

Making the Most of International Law on the Right to Identity: An Analysis of

Article 8 of the United Nations Convention on the Rights of the Child

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Introduction

Article 8 of the United Nations Convention on the Rights of the Child The Convention on the Rights of the Child (CRC)² represents the first occasion when States undertook express obligations binding them under international law in respect of children's rights and did so in a legal instrument devoted exclusively to that subject.³ The CRC also marked a decisive shift in the legal concept of the child at international law in its consistent application of a rights-based approach to children's issues.⁴ That Convention also enjoys two other distinctions. The first is that it is the most

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² Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 44/25 of 20th November 1989. Entry into force 2nd September 1990. The text of the Convention on the Rights of the Child is available on the website of the United Nations Commissioner for Human Rights: <http://www.unhchr.ch>

³ For a detailed exposition of the formation of the Convention, see Nigel Cantwell 'The Origins, Development and Significance of the United Nations Convention on the Rights of the Child' in Detrick et al (eds), *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff, Dordrecht, 1992) at pgs. 19-30. See also Florence Bruce 'The Making of the Convention and Some Questions for the Future' in P. Berwick and M. Burns, *The Rights of the Child: Irish Perspectives on the UN Convention* (The Council for Social Welfare, Dublin 1991) at pgs. 1-16 and Glenn A. Mower Jr. *The Convention on the Rights of the Child: International Support for Children* (London: Greenwood Press, 1997) Section 1: 'The Significance, Background and Development of the Convention'. For an overview of the UN Convention on the Rights of the Child generally see A. Bainham, *Children: The Modern Law* (2nd Edition, Bristol, Jordan Publishing Limited 1998) at pgs. 57-67.

⁴ A point emphasised in a statement made on 9th May 2002 by the former United Nations High Commissioner for Human Rights, Mrs Mary Robinson, to the United General Assembly Special Session on Children: "The adoption of the Convention on the Rights of the Child in 1989 reflected the international consensus on a new vision of children – no longer as mere objects of protection who have "needs", but as human beings who enjoy "rights"." (The text of Mrs Robinson's address was accessed on the website of the United Nations High Commissioner for Human Rights: <http://www.unhchr.ch>/Accessed on 11th May, 2002).

comprehensive legal instrument on children's rights. The second is that it has the highest number of State Party ratifications of any international human rights treaty.⁵ Article 8 of that Convention is of particular relevance to the child's right to identity. This article will examine the scope of that provision followed by an analysis of how the Committee on the Rights of the Child, established to monitor implementation of the Convention, is making an important contribution to its application. The question will then be posed whether further action by the international community might be required to provide adequately for identity issues arising in relation to children while suggesting, even if this were to be the case, use of Article 8 CRC as it stands would be of great benefit to regional and national legal systems as they address identity issues.

Exploring the Scope of Article 8 CRC

Article 8 CRC provides:

- a. 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.
- b. Where a child has been 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.

⁵ As of 1st February 2002, 191 States parties had ratified or acceded to the Convention: See UN Doc CRC/C/114 14th May 2002, The Committee on the Rights of the Child, *Report on the Twenty-Ninth Session (Geneva, 14 January – 1st February 2002)* "II. Organisational and Other Matters A. States parties to the Convention' at para.2. A complete list of the ratification or accession status of States Parties is contained in the Annex I of that Report. Ireland signed the CRC on 30th September, 1990, submitted its instrument of ratification on 28th September, 1992, and the Convention entered into force for Ireland on 28th October 1992. The text of all Reservations and Declaration to the CRC is contained in UN Doc CRC/C/2/Rev.8: *'Reservations, Declarations and Objections: relating to the Convention on the Rights of the Child: 07/12/99'* Ireland has not entered any Reservations or Declarations to the CRC.

Alston once remarked: ‘The definition of any right requires time and broad discussion’.⁶ There is a number of ways in which the scope of the right to preservation of identity under Article 8 CRC might be clarified. The first is through a critical analysis of the text of the CRC. Such an analysis is assisted by recourse to the ‘Travaux Préparatoires’ of the Convention.⁷ Article 49 of the Vienna Convention on the Law of Treaties permits this preparatory work to be used to aid interpretation of a treaty where its provisions are unclear. A second way in which the scope of the child’s right to preservation of identity under Article 8 CRC can be explored is through an analysis of the relevant ‘Concluding Observations/Comments’ issued by the Committee on the Rights of the Child in response to States Parties reports and its discussions with States in relation to those reports. Those Observations/Comments are also worthy of attention because they provide an authoritative illustration of how Article 8 CRC might be utilised in practice by different legal orders.

Article 8 (1) CRC expressly refers to three elements of identity: nationality, name and family relations as recognised by law. This paper will focus first on the meaning of the term ‘identity’ used in Article 8, following which one element of identity referred to in Article 8 will be analysed, namely, ‘...family relations as recognised by law...’.

