right to family identity. The child's birth certificate can also indicate some information which is specific to the child.²⁶⁷ Birth certificates are most of the time a prerequisite to be able to access other rights, such as education or health.²⁶⁸ A country may also deduce from the birth certificate what is the nationality of the child,²⁶⁹ thus having a legal identity can further protect the child's right to a national identity. The right to a legal identity also encompasses the right to be granted a national identity card and a passport, which is essential to prove that a person is who he pretends to be and also to be able to travel.²⁷⁰ It is usually these national identity cards and passports that mention the child's national identity; his nationality.

The child's right to a legal identity is of utmost importance because it acknowledges his existence by the State.²⁷¹ Legal identity is also a requirement in order for a State to know who is on its territory and to take measures accordingly to secure the rights of those under its jurisdiction.²⁷² In the same way as the right to life, the right to a legal identity is usually seen as a prerequisite to be awarded others rights.²⁷³ Even when the right to a legal identity is not acknowledged as such prerequisite, it still appears that in practice, the safeguarding of other rights are more easily accessible when a person has a legal identity.²⁷⁴ For instance, if a child does not have a legal identity, he should still be allowed to have access to education or health services.²⁷⁵ However, it will be impossible for him to legally leave the country he is living in.²⁷⁶ The child's right to a legal identity is also crucial for children who happen to be separated from their families. Indeed, if a child at least knows his name and his country of origin, the authorities might be able to find a record of his birth certificate, and thus find information about the child's parents. It will help the authorities to trace the child's family and eventually, reunite them.²⁷⁷

at 70 (2015) [hereinafter Harbitz & Gregson].

²⁶⁴ Henaghan, *supra* note 58, at 55.

²⁶⁵ Harbitz & Gregson, *supra* note 263, at 48.

²⁶⁶ Even though in some cases of abuse, the child's legal parents don't legally care for him. See Blyth et al., *supra* note 177, at 219.

²⁶⁷ Harbitz & Gregson, *supra* note 263, at 48.

²⁶⁸ Such requirements are seen as being discriminatory for those children who have not been registered or who do not have a birth certificate, although it does prove the importance of such documents. See McCombs & Shull Gonzáles, *supra* note 169, at 20.

²⁶⁹ 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*, para. 3 (2014) [hereinafter ACERWC GC No. 2]. J. Stein, *The Prevention of Child Statelessness at Birth under the Convention on the Rights of the Child: the Committee's Role & Potential*, LLM Thesis, Leiden University, at 7 (2014).

²⁷⁰ L. Van Waas, *The right to a legal identity or the right to a legal ID?*, *European Network on Statelessness* (2015) available at <http://www.statelessness.eu/blog/right-legal-identity-or-right-legal-id> (last accessed 05-06-2017). See also Harbitz & Gregson, *supra* note 263; ACERWC GC No. 2, *supra* note 269, para. 86.

²⁷¹ Hodgkin & Newell, *supra* note 55, at 98. See also Blyth et al., *supra* note 177, at 219.

²⁷² Overseas Development Institute, *The data revolution, Finding the missing millions*, Research Report No. 3, at 11 (2015). See also United Nations Children's Fund, *Excluded and Invisible, The State of the World's Children 2006*, at 26 (2006).

²⁷³ OHCHR, *Birth registration and the right of everyone to recognition everywhere as a person before the law*, para. 3 (2014) [hereinafter OHCHR]. See also Blyth et al., *supra* note 177, at 219.

²⁷⁴ P. Gerber et al., *Does the right to birth registration include a right to a birth certificate?*, *Netherlands Quarterly of Human Rights*, Vol. 29/4, at 434 (2011) [hereinafter Gerber et al.].

²⁷⁵ CRC GC No. 7, *supra* note 206, para. 25.

²⁷⁶ S. Nonnenmacher & R. Cholewinski, *The nexus between statelessness and migration*, in A. Edwards & L. Van Waas (Eds.), *Nationality and Statelessness Under International Law*, at 254 (2014). See also OHCHR, *supra* note 273, para. 30.

²⁷⁷ OHCHR, *supra* note 273, para. 35.

The child's right to a legal identity is protected at the international level. On the one hand, article 7 (1) of the CRC protects the child's right to a name and to birth registration. Because article 7 (1) is exhaustive,²⁷⁸ the child's right to a birth certificate and to a national identity card/passport is not expressly protected by the CRC. Without recognition of a right to a birth certificate and to a national identity card/passport, it appears that the child's existence cannot be acknowledged in practice, and thus, the right to birth registration and to a name would have no purpose.²⁷⁹ Nevertheless, the CRC has recognised the importance of birth certificates in its concluding observations because it does refer to them under the category 'birth registration.'²⁸⁰ While it is argued that a birth certificate is recognised by the CRC as the practical way of safeguarding the child's right to birth registration,²⁸¹ it is unfortunately not expressly mentioned in the CRC. Countries are therefore bound by the child's right to birth registration but they are not bound by any obligation to provide a birth certificate, nor a national identity card/passport, to the child. On the other hand, article 8 (1) of the CRC preserves the child's right to identity whenever there is unlawful interference and article 8 (2) of the CRC protects the child from illegal deprivation of elements of his identity. For instance, if a child does not have a birth certificate and/or a national identity card/passport, he should be able to argue such negligence under article 8 of the CRC. If the State is not able to give valuable justification for such deprivation, violation of article 8 of the CRC should be recognised and the child should consequently be provided with a birth certificate and/or a national identity card/passport. Overall, it appears that the child's right to a legal identity is entirely safeguarded at the international level, whether such safeguard is explicit or implicit. Besides, while children are accorded an explicit right to birth registration, and by extension, an implicit right to birth certificate, it is not specified which information should be recorded.²⁸² It is commonly admitted that the name, date and place of birth, and information about the child's parents should be registered.²⁸³ Information registered should be done "in accordance with the legal requirements of a country."²⁸⁴ It thus appears that if a country wants to record other relevant information about a child, it should be allowed to do so.

