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**CHILDREN'S RIGHT TO PRIVATE AND FAMILY LIFE IN
INTERNATIONAL SURROGACY AGREEMENTS IN THE
EUROPEAN UNION**

Bachelor's thesis

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I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

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The paper conforms to requirements in force
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ABSTRACT

This research examines the legal framework of international surrogacy agreements in the European Union and analyzes its impact on children's right to private and family life. The implementation of the Convention on the Rights of the Child with the the European Convention on Human Rights Article 8, the right to private and family life are focused from perspective of the Child's Best interest principle in this thesis. The hypothesis is that violations to children's right to a private and family life happen due to the lack of harmonized legislation of international surrogacy agreements in the EU. The research aim is to examine the legal issues within international surrogacies and protection of children's rights.

This thesis concludes the need for safeguarding childrens' right to private and family life, including the right to nationality, identity and legal parentage in order to pursue the best interest of the child in international surrogacy agreements in the EU.

The research is conducted with methods based on the EU and international legislation, literature, legal and medical articles and the European Court of Human Rights case law resulting to the lack of regulations in EU, violating children's right to private and family life. It is stated that international surrogacy needs harmonization on regulation in the European Union in order to protect children's right to private and family life.

Keywords: international surrogacy agreement, childs best interest, right to private and family life, children's rights

LIST OF ABBREVIATIONS

The European Union (EU)

The Court of Justice of the European Union (CJEU)

The European Court of Human Rights (ECtHR)

The European Parliament (EP)

The Hague Conference on Private International Law (HCCH)

The Treaty on the Functioning of the European Union (TFEU)

United Nations (UN)

The Charter of Fundamental Rights of European Union (ECHR)

Convention on the Rights of the Child (CRC)

International Social Services (ISS)

INTRODUCTION

Surrogacy has been a trending and divisive topic in the public discussions, due to the increasing popularity within couples struggling to have children from various reasons. Childlessness is a problem many couples face, and surrogacy is a raising method between parents who are unable to have children, making it a relevant issue with complex legal arrangements.¹ With the technology today, these parents are still able to have children due to surrogacy.² Thus, it raises a lot of legal matters that need to be regulated and most importantly protect children in the process.

Often the subject creates mixed and contradictory feelings arising from ethical and moral challenges. Despite surrogacy being a practice that has been in use for several decades, only a few states have legalized it, and it remains illegal in many others. Within these jurisdictions a lot of legal problems raise with international agreements. Legislation regarding surrogacy varies around EU broadly. Legal framework must deal with legal issues regarding family law, contract law, human's and children's rights, and adoption as well as dealing with ethical and moral aspects of the subject. However, the European Union does not have legislation regarding surrogacy yet.³

This thesis is focused on determining whether international surrogacy agreements protect the children's right to the right to private and family life in the light of the United Nation's Convention on the Rights of Child. This thesis is examining the right of private and family life, the hypothesis being that children's rights are not protected in surrogacy agreement due the lack of legislation. Various data from legal articles, other law research papers, case law, court rulings and legal framework will be used within the European Union and other international institutions. Professional opinions from medical experts will be used due medical definitions for surrogacy. When focusing on legal rules the method used is theoretical background of the research, which is a great way to support the hypothesis with wide analysis. Thesis includes the contradistinctions in various legal framework. The legislation of surrogacy can differ a lot in the EU member states, so identifying various regulations can identify benefits and understanding of different jurisdictions.

¹ Fenton-Glynn, C. (2016). International surrogacy before the European Court of Human Rights. *Human Reproduction*, 31(8), 1639-1646. doi: 10.1093/humrep/dew175.

² Kriari, I., & Valongo, A. (2019). International issues regarding surrogacy. *Italian Journal of Public Law*, 11(1), 301-316

³ Stark, B. (2012). Transnational surrogacy and international human rights. *ILSA Journal of International & Comparative Law*, 18(2), 359-374.

This thesis researches the violations in international surrogacy agreements against children's right to private and family life. The research examines whether children's rights are protected in the arrangements or not in the scope of EU. The right that this thesis is focused on is Article 8 of the European Convention on Human Rights, as well as rights on the Convention on the Rights of the Child, scoping on family life; the right to nationality, identity and legal parentage. The author argues that children's right to private and family life is violated due to the lack of regulation in EU.

The purpose of this thesis is to understand the legal implications of surrogacy agreements and whether children's rights are safeguarded in them. The best interest of children can be in danger through these international arrangements. This thesis may argue that while surrogacy agreements do provide a good opportunity for infertile or same-sex couples to have children, it also raises issues related to the rights of children. The thesis also explores the challenges within the lack of legal frameworks in the European Union.

In this thesis basic facts about surrogacy will be provided, as well as the definition of it and how the legislation for surrogacies varies around the European Union. The legislation on the international scope is presented as well as EU case law regarding international surrogacy. At the end of the thesis, conclusion of the future of surrogacy legislation and other conclusions, such as argumentation of the need to regulate surrogacies more, are stated.