The scope of ‘...identity...’ in Article 8 CRC The concept of identity means different things in psychology, sociology and cultural studies. The understanding of identity in these and other disciplines cannot be assumed to be the meaning of the term ‘identity’

⁶ See *Economic and Social Rights and the Right to Health: An Interdisciplinary Discussion Held at Harvard Law School in September, 1993* (Harvard Law School Human Rights Program Publications, 1995) at pg.34.

in Article 8 CRC. This becomes apparent from a review of the drafting history of that provision.

The inclusion of what eventually became Article 8 of the Convention originated in an initial proposal for a provision in relation to identity submitted in 1985 by Argentina but not considered at that point in time.⁸ That Argentinian proposal read: The child has the inalienable right to retain his true and genuine personal, legal and family identity. In the event that a child has been fraudulently deprived of some or all of the elements of his identity, the State must give him special protection and assistance with a view to re-establishing his true and genuine identity as soon as possible. In particular, this obligation of the State includes restoring the child to his blood-relations to be brought up Argentina re-introduced its original proposal at the 1986 session of the Working Group,⁹ at which separate proposals on the same theme from Poland and from the Informal Ad Hoc Group on the Drafting of the Convention were also received.¹⁰ Argentina explained that the reasons it was proposing the inclusion of an Article on this topic in the Convention were, firstly, on account of the need for special protection to be given by the State to the child as soon as possible when the child's right to preservation of her or his identity had been violated; and secondly, on account of the distinction made in its proposal between the true and genuine and legal identities of the

⁷ This preparatory work is published as Detrick et al (eds) S. (ed.) *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Martinus Nijhoff, Dordrecht, 1992), which is the location relied on in this article for that source-material

⁸ See Detrick et al (eds) op cit supra at pg. 291: 'Proposal submitted but not considered by the 1985 Working Group' (UN Doc E/CN.4/1985/65 Annex II)

⁹ See Detrick et al (eds) op cit supra at pg. 292: 'Considerations 1986 Working Group' (UN Doc E/CN.4/1986/39) at para. 33.

¹⁰ Ibid

child.¹¹ Argentinean concern about this issue seems to have arisen on account of the ‘disappearance’ of approximately 150 children during the period of rule by the military junta in that country in which it was alleged the government had been involved. It appears the children involved were forcibly taken from their families and given a new legal identity as the children of other persons.

The delegations of the Netherlands, Austria, the United States and Canada supported Norway’s initial query about the appropriateness of including such an Article in the Convention.¹² The representative of Brazil suggested¹³ that the matter be referred for the attention of a working party, during consideration of which suggestion, a new text for this provision was proposed by Argentina making ‘family identity’ the sole focus of the right of preservation of identity. That text read:

The States Parties undertake to respect the right of the child to preserve his or her family identity without unlawful interference. Where a child is illegally separated or removed from his or her lawful custodians or otherwise fraudulently or illegally deprived of some or all of the elements of this identity, the States Parties shall provide special assistance and protection, with a view to speedily re-establishing his or her rightful family identity.¹⁴

¹¹ See Detrick et al (eds) op cit supra at pg. 292: ‘Considerations 1986 Working Group’ (UN Doc E/CN.4/1986/39) at paras. 34-35.

¹² See Detrick et al (eds) op cit supra at pgs. 292-293: ‘Considerations 1986 Working Group’ (UN Doc E/CN.4/1986/39) at paras. 36-37.

¹³ Supported by the representative of Bangladesh: See Detrick et al (eds) op cit supra at pg. 293: ‘Considerations 1986 Working Group’ (UN Doc E/CN.4/1986/39) at para.38.

¹⁴ See Detrick et al (eds) op cit supra at pg. 293: ‘Considerations 1986 Working Group’ (UN Doc E/CN.4/1986/39) at para.40.

The term ‘family identity’ was rejected by the Working Group and replaced by ‘family relations as recognised by law’ in a text almost identical to that which now appears as Article 8.¹⁵ The proposed text for Article 8 CRC was further considered at sessions held in 1986 and 1989 of the Working Group, which prepared the Convention¹⁶ and between those dates by a working party, the membership of which was made up of delegations from Argentina, the Netherlands, Norway and Poland.¹⁷

Three features in the ‘Travaux Préparatoires’ of the Convention suggest the term ‘identity’ was meant to have a specific scope when used in Article 8 of the CRC.

The first significant feature suggesting the scope of the term ‘identity’ in Article 8 CRC was not intended to be open-ended was the ground on which many delegations refused to accept a proposal put forward by the representatives of Argentina to use the term ‘family identity’ in that provision.¹⁸ The reason put forward by many delegations for that refusal was lack of clarity about its scope with requests made to Argentina to define it more precisely going unsatisfied.¹⁹ A successful compromise on the wording of Article 8 emerged after a suggestion was made by the Chairman of the Working

¹⁵ The text adopted by the 1986 Working Group was: “(1) The States Parties to the present Convention undertake to respect the right of the child to preserve his or her identity (nationality, name, 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, the States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity”: see Detrick et al (eds) op cit supra at pgs. 294-295: ‘Text as adopted by the 1986 Working Group’ (UN Doc E/CN.4/1986/39 Annex 1).

