



# A Children's Rights Approach to Surrogacy

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**Abstract.** Today, surrogacy procedures offer medical solutions to intended parents who otherwise cannot have a child naturally. Various legal and ethical issues arise from both traditional and gestational surrogacy from the child's point of view. To balance the rights of children and parents, international legal documents and case law of the European Court on Human Rights, which deliver approaches to ensure the best interest of the child and the child's right to identity as highlighted in the United Nations Convention on Children's Rights, are considered in surrogacy procedures where the legal situation is complex due to the different national regulations.

**Keywords:** cross-border surrogacy, best interest of the child, legal parent–child relationship

## 1. Introduction

Surrogacy arrangements have challenged traditional family structures. Originally, founding a family with a child occurred in the very private sphere of a man and woman, with no interference from third persons. However, involvement of a reproductive clinic, a surrogate mother, and sometimes a gamete donor exposed the intimate family relationship to a broader perspective. As more subjects are present in surrogacy arrangements, legal ties become more complex, thus finding a fair balance between the rights of all is demanding. Especially, the child's position is really sensitive, as the child is in the primal care of his or her legal parents, and when legal parenthood is not that obvious (which is usually the case in surrogacy), the parental responsibility is split. Thus, due to the controversy of this phenomenon, states tend to choose one of three legislative approaches (complete prohibition, permissive legislation or non-regulation, and silence on the issue) to manage surrogacy legally. Moreover, cross-border surrogacy agreements make the family structure even more complex. Here, the intended parents' main

reason to travel abroad to engage in such procedures are the legal obstacles their home country creates. To avoid the consequences of prohibitive legislation, they choose a state where surrogacy is legal and accessible to foreigners. However, upon returning home, grave issues surface when the intended parents wish to register the child before a competent civil registry based on the foreign birth certificate. This likely leaves the child in exceptional factual and legal uncertainty concerning the parents' ties to him or her and the child's nationality. Sometimes, even placement into alternative care may be ordered.

The child's right to identity must therefore be the object of prominent focus, including the right to know his or her genetic origins. The best interests of the child and the right to a private and family life must be considered paramount. These values are very broad in the context of surrogate-born children, and states that are parties to any international children's rights document must assume positive and negative obligations to create a legal environment in which these rights can be exercised. However, the right to self-determination of the surrogate mother and the intended parents might not be fully respected, as usually the intended parents are the putative holders of parental status, including all rights and responsibilities; however, the majority of the states in Europe declare the birth mother as the legal parent of the child.

The clash of rights and legal values is definite; which one prevails often lies in the hands of courts, mainly the European Court of Human Rights (ECtHR), which offers numerous interpretative approaches to deal with international surrogacy arrangements to avoid human rights violations. As of today, it is evident that children's rights are human rights, and thus the international community must take steps towards improving the situation of every child, including surrogate-born-children, to benefit from the rights enshrined in several international conventions. In particular, it must be examined how the child's best interests and right to identity are configured in cases of surrogacy in such a delicate familial structure. This is notwithstanding the legal implications and issues stemming mainly from international surrogacy arrangements.

## **2. History of International Legal Protection of Children**

The recognition of specific legal protections to children emerged hand in hand with the anti-child labour movements in the 19<sup>th</sup> century. The consequences of the Industrial Revolution implied a bigger workload, which was imposed on children. Parental authority remained in focus and stayed decisive in family power dynamics, and thus the formal equality introduced with the bourgeois-influenced transformation of civil law and the Industrial Revolution remained non-inclusive to

children.<sup>1</sup> The idea of children being valuable members of the society was starting to prevail, which started to highlight the importance of their right to education. As exercising the right to education was not compatible with child labour, it resulted in a significant reduction in the child labour force. Moreover, social awareness about children's well-being started to gain recognition.<sup>2</sup> A great breakthrough was achieved by the International Labour Organization in 1919, namely Convention No. 5 on the minimum age of children for employment in industry and Convention No. 6 on the night work of young persons in industry, which started a wave in recognition of the exclusive link between compulsory education and minimum age of employment.<sup>3</sup>