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1. SURROGACY IN THE EUROPEAN UNION

Surrogacy is a practise of assisted reproduction, where another woman carries a child for another woman.⁴ The word surrogacy comes from Latin language, “Subrogare”.⁵ Translated into English, it means substitute, referring to a person who acts as a replacement when filling a particular role.⁶ In the context of surrogacy, this refers to a woman who carries the pregnancy and then delivers the child for another couple or individual – filling the role of carrying the child, intending not to keep it themselves. The woman carrying the child is called surrogate mother. The child will then be given to the intended parents or parent.⁷

The types of surrogacies used in the arrangements varies from traditional and natural to gestational and via vitro fertilization. The two methods exercised are called the traditional surrogacy and the gestational surrogacy.⁸ The intended parents are usually able to choose the method for surrogacy, depending on the national laws and jurisdiction.⁹ In traditional surrogacy, also known as natural, partial, or straight surrogacy, the surrogate mother will be artificially inseminated by the intended father’s sperm or by donated sperm. The surrogate mother’s eggs are inseminated¹⁰, meaning that this way, the surrogate mother is also a genetic parent to the child.¹¹ Insemination of the surrogate mother can occur through natural means or artificial insemination. When used the intended father’s sperm, the child will genetically be related to the intended father as well as to the surrogate mother. If donor sperm is used, the child is not genetically related to intended parents. Insemination can be performed by the parties themselves, without medical intervention, which would be used in the case of artificial insemination. However, depending on the jurisdiction, the intended parents who use

⁴ Jadvá, V., Murray, C., Lycett, E., MacCallum, F., & Golombok, S. (2003). Surrogacy: The experiences of surrogate mothers. *Human Reproduction*, 18(10), 2196-2204.

⁵ Patel, S., Jadeja, Y., Bhadarka, H. K., Patel, S., Patel, S., & Sodagar, N. R. (2018). Insight into different aspects of surrogacy practices. *Journal of Human Reproductive Sciences*, 11(1), 4-12.

⁶ Ibid.

⁷ Foret, B., & Bolzonaro, C. (2021). How the European Union deals with surrogacy. *Birth without borders as a driver of value conflicts? Gender, Technology and Development*, 25(1), 1-20.

⁸ Ghodrati, F. (2013). A comparative study of surrogacy rights in Iran and European countries: A review article. *Journal of Reproductive Healthcare and Medicine*, 3(1), 11-17.

⁹ Ibid.

¹⁰ Patel, S., Jadeja, Y., Bhadarka, H. K., Patel, S., Patel, S., & Sodagar, N. R. (2018). Insight into different aspects of surrogacy practices. *Journal of Human Reproductive Sciences*, 11(1), 4-12.

¹¹ Ibid.

donor sperm, might have to go through an adoption process to establish the legal parental rights for the child.¹²

Gestational surrogacy involves arrangement where an embryo must be created.¹³ Alternatively called the host or full surrogacy can be done in two different ways. One option is to take sperm from the intended parents and transfer it to the surrogate mother's uterus via IVF (vitro fertilization). This method referred to as gestational carrier, involved an embryo created via in IVF into the surrogate mother. The child in this arrangement is genetically unrelated to the surrogate mother, meaning that the surrogate mother has no genetic connection to the child. Another option is to use the intended father's sperm and the intended mother's eggs to create the embryo.¹⁴ The various forms of gestational surrogacy are to use the intended father's sperm and donor eggs, or donor embryo or the intended father's sperm and a donor egg to create the embryo. The intended mother's egg and donor sperm can be used, but as well as donor embryo can be used to the surrogate mother, where the resulting child is genetically unrelated to the intended parent(s).¹⁵

Surrogacy arrangements can be classified into two categories. In commercial surrogacies, the surrogate mother receives a financial compensation for the pregnancy. Any kind of commercial gain, money, services, or financial advantage is classified as this.¹⁶ If the surrogate mother does not receive any compensation for medical bills and other costs related to the pregnancy, such as insurance coverage, it is classified as altruistic surrogacy.¹⁷

In the European Union level surrogacy has not been regulated. Due to the different national legislation in the European Union member states, in some state's surrogacy is legal, partly legal or prohibited all together.¹⁸ In addition, some jurisdictions prohibit commercial surrogacies but allow altruistic. Furthermore, some countries have no legislation regarding surrogacy at all. EU has had interest in regulating surrogacy since 2010s¹⁹, when rulings of the Court of Justice of the European

¹² Bhatia, K., Kalsang, S., Martindale, E. A., Rustamov, O., & Nysenbaum, A. M. (2009). Surrogate pregnancy: An essential guide for clinicians. *The Obstetrician & Gynaecologist*, 11(2), 97-102.

¹³ Patel, S., Jadeja, Y., Bhadarka, H. K., Patel, S., Patel, S., & Sodagar, N. R. (2018). Insight into different aspects of surrogacy practices. *Journal of Human Reproductive Sciences*, 11(1), 4-12.

¹⁴ Ibid.

¹⁵ Brinsden, P. R. (2003). Gestational surrogacy. *Human Reproduction Update*, 9(5), 483-491.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Foret, B., & Bolzonaro, C. (2021). How the European Union deals with surrogacy. *Birth without borders as a driver of value conflicts?* *Gender, Technology and Development*, 25(1), 1-20.

¹⁹ Ibid.

Union (CJEU), as well as European Court of Human Rights (ECtHR) advisory opinions and the European Parliament (EP) dismissed the agenda. Surrogacy can be seen as transnational and international legal issue, which contains also major morality and ethical challenges. Most common reason for banning surrogacy is the violation of human dignity, both for the surrogate mother and the intended child.²⁰ EU has not developed regulatory framework around surrogacy yet. Due to this, international institutions have taken the role to govern and guide surrogacy.²¹ The Hague Conference on Private International Law (HCCH) and United Nations (UN) have expressed interest to monitor international surrogacy agreements.²² As the popularity of surrogacies increases, EU aims to take a stand on the legislation and ethical side.²³

Surrogacy has created conflicts between European values, highlighting the need for EU to create clarity and clear rules on legal parenthood and fundamental rights within the legal framework.²⁴ Firstly, cross-border surrogacy has led to legal conflicts that have required the attention of European courts. Secondly, debates surrounding surrogacy in individual member states have changed into more wide discussion transnationally. Lastly, surrogacy has sparked conflicts between different "European values" outlined in EU treaties, such as human dignity and free movement.²⁵

In 2013, there was a study about the need for EU to regulate surrogacy.²⁶ The study examined whether EU needs to implement clarity over the legal parenthood of the child, guaranteeing the child's right to leave their country of origin, and securing the child's right to permanent residency in the receiving country.²⁷ Within increasing practise of international surrogacy arrangements, the rising issues of private international law and fundamental rights are directly affecting human lives. These issues include determining parentage, nationality and the right to family life.²⁸ Although family law falls under the of national governments, EU can intervene in matters with cross-border implications, as defined in Article 81 of the Treaty on the Functioning of the European Union (TFEU).²⁹

²⁰ van Beers, B. (2018). A revolution by stealth: A legal-ethical analysis of the rise of pre-conception authorization of surrogacy agreements. *Journal of Law and Medicine*, 25(1), 36-57.