¹⁶ ‘Considerations 1986 Working Group’ (UN Doc E/CN.4/1989/360) and ‘Considerations 1989 Working Group’ (UN Doc E/CN.4/1989/48): see Detrick et al (eds) op cit supra at pgs. 291-296. During drafting, Article 8 CRC was enumerated ‘Article 9 bis’.

¹⁷ See ‘Considerations 1986 Working Group’ (UN Doc E/CN.4/1989/360): see Detrick et al (eds) op cit supra at pg. 293 at paras. 38-40

¹⁸ See ‘Considerations 1986 Working Group’ (UN Doc E/CN.4/1986/39): see Detrick et al (eds) op cit supra at pgs. 293- 294, paras 41-49. The delegations which expressed unease about the term ‘family identity’ included those of the Netherlands, Australia, Finland, Norway, Austria, France and the United Kingdom.

¹⁹ Ibid.

Group that the word ‘family’ be deleted before the word ‘identity’ with the words ‘nationality, name, family relations’ be added in parentheses immediately after it.²⁰

The second feature occurring during the drafting of the Convention which supports the conclusion that the scope of the term ‘identity’ used in Article 8 CRC is restricted to the three elements mentioned in it is the fact that a broader definition of ‘identity’ was actually put before the drafters of the Convention both in the original Argentinian text already quoted for Article 8 and also in the context of the proposed text for Article 7, but both texts failed to be accepted. The broader definition of ‘identity’ in relation to Article 7 was contained in a proposed text put forward by the representative of Egypt as an amendment to an earlier working text for that provision. That delegate’s text stated:

2. The child shall have the right from birth to respect for his or her human, racial, national and cultural identity and dignity, as well as have the duty to respect the human, racial, national and cultural identity and dignity of others.²¹

A third significant event during drafting which suggests the term ‘identity’ has particular scope in Article 8 CRC was the acceptance without debate at the 1989 session of the Working Group of a change in the proposed text of the provision from ‘...identity (nationality, name, family relations as recognised by law)...’ which had been adopted by the Working Party at the conclusion of its 1986 Considerations²² to

²⁰ *Ibid* at para. 46. On the proposal of the observer from the Netherlands, the phrase ‘as recognised by law’ was then added to the words ‘family relations’.

²¹ See Detrick et al (eds) op cit at pg.127: ‘Considerations 1989 Working Group’ (UN Doc E/CN.4/1989/48) at para. 92. No reason is given in the ‘Travaux Préparatoires’ for the short life of the Egyptian proposal

²² See ‘Considerations 1986 Working Group’ (UN Doc E/CN.4/1986/39): see Detrick et al (eds) op cit supra at pgs. 293- 294 at para. 47.

‘...identity, including nationality, name and family relations as recognised by law...’.

It is a reasonable conclusion that the absence of debate about these textual changes indicates there was general agreement among delegations with the view of the Session Chairperson that these were ‘...small changes suggested by the Secretariat’²³ and they added nothing to the provision. On that basis, it is suggested it would be incorrect to draw an inference from the use of the word ‘...including...’ in Article 8 (1) CRC that there are other elements of identity covered by that provision but not enumerated in it.

For these reasons, it is suggested that the elements of identity included under Article 8 CRC are solely the three elements specifically mentioned in it, i.e, ‘...nationality, name and family relations as recognised by law...’. The scope of ‘...family relations as recognised by law...’ in Article 8 CRC The construction of the phrase ‘...family relations as recognised by law...’ suggests that a difference existed in the minds of the drafters of the Convention between ‘family relations’ on the one hand and ‘...family relations as recognised by law...’ on the other. The relationships encompassed in the latter phrase are the ones which the child is entitled to have preserved under Article 8 CRC. Article 8 CRC does not list the sources of law it intends to be applied in order to interpret the phrase ‘...family relations as recognised by law...’. It is suggested the Convention on the Rights of the Child is itself a source of law, which can be used for that purpose.²⁴

²³ See Detrick et al (eds) op cit supra at pgs. 295-296: ‘Considerations 1989 Working Group’ (UN Doc E/CN.4/1989/48) at paras. 334-335.

²⁴ Article 38(1) of the Statute of the International Court of Justice (ICJ) recognizes international conventions as a source of law. The ICJ Statute is available at the website of the International Court of Justice: <http://www.icj-cij.org> (Last visited 3rd June 2003).

A related issue, which requires clarification is whether national law was intended to be the only source of law to be applicable, other than the Convention itself, for interpretation of the range of ‘family relations’ which come within the scope of Article 8. Two reasons suggest that other sources of international law which are binding on a State were intended to be taken into account in order to identify ‘...family relations as recognised by law...’ relevant to that State.

The first reason in favour of this position is supported by discussions during the drafting process in connection with Article 16 CRC which provides for the right of the child to the protection of the law against arbitrary or unlawful interference with his family, privacy, home or correspondence. A proposal was made by the delegate of Venezuela during the 1989 session of the Working Group on the Convention for inclusion of what was termed a ‘safeguard’ clause expressly making the right recognised in Article 16 subject to national legislation on the ground that this would offer the best protection for children’s interests. This proposal was opposed by the United States of America, Sweden and Portugal and was not added to the text of the Article.²⁵ This debate and the text adopted for Article 16 is significant in that it suggests the drafters of the Convention understood that using the term ‘law’ on its own indicated the reference was not restricted to national law. It is submitted that a similar interpretation of the scope of the term ‘law’ used in Article 8 CRC is appropriate because that provision also does not expressly state that the term ‘...law...’ refers only to national law.