The authentic blossoming of children's rights in a normative sense started in the 20<sup>th</sup> century. First, many national laws were passed, focusing on the protection of children, which contributed to the recognition of the need for an extensive legal document protecting children's rights. The devastating consequences of the First World War highlighted the losses of the most vulnerable groups of society, and thus public opinion turned to ways of assisting their recovery. Noteworthy examples are the Save the Children Fund established by Eglantyne Jebb in 1919, International Save the Children Union launched by R  dda Barnen, and International Committee of the Red Cross in 1920. These efforts culminated in the adoption of the Declaration of the Rights of the Child by the League of Nations in Geneva in 1924. The declaration, in just five articles,<sup>4</sup> aimed to direct member states' attention to the universal international legal protection of children, which had to be a general requirement to ensure the healthy upbringing of children, as their weak position makes them more likely to be subjected to abuse and exploitation. The motivation behind drafting the Geneva Declaration was to create a special group of legal subjects for children, recognise their interests and need, and make visible for adults the duties they owe to children who depend on them. Regardless of the goodwilled efforts, the Geneva Declaration remained non-binding on the member states; nevertheless, it was a great initiative and the first step towards recognition and implementation of the comprehensive international legal protection for children.

Under the scope of the United Nations (UN), the field of children's rights gained special recognition and had the opportunity to ensure the ongoing development

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1 Hrabar, 2016, p. 21.

2 Although child labour itself was not considered as exploitative and harmful, with time, legal safeguards regulating the minimum and maximum age to work, improving working conditions, and shortening the working hours were introduced as of the second half of the 19<sup>th</sup> century in some countries such as Prussia, Denmark, Germany, Italy, the Netherlands, and Belgium.

3 Grgurev, 206, p. 103.

4 These articles, if paraphrased in today's legal terms, encompassed the right to development; right to survival, health, resocialisation, rehabilitation, and substitute care; right to protection from economic exploitation and restricted work conditions; and right to upbringing and all-round development and to nurture and educate the child in a way that later he or she can be beneficial to the society.

of the legal protection of children. The second step in this process was embodied by the adoption of the Declaration on the Rights of the Child proclaimed by UN General Assembly Resolution No. 1386 (XIV), which revised, extended, and updated the wording of the Geneva Declaration, as well as reframed the overall message towards the international community. It specifically asserted the freedoms and rights of children and emphasised the pursuit of the well-being of both children and the society.<sup>5</sup>

These noteworthy efforts culminated in the adoption of the Convention on the Rights of the Child<sup>6</sup> (CRC), intended to oblige member states to actively contribute to the well-being of children and shape their national legislation to achieve a universal children's rights-based approach. Their progress is monitored by a special committee that delivers expert reports to the state parties on whether they managed to fulfil the requirements for proper implementation. From the other side, member states who ratified the CRC have to submit a report regarding the progress they made in implementing the advice of the committee on national child protection policies.<sup>7</sup> This is the fundamental method by which the UN puts certain pressure on state parties to respect the CRC regulations, as it is not 'strictly' binding on states that had ratified it. Overall, in international law, state parties are bound to abide by its provisions.

In the sphere of the UN child protection initiatives, we ought to mention the Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography, as it is one of the most extensively ratified global agreements advocating for the criminalisation of subjects involved in instances of sexual exploitation and other forms of exploitation of minors. The Optional Protocol was adopted in 2000 and entered into force in 2002, which was preceded by a long debate and call for action initiated by the international community, the UN General Assembly, and the Special Rapporteur on the Sale of Children, Child Prostitution, and Child Pornography. They asked to extend the jurisdiction of national laws of member states to effectively tackle the criminality related to exploitation and other offences against children, as well as enhance cross-border cooperation. The Optional Protocol is of high importance regarding the protection of children in cases of international commercial surrogacy.

Furthermore, international protection of children's rights is present in the work of the Council of Europe, especially in the case law of the ECtHR. Since the European Convention on Human Rights (ECHR) has been drafted, member states have incorporated its human rights regulations into their national legislation. Although the ECHR does not specifically deal with children, some of its

5 Veerman, 1992, p. 159.

6 CRC was adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25 of 20 November 1989.

7 *Id.*, Articles 43–45.

provisions remain applicable to them. Moreover, case law of the ECtHR provides a guideline for the 'preferred' and quite comprehensive interpretations in cross-border surrogacy cases and for issues that arise from them (legal parenthood, discrimination, adoption, genetics, distinction of commercial and altruistic surrogacy procedures, etc.), including for the protection of the rights of the child if born from a surrogacy agreement. It is essential to mention that the court always examines whether the state's legislation was proportionate, pursued a legitimate aim, and was necessary in a democratic society to protect certain values when there was an interference to the applicant's certain rights. Referring to the fact that there is no consensus on whether surrogacy arrangements that were drafted abroad would gain legal recognition, member states enjoy a substantial margin of appreciation, depending on the interests and issues at stake.