²¹ Coutinho, T. (2019). Surrogacy in the light of European Union law: Brief considerations. *Unio EU Law Journal*.

²² Ibid.

²³ Rigon, A., & Chateau, A. (2019). Regulating international surrogacy arrangements – State of play. European Parliament.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Article 81 (3) TFEU. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12008E081>

The legality of surrogacy varies greatly around EU. Some member states prohibit surrogacy due to concerns about human dignity violations for the surrogate mother and the child.³⁰ Many factors, such as ethical and moral considerations, complicate the regulation of surrogacies regulation. Meanwhile other states do permit surrogacies, most commonly altruistic surrogacies.³¹ Legality of surrogacies have been justified based on the right to form a family, freedom of personal autonomy and freedom of disposition over one's own body and the right to free development of personality.³² There are also member states who have no regulation about surrogacies at all.³³ Regardless of the regulations and legality that varies within the states, surrogacy arrangements still occur, and domestic jurisdictions need to process the legal issues rising from the lack of consensus. Surrogacies lawfulness in EU varies broadly. States, where surrogacy is legal (both altruistic and commercial), are Greece, Ukraine, and United Kingdom. Member states where surrogacy is only partially legal are Belgium, Netherlands, Portugal, and Denmark. Lastly, member states that prohibit surrogacy all together are France, Germany, Italy, Lithuania, and Spain.³⁴

Due to the lack of regulations of surrogacies in the EU, some international institutions have undertaken the position of controlling the policies of international surrogacies. However, these guidelines are not binding, which can potentially harm the children in the process, causing violations on the child's identity and nationality and overall the right to respect for family life. Not only are children's rights in danger but the intended parents' legal parentage rights as well. In addition, the surrogate mothers do need protection in the surrogacy processes and their rights should be safeguarded in the regulations. The need to protect the children's fundamental right to private and family life is the primary need, due to the violations they face from member states varying national laws.

The Hague Conference on Private International Law (HCCH) is organization which includes all EU member states and EU itself. HCCH works as intergovernmental institution and has group of experts aiming to harmonize international principles of private international law to national

³⁰ Shaffer, G. C. (2013). Surrogacy, privacy, and the American Convention on Human Rights. *Yale Journal of International Law*, 38(1), 1-55.

³¹ Ibid.

³² Ibid.

³³ Pande, A. (2010). Transnational commercial surrogacy in India: Gifts for global sisters? *Reproductive BioMedicine & Society Online*, 1, 47-64.

³⁴ Piersanti, B., Consalvo, M., Signore, F., Del Rio, A., & Zaami, S. (2021). Surrogacy and "Procreative Tourism". What Does the Future Hold from the Ethical and Legal Perspectives? *Journal of Clinical Medicine*, 10(5), 914.

jurisdictions.³⁵ HCCH has ruled the surrogacy issues on the International Recovery of Child Support and Other Forms of Family Maintenance.³⁶ However, it does not regulate surrogacy directly itself, but the Convention more so provides framework for legal issues rising from conflicts with maintenance of children across international borders. These situations can include cases where a child was born through surrogacy.³⁷ The Convention does not address issues related to the recognition of surrogacy agreements, as surrogacy arrangements are not considered to be forms of family maintenance. However, if a child is born as a result of a surrogacy arrangement and there is a child support obligation owed to that child, the Convention's rules on the recognition and enforcement of child support orders would apply despite the national laws. Furthermore, the principle of child's best interest does recognize the need to supersede protocols that might not serve the well-being of the child.³⁸

This can be seen as a way to take a stand on surrogacy indirectly, since the Hague Conference has acknowledged the need for greater international cooperation on surrogacy, but has not yet taken concrete steps to develop a convention on the topic. In the EU the International Recovery of Child Support and Other Forms of Family Maintenance has entered into force in 2014.³⁹ Due to the subject of the convention falling fully to the under of EU jurisdiction, the EU, rather than individual member states, is a signatory to the convention. The convention is binding on all 27 member states except Denmark and only applies to territories that are part of the European Union.⁴⁰

The Hague Conference has also established their interest on advancing work on private international law issues related to the status of children in international surrogacy agreements. HCCH has planned to produce a multilateral instrument to regulate the laws of jurisdiction, applicable law, recognition and enforcement. This could lead to legal cooperation that emphasizes the various jurisdictions to work together in cross border situations while still respecting the national jurisdictions and traditions.⁴¹ HCCH drafted a report in 2022 that presents analysis on

³⁵ HCCH. (2023). About the HCCH. <https://www.hcch.net/en/about>

³⁶ Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. <https://eurlex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A22011A0722%2802%29>

³⁷ Ibid.

³⁸ Parentage/Surrogacy Experts' Group. (2023). Final Report "The feasibility of one or more private international law instruments on legal parentage". HCCH.

³⁹ Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. <https://eurlex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A22011A0722%2802%29>

⁴⁰ Ibid.