²⁵ See ‘Considerations 1989 Working Group’ (UN Doc E/CN.4/1989/48): see Detrick et al (eds), *op cit supra* at pg. 262, paras. 300-303. Venezuela also proposed the same reference be added to the texts

A second reason to suggest that restriction of the scope of the term ‘law’ in Article 8 to national law alone would be incorrect is that it would contradict the express requirement under Article 41 of the Convention that the most favourable law be applied where the rights of the child are involved. That provision states:

Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State.

For these reasons, it is submitted the term ‘law’ used as a constituent of the element of identity referred to as ‘...family relations as recognised by law...’ in Article 8(1) CRC includes international, regional and national law in force for each contracting State. This conclusion is significant for States Parties to the CRC which are simultaneously Contracting Parties to the ECHR in that it suggests compliance with international obligations under Article 8 CRC cannot be assessed solely by reference to ‘...family relations...’ recognised under relevant national law but also requires ECHR law on that matter be taken into account.

The scope of ‘...family relations...’ in the Convention on the Rights of the Child. As might be reasonably expected, a legal instrument concerned with the rights of children will almost inevitably have to take cognisance of the principal environment within which the child lives her or his life, namely, the family unit. This is certainly the case in the Convention on the Rights of the Child.

of what were eventually adopted as Articles 12, 13 and 14 CRC (During drafting Articles 7, 7a and 7bis respectively).

The Preamble to the CRC states the family to be ‘...the fundamental group of society...’, ‘...the natural environment for the growth and well-being of all its members and particularly children...’²⁶ and the optimum environment for the development of the child’s personality.²⁷

The Convention has a specific concern that separation of the child from her or his parents should be effected only by competent authorities in conformity with the best interests principle and subject to judicial review²⁸ and requires even in such circumstances that personal relations and direct contact be maintained between the child and her or his parents, except where it is contrary to the child’s best interests.²⁹

This provision protecting the parent-child relationship does not, however, exhaust the definition of the family or protection afforded it under the Convention. Article 16 CRC makes provision for more wide-ranging protection of the child from arbitrary or unlawful interference with her or his family. That provision states:

No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, or to unlawful attacks on his or her

²⁶ Preambular para. 5. For a complete discussion of the drafting of the Preamble to the CRC, see Detrick et al (eds) op cit at pgs. 100-114. The sole change made during the preparatory work in relation to this section of Preambular para. 5 was the replacement of an earlier reference to the family as “as the basic unit of society” with the present on of “as the fundamental group of society” See Detrick et al (eds) op cit pg. 108 ‘Considerations of the 1989 Working Group’ (UN Doc E/CN.4/1989/48) at para. 30. The ‘family’ also receives recognition in other instruments of international law, particularly Article 16 of the Declaration of Human Rights 1948 and Article 23 of the International Covenant on Civil and Political Rights 1966.

²⁷ Preambular para. 6: “Recognising that the child, for the full an harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding” The addition of the word ‘happiness’ to the text of the sixth preambular paragraph on the proposal of the Netherlands appears to have been the only alteration during the drafting of the Convention. See Detrick et al (eds) op cit supra at pgs. 103-104: ‘Considerations of the 1980 Working Group’ (UN Doc E/CN.4/L.1542) at paras. 20-21

²⁸ See Article 9 (1) CRC. Further provision is made in the Convention concerning the child’s care and contact with her or his parents : see Articles 18, 20, 21 CRC.

²⁹ See Article 9 (3) CRC

honour and reputation. The child has the right to the protection of the law against such interference or attacks.

It is evident from the Preamble and CRC provisions considered above that inclusion of ‘...family relations as recognised by law...’ as an element of the child’s identity in Article 8 is consistent with a general approach in the Convention to acknowledge the importance of the family in the life of the child and to secure legal protection for it. It is also arguable that within the Convention itself the scope of the term ‘...family relations as recognised by law....’ in Article 8 CRC refers to more than just the parent-child relationship.

Given the importance of the family in the life of the child under the Convention, it is particularly significant for the interpretation of Article 8 that the CRC embraces a broad definition of the term ‘family’. For example, the Convention does not provide that marriage has any constitutive role in the legal definition of the family. In addition, the CRC provides no definition of the term ‘parent’ and the term ‘child’ is defined solely by reference to age.³⁰ References are made in the Convention to ‘the extended family’³¹ ‘members of the family’³² ‘family relations’³³ and the ‘family environment’³⁴, but the range of relationships encompassed in those terms is not defined. It is noteworthy that despite reservations expressed about the text of Article 5 during the drafting process that reference in it to ‘the extended family’ ‘...would essentially

³⁰ A ‘child’ for the purposes of the CRC is defined in Article 1 principally as a human being under the age of eighteen years. Article 1 provides, however, majority may be arrived at earlier. For the various drafts of Article 1 prior to its adoption: see Detrick et al (eds) op. cit supra at pgs. 115-119

³¹ Article 5 CRC

³² Article 9 (4) CRC. See also Articles 10 (1) and 22 (2) CRC

³³ Article 8 (1) CRC.

