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„A Children’s Rights Perspective on the Recognition
of Legal Parenthood Following Cross-Border
Surrogacy Arrangements“

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Abbreviations

AdVermiG	Adoption Placement Act (<i>Adoptionsvermittlungsgesetz</i>)
ART	assisted reproductive technologies
art	article
cf	confer
ch	chapter
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CSR	Center for Social Research
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights
ECLJ	European Centre for Law and Justice
ECtHR	European Court of Human Rights
ed/eds	editor/editors
edn	edition
eg	for example
EGBGB	Introductory Act to the Civil Code (<i>Einführungsgesetz zum Bürgerlichen Gesetzbuche</i>)
ESchG	Embryo Protection Act (<i>Embryonenschutzgesetz</i>)
etc	et cetera
EU	European Union
EUDO	European Union Democracy Observatory on Citizenship
ff	and following
FGM	female genital mutilation
FMedG	Artificial Procreation Act (<i>Fortpflanzungsmedizingesetz</i>)
GC	General Comment
[GC]	Grand Chamber
HCCH	Hague Conference on Private International Law
ibid	ibidem, meaning 'in the same place'
ICCPR	International Covenant on Civil and Political Rights
ICCS	International Commission on Civil Status
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMR	Indian Council of Medical Research
ie	id est, meaning 'that is' or 'which means'
ILO	International Labour Organization
int'l	international
IVF	in-vitro fertilisation

J	Journal
L	Law
n/no	number
nn	numbers
OHCHR	Office of the High Commissioner for Human Rights
OUP	Oxford University Press
para/paras	paragraph/paragraphs
Q	Quarterly
Rev	Review
s/ss	section/sections
UDHR	Universal Declaration of Human Rights
UK	The United Kingdom
UN	United Nations
US	The United States of America
VCLT	Vienna Convention on the Law of Treaties

The thesis uses the Oxford University Standard for Citation of Legal Authorities (OSCOLA) as a guide to citation (to be found at www.law.ox.ac.uk/oscola).

Journals are largely abbreviated according to the *Cardiff Index of Legal Abbreviations* (to be found at www.legalabbrevs.cardiff.ac.uk).

Decisions by the European Court of Human Rights are cited according to the mode of citation published by the European Court of Human Rights (to be found at http://www.echr.coe.int/Documents/Note_citation_ENG.pdf).

I. Introduction

A. Framing the problem

With the seemingly inexorable medical progress in the field of assisted reproductive technologies (ARTs), new opportunities have opened up for infertile people to fulfil their dream of becoming parents. Besides the development of in-vitro fertilisation as such, the practice of surrogacy has gained popularity over the last years and become an attractive option for people seeking infertility treatment.¹ However, as surrogacy is banned or not tolerated in a significant number of jurisdictions around the world, a lot of people see themselves forced to travel abroad in order to conduct such an arrangement.² This phenomenon, sometimes referred to as 'surrogacy tourism'³, has caused a great stir ever since the wider public has become aware of it. This is due to the reason that surrogacy, especially in its commercial form, entails a panoply of legal and ethical issues and is subject to heated debates in the media and academia alike. At the very heart of these discussions lies the question of whether surrogacy fosters the commodification and exploitation of human beings and is thus per se irreconcilable with human rights.⁴ In addition, the transnational component adds further delicate issues and often leads to unsatisfying results for one or all of the parties involved.

Whilst the thesis at hand does not aim to find an answer to the fundamental question outlined above, its focus lies on situations that occur *after* a surrogate mother (hereinafter referred to as 'surrogate'⁵) has successfully delivered and handed over the

¹ Cf Katarina Trimmings and Paul Beaumont, 'General Report on Surrogacy' in Katarina Trimmings and Paul Beaumont (eds), *International Surrogacy Arrangements. Legal Regulation at the International Level* (Hart 2013) 439ff.

² Erin Nelson, 'Global Trade and Assisted Reproductive Technologies' (2013) 41 *Journal of Law, Medicine & Ethics* 240, 241.

³ Jyothi Kanics, 'Preventing and Addressing Statelessness in the Context of International Surrogacy Arrangements' (2014) 19 *Tilburg L Rev* 117, 119.

⁴ See eg Elizabeth S Anderson, 'Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales' (2000) 8 *Health Care Analysis* 19; European Centre for Law and Justice (ECLJ), 'Surrogate Motherhood: A Violation of Human Rights' (Report presented at the Council of Europe, Strasbourg, 26 April 2012) <www.culturavietii.ro/wp-content/uploads/2015/01/Surrogacy-Motherhood-ECLJ-Report.pdf> accessed 5 February 2015.

⁵ Fernando Zegers-Hochschild and others, 'International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary of ART Terminology' (2009) 92 *Fertility and Sterility* 1520, 1522.

baby to the intending parents. Due to the vast disparities in relevant domestic legislations, families formed through surrogacy abroad may face serious obstacles upon returning or wishing to return to their home country.⁶ Often due to the prohibition of surrogacy under their own jurisdiction, some of these home countries (also referred to as 'receiving states') perceive the intending parents' conduct as a circumvention of their domestic laws and a violation of public policy.⁷ Therefore, numerous cases have become public where receiving states refused to recognise the parent-child relationship created abroad, often with serious consequences for the newly formed family. Some states, for example, denied the child born through a surrogacy arrangement ('resulting child') to enter the intending parents' home country,⁸ refused to recognise foreign birth certificates under domestic law,⁹ or even took the child away from the intending parents and placed it under guardianship.¹⁰ Whilst the domestic authorities' intention to deter its citizens from entering into agreements abroad which are illegal in their own country may be plausible, one has to keep in mind that such decisions affect not only the intending parents, but first and foremost the respective children. Not granting effect to the parent-child relationship established abroad leaves many innocent children in legal limbo – often stateless, parentless and thus deprived of a formal identity.¹¹

B. Principle objectives & research questions

The thesis at hand aims to highlight the vulnerable position of resulting children and approaches the topic from a children's rights perspective. Thereby, the focus lies on examining the significance of legal parenthood in general and the negative implications a non-recognition of the parent-child relationship has on the rights of the children

⁶ Steven H Snyder, 'United States of America' in Katarina Trimmings and Paul Beaumont (eds), *International Surrogacy Arrangements. Legal Regulation at the International Level* (Hart 2013) 387.

⁷ Hague Conference on Private International Law (HCCH), 'A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements' (Prel Doc No 3 C, March 2014) para 100 <www.hcch.net/upload/wop/gap2014pd03c_en.pdf> accessed 5 February 2015; see for concrete examples Velina Todorova, 'Recognition of Parental Responsibility: Biological Parenthood v. Legal Parenthood, i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?' (European Parliament 2010) 25ff <[www.europarl.europa.eu/RegData/etudes/note/join/2010/432738/IPOL-JURI_NT\(2010\)432738_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2010/432738/IPOL-JURI_NT(2010)432738_EN.pdf)> accessed 25 February 2015.

⁸ See eg the case of *Jan Balaz v Union of India* as depicted in Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 Geo L J 2249, 2275ff.

⁹ *Mennesson v France*, no 65192/11, ECHR 2014; *Labassee v France*, no 65941/11, ECHR 2014.

¹⁰ *Paradiso and Campanelli v Italy*, no 25358/12, ECHR 2015.

¹¹ Kanics (n 3) 119; see also *Paradiso and Campanelli v Italy* (n 10) § 85.

involved. For this purpose, two international human rights instruments are consulted, namely the Convention on the Rights of the Child (CRC) and the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR, 'the Convention').

Following the more general part of research, the thesis continues to analyse concrete cases brought before the European Court of Human Rights (hereinafter referred to as 'the Court' or ECtHR) in this specific context. In June 2014, the ECtHR eventually got the opportunity to rule on two cases concerning the domestic authorities' refusal to recognise the parent-child relationship established abroad, justified by referring to the illegality of surrogacy agreements and the violation of public policy. Given the legal uncertainty and the diverging approaches adopted by the member states in this context, the judgments were widely anticipated because it was hoped that they would provide guidance for member states and shed light on their concrete obligations arising from the Convention in this respect. The second part of this thesis' research therefore examines the Court's judgments issued in the cases of *Mennesson v France* and *Labassee v France*.¹² The principal objectives are to carve out general principles established therein and to analyse the legal implications of the main findings – not only for France, but also for other member states with similarly restrictive approaches in this context.¹³

In brief, the thesis is centred around the following two research questions:

1. What rights of the child are primarily affected by the non-recognition of the intending parents' legal parenthood due to the involvement of surrogacy?
2. With regard to the relevant case-law of the European Court of Human Rights, which human rights obligations arise from the Convention in relation to the acknowledgment of parent-child relationships in the given context?

¹² *Mennesson v France* (n 9); *Labassee v France* (n 9).

¹³ Cf Nila Bala, 'The Hidden Costs of the European Court of Human Rights' Surrogacy Decision' (2014) 40 Yale J Int'l L 11, 14.

C. Structure

The thesis is divided into six chapters altogether. Following an introduction (I), Chapter II provides the reader with the relevant terminology and gives a brief overview of the increasing phenomenon of cross-border surrogacy. Chapter III is devoted to one of the underlying problems by sketching the current legal landscape in Europe concerning a) states' approaches to the practice of surrogacy per se and b) general principles surrounding the determination and recognition of legal parenthood. Chapter IV goes on to explore the most relevant rights of the child as stipulated in the CRC and the ECHR, which are predominantly affected in the context of cross-border surrogacy and the associated issue of legal parenthood. In Chapter V, the thesis subsequently illustrates and analyses the Court's reasoning provided in *Mennesson v France* and *Labassee v France*. In addition, given that the ECtHR issued two more decisions in the context of cross-border surrogacy, the cases of *D and Others v Belgium*¹⁴ and *Paradiso and Campanelli v Italy*¹⁵ are briefly examined, as well. Lastly, the paper concludes by picking up and providing answers to the research questions posed at the outset of this paper (VI).

D. Limitations

Given the complexity of the topic and the constraints of this paper, its scope will be delimited based on deliberations of frequency, relevance as well as personal motives. With regard to the geographical scope, several limitations are necessary: On the part of intending parents, the main focus is on citizens of one of the member states of the European Union (EU), who want to continue living there with their newly founded family. The reasons are twofold: First, no EU country allows commercial surrogacy on their territory, meaning that travelling abroad in order to enter into such agreements is in fact the only option for EU residents. Second, as all the EU member states are also bound by the ECHR, the Court's case-law affects all of these countries. In addition, spatial delimitations are made when examining the current legal landscape with regard to the question of how states determine and/or recognise legal parenthood within their

¹⁴ *D and Others v Belgium* (dec), no 29176/13, ECHR 2014.

¹⁵ *Paradiso and Campanelli v Italy* (n 10).

jurisdictions. In relation to receiving states, the situation in France and Germany is depicted in more detail, given their particularly adverse attitudes towards surrogacy.¹⁶ On the part of destination states, Russia and California are selected and their respective procedures illustrated. Not only are they both known for being 'surrogacy-friendly',¹⁷ they are also the children's actual state of birth in two of the cases brought before the ECtHR which are analysed below.¹⁸

Concerning the legal analysis of relevant human rights norms and case-law, one additional limitation is required. Given that the practice of surrogacy potentially interferes with the human rights of all parties involved, the present thesis deliberately takes up a child-centred perspective and is thus only concerned with the children's rights affected by the practice of surrogacies conducted abroad. Besides the factual impossibility of conducting an all-encompassing human rights study in this paper, the principal reasons for adopting a children's rights approach lie in the author's personal interest as well as in the Court's very own approach to this issue. By having applied the best interests principle in its 'surrogacy cases', the ECtHR reiterated that 'whenever the situation of a child is in issue, the best interests of that child are paramount'¹⁹. Moreover, in *Mennesson v France* and *Labassee v France*, the situation was primarily assessed from a children's rights perspective and a violation eventually found only with regard to the children's right to respect for their private life, even though the intending parents had claimed a violation of their rights, as well.²⁰

¹⁶ Trimmings and Beaumont (n 1) 463.

¹⁷ Ibid 443.

¹⁸ In *Mennesson v France* (n 9), the children were born in California; in *Paradiso and Campanelli v Italy* (n 10), the child was born in Russia.

¹⁹ *Mennesson v France* (n 9) § 81; *Paradiso and Campanelli v Italy* (n 10) § 75.

²⁰ Cf European Court of Human Rights, 'Questions and Answers on the *Paradiso and Campanelli v Italy* judgment (27 January 2015)' <www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf> accessed 3 April 2015.

II. Definitions and background

A. The practice of surrogacy explained

Whilst there is overarching consensus that the number of surrogacy arrangements is on the rise,²¹ it is still far from being a common practice people are generally aware of. It is therefore crucial at the outset of this thesis to familiarise the reader with some basic facts and characteristics of surrogacy agreements.

1. Definition and types

As is common in academia, there are numerous different ways in which surrogacy has been described. No universally valid definition is thus available. For the purposes of this paper, the author follows *Jackson* who defines surrogacy as 'the practice whereby one woman (the surrogate mother) becomes pregnant with the intention that the child should be handed over to the commissioning couple (or individual) after birth'²². However, as surrogacy comes in various guises, further explanations are essential. The first distinction relates to the genetic material used in such procedures. In traditional surrogacy (or partial surrogacy), the surrogate is artificially inseminated with sperm from the intended father or an anonymous sperm donor. This means that the surrogate not only provides her uterus but also her ovum and is thus genetically related to the resulting child. Besides, it usually produces lower costs than gestational surrogacy as the process is carried out *in vivo* (within the body).²³ With the development of in-vitro fertilisation (IVF) in the late 1970ies, another type of surrogacy was established soon thereafter: gestational surrogacy.²⁴ This kind of treatment entails the implantation of an embryo created via IVF into the surrogate's uterus. The embryo is produced using both the ovum and sperm from either the intending parents or donors, ie the surrogate has no

²¹ Cf HCCH, 'A Study of Legal Parentage' (n 7) para 129; Laurence Brunet and others, 'A Comparative Study on the Regime of Surrogacy in EU Member States' (European Union 2013) 9 <[www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf)> accessed 8 February 2015.

²² Emily Jackson, *Medical Law: Text, Cases and Materials* (3rd edn, OUP 2013) 838.

²³ Mortazavi (n 8) 2253.

²⁴ The first baby born through IVF was reported in 1978, see Jeff Wang and Mark V Sauer, 'In Vitro Fertilization (IVF): A Review of 3 Decades of Clinical Innovation and Technological Advancement' (2006) 2 Therapeutic Clinical Risk Management 355; the first baby born resulting from gestational surrogacy was reported in 1985, see James M Goldfarb and others, 'Fifteen Years Experience with an In-Vitro Fertilization Surrogate Gestational Pregnancy Programme' (2000) 15 Human Reproduction 1075.

genetic link to the child she has agreed to carry to full term.²⁵ Since this type of procedure became available, surrogacy has significantly risen in popularity. To date, it is estimated that the vast majority of surrogacies are of gestational nature, with traditional surrogacies becoming more and more a curiosity.²⁶ This preference is primarily due to the lack of genetic relation between the surrogate and the child. Besides allegations that the gestational carrier is emotionally less attached to the child, legal deliberations also play an important role. Should a surrogate change her mind about relinquishing the baby after having given birth to it, her chances of being recognised as the legal mother are comparatively low, given the lack of genetic connection.²⁷ Furthermore, in cases where the intending mother has functioning ovaries, but cannot (for various reasons) carry a baby to full term herself, gestational surrogacy is an attractive option since it enables these women to have a child that is still genetically related to them.²⁸

In addition, gestational surrogacy can be subdivided depending on the usage of ovum and/or sperm donors. Where only one of the intending parents is infertile, the other partner usually contributes their ovum/sperm with which the embryo is then produced. Hence, in most of the cases, the child has a genetic link to at least one intending parent. However, where both partners are infertile or where a single infertile person wishes to have a child, the possibilities of making use of surrogacy are limited. Whilst it is of course possible to implant an embryo produced with ovum and sperm both provided by donors, some jurisdictions that regulate surrogacy prohibit such arrangements.²⁹

²⁵ Magdalena Gugucheva, 'Surrogacy in America' (Council for Responsible Genetics 2012) 6 <www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf> accessed 8 February 2015.

²⁶ HCCH, 'A Study of Legal Parentage' (n 7) para 135; Usha R Smerdon, 'Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India' (2008) 39 Cumb L Rev 15, 17.

²⁷ Cf Olivia Rundle, 'Transnational Surrogacy: Mapping the Issues' (National Family Law Conference, Canberra, October 2012) <[ftp://203.30.31.101/fl12/speaker%20papers/_papers/concurrent%20session%204/SP13_olivia%20rundle_%20where%20did%20i%20come%20from.%20legal%20issues%20in%20surrogacy%20and%20assisted%20reproductive%20technology.pdf](http://203.30.31.101/fl12/speaker%20papers/_papers/concurrent%20session%204/SP13_olivia%20rundle_%20where%20did%20i%20come%20from.%20legal%20issues%20in%20surrogacy%20and%20assisted%20reproductive%20technology.pdf)> accessed 8 February 2015.

²⁸ Peter R Brinsden, 'Gestational Surrogacy' (2003) 9 Human Reproduction Update 483, 484.

²⁹ Whilst Russia and California allow ovum and sperm donation, South Africa and the United Kingdom require a genetic link to the intending parents, see Theresa M Erickson, *Surrogacy and Embryo, Sperm & Egg Donation: What Were You Thinking?* (iUniverse 2010) 68; Konstantin N Svitnev, 'Legal Control of Surrogacy – International Perspectives', in Joseph G Schenker (ed), *Ethical Dilemmas in Assisted Reproductive Technologies* (De Gruyter 2011) 149, 153-156.

The second big distinction concerns the pecuniary aspect of surrogacy arrangements. Depending on whether the surrogate may or may not be financially rewarded for her services, surrogacies can be either altruistic or commercial. Commercial surrogacies include an agreement that a specific sum will be paid to the surrogate upon relinquishing the child. In altruistic agreements no such fee is foreseen, although surrogates may receive compensation for expenses related to the pregnancy and birth.³⁰ While surrogacies of the altruistic type are not directly in the line of fire and even allowed in some European Union countries, for example in the United Kingdom (UK)³¹ and Greece³², the commercial aspect has led to a rejectionist stance on surrogacy by many. It is widely argued that reimbursing a woman for carrying a baby to full term in order to hand it over to someone else amounts to the commodification of female bodies and children and moreover fosters the exploitation and trafficking of women.³³

In short, the nature of surrogacy arrangements varies according to the genetic material used and the manner in which the surrogate is financially rewarded for her services. The practice can therefore roughly be divided into the following categories: traditional/gestational and altruistic/commercial.

2. The parties involved

As it has become apparent in the previous section, surrogacy arrangements are often very complex and include a number of stakeholders. For a better understanding, the potential parties to such agreements are briefly outlined here.

This overview begins with those individuals who set the whole procedure in motion and are vastly referred to as 'intending parents' or 'commissioning parents'. Following the

³⁰ Robyn Perry-Thomas, 'Commercial Surrogacy: A Priceless Commodity?' (*A Global Village*, May 2012) <www.aglobalvillage.org/journal/issue7/globalhealth/surrogacy/> accessed 9 February 2015.

³¹ Bianca Jackson and Coram Chambers, 'Surrogacy: A Guide to the Current Law (Part 2) – Issues Arising' (*Family Law Week*, 30 January 2014) <www.familylawweek.co.uk/site.aspx?i=ed127234> accessed 9 February 2015.

³² Grigoriou Leon and others, 'Overview of the Greek Legislation Regarding Assisted Reproduction and Comparison With the EU Legal Framework' (2011) 23 *Reproductive BioMedicine Online* 820, 822ff.

³³ Cf Anderson (n 4); Pyali Chatterjee, 'Human Trafficking and Commercialization of Surrogacy in India' (2014) 85 *European Researcher* 1835.

terminology of two comprehensive studies recently conducted,³⁴ the thesis at hand sticks to the terms 'intending' or 'intended parents' when referring to the persons wishing to become the parents of a child born through surrogacy. Despite using the notions in plural, it shall be clarified that this paper encompasses all individuals initiating such a procedure, ie single persons just as much as couples – heterosexual or homosexual, married or unmarried. Turning to the typical profile of intending parents, various studies have shown that the vast majority of persons opting for surrogacy do so because they are physically not able to reproduce, often due to women lacking a uterus, having suffered repeated miscarriages or because other medical conditions prevent them from carrying a baby to full term.³⁵ Although the media have recently noticed a 'rise of social surrogacy' and asserted that more and more people choose to outsource pregnancy for other reasons than medical necessity (usually career-oriented reasons),³⁶ such arrangements are still quite rare, especially as some countries which permit surrogacy expressly require a medical condition on the part of intending parents.³⁷

The second party key to such arrangements is the 'woman who carries a pregnancy with an agreement that she will give the offspring to the intended parent(s)'³⁸ and is referred to as 'surrogate' in this paper. Thirdly, the child or children born as a result of surrogacy are addressed with the term 'resulting child'³⁹ or simply 'child', including cases of multiple births, as well. Concerning the profile and the prevalent motives for why women choose to become surrogates, research in this area has revealed that it is predominantly the financial incentive that makes commercial agreements attractive for potential surrogates. Having in mind that these women are usually paid a considerable

³⁴ Brunet and others (n 21) 12; HCCH, 'A Preliminary Report on the Issues Arising from International Surrogacy Arrangements' (Prel Doc No 10, March 2012) <www.hcch.net/upload/wop/gap2012pd10en.pdf> accessed 9 February 2015.

³⁵ Cf this study carried out in India: Center for Social Research (CSR), 'Surrogate Motherhood – Ethical or Commercial' (March 2012) 65 <https://drive.google.com/file/d/0B-f1XIdg1JC_UGh5UTNxUGxMV1k/edit> accessed 9 February 2015; cf this report about a clinic in the UK: Brinsden (n 28) 484.

³⁶ Radhika Sanghani, 'The Rise of "Social Surrogacy" to Protect Careers or Bodies: Would You Ever Do It?' *The Telegraph* (London, 17 April 2014) <www.telegraph.co.uk/women/womens-health/10772725/The-rise-of-social-surrogacy-to-protect-careers-or-bodies-Would-you-ever-do-it.html> accessed 10 February 2015.

³⁷ Such as Russia and Ukraine, see Seema Mohapatra, 'Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy' (2012) 30 *Berkeley J Int'l L* 412, 431; Svitnev (n 29) 155.

³⁸ Zegers-Hochschild and others (n 5) 1522.

³⁹ Mortazavi (n 8) 2253.

sum of money for their services (from approximately € 5.000,- in India to € 25.000,- in the US)⁴⁰, it is predominantly women from a low socio-economic background who decide to act as a surrogate.⁴¹

Apart from the key stakeholders mentioned above, there are more parties involved in the procedure. Besides gamete donors who contribute their ovum or sperm in cases where the intending parents are not able to do so, intended parents are normally dependent on intermediaries who facilitate the process. Typically involved entities are surrogacy agencies, fertility clinics and respective law firms, whose main tasks are to establish the contact between the primary parties, to give legal advice, take care of the money transaction as well as to provide the necessary medical services.⁴²

B. The prevalent phenomenon of cross-border surrogacy

Another characteristic very common to surrogacy arrangements is their transnationality. Due to various interconnected factors, intending parents very often travel abroad in order to make use of surrogacy, which means that the parties involved come from and reside in different countries. This, in turn, implies that it is typically more than just one domestic legislative framework parties have to abide by and which determine the outcome of such undertakings.⁴³ In fact, the practice of travelling to another jurisdiction for receiving infertility treatment is not restricted to the practice of surrogacy, but applies more or less to the entire sector of reproductive health care. This phenomenon is primarily caused by the huge differences in how these treatments are regulated and carried out in states all over the world. The prevailing reasons for people seeking these types of medical services are therefore legal prohibitions or lack of availability in their own jurisdiction, or may be related to preferable conditions found in other countries with regard to lower costs or higher success rates.⁴⁴

⁴⁰ Family Through Surrogacy, 'Surrogacy Costs' (2014) <<http://familieshrusurrogacy.com/conference-faq/surrogacy-costs>> accessed 10 February 2015.

⁴¹ Margaret Ryznar, 'International Commercial Surrogacy and Its Parties' (2010) 43 J Marshall L Rev 1009, 1028ff.

⁴² HCCH, 'A Study of Legal Parentage' (n 7) para 143.

⁴³ Nelson (n 2) 240.

⁴⁴ Zeynep B Gürtin and Marcia C Inhorn, 'Introduction: Travelling for Conception and the Global Assisted Reproduction Market' (2011) 23 Reproductive BioMedicine Online 535.

Likewise, the burgeoning international market for commercial surrogacies does not come as a surprise when putting the abovementioned factors in context. Beginning with domestic regulations on surrogacy, it can be seen that a significant number of states prohibits commercial surrogacy. Naturally, this has led to those few countries with permissive approaches quickly turning into top destinations for many foreigners in search of a surrogate. Whilst it was previously predominantly the United States, the global commercial surrogacy market has shifted to other parts of the world in recent years. This development is explainable: As soon as less wealthy countries started offering medical services of very high quality but to markedly lower prices, many people who were not able or willing to pay for a surrogacy arrangement in the United States have become attracted by new possibilities opening up in countries such as India, Thailand or Ukraine.⁴⁵ Moreover, the absence of tight legal frameworks governing such procedures serves as an additional incentive for intending parents. Whilst Russia, for example, has concrete surrogacy laws which are drafted in a comparatively favourable way for intended parents (especially in connection with eligibility criteria),⁴⁶ India's surrogacy industry still operates in a legal vacuum with the only orientation being non-binding guidelines issued by the Indian Council of Medical Research (ICMR).⁴⁷ However, the global surrogacy market could not have expanded with such a pace and intensity were it not for the internet. The significant growth of internet access has made it possible for intending parents to explore their options online. It does not only help infertile persons to find a solution they may not have been aware of before, it also matches them with respective agencies, clinics and gamete donors.⁴⁸

In conclusion, it can be said that the combination of all these factors created a 'perfect storm' for a rapidly growing global surrogacy market. Unsurprisingly though, the

⁴⁵ Mohapatra (n 37) 413-414; Jennifer Rimm, 'Booming Baby Business: Regulating Commercial Surrogacy in India' (2014) 30 U Pa J Int'l L 1429, 1431ff.