⁴¹ Rigon, A., & Chateau, A. (2019). Regulating international surrogacy arrangements – State of play. European Parliament.

parentage and surrogacy matters.⁴² The report aims to regulate legal parentage especially in cases of international surrogacy arrangements.

The United Nations has also addressed the issue of surrogacy in various contexts, including the rights of the child and the protection of human rights.⁴³ The Convention recognizes every child's right to know and be cared by their parents while preserving their identity.⁴⁴ The rights can be implicated for surrogacy agreements, since the child's identity and relationship with their biological parents and legal parents might be disputed or unclear in cases of international surrogacy. This has been demonstrated in the EU case law, where children's rights to identity, nationality and respect to family life have been violated.⁴⁵ The in worst case scenario, the child can end up in an orphanage, which does not serve the best interest of the child. The overall well-being of the child should be the priority in surrogacy agreements, which is extremely important to safeguard with international regulations and guidelines, so that such dangerous scenarios do not happen and children are able to enjoy their rights. Due to non sufficient legislation, legal protection might be hard to guard. However, while there may not be a specific report on safeguards for the protection of the rights of children born through surrogacy arrangements, the issue of surrogacy has been addressed in various United Nations conventions and documents related to human rights and the rights of the child.⁴⁶ When regulating surrogacies and children's rights, these factors that UN has highlighted should be taken into consideration for safe surrogacies for the children and the surrogate mothers.

Currently, children born through domestic or international surrogacy arrangements are not under specific protections under international human rights law, leaving them vulnerable to potential risks.⁴⁷ In addition, HCCH has drafted definitions on parentage and surrogacy matters in international cases of surrogacy. Children born through surrogacy do obtain the same rights as all children under the UN's Convention on the Rights of the Child (CRC) without any discrimination. These rights stated in the CRC do need to be exercised and safeguarded even more carefully within surrogacy agreements, for the reason of children's best interest and well-being, in a preventive method to avoid violations to the rights.

⁴² Parentage/Surrogacy Experts' Group. (2023). Final Report "The feasibility of one or more private international law instruments on legal parentage". HCCH.

⁴³ United Nations. The Convention on the Rights of the Child.

⁴⁴ United Nations. The Convention on the Rights of the Child.

⁴⁵ Paradiso and Campanelli v Italy (25358/12) European Court of Human Rights.

⁴⁶ <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-170359%22%7D>

⁴⁷ United Nations. The Convention on the Rights of the Child.

⁴⁷ Unicef. (2022). Key considerations: Children's rights & surrogacy.

In international legal framework surrogacy agreement is made between the surrogate mother and intended parents or individual.⁴⁸ The agreement is made before the child is conceived, providing the child's birth, the parties intend for the intended parents or individuals to be the child's legal parent(s) and for the child to be placed into the care of the intended parent(s).⁴⁹ International surrogacy arrangement stands for a surrogacy agreement where surrogate mother is habitually resident in one state and intended parents or individual is resident in another state. The intended child the arrangement involves is being born in one state and then relocating to the intended parents or individual's habitual state of residence.⁵⁰ The surrogacy agreement is established prior to birth, involving the surrogate mother and intended parents, so that once the child has born, the intended parents are legally the child's parents and they can take care of the them.

⁴⁸ Pillai, A. V. (2014). Intended parents and the legal concerns in surrogacy practices. *Rostrum Law Review (RLR)*, 1(3), 75-84.

⁴⁹ Parentage/Surrogacy Experts' Group. (2023). Final Report "The feasibility of one or more private international law instruments on legal parentage". HCCH.

⁵⁰ Parentage/Surrogacy Experts' Group. (2023). Final Report "The feasibility of one or more private international law instruments on legal parentage". HCCH.

2. LEGAL ISSUES IN INTERNATIONAL SURROGACY AGREEMENTS

In cases where a couple or an individual uses international surrogacy, the legal battle can be long and frustrating.⁵¹ Usually, in international surrogacy agreements, the baby might stay in the surrogate mother's state for few months after birth, due to necessary formalities. Legal issues with citizenship, nationality, acknowledging parentage and the rights of the child can be complex at this stage of surrogacy.⁵² Without safeguarding these formalities and rights, children might be denied of the nationality of the intended parents state, which could result to long legal battles or the child's rights to be taken care of their parents is violated.⁵³ The most common legal issues deal with child's nationality, identity, and legal parents and violating the right to respect for family life. These severe violations can have a huge influence on the child when they are building their identities, as EU case law demonstrates. The challenges rise when surrogacy arrangement occurs in states where its legal and intended parents are coming from a country where surrogacy is unlawful. For this reason, child's rights that are at risk are the rights to a nationality, parentage and the right to preserve one's identity, regulated in ECHR Article 8.⁵⁴ This illustrates the need for international surrogacy regulation, safeguarding all parties involved since national laws of two different states can often clash with one another, resulting in uncertainty for the child.⁵⁵

The Convention on the Rights of the Child (CRC) has been adopted by the UN in 1989, focusing on the fundamental rights of children.⁵⁶ The human rights treaty contains civil, political, economic, social, health and cultural rights of the children. EU has signed the Convention; thus, its provisions is applied to all EU member states. EU member states are required to ensure the protection of the rights of children within their jurisdictions. However, the different legal institutions and frameworks may vary across member states, none the less the CRC imposes the states to review how other law, policies and practises affect the rights laid down by CRC.⁵⁷

⁵¹ Siboni, S. (2014). Protecting the voiceless: Rights of the child in transnational surrogacy agreements. *Vanderbilt Journal of Transnational Law*, 47(1), 63-103.

⁵² Saxena, A., Mishra, M., & Malik, S. (2012). Surrogacy: Ethical and legal issues. *Indian Journal of Community Medicine*, 37(4), 201-203.