Moreover, the court promulgates the CRC by using it as a source of law in the decision-making process.

In the circumstances of European Union (EU) membership, the Lisbon Treaty<sup>8</sup> brought a considerable improvement in children's rights protection at the supranational level. It has made the value of protection of children's right a general objective of the EU, which shall be enforced with regard to all EU policies, in both internal and international relations.<sup>9</sup> Accordingly, the member states have the obligation to promote children's rights. In connection with parental responsibility, the procedural law was enhanced by the revision of the Brussels IIa Regulation,<sup>10</sup> requiring procedures involving children to be accelerated and made more efficient and the promotion of stronger enforcement of children's rights.

Besides, the EU Charter of Fundamental Rights<sup>11</sup> is considered as binding and one of the fundamental, primary sources of EU law. It contains specific provisions on children's rights, thus obliging EU institutions and Member States to comply with these provisions. It is worth mentioning in connection with the ECHR that the charter's legal protection cannot be of a lower level than that of the ECHR.

As outlined above, children's rights have been at the centre of attention in the 20<sup>th</sup> century. Many different international organisations have dealt with emphasising the relevance of children's rights by approaching them from the basic human rights perspective. The outcome of interpretational development from both social and legal points of view led to the acknowledgement of the concept that children's rights are human rights. The message behind these regulations is in sync with the original motivations behind the CRC's initiators and drafters. They aimed to consider children as fully fledged rights holders with rights equal to adults,

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8 Treaty of Lisbon, 2007.

9 Treaty of Lisbon, 2007, articles 2 and 3.

10 Council Regulation (EC) No 2201/2003.

11 European Union, 2012.

highlighting the ‘contractual’ nature of the CRC between adults and children, which is based upon the three hard ‘Ps’: provision, protection, and participation.

In the context of all abovementioned international instruments, the core principles are none other than non-discrimination, best interest of the child, rights to life, survival and development, and lastly consideration of the viewpoint of the child.<sup>12</sup> When examining these principles to be ensured in family structures, assisted reproductive techniques, especially commercial surrogacy, add great complexity to the equation, particularly in the fields of the child’s best interest, right to identity (and including access to origins and family environment for the child), parental filiation, right to birth registration, and the problem of commodification and sale of children.

### 3. Clash between Children’s Rights and Surrogacy Arrangements

Utilisation of assisted reproductive technology, which encompasses surrogacy, is on the rise for establishing families. Children born through these medical procedures are entitled to the same rights as all children under the UN CRC. However, surrogacy arrangements, mainly for monetary compensation – specifically gestational<sup>13</sup> and cross-border ones – could expose the child to potential violations of his or her human rights in various ways. The use of assisted reproductive techniques is not new, and it is getting more and more popular among couples who are affected by infertility on the grounds of medical or social conditions.<sup>14</sup> Nevertheless, it brings a great complexity not only to family interrelations but also from the conceived child’s point of view.

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12 These four are the underlying principles of the UN CRC: non-discrimination in Article 2, best interests of the child in Article 3, right to survive and develop in Article 6, and right to have their views heard and taken seriously in Article 12. Notwithstanding, these principles are not exclusive to the CRC but rather are encompassed or in line with other international legal instruments, optional protocols, and conventions, which are tangentially related to children.

13 In this surrogacy agreement, the surrogate mother’s eggs are not used, and someone else is the genetic mother of the child, usually the intended mother. In gestational surrogacy arrangements, the surrogate mother is the birth mother of the child, but with no genetic filiation to him or her. This type of surrogacy seems to be ideal for prospective parents because if the medical condition causing infertility is connected to the incapability of the women to carry the child (uterine conditions, lack of a uterus, etc.) or if the pregnancy would be high-risk (heart disease, eye disease, etc.), it will result in the genetic offspring of the prospective parents to whom a surrogate gives birth.

14 Infertility is a medical condition, specifically recognised as a disease by the World Health Organization, which can impact the reproductive systems of both men and women, defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse. Social infertility is connected to social and legal obstacles that aggravate family foundation with a child for single individuals and gay and lesbian couples.