⁴⁶ Svitnev (n 29) 156.

⁴⁷ Surrogacy Laws India, 'ART (Draft) Bill 2013/Surrogacy Bill: Update/Follow Up/Current News' (9 January 2015) <<https://surrogacylawsindia.wordpress.com/tag/surrogacy-laws-2/>> accessed 11 February 2015.

⁴⁸ J Brad Reich and Dawn Swink, 'Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era' (2011) 14 J Health Care L & Pol'y 241, 253ff.

expansion of cross-border commercial surrogacy has not only been noticed with marked displeasure and a wide range of ethical objections,⁴⁹ but has also caused great upheaval in the field of relevant law disciplines. The main interest of this paper is in the legal consequences, therefore a closer examination of the latter point will be part of the following chapters.

⁴⁹ Cf Raywat Deonandan and others, 'Ethical Concerns for Maternal Surrogacy and Reproductive Tourism' (2012) 38 *Journal of Medical Ethics* 742; Kristine Schanbacher, 'India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women' (2014) 25 *Hastings Women's L J* 201.

III. Relevant domestic legislation

The present chapter is divided into two parts. First, the issue of domestic legislation on surrogacy is taken up and examined in more detail. Thereby, an overview of current domestic legislations in Europe is given in order to identify prevailing trends and approaches regarding the practice of surrogacy as such. Following this, the focus shifts and attention is drawn to the actual problem lying at the heart of this thesis. Leaving the field of regulations revolving around surrogacy and other forms of assisted reproductive techniques, light is shed on what happens *after* such arrangements have actually been conducted. As soon as a child is born, its parents are determined and recorded in a birth register. Whilst this is in most cases a standard procedure creating no notable confusion, the question of legal parenthood in connection with a child born as a result of surrogacy is far from being standard. Whilst the destination country is usually prepared to solve issues of this kind and has adequate procedures in place, the real struggle often begins when intending parents want to return to their home country with the new-born child. As these latter jurisdictions very often prohibit or do not tolerate surrogacy on their territory, problems are and have been arising in connection with acknowledging the legal parent-child relationship established on the basis of such an agreement. Therefore, the second part of this chapter deals with the question of how legal parenthood is determined in two specific states of birth, before highlighting current legislation and administrative practices in selected receiving states across Europe.

A. The legal landscape on surrogacy in Europe

Although it can be said that the overall attitude towards surrogacy is not a very favourable one in Europe, specific domestic laws and practices in this context vary considerably. A comprehensive and detailed examination of all states is therefore beyond the scope of this paper. However, in order to provide the reader with an overview on certain trends and the current range of various approaches taken, a rough categorisation in this regard is made. In the course of this, a few sample jurisdictions are singled out and some particular aspects illustrated for a better understanding of how different issues are treated at the moment.

1. Permissive approaches towards surrogacy

Before handing down the judgment in the case of *Mennesson v France*⁵⁰, the ECtHR carried out a study in 35 of its member states and has thereby noticed that surrogacy appears to be authorised in eleven of them. Whilst seven of these states expressly allow surrogacy, four others have been found to tolerate this practice on their territory. Apart from Georgia, Russia and Ukraine, where even commercial surrogacy is allowed,⁵¹ surrogacy arrangements are permitted under comparatively strict conditions and only when altruistic in, inter alia, Greece⁵², the Netherlands⁵³, and the United Kingdom⁵⁴.

Within the EU area, Greece is said to have the most comprehensive legal framework on surrogacy, which came into force in 2002 and was specified in 2005.⁵⁵ First, it can be observed that by far not all types of surrogacy are allowed under Greek law. Besides the prohibition of commercial agreements, only gestational surrogacies are allowed. Whilst the surrogate must never be genetically related to the child, the intending parents may, but do not have to contribute any gametes of their own. With regard to the eligibility criteria, further limitations are put in place with the most striking ones being: the intending parents must show that they cannot have a child due to medical reasons, which means that 'social surrogacy' is not legal in Greece. Further, as the law stipulates that intending parents must either be married couples or single individuals, same-sex couples are implicitly excluded from resorting to surrogacy. Last, only Greek citizens or permanent residents may have recourse to surrogacy, which means that this type of treatment is effectively not available for other EU citizens who may come from countries with a more rejectionist stance on surrogacy and therefore look for options

⁵⁰ *Mennesson v France* (n 9) § 78.

⁵¹ Cf David Fieldsend, 'The Attempts to Legalise Surrogacy in Europe' (Presentation to the CoE Parliamentary Assembly, Strasbourg, 26 April 2012) <<http://careforeurope.org/wp-content/uploads/2013/02/Surrogacy-Speech.pdf>> accessed 13 February 2015.

⁵² Leon and others (n 32) 822.

⁵³ Ian Curry-Sumner and Machteld Vonk, 'National and International Surrogacy: An Odyssey' (2011) <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/29180/ISFL%202011%20-%20Final.pdf?sequence=1>> accessed 13 February 2015.

⁵⁴ Bianca Jackson and Coram Chambers, 'Surrogacy: A Guide to the Current Law (Part 1)' (*Family Law Week*, 24 January 2014) <www.familylawweek.co.uk/site.aspx?i=ed127038> accessed 13 February 2015.

⁵⁵ Leon and others (n 32) 821.

abroad.⁵⁶ In this regard it is important to remark that also the United Kingdom⁵⁷ and the Netherlands⁵⁸ have similar limitations of this kind, which reduces the possibilities for EU citizens to conduct surrogacy on European soil even further.

So, although there are a few countries within the EU that permit surrogacy, the numerous limitations and requirements set forth factually bar a great number of people from conducting a surrogacy arrangement there. These countries are therefore not a viable option for Europeans in search of a surrogate. Given few alternatives, they are likely to travel to other, often less wealthy, destinations such as Ukraine or India.⁵⁹

2. Prohibitionist laws and policies on surrogacy

Again, with regard to the comparative survey carried out by the Court, surrogacy is expressly prohibited in 15 of the 35 contracting states examined, and is in addition implicitly forbidden, not tolerated or its lawfulness is considered uncertain in ten more states.⁶⁰ When comparing this to the number of countries that actually allow or tolerate surrogacy, it becomes apparent that a clear majority of states party to the Convention do not look favourably upon this type of infertility treatment. This trend becomes even more visible in the context of the European Union. According to an EU-wide report published in 2013, surrogacy is illegal in Austria, Bulgaria, Finland, France, Germany, Italy, Malta, Portugal, Spain, and Sweden.⁶¹ As the reproductive health care sector is rapidly evolving and thereby constantly posing new challenges for domestic legislators, the countries enumerated above may however have enacted new regulations in this context in the meantime.

⁵⁶ Konstantinos A Rokas, 'Greece' in Katarina Trimmings and Paul Beaumont (eds), *International Surrogacy Arrangements. Legal Regulation at the International Level* (Hart 2013) 143, 144ff.

⁵⁷ According to Section 54 (4) of the Human Fertilisation and Embryology Act 2008, at least one of the intending parents must be domiciled in the UK, in the Channel Islands, or the Isle of Man.

⁵⁸ Although there is no formal limitation to this, a number of surrogacy clinics actually require the parties to hold Dutch citizenship and residency, see Brunet and others (n 21) 69.

⁵⁹ Cf Bala (n 13) 12ff.

⁶⁰ *Mennesson v France* (n 9) § 78.

⁶¹ Brunet and others (n 21) 15-16.

With regard to the current situation in Austria, for example, a new law which amends the existing Artificial Procreation Act (*Fortpflanzungsmedizingesetz* – FMedG) has come into force in February 2015.⁶² With particular regard to the ECHR and the Court’s reminder that ‘this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law, needs to be kept under review by the Contracting States’⁶³, the legislator considered it was time to revise regulations in the field of medically assisted procreation. Besides including same-sex couples to the circle of persons who may be eligible for sperm donation, Austria also legalised ova donation as well as pre-implantation diagnostics (albeit under very strict conditions).⁶⁴ As regards surrogacy, however, the total ban has been upheld and its legalisation had apparently not even been taken into due consideration.⁶⁵ Apart from these particular observations concerning Austria, the thesis at hand nonetheless refers to the results shown in the survey of 2013 as its scope does not allow for a comprehensive review as to the validity of the situation depicted therein. Besides, it still serves the purposes of this paper in that it provides a rough overview and highlights predominant trends and common attitudes in connection with surrogacy arrangements.

The second sub-group encompasses those states with no explicit prohibition on surrogacy, but where surrogacy is not tolerated or practiced or where its lawfulness remains uncertain. In fact, quite a few domestic laws are simply silent on the issue of surrogacy, such as those of Ireland, Lithuania, Luxembourg, and Slovenia.⁶⁶ This does not mean, however, that surrogacy is not an issue in these countries and has not at all been discussed in the public. On the contrary, in Ireland, for example, a revision of its family law is currently under way and a draft bill, published in February 2014, contained provisions particularly addressing surrogacy. Besides putting a ban on commercial surrogacy, proposals on facilitating the process for intending parents to

⁶² BGBl I 2015/36.

⁶³ *SH and Others v Austria* [GC], no 57813/00, § 118, ECHR 2011.

⁶⁴ Cf Sections 2, 2a and 3 of the Artificial Procreation Act as amended in 2015.

⁶⁵ RV 445 BlgNR 25. GP <www.parlament.gv.at/PAKT/VHG/XXV/I/I_00445/fname_377350.pdf> accessed 14 February 2015.

⁶⁶ Brunet and others (n 21) 15ff.

have their legal parent-child relationship established were made.⁶⁷ In September 2014, the Irish government published a revised version of the bill, with all provisions on surrogacy having been removed completely. Whilst surrogacy therefore still remains unregulated by the domestic legislator, the Irish Department of Justice and Equality at least published some guidelines concerning issues of citizenship, legal parenthood and immigration in the context of surrogacy arrangements conducted abroad.⁶⁸

After a rough examination of how surrogacy is approached across Europe, it can be concluded that the great majority of states either generally prohibit surrogacy or do not address it at all in their domestic laws, which means that surrogacy arrangements are effectively not carried out in most parts of the EU area. Moreover, with a handful of permissive states having regulated surrogacy under very strict conditions and with tight eligibility criteria in place, the number of surrogacy arrangements concluded there is quite low, especially when compared to jurisdictions that allow for commercial agreements.⁶⁹

B. The repercussions of surrogacy conducted abroad: the issue of legal parenthood

Whilst it seems that due to medical advances and the impacts of globalisation, the conduct of surrogacy arrangements across borders has become more readily available, surrogacy is still not an easy and carefree option for people who intend to have a child with the support of medically assisted procreation. What is even more troubling is that the cumbersome journey, often involving countless hours at fertility clinics, agencies, or law firms as well as before courts and public authorities, is usually not over with the child finally being handed over to the intending parents. Due to the transnational dimension inherent in the majority of such arrangements, new bureaucratic and legal

⁶⁷ Anthony Blackburn-Starza, 'Ireland Publishes Draft Surrogacy Legislation' (*BioNews*, 3 February 2014) <www.bionews.org.uk/page_393342.asp> accessed 15 February 2015.

⁶⁸ Department of Justice and Equality, 'Citizenship, Parentage, Guardianship and Travel Document Issues in Relation to Children Born as a Result of Surrogacy Arrangements Entered into Outside the State' (2012) <www.justice.ie/en/JELR/Pages/Surrogacy> accessed 15 February 2015.

⁶⁹ Cf HCCH, 'A Study of Legal Parentage' (n 7) para 135.

hurdles are likely to arise upon return to the intending parents' home jurisdiction, especially with regard to the child's civil status and the determination of its legal parents.⁷⁰ By depicting some basic principles related to the determination of legal parenthood in various European countries, attention shall be drawn to the difficulties arising in this context and the resulting risk of the legal parent-child relationship not being acknowledged in the family's country of residence.

1. The significance of legal parenthood

What does it mean to be the legal parent of a child and why is state recognition of this bond so important? As a wide range of rights and obligations derive from legal parenthood, the significance of being acknowledged as the legal mother or father is not to be overrated. Domestic family laws generally determine that rights relating to, inter alia, custody, maintenance, or inheritance are directly linked to the question of legal parenthood.⁷¹ Moreover, the acquisition of citizenship is usually dependent on the nationality of the child's parents. According to the *ius sanguinis* principle, citizenship is acquired by 'blood', meaning that the parents pass their nationality on to the child.⁷² Since a lot of European states apply the mentioned principle, the determination of legal parenthood is therefore crucial for resulting children to acquire the citizenship of the intending parents' country of origin.⁷³ With regard to surrogacy arrangements, the problem of states requiring a blood tie in order to grant children citizenship is obvious. As the intending mother did not give birth to the child and there may be no genetic link between the child and the intending parents, the question arises whether nationality can also be passed on 'along "artificial" blood lines' under the *ius sanguinis* principle.⁷⁴ In

⁷⁰ See for an overview covering the situation in 13 countries: Frédérique Granet, 'Surrogacy and the Civil Status of the Child in ICCS Member States' (International Commission on Civil Status 2014) <www.ciecl.org/Etudes/2014-SurrogacyAndTheCivilStatusOfTheChild.pdf> accessed 17 February 2015.

⁷¹ Cf HCCH, 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project' (Prel Doc No 3 B, March 2014) para 18 <www.hcch.net/upload/wop/gap2015pd03b_en.pdf> accessed 17 February 2015.

⁷² Iseult Honohan, 'Bounded Citizenship and the Meaning of Citizenship Laws: Ireland's *Ius Soli* Citizenship Referendum' in Linda Cardinal and Nicholas Brown (eds), *Managing Diversity: Practices of Citizenship in Australia, Canada, and Ireland* (University of Ottawa Press 2007) 63, 64.

⁷³ According to a comparative study including 33 European countries, all of these states award their citizenship to a child if its mother possesses that state's citizenship at the time of birth, see Maarten P Vink and Gerard-René de Groot, 'Birthright Citizenship: Trends and Regulations in Europe' (EUDO Citizenship Observatory 2010) <http://eudo-citizenship.eu/docs/birthright_comparativepaper.pdf> accessed 17 February 2015.

⁷⁴ Ibid 7-8.

addition, many children born as a result of cross-border surrogacy face the genuine risk of being left stateless. For example, regarding the state where the surrogate has given birth (State A), the resulting child will most likely not acquire State A's citizenship if the *ius sanguinis* principle is strictly applied and if the state acknowledges the legal parenthood of the intending parents. However, if the intending parents' country of origin (State B) does not recognise the legal parent-child relationship established abroad, but in fact recognises the surrogate (and her husband if present) as the legal parent(s), the child is at risk of not being granted citizenship in State B either.⁷⁵

Without going into depth about citizenship laws and their struggles in connection to surrogacy agreements, scenarios like the one mentioned above illustrate once more that transnational surrogacy arrangements evoke numerous highly complex issues, cutting across various fields of law. Domestic legislators are thus confronted with great legal challenges in this regard, which are further intensified by the potentially precarious situation of children born as a result of such agreements. By linking such essential rights to the question of parenthood, the significance of being recognised as the legal mother or father is evident.

2. The establishment of legal parenthood in the child's state of birth

The present section deals with the establishment of the legal bond between intending parents and resulting children in those countries where surrogacies are officially being carried out. Two jurisdictions shall serve as an example in order to point out possibilities of how legal parenthood can effectively be established in such constellations. California and Russia are not only popular destinations for surrogacies in general, they also serve as the child's state of birth in two of the cases brought before the ECtHR that are analysed in Chapter V.⁷⁶

⁷⁵ Kanics (n 3) 119ff.

⁷⁶ I.e. California in *Menesson v France* (n 9); Russia in *Paradiso and Campanelli v Italy* (n 10).

a) California

Due to the lack of federal legislation in the United States (US), it is in each state's discretion whether and how surrogacy is regulated.⁷⁷ This has led to a wide spectrum of approaches in this regard. Some states ban or even criminalise (specific types of) surrogacy, others lack specific regulations, but declare surrogacy contracts null and void. A number of states permit surrogacy, provided that the requirements (individually defined by each state) have been complied with.⁷⁸ In addition, due to neither a federal nor a state legislation in place, certain states somewhat shift the responsibility to the judges, who are then called upon to decide on the legality of surrogacy arrangements when brought before court.⁷⁹ In the light of these disparities, it is impossible to depict how surrogacy is being handled in the US in a uniform manner. Therefore, any explanations made in the following apply for one state only, namely California.

Up until 2013, California was one of those states who had no specific surrogacy laws in place.⁸⁰ In spite of this, it nonetheless built a reputation as a very 'surrogacy-friendly'⁸¹ state already twenty years ago. By having developed permissive case-law in relation to the enforceability of surrogacy arrangements, California emerged as one of the most popular destinations for intending parents from all across the world.⁸² In 1993, the California Supreme Court handed down a landmark judgment, *Johnson v Calvert*⁸³, in which it declared surrogacy contracts enforceable. In addition, a new doctrine was developed which explicitly acknowledges the legal parenthood of intending parents. Based on the initial *intent* of the parties, the California Supreme Court ruled in favour of the intending parents' claim to be recognised as the parents of the child born as a result

⁷⁷ Snyder (n 6) 388.

⁷⁸ See for an overview of various states' approaches: Jessica Arons, 'Future Choices. Assisted Reproductive Technologies and the Law' (Center for American Progress 2007) 35ff <https://cdn.americanprogress.org/wp-content/uploads/issues/2007/12/pdf/arons_art.pdf> accessed 18 February 2015.

⁷⁹ Carla Spivack, 'The Law of Surrogate Motherhood in the United States' (2010) 58 Am J Comp L 97, 102.

⁸⁰ Richard Vaughn, 'California Surrogacy Law to Take Effect Jan. 1' (*International Fertility Law Group*, 26 November 2012) <www.iflg.net/california-surrogacy-law-to-take-effect-jan-1/> accessed 19 February 2015.

⁸¹ Trimmings and Beaumont (n 1) 443.

⁸² Charles P Kindregan and Danielle White, 'International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements' (2013) 36 Suffolk Transnat'l L Rev 527, 535ff.

⁸³ *Johnson v Calvert* 851 P 2d 776 (Cal 1993).

of surrogacy.⁸⁴ With this judicial precedent in place, California soon turned into an attractive destination for intending parents. This approach was subsequently upheld and extended to cases of gestational surrogacy where neither of the intending parents was genetically related to the child.⁸⁵ However, for the sake of completeness it should be mentioned that the intent-based doctrine is not applicable to traditional surrogacy arrangements, ie where the surrogate provides her own ovum.⁸⁶

In practice, legal parenthood is determined by a judgment, called 'prebirth parentage order'⁸⁷. Based on the 1973 Uniform Parentage Act and the California Family Code, courts may acknowledge the maternity and/or paternity prior to the child's birth. With the new surrogacy law now in place, a number of safeguards and specific requirements in connection to gestational surrogacy contracts were eventually introduced, which must be complied with in order for such agreements to be deemed valid and a prebirth parentage order to be issued.⁸⁸ Significant advantages of such an order are, among others, that hospitals can hand over the child to the intending parents and register them on the original birth certificate right away.⁸⁹ It is important to note that the legal requirements in force since 2013 are not intended to restrict or prohibit surrogacy agreements. Their principal objectives are to protect the parties from potential misconduct and to codify already existing practices that have been established over the years. California's reputation as a surrogacy-friendly state has therefore not been damaged by the new bill; in fact it clarified and reiterated California's favourable stance towards this kind of ART treatment.⁹⁰

To sum up, intending parents who want to conduct a gestational surrogacy arrangement in California are generally in a good position to be acknowledged as the legal parents of

⁸⁴ Ibid; see also Trimmings and Beaumont (n 1) 449ff.

⁸⁵ *Buzzanca v Buzzanca* 72 Cal Rptr 2d 280 (Cal Ct App 1998).

⁸⁶ *Re Marriage of Moschetta* 30 Cal Rptr 2d 893 (Cal Ct App 1994); see also Deborah H Wald, 'California Surrogacy Law FAQ' (*The Wald Law Group*, January 2015) <www.waldlaw.net/surrogacy.html> accessed 22 February 2015.

⁸⁷ Mary P Byrn and Steven H Snyder, 'The Use of Prebirth Parentage Orders in Surrogacy Proceedings' (2005) 39 Fam L Q 633.

⁸⁸ Ibid 643ff; Vaughn (n 80).

⁸⁹ Byrn and Snyder (n 87) 634ff.

⁹⁰ Vaughn (n 80); Surrogacy Parenting Services, 'New California Surrogacy Bill is the Most Progressive in the World' (2014) <<http://surrogateparenting.com/new-california-surrogacy-bill-progressive-world/>> accessed 22 February 2015.

the resulting child. As long as the formal requirements are being complied with, courts are likely to issue a prebirth parentage order. Besides, what might serve as another incentive to choose California is that children born in the United States as a result of a surrogacy agreement are US citizens. Since the US are one of the few countries which extensively apply the principle of *ius soli* (in contrast to the principle of *ius sanguinis*⁹¹), every child born on its soil automatically holds US citizenship and is entitled to a US passport.⁹²

b) Russia

In Russia, an increasingly popular destination for foreigners to conduct surrogacy agreements, the legal parenthood of intending parents is established in a completely different manner than in California and therefore illustrates the heterogeneity of domestic surrogacy laws. What is similar, however, is the relative scarcity of legislation governing the practice of surrogacy. Although a new law was adopted in 2011, entailing some provisions on surrogacy, Russia is still far from having a comprehensive legal framework in this regard.⁹³ This being said, Russia allows gestational surrogacy only, but is not restricted to altruistic agreements and does not require intending parents to be domiciled in Russia. Single women or heterosexual couples, married or unmarried, may be the parties to a surrogacy contract, provided a medical condition prevents these women from carrying a child to full term themselves.⁹⁴

With regard to the determination of parenthood in the course of surrogacy, the differences to the Californian model are striking. First, it is not possible to obtain legal parenthood prior to the child's birth in Russia. Second, no courts are involved in the whole procedure, as legal parenthood is established with the parents' registration on the child's birth certificate and in the birth registry book. While this may sound easy and

⁹¹ Honohan, 'Bounded Citizenship and the Meaning of Citizenship Laws' (n 72) 64.

⁹² Iseult Honohan, 'The Theory and Politics of Ius Soli' (EUDO Citizenship Observatory 2010) 2 <<http://eudo-citizenship.eu/docs/IusSoli.pdf>> accessed 22 February 2015; Snyder (n 6) 396.

⁹³ Olga Khazova, 'Russia' in Katarina Trimmings and Paul Beaumont (eds), *International Surrogacy Arrangements. Legal Regulation at the International Level* (Hart 2013) 311.

⁹⁴ Brunet and others (n 21) 335; Michele Rivkin-Fish, 'Conceptualizing Feminist Strategies for Russian Reproductive Politics: Abortion, Surrogate Motherhood, and Family Support after Socialism' (2013) 38 Signs 569, 577.

non-bureaucratic, there is in fact a catch: The intended parents will only be registered if the surrogate gives her written consent to this and the hospital confirms the said consent in a document, which has to be presented at the civil status registry. This effectively means that the surrogate has the possibility to change her mind about relinquishing the child after having given birth to it and will be recognised as the legal mother by Russian authorities.⁹⁵ Therefore, the procedure might be cheaper and involve less bureaucracy than in the US, but the risk for intending parents of not receiving the child and thereafter not being recognised as the legal parents is undoubtedly higher in Russia. Moreover, resulting children born in Russia will not automatically obtain Russian citizenship. If the intending parents are foreigners and do not reside in Russia, the child may only obtain Russian citizenship if it is otherwise left stateless, eg due to the receiving state's refusal to grant the child conceived via surrogacy its citizenship.⁹⁶

3. The determination and recognition of legal parenthood in receiving states

In jurisdictions where surrogacy operates under a regulatory framework, their domestic laws generally include provisions dealing with the question of legal parenthood following surrogacy agreements. Being recognised as the legal parents in the child's state of birth is a very important step and a great relief for intended parents from abroad. However, as they usually travel to the child's state of birth solely in order to conduct the surrogacy agreement and therefore want to continue living in their actual home country as a newly founded family, it is far more important that the legal parent-child relationship is acknowledged by their home jurisdiction, as well. For this reason, the present section briefly sets out existing principles with regard to the determination of maternity and paternity in typical receiving states in Europe. It then goes on to examine how two such states, namely France and Germany, regulate and factually handle situations where intending parents demand that their legal parenthood (which was established abroad) be recognised in their home jurisdictions.

⁹⁵ Khazova (n 93) 319; Brunet and others (n 21) 337.