³⁴ Article 20 (1) CRC. See also Article 22 (2) CRC

change the traditional triangular responsibility for the child...³⁵ many State delegations successfully voiced support for its inclusion.³⁶ Recognition of the importance of the extended family in Article 5 is not, however, replicated by its inclusion among the range of relationships to be given consideration in situations envisaged under Article 9 where a child's best interests require that s/he be separated from her or his parents. Article 9(3) confers a right on a child to maintain personal relations and direct contact on a regular basis solely with parents and does not acknowledge any similar right in relation to other members of either the immediate or extended family.

It is arguable that the reason for the omission of a reference to the right of the child to maintain personal relations and direct contact with members of the family other than parents in Article 9(3) CRC may be due in part to the fact that the primary focus of the original draft of the provision which became Article 9 CRC was the right of parents to make decisions about the child's place of residence. It was only during the drafting process in response to a revised proposal for the Article submitted by the United States of America that the draft of Article 9 CRC was transformed into a provision dealing with the child's rights to contact with her or his parents.³⁷ The records of the preparatory work on Article 9 CRC are silent on whether any attention was given to consideration of a right of the child to respect for ongoing personal relations and direct

³⁵ See Detrick et al (eds) op cit supra at pg.161: 'Considerations 1989 Working Group' (UN Doc E/CN.4/1989/48) at para.180

³⁶) *Ibid.* Article 5 CRC provides: "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention"

³⁷ For the preparatory work on Article 9 CRC, see Detrick et al (eds) op cit supra at pgs. 162-182, which includes particular reference to the transformation of the tenor of the provision effected by the proposal of the United States of America, see 'Considerations 1981 Working Group' (UN Doc E/CN.4/L.1575): see Detrick et al, op cit supra at pg. 164, para. 69.

contact with siblings or other non-parental family members independent of those mediated through parents.³⁸

The special protection given to the parent-child relationship within the Convention is also evident in Article 7 (1) which provides:

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.

The significance of biological ties for establishment of ‘family relations’ between persons was addressed during drafting of the Convention arising from a contribution made by the representative of Mexico during the consideration in 1989 of the text of Article 8. Mexico made a specific suggestion that reference to biological elements of identity should be included in the Article.³⁹ No response is recorded to that proposal. It is submitted that the fact that this suggestion was even made by the Mexican representative indicates that not all parties involved in the Travaux Préparatoires took the view that persons with whom the child shares a biological connection would automatically be regarded on that basis as ‘...family relations as recognised by law...’ under Article 8 CRC. Such evidence of lack of a definite consensus about the scope of Article 8 in this area weakens the case which might be put forward that, under the treatment of identity rights in it, international law has taken a particular stance on the significance which a biological nexus with another person should be given in the determination of ‘...family relations as recognised by law’.

³⁸ See Detrick et al (eds) *op cit supra* at pgs.163-182.

It is apparent from the above analysis of the particular protection given to the parent-child relationship under some Convention provisions in contrast with references made to the family in others that under CRC law itself ‘...family relations as recognised by law...’ encompass more than the parent-child relationship alone but those other relations which qualify as ones of family are less specifically defined and less extensively protected.

Utilising Article 8 CRC: Some lessons from the work of the Committee on the Rights of the Child

States Parties to the CRC are obliged to submit reports under Article 44 of the Convention indicating progress made in implementing its provisions within their jurisdictions.⁴⁰ Those reports are submitted to the Committee on the Rights of the Child, the body charged with monitoring implementation of the Convention, and statements in the Concluding Observations/Comments made by it in response to those States Parties Reports are relevant indications of the scope of the provisions of the CRC and how they might be utilised.

³⁹ See Detrick et al (eds) op cit supra at pg. 296: ‘Considerations 1989 Working Group’ (UN Doc E/CN.4/1989/48) at paras. 336.

⁴⁰ An overview of the reporting procedure applicable for State Parties reports is very helpfully set forth in UN Doc CRC/C/33 24th October 1994, The Committee on the Rights of the Child, *Overview of the Reporting Procedures*. For the rules of procedure and methods of work applicable to the Committee on the Rights of the Child, see both UN Doc CRC/C/4 14th November 1991 The Committee on the Rights of the Child, *Provisional Rules of Procedure* (Also available in UN Doc HRI/GEN/3 6th June 2001 *Compilation of Rules of Procedure adopted by Human Rights Treaty Bodies* (Chapter VI) and UN Doc CRC/C/19/Rev.10 11th March 2002 The Committee on the Rights of the Child, *Methods of Work of the Committee*. For analyses of the monitoring experience in relation to both Ireland’s and the United Kingdom’s States Party Reports, see respectively, U.Kilkelly ‘*The Protection of Children’s Rights in Ireland: Monitoring the Monitoring Process of the U.N. Convention on the Rights of the Child*’ in Driscoll D. (ed.) *Irish Human Rights Review 2000* (Dublin, Round Hall, 2001) 17; and, U.Kilkelly, ‘*The UN Committee on the Rights of the Child – an evaluation in the light of recent UK experience*’ (1996) 8 CFLQ 105. For a review of the reporting process generally to date, see Gerison Landsown ‘*The Reporting Process under the Convention on the Rights of the Child*’ in Alston and Crawford (ed) *The Future of Human Rights Treaty Monitoring Bodies* (Cambridge; New York; Cambridge University Press, 2000) 113.