First, it is essential to provide a definition of surrogacy arrangements, as well as discuss the medical practice and address the issues they raise for children born from these procedures. Basically, surrogacy is the practice of a woman getting pregnant on behalf of another, who for medical or other reasons is not able to get pregnant and bear a child on her own. We can distinguish altruistic or commercial surrogacy, based on whether the surrogate mother receives monetary compensation above the necessary reimbursement of the medical expenses. From the biological and medical points of view, the combinations of genetic connections between the conceived child, surrogate mother, and intended parents can vary (in case a donor gamete is involved), but for the sake of simplicity, we distinguish between traditional and gestational surrogacy. In the latter case, gametes of the intended father and mother are used and fertilised in a laboratory environment, outside the body *in vitro*. Then, the embryo is implanted into the surrogate mother's uterus. Thus, the surrogate has no genetic filiation to the child although she bears and gives birth to him or her. In traditional surrogacy, the surrogate mother's eggs are used, and thus the most preferred form of surrogacy from the intended parent's perspective is the former.

Second, it is evident from the abovementioned practice that this procedure is truly contentious from the legal, ethical, and bioethical perspectives for all subjects involved. Despite all the challenging implications, this phenomenon is on the rise. We must emphasise the future children's interests and consider their basic and essential needs before, during, and after the use of this particular assisted reproductive method. The most pressing questions concern the human rights dimensions of surrogacy in relation to the child, specifically the child's right to identity, in the light of the child's best interest principle.

### **3.1. The Child's Right to Identity in Cases of Surrogacy**

The right to identity can entail many elements considering one's origins; thus, it is a fundamental determinant of one's personality. Although it has extensive components for conceptualising what identity is and how one's self is created or constructed from philosophical and sociological points of view, it is certain that knowing one's cultural, biological, national, and ethnic origins is essential in the healthy development of the child, as it has a lifelong impact on future generations.<sup>15</sup>

In legal terms, the child's right to identity is specified first in the UN CRC, namely in Article 7, which affirms that every child has the right to acquire a nationality, register his or her birth at the competent civil registry immediately after birth, have a name, and know and be cared for by his or her parents as far as possible. Article 7 renders a positive obligation towards member states to prevent children from becoming stateless or unregistered. Moreover, Article 8 stipulates that state parties

15 O'Callaghan, 2021, p. 2.



respect the right of the child to preserve his or her identity, including nationality, name, and family relations as recognised by law without unlawful interference. Moreover, the child's right to identity is closely linked to the exercise of other rights mentioned in the CRC. In particular, these include the rights to development in Article 6, keep families together in Article 9, facilitate contact with families across country borders in Article 10; and maintain continuity in a child's ethnic, religious, cultural, and linguistic backgrounds in Article 20.<sup>16</sup>

In addition, the UN Children's Fund notably highlighted the importance of preserving the child's right to identity in 2019 as the 'Society first acknowledges a child's existence and identity through birth registration. The right to be recognised as a person before the law is a critical step in ensuring lifelong protection and is a prerequisite for exercising all other rights.'<sup>17</sup> Apparently, identity rights, although very complex, shall be considered to comply with the abovementioned standards, even in cases of pre- and post-effects of surrogacy arrangements. With surrogacy in the picture, the identity protection of the child has numerous shortcomings, stemming from two main dimensions of the phenomenon.

First, complications result from the nature of the so-called 'split parenthood'<sup>18</sup> caused by the unique combination of biological and genetic links between the child, surrogate mother, and intended parents. Overall, parenthood of the child can be established through gestational, genetic, and social means; which pathway the law recognises varies from country to country.<sup>19</sup> However, there might be cases where the child born through surrogacy potentially has as many as five parents (the surrogate mother who gave birth to him or her; intended mother who contributed the genetic material; intended father who contributed the genetic material; and, if not, male and female donors who contributed the genetic material). As the dominant trend of anonymous donations of genetic material and the nature of surrogacy is that the surrogate mother does not wish to become a legal parent to the child to whom she gave birth, ultimately, the child has little chance and transparency to get to know his or her genetic origins, especially the

16 Dambach and Cantwell, 2023, p. 2.

17 United Nations Children's Fund, 2019.

18 Navratyil, 2012, p. 178.

19 In surrogacy cases, the most problematic aspect regarding establishment of parenthood is the legal status of the mother. Predominantly, countries with continental legal systems carry the long-established Roman law principle, namely the *Mater semper certa est* (the mother is always certain), which considers that the fact of childbirth is connected to legal maternity; in other words, the mother of the child is who gave birth to it. However, in some legal systems, usually where surrogacy is permitted, the biological and gestational facts can be overwritten, and maternity is established based on intent via the surrogacy contract. As the biological fact was not present for the intended mother, her maternity can be easily challenged when she returns to the home country where the Roman law principle is valid. Thus, acknowledgement of her legal maternal status can be easily contested, or even rejected, because the surrogacy contract is either illegal or null and void.