⁹⁶ Khazova (n 93) 321.

a) *The determination of parenthood: general principles*

The Roman law principle *mater semper certa est* ('the mother is always certain') signifies that the woman who gives birth to a child is recognised as its legal mother. According to several studies conducted recently, this principle is still predominantly valid in (European) domestic family laws, wherein legal maternity is established 'by operation of law'⁹⁷. This is the case in Belgium, Germany, The Netherlands, and Spain, to name but a few. In France, for example, legal maternity is not expressly defined in its Civil Code, but other provisions similarly imply that the woman who gives birth to a child shall primarily be established as the legal mother.⁹⁸ As childbirth is still the primary ground for establishing legal maternity, frictions in connection to surrogacy agreements are pre-programmed. In Germany, for example, the *mater semper certa est*-principle was explicitly incorporated into domestic family law in 1998 only, namely as a deliberate reaction to the advancement in assisted reproduction technologies. In order to avoid 'split motherhood', German law does not foresee any exceptions to this rule and hence treats legal maternity as an incontestable fact.⁹⁹ Likewise, in other jurisdictions where surrogacy is prohibited, the traditional rules on legal parenthood are equally valid for children born as a result of surrogacy agreements conducted on their territory. The establishment of maternity of an intending mother is therefore often infeasible or only possible through completing an adoption procedure afterwards.¹⁰⁰

The question of fatherhood is not regulated in such a straightforward manner and may be established in multiple ways and on different grounds. Without going too much into depth, paternity is in most countries primarily linked to genetic affiliation and is either established by virtue of legal presumption (ie the husband of the woman who gave birth to the child is presumed to be the genetic father), voluntary acknowledgment or a court

⁹⁷ HCCH, 'A Study of Legal Parentage' (n 7) para 11; see also Caroline Forder and Kees Saarloos, 'The Establishment of Legal Parenthood. A Story of Successful Convergence?' (2007) Maastricht Faculty of Law Working Paper 2007/1, 7ff <<http://arnop.unimaas.nl/show.cgi?fid=8038>> accessed 25 February 2015; Todorova (n 7) 16.

⁹⁸ Forder and Saarloos (n 97) 8.

⁹⁹ Susanne L Gössl, 'Germany' in Katarina Trimmings and Paul Beaumont (eds), *International Surrogacy Arrangements. Legal Regulation at the International Level* (Hart 2013) 131, 136; Granet (n 70) 5.

¹⁰⁰ HCCH, 'A Study of Legal Parentage' (n 7) para 26.

decision.¹⁰¹ Further, in jurisdictions where (certain forms of) ART treatment are permitted, such as sperm or ovum donation by a third party, there usually are specific provisions in place which regulate that under such circumstances, parenthood is not acquired based on a genetic relationship, so that gamete donors will not be established as the legal parents.¹⁰² Taking up the example of Germany again, the rules are not as tight as the ones regarding maternity, ie it is theoretically possible that the intending father may be able to acknowledge paternity. This will however only be possible under the following conditions, which are to be met cumulatively: firstly, the surrogate may not be married at the time of parturition, for otherwise her husband will be legally presumed to be the father. Secondly, the intending father must have provided his gametes so that he is genetically related to the resulting child. And lastly, the surrogate must consent to the intending father's acknowledgement. Only then may the intended father request the court to be determined as the legal parent.¹⁰³

The respective legal situation in Germany illustrates the precarious situation of intending parents who come from jurisdictions with a prohibitionist attitude towards surrogacy. Often due to the absence of specific legal provisions, the traditional rules on legal affiliation are applied to situations arising out of surrogacy agreements. This may produce unsatisfying results for the parties involved, especially the intending parents.¹⁰⁴

b) The recognition of parenthood established abroad

Having shown that the majority of European jurisdictions not only prohibits the practice of surrogacy as such, but also does not establish the legal parenthood of the intended parents, the question inevitably arises whether there are any other possibilities left for having the desired parent-child relationship legally acknowledged in these states. In cases of cross-border surrogacy, it was observed that the intending parents are usually registered as the legal parents in the child's state of birth, which means that they are in

¹⁰¹ Forder and Saarloos (n 97) 12; HCCH, 'A Study of Legal Parentage' (n 7) para 13.

¹⁰² Cf Todorova (n 7) 17; HCCH, 'A Study of Legal Parentage' (n 7) para 20.

¹⁰³ Cf Alexander Diel, 'Leihmutterschaft und Reproduktionstourismus' in Tobias Helms and Martin Löhnig and Anne Röthel (eds), *Schriften zum deutschen und ausländischen Familien- und Erbrecht* (Bd 11, Wolfgang Metzner Verlag 2014) 90ff.

¹⁰⁴ Cf HCCH, 'A Study of Legal Parentage' (n 7) paras 19-20.

possession of a birth certificate, a judgment or some other official document certifying their legal bond with the child. Therefore, receiving states (at least those with a civil law system) may acknowledge the legal relationship by virtue of recognising the foreign decision or document under their private international law rules.¹⁰⁵ How private international law has been applied in the context of cross-border surrogacy can be shown by examining how domestic authorities have dealt with such cases in France and Germany over the last years.

(1) France

France ranges amongst those countries with a particularly rejectionist attitude towards surrogacy. Besides declaring all forms of surrogacy contracts null and void under civil law, engaging in or facilitating such practices is even punishable by criminal law.¹⁰⁶ In spite of this dissuasive legislation, it is estimated that each year approximately 150 to 200 children are born abroad as a result of surrogacy agreements initiated by intending parents from France.¹⁰⁷ This means that French authorities have been confronted with cases of cross-border surrogacy. However, the law seems to provide no clear guidance in this respect and the issues arising therefrom. Especially the question of whether or how legal parenthood established abroad may be recognised under French law has therefore not been resolved in a uniform manner yet. To put it quite dramatically: 'French law has become illegible'¹⁰⁸.

Depending on how the legal parent-child relationship has been established in the child's state of birth, different laws and procedures apply. If the intending parents claim acknowledgment of their legal parenthood on the basis of presenting the child's birth certificate, Article 47 of the Civil Code is relevant. It determines that foreign civil status documents are in general considered valid under French law, save where 'sufficient elements establish that they are irregular, forged or that the facts declared therein do not

¹⁰⁵ Cf Trimmings and Beaumont (n 1) 510.

¹⁰⁶ Granet (n 70) 7ff.

¹⁰⁷ Louis Perreau-Saussine and Nicolas Sauvage, 'France' in Katarina Trimmings and Paul Beaumont (eds), *International Surrogacy Arrangements. Legal Regulation at the International Level* (Hart 2013) 119.

¹⁰⁸ Brunet and others (n 21) 120.

correspond with reality'¹⁰⁹. If the child's state of birth issued a judgment in this regard (such as is the case in California¹¹⁰), the intending parents may demand to have the judicial decision enforced in order to have their parenthood legally recognised in France. However, the enforcement of a foreign judgment may be refused if, for example, the decision was obtained abroad in order to evade French law or if it goes against public policy. Lastly, the third possibility for intending parents is to ask for the transcription of the respective decision or document into French civil status records, which would certify the legal parenthood in the strongest way possible. In fact, this option is said to be the most popular one on the part of intending parents.¹¹¹

With regard to the desired transcription of foreign birth certificates, there have been some cases where the French authorities actually recognised the child's birth certificate, in spite of the authorities' presumption that the child was born as a result of a surrogacy arrangement.¹¹² Whilst this approach appears quite liberal at first sight, further comments as to the specific circumstances of the cases are necessary. All these cases have in common that it was only intending *fathers*, who were moreover genetically related to the respective children, who requested the recognition of the birth certificate. In addition, the registration was only possible because the surrogate (and not a potential intended mother or other parent) was mentioned in the birth certificate. For these reasons, the documents were in line with the French perception of who are the legal parents of a child and thus reflected the truth according to the domestic authorities. Furthermore, although there is a certain trend towards recognition under the said circumstances, there has been another case in 2012 where the registration was in fact not authorised. Regardless of the biological truth, the denial was justified by invoking public policy and claiming that surrogacy amounted to the buying of a child.¹¹³

¹⁰⁹ Perreau-Saussine and Sauvage (n 107) 122.

¹¹⁰ Byrn and Snyder (n 87) 633.

¹¹¹ Perreau-Saussine and Sauvage (n 107) 124, 126ff; Brunet and others (n 21) 116.

¹¹² CA Rennes 29 March 2011, n° 10/02646; CA Rennes 21 February 2012, n° 11/02758; CA Rennes 15 January 2013, RG 11/7500 (unpublished); see also Brunet and others (n 21) 118ff.

¹¹³ CA Rennes 10 January 2012, n° 11/01846.

Concerning requests for registration based on a foreign judicial decision, recent cases have shown that the courts adopt a different approach and tend to rule against the intending parents' claims. A prominent example is one of the cases that were eventually ruled by the European Court of Human Rights, *Mennesson v France*. The intending parents concluded a surrogacy agreement in California and were registered as the legal parents of the resulting children (twins), in accordance with the court order they had obtained prior to parturition. Upon the request for the children to be registered in the French civil status records, various domestic courts had dealt with the case before the Court of Cassation (one of the highest courts in France) handed down its judgment on 6 April 2011.¹¹⁴ The court held in essence that since the foreign court decision contradicted the French perception of international public policy, it had been correct not to give effect to the foreign judgment and hence to annul the registration of the birth certificates in the French civil status records.¹¹⁵ This position was later confirmed by the Court of Cassation in two similar cases decided in September 2013. Therein it reiterated that surrogacy agreements are void and contrary to French public order. It was therefore correct to refuse the transcription of foreign birth certificates of children born as a result of surrogacy agreements.¹¹⁶ This case-law demonstrates the reluctant attitude towards surrogacy France has developed over the last years and the resulting difficulties for intending parents to have their legal parenthood recognised in their home jurisdiction. The current position adopted by the French judiciary obviously favours strict adherence to public policy considerations and thus leaves hardly any room for other arguments that would speak for recognising the legal parent-child relationship.¹¹⁷

(2) Germany

Just like France, Germany is rated among the 'anti-surrogacy jurisdictions'¹¹⁸. Even though the method of surrogacy in itself is not explicitly banned, the Adoption Placement Act (*Adoptionsvermittlungsgesetz* – AdVermiG) forbids the intermediation

¹¹⁴ Cass civ (1) 6 April 2011, 10-19.053.

¹¹⁵ Cf *Mennesson v France* (n 9) § 27.

¹¹⁶ Cass civ (1) 13 September 2013, 12-18.315; Cass civ (1) 13 September 2013, 12-30.138; Cf Granet (n 70) 21.

¹¹⁷ Ibid.

¹¹⁸ Trimmings and Beaumont (n 1) 463.

and advertisement of surrogacy agreements. Further, the Embryo Protection Act (*Embryonenschutzgesetz* – ESchG) outlaws any medical assistance to surrogacy.¹¹⁹ The main justification for such a rejectionist stance lies in the legislator’s perception that surrogacy amounts to the commodification of women and children, thereby violating their human dignity. As a consequence, surrogacy agreements are contrary to domestic public order and therefore unenforceable.¹²⁰

With regard to the issue of legal parenthood following surrogacy arrangements conducted abroad, the German system is rather complicated and, depending on the nature of the foreign document, different procedures may be enacted. In cases where the intending parents are merely in possession of a declaratory birth certificate issued by the child’s state of birth, the first question relates to the law applicable for establishing parenthood, which has to be solved by domestic private international law. Article 19 (1) of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche* – EGBGB) determines that a child’s descent will be determined by the law of the state where the child habitually resides (first sentence), by the law of the country of one of the parent’s nationality (second sentence), or if the mother is married, the law of the country which governs the effects of the marriage (third sentence). The child’s habitual residence is predominantly assumed to correlate with its mother’s residence, which is always the woman who gave birth to it under German law.¹²¹ Therefore, German authorities are likely to apply the respective laws of the child’s state of birth when having to determine legal parenthood. However, even if foreign law would actually lead to the acknowledgement of the intending father and/or mother as the legal parents, establishing such a relationship may still be refused by invoking the public order exception under Article 6 of the EGBGB (which has already happened with regard to surrogacy agreements).¹²² If the legal parent-child relationship has been established by a constitutive foreign decision, it could be recognised under domestic

¹¹⁹ Diel (n 103) 66.

¹²⁰ Gössl (n 99) 132; Granet (n 70) 14.

¹²¹ Ibid 136.

¹²² Ibid 139ff.

procedural law, again provided that its contents are not contrary to Germany's *ordre public*.¹²³

In the context of German citizens travelling abroad in order to conduct a surrogacy agreement, several – quite dramatic – cases have become known in previous years where intending parents could not return to Germany with the resulting child. In cases where a child does not automatically obtain citizenship of its birth state (such as in India or Russia), it may only enter Germany if it holds German (or in fact any) citizenship. However, since Germany applies the *ius sanguinis*-principle, nationality is only granted if the child's legal parents are German citizens. This has led to children being left stateless due to the two states involved arriving at different conclusions as to who the child's legal parents are.¹²⁴

Concerning the establishment of legal parenthood following surrogacy, cases in the past were dealt with in an inconsistent manner by the authorities, which is mainly due to the lack of a Supreme Court decision in this regard. In fact, the Federal Court of Justice handed down its first judgment concerning this issue in December 2014.¹²⁵ Prior to this, the diverging approaches and lines of argumentation adopted have led to legal uncertainty. Although it could be observed that foreign birth certificates were not recognised commonly,¹²⁶ requests for adoption as well as for acknowledging paternity of intending fathers established abroad were granted in some cases,¹²⁷ refused in others.¹²⁸

¹²³ Cf Claudia Mayer, 'Ordre Public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterchaftsfällen' (2014) 78 *RabelsZ* 551, 569ff.

¹²⁴ Eg in the prominent case of *Jan Balaz v Union of India*, where the children were not allowed to leave India for two years. Eventually, India agreed to let the intending father adopt the resulting children in order for them to be granted German citizenship, see Mortazavi (n 8) 2275ff; Kindregan and White (n 82) 551ff.

¹²⁵ BGH NJW 2015, 479.

¹²⁶ See eg OLG Stuttgart FamRZ 2012, 1740; see also Brunet and others (n 21) 273.

¹²⁷ Cf AG Nürnberg StAZ 2010, 182 concerning the acknowledgment of the intending father's paternity established in Russia; cf LG Düsseldorf openJur 2012, 124738, where an adoption request of the partner of the intending father was granted.

¹²⁸ Cf AG Hamm openJur 2012, 79106 concerning the refusal of the intending mother adopting the resulting child.

C. Concluding remarks

The present chapter provides an overview of relevant domestic legislation in connection to surrogacy agreements and the subsequent question of how legal parenthood may be established in such a context. The following conclusions can be drawn from the above examinations: As regards surrogacy per se, it could be observed that this practice is up to the present day hardly conducted anywhere in Europe, either due to explicit/implicit bans or legal vacuums. Further, since cross-border surrogacy is not an option in the whole EU area, intending parents travel to destinations like Ukraine, Russia, the United States or India where surrogacy is permitted and even advertised to foreigners.

Concerning the determination of legal parenthood, the previous sections have illustrated that whilst intending parents usually face no great obstacles in obtaining legal parenthood of the resulting child in the latter's state of birth, the situation is far more complicated in the intending parents' home country. Traditional concepts of maternity and paternity, combined with the reluctance to recognise foreign legal relationships that could not have been established under domestic family laws in many European jurisdictions, have the potential to prevent surrogacy agreements from producing the desired results in the countries where such families reside. This is not to say that all states and all domestic authorities in Europe categorically refuse to acknowledge the legal parent-child relationship concerning resulting children. However, the objective of the present chapter was to raise awareness that problems of this kind can and have actually arisen in certain EU states and that numerous children have suffered the consequences of non-recognition.

IV. The human rights of children born as a result of surrogacy agreements

Leaving the field of domestic frameworks governing surrogacy and associated issues in relation to the application of family and private international laws, the thesis continues with exploring the respective issues from a human rights, or more precisely, a children's rights perspective. Although the denial to recognise legal relations established in foreign jurisdictions on the basis of public policy considerations is in theory an accepted practice, such decisions must equally be governed by human rights considerations. Focusing on the principle objectives and underlying research questions, the following elaborations are delimited to examining the relevant human rights provisions in connection to the issue of states' refusal to recognise the legal parent-child relationship following cross-border surrogacy. The human rights compatibility of surrogacy agreements in all its facets is hence not analysed here, but can be found elsewhere in literature.¹²⁹

A. The Convention on the Rights of the Child

Whenever an issue is to be examined from a children's rights perspective, the Convention on the Rights of the Child (CRC) generally serves as a valuable point of departure. This is no less true for the topic at hand. On the following pages it is thus attempted to carve out the most relevant provisions of the CRC and subsequently determine which human rights obligations can be deduced therefrom when states are requested to determine and/or recognise the parent-child relationship established on the basis of a surrogacy arrangement.

1. Introductory remarks

Although it is undisputed that general human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR), apply to all individuals and hence

¹²⁹ See eg John Tobin, 'To Prohibit or to Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63 Int'l & Comp L Q 317.

address children just as much as adults,¹³⁰ the international community saw a need for laying down the human rights of children in a separate binding document, dedicated exclusively to this group of individuals. For this reason, the Convention on the Rights of the Child was adopted by the UN General Assembly in New York on 20 November 1989 and came into force less than a year later, on 2 September 1990. As of March 2015, the CRC counts 194 ratifying states (including all EU and CoE member states) and is hence very close to universal applicability.¹³¹ So although children have previously been protected and addressed by other human rights or international law instruments, the CRC is especially notable because it marked a fundamental shift of how children are perceived in society – from mere objects of protection to active participants and rights-holders.¹³²

The CRC qualifies as an international treaty and is therefore legally binding for the states parties. This being said, the CRC still lacks a strong mechanism that would oversee states' compliances with the provisions stipulated therein. Until very recently, the only way of monitoring the implementation of the CRC had been by way of states submitting periodic reports to a panel consisting of 18 independent experts (the Committee on the Rights of the Child), which would subsequently make non-binding recommendations to the respective governments.¹³³ With the entering into force of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in April 2014¹³⁴, the expert body was given additional competences in this regard: it may now, inter alia, receive and examine communications by individuals who claim that their rights have been violated by one of the state's party to the respective Optional Protocol. However, upon having examined such an individual complaint, the

¹³⁰ Cf for the ICCPR UN Human Rights Committee, 'General Comment No 17: Article 24 (Rights of the child)' (Thirty-fifth session, 1989) para 2 <www.refworld.org/docid/45139b464.html> accessed 3 March 2015; see also Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 1999) 1.

¹³¹ Cf UN Treaty Collection, '11. Convention on the Rights of the Child' (Status as on 3 March 2015) <https://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-11&chapter=4&lang=en> accessed 3 March 2015.

¹³² Stefanie Schmahl, *Kinderrechtskonvention mit Zusatzprotokollen. Handkommentar* (1st edn, Nomos 2013) 29ff.

¹³³ Detrick (n 130) 41; Office of the High Commissioner for Human Rights (OHCHR), 'Committee on the Rights of the Child' <www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> accessed 4 March 2015.

¹³⁴ UN Treaty Collection, '11.d Optional Protocol to the Convention on the Rights of the Child on a communications procedure' (Status as on 3 March 2015) <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtmsg_no=iv-11-d&chapter=4&lang=en> accessed 4 March 2015.

Committee on the Rights of the Child may again only make observations and recommendations to the states.¹³⁵ This means that even if a violation was found, states can still not be held legally accountable for their wrongdoings.

The CRC takes a holistic approach and entails 41 substantive provisions, ranging from basic human rights which can also be found in other human rights instruments (such as the right to life or freedom of expression) to very 'child-specific' provisions (eg the right to know and be cared for by one's parents or the right to rest and leisure). Moreover, the CRC was the first treaty to embrace social, economic, and cultural rights as well as civil and political rights in one document, thus promoting the idea that human rights are 'universal, indivisible and interdependent and interrelated'.^{136, 137} The rights enshrined in the CRC are divided by many scholars into the three 'Ps': provision (of assistance to have basic needs fulfilled), protection (from harm, discrimination, abuse etc) and participation (in decision-making processes).¹³⁸ Lastly, as regards the personal scope of the CRC, a child is defined in Article 1 as 'every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier.' Whilst the end of childhood is defined in a quite straightforward manner, the question of when it begins, ie whether unborn children are included or not, is far more controversial.¹³⁹ However, as the thesis at hand deals with issues that often arise (shortly) after a baby is born, it is not necessary to delve into this discussion here and it can be stated that the scope of the CRC generally applies to the problem lying at the heart of this paper.

2. The most relevant provisions

Scholars have discussed and examined the practice of surrogacy, especially in its commercial and/or transnational form, from a human rights perspective for the last number of years. The focus is thereby still predominantly on the practice per se and

¹³⁵ Article 10 (4) of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

¹³⁶ Cf Article 5 of the Vienna Declaration and Programme of Action (World Conference on Human Rights, Vienna, 25 June 1993) <www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> accessed 4 March 2015.

¹³⁷ Cf Schmahl (n 132) 40ff.

¹³⁸ Robin S Mama, 'Needs, Rights, and the Human Family: The Practicality of the Convention on the Rights of the Child' (2010) 89 Child Welfare 177, 179; some authors refer to four Ps, see Schmahl (n 132) 41.

¹³⁹ Cf Detrick (n 130) 53ff; Schmahl (n 132) 46ff.

revolves around rather fundamental questions relating to its human or children's rights compatibility and whether states should prohibit surrogacy altogether or whether it could in fact be regulated in a manner that ensures respect for the rights of the parties involved.¹⁴⁰ What appears not to have attracted as much attention in academia, however, are the potential human rights obligations arising for receiving states when confronted with families formed through surrogacy agreements and whose aim is to reside within their jurisdictions. Therefore, the present thesis makes an attempt to detect and highlight the most relevant provisions enshrined in the CRC in this specific context.

a) General principles of the CRC

Amongst the vast spectrum of substantive rights set forth in the CRC, four of its provisions have been singled out and defined as general principles, which shall be respected at any time and in all situations affecting children, and which shall guide member states when implementing the CRC as a whole. The four provisions are to be found in Article 2 (principle of non-discrimination), Article 3 (best interests of the child), Article 6 (right to life, survival and development) and Article 12 (right to express one's views).¹⁴¹ In the following, two of those principles are looked at in more detail as they are particularly relevant for the constellations examined in this paper.

(1) The principle of non-discrimination

Article 2 (1)¹⁴² requires that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race,

¹⁴⁰ See eg Anderson (n 4); Jason K M Hanna, 'Revisiting Child-Based Objections to Commercial Surrogacy' (2010) 24 Bioethics 341; Tobin (n 129); Yehezkel Margalit, 'In Defense of Surrogacy Arrangements: A Modern Contract Law Perspective' (2014) 20 Wm & Mary J Women & L 423.

¹⁴¹ UN Committee on the Rights of the Child, 'General Comment No 5' (GRC/GC/2003/5, 34th Session, 2003) para 12
<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en> accessed 5 March 2015; OHCHR, 'Fact Sheet No 10 (Rev 1), The Rights of the Child' <www.ohchr.org/Documents/Publications/FactSheet10rev.1en.pdf> accessed 5 March 2015.

¹⁴² All legal provisions in the present section without an indication as to their legal source refer to the CRC.

colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, *birth or other status*. (emphasis added)

Although the formulation is quite similar to non-discrimination provisions found in other human rights treaties and resembles Article 2 (1) of the ICCPR, it is nonetheless outstanding as it takes the particular situation of children into account. By not only condemning discrimination on grounds related to the child itself, but extending them to its parents or legal guardians, the CRC acknowledges the specifics of parent-child relationships and the state of dependence children are usually in. This effectively obliges states to protect children from discrimination based on grounds attributed to their legal guardians, as children are often affected by these situations just as much.¹⁴³ Particularly with regard to young children (0 – 8 years), the Committee on the Rights of the Child has stressed that they are 'especially at risk of discrimination because they are relatively powerless and depend on others for the realization of their rights'¹⁴⁴.

Regarding the personal scope of Article 2 (or in fact of all the rights laid down in the CRC), it is important to note that the CRC applies to all children who are present in one of the contracting state's territories. Regardless of whether they are stateless, citizens, foreigners or illegal residents, states must respect and ensure the rights of every child within their jurisdiction.¹⁴⁵ Bearing in mind that receiving states, when confronted with questions arising out of cross-border surrogacy agreements, often rule on the faith of children who are not (yet) their citizens or, even worse, without any nationality at all, the comprehensive scope of application is crucial. In fact, it determines that courts and administrative authorities are in any case bound by the rights set forth in the CRC when handling issues or requests concerning and affecting resulting children.

¹⁴³ Samantha Besson, 'The Principle of Non-Discrimination in the Convention on the Rights of the Child' (2005) 13 Int'l J Children's Rights 433, 446ff.

¹⁴⁴ UN Committee on the Rights of the Child, 'General Comment No 7' (CRC/C/GC/7/Rev 1, 40th Session, 2005) para 11
<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f7%2fRev.1&Lang=en> accessed 5 March 2015.

¹⁴⁵ Cf Schmahl (n 132) 50ff.

Having answered the question of general applicability in the affirmative, what can be drawn from the non-discrimination clause in relation to the central issue of this thesis? Article 2 (1) enumerates the grounds on which children must not be discriminated against, but the list is not exhaustive so that discriminatory behaviour based on other factors may equally be prohibited.¹⁴⁶ Concerning the issue at stake, discrimination is most likely to occur on the basis of 'birth' or 'other status'. The acknowledgement of a child's legal parents, or rather the refusal to do so, based on considerations relating to the circumstances of its conception appears at first sight to amount to differential treatment on grounds of birth. The original intention to include birth in the list of grounds was, however, to eradicate existing class distinctions by eliminating the possibility for children to inherit privileges at birth. Moreover, it has not yet been possible to conclusively clarify whether children born out of wedlock fall under the status of birth.¹⁴⁷ The author therefore doubts that the authorities' conduct in relation to cross-border surrogacy arrangements can be subsumed under this prohibited ground.