As with any other child, Arthur should have a right to a legal identity in order to first acknowledge his existence, but also to know who his legal parents are, and to ensure that he will be entitled to the protection and access to all of the rights to which he is entitled. As with any other child, Arthur's legal identity should take the form of a registration of his birth, of the issuance of a birth certificate and a national identity card/passport, all containing the relevant information as prescribed by his State of birth. At the national level, it seems that Arthur's right to a legal identity will be respected and will not be an issue.²⁸⁵

5.2.2. Protection of AW Born Children's Right to Identity Through the Protection of AW Born Children's Right to a Legal Identity

While Arthur's right to a legal identity is a right in itself that is entitled to safeguarding, this right is of

²⁷⁸ See explanation part 2.4.

²⁷⁹ Gerber et al., *supra* note 274, at 443.

²⁸⁰ See for example, CRC Committee, *Concluding observations on the initial report of Afghanistan*, para. 34 (2011). See also CRC Committee, *Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation*, para. 29 (2014); CRC Committee, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, para. 34 (2016); CRC Committee, *Concluding observations on the second periodic report of South Africa*, para. 32 (d) (2016); CO India, *supra* note 204, para. 40 (a).

²⁸¹ Gerber et al., *supra* note 274, at 454.

²⁸² It is not further specified in General Comments nor Concluding observations.

²⁸³ Harbitz & Gregson, *supra* note 263, at 48. See also Henaghan, *supra* note 58, at 56.

²⁸⁴ Henaghan, *supra* note 58, at 69.

²⁸⁵ Such affirmation is based on a comparison with children born via surrogacy in their country of nationality and residence. Their right to a legal identity was respected.

particular importance in the context of AWT because it will ensure that other aspects of Arthur's right to identity will also be protected, namely, his right to family, biological, genetic, conceptional, and national identities.

With regards to Arthur's right to family identity, the fulfilment of Arthur's right to a legal identity includes the registration of his parents, the mention of his parents on his birth certificate, and important information about his parents to be able to identify them as his parents. The indication of parents through registration and on his birth certificate acknowledges them as Arthur's legal parents.²⁸⁶ Arthur's parents would be acknowledged through registration and the issuance of a birth certificate. The fulfilment of Arthur's right to a legal identity will further ensure the protection of his right to family identity. The particularity of Arthur is that he is not directly connected to his mother through pregnancy, making him parentless from conception. In order to avoid such a concerning situation, it was argued in part 4.4 that Arthur should be registered with legal parents from no later than 14 days after his conception; thus, Arthur's right to family identity should be recognised from no later than 14 days after his conception. The registration should be executed by Arthur's intended parents with the doctor who attended Arthur's conception. It is important that the doctor is present through the registration process because he is the only one who can attest to the genetic link between Arthur and at least one of his social parents. The authorities should register information regarding Arthur's intended parents in order to protect Arthur's right to family identity. Once Arthur is born, in other words, from the moment he is viable, complementary information regarding birth particularly²⁸⁷ should further be registered and should be added to his birth certificate.

With regards to Arthur's right to biological identity and to conceptional identity, the fulfilment of Arthur's right to a legal identity may include the recording of other relevant information concerning him. Indeed, a legal identity is supposed to record all information that is unique to one child and that may be of particular relevance for him.²⁸⁸ Extra information added on a birth certificate or a national identity card/passport is usually information that enables further verification as to whether the person is actually who he pretends to be.²⁸⁹ For instance, extra information can include colour of the eyes.²⁹⁰ Extra information is normally not recorded to inform a child that he should be aware of specific information but to ensure who he is and that he does not use the identity of someone else.²⁹¹ Nonetheless, a legal identity, and a birth certificate specifically, are truly unique to one child,²⁹² and it is the only document that a child will always need and have through his lifetime. The child will most certainly see his birth certificate and read the information that is recorded on it.²⁹³ As it was explained in parts 3.3.3 and 3.4.2, there is no guarantee that Arthur's right to biological and conceptional identities will be safeguarded because his parents may not want to disclose such information to him. However, if information leading to disclosure is recorded on a document that Arthur will necessarily have access to, his parents will in a way have no choice but to tell Arthur the truth about his biological and conceptional identities if they want to avoid disclosure by accident.²⁹⁴ Thus, the safeguarding of Arthur's right to a legal identity

²⁸⁶ Blyth et al., *supra* note 177, at 225.