The Committee on the Rights of the Child has utilised a thematic approach for State Parties' Reports in order to encourage awareness of the comprehensive nature of the CRC⁴¹. As a result, the Committee has tended not to respond to State Reports on an Article-by-Article basis⁴². This means significant comments relevant to individual articles, including Article 8, may be located either in comments on that provision itself, in remarks on Convention implementation in general or in statements about a closely associated provision.⁴³

The ensuing presentation of the contribution of the Committee on the Rights of the Child is based on an analysis of the 186 Observations/Comments⁴⁴ on State Parties' Reports it had issued by July, 2002. Many of these Observations/Comments contain remarks which are significant to understand of both the scope of '...family relations as recognised by law...' and States Parties' obligations under Article 8 CRC. Those remarks can be considered under four categories.

(i) Adequate measures for Birth Registration.

The Committee has repeatedly promoted adequate resources and procedures be available to facilitate the registration of children at birth.⁴⁵ It has specifically linked

⁴¹ Lansdown op cit supra at pg. 115

⁴² Lansdown has suggested consideration of an article-by-article format for periodic reporting: see Lansdown op cit supra at pgs. 117-118

⁴³ In the case of Article 8 CRC, this is often Article 7 CRC

⁴⁴ The vast majority of these Observation/Comments issued by the Committee are Concluding ones but a small number were Preliminary ones, in particular, the Preliminary Observations on the initial Report of Colombia CRC/C/15/Add. 15, 7th February 1994; Preliminary Observations on the initial Report of Rwanda CRC/C/15/Add. 12, 18th October 1993; and, Preliminary Observations on the initial Report of Indonesia CRC/C/15/Add. 7, 18th October 1993.

⁴⁵ See, for example, Concluding Observations/Comments on the initial Report of Guinea-Bissau CRC/C/15/Add.177 7th June 2002 paras.28 & 29; on the initial Report of Turkey CRC/C/15/Add.152 9th July 2001 paras. 35 & 36; on the initial Report of Cote d'Ivoire CRC/C/15/Add.155 9th July 2001 paras. 28 & 29; on the initial Report of Burundi CRC/C/15/Add.133 16th October, 2000 paras. 36 & 37; on the initial Report of Cambodia CRC/C/15/Add.128, 28th June, 2000 paras. 29 & 30; on the initial Report of Venezuela CRC/C/15/Add.109, 2nd November, 1999 at para.21; on the initial

such procedures to compliance with Article 8(1) CRC⁴⁶ in particular with the right of preservation of family relations as recognised by law under that provision.⁴⁷ It has also associated such measures with the child's enjoyment of fundamental rights in general.⁴⁸

The Committee generally does not require any specific procedure be implemented for birth registration by States, but it has linked birth registration with identity issues, especially family relations, in the following comment on a particular system being used to register children which it stated '....paves the way for their stigmatisation and the impossibility of having access to their origins, and that when born to a mother or father who is a minor, these children cannot be recognised by that parent'.⁴⁹

It is submitted that the way in which the Committee on the Rights of the Child has made an association between birth registration and identity and, in that context, made reference to the potential for stigmatisation indicates that the State obligation to respect the identity of the child under Article 8 CRC requires that national systems of birth registration ensure that they do not provide a means of discrimination and, furthermore, that procedures be available to safeguard against such a usage of them.

Report of Fiji CRC/C/15/Add. 89, 24th June, 1998, paras. 15 & 35; on the initial Report of Nepal CRC/C/15/Add. 57, 7th June, 1996, para.31.

⁴⁶ See Concluding Observations/Comments on the initial Report of Tanzania CRC/C/15/Add.156 9th July 2001 paras. 34 & 35

⁴⁷ See Concluding Observations/Comments on the second periodic Report of Belize CRC/C/15/Add. 99, 10th May, 1999 at para.18

⁴⁸ See Concluding Observations/Comments on the initial Report of Marshall Islands CRC/C/15/Add.139 16th October, 2000 paras. 32 & 33; on the second Periodic Report of Colombia CRC/C/15/Add.137 16th October, 2000 paras. 36 & 37; on the initial Report of Sierra Leone CRC/C/15/Add.116, 24th February, 2000 para. 42; on the second periodic Report of Yemen CRC/C/15/Add.102, 10th May, 1999 para. 20; on the initial Report of Uganda CRC/C/15/Add. 81, 21st October, 1997, para.31; and on the initial Report of Nicaragua CRC/C/15/Add. 36, 20th June, 1995, para.16.