The only remaining basis of potential relevance is thus the very broad ground of 'other status', by which the CRC aims to encompass all sorts of other characteristics on the basis of which children may be discriminated against, even if they are not expressly enumerated in Article 2 (1). Up to the present day, several such distinguishing elements have explicitly been qualified by the Committee on the Rights of the Child as falling under this 'catch-all' ground, such as sexual orientation or health status.¹⁴⁸ In addition, it is undisputed that children born out of wedlock are in any case covered by 'other status',¹⁴⁹ which is probably why it has been neglected to reach consensus on the question of whether they are protected under the more specific ground of 'birth'. Children born as a result of surrogacy have not yet been expressly included in that list. However, taking into account the inclusive nature of the CRC and Article 2 in particular, it may well be assumed that children born through such agreements are

¹⁴⁶ Detrick (n 130) 75.

¹⁴⁷ Schmahl (n 132) 57.

¹⁴⁸ UN Committee on the Rights of the Child, 'General Comment No 4' (CRC/GC/2003/4, 33rd Session, 2003) para 6 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f4&Lang=en> accessed 6 March 2015.

¹⁴⁹ Schmahl (n 132) 57.

protected from discrimination on the ground of 'other status'. Justifying the non-recognition of a legal parent-child relationship by pointing to the fact that the child was delivered by a surrogate therefore interferes with Article 2 of the CRC.¹⁵⁰ This means that states need to prove that the refusal to establish a legal bond between children and their intending parents can be objectively justified.¹⁵¹ Considering the consequences resulting from such a denial, ie putting affected children at risk of being parentless and sometimes also stateless, providing a valid justification is certainly not an easy task.

(2) Best interests of the child

The obligation to have the best interests of the child taken as a primary consideration in any action concerning children is one of the cornerstones of the CRC and some even describe it as the *raison d'être* of the Convention on the Rights of the Child.¹⁵² As a general principle of the CRC, Article 3 (1) follows a holistic approach as it obliges states to consider the best interests of the child when implementing the CRC as a whole. Moreover, and unlike the principle of non-discrimination (which is not autonomous and thus only applies in conjunction with other provisions)¹⁵³, Article 3 (1) reaches even further and must be safeguarded in *any action* concerning children, ie even in situations where none of the other provisions are potentially being interfered with.¹⁵⁴ As decisions taken by administrative authorities or courts regarding the determination/recognition of legal parenthood following surrogacy are definitely 'action(s) concerning children', states are bound by Article 3 (1) and hence must give primary consideration to the best interests of the children concerned. In fact, the best interests principle has already been expressly referred to in numerous domestic judgments of relevance, mostly in order to rule in favour of the intending parents' request.¹⁵⁵ Prior to taking a closer look at how the principle was applied in concrete cases, some general remarks on the meaning and content of Article 3 (1) are provided.

¹⁵⁰ Cf Barbara Stark, 'Transnational Surrogacy and International Human Rights Law' (2012) 18 ILSA J Int'l & Comp L 17 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118077> accessed 6 March 2015.

¹⁵¹ Cf Tobin (n 129) 334.

¹⁵² Schmahl (n 132) 66.

¹⁵³ Besson (n 143) 447.

¹⁵⁴ Detrick (n 130) 90.

¹⁵⁵ Cf Granet (n 70) 4.

i) What is in the child's best interests?

So what is it that the best interests principle entails? And how do states know what is concretely required by it? The Committee on the Rights of the Child issued a General Comment (GC) on Article 3 (1) in 2013, which aims at providing domestic authorities with valuable guidance as to the proper interpretation and application of this fundamental principle.¹⁵⁶ Therein, it has been acknowledged that the best interests principle is of a very complex nature and cannot be determined in a universally applicable manner. In contrast, the best interests of a particular child 'must be assessed and determined in the light of the specific circumstances (...)' and are therefore to be defined anew according to the specifics of each case.¹⁵⁷ It must be for this reason that neither the Convention nor the Committee on the Rights of the Child give a clear-cut definition of 'best interests of the child'. Whilst respecting and supporting this view, it is nonetheless interesting to look at attempts that have been made by scholars in the past. John Eekelaar, for example, defines the concept as

basic interests, for example to physical, emotional and intellectual care, developmental interests, to enter adulthood as far as possible without disadvantage; autonomy interests, especially the freedom to choose a lifestyle of their own.¹⁵⁸

Bearing in mind that determining a child's best interests is always a subjective value judgment and may in addition vary significantly across cultures and over time, it is however still very difficult to grasp the concept. The best interests principle may be informed by different values and perceptions of children according to the cultural setting they grow up in. Whilst it is proposed to take into account the cultural background when assessing what is best for the child, it must however not lead to

¹⁵⁶ UN Committee on the Rights of the Child, 'General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, para. 1)' (CRC/C/GC/14, 62nd Session, 2013) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14_&Lang=en> accessed 7 March 2015.

¹⁵⁷ Ibid, para 32.

¹⁵⁸ John Eekelaar, 'The Importance of Thinking that Children Have Rights' (1992) 6 IJLPF 221, 230.

culture being awarded 'the status of a metanorm which trumps rights'¹⁵⁹. In this context, the Committee on the Rights of the Child spelled out certain practices and rules that it views as not reconcilable with the best interests of the child, such as female genital mutilation (FGM), low minimum age of marriage, or corporal punishment.¹⁶⁰ Another useful guidance can be found in the GC, where the 'ultimate purpose' of Article 3 (1) is defined as 'to ensure the full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child'¹⁶¹.

ii) The weight attached

Although discussions took place and other wordings were suggested during the drafting process, consensus was eventually reached to make the best interests 'a primary consideration' (and not, for example, 'the paramount consideration'). This means that the best interests of the child are not the sole determining factor, but (merely) the first element that shall be considered alongside various other considerations that might also be of relevance in a specific case. In situations where the best interests of the child conflict with the rights or interests of others, states must carefully balance the competing factors, but they must award high priority and give greater weight to the interests of the child.¹⁶² The obligation to prioritise the interests of the child is of particular relevance in situations where administrative authorities or courts balance public interests against those of the child born through a surrogacy agreement.

iii) The best interests principle applied in the context of surrogacy

In many, though not all of the more recent domestic cases concerning the question of legal parenthood following foreign surrogacy agreements, the best interests of the child were explicitly taken into account. In Belgium, for example, numerous of such cases

¹⁵⁹ Philip Alston, 'The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 IJLPF 1, 20.

¹⁶⁰ Cf Michael Freeman, 'Article 3. The Best Interests of the Child' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 2007) 51ff.

¹⁶¹ CRC/C/GC/14 (n 156) para 51.

¹⁶² Freeman (n 160) 60ff; CRC/C/GC/14 (n 156) para 39.

eventually led to the recognition of the legal bond between intending parents and resulting children because it was found that this would serve the best interests of the affected child.¹⁶³ Further examples where the best interests of the child were referred to in order to recognise the legal parenthood of intending parents established abroad are two judgments by the Austrian Constitutional Court.¹⁶⁴ Therein, the judges held that not recognising the foreign documents would be contrary to the children's best interests as it would deprive them of having legal parents and holding Austrian citizenship. The argument that recognition shall be denied due to surrogacy being prohibited in Austria was not accepted by the Austrian Constitutional Court. It stated that the prohibition of surrogacy was not a part of the domestic *ordre public* and could therefore not justify a decision that would run counter to the children's welfare.¹⁶⁵

On the other side of the spectrum range, two decisions were handed down by the French Court of Cassation in 2013.¹⁶⁶ The judges found that the intending parents conducted an agreement abroad which is prohibited under French law and is moreover contrary to public order. In the light of this fraudulent evasion of domestic law, the Court of Cassation concluded that the legal parenthood established abroad was not to be recognised and explicitly held that not even the consideration of the child's best interests as stipulated in Article 3 (1) of the CRC could have been invoked in order to reach a favourable decision for the intending parents.¹⁶⁷ Bearing in mind that Article 3 (1) requires states to give *primary* consideration to the child's interests and that they must be given more weight in case of conflicting interests, the author doubts that the reasoning given by the Court of Cassation in the mentioned cases is in full compliance with the best interests principle.

¹⁶³ Cf for concrete examples Granet (n 70) 17ff.

¹⁶⁴ VfSlg 19596/2011; VfSlg 19692/2012.

¹⁶⁵ Ibid, paras III.4 and III.6.

¹⁶⁶ Cass civ (1) 13 September 2013, 12-18.315; Cass civ (1) 13 September 2013, 12-30.138.

¹⁶⁷ Cf Cass civ (1) 13 September 2013, 12-18.315: 'Qu'en présence de cette fraude, ni l'intérêt supérieur de l'enfant que garantit l'article 3, § 1 de la Convention internationale des droits de l'enfant, ni le respect de la vie privée et familiale au sens de l'article 8 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ne sauraient être utilement invoqués'.

b) Birth registration and nationality (Article 7)

Article 7 can be broken down into various elements and entails more than just one right, ie the right to be registered immediately after birth, the right to a name, the right to acquire a nationality as well as the right to know and be cared for by parents. As a great number of domestic cases depicted in previous sections revolve around the issue of registering resulting children in civil status records of receiving states¹⁶⁸ and thereby determining a child's legal parents as well as its nationality, it is worth taking a closer look at the obligations arising out of Article 7 and its significance for the situations at stake. Especially the right to be registered at birth and the right to acquire a nationality are relevant in this context. Although the right to know one's origins plays a crucial role in surrogacy arrangements too, it is not part of the present examination as it largely entails obligations for those states where surrogacies are carried out. It is primarily for the child's state of birth, and not the receiving state, to keep records and provide the resulting child with information regarding the persons involved in its creation.¹⁶⁹

(1) The right to be registered at birth

Article 7 (1), largely inspired by Article 24 (2) of the ICCPR,¹⁷⁰ stipulates that '[t]he child shall be registered immediately after birth (...)'. The Committee on the Rights of the Child repeatedly held that registering the child is a precondition for the full enjoyment of human rights and is crucial for the child in forming and preserving its identity.¹⁷¹ The act of birth registration is significant per se because it is 'the literal expression of the idea that children, at birth, are people'¹⁷² and acknowledges them as active members of society. Besides, many rights and entitlements flow from such a recognition. Non-registration in domestic records may lead to certain services provided by the state (such as education or health care) to be more difficult or even impossible for the child to access and may on top of it even bar the child from acquiring a

¹⁶⁸ See eg Cass civ (1) 6 April 2011, 10-19.053.

¹⁶⁹ Tobin (n 129) 330.

¹⁷⁰ Detrick (n 130) 144.

¹⁷¹ Ineta Ziemele, 'Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 2007) 21 ff.

¹⁷² Mama (n 138) 183.

nationality.¹⁷³ Moreover, as the birth certificate includes information as to the child's parents, non-registration may result in children having no legally acknowledged relationship with their parents.

Article 7 (1) requires states to register all children at birth in a non-discriminatory manner. It has been acknowledged that especially children born to persons seeking asylum or with illegal residence status as well as disabled children are particularly at risk of not being registered.¹⁷⁴ Whilst no express reference is made to children born out of surrogacy agreements, the Committee on the Rights of the Child calls upon states to combat all forms of discrimination against children who have been born under 'circumstances that deviate from traditional values'¹⁷⁵. Surrogacy undoubtedly qualifies as such a non-traditional way of conception, from which it can be drawn that children born out of a surrogacy agreement must not be denied birth registration based on the circumstances of their conception.¹⁷⁶

It is apparent that Article 7 (1) primarily addresses states of birth and indeed, children born out of surrogacies are usually registered and provided with a birth certificate in their state of birth.¹⁷⁷ However, bearing in mind that these children usually spend their lives in another jurisdiction, namely the intending parents' country of origin or residence, it is equally important for the latter state to acknowledge the child's civil status under its system. Not doing so exposes these children to similar risks that would arise from a non-registration on the part of the child's state of birth. As could be seen in the case of *Mennesson v France*, the refusal to transcribe the foreign birth certificates into the French birth register led to various practical difficulties whenever the access to a right or a service is dependent on the existence of a legal parent-child relationship. Examples given in the concrete case relate to access to certain social services, requests

¹⁷³ CRC/C/GC/7/Rev 1 (n 144) para 25; see also Jaap E Doek, 'Citizen Child: A Struggle for Recognition [Foreword]' in Antonella Invernizzi and Jane Williams, *Children and Citizenship* (SAGE Publications 2007) xiii.

¹⁷⁴ Ibid.

¹⁷⁵ CRC/C/GC/7/Rev 1 (n 144) para 12.

¹⁷⁶ Cf Usha R Smerdon, 'Birth Registration and Citizenship Rights of Surrogate Babies Born in India' (2012) 20 Contemporary South Asia 341, 354.

¹⁷⁷ Cf text to nn 89 and 95 in ch III.

for financial allowance or situations occurring in daily life such as enrolling the children at the school canteen.¹⁷⁸ Notwithstanding that the child's right to be registered may not be directly invoked against a receiving state because the child was not born on its territory,¹⁷⁹ this nonetheless highlights the significance of registration and its far-reaching consequences for the realisation of various other human rights. The author therefore suggests that decisions by domestic authorities concerning requests for registering resulting children in their civil status records shall also be informed by this particular right enshrined in Article 7 (1).

(2) The right to acquire a nationality & the prohibition of statelessness

Just as the right to be registered at birth largely follows Article 24 (2) of the ICCPR, the child's right to acquire a nationality in Article 7 (1) has its counterpart in Article 24 (3) of the ICCPR. Both provisions grant children the right to *acquire* a nationality, but do not go so far as to grant each child the right to a nationality. Although discussions took place during the drafting process and some delegations suggested to phrase Article 7 (1) in a way to combat statelessness in a more effective manner, the majority voted for adopting the same approach that can be found in the ICCPR. However, recognising the precarious situation of stateless children and the need to eliminate statelessness as far as possible, a second paragraph now complements the right enshrined in paragraph 1 and requires states to comply with international law when confronted with children who are at risk of being stateless.¹⁸⁰ This means that states are not obliged to automatically grant nationality to every child born on their territory; in fact, the acquisition of nationality is still respected as being largely a domestic matter and may be based on different rules and principles. States are however still under the obligation to protect children from statelessness and to comply with the general principles enshrined in the CRC, ie there are certain limits to domestic regulations.¹⁸¹

¹⁷⁸ *Mennesson v France* (n 9) § 88.

¹⁷⁹ Cf UN Human Rights Committee (n 130) para 7, where states are requested to provide information on the registration of children *born in their territory* (emphasis added).

¹⁸⁰ Detrick (n 130) 149ff.

¹⁸¹ Ziemele (n 171) 24ff.

With regard to cross-border surrogacy arrangements, resulting children may under certain circumstances actually face the risk of acquiring no nationality. In constellations where both states involved in the procedure apply the *ius sanguinis* principle, but arrive at different conclusions as to who are the child's legal parents, the chance that both states refuse to provide the child with a nationality is high.¹⁸² As such an outcome is clearly not in the best interests of the child and puts it in a very vulnerable position, the Committee on the Rights of the Child expects states to negotiate with each other in order to find a satisfying solution when situations of this kind occur. Moreover, states are strongly encouraged to grant those children who were not born, but who *are living* on their territory, a nationality, if they were otherwise stateless.¹⁸³ This implies that children living with their intended parents in receiving states shall be granted the nationality of this state if they did not acquire the nationality of the state where they were born.

This argument finds support in the 'List of Issues in Relation to the Combined Third and Fourth Periodic Report of Germany'¹⁸⁴ drawn up by the Committee on the Rights of the Child prior to submitting its observations and recommendations. Therein, explicit reference was made to the practice of surrogacy and Germany was requested to explain how it ensures the rights of children born as a result of a surrogacy arrangement conducted abroad and where the surrogate was not a German national. Information was particularly demanded on how Germany intends to prevent these children from remaining stateless.¹⁸⁵ Given that surrogacy is still not a very present topic in the Committee on the Rights of the Child, this reference is highly valuable for the purposes of this paper in that it underpins the author's position that Article 7 of the CRC needs to be taken into account by receiving states in the context of cross-border surrogacy

¹⁸² Kanics (n 3) 119ff; see also n 124 in ch III.

¹⁸³ Doek (n 173) xiv.

¹⁸⁴ UN Committee on the Rights of the Child, 'List of Issues in Relation to the Third and Fourth Periodic Reports of Germany' (CRC/C/DEU/Q/3-4, 65th Session, 2013) <www.refworld.org/docid/52de5d774.html> accessed 12 March 2015.

¹⁸⁵ Ibid, para 7.

arrangements. It has to be noted, however, that no reference to surrogacy was eventually made in the subsequent concluding observations concerning Germany¹⁸⁶.

c) Preservation of identity (Article 8)

The last provision to be examined here is Article 8, which aims at preserving the child's identity. The suggestion to include this innovative right came from the Argentinian delegation. Having encountered a great number of enforced disappearances of (not only) children under the military junta, whereby children lost their ties with their parents and were placed in other families, the Argentinian delegation wanted to include a provision that protects the child's genuine identity.¹⁸⁷ Article 8 (1) expressly mentions (but is not restricted to) the child's nationality, name and family relations as parts of its identity. The parent-child relationship is therefore seen as an essential element of the child's identity that enjoys protection under the CRC. Although it appears that the original intention of Article 8 was to preserve the child's identity with regard to its biological parents,¹⁸⁸ it is thought not to be beyond the scope of the said provision to include the protection of the child's relationship with its social parents. As the CRC does not define the term 'parents' and has acknowledged the diversity and changing concept of family formations,¹⁸⁹ there is a strong case for assuming that children have the right for their legal parent-child relationship in connection to their intended parents acknowledged by the state on whose territory they are living.

However, the significance of the present provision in this context should not be overrated. First, Article 8 has been criticised in general as being superfluous due to the rights being protected by several other provisions in the CRC already.¹⁹⁰ Second, it seems that Article 8 primarily entails obligations for those states where the surrogate

¹⁸⁶ UN Committee on the Rights of the Child, 'Concluding Observations on the Third and Fourth Periodic Reports of Germany' (CRC/C/DEU/CO/3-4, 1875th Meeting, 2014) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/DEU/CO/3-4&Lang=En> accessed 13 March 2015.

¹⁸⁷ Detrick (n 130) 159ff.

¹⁸⁸ Ibid 163.

¹⁸⁹ UN Committee on the Rights of the Child, 'Report on the Fifth Session' (CRC/C/24, Fifth Session, 1994) Annex V, para 2.1 <www.refworld.org/pdfid/3f4765d04.pdf> accessed 13 March 2015.

¹⁹⁰ Schmahl (n 132) 99.

gives birth to the child, since they are the ones who must provide children with information about the persons involved in their conception.¹⁹¹ Yet, Article 8 may still be raised in order to highlight the importance of acknowledging the legal parent-child relationship as part of respecting and preserving the child's identity within society.

According to the specifics of each case, other provisions included in the CRC which have not been examined here may also be relevant in the context of cross-border surrogacy arrangements and its implications in receiving states. The significance of the prohibition of discrimination and the best interests principle enshrined in Articles 2 and 3 respectively must not be pointed out again, since states must respect these underlying principles in every situation concerning children anyhow. In addition, it has been illustrated that the right to acquire a nationality, to be registered and to have one's identity established are particularly relevant in the context of this paper. States are therefore called upon to take into account these provisions when determining a resulting child's legal parents.

B. The European Convention on Human Rights¹⁹²

1. Introductory remarks

In the aftermath of the Second World War, attempts were made to reunify Europe and to prevent such gross human rights violations from happening again. The formation of the Council of Europe (CoE) was one such attempt. The CoE was created as an international organisation in 1949 with the aim to build a community of European states based on the values of human rights, democracy and the rule of law. In order to concretise this commitment, the Convention for the Protection of Human Rights and Fundamental Freedoms was drafted within the organisation. Following a rather short drafting period, the ECHR was adopted in 1950 and entered into force after the tenth state had ratified the Convention in 1953.¹⁹³ The CoE as well as the ECHR count 47

¹⁹¹ Cf Tobin (n 129) 328.

¹⁹² All legal provisions in the present section without an indication as to their legal source refer to the ECHR.

¹⁹³ David Harris and others, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 1ff; Alastair Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd edn, OUP 2012) 1ff.

member states today, encompassing all European states except for Belarus, Kosovo and the Vatican. As the Convention represents the cornerstone of the organisation, ratifying the ECHR was made a precondition for becoming a member of the CoE, explaining the congruency of the number of member states.¹⁹⁴

The ECHR is the very first international human rights treaty and is to the present day still commonly perceived as the most developed and influential regional human rights instrument. The idea to draft an international treaty covering human rights and fundamental freedoms on a supranational scale was not innovative though, since the Universal Declaration of Human Rights (UDHR) was proclaimed by the UN already in 1948. However, whilst the UDHR is a declaration and was thus more of a political statement at the time, the ECHR is the first *legally binding* document of international law in this context.¹⁹⁵ Content-wise, the ECHR did not follow the comprehensive approach adopted in the UDHR and largely covers civil and political rights only, as they were seen as far less controversial and thus easier to agree on amongst the states involved in the drafting process.¹⁹⁶

In comparison to the CRC, three major differences are worth mentioning here. As regards the type of rights guaranteed, the CRC is more comprehensive since it does not only secure civil and political rights, but also social, economic and cultural rights. Second, the CRC is an international treaty particularly addressing a specific group of individuals, namely children. In contrast, the ECHR is a general human rights treaty, applying in principal to 'everyone'.¹⁹⁷ The last significant difference relates to the issue of implementation. Whilst the CRC has been criticised for lacking a strong enforcement mechanism, the ECHR is in fact known for the opposite.

¹⁹⁴ Anne Peters and Tilmann Altwicker, *Europäische Menschenrechtskonvention mit Rechtsvergleichenden Bezügen zum Deutschen Grundgesetz* (2nd edn, CH Beck 2012) 1ff.

¹⁹⁵ Ibid; Franz C Mayer, 'Einleitung und Präambel' in Ulrich Karpenstein and Franz C Mayer, *EMRK. Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (CH Beck 2012) 3ff.

¹⁹⁶ Harris and others (n 193) 3.

¹⁹⁷ Article 1 of the ECHR.

A permanent international court, the European Court of Human Rights, oversees member states' compliance with the rights enshrined in the ECHR¹⁹⁸ and is competent to hand down legally binding judgments. Under this regime, individuals may apply to the Court and complain about a human rights violation committed against them by one of the contracting parties. Member states must execute the Court's judgments and may be obliged to pay compensation ('just satisfaction') to the applicant in case a violation was found.¹⁹⁹ The impact of the ECHR is therefore disproportionately higher when compared to other international human rights treaties. So whilst the CRC may seem to be the more accurate source for invoking the rights of the child due to its personal scope, it must be examined whether and how children's rights – especially in situations examined in this thesis – are protected under the ECHR, given its high degree of legal enforceability.

2. Children and the ECHR

As the ECHR is one of the general human rights treaties and does not specifically identify a particular group of individuals as beneficiaries of its substantive guarantees, it is not surprising that children are hardly ever mentioned throughout the Convention.²⁰⁰ It is therefore necessary to clarify at the outset whether and how children are protected under the ECHR before dealing with the material scope of the rights stipulated therein.

a) The personal scope of the Convention

Article 1 serves as point of departure as it defines the personal scope of application. It determines that the member states must guarantee the rights laid down in the Convention to 'everyone within their jurisdiction'. This means that the member states are obliged to guarantee the Convention rights to all individuals under their jurisdiction without any restriction as to their nationality, for example.²⁰¹ The all-encompassing

¹⁹⁸ Any reference to the ECHR includes the substantive provisions enshrined in its various additional protocols, unless stated otherwise.

¹⁹⁹ Harris and others (n 193) 4; see also Articles 41 and 46 of the ECHR.

²⁰⁰ Cf Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 Hum Rts Q 308, 311.

²⁰¹ Jochen Frowein and Wolfgang Peukert, *Europäische MenschenRechtsKonvention* (3rd edn, N P Engel 2009) 15.

term 'everyone' further implies that children must be seen as beneficiaries of the rights stipulated in the ECHR just as much as adults. Academic commentaries on Article 1 of the Convention are largely not even concerned with this issue, which signifies that children naturally come within the personal scope.²⁰² Although the question of whether an unborn child (*nasciturus*) is included has not been conclusively determined by the Court, there is consensus that the protection begins with birth at the latest.²⁰³ In addition, the prohibition of discrimination enshrined in Article 14 serves as another useful point of reference in this context. Although the provision does not explicitly mention 'age' as a prohibited ground of discrimination, the Court has clarified that this status is in fact covered by Article 14.²⁰⁴ In the light of the foregoing, it can therefore be argued that states must safeguard the rights laid down in the Convention vis-à-vis children in the same manner and with the same intensity as they must do to adults, unless stated otherwise.²⁰⁵

As it is beyond doubt that children are entitled to the rights enshrined in the Convention, member states are obliged to guarantee these rights to all children within their jurisdiction. But which particular rights of the ECHR are relevant in the context of cross-border surrogacies and the associated issue of legal parenthood? Bearing in mind that the ECHR does not address a particular group of individuals and that the drafters did not formulate the provisions in a way so as to accommodate the specific needs of children, it requires some more interpretation in order to detect if and how the ECHR has to be observed by its member states when handling situations arising from surrogacy arrangements conducted abroad. For this reason, the thesis at hand goes on to

²⁰² Cf eg Jens Meyer-Ladewig, *Europäische Menschenrechtskonvention. Handkommentar* (3rd edn, Nomos 2011) 46; Christian Johann, 'Art 1. Verpflichtung zur Achtung der Menschenrechte' in Ulrich Karpenstein and Franz C Mayer (eds), *EMRK. Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar* (CH Beck 2012) para 16; Peters and Altwicker (n 194) 14.

²⁰³ Christoph Grabenwarter, *European Convention on Human Rights. Commentary* (CH Beck 2014) 2.

²⁰⁴ *Schwizgebel v Switzerland*, no 25762/07, § 85, ECHR 2010; see also European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law* (Publications Office of the European Union 2011) 102.