²⁸⁷ The date, place of birth, and the gender should be added on the birth certificate.

²⁸⁸ Harbitz & Gregson, *supra* note 263, at 48. See also Henaghan, *supra* note 58, at 55; Blyth et al., *supra* note 177, at 219.

²⁸⁹ P. Beynon-Davies, Personal identity management in the information polity: The case of the UK national identity card, *Information Polity* 11, at 5 (2006) [hereinafter Beynon-Davies]. See also Harbitz & Gregson, *supra* note 263, at 70.

²⁹⁰ Beynon-Davies, *supra* note 289, at 12.

²⁹¹ G. Dickson, A national Identity Card?, *Law Now*, 27(6), at 60 (2003).

²⁹² Henaghan, *supra* note 58, at 55.

²⁹³ The birth certificate could be hidden from a child up until the time he will not be under the responsibility of his parents anymore and lives on his own. Parents may want to hide the truth during childhood but they will have no choice but to reveal the truth to their child once he has access to his birth certificate.

²⁹⁴ Daniels & Douglass, *supra* note 166, at 9.

through the issuance of a birth certificate appears as the best solution to ensure that his right to biological and conceptional identities is protected. Two solutions appear feasible.

First, Arthur could be issued two birth certificates as it is done in the United Kingdom.²⁹⁵ The “short” birth certificate would only record information regarding Arthur’s birth. The “long” birth certificate would have information regarding Arthur’s parents and other extra information. The advantage of issuing two birth certificates is that only Arthur’s “short” birth certificate will actually be necessary in his everyday life. Authorities and institutions requiring Arthur’s birth certificate to be divulged will not be able to know about his biological and conceptional identities.²⁹⁶ Indeed, this information is private to Arthur and not having to disclose such information to other parties will protect Arthur’s right to privacy. Second, Arthur could be issued a usual birth certificate in which a specific mention could be added at the end. Such solution was already suggested by the New Zealand Law Commission.²⁹⁷ It was advised to add at the end of the birth certificate a note declaring that other information is available on a specific register. For instance, there could be a mention of ‘extra information’ where it would be declared ‘further information is available on the register [name of the register]’. Once Arthur sees such mention of ‘extra information’, he would have to solicit by himself the disclosure of the specific information that is on the register in order to know what it contains. The second option appears as a better solution in that it only provides Arthur with one birth certificate. Besides, it is not because Arthur would be provided with two birth certificates that his right to privacy would be safeguarded. Indeed, the “long” birth certificate has to be issued in order to be granted a passport.²⁹⁸ Arthur would still have to divulge his “long” birth certificate and the issuance of two birth certificates loses its purpose in a way. Moreover, whichever option is selected, specific information will still have to be recorded within a specific register. Indeed, even if the exact name of Arthur’s biological parent is written on his birth certificate, other information concerning him – such as his last address or his genetic information – would not be reported on his birth certificate but on a specific register. The same goes with Arthur’s potential genetic siblings.

The mention of specific information regarding Arthur’s biological and conceptional identities on his birth certificate has been criticised in that it would interfere with Arthur’s right to privacy. Indeed, whenever Arthur would have to issue a copy of his birth certificate, the authority or institution will be aware of information that is supposedly private to Arthur. Nonetheless, the same argument that was used in part 3.4.3 with regards to the balance between Arthur’s right to conceptional identities and Arthur’s right to private and family life can be applied here. There is no guarantee that Arthur’s right to biological and conceptional identities will be protected if no interference with his right to privacy is permitted. On the contrary, while the specific mention of ‘extra information’ on Arthur’s birth certificate is an obvious interference with his right to privacy, it does not mean that his right to privacy will be completely neglected. The interference with Arthur’s right to privacy will be limited to mentioning that further information can be found on the register. While those having access to Arthur’s birth certificate may have an idea of which information Arthur may find on the register, they will not know it for sure and the register will only be accessible by Arthur. Besides, if Arthur believes that the mention of ‘extra information’ is effectively interfering too much with his right to privacy, he should be allowed to apply for the removal of such mention. This application should however only be submitted by Arthur himself and not on his behalf (to avoid that his parents would do so to prevent disclosure).

In practice, the protection of Arthur’s right to biological and conceptional identities should arise through the registration of Arthur no later than 14 days after his conception. The doctor who assisted with Arthur’s conception should attest that he has a biological parent different than one of his legal parent and should also attest to the technology used to conceive him. The doctor should also note

²⁹⁵ Blyth 2010, *supra* note 118, at 348.

²⁹⁶ Blyth et al., *supra* note 177, at 219.

²⁹⁷ Blyth et al., *supra* note 177, at 223.

²⁹⁸ For example, see United Kingdom Government, HM Passport Office, Birth certificates and the full birth certificate policy, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118596/birth-certificates-policy.pdf (last accessed 06-06-2017).

Arthur's specific conception and gestation, and biological parent's information on the relevant register. Moreover, such register should be updated for every sibling genetically related to Arthur. This way, the protection of Arthur's right to a legal identity will further protect Arthur's right to biological and conceptional identities.