⁵³ *Ibid.*

⁵⁴ Rotabi, K. S., Mapp, S. C., Cheney, K. E., Fong, R., & McRoy, R. G. (2017). Regulating commercial global surrogacy: The best interests of the child. *Journal of Human Rights and Social Work*, 2(3), 129-141.

⁵⁵ *Ibid.*

⁵⁶ United Nations. *The Convention on the Rights of the Child*.

⁵⁷ Wade, A. (2017). The Regulation of surrogacy: a children's rights perspective. *Child Fam Law Q.*

The CRC regulates family life and personal identity issues, which are related to international surrogacy agreements. Children are entitled to all the fundamental human rights and special regulations due to their characteristic needs and limited legal capacity.⁵⁸ Because of these needs and limited capacities, children need protection and legal framework to safeguard the implementation of these rights. The Convention defines a child as an any human being under the age of 18.⁵⁹ All though the CRC is focused on children’s rights, they do apply to adults as well. The Article 8 of the ECHR has four interests identified in itself: private life, family life, home, and correspondence.⁶⁰ The Council of Europe has published a “Guide on Article 8 of the European Convention on Human Rights”, which advises the use and understanding of the Article 8.⁶¹ The Court has interpreted the Article 8 broadly, even overlapping in some cases with the four interests laid down in the Article.⁶² The Article 8’s purpose is to protect against unreasonable and unjustified interventions within the four interests, within private and public authority. The broad description creates a highly negative obligations to the EU member states, but it does bind the member states to take responsibility over positive obligations as well, including implementing positive measures.⁶³

The broad conception of the Article 8 consists of the rights to family life, identity, and parentage, as the “Guide on Article 8 of the European Convention on Human Rights” states.⁶⁴ However, the broad conception does include various rights besides these, but in the context of children’s right to private and family life in international surrogacy arrangements, namely the children’s rights to family life, identity and parentage will be examined. Within international surrogacy agreements these specific children’s rights are in danger due to the lack of legislation in EU.

The right to enjoy family life is essential for every child, but especially children born through surrogacy agreements are in need to exercise this right due to the legal difficulties with involvement of multiple parties. Intended parents might not have the legal parentage for the children which creates inability for the children to form stable and lasting family bonds. Additional difficulties, such as discrimination might can isolate the children and harm forming healthy family relationships.

⁵⁸ Wade, A. (2017). The Regulation of surrogacy: a children’s rights perspective. *Child Fam Law Q.*

⁵⁹ *Ibid.*

⁶⁰ Council of Europe. (2022). Guide on Article 8 of the European Convention on Human Rights.

⁶¹ Article 8, paragraph 1 of the European Convention on Human Rights. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62003CJ0540>

⁶² Council of Europe. (2022). Guide on Article 8 of the European Convention on Human Rights.

⁶³ Article 8, paragraph 2 of the European Convention on Human Rights. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62003CJ0540>

⁶⁴ Council of Europe. (2022). Guide on Article 8 of the European Convention on Human Rights.

Definition of the family life usually consists of the right to live together, making relationships able to develop within the family.⁶⁵ Children have the right to bonding and spending time with their family members.

Family life as a concept depends on the practise of the personal ties. ECtHR has emphasized de facto family ties in cases where legal recognition of family life has been missing, including examining the applicant's living situation and marriage.⁶⁶ Thus, family life can have various elements of dependences. According to the ECtHR, biological ties between child and parents is not a sufficient to attract the protection of the Article 8, unless other factors, such as close personal relationship exist. In the context of surrogacy, the children can have family ties to their intended parents without the biological tie. The key factor that the Court underlines is the personal ties and nature of the relationship.⁶⁷ Furthermore, once the existence of a family tie has been established, the State must take action to enable that tie to be developed and exercised by integration of the child into their family as soon as possible after birth. Respect for family life contains the legal parent-child relationship. The Article 8 requires that everyone should be able to establish their identity as individual human being that includes the legal parent-child relationship.⁶⁸

The chapter of 5 of the Handbook on European Law relating to the rights of the child deals with family life. It covers right to respect for family life, which includes the right to be cared for by parents, right to maintain contact and improper removal of children across borders.⁶⁹ Regulated in the ECHR Article 8, these positive rights are essential for children to enjoy their family rights. The child's best interests must be a primary consideration, whether taken by public authorities or private institutions, the EU Charter of Fundamental Rights requires. This has been incorporated through case law in ECtHR even though it has not been regulated directly.⁷⁰ These rights should be granted heavily to children born through international surrogacy agreements. Surrogate children often face challenges related to their origins and denying them the right to family can be further aggravating to the already complex situation, leading to isolation and stigmatization.

⁶⁵ Council of Europe. (2022). Guide on Article 8 of the European Convention on Human Rights.

⁶⁶ Council of Europe. (2022). Handbook on European law relating to the rights of the child. Strasbourg: Council of Europe Publishing.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Council of Europe. (2022). Handbook on European law relating to the rights of the child. Strasbourg: Council of Europe Publishing.

⁷⁰ Article 24 EU Charter of Fundamental Rights from [ps://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN)

The right to respect for family life is closely linked to the right to identity due to the nature of children's way to tie their identities to their families. The need to maintain contact with parents and to know their family history and background are safeguarded rights in the CRC.⁷¹ These are closely linked to the best interest of the child, as the right to respect for family life guarantees the essential need to connect with their intended parents and have a meaningful relationship with them. Denying children born through surrogacy the right to family life would undermine these efforts and perpetuate discrimination and inequality.