²⁰⁵ European Commission for Democracy Through Law (Venice Commission), 'Report on the Protection of Children's Rights: International Standards and Domestic Constitutions' (CDL-AD(2014)005, 98th Plenary Session, Venice, March 2014) para 53 <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)005-e)> accessed 15 March 2015.

explain some of the interpretation methods that are applied in order to determine the material scope of the Convention rights.

b) General principles of interpretation

With the ECHR qualifying as an international treaty, it is necessary to first and foremost look into the Vienna Convention on the Law of Treaties (VCLT) for guidance as to the proper interpretation, especially since the ECHR itself is silent on this issue. And indeed, the Court (which has to apply the Convention when ruling on cases brought before it) confirmed that it deduces its interpretation techniques primarily from 'generally accepted principles of international law' as laid down in Articles 31 to 33 of the VCLT.²⁰⁶ Treaty provisions are thus primarily to be interpreted in accordance with the ordinary meaning of the terms used therein as well as their object and purpose (Article 31 (1) VCLT). When having recourse to the object and purpose of the treaty, the Court predominantly adopts a teleological approach, thereby seeking to explore the current purpose of a specific provision rather than looking at the original intention at the time the Convention was drafted. This approach is substantiated by the Court referring to the Convention as a 'living instrument which...must be interpreted in the light of present-day conditions'²⁰⁷ in order for the rights secured therein to remain effective.²⁰⁸ The so-called evolutive interpretation enables the ECHR to adapt to social, political, or legal developments identified across Europe, but it must find its limitation in the formulation of the respective provisions. This means that the Court may not read new rights into the Convention that are not covered by its wording.²⁰⁹

As far as children are concerned, the interpretation of the ECHR enables the Court to carve out specific rights of the child in a dynamic manner, seeking to ensure effective human rights protection and taking into account current contexts. This is in particular

²⁰⁶ Cf *Golder v The United Kingdom*, 21 February 1975, § 29, Series A no 18; see also Harris and others (n 193) 5.

²⁰⁷ *Tyrer v The United Kingdom*, 25 April 1978, § 31, Series A no 26.

²⁰⁸ Mayer, 'Einleitung und Präambel' (n 195) paras 45ff; Peters and Altwicker (n 194) 24ff.

²⁰⁹ Cf *Johnston and Others v Ireland*, 18 December 1986, § 53, Series A no 112; Robin C A White and Clare Ovey, *The European Convention on Human Rights* (5th edn, OUP 2010) 72.

possible with regard to provisions such as Article 8, which are formulated in a rather open way and thus allow for a more flexible interpretation.²¹⁰

Apart from the teleological and the evolutive approach, the Court's 'two core principles of interpretation'²¹¹, various other methods have been used more or less frequently over the years in order to interpret the Convention. Amongst those ranges the principle laid down in Article 31 (3) of the VCLT, which determines that recourse shall also be had to any relevant rules of international law when interpreting a treaty. Whilst the Court is far from applying this concept consistently – in fact, it deviates from existing rules of international law from time to time – it can be observed that other sources of international law, especially human rights law, have been increasingly consulted by the Court over the last years.²¹² According to this approach, the Convention is not to be interpreted in a vacuum, but rather strives towards coherence with other rules of international law as far as possible.²¹³ This has led the Court to refer to a wide variety of binding as well non-binding legal instruments drafted by various international organisations such as the Council of Europe itself, the United Nations or the International Labour Organization (ILO). In *Demir and Baykara v Turkey*²¹⁴, the Court provides an extensive overview on how it has used this method of interpretation in past cases. In addition, by stating that the Convention 'may be interpreted, *firstly*, in the light of relevant international treaties that are applicable in the particular sphere'²¹⁵, considerable weight is attached to the aim of reaching uniformity in the field of international human rights law.²¹⁶

²¹⁰ Cf Kilkelly, 'The Best of Both Worlds' (n 200) 313ff.

²¹¹ White and Ovey (n 209) 81.

²¹² Christina Binder and Konrad Lachmayer, 'Introduction – The Reception of Public International Law in the Jurisprudence of the European Court of Human Rights: Sign of Fragmentation or Unity?', in Christina Binder and Konrad Lachmayer (eds), *The European Court of Human Rights and Public International Law. Fragmentation or Unity?* (Facultas 2014) 8ff; Harris and others (n 193) 14.

²¹³ Cf eg *Al-Adsani v The United Kingdom* [GC], no 35763/97, § 55, ECHR 2001-XI.

²¹⁴ *Demir and Baykara v Turkey* [GC], no 34503/97, ECHR 2008.

²¹⁵ Ibid § 69 (emphasis added).

²¹⁶ Cf Daniel Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*' (2010) 79 Nord J Int'l L 245, 271ff.

c) *The CRC as source of expertise*

As stated above, the consideration of other legal sources is a generally accepted interpretive method in international law and has been explicitly recognised as such by the ECtHR. From this it follows that the Convention on the Rights of the Child may be used as a source of expertise where the Court has to rule on cases that concern children in some way or other. As the ECHR is largely silent on this particular group, having recourse to the comprehensive children's rights catalogue laid down in the CRC is seen as a good way of promoting children's rights at international, or at least regional, level.²¹⁷

With the CRC having entered into force in 1990, the Court did not let too much time pass before explicitly making reference to the CRC when dealing with cases concerning children. In 1992, however, the Court was criticised precisely because it had not mentioned the CRC in the case *Olsson (No 2) v Sweden*²¹⁸ (concerning the placement of children in care and the contact with their biological parents). In a partly dissenting opinion, Judge Pettiti regrets that the judgment did not refer to the Convention on the Rights of the Child in order to claim that the children should have been heard in the proceedings. This being said, the Court made up for this omission only a few months later. In *Costello-Roberts v The United Kingdom*²¹⁹ (regarding the physical punishment of a boy in a private school), the Court held that states are obliged to secure the child's right to education as stipulated in Article 2 of Protocol No 1 to the Convention and that the issue of school discipline falls within the scope of the said right. To substantiate this argument, reference was made to Article 28 of the CRC and its second paragraph was quoted in order to highlight that states must ensure that school discipline does not violate the child's rights as defined in the CRC and in particular his or her human dignity.²²⁰

²¹⁷ Kilkelly, 'The Best of Both Worlds' (n 200) 326.

²¹⁸ *Olsson v Sweden (No 2)*, 27 November 1992, Series A no 250.

²¹⁹ *Costello-Roberts v The United Kingdom*, 25 March 1993, Series A no 247-C.

²²⁰ *Ibid* § 27.

From then on, numerous cases concerning the rights and well-being of children that followed have entailed some reference to the CRC, either to specific provisions laid down therein or to the CRC as a whole.²²¹ Again, especially cases in the sphere of family life protected under Article 8 (concerning, for example, child custody) have been informed by the standards set out in the Convention on the Rights of the Child quite frequently over the last years.²²² In addition, the best interests principle as adopted and applied by the Court, stipulating that the child's interests must be the paramount consideration in all situations affecting children, builds upon, inter alia, Article 3 of the CRC.²²³

These observations show that the Court's approach to interpreting the rights of the child in a way that is compatible with the CRC can be a promising tool for enhancing respect for children's rights, especially as the provisions laid down in the CRC and the explanatory reports provided by the Committee on the Rights of the Child offer useful guidance in this regard.²²⁴ Turning to issues arising from cross-border surrogacy, it is therefore asserted that this interpretive method could provide the Court with helpful orientation when ruling on such cases. The relevant provisions laid down in the CRC, most notably those mentioned in the previous section (ie Articles 2, 3, 7 and 8), could be used in order to raise awareness of and attach adequate weight to the rights of resulting children in the context of determining and recognising their legal parents.

3. The protection of children's rights under Article 8 ECHR

Following a selective overview of interpretation techniques applied and having shown that children do enjoy protection under the ECHR, regardless of the widespread absence of any explicit reference thereof, the present thesis goes on to take a closer look at the right to respect for private and family life enshrined in Article 8. As this provision is certainly the most relevant in the context of this paper and has also contributed

²²¹ Cf eg *Sommerfeld v Germany* [GC], no 31871/96, §§ 37-39, ECHR 2003-VIII.

²²² Cf Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefwaard and Jaap E Doek (eds), *Litigating the Rights of the Child* (Springer 2015) 193, 197.

²²³ Cf eg *Neulinger and Shuruk v Switzerland* [GC], no 41615/07, §§ 49-56, ECHR 2010; *Mennesson v France* (n 9) § 81.

²²⁴ Cf Kilkelly, 'The Best of Both Worlds' (n 200) 326.

significantly to the advancement of children's rights in more general terms,²²⁵ certain aspects of Article 8 are illustrated in the following.

a) *The material scope of Article 8: an overview*

Article 8 obliges states to respect a person's privacy in the broader sense and enumerates four particular spheres which are protected, namely private life, family life, home, and correspondence. The Court interprets these spheres autonomously and rather on a case-by-case basis, which has led to the material scope becoming quite broad and a wide variety of individual interests being interpreted as falling thereunder. Moreover, whilst the different spheres mentioned can be roughly distinguished, a strict separation is neither possible nor intended as they relate to each other or overlap in certain situations. Although the wording of Article 8 (1) suggests that it predominantly imposes negative obligations on the state, which means that it shall abstain from arbitrary interferences with a person's privacy, the Court has repeatedly held that states also have a positive duty to ensure the effective enjoyment of the rights safeguarded under this provision.²²⁶

b) *The child's right to respect for his or her family life*

(1) What constitutes 'family life'?

Neither the Convention nor the Court provide a concrete definition of what qualifies as 'family life' and hence falls under the material scope of Article 8. Not least due to the ECHR's aspiration to be able to adapt to societal and other changes in order to remain effective, the concept of family life is interpreted in a rather flexible manner. What is important, however, is that Article 8 does not entail the right to found a family or to have children; in contrast, it guarantees that an *already established* family life is respected and protected by the state.²²⁷

²²⁵ Cf Ursula Kilkelly, 'Protecting Children's Rights under the ECHR: The Role of Positive Obligations' (2010) 61 NILQ 245, 248.

²²⁶ Harris and others (n 193) 361ff; Grabenwarter (n 203) 184ff.

²²⁷ Ursula Kilkelly, 'The Right to Respect for Private and Family Life. A Guide to the Implementation of Article 8 of the European Convention on Human Rights' (Human Rights Handbooks No 1, Council of Europe 2001) 15ff.

Concerning the notion of 'family life' between partners, the Convention primarily looks at the existence of personal ties and does not per se require any formal requirements, ie marriage or common household. Whilst being married usually suffices in order to establish a family according to Article 8, a variety of factors are taken into account for determining whether the relevant persons form such a unit. Relevant factors are, for example, the length of the relationship, the commitment shown therein or their living situation.²²⁸ Further, while same-sex relationships had not been recognised as constituting 'family life' for a long time, but had been examined under the concept of 'private life', the Court recently amended its approach and now treats same-sex and different-sex couples in the same way when determining whether a family life exists.²²⁹

Regarding the relationship between parents and children, a similarly flexible approach is taken. So, as the notion of family life is not clearly demarcated for this kind of ties either, new or less traditional constellations, primarily emerging due to social change and/or medical progress, may be protected under the heading of 'family life'.²³⁰ Yet, there are certain constellations that typically (although not automatically) qualify as amounting to family life, such as the relationship between a child and its biological mother.²³¹ Further, children born into an already existing family unit or where the parents are married at the time of conception are viewed as having family ties established *ipso iure*.²³² In spite of these assumptions, the most decisive criterion is not the biological connection. The existence of *de facto* family ties and the close personal relationship between children and their parents appear to be more important. In this respect, it is interesting to note that in certain situations where such personal ties have not (yet) been established, they may nonetheless fall under the scope of application, as was the case in *Pini and Others v Romania*.²³³ The Court held that even though a family

²²⁸ Grabenwarter (n 203) 193ff.

²²⁹ *Schalk and Kopf v Austria*, no 30141/04, §§ 92-94, ECHR 2010.

²³⁰ *Harris and others* (n 193) 372.

²³¹ Cf *Marckx v Belgium*, 13 June 1979, § 31, Series A no 31.

²³² *Berrehab v The Netherlands*, 21 June 1988, § 21, Series A no 138; Grabenwarter (n 203) 194.

²³³ *Pini and Others v Romania*, nos 78028/01, 78030/01, ECHR 2004-V.

life has not been fully established, the 'relationship, arising from a lawful and genuine adoption' may suffice in order to claim respect for family life under Article 8.²³⁴

For the purposes of this paper, it is particularly interesting to see to what extent relationships between children and their social (ie non-biological) parents have been recognised in the past, given that children born as a result of surrogacy arrangements are not necessarily genetically related to their intending parents.²³⁵ Apart from the possibilities of establishing a family life without a biological relation via adoption or marriage, the case of *X, Y and Z v The United Kingdom*²³⁶ can be used as a point of orientation here. The case concerned a couple, X and Y, and their child Z to which Y gave birth. Since X had been born female (but underwent gender reassignment surgery), they had to make use of sperm donation from which it follows that X was not genetically related to Z. Regardless of the fact that no biological ties existed between the latter two, it was held that their relationship amounted to family life protected under Article 8. Due to X and Y having lived in a stable relationship, with X acting as the male partner of Y as well as the father to Z since the child's birth and even prior to it, the Court concluded that a factual family tie existed.²³⁷ Therefore, it may be assumed that the lack of a genetic connection principally does not rule out the existence of family ties as defined in the ECHR.²³⁸ While the circumstances are significantly different in cases of cross-border surrogacy, the approach adopted in *X, Y and Z v The United Kingdom* nonetheless serves as a reference in order to argue for intending parents to be acknowledged as the legal parents of a resulting child, even though they might not be genetically related to it.

Another important development in the interpretation of what constitutes 'family life' relates to problems arising from the legal situation not reflecting reality. The case *Kroon and Others v The Netherlands*²³⁹ concerned the state's refusal to legally acknowledge

²³⁴ Ibid §§ 146-148.

²³⁵ Cf n 29 in ch II.

²³⁶ *X, Y and Z v The United Kingdom* [GC], no 21830/93, ECHR 1997-II.

²³⁷ Ibid § 37.

²³⁸ Cf Harris and others (n 193) 373.

²³⁹ *Kroon and Others v The Netherlands*, 27 October 1994, Series A no 297-C.

the biological father of the child due to the legal presumption that the mother's husband was the father. The Court first reiterated that a family tie existed between the biological father and the child. Since the parents were in a relationship at the relevant time, the child automatically became part of that already existing family unit.²⁴⁰ Whilst this was not a novel line of argumentation, the Court then went on and stated that

'respect' for 'family life' requires that biological and social reality prevail over a legal presumption which...flies in the face of both established fact and the wishes of those concerned without actually benefitting anyone.²⁴¹

Picking up some of the domestic cases mentioned earlier where the authorities were asked to determine the parents of a resulting child and eventually concluded that the surrogate (and, where present, her husband) are the legal parents, the line of argumentation adopted by the Court in *Kroon and Others v The Netherlands* could indeed prove useful. In cases where the state lets the legal presumption prevail over the social and sometimes also the biological reality in the respective cases, the intending parents' right and also the resulting child's right to respect for his or her family life may be interfered with.

(2) The protection of the parent-child relationship

Relationships that come within the ambit of family life as understood in the Convention must be respected and not be unduly interfered with by domestic authorities. This means in essence that families have the right to live a common life, which states are in principle obliged to respect and facilitate.²⁴² Regarding the relationship between parents and children, this right primarily entails the entitlement to mutually enjoy each other's company.²⁴³ Therefore, a large proportion of children-related cases examined by the Court under Article 8 concerns situations where this 'mutual enjoyment' is at stake – due

²⁴⁰ Ibid § 30.

²⁴¹ Ibid § 40.

²⁴² Grabenwarter (n 203) 195ff.

²⁴³ Cf eg *W v The United Kingdom*, 8 July 1987, § 59, Series A no 121; *Adžić v Croatia*, no 22643/14, § 91, ECHR 2015.

to custody disputes between parents, or children being placed in foster care, for example.²⁴⁴ However, as the issue central to this thesis is less concerned with cases where intending parents are in fact hindered from living together with their resulting child (although such cases exist²⁴⁵), it is questionable whether the right to respect for his or her family life can be interpreted so as to include the general right for the parents to be recognised as the legal parents under their home jurisdiction. Although in *Marckx v Belgium*, the Court found that the legal recognition of the applicants' family ties was guaranteed by the right to respect for their family life,²⁴⁶ the circumstances of this case are not comparable to such requests filed by intending parents and no analogy may hence be drawn.

Also, the case of *X, Y and Z v The United Kingdom* is of no help in this respect. Despite having affirmed the existence of a family life, the Court distinguished this case from previous ones that were also concerned with the legal recognition of parenthood, precisely because there was no biological connection between the applicants. Although it was noted that the child may suffer in various ways from her social father not being legally recognised, no violation was found in the end. The Court mainly justified its decision with the lack of a European consensus on the question of recognising non-biological as well as transsexual parents and with the argument that it is not clear what serves the best interests of the child in such a situation.²⁴⁷ Thereby, the Court deviated from previous related cases where it was held that the child should not suffer any negative consequences due to its legal status.²⁴⁸ In *X, Y and Z v The United Kingdom*, in contrast, these disadvantages were somehow belittled and seen as 'unlikely to cause undue hardship' for the child.²⁴⁹ Given that several years have passed since *X, Y and Z* was handed down, it will be interesting to see how the Court dealt with the issue of

²⁴⁴ White and Ovey (n 209) 338.

²⁴⁵ *Paradiso and Campanelli v Italy* (n 10).

²⁴⁶ *Marckx v Belgium* (n 231) §§ 36-37; see also Kilkelly, 'Protecting Children's Rights under the ECHR' (n 225) 248ff.

²⁴⁷ *X, Y and Z v The United Kingdom* (n 236) §§ 45 and 52.

²⁴⁸ Cf eg *Marckx v Belgium* (n 231); *Kroon and Others v The Netherlands* (n 239).

²⁴⁹ *Ibid* § 48; see also Kilkelly, 'Protecting Children's Rights under the ECHR' (n 225) 252ff.

recognising social family ties in the cases concerning surrogacy which were brought before it in 2014 (analysed in Chapter V below).

The third case worth mentioning in this context is *Wagner and JMWL v Luxembourg*²⁵⁰, concerning the state's refusal to recognise a valid adoption judgment pronounced abroad on the basis that unmarried women like the applicant were not allowed to a full adoption under Luxembourg law. Two points of the Court's assessment are particularly important for the purposes of this paper. Firstly, it was held that the authorities turned a blind eye on the social reality by not recognising the family ties lawfully established abroad. The applicants were therefore found to 'encounter obstacles in their daily life and the child is not afforded legal protection making it possible for her to be fully integrated into the adoptive family'²⁵¹. Secondly, the strict application of domestic law did not allow for properly assessing the best interests of the child, which must be the paramount consideration in such cases. Accordingly, a violation of Article 8 was found.²⁵² The arguments adopted in the said judgment are certainly of relevance here. Given that the states' denial to acknowledge the legal parenthood of intending parents, albeit lawfully established abroad, was predominantly justified by invoking domestic conflict of law rules, it is asserted that the arguments brought forward in *Wagner and JMWL v Luxembourg* may be applied by analogy in this regard.

c) *The child's right to respect for his or her private life*

Although the relationship between intending parents and the resulting child arguably falls under family life within the meaning of Article 8 and must hence not be arbitrarily interfered with by the state, it is also of interest in what way the child's private life enjoys protection under the ECHR. In particular, it shall be examined whether the legal recognition of the parent-child relationship constitutes an element of 'private life' and may even be the more suitable category within Article 8 for bringing claims in these constellations.

²⁵⁰ *Wagner and JMWL v Luxembourg*, no 76240/01, ECHR 2007.

²⁵¹ Ibid § 132.

²⁵² Ibid §§ 133-136.

(1) The general scope of protection

The Court has held on numerous occasions that private life is a 'broad term not susceptible to exhaustive definition'²⁵³ and has through its case-law developed certain categories covered by this expansive concept, such as the right to personal autonomy and personal development, the right to physical and psychological integrity,²⁵⁴ the right to identity or the right to enter into and develop relationships with other persons and the outside world²⁵⁵, to name but a few. Moreover, the notion of private life as defined in the Convention appears to be broader than conceptions prevailing elsewhere. Article 8 not only protects the 'inner circle' of one's private life, which entails the right to privacy and to a lifestyle of one's own choosing, but also embraces the right to develop and establish relationships with the outer world and may to a certain extent even include relations in the public realm.²⁵⁶

Although the Court provides some guidance as to the scope of protection, it is lastly decided on a case-by-case basis whether a certain situation falls under the sphere of private life. Scholars appear to struggle with the somehow indefinable notion of 'private life' and have tried to subdivide the concept into specific categories or activities that come within its ambit.²⁵⁷ Without going too much into detail, the category of physical and moral or psychological integrity, for example, protects the person's body and the right to have control over it.²⁵⁸ In the context of children, their physical and moral integrity was found to be interfered with, inter alia, in cases of corporal punishment in schools,²⁵⁹ sexual assault,²⁶⁰ or medical treatment of a severely handicapped child against the clear will of its mother.²⁶¹ Other areas of private life within the meaning of

²⁵³ *Dubská and Krejzová v The Czech Republic*, nos 28859/11, 28473/12, § 73, ECHR 2014.

²⁵⁴ *Ibid.*

²⁵⁵ *Peck v The United Kingdom*, no 44647/98, § 57, ECHR 2003-I.

²⁵⁶ *Niemietz v Germany*, 16 December 1992, § 29, Series A no 251-B; see also *White and Ovey* (n 209) 358ff.

²⁵⁷ *Harris and others* (n 193) 364ff; *White and Ovey* (n 209) 357.

²⁵⁸ *Grabenwarter* (n 203) 187.

²⁵⁹ See, *mutatis mutandis*, *Costello-Roberts v The United Kingdom* (n 219) § 36.

²⁶⁰ *X and Y v The Netherlands*, 26 March 1985, § 22, Series A no 91.

²⁶¹ *Glass v The United Kingdom*, no 61827/00, § 70, ECHR 2004-II.

Article 8 guarantee individuals the protection of their privacy, reputation, images or other personal data, but may also extends to one's living environment.²⁶²

(2) The child's identity as part of 'private life'

Identity, too, forms part of a person's private life and therefore falls within the ambit of Article 8. Whilst the Court has repeatedly acknowledged the existence of such a right to identity,²⁶³ it is not entirely clear which aspects of a person's identity and to what extent these are protected under the Convention. What is undisputed, however, is that Article 8 contains the right to know one's origins. The Court recognised that knowing one's ascendants is an important element in establishing one's own identity and is therefore protected under the concept of private life.²⁶⁴ Therefore, states may be obliged to support persons in their quest for their biological parents, eg by ordering the putative father to undergo DNA testing.²⁶⁵ It is interesting to note that the Court has been reluctant to refer to the Convention on the Rights of the Child in these cases, although the right to know one's parents is explicitly laid down in Article 7 of the CRC and could therefore have been quoted in order to underpin the existence and relevance of this particular right.²⁶⁶

Whilst some of the judgments cited in the previous paragraph were also concerned with the legal recognition of the child's parents, it was not the decisive element but rather the means by which the applicants sought to obtain information on the identity of their parents.²⁶⁷ Therefore, the Court did not directly examine the child's right to have his or her parents recognised in these cases. However, a good example where the legal recognition lies at the heart of the complaint can be found in the field of gender identity, raised in particular by transsexual persons who want to have their gender recognised in

²⁶² White and Ovey (n 209) 394; Grabenwarter (n 203) 189.

²⁶³ *Odièvre v France* [GC], no 42326/98, § 29, ECHR 2003-III; *Gough v The United Kingdom*, no 49327/11, § 182, ECHR 2014.

²⁶⁴ *Odièvre v France* (n 263) § 29.

²⁶⁵ *Mikulić v Croatia*, no 53176/99, § 55, ECHR 2002-I; see also *Jäggi v Switzerland*, no 58757/00, §§ 25-26, ECHR 2006-X.

²⁶⁶ Cf the joint dissenting opinion in *Odièvre v France* (n 263) § 15.

²⁶⁷ Eg in *Mikulić v Croatia* (n 265).

official documents. In *Christine Goodwin v The United Kingdom*²⁶⁸, the Court held that where the legal situation does not reflect one's personal identity, the right to respect for private life may be seriously interfered with and may cause 'feelings of vulnerability, humiliation and anxiety'²⁶⁹. Being aware of the fact that the recognition of one's gender is significantly different from that of one's parents, it is nonetheless argued here that the situation faced by some of the children resulting from surrogacy arrangements, namely being raised by persons who are not determined as their legal parents in the country they are living in, likewise amounts to a 'conflict between social reality and law'²⁷⁰.

Another particular aspect that has been accepted by the Court as forming part of one's identity and which thus comes within the Convention's scope of protection, relates to issues of nationality. Considering that the acquisition of nationality often depends on the nationality of one's parents as determined by the respective state, this specific issue plays an important role in numerous cases concerning cross-border surrogacy and is worth mentioning here. In the landmark case of *Genovese v Malta*²⁷¹, the notion of 'private life' was interpreted as being broad enough as to include certain aspects of a person's identity, including their citizenship status. Although the Court reiterated that the Convention entails no right to a nationality as such, it held that the denial of granting one may amount to the violation of the right to respect for private life, due to its impact on a person's social identity.²⁷² Therefore, by qualifying nationality as an element of a person's identity which falls within the ambit of 'private life', every state action that potentially affects a person's citizenship status must comply with the rights enshrined in Article 8. More precisely, in cases where the determination of legal parenthood also influences the child's right to acquire that state's nationality, the child's private life as protected under the Convention is at stake. The arguments established in *Genovese v Malta* are helpful and may thus be invoked in respective cases revolving around the legal repercussions of surrogacies conducted abroad. This being said, it is

²⁶⁸ *Christine Goodwin v The United Kingdom* [GC], no 28957/95, ECHR 2002-VI.