With regards to Arthur's right to genetic identity, the same register should also contain information about genetic particularities concerning Arthur's biological parent(s) and such information should be updated if necessary. Indeed, if his biological parent has any genetic particularities, Arthur will be able to know about it and will be able to make appropriate medical decisions accordingly. The protection of Arthur's genetic identity can only be protected if Arthur's biological identity is protected in the first place. Because it was demonstrated that Arthur's right to biological identity will be protected through Arthur's right to a legal identity, it appears that the fulfilment of Arthur's right to a legal identity will indirectly also protect Arthur's right to genetic identity.

With regards to Arthur's right to a national identity, it should be mentioned that he is entitled to acquire a nationality.²⁹⁹ Such nationality is acquired based on the nationality of his parents (*jus sanguinis*) or based on his place of birth (*jus soli*).³⁰⁰ Through the use of the Latin adage, unborn Arthur should be considered born within 14 days after his conception. He should thus have the right to acquire a nationality from the moment he is considered 'born', whether granted because of his parent's nationality or because of his place of birth. Indeed, the incubator where unborn Arthur will be is not meant to travel between countries; his place of birth will be known from conception. Besides, both ways of acquiring a nationality are based on information that is transcribed in the child's birth certificate. The protection of Arthur's right to a legal identity will therefore ensure the protection of Arthur's right to a national identity. While the safeguarding of Arthur's right to a national identity should not be an issue at national level, problems may arise at the international level if Arthur's parents have a nationality which differs from where he is born.³⁰¹

Overall, it was demonstrated that more than just being a right in itself, Arthur's right to a legal identity should also be the means used to safeguard his right to identity in general. Indeed, all aspects of identities that can potentially be affected by the use of AWT might find protection through the protection of Arthur's right to a legal identity.³⁰²

5.3. The Safeguarding of AW Born Children's Right to Identity at the International Level

5.3.1. Potential Issues Arising with Transnational AWT

It has been shown over the years that not all countries in the world allow every practice of ART.³⁰³ Nonetheless, globalisation and democratisation of transnational transportation have not stopped people living in prohibition countries from having access to any form of ART.³⁰⁴ Issues do not arise with regards

²⁹⁹ CRC, *supra* note 19, article 7 (1).

³⁰⁰ A. Edwards, The meaning of nationality in international law in an era of human rights: procedural and substantive aspects, in A. Edwards & L. Van Waas (Eds.), *Nationality and Statelessness Under International Law*, at 16 (2014).

³⁰¹ Such issue was raised in cases of surrogacy and there exists a risk that the same issue might be raised in cases of AWT. This problem will be explored in part 5.3. For cases of surrogacy, see J. Kanics, Preventing and Addressing Statelessness, In the Context of International Surrogacy Arrangements, *Tilburg Law Review* 19, at 119-120 (2014) [hereinafter Kanics]; T. Lin, Born Lost: Stateless Children in International Surrogacy Arrangements, *Cardozo Journal of International & Comparative Law*, Vol. 21:545, at 555-556 (2013).

³⁰² Except for the AW unborn child's right to family identity with regard to bonding with the mother. This aspect of the right to family identity cannot be safeguarded.

³⁰³ While IVF is basically allowed everywhere, the same cannot be said about gamete donation, frozen embryos, and surrogacy, to only give some examples.

³⁰⁴ G. Palattiyil, Globalization and cross-border reproductive services: Ethical implications of surrogacy in India for social work, *International Social Work* 53(5), at 689 (2010). See also C. Kindregan & D. White, International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements, *Suffolk*

to access to ART, but they do once the child is born and the family returns to its country of residence. The specific example of surrogacy will be used in this part. Although only few countries in the world allow the practice of surrogacy,³⁰⁵ there has not been any person denied access to such technology in countries allowing such practices.³⁰⁶ Once parents have had access to surrogacy and their child has been born, the family goes back to its country of residence. Parents therefore apply for the transcription of their child's birth certificate in their country of residence and for the transmission of their nationality to the surrogate born child.³⁰⁷ For diverse reasons, the country of residence may refuse such application, leaving the child with only a foreign nationality and a foreign birth certificate in the best-case scenario or with only a foreign birth certificate and no nationality at all in the worst-case scenario. Experiences with international surrogacy agreements suggest that the same issues may probably arise if AWT becomes a reality and is accessed by parents living in a country which does not allow such technology. Moreover, other issues that are specific to AWT may also arise with international AWT.

On the one hand, Arthur's foreign birth certificate may not be allowed for transcription by the authorities where he is going to live. Some countries only allow the transcription of a foreign birth certificate that states the truth.³⁰⁸ This implies that a birth certificate has to recognise the woman who gave birth to the child as his mother. If the mother registered on the child's birth certificate is another person, the country may refuse to transcribe the child's birth certificate in its own civil status records.³⁰⁹ The most significant particularity of AWT is that Arthur will not be born through any woman; thus, it will be impossible for Arthur to have his birth certificate transcribed in countries applying such policy. Not only will it negatively affect Arthur's right to a legal identity, but it will also disregard Arthur's right to a family identity. Furthermore, if Arthur's birth certificate is not transcribed, it can further imply that the national authorities will not grant him the same nationality as his parents. If Arthur is born in a country recognising the *jus soli* principle, Arthur will at least have one nationality. However, if he is born in a country recognising the *jus sanguinis* principle, he might end up stateless. Arthur's right to a national identity will either be negatively affected or completely violated.