⁴⁹ See Concluding Observations/Comments on the initial Report of Uruguay CRC/C/15/Add. 62, 30th October, 1996, para.11

(ii) Adequate measures in relation to adoption law.

A second area, in which the Committee has made comments, which are relevant for interpretation of provisions concerned with identity under Article 8(1) CRC, occurs in its consideration of adoption law and practice in the context of Article 21 of the Convention. The general approach of the Committee has been to favour adoption over institutional care of children on the basis that an experience of family life is better for the child.⁵⁰ The Committee has emphasised adoption law is to be based on the principle that the best interests of the child are the paramount consideration as required under Article 21.⁵¹

It is a particular concern of the Committee that States ensure adequate legal safeguards are in place so that adoption law and practice do not improperly deprive the child of her or his relations with her or his family of origin.⁵² This is particularly so in connection with inter-country adoption. This concern of the Committee is reflected in its repeated recommendations that States Parties accede to the 1993 Hague Convention on Protection of Children and Cooperation in respect of Inter-Country Adoption,⁵³ ratify it⁵⁴, or reform domestic legislation to implement obligations under

⁵⁰ See, for example, Concluding Observations/Comments on the initial Report of Cambodia CRC/C/15/Add.128, 28th June, 2000 para. 37; on the second periodic Report of Mexico CRC/C/15/Add.112, 10th November, 1999 para.24; on the second periodic Report of Yemen CRC/C/15/Add.102, 10th May, 1999 para. 23.(in relation to kafalah & fostering)

⁵¹ See Concluding Observations/Comments on the initial Report of Malawi CRC/C/15/Add.174, 2nd February, 2002 para. 39

⁵² See, for example, Concluding Observations/Comments on the initial Report of Gambia CRC/C/15/Add.165 6th November 2001 paras. 48 & 39; and on the initial Report of Kyrgyzstan CRC/C/15/Add.127 9th August 2000 paras. 37 & 38.

⁵³ See Concluding Observations/Comments on the initial Report of Tanzania CRC/C/15/Add.156 9th July 2001 paras. 42 & 43

⁵⁴ See Concluding Observations/Comments on the initial Report of Cameroon CRC/C/15/Add.164, 6th November 2001, para.39 (c)

it.⁵⁵ The Committee has on occasion noted ‘...in some instances of “adoption” (especially international adoption) children are sold for money or with promises of financial assistance to those giving up the child...’ and recommended the strengthening of procedures in that regard.⁵⁶ In the case of Guatemala, the Committee took the rare step of recommending the suspension of inter-country adoptions.⁵⁷

It is suggested these comments of the Committee on the Rights of the Child have a clear connection with the right to preservation of ‘...family relations as recognised by law...’ under Article 8 CRC, particularly in that it indicates compliance with that provision requires that the inter-country adoption law and practice of receiving States take sufficient cognisance of the definition of ‘...family relations...’ under the law applicable in the adoptee’s State of origin. Furthermore, this elaboration of the need for safeguards in relation to adoption suggests, when they are inadequate or not properly enforced, Article 8 will require provision of means to repair any harm caused as a result to the child’s enjoyment of the right to preservation of her or his identity.

Observations made by the Committee which are also relevant to Article 8 CRC include the statement that adoption law provide special guarantees in connection with the adoption of children of minority groups. The Committee has stated in this regard that it ‘...recommends that domestic legislation guarantees the cultural, religious and linguistic rights of children, particularly as regards education and adoption

⁵⁵ See Concluding Observations/Comments on the second periodic Report of Costa Rica CRC/C/15/Add.117, 24th February, 2000 para.19. See also Concluding Observations/Comments on the initial Report of Venezuela CRC/C/15/Add.109, 2nd November, 1999 para. 24.

⁵⁶ See Concluding Observations/Comments on the initial Report of St Vincent and Grenadines (CRC/C/15/Add.184) at paras. 32 & 33.

⁵⁷ See Concluding Observations/Comments on the initial Report of Guatemala CRC/C/15/Add.154 9th July 2001 paras. 34 & 35.

procedures...'.⁵⁸ It is suggested that such an observation has significance in the context of inter-country adoption for State responsibility to provide support in connection with post-adoption contact by adopted persons born in or adopted into a State with a different cultural or linguistic milieu.

A further concern of the Committee has been the encouragement of greater participation by the child in her or his adoption in keeping with the requirement of Article 12 CRC to give due consideration to the views of the child.⁵⁹

(iii) Adequate measures to strengthen family relations.

On a number of occasions, the Committee recommends States make provision in law to promote family relations.⁶⁰ It has also recommended the provision of family tracing services when considering the situation of unaccompanied children.⁶¹ Both matters have connections with the scope of the right recognised under Article 8 CRC and, in particular, indicate that it is arguable that it enjoins positive obligations on States in relation to preservation of identity which encompasses provision for a range of economic, social and cultural rights.

(iv) Adequate measures in relation to the identities of the child's parents.