²⁶⁹ Ibid § 77.

²⁷⁰ Ibid.

²⁷¹ *Genovese v Malta*, no 53124/09, ECHR 2011.

²⁷² Ibid § 33.

regrettable that the Court hardly provided any explanation as to why it considered the denial of citizenship as falling within the ambit of Article 8 and further, why it subsequently found that the interference with the applicant's right to respect for his private life did not amount to a violation.²⁷³

4. Concluding remarks

The present section analysed if and how children's rights are protected under the European Convention on Human Rights and how previous judgments and lines of argumentation established therein could possibly inform cases of central interest in this paper. In the course of this examination, it has become clear that children enjoy widespread protection of their rights under the ECHR and that the Court's case-law contributed significantly to the advancement of children's rights in general. In addition, the right to respect for one's family and private life, combined with the Court's extensive and dynamic interpretation techniques, led to numerous situations which affect the rights of children being recognised as falling within the ambit of Article 8.²⁷⁴ To recapitulate, as a variety of children's rights protected under the Convention on the Rights of the Child as well as the European Convention on Human Rights are at stake when domestic authorities decide whether or not to acknowledge the legal parenthood of intending parents, states are obliged to consider and attach due weight to the rights of affected children when balancing competing interests.

²⁷³ Ibid; Cf Maris Burbergs, 'Ambit and Scope of Article 8 in Citizenship Cases' (*Strasbourg Observers*, 23 October 2011) <<http://strasbourgobservers.com/2011/10/23/ambit-and-scope-of-article-8-in-citizenship-cases/>> accessed 22 March 2015.

²⁷⁴ Venice Commission (n 205) paras 52 and 62.

V. Cross-border surrogacy at the European Court of Human Rights

Following an extensive, albeit rather theoretical examination of children's rights that are potentially being interfered with in the given context, the present chapter is devoted to analysing the specific cases brought before the ECtHR on the issue lying at the heart of this paper. The principal objectives are – besides looking at the overall outcome of the Court's judgments – to examine to what extent the rights of affected children play a role therein and the importance attached to the legal parent-child relationship when viewed from a human rights perspective. Keeping in mind some of the findings of the previous chapter, it is of particular interest how Article 8 of the ECHR is interpreted and applied in these specific constellations.

A. The European Court of Human Rights in a nutshell

1. Functioning of the Court

In order to ensure member states' compliance with the human rights obligations they agreed to abide by, the Convention created two bodies responsible for observing this commitment – the European Commission of Human Rights and the European Court of Human Rights. Initially set up as two part-time organs, their task was to rule on the admissibility and merits of complaints lodged by either individuals or member states alleging a breach of the ECHR by one of the state's party to the Convention. As the case load continued to increase, Protocol 11 to the Convention²⁷⁵ amended the original enforcement machinery with the aim to create more efficiency. With the said protocol entering into force in 1998, the European Commission of Human Rights was abolished and the Court transformed into a new full-time court with an entirely different internal organisation and setup.²⁷⁶

²⁷⁵ 'Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby' (Council of Europe Treaty Office)
<<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=155&CM=7&DF=23/03/2015&CL=ENG>>
accessed 23 March 2015.

²⁷⁶ Cf Mowbray (n 193) 10ff.

The Court in its present constitution is competent to rule on the admissibility and merits of applications lodged by either individuals or other states claiming a violation of the Convention committed by a member state. Whilst inter-state complaints are hardly ever made, the number of individual applications reaching the Court is enormous. In 2014, the Court received 56,250 new applications and disposed of approximately 86,000 complaints by a decision or judgment.²⁷⁷ If the application is declared admissible, the Court, sitting either as a Committee (three judges), Chamber (seven judges) or Grand Chamber (17 judges), examines the merits and subsequently presents its findings in a written judgment.²⁷⁸ For an application to be admissible, several criteria must be fulfilled. Without going into detail, it is important to consider that an individual may only apply to the ECtHR once all domestic remedies have been exhausted. This means that every person who claims a violation of their Convention rights by one of the member states must first raise its complaints and have them reviewed at national level, since it is primarily the task of the member states to ensure compliance with the obligations flowing from the ECHR.²⁷⁹

2. The legal effects of judgments

According to Article 46 (1)²⁸⁰, member states 'must abide by the final judgment of the Court in any case to which they are parties', ie judgments are legally binding under international law upon the respective states. Besides, while decisions formally produce no legal effects for other member states which were not party to a specific case, they may still have an impact on those states, as well. For example, if the Court found that a certain law or administrative practice in a member state is not compatible with the ECHR, other states with similar systems may amend their legislation and/or conduct in order to anticipate a negative judgment being handed down against them.²⁸¹

²⁷⁷ European Court of Human Rights, 'Analysis of Statistics 2014' (Council of Europe 2015) 4 <www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf> accessed 23 March 2015.

²⁷⁸ Cf Articles 28-31 of the ECHR.

²⁷⁹ Article 35 of the ECHR; see also Mowbray (n 193) 35.

²⁸⁰ All legal provisions in the present chapter without an indication as to their legal source refer to the ECHR.

²⁸¹ Harris and others (n 193) 31ff.

In spite of the legally binding nature of judgments, they are merely declaratory, which means that if the Court finds a violation, it is not competent to repeal or replace a domestic judgment and leaves the manner of implementation largely to the states. Moreover, it is not the Court who supervises the execution of judgments, but the Committee of Ministers, a political body within the Council of Europe.²⁸²

Whilst the ECtHR in principle does not concretise how a specific judgment shall be enforced at national level, it may award 'just satisfaction' to the applicant according to Article 41. Where a breach of the Convention is found and it is not possible to (fully) remedy this violation under national law, the Court may grant financial compensation for pecuniary or non-pecuniary damages, or for costs and expenses incurred in the case, provided that the applicant files a respective request.²⁸³

In comparison to the Committee on the Rights of the Child, which is not competent to render binding judgments against member states to the CRC in case of non-compliance,²⁸⁴ the Court is certainly more influential in this regard. Human rights violations are in general remedied more satisfactorily when brought before the Court than any other body operating under international law.

B. The Court's first rulings in the context of cross-border surrogacy: *Mennesson v France & Labassee v France*

On 26 June 2014, the Court handed down its very first judgments revolving around the practice of surrogacy arrangements, *Mennesson v France*²⁸⁵ and *Labassee v France*²⁸⁶. The key issue that was to be solved coincides with the central theme of the thesis at hand, namely the question whether or under which circumstances states may refuse to recognise the legal parent-child relationship between intended parents and resulting children following a surrogacy arrangement conducted abroad. Given the great

²⁸² Ibid 25ff.

²⁸³ White and Ovey (n 209) 44ff; Mowbray (n 193) 52.

²⁸⁴ Text to n 135 in ch IV.

²⁸⁵ *Mennesson v France* (n 9).

²⁸⁶ *Labassee v France* (n 9).

significance of the ECtHR and the impact of its decisions and judgments at regional, if not international level, the case of *Mennesson v France* shall be examined and analysed in more detail below. Due to the circumstances of the cases showing a high level of similarity, the Court decided to deal with both applications simultaneously.²⁸⁷ For the sake of efficiency and in order to avoid repetition, the paper at hand follows this approach and limits itself to examine the particular circumstances and the Court's findings with regard to one of these cases.

1. The circumstances of the case

The case concerns a married couple from France, Mr Mennesson (the first applicant) and Ms Mennesson (the second applicant), who concluded a surrogacy agreement in California. Due to the second applicant's infertility, an embryo was created *in vitro* with the use of genetic material from the first applicant and an anonymous egg donor, which was then implanted into the uterus of the surrogate (gestational surrogacy). In October 2000, the surrogate gave birth to twins (the third and fourth applicants) of whom Mr Mennesson was recorded as the 'genetic father' and Ms Mennesson as the 'legal mother' in the birth certificates. This registration was based on a judgment issued by the Supreme Court of California that was obtained already prior to the children's birth (a so-called prebirth parentage order).²⁸⁸ The French consulate in California, however, refused the first applicant's request to enter the birth certificates into the French civil status register, but rather informed the public prosecutor in France for he assumed that the children were born as a result of a surrogacy arrangement.²⁸⁹

Back in France (the children were able to travel, since they acquired US citizenship), criminal investigations against the first two applicants were dropped and the birth certificates were entered into the domestic birth register in November 2002. Only a few months later, however, the responsible public prosecutor instituted proceedings and requested to annul the entries. Since the Californian judgment, on whose basis the

²⁸⁷ *Mennesson v France* (n 9) § 3; *Labassee v France* (n 9) § 3.

²⁸⁸ See for a brief description of the legal procedure in California text to nn 87-90 in ch III.

²⁸⁹ *Mennesson v France* (n 9) §§ 7-12.

Mennessons were registered as the children's parents, violated public policy (for it endorsed surrogacy), it should not be enforceable in France. While the courts of first and second instance dismissed the public prosecutor's request, the Court of Cassation quashed the judgment and referred the case back to the Court of Appeal.²⁹⁰ The latter court examined the case anew and ordered the annulment of the entries of the birth certificates in its judgment from March 2010. It stated that the prohibition of surrogacy is stipulated in domestic law and part of French public policy, which is why the judgment issued by the Supreme Court of California must be null and void in France. The Court of Appeal further held that the best interests of the children as laid down in the Convention on the Rights of the Child were not infringed by the annulment, because it did not have any bearing on the Californian birth certificates or the validity of the parent-child relationship established under US law.²⁹¹

The applicants appealed and alleged, *inter alia*, that the judgment did not consider Article 3 of the CRC (the best interests of the children) and that their right to have a legal parent-child relationship as protected under Article 8 taken alone and in conjunction with Article 14 of the ECHR was violated. In April 2011, the Court of Cassation dismissed the applicants' appeal and upheld the lower court's judgment wherein the annulment of the entries was ordered. It held that the line of argumentation adopted by the Court of Appeal was correct. As the Californian judgment violated the 'inalienability of the civil status – a fundamental principle of French law' and hence the French perception of international public policy, it would not produce any legal effects in France. It was therefore legitimate not to recognise the foreign birth certificates and transcribe them into the domestic register of births, marriages and deaths. The children's rights under Article 8 of the ECHR or Article 3 of the CRC were thereby not violated, since the non-recognition of legal parenthood in France did not prevent the family from actually living together and did not render the US documents null and void.²⁹²

²⁹⁰ Ibid §§ 13-21.

²⁹¹ Ibid §§ 22-24.

²⁹² Ibid §§ 25-27.

Having exhausted all domestic remedies, the Mennessons turned to the European Court of Human Rights. They alleged that France's refusal to recognise the legal parenthood of the first two applicants lawfully established abroad violated the parents' as well as the children's right to respect for their private and family life within the meaning of Article 8 of the ECHR and that it was moreover contrary to the best interests of the children, the third and fourth applicants.

2. The Court's assessment

a) Admissibility

First of all, the Court declared the application admissible as all admissibility criteria were met. Regarding the question of whether the facts of the case were included in the material scope of Article 8, it was recognised that the concrete reality shows that a family tie actually exists between the intending parents and the children born as a result of surrogacy, regardless of their legal or genetic relationship. As regards 'private life', the Court reiterated that this concept encompasses the aspect that everyone should be able to establish details of their identity, of which the issue of parenthood is an essential element. There was hence a direct link between the children's private life and the determination of the legal parent-child relationship.²⁹³ The circumstances of the case therefore came within the ambit of Article 8 and the application was declared admissible.

b) Interference with Article 8

As most of the Convention rights, including Article 8, are not absolute in nature, not every interference automatically amounts to a violation. This means that the rights guaranteed by Article 8 may be legitimately interfered with under certain conditions. Therefore, any assessment as to whether Article 8 was violated consists of several stages: The first step is to figure out whether there has been an interference of one or more of the rights protected under Article 8. Only if this is answered in the affirmative may one continue to examine whether this interference amounted to a violation. In

²⁹³ Ibid §§ 45-46.

doing so, regard must be given to Article 8 (2), which sets out the conditions under which an interference may be justified, namely if it a) is 'provided by law', b) 'pursues a legitimate aim' and c) is 'necessary in a democratic society'.²⁹⁴

It was undisputed that France's non-recognition of the applicants' existing family ties interfered with their right to respect for their family life. In addition, the situation was also held to interfere with the applicants' private life as guaranteed by Article 8.²⁹⁵

c) *Was the interference justified?*

(1) The legal basis & the aims pursued

As the applicants' right to respect for their family and private life was undoubtedly affected, the Court went on to examine whether there was a legal basis for the refusal to recognise the legal parent-child relationship and, as a next step, whether it could be justified by one or more of the legitimate aims enumerated in Article 8 (2).

With regard to the legal basis, it was held that the measures taken by the domestic authorities were in accordance with the domestic law. As the French Civil Code explicitly determines that surrogacy contracts are contrary to public policy and therefore unenforceable, combined with recent case-law pointing in the same direction, the first two applicants must have been aware of the factual risk that their legal parenthood would not be recognised in France.²⁹⁶

As to the second criterion, it was accepted that by refusing to recognise the legal parent-child relationship, France aims to deter its citizens from going abroad in order to conduct a surrogacy arrangement, because it perceives surrogacy as potentially harmful to children and surrogates and wants to protect them. The Court accepted that the

²⁹⁴ Harris and others (n 193) 342, 360.

²⁹⁵ *Mennesson v France* (n 9) §§ 48-49.

²⁹⁶ *Ibid* § 58.

interference therefore pursued two legitimate aims, namely the 'protection of health' as well as the 'protection of the rights and freedoms of others'.²⁹⁷

(2) The proportionality of the interference

Lastly, an interference can only be justified if it is 'necessary in a democratic society'. The Court explained that the interference must 'correspond to a pressing social need' and must be 'proportionate to the legitimate aims pursued'²⁹⁸. When assessing whether a fair balance has been struck between the aims pursued and the rights of the individual that are interfered with, states are typically left with a certain discretion in this regard, or what is called the 'margin of appreciation'. The scope of discretion granted, however, varies from case to case and is dependent on various factors and the specific context.²⁹⁹ Prior to examining whether the respective interference was proportionate, the Court must therefore decide how much discretion the state enjoys in the particular case brought before it.

Coming back to *Mennesson v France*, mainly two factors were taken into account in order to assess the extent of the state's discretion. On the one hand, France was awarded a wide margin of appreciation due to the practice of surrogacy raising 'sensitive ethical questions' and because of the diverging approaches adopted amongst the states party to the Convention in this context. With regard to the legality of surrogacy, but also concerning the question of whether the legal parenthood of intending parents should be recognised, no consensus is currently in existence. On the other hand, the intentionally wide discretion was limited again due to the importance of the protected aspect affected, namely a person's identity, and the fact that the interests of the children must be the paramount consideration in situations of this kind.³⁰⁰

²⁹⁷ Ibid § 62.

²⁹⁸ Ibid § 50; see also *Wagner and JMWL v Luxembourg* (n 250) § 124.

²⁹⁹ See for a detailed description *Harris and others* (n 193) 349ff.

³⁰⁰ *Mennesson v France* (n 9) §§ 79-81.

i) The applicants' right to respect for their family life

The Court decided to split up the applicants' complaint under Article 8 and examined the issue of family life and private life separately. Beginning with the applicants' family life, the Court recognised that the lack of a legally recognised parent-child relationship under French law had an impact on their family life as it complicated their daily lives in various ways and also led to the children not being awarded French citizenship, at least not yet. However, what was decisive for the Court was whether a fair balance had been struck between the practical obstacles faced by the Mennessons and the interests of the French community that their members comply with the rules set up democratically. In this regard, the Court noted that the applicants factually enjoyed their family life in France as they were neither prevented from living together, nor at risk from being separated from each other. Therefore, and because the Court of Cassation took into account the competing interests at stake, no violation of the applicants' right to respect for their family life was found.³⁰¹

ii) The children's right to respect for their private life

The Court first of all reiterated that the concept of private life entails the right to establish details of one's identity, of which the legal parent-child relationship is an essential part. The refusal to register the first two applicants in the French system as the legal parents of the children, in spite of the parenthood having been lawfully established in California, was held to 'undermine the children's identity within French society'³⁰². Another element of the children's identity found to be affected by the non-recognition relates to the acquisition of French nationality. Reiterating that nationality constitutes an element of one's identity, the Court held that the uncertainty whether the children were able to obtain the nationality of their biological father potentially hampered the children in defining their identity.³⁰³ Lastly, the Court considered that the children's right to inherit from their parents also forms part of their identity protected under Article 8. So,

³⁰¹ Ibid §§ 87-94.

³⁰² Ibid § 96.

³⁰³ Ibid § 97.

as the non-recognition of the legal parent-child relationship would lead to the third and fourth applicant being placed in a disadvantageous position when it came to inheritance rights, this element of their identity was said to be affected, as well.³⁰⁴ Given that the state's conduct significantly interfered with the children's right to establish their identity and did so on multiple levels, the Court noted that 'a serious question arises as to the compatibility of that situation with the child's best interests (...)'³⁰⁵.

Following this observation, the Court went on to separately examine the situation between the children and the first applicant, since he was – unlike the second applicant – biologically related to the children. Emphasising that the issue of biological parenthood had repeatedly been found to constitute a very important element of the child's identity, the Court concluded that the refusal to legally recognise the biological reality, even though all parties requested their full recognition, amounted to a violation of the children's right to respect for their private life. With regard to the children's best interests and the particularly grave interference with their identity, it was found that the complete refusal to acknowledge the legal parenthood of the children's biological father went beyond the confines of the state's margin of appreciation.³⁰⁶

In conclusion, the Court unanimously found that whilst the applicants' right to respect for their family life had not been violated by the non-recognition of the legal parent-child relationship under French law, the children's right to respect for their private life had been violated, however only in relation to the first applicant.

3. Analysis of the Court's findings

Following an illustration of the Court's findings in its first judgment concerning surrogacies conducted abroad and in particular its repercussions for the legal parent-child relationship 'back home', the assessment conducted in *Mennesson v France* is of high relevance because it provides orientation for France, but also for other member

³⁰⁴ Ibid § 98.

³⁰⁵ Ibid § 99.

³⁰⁶ Ibid § 100-101.

states struggling with similar issues in this context. Particular aspects of the said judgment are therefore analysed and also put in a wider context below. The principal objectives are to detect which particular rights of the child play a role in the Court's assessment. It is further examined whether general principles or obligations may be deduced, which member states are called upon to abide by in the future.

a) *The applicants' right to respect for their family life*

(1) The existence of a family life

The relationship between the first two applicants and the third and fourth applicants were unsurprisingly recognised as amounting to a family life in the sense of Article 8. It is nonetheless worth mentioning here as it further underpins the Court's tendency in attaching more weight to the social reality rather than to the existence of formal or other ties when examining whether a certain situation falls within the ambit of family life. By referring to the cases *X, Y and Z v The United Kingdom* and *Wagner and JMWL v Luxembourg*,³⁰⁷ the Court reiterated that since the concrete reality of the relationship is what matters, a family life may also exist between the child and its adoptive mother or the child conceived via sperm donation and its social father. Likewise, a family life exists between the Mennessons regardless of the legal parent-child relationship not being recognised under French law, since they acted as a family and have lived together from the moment of the children's birth. It is welcomed that the Court continues to take social changes and in particular new situations arising from developments in medically assisted reproduction into account.³⁰⁸ Any relationship created with the help of assisted reproductive technologies may thus very likely be recognised as falling within the ambit of Article 8, given the Court's progressive and dynamic interpretation in this respect.

(2) No infringement of the applicants' family life

More surprising, however, was that no violation of the applicants' right to respect for their family life was found, especially as the Court thoroughly assessed the negative

³⁰⁷ *X, Y and Z v The United Kingdom* (n 236); *Wagner and JMWL v Luxembourg* (n 250).

³⁰⁸ Cf *Harris and others* (n 193) 372.

implications the non-recognition had on the applicants' enjoyment of their family life. Besides noting that the lack of French documents, which would prove the applicants' legal parent-child relationship, led to practical difficulties in their daily lives, regard was also given to the fact that the children had not yet obtained French citizenship and that further problems could occur in the future, for example due to the parents' death or separation.³⁰⁹ Whilst all these factors were recognised as (potentially) endangering to the stability of the applicants' family unit, they did in the end not weigh so heavily as to amount to an infringement. In order to comprehend this outcome, a closer analysis of the Court's assessment and the arguments used therein is necessary.

First, the Court relativised its own observations regarding the negative consequences of the non-recognition and stated that when balancing the competing interests at stake, it must only take into account the practical difficulties actually encountered by the Mennessons in their strive to enjoy their right to respect for their family life in France. It went on by noting that no insurmountable obstacles prevented them from establishing and enjoying their family life in France since they were able to 'live there together in conditions broadly comparable to those of other families' and were not at risk of being separated.³¹⁰ Whilst this may be true, it is nonetheless striking that the Court played down the impact of the non-recognition on the applicants' family life. Thereby, it appears that less importance was attached to the legal recognition of family ties lawfully established abroad than was the case in *Wagner and JMWL v Luxembourg*, where it was held that the refusal to recognise the legal relationship not only created practical obstacles, but also deprived the child of legal protection and the possibility to fully integrate into her adoptive family.³¹¹ It is therefore not entirely comprehensible why the Court did not pick up the position adopted in *Wagner and JMWL v Luxembourg*, in spite of the situations certainly being comparable in this regard.

³⁰⁹ *Mennesson v France* (n 9) §§ 87-91.

³¹⁰ *Ibid* § 92.

³¹¹ *Wagner and JMWL v Luxembourg* (n 250) § 132.

The second determining factor in the Court's examination of whether the interference was proportionate to the legitimate aims pursued relates to the domestic court's conduct. Highlighting the importance of the domestic authorities' obligation to duly assess the actual situation and to take into account the competing interests at stake, it came to the conclusion that France's Court of Cassation, unlike the Luxembourg authorities in the case of *Wagner and JMWL v Luxembourg*, considered the implications of its judgment on the applicants' family life and did carry out a proper balancing exercise.³¹² By explicitly distinguishing the circumstances in *Mennesson* from those in *Wagner and JMWL*, where the domestic courts refrained from examining the actual facts of the case, the ECtHR presumably wanted to offer an additional explanation why it arrived at different conclusions regarding the applicants' family lives in those two cases.

The last crucial point, which undoubtedly contributed to the Court eventually finding no violation of the applicants' right to respect for their family life, lies in the wide margin of appreciation awarded to the state in the particular situation. The Court recognised that due to the absence of a European consensus and the sensitivity of the issue at stake, domestic authorities must be granted a greater scope of discretion. Moreover, France was said to have good reasons why it refused to acknowledge the parent-child relationship in this specific case. Considering that surrogacy is expressly prohibited for it is seen as contrary to essential principles of French law and public policy, the Court comprehended France's intention to deter its citizens from entering into surrogacy arrangements abroad and hence evading their domestic laws.³¹³ The relatively wide margin of appreciation, combined with the domestic court having balanced the competing interests to the Court's satisfaction, possibly explain why no violation was found in the end.

Following these observations, the final outcome of the Court's assessment has certainly become more understandable. However, it is still believed that the arguments brought forward in *Mennesson v France* are somewhat inconsistent with those established in

³¹² *Mennesson v France* (n 9) § 93.

³¹³ *Ibid* §§ 79-85.

Wagner and JMWL v Luxembourg, namely with regard to the level of severity allocated to the interference. Moreover, the Court's conclusion that the Court of Cassation carefully examined the circumstances of the case cannot be entirely supported here, or is at least viewed with scepticism. It is true that the French court held that the applicants' rights under Article 8 of the ECHR as well as the best interests principle enshrined in Article 3 of the CRC were not infringed by its decision. The reasoning, however, was rather slender in this respect, and especially an examination of whether the non-recognition of the legal parent-child relationship under French law would indeed serve the best interests of the children has in fact not been carried out, at least not explicitly.³¹⁴ Therefore, and notwithstanding the wide margin of appreciation awarded to France in this specific case, the author is not convinced that the children's best interests were the paramount consideration in the domestic decision.

b) The children's right to respect for their private life

(1) The child's identity: an important element of 'private life'

The second part of the Court's analysis as to whether the interference was necessary, ie proportionate to the aims pursued, relates to the children's private life. Concerning the material scope, the approach already established was followed that certain aspects of a person's identity may fall within the ambit of 'private life' and that it entails the right to establish details of one's identity. With reference to *Mikulić v Croatia*³¹⁵, the Court first reiterated that there was a direct link between the determination of legal parenthood and the child's private life,³¹⁶ before going a step further and holding that the legal parent-child relationship was not merely included in the concept of 'private life', but in fact constituted an 'essential aspect of the identity of individuals'³¹⁷. Thereby, more importance was attached to the legal recognition of parenthood than in previous cases.

³¹⁴ Cf *ibid* § 27.

³¹⁵ *Mikulić v Croatia* (n 265) §§ 53-55.

³¹⁶ *Mennesson v France* (n 9) § 46.

³¹⁷ *Ibid* § 80.

In addition, further elements of the children's identity other than the determination of their legal parents were subsequently found to be affected as well. The Court took the opportunity to confirm its recently adopted position that nationality formed part of one's identity and had therefore to be included in the concept of 'private life'.³¹⁸ Moreover, the possibility to inherit from one's parents was found to be an element of an individual's identity as well – a novel aspect, it is believed, that was expressly recognised as being included into what constitutes a person's private life within the meaning of the Convention.