On the other hand, even if Arthur's country of residence does allow the transcription of his birth certificate, acknowledge the same legal parents as the one registered in the country of birth, and grant him the same nationality as his parents, other issues may arise. It was argued in part 5.2 of this thesis that the birth certificate should have an additional mention of 'extra information' indicating to Arthur that he can have access to further information regarding his biological and conceptional identity on a national register. However, there is no guarantee that countries which do not permit AWT will provide for such extra mention or will allow the transcription of such a mention into their national birth certificate format. If such a mention could not be transcribed, there would exist no way to ensure that Arthur's parents will disclose to him important information about his biological parents, and about his conception and gestation. Furthermore, because the country of residence would not recognise AWT, it would not envisage in its law the appointment of a social worker or any other professional to ensure disclosure of biological and conceptional identities by Arthur's parents to Arthur. Even if such extra mention was possible, there is always a risk that Arthur will not know to which register his birth certificate is referring to because it would not be the national register of his country of residence but the national register of his country of birth. It will in any case, be more difficult for Arthur, if he is born abroad, to have access

Transnational Law Review, Vol. 36:3, at 532-533 (2013) [hereinafter Kindregan & White].

³⁰⁵ European Parliament, *A comparative study on the regime of surrogacy in EU Member States*, Policy Department C, Citizen's Rights and Constitutional Affairs (2013) [hereinafter European Parliament]. See also Kanics, *supra* note 301, at 119.

³⁰⁶ However, the rise of issues has led some countries to close their doors to international surrogacy agreements to avoid such problems. See Kindregan & White, *supra* note 304.

³⁰⁷ Y. Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, *Emory International Law Review*, Vol. 27, at 174 (2013) [hereinafter Ergas]. See also European Parliament, *supra* note 305, at 98, 117 & 122.

³⁰⁸ Henaghan, *supra* note 58, at 56. See also Blyth et al., *supra* note 177, at 219.

³⁰⁹ Ergas, *supra* note 307. See also European Parliament, *supra* note 305, at 98, 117 & 122.

to the register; even if it is only because of a language barrier for instance. Therefore, Arthur's right to biological, genetic and conceptional identities may be negatively affected or completely overlooked due to international AWT.

Overall, it appears that international AWT will be accessible to non-national parents. Unlike at the national level, international AWT may lead to violation of Arthur's right to a legal identity. Consequently, it will be more difficult to enforce Arthur's right to a legal identity as a means to protect his right to identity as a whole. In order to avoid that Arthur's right to identity would be violated through international AWT, it might be necessary to put in place a comprehensive international legal instrument that would take into account all those risks and would try to protect Arthur's right to identity.

5.3.2. Protection of AW Born Children's Right to Identity Through an International Legal Instrument

While Arthur's parents may make choices in their interests, those interests might impair Arthur's own interests. However, Arthur should not be the one suffering from his parents' choices and his right to identity should not be left unprotected or negatively affected simply to satisfy the interests of his parents. To ensure that Arthur's identity, if born in a country different than the one he will be living in or in a country where he does not have nationality, will be protected the same way as his peers, a global solution should be found. In order to do so, both countries of birth and of residence should sign an international legal instrument.

The value of international legal instruments is indisputable. It has been widely recognised that international legal instruments have led to the enhancement of children's rights. The ratification of the CRC has led to major achievements³¹⁰ which would probably not have been reached without the work done by the CRC Committee, the States, and civil society. When a State ratifies an international legal instrument, it implies that it acknowledges the importance of the rights put forward in the instrument and commits to enhance them. The ratification of such instrument may also raise awareness in society.³¹¹ It brings visibility to those subject to the instrument: their particularities or vulnerabilities are given weight as characteristics that require ample protection and safeguards.³¹² An international legal instrument is not simply a piece of paper set in stone. An international legal instrument includes actors that will ensure that the international legal instrument is actually applied in practice. Experts might be elected to review the State achievements and help them going further.³¹³ A Secretariat might be set up in order to provide assistance to States parties to ensure that the instrument is correctly applied.³¹⁴ Intergovernmental organisations and nongovernmental organisations may also provide further guidance and awareness on children's rights enhancements that still need to be achieved or violations that still occur. They may also raise new issues that have become relevant. ART have become more and more significant over the years and the children's rights violations that are occurring due to those technologies are well known by now. The possibility that AWT becomes a reality brings with it questions and concerns that additional children's rights violations will occur. Especially, as it was demonstrated in chapters 3 and 4, Arthur's right to identity is of particular concern. Therefore, the ratification of an international legal instrument

³¹⁰ J. Doek, *The CRC 20 years: An overview of some of the major achievements and remaining challenges*, *Child Abuse & Neglect* 33, at 780 (2009) [hereinafter Doek 2009]. See also Arts, *supra* note 201, at 271-294.

³¹¹ N. Cantwell, *Are Children's Rights Still Human?*, in A. Invernizzi and J. Williams (Eds.), *The Human Rights of Children, From Visions to Implementation*, at 24 (2011).