The right to respect for family life also implies the right to be protected from separation from their parents against their will. This measure has to be in accordance with the applicable procedure keeping the best interest of the child as priority. Furthermore, the right guarantees the right to family reunification. Children separated from families do have the right to reunite with them in specific situations.⁷² The right holds a perspective of overall benefits of the child, safeguarding important bases for stable childhood, so children are able to build their identities with their families.

The right to identity is a fundamental right recognized by the UN and regulated in the CRC, which is the first institution to recognize this right.⁷³ The Article 8 guarantees that every child has the right to an identity, including a name, a nationality, and, where possible, the right to know and be cared for by their parents.⁷⁴ From a children's perspective, the right to identity is essential, due to its enabling way to understand who they are and where they come from. Often a child's identity has significant influences from their social and cultural backgrounds. These factors create a sense of belonging and connection to their family and community.⁷⁵ A child's first expression of identity can be their name, due to being recognized and addressed by others reflects their family heritage, which is why the right to identity is important in international surrogate cases. Article 8 of ECHR safeguards the individual right to develop and pursue their personality freely.⁷⁶

The right to identity was highlighted in the case of *Paradiso and Campanelli v. Italy*, where the child who was born through international surrogate arrangement and separated from the intended

⁷¹ Council of Europe. (2022). Handbook on European law relating to the rights of the child. Strasbourg: Council of Europe Publishing.

⁷² Ibid.

⁷³ Csortan, J. (2020). Surrogacy Arrangements and best interests of the child, Umeå University.

⁷⁴ Article 8 of the Convention on the Rights of the Child. United Nations Treaty Collection.

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec

⁷⁵ Wade, A. (2017). The Regulation of surrogacy: a children's rights perspective. *Child Fam Law Q.*

⁷⁶ Council of Europe. (2022). Guide on Article 8 of the European Convention on Human Rights.

parents. ECtHR emphasised the impact of the child's right to respect for their private life and the personal development, which is a basic need for a child to have a continuing relationship with themselves but also with their parents.⁷⁷ The Court held that maintaining the relationship was needed to ensure the child's personal development, as regulated in the Article 8.

The right to identity is connected to the right to nationality as well. Nationality is essential tool to safeguard the access to rights and benefits in their state or the origin residence. Nationality affects also on their chances to study, work, and vote in the future.⁷⁸ A stateless child is a status that can harm child from a legal point of view when accessing their rights, but also for a child's realization of their identity. Children's right to identity enables the services, such as education, social services, and education. The right to identity is connected to the right to know and to be cared by their parents. The child can experience trauma and long-lasting effects on their mental and emotional health if separated from their parents and deprived from this right.⁷⁹

The importance of identity has been clarified by the ECtHR, but the lack of regulations on surrogate agreements still creates violations on children's rights to identity.⁸⁰ The right to identity and nationality are significant for children's psychological and emotional well-being and development, while preserving their cultural diversity, which is why the protection of these rights for children born through surrogacy agreements is crucial to recognize under EU legislation but under the national laws as well.

The chapter 4 of the Handbook on European law relating to the rights of the child focuses on personal identity issues and citizenship.⁸¹ As the CRC states, the chapter does not refer to a specific fundamental right, instead it presents a selection of essential concerns regarding identity. As ECtHR case law rulings demonstrate, the identity of a child is a necessary tool for children to build their self-concept. The identity of a child is partly built upon on citizenship. Other important factors that chapter 4 addresses are concerning birth registration and right to a name, but with frequently

⁷⁷ Council of Europe. (2022). Handbook on European law relating to the rights of the child. Strasbourg: Council of Europe Publishing.

⁷⁸ O'Callaghan, E. (2021). Surrogacy reform and its impact on the child's right to birth registration. *Reproductive Biomedicine & Society Online*, 13, 152-161.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Council of Europe. (2022). Handbook on European law relating to the rights of the child. Strasbourg: Council of Europe Publishing.

occurring with surrogacy, the legal problem is the lack of citizenship. However, the right to identity is a fundamental right for every child. Besides CRC and ECHR, it has been highlighted in ECtHR. The right to citizenship is covered in Article 8 to right to respect for private and family life in ECHR.

3. CHILDREN'S RIGHTS IN INTERNATIONAL SURROGACY AGREEMENTS

Children are independent right-holders as the CRC states. Due to its applicability in the EU, it binds all jurisdictions. To secure the implication the CRC obliges the concept of child as independent holder of comprehensive rights.⁸² Thorough legal framework is important to safeguard the rights of children, including the right to nationality and be cared by their parents. These rights have been violated in the cases of surrogacy children according to case law in EU. CRC regulates the need for states to prioritize the best interest of the child in all action concerning them, without discrimination based on birth or any other status. CRC Committee has urged the discrimination against children to affect situations that deviate from traditional values. Accordingly, children born in surrogacy arrangements should not be discriminated due to their status.⁸³

The children's capability to enjoy their rights is essential. The rights-based approach guarantees parent's involvement in their children's lives, which is the best interest of the child and their basic needs. The fulfilment of parental responsibilities is stated in the Article 18 of CRC. Due to the Article 18, parents are primarily responsible for raising and nurturing their children but also that states need to aim to assist parents in fulfilment of this right.⁸⁴ Therefore, the legal framework regarding surrogacy should be done by rights-based approach, acknowledging that the fulfilment of parental obligations is fundamental to children's ability to enjoy their rights in surrogacy agreements as well. Regulatory framework for surrogacy should also contain the principle of child participation.⁸⁵

CRC states in the Article 3 that all actions that include children need to be done in the best interest of children principle, no matter if the action is by public or private institution.⁸⁶ The concept of this Article is comprehensive due to its three key elements to serve as a principle, rule, and procedure.⁸⁷ The principle balances the best interests of a child to balance and evaluate different factors when making decisions about the child. In individual situations, such aspects as the child's identity, care,