The case of *Mennesson v France* may hence be regarded as significant for substantiating the child's right to identity as guaranteed by the ECHR. First, several aspects were identified as forming part of the child's identity and thus worthy of protection under Article 8, ie the legal recognition of parents, the child's citizenship status and lastly the possibility to inherit from one's parents. Moreover, great weight was accorded to the formal recognition of the parent-child relationship as it was explicitly held to be an '*essential*' aspect of the identity of individuals³¹⁹. It will therefore be arguably more difficult for states to justify the refusal to legally recognise a parent-child relationship where *de facto* family ties exist, especially if such a legal bond has already been established under foreign law.

In this context, it is however interesting to note that the Court abstains from mentioning the Convention on the Rights of the Child when elaborating on the child's right to establish his or her identity, even though Article 7 of the CRC could have served as a useful point of reference in this regard.³²⁰ Not only in order to legitimise the very existence of such a right, but also for the identification of the various elements inherent in the child's identity, a reference to the relevant provisions enshrined in the CRC could have underpinned the Court's arguments even further.

³¹⁸ Ibid § 97; *Genovese v Malta* (n 271) § 30.

³¹⁹ Ibid § 96 (emphasis added).

³²⁰ See for more details on Articles 7 and 8 of the CRC ss IV.A.2.b. and IV.A.2.c. respectively.

(2) A violation with regard to the legal parenthood of both parents?

The Court initially assessed the proportionality of the measure in question by looking at the relationship between the children on the one side and the intending parents on the other side, without distinguishing between the mother (second applicant) and the father (first applicant). In this respect, the crucial issue was in fact not the refusal to recognise the legal parenthood per se, but rather the legal uncertainty and confusion revolving around the parent-child relationship caused by the authorities' conduct. The Court criticised the domestic authorities for not recognising the legal parenthood under French law, whilst simultaneously acknowledging the validity of the foreign documents that lawfully established this parent-child relationship. In addition to the significant interference with the children's identity caused by this state of legal uncertainty, the Court also took into account the widespread consequences flowing from the existence of a formally recognised parent-child relationship. As previously mentioned, it was recognised that the lack of recognition under the French system affected the children's identity in various ways, which ultimately led the Court to the observation that the children's right to establish details of their identity was 'substantially affected' in this regard. It was therefore held that 'serious questions arise as to the compatibility of that situation with the child's best interests (...)'³²¹. However, no conclusion was offered whether 'that situation' amounted to a violation of Article 8. Instead of providing a final answer at the end of its analysis, the Court decided to continue with examining the relationship between the children and the first applicant only in a separate paragraph. For this reason, it remains unclear whether the non-recognition of the legal parent-child relationship vis-à-vis both parents amounted to an infringement of the children's right to respect for their private life.³²²

³²¹ *Mennesson v France* (n 9) § 99.

³²² Cf Grégor Puppinek and Claire de La Hougue, 'ECHR: Towards the Liberalisation of Surrogacy. Regarding the *Mennesson v France* and *Labassee v France* cases (n°65192/11 & n°65941/11)' (2014) 118 *Revue Lamy de Droit Civil* 78 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500075> accessed 27 March 2015.

(3) The importance of a biological connection

Prior to offering a conclusion in this respect, the Court took a different direction and made a distinction between the first and the second applicant concerning their relationship with the children, based on the existence of a biological link. Due to the father being genetically related to the children, it was found that his relationship with the third and fourth applicants had a different character than the mother's, where no biological links existed due to her infertility. For this reason, the Court limited its assessment at this point and solely looked at the implications of the non-recognition of the father's paternity on the children's identity. Reaffirming the particular importance of the existence of a biological connection, especially as an element of a person's identity, the interference with the children's private life was obviously qualified as even more severe with regard to the first applicant because he was also their *biological* father. Regard was further given to the impossibility of having the paternity established under French law in any way. Apart from the refusal to give effect to the Californian judgments, the first applicant was also prevented from establishing the legal parent-child relationship via other means, such as adoption or the declaration of paternity. The complete denial to acknowledge the biological reality ultimately led the Court to finding a violation of the children's right to respect for their private life. It did, however, still abstain from giving an answer whether a violation would have also been found in case no biological links had existed between the children and the parents.³²³

This reasoning at the end of the Court's analysis naturally gives rise to many questions. In order to investigate the possible implications of the arguments brought forward in *Mennesson v France*, the most pressing issues are examined in more detail below.

i) In the absence of a biological relation?

As the Court deliberately refrained from clarifying whether the interference was grave enough to amount to an infringement of Article 8 regardless of the existence of a

³²³ *Mennesson v France* (n 9) §§ 100-101.

biological connection, the view is taken that implicitly no violation was found with regard to the children's relationship with the second applicant. Considering the wide margin of appreciation afforded to the state in this context, the Court presumably found that it would go too far to oblige states to acknowledge a parent-child relationship where no biological links exist (apart from adoption).³²⁴ This assumption is supported by the Court's assessment made in paragraph 96 of the *Mennesson* judgment, where it was found that it was not the refusal per se that caused so much harm to the children's identity, but the contradictory situation created by the domestic authorities.

It may therefore be assumed that states are not under the general obligation to recognise foreign judgments or documents that establish the legal parent-child relationship between intended parents and resulting children in the complete absence of a genetic connection. However, what states must not do is to put the child in a state of legal uncertainty by on the one hand accepting the validity of the foreign establishment of parenthood in practice, whilst on the other hand refusing to legally recognise this bond under the receiving state's domestic system.³²⁵ The *Mennesson* judgment therefore does not provide clear guidance for situations where non-biologically related intending parents claim recognition of their legal parent-child relationship established abroad. Whether the refusal to do so would likewise amount to a violation of the resulting child's right to establish details of his or her identity remains open and may hence be the subject matter of another case brought before the Court in the future.

ii) The position of intending mothers

Another issue that arises from the Court having qualified the biological connection to be the decisive factor for finding a violation in the *Mennesson* case relates to the position of the second applicant, or of intending mothers in general. As stated above, the Convention as interpreted by the Court entails no general obligation to recognise the

³²⁴ Cf Adeline Gouttenoire, 'Surrogacy Agreements: At Last, the Primacy of the Child's Interests' (2015) 1 *Montesquieu Law Review* 4 <www.montesquieulawreview.eu/lr1_content/Gouttenoire_lr1.pdf> accessed 27 March 2015.

³²⁵ Cf Puppink and De La Hougue (n 322).

parenthood of genetically unrelated intending parents. Moreover, there is no indication in the *Mennesson* judgment that states are obliged to recognise the legal parent-child relationship between the resulting child and the *spouse* of the biological parent.³²⁶ It therefore appears to be sufficient for states to acknowledge the legal parenthood with regard to the genetically related parent, even if both partners entered into the surrogacy arrangement, acted as parents and claimed recognition of their parenthood together. As most women who opt for surrogacy do so precisely because they are infertile and thus unable to provide their ova,³²⁷ it is largely intending mothers who are thereby left in a weaker legal position in relation to their children. Therefore, the recognition of the legal parenthood of biologically related parents only, ie predominantly the fathers, raises serious issues in terms of equal treatment. First, as it is mostly the female partner who is not biologically related to the child born as a result of surrogacy, women are *de facto* affected by this restriction to a greater extent than men. In addition, by distinguishing intending parents based on their genetic relationship with the child, infertile persons are arguably treated less favourably on grounds of their incapacity to procreate.

Domestic authorities are therefore strongly encouraged to take the wider implications into account, especially with regard to the differential treatment of intending parents vis-à-vis each other when interpreting and implementing the Court's findings in this context. It is moreover hoped that the ECtHR will soon receive and also take the opportunity to clarify these issues, given the high level of uncertainty and the many questions left unanswered, or in fact newly raised, by the arguments put forth in *Mennesson v France*.

iii) The method of acknowledgment

Strictly speaking, the Court did not condemn France for having refused to recognise the legal parenthood of the first applicant via transcribing the foreign birth certificates into the French register of births, marriages and deaths. A violation of the children's right to

³²⁶ Ibid.

³²⁷ Brinsden (n 28) 484; see also text to n 35 in ch II.

respect for their private life was only found because the state did not allow for establishing the first applicant's paternity in any way. As the Court enumerates several other possibilities of how the legal parenthood could have been satisfactorily acknowledged under French law, states are obviously left with a great degree of discretion in this regard. Since adoption is explicitly listed as an alternative in the judgment at hand, it appears that it is seen as an appropriate and sufficient method of acknowledging the legal bond between biological parents and children, at least in the context of surrogacy arrangements. This is somewhat striking, given that adoption has not been viewed as a suitable alternative to the recognition of foreign judgments or documents in a number of recent decisions issued at domestic level.³²⁸

In sum, it can be observed that the Court's reasoning in *Mennesson v France*, especially with regard to the distinction made between the first two applicants, almost produces more questions than it does answers. Whilst it is most welcomed that the Court ultimately found a violation of the children's right to respect for their private life in the particular case, the concrete justification is not entirely satisfactory for the author. By stressing the importance of a biological connection, the ECHR still allows for many children born as a result of surrogacy agreements to be deprived of having their parents legally recognised, provided there is no genetic link to either of the intending parents. Especially when considering the principle that the child's interests must always be the paramount consideration in situations of this kind, it is difficult to comprehend how the non-recognition of the legal parent-child relationship would serve the interests of these children. Further, the strong focus on the biological reality predominantly affects women and may thus produce unfavourable results for intending mothers, in particular single intending mothers. France as well as other member states in a similar situation are therefore advised to interpret the Court's assessment with great care.

³²⁸ Cf BGH NJW 2015, 479, §§ 59-60; see also HCCH, 'The Parentage/Surrogacy Project: An Updating Note Drawn Up by the Permanent Bureau' (Prel Doc No 3 A, February 2015) para 8b <www.hcch.net/upload/wop/gap2015pd03a_en.pdf> accessed 28 March 2015.

c) *The broader implications of Mennesson v France*

Following a detailed examination of the Court's findings with regard to the central issue that was at stake in *Mennesson v France*, ie the compatibility of not recognising the legal parent-child relationship with the applicants' rights protected under Article 8, the analysis now continues with highlighting some of the wider implications the *Mennesson* judgment might have. Thereby, an attempt is made to identify the Court's stance and its potential influence on surrogacy as a method of ART per se and the flourishing international surrogacy market.

(1) Surrogacy in itself is not a human rights violation

As the Court was not called upon to rule on the question whether the practice of surrogacy is compatible with the rights set forth in the ECHR, this issue was largely omitted when dealing with the respective case. Some general insights may nonetheless be drawn from some of the Court's observations made in *Mennesson v France*. When assessing France's margin of appreciation in the particular case, a comparative study was conducted in order to find out how other member states handle the issue of surrogacy agreements as well as the associated questions regarding the parent-child relationship following therefrom. In this context, the Court observed that no consensus exists amongst the member states as to the lawfulness of surrogacy and explains the diversity by recognising that the said treatment 'raises sensitive ethical questions'. Despite or perhaps because of the controversy revolving around surrogacy arrangements, it was found that states must be granted a wide margin of appreciation in deciding whether or not to allow this type of treatment on their territory.³²⁹

In practice, this means that the ECtHR does not perceive the practice of surrogacy in itself as being contrary to human rights, for instance because it amounts to the sale of children or fosters the commodification of women's bodies, as has been asserted elsewhere in academia.³³⁰ Rather, surrogacy is identified as another form of assisted

³²⁹ *Mennesson v France* (n 9) §§ 78-79.

³³⁰ Cf eg Brunet and others (n 21) 23ff; Tobin (n 129) 351.

reproductive technology, which member states may or may not offer within their jurisdiction. This viewpoint adopted by the Court in *Mennesson* further implies that individuals are in theory able to apply to the ECtHR and complain about the state's refusal to offer this method of medically assisted reproduction to them.³³¹ Whilst states are to date still granted a considerable discretion with regard to authorising surrogacy, the rapidly-changing society and inexorable medical advancements may possibly lead the Court to narrowing the states' margin of appreciation in this context soon. Therefore, by not categorically condemning surrogacy agreements as incompatible with human rights in the first place, the Court does not preclude the possibility that surrogacy may become a valid alternative of infertility treatment in Europe.

At the other end of the spectrum, the ECHR equally does not compel states to authorise surrogacy or to willingly accept and acknowledge all the consequences arising from such agreements conducted abroad. In contrast, it is viewed as legitimate that states may dissuade their citizens from going abroad in order to enter into agreements which are prohibited under domestic law, especially if they are contrary to public policy. The only restriction appears to be that the method of deterrence is compatible with the rights enshrined in the Convention and that it particularly takes the position of the innocent children involved into account.³³²

In conclusion, two major principles may be deduced from the Court's reasoning in *Mennesson* in this wider context: first, it is vastly left to the member states whether or not to legalise surrogacy on their territories. Second, in case states prohibit or do not tolerate surrogacy at domestic level, they are in principle allowed to dissuade their citizens from going abroad in order to make use of this treatment by, for instance, putting penalties in place. Such methods of dissuasion, however, must be applied in a manner consistent with the ECHR and must in particular not infringe the human rights

³³¹ Cf Puppink and De La Hougue (n 322).

³³² *Mennesson v France* (n 9) § 99.

of the resulting children, who shall not be held responsible for the choices made by their intending parents.³³³

(2) Does the judgment promote cross-border surrogacy?

In the light of the foregoing, it is asserted that France and other member states who have followed similarly restrictive approaches towards surrogacy must not change their laws so as to legalise surrogacy in the near future. What they will have to do, however, is to make sure that their legislation as well as their administrative practices are in line with the Court's findings, which means in particular that they must enable the legal parent-child relationship established abroad to be recognised under their domestic systems, especially where the determined parenthood correlates with the biological reality. Whilst the position that the non-recognition of legal parenthood violates the children's right to respect for their private life is supported here, consideration shall nevertheless be given to the possible broader implications of this reasoning. In this context, the judgment may be criticised for serving as an incentive for intending parents to travel abroad in order to enter into a surrogacy agreement. Whilst states are in theory still allowed to punish their citizens for evading their domestic laws, one of the most effective deterrents, namely the denial to give legal effect to the relationship established abroad, is not an acceptable option anymore. Intended parents from Europe may therefore be even more encouraged to look for a surrogate abroad following the *Mennesson* judgment.³³⁴

Recalling the many controversies and serious concerns raised in the context of cross-border surrogacy, it would indeed be problematic if the Court's judgments were interpreted as promoting 'surrogacy tourism'. Bearing in mind that most of the typical surrogacy destinations, such as India, Russia or Ukraine, tend to be significantly less wealthy than the intending parents' home countries, cross-border surrogacy is often criticised for fostering the exploitation of poor women in these countries.³³⁵ Besides

³³³ Ibid; see also Puppink and De La Hougue (n 322).

³³⁴ Cf Bala (n 13) 14ff.

³³⁵ Ibid 15ff; Brunet and others (n 21) 27.

most of these women coming from a low socio-economic background, serious questions also arise with regard to their informed consent. Recent studies carried out in India, for example, display that most surrogates are not even aware of the terms of the surrogacy contract, are thus not duly informed about the whole procedure and usually have no say in it either.³³⁶ Given the vast absence of legal safeguards, which would effectively ensure that the rights of all parties involved in surrogacy agreements are being adequately protected, the risk of exploitation, malpractice and misinformation is high.³³⁷ It is therefore hoped that the Court's first rulings in this context will not lead to an increasing number of intending parents from Europe travelling abroad and entering into surrogacy agreements where no proper safeguards are in place.

C. Subsequent decisions in the realm of cross-border surrogacy

Subsequent to *Mennesson v France* and *Labassee v France*, the Court handed down two more decisions in the context of cross-border surrogacy so far, with more cases currently still pending.³³⁸ Considering the numerous questions left unanswered or in fact newly created by the Court's findings in *Mennesson* and *Labassee*, it shall be examined whether the subsequent decisions entail some additional information and/or clarification concerning the issue of recognising the legal parent-child relationship lawfully established abroad and the obligations arising from Article 8 in this context.

1. The decision in *D and Others v Belgium*³³⁹

Just a few days after issuing the judgments in *Mennesson v France* and *Labassee v France*, the Court decided on another case in the context of cross-border surrogacy and specific associated problems which arose in the intending parents' home country.

³³⁶ See for a comprehensive overview CSR (n 35); Sama – Resource Group for Women and Health, 'Birthing a Market. A Study on Commercial Surrogacy' (2012) <www.samawomenshealth.org/downloads/Birthing%20A%20Market.pdf> accessed 29 March 2015.

³³⁷ See for the absence of legislation in India Raksha Kumar, 'Trying to Tame the Wild West of Surrogacy in India' (*Al Jazeera America*, 14 January 2014) <<http://america.aljazeera.com/articles/2015/1/14/the-wild-west-of-surrogacy.html>> accessed 29 March 2015; see for the lack of a regulatory framework at international level Trimmings and Beaumont (n 1) 442.

³³⁸ *Laborie v France*, no 44024/13 (pending); *Foulon v France*, no 9063/14 (pending).

³³⁹ *D and Others v Belgium* (n 14).

a) The circumstances of the case & the Court's decision

The case concerns a married couple from Belgium and their resulting child born through a surrogacy agreement conducted in Ukraine. After the child was born, the intending parents were recorded as the parents on the birth certificate issued by the Ukrainian authorities. In order to return home with their child, the intended parents requested the Belgian embassy to provide their child with a Belgian passport. However, the request was refused because the applicants were not able to produce additional documents that would prove their filiation with the child. Therefore, the applicants turned to the competent domestic court and complained about the refusal to issue a passport for the child. In addition, they filed a request for recognising the Ukrainian birth certificate under Belgian law. In the meantime, the intended parents had to return to Belgium and were forced to leave the child behind. The court of first instance dismissed the applicants' complaint because necessary documents were still missing. Only after the intending father had finally submitted a document proving his biological link with the child did the appeal court order the authorities to provide the child with a travel document so as to enable it to enter Belgium. The applicants, however, had applied to the Court prior to the appeal court's decision and complained, *inter alia*, under Article 8 that the refusal to issue a travel document led to a separation of the child from the parents, which was contrary to the child's best interests and infringed the right to respect for their family life.³⁴⁰

The Court, considering the novel circumstances that occurred in the meantime, struck out the complaint concerning the authorities' refusal to provide the child with a travel document. With regard to the temporary separation between the intending couple and the child, the Court acknowledged that this amounted to an interference with the right to respect for their *de facto* existing family life. However, as the separation was not found to be unreasonably long and that Article 8 did not compel states to allow the entry of resulting children without requesting certain legal verifications, the Court held that the

³⁴⁰ Ibid §§ 5-18, §§ 27-28.

state acted within its wide margin of appreciation and concluded that the application was therefore inadmissible as being manifestly ill-founded.³⁴¹

b) Possible insights to be gained

Given that the circumstances in *D and Others v Belgium* are significantly different to those in *Mennesson v France*, it must be asked whether any additional insights may be drawn from this decision with regard to the issue lying at the heart of this thesis. Even though the applicants had also requested the domestic authorities to recognise the birth certificates issued abroad, the Court explicitly stated that this was not the issue here. Since the applicants did not complain about this aspect, which was moreover still processed at domestic level, the Court clarified that it would not deal with the issue of recognising the parent-child relationship, but did not expressly refer to the *Mennesson* and *Labassee* cases. The decision at hand is therefore only of limited relevance here as it does not provide any additional information with regard to the issue of legal parenthood following cross-border surrogacy agreements.

However, some of the arguments brought forward in *D and Others v Belgium* are noteworthy insofar as they reaffirm certain general principles that were also detected in the respective judgments against France. First of all, the Court's expansive interpretation of the notion 'family life' was once again confirmed. It was reiterated that for a situation to come within the ambit of Article 8, family ties must not already have been fully established and that the factual situation and behaviour of the parties is in general more decisive in this respect. For this reason it was held that the applicants' relationship was protected under Article 8 even prior to them settling in Belgium, given that the first applicants acted as the child's parents from his birth and actively took steps that would allow them to enjoy an effective family life.³⁴² The argument provided in the decision at hand further underpins the assertion that there would hardly be any situation,

³⁴¹ Ibid §§ 35-36, §§ 58-64.

³⁴² Ibid § 49.

even in the context of cross-border surrogacy, where the Court would negate the existence of a family life within the meaning of Article 8.³⁴³

Also, with regard to the degree of discretion left to the state in this specific situation, the Court followed a similar approach as adopted in *Mennesson v France* and awarded Belgium a relatively wide margin of appreciation based on the fact that the issue raises delicate moral and ethical questions.³⁴⁴ Lastly, the importance attached to the existence of a biological connection was, at least implicitly, reaffirmed, as well. As the separation was caused by the domestic authorities' request to verify the existence of a genetic relation between at least one of the intending parents with the child, the Court accepted that member states make the decision to let a resulting child enter their territory conditional upon the existence of a biological connection. This possibly further implies that states may refuse other claims, such as requests relating to the recognition of the legal parent-child relationship, in the absence of any proven biological ties with the child. Even though *D and Others v Belgium* concerned different problems faced by intending parents under their home country's legal system, it can nevertheless be observed that the Court remained consistent with the more general approaches taken in *Mennesson v France*.

2. The case of *Paradiso and Campanelli v Italy*

On 27 January 2015, the Court handed down its third judgment in the sphere of cross-border surrogacy and subsequent issues encountered by the intending parents upon return to their home country. The circumstances of the case differ in various aspects from *Mennesson v France* and the issue of recognising the legal parent-child relationship was, again, not the central issue to be decided by the Court. As can be seen below, it nonetheless provides further guidance as to the states' obligations arising from Article 8 in this particular context. However, attention must be drawn to the fact that the judgment has not yet become final as it may still be referred to the Court's Grand Chamber. In case of such a referral, the application would then be re-examined and an

³⁴³ Text to nn 234-238 in ch IV.

³⁴⁴ *D and Others v Belgium* (n 14) § 54.

entirely new judgment be handed down.³⁴⁵ The following observations are therefore only made on a provisional basis and the assessments are kept rather concise.

a) *The key facts & findings*

The applicants are a married couple from Italy, who entered into a surrogacy agreement in Russia. Following the child's birth, the applicants were lawfully recorded as the parents on the Russian birth certificate.³⁴⁶ After the applicants' return to Italy (the Italian embassy in Moscow issued travel documents for the child, but later informed the domestic authorities that the birth certificate contained false information), they requested the birth certificate to be recognised under domestic law. The request was dismissed and proceedings were opened against the applicants for it was claimed that they illegally brought the child to Italy. As DNA tests proved that no biological ties existed with neither of the applicants, the child was removed from them and subsequently placed in foster care. In addition, the refusal to recognise the legal parenthood lawfully established in Russia was upheld by the appeal court. It held that the foreign birth certificate contained false information since the applicants were not the biological parents. It would have therefore been contrary to public order if effect had been given to such a document under domestic law. As a result, a new birth certificate was eventually issued by the Italian authorities, giving the child a new name and determining that it was born in Russia to unknown parents.³⁴⁷

On behalf of the child, the applicants complained under Articles 6, 8 and 14 of the Convention about the non-recognition of the legal parenthood and the removal from them. They also claimed a violation of their own right to respect for their private and family life as guaranteed under Article 8. With regard to the alleged violation of the child's rights, the application was declared inadmissible *ratione personae*. It was found that the applicants lacked standing to act on behalf of the child, given that no biological

³⁴⁵ Cf Mowbray (n 193) 57ff.

³⁴⁶ For an overview of the surrogacy procedure in Russia see text to n 95 in ch IV.

³⁴⁷ *Paradiso and Campanelli v Italy* (n 10) §§ 5-34.

ties exist and that the child had already been removed from them some years ago.³⁴⁸ In addition, the applicants' complaint concerning the refusal to recognise the Russian birth certificate was declared inadmissible. The Court found that the applicants had not exhausted all domestic remedies, since they had failed to lodge an appeal on points of law against the appeal court's decision in Italy.³⁴⁹ So, in spite of the thesis' key issue having formed a part of the application at hand, the case of *Paradiso and Campanelli* is actually not concerned with it as the Court abstained from examining this aspect and instead concentrated on the fact that the resulting child had been taken away from the applicants. This means that the Court did not further develop its approach with regard to the member states' acknowledgment of parent-child relationships established abroad in its so far latest judgment issued in the realm of cross-border surrogacy. Therefore, it can be said that the cases of *Mennesson v France* and *Labassee v France* are still the most relevant judgments and must first and foremost be consulted when examining current human rights standards states must comply with in this context.

Turning to the *Paradiso and Campanelli* case again, the Court's findings with regard to the child's removal are outlined in brief. This part of the applicants' complaint was declared admissible and also found to come within the ambit of Article 8. Reiterating established principles concerning the broad interpretation of 'family life', the Court accepted that *de facto* family ties existed in the present case, since the applicants cared for the child and acted as his parents for a sufficiently long period. It was further undisputed that the order to remove the child and place it in guardianship amounted to an interference with the applicants' family life. In addition, the Court also noted that the second applicant's private life was at stake because he had intended to prove his biological connection with the resulting child in the domestic proceedings. Given that the notion of 'private life' includes that everyone should be able to establish details of his or her identity, there was found to be a direct connection between the applicant's private life and the determination of his filiation with the child.³⁵⁰

³⁴⁸ Ibid §§ 49-50.

³⁴⁹ Ibid § 62.

³⁵⁰ Ibid §§ 69-71.