identity of the genetic parents and gestational mother. This leaves the child in an 'identity vacuum, lacking knowledge of their personal narrative'.<sup>20</sup>

On the other hand, generally, disputable surrogacy arrangement cases possess an international element (being concluded across borders), causing the child born from the agreement to grow up in the home country of the intended parents, which is geographically distinct from the place of birth and the domicile of the surrogate mother. In other words, he or she is raised at a distance from his or her ethnic and cultural origins. Knowing and being raised in alignment with one's ethnic and cultural identity and heritage and actively providing the children transparent information to link them with their ethnic and cultural backgrounds have long-term effects and contribute to their physical, psychological, cultural, and spiritual development, as evoked in Article 6 of the CRC. These elements are of paramount consideration for the child to form a cohesive identity, not to mention the relevance of accessing medical and health determinants.<sup>21</sup>

Furthermore, there are other important elements connected to the child's right to identity, as enshrined in articles 8 and 7 of the CRC, which stipulate immediate birth registration, as well as the right to have a nationality. Looking closer at the nationality aspect of identity, it is intertwined with human dignity, which can be compromised in international surrogacy arrangements by the high probability of these children becoming stateless. The core problem here also lies in the reluctance of the home country of the intended parents to recognise the effects of the surrogacy arrangements and the foreign birth certificate on their territory to maintain their ban or non-recognition of such procedures. Moreover, the practical challenges in obtaining a valid travel document or the requirement for a valid temporary visa are difficult given the conflicting legislation on legal parental filiation and nationality. There have been many infamous unfortunate

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20 Achmad, 2018, p. 60.

21 Access to medical data and medical history of the child is a crucial element of preserving his or her right to health and medical treatment in cases where a health risk occurs or there is risk of developing a hereditary disease. A clash between data protection and perseverance of anonymity of the surrogate mother (in traditional surrogacy) or gamete donors and the child's right to identity is inevitable. Nevertheless, the legal nature of these data usually fall into the scope of health data of a sensitive nature, which have high guarantees with regard to preserving confidentiality (these data may contain information about genetic data, health status, and predisposition to diseases). With the different regulations regarding the ownership of these data (usually only the owner has access rights, although they could be extended to genetic descendants), there is debate regarding whether the access should be unlimited or the disclosure should be restricted only to critical genetic data. Regulations on anonymity in sperm, oocyte, and embryo donation vary between states, and some have not ventured into the territory of surrogacy. Thus, even if the intended parents are keen on actively tracing the donor's medical and personal identity in cross-border situations, it can be extremely difficult or even impossible. For more about the child's access to genetic identity, see Panagopoulou-Koutnatzi, 2016.

cases with dramatic outcomes<sup>22</sup> where the child has been left stateless due to complications arising from cross-border surrogacy arrangements.

Lastly, the term ‘family relations’ mentioned in Article 8 also contributes to preserving the child’s right to identity by knowing and maintaining a relationship with family members. The family history includes the genetic, gestational, social, and legal forms of the child’s identity. Moreover, it encompasses a wide range of relationships, including historical ties, continuity, or separation, involving birth parents, gamete donors, siblings, grandparents, and additional relatives. Unlike the abovementioned components of the right to identity, family relations capture a much broader space for interpretation than what they practically refer to. Family relations in Article 8 intend to go beyond nuclear ties, and thus it does not focus solely on legal parenthood but parenthood in general (including genetic, gestational, and social links). These links, as discussed earlier, are multiplied in surrogacy cases. The meaning and intention of Article 8 and the reasoning for its inclusion in the CRC were to establish a basis for interpreting the provision as being relevant to aspects of a child’s identity rooted in both biological and genetic connections between children and adults. Although the biological, genetic, and gestational filiations were not mentioned explicitly in the article (as it was unforeseen at the time of codification), its drafters lightly touched on issues that may compromise the identity of a child born through assisted reproductive technologies.

In conclusion, the pressing problem is the elevated tension between the adult’s interest to preserve anonymity and confidentiality and the child’s interest to know and preserve their origins. By all accounts, it can be said that an approach to surrogacy focused on children’s rights might require the operation and maintenance of an accurate database that records the circumstances of their birth, including surrogacy arrangements, and details about the surrogate mother. Active preservation of the child’s right to identity lies especially in the hand of the legal