⁸² Wade, A. (2017). The Regulation of surrogacy: a children's rights perspective. *Child Fam Law Q.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Article 3 of CRC: United Nations Treaty Collection. (1989). Convention on the Rights of the Child. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-11&chapter=4&clang=_en

⁸⁷ Committee on the Rights of the Child. (2013). General Comment No. 14 on the right of the child to have his or her best interest taken as a primary consideration. United Nations.

protection, safety, family environment and relations, rights and needs are examined through the best interest principle.⁸⁸

As a right, the children's best interest must be given the primary consideration in all actions, in public as well as in private decision making too. Due to its overarching nature, it can be invoked independently in court without the need for additional Convention rights.⁸⁹

As principle, it is the overarching principle of the Convention, meaning that the rights in Convention must be interpreted and assessed with consideration to the best interest principle.⁹⁰

As a rule of procedure, it obligates states to present the best interest principle to be applied in every procedural process.⁹¹ However, there is no definition on the best interest of the child. Thus, it needs to be examined on case- basis and analysing the individual situation and needs of a child. All though the principle requires the best interest of the children, it does not correlate children's interest being an absolute.⁹²

In the EU, the best interest of the child principle has been relevant in policies and laws regarding children in the context of adoptions, migration, trafficking and asylums.⁹³ The principle could be used when balancing the rights of a child born through international surrogacy. National laws in EU could adapt the rule when determining the nationality and legal parents of the child according to the best interest of the child, since the lack of legislation regulating surrogacy is risking the rights and family environment of a child.

The most common legal issue arising from lack of legislation for international surrogacy agreements can cause the refusal to recognize foreign birth certificates.⁹⁴ Due to the missing regulations, the recognition of foreign certificates has been left to judges or national and international jurisdictions. Regarding cross-border surrogacy agreements, The European Court of Human Rights (ECtHR) has highlighted the principle of child's best interest.⁹⁵ The ruling of ECtHR states that children born through surrogacy should not be disadvantaged, based on the

⁸⁸ Committee on the Rights of the Child. (2013). General Comment No. 14 on the right of the child to have his or her best interest taken as a primary consideration. United Nations.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Kaime (2011). The Convention on the Rights of the Child: A Cultural Legitimacy Critique. Europa Law Publishing.

⁹³ European Commission (2010). Action Plan on Unaccompanied Minors (2010–2014), COM (2010) 213 final, Brussels, p. 3.

⁹⁴ Rigon and Chateau (2016). Regulating international surrogacy arrangements – state of play. European Parliament.

⁹⁵ Rigon and Chateau (2016). Regulating international surrogacy arrangements – state of play. European Parliament.

Article 8 of European Convention on Human Rights, the child's right to respect for private and family life.⁹⁶

In the case of *Paradiso and Campanelli v Italy* (25358/12) the denial of nationality violated a child's right to a private life. The couple had twins through a surrogacy agreement in 2012.⁹⁷ The couple was from Italy and the surrogate mother in Russia, where gestational surrogacy is legal. In gestational surrogacy, the intended parents do not have a genetic connection to the child. The Italian authorities did not recognize the children's birth certificate because it was from abroad. The children were denied for Italian nationality, meaning that the children are stateless. Stateless person is not able to access education, healthcare, or any other basic human rights. Stateless person is not able to access to their civil rights either, such as voting or legal protection.⁹⁸ In this case ECtHR ruled that the denial of the nationality did violate the children's rights under the Article 8 of ECHR.⁹⁹ Due to the denial of nationality, the court found that it can have an impact on the children's identity and development, but also affecting the parent's ability to take care of their children.¹⁰⁰

The missing genetic link was highlighted in this case by the court, all though the couple were under the impression that the intended father's sperm would be used to with the donated egg to the surrogate mother. Due to this, the child was placed into a children's home and denied having any contact with the intended parents. As ECtHR ruled, the consequences of not recognizing the child's birth certificate caused the violation to the child's right to private and family life. The circumstance where a child is removed from their family environment, denied of nationality, as well as identity cannot be the aim of the best interest of a child principle. Even without the genetic link, the child's best interest is to be taken care of by their intended parents and build their identity with the nationality given by the intended parent's state.

Similarly, in the case of *Labassée v France* (65941/11)¹⁰¹ in 2014 deals with surrogacy agreement between France and Minnesota in the United States, where a French couple became the biological

⁹⁶ Article 8 of European Convention on Human Rights. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62003CJ0540>

⁹⁷ *Paradiso and Campanelli v Italy* (25358/12), ECtHR. <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-170359%22%5D%7D>

⁹⁸ Directive 2011/95/EU of the European Parliament. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Labassée v France* (65941/11). European Court of Human Rights. <https://hudoc.echr.coe.int/fre#%7B%22tabview%22:%5B%22document%22%5D%7D%22itemid%22:%5B%22002-9780%22%7D%7D>

parents of the child born in California. When returning to France, they were unable to have the child legally recognized as theirs due to French law, which prohibits surrogacy.¹⁰² Authorities in France argued that the couple is not the child's legal parents, even though it was biologically theirs. The child was denied of French citizenship, which ECtHR ruled violating the Article 8, the exercise of family life as well as private life. The court empathized the fact that the intended parents were also biologically the child's parents, which makes the case even more significance. The ruling observed the importance of the biological parentage to the child's identity and their best interest.¹⁰³

The denial of nationality is a violation to children's right to respect for their private life stated in the Article 8. The child's identity was diminished as they were held in legal uncertainty with unable to secure French citizenship and subject to less advantageous inheritance laws. Especially in the case of *Labassée v France*, where one of the intending parents were also the child's biological parent, the denial can be seen as absurd,¹⁰⁴ when compared to the case of *Paradiso and Campanelli v Italy*, where the genetic link was missing, causing the denial of nationality.