³¹² J. Sloth-Nielsen, *Global, Regional, Sub regional? Prospects and pitfalls for children's rights in future*, *Inaugural Lecture*, at 2 (2014).

³¹³ W. Vandenhoe, *Children's Rights from a legal perspective*, in W. Vandenhoe et al. (Eds.), *Routledge International Handbook of Children's Rights Studies*, at 28-29 (2015). See also Doek 2009, *supra* note 310, at 778.

³¹⁴ For example, see the Permanent Bureau of the Hague Conference (hereinafter HCCH). See also P. Hayes, *The Legality and Ethics of Independent Intercountry Adoption under the Hague Convention*, *International Journal of Law, Policy and the Family*, Vol. 25(3), at 289 (2011).

appears as one solution to ensure that Arthur's right to identity will be protected.

Different kind of international legal instruments might be appropriate and will be explored. First, a United Nations (hereinafter UN) Declaration could be signed. Indeed, it was done in order to ban human cloning.³¹⁵ The problem with such instrument is that it is not binding and thus, there cannot be any mechanism ensuring that the rights safeguarded in the Declaration are correctly addressed and protected by States parties. Second, a UN Convention could be ratified. Unlike a Declaration, a Convention is binding on the States parties. It would appear more appropriate to advocate for a Convention addressing the rights of children born via ART in general, which would necessarily include the rights of children like Arthur specifically if AWT becomes a reality. A Convention enhances rights and give obligations to States, but is not really practical. Each State would still be allowed to operate ART and AWT the way it wishes as long as the rights of children like Arthur and the obligations put on the States, as set in the Convention, are safeguarded. Consequently, a UN Convention would not necessarily solve all the issues arising within international AWT. Third, a Convention by the Hague Conference (hereinafter HCCH) could be ratified. The HCCH is specialised in matters relating to private and family law. The common trait of all HCCH Conventions is that they all deal with matters involving a cross-border element, making the matter international and not national. In the context of AWT, it is specifically the involvement of a cross-border element that calls into question the possibility of safeguarding the right to identity of children like Arthur in their country of residence/non-nationality. Furthermore, the HCCH already has a Convention on Intercountry Adoption;³¹⁶ thus, it has already dealt with the issue of the child's right to biological identity. The HCCH is also currently working on surrogacy, a form of ART and most of the questions raised in this thesis are also addressed by the HCCH through its work on surrogacy.³¹⁷ Moreover, while there is neither a Committee or a Commission set in place to ensure that the countries which ratified the Convention actually apply it, the HCCH has over the years developed guides to good practices referring to a particular Convention, which provide further guidance to countries which ratified the Convention. The advantage of the HCCH's guides to good practices is that although they are not binding in theory, they are all approved by the States parties.³¹⁸ Countries are thus more inclined to follow and implement the good practices recommended by the HCCH. This makes the HCCH Conventions really practical and ensures that the rights of children, like Arthur, are truly safeguarded in practice.

Overall, it clearly appears that the best solution is to advocate for the ratification of a HCCH Convention which seems to be the type of Convention that will holistically ensure that the right to identity of children like Arthur born abroad will be protected and enhanced. It is finally necessary to explore which elements such Convention should encompass.

5.3.3. Ratification of a HCCH Convention Protecting AW Born Children's Right to Identity in Transnational AWT

The HCCH Convention would only apply for international AWT. A HCCH Convention can only be applied if there exists a cross-border element. Such element should be assessed in relation to the country where the AWT will be performed. In the matter of AWT, a cross-border element would refer to the nationality and/or country of residence of any of Arthur's parents (genetic, social, and legal parents), but also the nationality and/or country of residence of any of Arthur's genetic siblings. From the moment one of those elements involves a country different from the country where the AWT is performed, the HCCH Convention should be applicable. If the AWT is used in a purely national matter, the Convention

³¹⁵ United Nations, General Assembly, *United Nations Declaration on Human Cloning* (2005).

³¹⁶ HCCH, *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993).

³¹⁷ HCCH, Permanent Bureau, *The parentage / surrogacy project: an updating note*, Preliminary Document No 3A of February 2015 for the attention of the Council of March 2015 on General Affairs and Policy of the Conference (2015).

³¹⁸ For example, see HCCH, Permanent Bureau, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention*, Guide to Good Practice, Guide No. 1, para. 7 & 11 (2005).

cannot be applied. Although, if a country was to allow both national and international AWT, it would be strange to set national standards completely different from the standards determined in the HCCH Convention. The chances are that if a country ratifies a HCCH Convention, its national law will be similar, if not identical, to the principles set in the HCCH Convention.

The HCCH Convention would protect the rights of children born through ART, and specifically the right to identity of children born through AWT. It would appear more relevant to ratify a HCCH Convention protecting the rights of all children born through ART in general because most of the rights affected by each form of ART are the same. Besides, the Convention should also have specific provisions regarding the particularities of children like Arthur.³¹⁹

With regards to Arthur's right to family identity, there should be a specific provision stating the recognition of at least one genetic parent as the legal parent. The doctor who assisted with the conception of the child should be present during registration to attest the veracity of such statement. It should also be specified that parents should be registered before Arthur is placed in the incubator or within 14 days after Arthur is placed in the incubator.