22 The Yamadas, a Japanese couple, entered into a gestational surrogacy arrangement in India in 2007, where the intended father and an anonymous Indian woman provided the genetic material. After the couple developed some serious marital problems, they were divorced by the time baby Manji was born to the surrogate mother. Although the intended father insisted on caring for the baby, the now ex-wife did not, as she had no biological or legal relationship to the child. So, suddenly, there were multiple candidates who could legally become the child’s mother (the surrogate mother based on the surrogacy arrangement, the egg donor on genetic basis, and the surrogate mother who gave birth to him). Neither the previously drafted surrogacy arrangement nor any legislation could give any direction to determine baby Manji’s nationality and legal family relations, which eventually exposed him to statelessness. The case was heard and quickly resolved by the Indian Supreme Court, who instructed the competent state departments to deal with the case, ultimately issuing travel documents and allowing baby Manji and his grandmother to travel to Japan, where the Japanese authorities highlighted that he could acquire Japanese citizenship once the parent–child relationship was resolved. See more in Points, 2009.

parents; moreover, the legal environment is an external factor, as the child cannot be expected to maintain his or her identity independently and actively.<sup>23</sup>

Despite the great efforts of UN organisations focused on children's rights,<sup>24</sup> shifting the member states' attitudes towards acceptance remains a challenge. The reasons for the states' reluctance in this matter are discussed later.

### **3.2. The Child's Best Interest Principle in Surrogacy**

The concept of the best interest of the child is enshrined in Article 3 of the CRC and is of primary consideration in every substantive and procedural legislative step, legal practices of the member states, and public and private decision-making that involves or affects children. This principle intends to ensure that the rights most conducive to the child's interest are realised. It also imposes a ranking in the corresponding rights of other subjects, based on which the best interests of the child are served. It basically represents a kind of positive discrimination for the child in legal relations. As one of the fundamental holistic overreaching principles of the CRC, it is the embodiment of the prioritisation of children's aspects of any case.<sup>25</sup>

The exact definition of the child's best interest is absent in the CRC. Thus, its content must be determined on a case-by-case basis, by paying special attention to the given circumstances of the case and closely analysing the situation of the child, their needs, and effects of the decision on them. Most importantly, the best interest of the child must be a primary consideration, but this interest is not of an absolute nature.<sup>26</sup>

To connect this principle to the discussion of the child's identity, the CRC Commission undoubtedly recognises that it is usual that, because surrogacy

23 Dambach and Cantwell, 2023, p. 2

24 It is worth mentioning the steps taken by the CRC Committee, which has prepared numerous recommendations connected to safeguards and guarantees to child identity preservation in cases of assisted reproduction. The UN Special Rapporteur on Sale and Sexual Exploitation of Children notably turned towards states to strengthen and pay special attention to the access to origins, for the purposes of identity preservation if the child is born through surrogacy. Moreover, in her report for the 2019 UN General Assembly, she urged states to '(d) Preserve, in all cases, all pertinent information, and establish and maintain registers and national records containing information about the genetic and gestational origins of surrogate-born children, through which children can seek to access (...) there should be comprehensive safeguards to ensure that records of the surrogate arrangement are kept in order to enable the surrogate-born children to have access to information about their origins; (e) Ensure the right of surrogate-born children to access information about their identity and origin, including their cultural, ethnic, religious and linguistic background, in line with their evolving capacity and in accordance with the legal regulations of the given country.' See more: Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, 2018.

25 UN Committee on the Rights of the Child (CRC), 2013.

26 Kaime, 2011, p. 106.

arrangements ‘modify’ the identity of the child (when the legal parental filiation and responsibility is transferred from the surrogate mother to the intended parents), it is in their best interest to protect and preserve their genetic and biological origins as well as family relations (even in the analogous case of natural conception leading to adoption, i.e. anonymous births).<sup>27</sup> In cases where modification of the child’s identity is present, this decision shall be preceded by a best interest assessment and determination conducted by qualified and competent professionals, with ‘paramount consideration’<sup>28</sup> of the best interest of the child in identity matters.<sup>29</sup> Best interest determinations are self-explanatory challenges to states prohibiting or not regulating surrogacy, as they have to recognise the parental filiation without having any original proof of the circumstances of birth, pregnancy, etc., being presented mostly with only a foreign birth certificate. Thus, UNICEF Child Identity Protection briefing notes acknowledge these challenges by expressing that

Although it is in the best interests of children to have legal parentage established as soon as possible after birth, the integrity of a child’s legal parentage in surrogacy needs to be protected through minimum standards. These include, for example, pre-surrogacy safeguards, best interest determinations (BID), consents of all parties to the arrangement, and protecting the child’s right to access their origins.<sup>30</sup>