⁵⁸ See Concluding Observations/Comments on the initial Report of South Africa CRC/C/15/Add.122, 23rd February, 2000 para. 41

⁵⁹ See Concluding Observations/Comments on the second Periodic Report of Denmark CRC/C/15/Add.151 10th July 2001 para. 8. See also Concluding Observations/Comments on the initial Report of Costa Rica CRC/C/15/Add. 11, 18th October 1993, paragraph 14; and Concluding Observations/Comments on the initial Report of Germany CRC/C/15/Add. 43, 27th November 1993, paragraph 9

⁶⁰ See Concluding Observations/Comments on the initial Report of Grenada CRC/C/15/Add.121, 28th February, 2000 para.7.

⁶¹ See Concluding Observation/Comments on the initial State Report of Switzerland CRC/C/15/Add.182, 7th June, 2002, at paras. 28 & 29. See also Concluding Observations/Comments on the initial State Report of Monaco, CRC/C/15/Add.158, 8th June 2001, at paras. 24 & 25; on the Initial Report of Denmark CRC/C/Add.33, 15th February 1995, at para.11; on the initial Report of France CRC/C/15/Add. 20, 25th April 1994, at para.14; and on the initial Report of Norway CRC/C/15/Add. 23, 25th April 1994, at para. 10.

The Committee on the Rights of the Child has also expressed concern that States make adequate provision for the right of the child to know the identity of her or his biological parent where the means of conception has been through medically assisted procreation⁶² or in the case of adopted children⁶³ or where social pressure militates against determination of paternity.⁶⁴ It is suggested the approach of the Committee to these issues might be contentious on the ground that it is arguable that determination of ‘family relations’ solely on the basis of a biological link was not intended clearly and definitely by the drafters of the Convention.

A need for a new provision on identity?

A significant period of time has elapsed since the Convention on the Rights of the Child was adopted in 1989. It is submitted that no commentator has ever suggested the CRC was intended to be the final word on children’s rights. There have been significant developments in a number of areas in the last fifteen years which may cause the international community to conclude at some future date that it should give further consideration to the legal provision to be made in relation to children’s rights.

It is submitted that the Observations of the Committee on the Rights of the Child referred to in the last section in relation to the role of a biological link for determining

⁶² See Concluding Observation/Comments on the initial State Report of Switzerland CRC/C/15/Add.182, 7th June, 2002, at paras. 28 & 29. See also Concluding Observations/Comments on the initial State Report of Monaco, CRC/C/15/Add.158, 8th June 2001, at paras. 24 & 25; on the Initial Report of Denmark CRC/C/Add.33, 15th February 1995, at para.11; on the initial Report of France CRC/C/15/Add. 20, 25th April 1994, at para.14; and on the initial Report of Norway CRC/C/15/Add. 23, 25th April 1994, at para. 10.

⁶³ See Concluding Observations/Comments on the initial State Report of Switzerland CRC/C/15/Add.182, 7th June, 2002, at para.36; on the initial Report of Kyrgyzstan CRC/C/15/Add.127, 9th August 2000, at paras. 37 & 38; and on the initial Report of Georgia CRC/C/15/Add.124, 28th June 2000, at paras. 38 & 39

⁶⁴ See Concluding/Observations/ Comment on the initial State Report of St Vincent and Grenadines, CRC/C/15/Add.184, 13th June, 2002, at paras. 26 & 27

the existence of ‘family relations’ and a possible divergence from the view taken by the drafters of the Convention indicates at least one area suggesting that further development in international children’s rights law and Article 8 CRC in particular may be required. Scientific knowledge and its practical application have developed on a scale since 1989 which might mean issues related to identity would be given substantially more attention if the CRC were being drafted at the present time. The increased awareness of the importance of identity issues in relation to adopted persons and analogies drawn between that experience and those which might be relevant for children conceived through forms of medically assisted procreation in which donor anonymity is a feature also suggest a reason why the scope of a legal provision made for preservation of the child’s identity might be more elaborate if made today.

Time will tell whether further attention will be given to the scope of the right of the child to identity under a legal instrument adopted by the international community. It is submitted that the hypothetical nature of that event should not cause the extensive scope already evident in connection with the right to identity under Article 8 CRC to be overlooked by regional and national legal systems as they address identity issues. It is suggested that the broad approach followed by the Committee on the Rights of the Child considered above is an excellent example of utilisation of that scope which might profitably be imitated in those legal systems. In relation to the ECHR system, more extensive use by it of Article 8 CRC would also be consistent with the cogent case, which has been made that European Convention law, can benefit in its treatment of

children's rights from recourse to the provisions of the Convention on the Rights of the Child.⁶⁵ It is suggested the point is equally valid for national systems of law.

⁶⁵ See further on this point: U.Kilkelly, '*Effective Protection of Children's Rights in Family Cases: An International Approach*' in 12 (2) (Fall 2002) *Transnational Law and Contemporary Problems* 335 and U.Kilkelly, '*The Best of Both Worlds: Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child*' in 23 (2) (May 2001) *Human Rights Quarterly* 308.