As to the question whether the interference amounted to a violation, it was first of all accepted that the measure in question was provided by law and pursued the legitimate aim of preventing disorder. Concerning the proportionality of the interference, the Court assessed whether the domestic authorities struck a fair balance between the competing interests at stake and reiterated, by citing *Mennesson v France* and *Labassee v France*, that the best interests of the child must be paramount in situations of this kind. Whilst it was recognised that the Italian authorities had expressed their doubts as to the applicants' child-raising capacities, the main reason for ordering the child's placement in care was in fact that the applicants circumvented Italian law and hence created an unlawful situation. Public policy considerations, however, cannot simply justify any measure since the authorities have to take the interests of the child into account in such a situation, even in the absence of a genetic connection with the intending parents. Moreover, the removal of a child is such an extreme measure that it may only be justified by the necessity to protect him or her from immediate danger. In the light of the foregoing, the Court concluded that the arguments taken into account and brought forward by the Italian authorities were not sufficient to justify this extreme measure and accordingly found a violation of Article 8. However, with regard to the fact that the child had been living with a foster family for a significant period of time already and thus certainly established emotional ties with them, the Court clarified that the finding of a violation did not automatically imply that the child had to be returned to the applicants.³⁵¹

b) The most relevant points

As previously mentioned, the Court did not directly examine the issue of legal parenthood following cross-border surrogacy arrangements in the case of *Paradiso and Campanelli v Italy*. However, since the issues at stake were in principle caused by the same underlying reason, ie the domestic authorities' refusal to acknowledge family formations resulting from surrogacies conducted abroad on the basis of public policy

³⁵¹ Ibid §§ 72-88.

considerations, the Italian case contains some important insights also in connection to the central theme of this paper. There are in particular three points included in the judgment against Italy worth mentioning here.

(1) The significance of a biological link in the particular case

First, attention shall be given to the importance attached to the biological relationship between the intending parents and the resulting child in this particular case. In this regard, the Court explicitly held that the child's best interests must always be taken into consideration, regardless of the existence of a genetic connection or not. Therefore, the decision to remove the child from the applicants could not be justified simply by pointing to the absence of a biological connection. This statement reaffirms the Court's approach that the absence of a biological relationship does not preclude the existence of a family life and that such family ties must in principle enjoy the same degree of protection under Article 8. However, while the significance of the genetic connection is somewhat relativised by this argument, this is not interpreted as a general shift in this direction. Rather, it must be borne in mind that the respective context in which the Court assessed the importance of a biological connection differs considerably in *Mennesson v France* on the one hand, and *Paradiso and Campanelli v Italy* on the other hand. Besides the fact that the measures complained about were not the same, it is further essential to note that the former judgment examined the issue from the perspective of the child's right to respect for his or her private life, whilst the latter was concerned with the intending parents' disruption of their family life. No analogy may thus be drawn from the arguments put forth in *Paradiso and Campanelli* with regard to the importance of the existence of a biological tie when deciding whether to recognise the legal parenthood of intending parents.

(2) The Court's reference to the Convention on the Rights of the Child

A second aspect that deserves particular attention relates to the fact that, unlike in *Mennesson* and *Labassee*, explicit reference is made to the Convention on the Rights of the Child. Another consequence of the state's refusal to recognise the Russian birth

certificate was that the child was actually left without an official identity and was thus formally inexistent for about two years, since the Italian authorities had not provided the child with a new birth certificate earlier than that. In this connection, it was acknowledged that the child's right to an identity, ie to be registered at birth, and to acquire a nationality as enshrined in Article 7 of the CRC are of utmost importance. More concretely, the Court stated that resulting children must not be discriminated against on the basis that they were born by a surrogate, especially not when it comes to the child's citizenship status or identity.³⁵² As the Court has largely abstained from making reference to the CRC when defining and further developing the child's right to an identity in previous case-law,³⁵³ the fact that Article 7 of the CRC was now used in order to underpin the crucial importance of having certain details of one's identity established is not to be underestimated. Moreover, it supports the author's argument that the rights laid down in Article 7 of the CRC, in particular those relating to the granting of a nationality and adequate birth registration, do not solely address the child's state of birth, but may also impose certain obligations on receiving states.³⁵⁴ It is therefore essential for domestic authorities to duly take the widespread consequences into account that result from the refusal to formally recognise the parent-child relationship based on public policy considerations, not least because of the obligations arising from the child's right to be registered immediately after birth and thus given a formal identity as soon as possible.

(3) In contradiction to *Mennesson v France*?

The last point raises some questions as to the compatibility of the approaches adopted in the respective judgments with regard to family settings where no biological links exist between the intending parents and the resulting child. In the analysis above,³⁵⁵ it is argued that the findings in *Mennesson v France* may be interpreted so as to allow states to refuse to recognise the parent-child relationship in case no genetic connection exists. This assumption is based on the Court's reasoning that it was primarily the legal

³⁵² Ibid § 85.

³⁵³ Cf eg *Mikulić v Croatia* (n 265); *Odièvre v France* (n 263); *Genovese v Malta* (n 271).

³⁵⁴ Cf text to nn 177-179 in ch IV.

³⁵⁵ See s V.B.3.b.(3).i.

uncertainty and contradictory behaviour by the domestic authorities that led to the severe interference with the children's right to respect for their private life. In conclusion, it was thus alleged that states may arguably refuse to acknowledge the family setting established abroad in a rigorous manner, rather than creating confusion by partly giving effect to it.³⁵⁶ However, while this may be true with regard to the child's right to respect for his or her private life, this approach is extremely difficult to reconcile with the intending parents' and the child's right to respect for their family life. This is well illustrated in *Paradiso and Campanelli v Italy*, where the state denied to give any effect to the relationship created abroad. While this probably did not amount to a violation of the child's right to respect for his private life, it was not compatible with the applicants' right to respect for their family life.

Strictly speaking, the Court's findings in *Mennesson v France* and *Paradiso and Campanelli v Italy* respectively are not in contradiction to each other because they are concerned with and refer to different spheres protected under Article 8. In practice, however, states will most likely be in breach of the Convention in one way or other when refusing to recognise the legal parent-child relationship established abroad on the basis of a surrogacy agreement, even in the absence of any genetic connection. To assume otherwise would accept that resulting children with no biological connection to their parents may be put in a state of legal uncertainty, while this is found to violate Article 8 with regard to children who are genetically related to the intending parents. Moreover, not giving any effect to the relationship established abroad entails numerous legal consequences which may seriously interfere with the affected persons' right to respect for their family life. This could be seen in the case of *Paradiso and Campanelli v Italy*, where the refusal to recognise the applicants' legal parenthood led to the domestic authorities taking away the child from the intended parents, placing it in foster care, and leaving it with no formal identity for more than two years. The child's best interests are of paramount importance, so, striking a fair balance between the state's interest to preserve public policy and the child's interests to enjoy his or her private and

³⁵⁶ Cf Puppink and De La Hougue (n 322).

family life undisputedly necessitates a high degree of sensitivity and finesse on the part of domestic authorities.

VI. Conclusion

At the end of the present thesis and following an extensive description and analysis of the central issue and its underlying causes, the two research questions formulated at the outset shall be posed once again in order to recall the principal objectives of the paper, before offering some final answers and conclusions.

1. What rights of the child are primarily affected by the non-recognition of the intending parents' legal parenthood due to the involvement of surrogacy?

Given the thesis' clear focus on children, the most logical point of departure for identifying the relevant human rights is the Convention on the Rights of the Child, this even more so as the CRC is legally binding and has been ratified by almost the entire international community of states. With regard to the key theme of this paper, four specific provisions of the CRC were singled out and examined in more detail. In the course of this examination, it became apparent that the omnipresent best interest principle laid down in Article 3 (1) of the CRC, according to which the best interests of the child must be the primary consideration in any action affecting them, plays a decisive role in relation to the issue at stake here. As the decision not to recognise the legal parenthood of intending parents, even though lawfully established abroad, leads to the child being formally left parentless and may subsequently cause further inconveniences in the parents' home country, it is argued that the best interests principle makes it rather difficult for states to justify such a refusal by invoking public policy considerations. Besides the best interests principle, another general principle of the CRC was found to be particularly relevant in the context of this paper. The principle of non-discrimination as formulated in Article 2 (1) of the CRC offers a comprehensive protection to children. As states are obliged to respect the principle of non-discrimination also with regard to children who are not their citizens, receiving states must not discriminate against resulting children who reside on their territory. Moreover, given that Article 2 (1) of the CRC prohibits not only the discrimination on grounds of the child's status, but also on grounds of the child's parents' status, this provision may

be successfully invoked in order to argue that resulting children shall not be put in a less favourable position due to their parents having entered into a surrogacy agreement abroad. In addition, children may not be discriminated against on the basis of how they were born since this arguably falls under the prohibited ground of 'other status'.

Next to the CRC's underlying principles, Article 7 of the CRC is undoubtedly the most relevant provision when it comes to the determination or recognition of a child's legal parents. First of all, Article 7 (1) of the CRC determines that every child shall be registered at birth in a non-discriminatory manner. This effectively means that children born as a result of surrogacy must not be denied entry into civil status registers. The importance of being registered can in fact not be overrated for it is held to be an essential prerequisite for children to form their identity within society and for the realisation of various other human rights or benefits.³⁵⁷ In the context of surrogacy agreements, it could be observed that resulting children are usually registered and provided with a birth certificate, which indicates the intending parents as the legal parents, in the child's state of birth. However, given that these children live and grow up in another country, it is equally important that their birth registration is acknowledged there as well. Otherwise, the child would be deprived of an identity within the state he or she is living in.³⁵⁸

Another right enshrined in Article 7 of the CRC relates to children acquiring a nationality and not being left stateless. Whilst states are not under the general obligation to provide every child on their territory with their nationality, they are in fact called upon to prevent children from being stateless. This provision is especially important in circumstances where resulting children neither acquire the nationality of their state of birth, nor of the intending parents' home country. In situations of this kind, states are expected to negotiate with each other in order to prevent statelessness as far as possible. However, if no solution can be reached, receiving states are strongly encouraged to

³⁵⁷ Ziemele (n 171) 21ff.

³⁵⁸ As was expressly acknowledged by the ECtHR in *Paradiso and Campanelli v Italy* (n 10) § 85.

provide stateless children who are living on their territory with a nationality.³⁵⁹ So, even though Article 7 of the CRC does not explicitly contain the child's right to have their parents formally acknowledged, it is *de facto* included, since it is part of the child's birth registration and often a precondition for determining a child's nationality.

Apart from the Convention on the Rights of the Child, another international human rights instrument, namely the European Convention on Human Rights, was consulted. Whilst the ECHR might at first sight not appear to be as suitable as the CRC when it comes to examining a situation from a children's rights perspective, it would have been unjustifiable not to look into the ECHR, given its incomparably strong enforcement mechanism and the legal effects it unfolds at national level for its member states. Plus, even in the absence of provisions specifically addressing children, they are protected under the Convention just as much as adults. In the context of the child's relationship with his or her parents, Article 8 of the ECHR has been the most relevant provision.³⁶⁰ Concerning the notion of 'family life', it is concluded that families formed through surrogacy come in principle within its ambit, regardless of a biological connection. Given that the factual situation and the respective applicants' behaviour are usually held to be the most decisive factors in this respect, a family life in the sense of the Convention may even exist where such ties have not yet been fully established. This means that even those relationships may be protected where the intending parents and the resulting child have not (yet) had the opportunity to live together.³⁶¹ The child's right to respect for his or her family life may thus be interfered with if the non-recognition impedes the child's enjoyment of his or her parents' company or if it prevents the child from integrating into the respective family unit.³⁶²

In addition to family life, Article 8 of the ECHR also protects the right to respect for one's private life. The concept of private life was found to include the right to establish details of one's identity, of which parenthood forms an essential part. Therefore, the

³⁵⁹ Cf Doek (n 173) xiv.

³⁶⁰ Kilkelly, 'Protecting Children's Rights under the ECHR' (n 225) 248.

³⁶¹ Cf *Paradiso and Campanelli v Italy* (n 10) §§ 68-69; see also *Pini and Others v Romania* (n 233) § 148.

³⁶² Cf *Wagner and JMWL v Luxembourg* (n 250) § 132.

child's private life is necessarily affected when it comes to the determination or recognition of the legal parent-child relationship.³⁶³

To sum up, with regard to the Convention on the Rights of the Child and the European Convention on Human Rights, the following rights of the child were found to be primarily interfered with in the event of states not recognising the parent-child relationship: The child's right to be registered at birth and to acquire a nationality as laid down in Article 7 of the CRC as well as the child's right to respect for his or her family and private life guaranteed by Article 8 of the ECHR. In addition, the overarching principles that the child's best interests must be the primary or even paramount consideration in any action concerning them and further, that children must not be discriminated against on the basis of their own or their parents' status must guide any decision relating to the determination of a child's legal parents – this even more so in the context of surrogacy arrangements where competing interests are at stake.

2. With regard to the relevant case-law of the European Court of Human Rights, which human rights obligations arise from the Convention in relation to the acknowledgment of parent-child relationships in the given context?

The second research question approaches the topic from a different, perhaps more concrete, angle and requires an analysis of the European Court of Human Rights' current position in this specific context, undertaken in Chapter V. Given that the Court has by today ruled on four cases in the realm of cross-border surrogacy in total, with only two of them being concerned with the central issue of this paper, the analysis was quantitatively limited. Moreover, as the Court bases its examination on the specific circumstances of each case, it is rather difficult to make any general remarks. This being said, some conclusions were nonetheless drawn and unresolved questions were critically illustrated in the course of said analysis. In order to provide the reader with concrete

³⁶³ *Mennesson v France* (n 9) § 96.

answers to the second research question, the main insights shall be summarised in a concise manner below.

First, it could be observed that states are not required to amend their general approaches towards the practice of surrogacy per se. In the absence of any European consensus, member states are in principle free to decide whether to allow surrogacy arrangements to be conducted on their soil.³⁶⁴ Further, member states which prohibit surrogacy are not obliged to adapt their domestic family laws so as to determine the legal parents of children born as a result of surrogacy arrangements conducted abroad. Indeed, the problems encountered by families formed through surrogacy when returning home are not so much caused by the receiving states' application of their own family laws, but are rather rooted in domestic private international law. However, also with regard to private international law rules, it appears that states are largely not compelled to make any formal modifications. According to the Court's findings in *Mennesson v France*, it is in principle accepted that states may refuse to recognise foreign decisions or documents in case they are found to be in contradiction with public policy.³⁶⁵ It can thus be summarised that France, and presumably most of the other states party to the ECHR, are not obliged to amend any of their domestic laws due to the judgments handed down in *Mennesson v France* and *Labassee v France*.³⁶⁶

What needs to be amended, however, are certain domestic practices and jurisprudence in this context. In spite of the judgments being legally binding only upon France, member states with currently similar approaches are likely to abide by them, as well, in order to avoid the risk that the Court will find them to also be in breach of the Convention.³⁶⁷ After having conducted an extensive analysis of the Court's findings provided in *Mennesson v France*, and to a lesser extent in *Paradiso and Campanelli v Italy*, the following obligations under Article 8 of the Convention may be deduced.

³⁶⁴ *Mennesson v France* (n 9) § 79; see also European Court of Human Rights, 'Questions and Answers on the *Paradiso and Campanelli v Italy* judgment' (n 20).

³⁶⁵ Ibid § 84.

³⁶⁶ Cf Gouttenoire (n 324) 4.

³⁶⁷ Cf Bala (n 13) 14.

Beginning with the child's right to respect for his or her family life, it is undisputed that the refusal to recognise the parent-child relationship lawfully established abroad in general affects the child's (and also the intending parents') family life. This being said, the threshold of what amounts to a violation is high and consequently, the states' margin of appreciation relatively wide. Considering the Court's respective arguments in *Mennesson* and *Paradiso and Campanelli* cumulatively, it appears that the Court is willing to accept the domestic authorities' refusal to acknowledge the legal bond between intending parents and resulting children, as long as it does not lead to a very serious disruption of their family life, such as the removal of the child. Less severe interferences, which do not prevent resulting children from living under circumstances 'broadly comparable to those of other families' are thus in principle tolerated when balanced against the state's legitimate interest to deter its citizens from entering into surrogacy agreements abroad.³⁶⁸

The second aspect to be discussed in the context of Article 8 of the ECHR relates to the child's right to respect for his or her private life and the obligations arising therefrom in the given context. Having in mind that an important element of the child's identity is at stake, it was found that domestic authorities must not put children in a state of uncertainty when it comes to the determination or recognition of their legal parents, since this would effectively undermine the child's identity within the society he or she is living in. Strictly speaking, the child's right to establish details of his or her identity does not require states to automatically recognise any legal parent-child relationship established on the basis of cross-border surrogacy, as long as it does not lead to a contradictory situation. However, the alternative, ie the decision to completely deny the situation created abroad any legitimacy, will in most cases amount to a violation of the applicants' family life, which was the case in *Paradiso and Campanelli v Italy*. It is therefore assumed that member states are *de facto* obliged to recognise the legal parent-child relationship, notwithstanding the Court's statement that a wide margin of

³⁶⁸ *Mennesson v France* (n 9) § 92; *Paradiso and Campanelli v Italy* (n 10) § 80.

appreciation must be granted to states in this particular context.³⁶⁹ Bearing in mind that the child's interests must be the paramount consideration in all of these decisions, the view is taken that public policy deliberations must not trump the child's right to have his or her social parents legally acknowledged. It is regrettable that the Court did not take a clear stand in this respect and deliberately left open the question whether the severe interference with the child's identity caused by the non-recognition amounted to a violation of Article 8, regardless of the child's filiation. It is therefore hoped that the Court will soon clarify the member states' obligations in this context.

A much firmer position is taken with regard to situations where the resulting child is biologically related to the intending parent who seeks recognition of the parent-child relationship. By making clear that the formal acknowledgment of the child's legal parents is even more important where the social reality corresponds with the biological reality, states are in principle under the obligation to give effect to this relationship and may not refuse such a request by referring to the illegality of surrogacy arrangements. The concrete manner in which the legal parenthood must be acknowledged, however, was again left open by the Court. Granting an adoption in this regard may therefore already be sufficient in order to respect the applicants' private life and in particular the child's identity.³⁷⁰

Ultimately, the possible wider implications of the Court's case-law are to be recalled. So, it is in principle accepted that states which prohibit surrogacy may continue to penalise and hence deter their citizens from conducting surrogacy agreements abroad, just not at the expense of the child's rights and interests. But if no adequate alternative sanctions are found, it is feared that potential intending parents may even be more encouraged to travel abroad in order to 'commission' a child. Such an outcome, however, would be highly problematic and extremely difficult to justify, especially when considering that it is predominantly poor countries, and even poorer women, who decide to carry a baby to full term for wealthy couples from abroad.

³⁶⁹ *Mennesson v France* (n 9) § 79.

³⁷⁰ *Ibid* § 100.

From a children's rights perspective, the Court's ruling in *Mennesson v France* is in principle welcomed for it highlights the need to protect the child's identity and largely gives precedence to the child's best interests. However, one must not forget the possible broader implications the judgment might have on the international surrogacy market as a whole, for it can indeed be criticised as sending 'a symbolic message that it is acceptable to protect domestic wombs at the cost of foreign wombs'³⁷¹.

³⁷¹ Bala (n 13) 15; see also Puppinck and De La Hougue (n 322).

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Abstract

Taking up a child-centred perspective, the thesis at hand discusses and analyses the consequences arising from the non-recognition of legal parent-child relationships in the context of cross-border surrogacy arrangements. As the vast majority of states do not allow for such arrangements to be concluded, a global surrogacy market, flourishing in those few countries where this practice is tolerated, has been emerging over the last years. After having entered into a surrogacy agreement abroad, however, problems are likely to arise upon the return of the newly founded family. The present thesis examines one such specific problem, namely the refusal of domestic authorities in Europe to recognise the legal parent-child relationship established abroad, precisely because the child was born through surrogacy.

This study has two primary objectives. The first aim is to determine which human rights of the child are predominantly affected by the non-recognition of legal parenthood due to the state's rejectionist stance towards surrogacy. Thereby, two international human rights treaties are consulted, the Convention on the Rights of the Child (CRC) and the European Convention on Human Rights (ECHR). It then continues to look into relevant case-law by the European Court of Human Rights (ECtHR) and analyses in particular the judgment *Mennesson v France* (no 65192/11, ECHR 2014). The second objective is therefore to identify under which circumstances are states compelled to acknowledge the legal parenthood established abroad in the context of surrogacy, according to current human rights standards enshrined in the ECHR.

With regard to the first research question, it is concluded that the refusal to formally acknowledge the legal parent-child relationship primarily interferes with Article 7 of the CRC as it contains, inter alia, the right to be officially registered at birth and to acquire a nationality. Further, the child's right to respect for his or her private and family life as laid down in Article 8 of the ECHR is in general affected. In addition, children are at risk of being discriminated against based on how they were born and may have their best interests not adequately taken into account when states decide to refuse recognition.

Concerning the second main objective, the analysis of case-law has shown that states must in principle acknowledge the parenthood of intending parents, provided they are genetically related to the child. Not doing so would infringe the child's right to establish details of his or her identity. What has not been conclusively clarified, however, is to what extent these obligations exist in connection to relationships lacking any biological ties. With regard to the child's best interests and the right to an identity, the view is taken that legal parenthood shall be acknowledged by receiving states regardless of a genetic relationship.

Abstract (German)

Diese Masterarbeit beleuchtet aus kinderrechtlicher Perspektive die Konsequenzen, die sich aus der Nichtanerkennung der rechtlichen Elternschaft ergeben, welche im Ausland aufgrund von Leihmutterschaftsvereinbarungen begründet wurden. Da Leihmutterschaft in den meisten europäischen Ländern verboten ist, sehen sich viele Wunscheltern gezwungen, ins Ausland zu reisen um ihren Kinderwunsch mithilfe einer Leihmutter zu realisieren. Häufig treten allerdings rechtliche Probleme auf, und zwar spätestens dann, wenn die Wunscheltern mit dem im Ausland geborenen Kind wieder heimkehren wollen. Ein spezifisches Problem ist die Verweigerung der rechtlichen Anerkennung der Elternschaft, da Leihmutterschaftsverträge in den Herkunftsländern der Eltern verboten sind und als nichtig gelten.

Vorliegende Arbeit verfolgt im Wesentlichen zwei Ziele. Erstens wird untersucht, welche Rechte des Kindes mit der Nichtanerkennung der Elternschaft vordergründig betroffen sind. Zu Rate gezogen werden hierbei die UN-Kinderrechtskonvention (KRK) wie auch die Europäische Menschenrechtskonvention (EMRK). Zweitens wird versucht herauszufinden, welche Verpflichtungen sich in diesem Kontext aus den in der EMRK verbrieften Rechten für ihre Mitgliedstaaten ergeben. Zu diesem Zweck werden kürzlich ergangene Entscheidungen des EGMR analysiert, im Besonderen der Fall *Mennesson gg Frankreich* (Nr 65192/11).

In Bezug auf die erste Forschungsfrage wurde festgestellt, dass in erster Linie Artikel 7 KRK bzw Artikel 8 EMRK betroffen sind. Jedes Kind hat das Recht, unverzüglich nach seiner Geburt registriert zu werden und eine Staatsbürgerschaft zu erhalten. Außerdem wird durch die Nichtanerkennung einer im Ausland begründeten Elternschaft regelmäßig in das Recht des Kindes auf Achtung seines Privat- und Familienlebens eingegriffen. Bezüglich des zweiten Teils der Untersuchung hat die Analyse der Rechtsprechung des EGMR ergeben, dass Mitgliedstaaten vor allem dann zur Anerkennung der Elternschaft verpflichtet sind, wenn die Wunscheltern mit dem Kind genetisch verwandt sind. Es wurde vom Gerichtshof jedoch nicht abschließend beurteilt,

inwieweit sich diese Verpflichtungen auch auf Konstellationen erstrecken, in denen das Kind nicht von den Wunscheltern abstammt. Im Hinblick auf das Wohl des Kindes und des Rechts auf Schutz seiner Identität wurde hier jedoch der Schluss gezogen, die Elternschaft unabhängig von der Existenz einer genetischen Verwandtschaft anzuerkennen.

Curriculum Vitae

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EDUCATION

10/2013 – 09/2015	Vienna Master of Arts in Human Rights, title to be obtained: Master of Arts (ISCED 5A) Master thesis: <i>A Children's Rights Perspective on the Recognition of Legal Parenthood Following Cross-Border Surrogacy Arrangements</i> University of Vienna, Austria
14/07/2014 – 27/07/2014	CREAN Student's Summer Workshop on Children's Rights to Non-Discrimination University of Minho, Braga, Portugal
10/2007 – 01/2013	Diploma Studies in Law, awarded title: Magistra iuris (ISCED 5A) Diploma thesis: <i>Freedom of the Arts in the European legal area</i> University of Graz, Austria
10/2008 – 01/2013	Bachelor Degree Programme in English (not completed) University of Graz, Austria
02/2011 – 06/2011	Study Exchange (via ERASMUS) Faculty of Law, Aarhus University, Denmark
09/2003 – 07/2007	Secondary school leaving certificate: Matura (ISCED 3A), completed with excellent success Sportrealgymnasium Saalfelden, Austria

RELEVANT WORK EXPERIENCE

09/2014 – 01/2015	Legal traineeship at the European Court of Human Rights Council of Europe, Strasbourg, France
03/2013 – 07/2013	Legal traineeship at Court Oberlandesgericht Graz, Austria

03/2012 – 09/2012

Study assistant at the Institute for Austrian and
International Civil Procedure Law, Insolvency Law and
Agricultural Legislation
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PERSONAL SKILLS

Mother tongue

German

Other languages

English

French

UNDERSTANDING		SPEAKING		WRITING
Listening	Reading	Spoken interaction	Spoken production	
C2	C2	C2	C2	C2
TOEFL iBT Score: 119				
A2	A2	A2	A2	A2
Levels: A1/2: Basic user - B1/2: Independent user - C1/2 Proficient user Common European Framework of Reference for Languages				