We can conclude that the best interest of the child notion is placed among the priority principles for consideration when cross-border surrogacy takes place between member states of the UN CRC. The primary targets of these recommendations are state parties where commercial and altruistic surrogacy is illegal or not regulated at all. This is because they face a controversial situation and need to strike a balance between maintaining their public order and respecting the child’s right listed in the UN CRC, as well as other regional human rights frameworks at the level of the EU and the Council of Europe, even when there is a lack of unified European legal instruments addressing surrogacy.<sup>31</sup>

27 The CRC Committee was not satisfied with the possibility of the so-called ‘baby boxes’ practice in the Republic of Korea, an initiative operated by some religious organisations, which is considered to be a safe and anonymous way for mothers in desperate situations to leave their unwanted babies. The CRC Committee urged to prohibit the practice and ‘to consider introducing, as a last resort, the possibility of confidential hospital births’ (UN Committee on the Rights of the Child, 2019). These initiatives are also operating in other member states; in Central Europe, the Czech Republic is a notable example in this field.

28 UN Committee on the Rights of the Child (CRC), 2013.

29 Dambach and Cantwell, 2023, p. 10.

30 Unicef and Child Identity Protection, 2022, p. 2.

31 Garay, 2020, p. 74.

## 4. ECtHR's Children's Rights-Based Approach to Surrogacy

Undoubtedly, the ECtHR case law contributes to navigating the human rights aspects of surrogacy, which generally affect the member states' legislation. In its decision-making process, the ECtHR turns many times to children's rights protection documents. Generally, the majority of the Council of Europe member states prohibit and condemn surrogacy, especially its non-altruistic version. Several conflicts brought before the court are connected to the non-recognition and refusal of issuing of a foreign birth certificate establishing legal parenthood based on surrogacy arrangements contracted abroad, upon return of the intended parents with a child to their home country. Given the lack of European consensus regarding surrogacy arrangements, member states enjoy a wide margin of appreciation in this area. However, the ECtHR has many times incorporated both the best interest of the child principle and the child's right to identity under the umbrella of Article 8 of the CRC (right to respect for private and family life).

The ECtHR's approach recognising parent-child relationships in cross-border surrogacy cases has been established on many occasions, especially in the following cases: *Labassée v. France* and *Mennesson v. France*,<sup>32</sup> *Foulon v. France*,<sup>33</sup> *Bouvet v. France*,<sup>34</sup> and *Laborie v. France*.<sup>35</sup>

By analysing the *Mennesson v. France* case, we may demonstrate how the best interest of the child principle and the child's right to identity played a key role in cross-border surrogacy cases.

In the factual background of the case, Mr and Mrs Menesson, both French citizens, concluded an international surrogacy agreement in California. The twins born out of this agreement had a genetic link to one of the intended parents. However, the French authorities refused to issue a French birth certificate, and thus the twins could not gain French citizenship. The ECtHR in its ruling and reasoning focused on the link between legal parentage and genetics and the difference between altruistic and commercial surrogacy. In these cases, significant emphasis was placed on preserving the child's right to identity through the recognition of parenthood with the genetic parent.<sup>36</sup> In other words, a person's identity encompasses the establishment of a legal parent-child relationship, and when this fails, an essential aspect of a persons' identity is lost.<sup>37</sup> Furthermore, the court emphasised how the best interest of the child principle was not considered by the French authorities, while it should have been a basis in public decision-

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

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

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

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

36 Trimmings, 2020, p. 198.

37 *Mennesson*, para. 96.

making concerning the child. The French authorities violated the child's right to respect for private life because their right to identity in French society was not ensured due to the refusal of their French nationality.

By relying on the children's rights-based approach, the court gave precedence to the biological connection in surrogacy cases while suggesting that the best interest of the child should precede public policy concerns over surrogacy.<sup>38</sup> This guidance of the ECtHR was further affirmed in the cases of *Paradiso and Campanelli v. Italy*<sup>39</sup> and *Valdís Fjölnisdóttir and Others v. Iceland*,<sup>40</sup> where the steps taken by the public authorities of states where surrogacy is against the law – involving formal non-recognition of the family relations between the child and the non-genetic intended parents – constituted a lawful and necessary interference with the applicants' right to respect for private and family life.