With regards to Arthur's right to a national identity, there should be a general provision establishing that rules of *jus sanguinis* and/or *jus soli* should apply for ART born children, like Arthur, and that those children should not be left stateless.

With regards to Arthur's right to a legal identity, there should be a general provision in which the countries ratifying the HCCH Convention should accept to coordinate their birth certificates so that each information would be referring to a number and each number would be referring to the same information in all those countries.³²⁰ The issuance of such 'international' birth certificate is no more than the continuity of what is done with biometric passports.³²¹ Issuance of passports is another aspect of the right to a legal identity; thus, it should expand to the right to a legal identity as a whole and include birth certificates. If countries were to ratify such a provision on an 'international' birth certificate, the birth certificate would not have to be transcribed in the country of nationality and/or residence of Arthur and there would not be any issue to transcribe the mention of 'extra information' regarding informing Arthur that he can have access to further information on a specific register. For instance, the mention of 'extra information' would be given the number '11'. If there exist no extra information, a box 'no' should be ticked. If on the contrary, there exists extra information, a box 'yes' should be ticked and the name of the register should be written next to the box. Moreover, because all the States parties would have the same birth certificate format, it will not be an issue to grant unborn Arthur a birth certificate 14 days after his conception and such birth certificate will already be valid in all the States parties.

With regards to Arthur's right to biological, conceptional, and genetic identities, there should be a general provision creating an international register. It will be easier for children, like Arthur, born through ART abroad or who have a parent and/or a genetic sibling living abroad to have access to an

³¹⁹ The recommendations made afterwards are based on what was stated in chapters 3 and 4 of this thesis.

³²⁰ This recommendation is based on existing proposals made in a similar vein. The European Commission is working on the regional recognition of public documents, such as birth certificate, marriage certificate, death certificate. Aiming for more cooperation and freedom of movement of persons within the European Union (hereinafter EU), such project aims at structuring all public documents of EU countries the same way, through a multilingual standard form. Each information that is to be recorded on the public document is given a number. Each number always refers to the same specific information. Transcription and/or translation of public documents between countries thus becomes unnecessary. See European Commission, *Proposal for a regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) (2013)*. See also Kanics, *supra* note 301, at 125.

³²¹ Approximately 100 countries issue biometric passports. Data stored within such passports are thus accessible by all authorities using this technology without the need for translation of the information stored in the passport. See B. Schouten & B. Jacobs, *Biometrics and their use in e-passports, Image and Vision Computing 27*, at 305 & 208 (2009). See also F. Aarts et al., *Inference and abstraction of the biometric passport*, in T. Margaria & B. Steffen (Eds.), *Lecture Notes in Computer Science*, at 678 (2010).

international register than to a national register. Indeed, the country might be far away and the language different. The creation of an international register will be in the interests of children like Arthur and will ensure that their right to identity is protected. At the time of registration of Arthur, the doctor who assisted with his conception should attest to the existence of extra information on the international register. A specific mention of 'extra information' should thus be added on Arthur's birth certificate. Furthermore, the doctor should also be the one addressing the different information to the institution handling the international register. Arthur should be allowed to have access to the international register from 10 years old and on the condition that he is mature enough, an element which can be assessed by a national institution based on national and/or international criteria.

5.4. Concluding Remarks

At the national level, the protection of AW born children's right to a legal identity appears as the best solution to further protect AW born children's right to identity. To be effective, countries should follow the different recommendations that were put forward in this chapter. At the international level, both AW born children's right to a legal identity in itself and as a means to protect AW born children's right to identity as a whole are at stake. In order to ensure their safeguards, the ratification of a HCCH Convention on ART, with specific provisions on AWT, appears as the most feasible solution.

6. Conclusion

Rapid advances in the field of ART has led scholars to believe that it will be possible to gestate a child from conception until birth outside of a human womb. While development of ART has brought with it many legal issues with regards to children's rights, there is no doubt that the same problems will arise in the context of AWT and that even more children's rights will be at stake. Particularly, the child's right to identity is at risk, which is why this study focused specifically on that right and assessed how such right should be protected in the context of AWT. The purpose of this thesis was to highlight the major child's right to identity violations that would occur in the event that AWT becomes a reality and to find remedies on how to tackle them.

Chapter 2 focused on defining the child's right to identity. For that, the concept of identity was first explored through other fields of study: philosophy, anthropology and sociology. It was concluded that every person has multiple identities and the addition of those identities forms the unique identity of one person. It was also concluded that those identities can further be divided into two groups: the fixed identity and the dynamic identity; the former usually influencing the latter. It was put forward that it is really important for individuals to know their identity in order for them to develop themselves and that such process is even more important during childhood. At a legal level, the concept of identity mostly reflects the views of the other disciplines but does not protect the right to identity holistically. While some identities are expressly protected by the CRC, some are only protected if it can be justified that they need protection. The child's right to identity is thus not fully protected by international law. With regards to children born via AWT, it was demonstrated that the use of this technology will impact on some of their identities specifically: their conceptional identity, their family identity, potentially their biological identity, their genetic identity, their national identity and their legal identity. Most of those identities are fixed identities but it was explained that they may influence their dynamic identity and their construction of identity.