Although the court clearly focused on the genetic/biological link as having decisive importance in establishing parenthood, it also acknowledged that adoption<sup>41</sup> is a valid option for the genetically non-related intended parent.<sup>42</sup> Nevertheless, the court still left some relevant and pressing questions open in this regard.<sup>43</sup>

Additionally, the ECtHR gave the green light to recognising the effects of surrogate motherhood in a cross-border context in an Advisory Opinion<sup>44</sup> following up the *Mennesson* case, as in a

situation where a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent–child relationship with the intended father has been recognized in domestic law:

1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent–child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother';

38 Trimmings, 2020, pp. 199, 200.

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

40 *Valdís Fjölnisdóttir and Others v. Iceland*, App. no 71552/17.

41 Nevertheless, it is important to highlight that the Hague Conference of Private International Law has explicitly emphasised that the structure outlined in the 1993 Hague Adoption Convention is not applicable to surrogacy agreements. Consequently, the conference established a working group on parentage/surrogacy to assess the viability of a private international law instrument in this regard.

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

43 Further issues arise from other situations when the surrogate mother is genetically related to the child. Whether this approach of the court applies also to genetic motherhood, not only fatherhood, and whether this reasoning in the *Mennesson* case could be applied to same-sex couples is further discussed here: Trimmings, 2019.

44 European Court of Human Rights (Grand Chamber), 2019.

2. the child's right to respect for private life does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used.<sup>45</sup>

As the case law presented above points out, the attitude of the ECtHR towards cross-border surrogacy arrangements is underpinned by a child-protection-centred approach, focusing on the best interest of the child principle and the child's right to identity. Although all international hard and soft law instruments protecting children's rights represent important and valid guidelines for member states, this also raises concerns that such a child-focused approach suggests the existence of a loophole in the law of the prohibiting states. Putting it simply, measures incorporated in the member states' law to prevent and discourage cross-border surrogacy practice (prohibitive regulation) usually hinder the safeguards of the best interest of the child. This means that the ECtHR, in its endeavour to prioritise the child's best interests, effectively legitimises surrogacy by granting legal parentage to commissioning parents.<sup>46</sup>

## 5. Conclusions

The evolution of surrogacy arrangements has challenged conventional notions of family structures, necessitating careful consideration of the legal and ethical dimensions. As surrogacy involves multiple parties and intricate legal ties, finding an equitable balance among the rights of all stakeholders remains a significant challenge. It is crucial to pay particular attention to the welfare of the child, who often becomes the key point of contention in surrogacy cases.

Throughout history, the society's perception of children has gradually changed from being assets to the family and society to becoming fully independent individuals with the potential of becoming contributors to the society, with their own rights and responsibilities, especially the right to be involved and participate in any decision-making process concerning them by expressing their standpoints on the issue. The UN CRC, being the most important legally binding document as well as the most widely ratified among UN member states, managed to shift the adult-centrism approach to children in general.

However, cross-border surrogacy initiated complex discussions in both the law and society about the 'debiologisation' of family structures, overemphasising the role of individual freedom and desires and the emergence of technocracy in

<sup>45</sup> Korać Graovac, 2021, p. 44.

<sup>46</sup> Čulo *et al.*, 2019, p. 797.



family creation. These have definitely dismantled the traditional views on family and influenced the legal environment and solutions to filiation.

In the middle of the conflicting ethical and legal ideals, the intended child is stuck between the competing interests of the state and wishes of the intended parents. Moreover, the non-universal regulation on international surrogacy arrangements elevates the risk of a breach in the children's rights.

Articles 7 and 8 of the UN CRC, the best interest of the child principle, and the follow-up guidance and recommendations carried out by professionals from interdisciplinary fields intend to help navigate situations wherein the children's right to identity and their best interest in identity modification are challenged. The UN CRC and the identity regulations help the ECtHR in its decision-making and interpretation of the child's right in the context of cross-border surrogacy arrangements; herein, the competing interests are usually related to parental filiation and the legality of surrogacy arrangements.

The child's identity is encompassed in Article 8 of the CRC, and it seems that case law suggests that the ECtHR highlights the genetic parentage and the child's right to identity, underscoring the importance of legal recognition of parent-child relationships in surrogacy contexts. However, while prioritising the child's welfare, the ECtHR's approach may inadvertently undermine prohibitive regulations enacted by member states, effectively legitimising surrogacy in certain instances. That is why member states express reluctance towards accepting the child's rights approach if they expressly prohibit surrogacy in their legislation.

Moving forward, it is essential for policymakers and legal authorities to appease the complexities of surrogacy with the fundamental rights of children, ensuring that legislative frameworks uphold the principles of the child's best interests and right to identity. Collaborative efforts at the international level are crucial to address the multifaceted challenges posed by surrogacy arrangements, safeguarding the rights and well-being of surrogate-born children in an evolving legal landscape.

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