Chapter 3 explored three main aspects of the right to identity of children born through AWT that could potentially be negatively impacted. First, children have a right to family identity, which reflects their right to be cared by someone who will take the most appropriate decision in their name or with them. This right refers both to children's fixed and dynamic identity. It was expressed that children's right to family identity is normally respected through their birth, the woman giving birth to them being automatically recognised as the person caring for them. However, if no change in the law is effected,

children born via AWT will be parentless, which is not in their interests and which will disregard their right to family identity. It was thus explained that children born through AWT should be genetically related to at least one of their social parents and such parent shall be recognised as the child's legal parent. Furthermore, it was also exposed that unborn children bond with their mother, and because they will not be able to do so within the artificial womb, this aspect of the child's right to family identity cannot be protected, and there is nothing that can be done to ensure its protection. Second, children have a right to biological identity, which reflects their right to know who the parents who were involved in their conception are, and who their genetic siblings are. Such right was already raised as very important for all children born through ART. The difficulty of such right is that the CRC only protects it "as far as possible". It was demonstrated that such wording should only be applied to material impossibility and not to impossibility decided by law. Hence, a child shall not be deprived of the right to know his genetic parents and siblings simply because the law does not allow it. Furthermore, it was also demonstrated that children born through ART and through AWT specifically should have access to identifying information about their genetic parents and siblings. Finally, it was exposed that there are no valid reasons to not disclose such information at an early age and it was advocated that children should have access to such information from the age of 10 and according to their maturity. Third, children have a right to conceptional identity, which reflects their right to know how they were conceived and gestated. It was demonstrated that not only this right is important in terms of children's identity construction but the protection of this right can also ensure the protection of the child's right to biological identity. In order to ensure the protection of this right, it was explained that disclosure should be mandatory and in that regard, a professional should be appointed and the child's birth certificate should have a specific mention of 'extra information' referring to the child's biological and conceptional identity. It was also demonstrated that while mandatory disclosure can interfere with children's right to private and family life, this interference is legitimate.

Chapter 4 focused on determining when the child's right to identity begins. It was explained that because the right to identity of children born through AWT is particularly at risk, it is wise to protect such right before birth. The initial observation was that the right to life is usually considered as the prerequisite right to be awarded other rights. It was explored whether unborn children considered alive from conception were awarded more rights than children considered alive from birth, and it was discovered that it is not because unborn children are considered alive from conception that they are awarded all rights children are entitled to. Similarly, it is not because children are only considered alive from birth that they do not enjoy the protection of some rights while in the womb. Besides, it was discovered that all unborn children are awarded a right to inheritance based on a Latin adage stating that unborn children are considered born every time it is in their interests. Because the right to inheritance indirectly acknowledges a right to family identity, it was demonstrated that the use of the Latin adage could be extended to children born through an artificial womb. It was further exposed that such adage could only be applicable on the conditions that the child is already conceived and that he further gets born viable and alive. In order to fulfil such requirement, it was suggested that the parents of children born via AWT should be registered as such before the child is placed in the incubator or within 14 days after the conception of the child. It was also suggested that those children should later be considered born from the moment they are viable. By recognising such right to unborn children gestated within an artificial womb, it would ensure a better protection of their right to identity.

Chapter 5 explored the protection of the right to identity of children born via AWT both at a national and an international level. At the national level, the child's right to a legal identity was first scrutinized. Its importance in terms of acknowledging the child's existence within the State was highlighted. Furthermore, it was explained that the protection of the child's right to a legal identity can also be a means to protect the right to identity of children born through AWT as a whole. Indeed, the registration of parents on the child's birth certificate will ensure the safeguarding of his right to family identity and the registration of an additional mention of 'extra information' referring to a register will ensure the safeguarding of his right to biological and conceptional identity. At the international level, it was

acknowledged that there is a risk that children will be born in a country where they neither reside nor have nationality and thus, that their right to a legal identity, to a family identity and to a national identity will be violated. In those cases, the transcription of the child's birth certificate might be refused and the authorities might further refuse to grant the child a nationality. Moreover, the transcription of the specific mention ensuring disclosure of information to the child might not be possible, violating the child's right to biological and conceptional identity. It was therefore argued that to ensure the protection of the right to identity of children born through AWT abroad, countries should ratify an international Convention to be drafted by the Hague Conference. It was suggested that such Convention should protect the rights of children born through ART and should have added provisions on children born via AWT specifically. This Convention should enhance the different rights that were put forward in this thesis and should also advocate for the issuance of a unique international birth certificate that would be instantly transcribed in all States parties. Finally, the ratification of the Convention should lead to the creation of an international register enabling children to have access to information about their genetic parents and siblings worldwide.

To conclude, the right to identity of children born through an artificial womb can only be protected if countries ensure that the rights and interests of those children come first, over the interests of parents, donors and medical clinics. The safeguarding and enhancement of those children's right to identity should be the primary focus of countries. If a State cannot ensure the protection and enhancement of the right of identity of children born through ART in general and through AWT specifically, they should not allow access to such technologies. Moreover, countries fulfilling the proposed requirements should not allow access to ART to individuals living or having the nationality of countries which do not respect the child's right to identity.

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