Article 7 of CRC states that "States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless".¹⁰⁵ The relevancy of this paragraph is realized in international surrogacy agreements, where CRC mandates that state procedures must comply with the aim to eliminate child statelessness.¹⁰⁶ The right to nationality is governed under the national law, however in the aspect of the right to respect for private life under Article 8 of the European Union, nationality is central part of child's identity. As identity is closely tied to various entitlements, such as education, medical care and right to vote, stated in Articles 24 and 28, statelessness can have negative impact on the child and not serve the best interest of the child. Furthermore, the states are required to protect the rights of children without any discrimination towards children in surrogacy arrangements under CRC.¹⁰⁷ Children born through international surrogacy agreements must be able to rightfully enjoy their rights.

¹⁰² *Labassée v France* (65941/11). European Court of Human Rights. <https://hudoc.echr.coe.int/fre#%7B%22tabview%22:%5B%5B%7B%22document%22%3A%22%22%7D%22%22itemid%22:%5B%5B%7B%22002-9780%22%7D%22%22%7D>

¹⁰³ *Labassée v France* (65941/11). European Court of Human Rights. <https://hudoc.echr.coe.int/fre#%7B%22tabview%22:%5B%5B%7B%22document%22%3A%22%22%7D%22%22itemid%22:%5B%5B%7B%22002-9780%22%7D%22%22%7D>

¹⁰⁴ Wade, A. (2017). The Regulation of surrogacy: a children's rights perspective. *Child Fam Law Q.*

¹⁰⁵ Article 7 (2) Convention on the Rights of the Child. <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

¹⁰⁶ Wade, A. (2017). The Regulation of surrogacy: a children's rights perspective. *Child Fam Law Q.*

¹⁰⁷ *Ibid.*

A lot of legal questions regarding the child's legal parents arise from cross broad surrogacy agreements. Legal parents refer to the individuals who have legal parental rights to the child. Thus, genetic parents usually refer to individuals who share DNA with the child or to the surrogate mother who has carried the child in question. The CRC does not define the term "parents". This means, that it could be interpreted to parents being genetic, gestational, or intending parents, meaning that a family can have a broader meaning than just genetics.¹⁰⁸ With surrogacy children, this principle should be used for intended parents being established as the legal parents, guaranteeing the rights in Article 8 of CRC. The issue of parentage has been a key factor for adopting a global regulation for surrogacy agreements as it could broad the legal framework protection for children's rights.¹⁰⁹

In 2022 the Commission of Europe adopted a proposal in matters of parenthood for the Council Regulation.¹¹⁰ The proposal suggested that the jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood should be ensured for parenthood in the cases where parenthood in EU Member State needs to be acknowledged legally in another Member state, according to the European Commission. In the society that changes due to globalization and creates cross border matters, the harmonization of EU law and private international law on parenthood is extremely important, according to the Commission President Ursula von der Leyen.¹¹¹ However, this does not only apply to surrogacy arrangements, but also to matters relating to job, travel or buying property in another Member state. Overall, the harmonization of EU law and international private law within recognition of parenthood is critical so children's rights can be ensured and protected.

CRC Articles 7, 8, 9, 18 and 21 outline the rights of children to specific intercountry adoption, stating that it should be considered after all other avenues of care within the child's "family kinship and community networks" have been exhausted. Furthermore, CRC emphasizes the importance of family preservation by providing the right to support the family of origin, so children won't be separated from family members unless it is necessary to ensure their safety.¹¹² This could be

¹⁰⁸ Wade, A. (2017). The Regulation of surrogacy: a children's rights perspective. *Child Fam Law Q*.

¹⁰⁹ Rotabi, Mapp, Cheney, Fong, McRoy (2017). Regulating Commercial Global Surrogacy: The Best Interests of the Child. *Journal of Human Rights and Social Work*, 2(4), 145-156.

¹¹⁰ European Commission. (2022). Recognition of parenthood between Member States.

https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law/recognition-parenthood-between-member-states_en

¹¹¹ Ibid.

¹¹² Rotabi, Mapp, Cheney, Fong, McRoy (2017). Regulating Commercial Global Surrogacy: The Best Interests of the Child. *Journal of Human Rights and Social Work*, 2(4), 145-156.

interrupted to surrogacy as well, as it has been established that the right to family life is a fundamental right for every child, which includes legal parent-child relationships and especially needed to safeguard for surrogacy children.

As stated in the cases of *Paradiso and Campanelli v Italy* (25358/12) and *Labassée v France* (65941/11), where member states Italy and France both refused to establish legal parentage with the child born through surrogacy agreement between the commissioning parents in application of Italian and French national law, the ECtHR rules that the lack of parentage violates the child's right to respect for private life and that it could negatively affect the child's identity. In accordance with EU law, member states need to recognize parenthood that has been established in another Member state for the purpose of granting rights derived from EU law, such as free movement and the right for equal treatment.¹¹³ The proposal has not been entered into force due to Member states' national legislation on succession and maintenance rights. This clearly shows that the EU values the respect for private life and the child's identity over the national legislation which in some situations does not recognize parenthood when it should. ECtHR stated in the case 25358/12 that identity includes the legal parent-child relationship as well as the nationality.¹¹⁴

The absence of EU's legal framework causes uncertainty and various legal issues with the recognition of cross board surrogacy arrangements, such as children being removed from their family environments. The right to family life is guaranteed as a fundamental human right in the Article 8 European Union Charter of Fundamental Human Rights.¹¹⁵ This right is aimed to protect family life and highlight the importance of it. Member states need to respect the right in their own national jurisdictions. According to the caselaw in ECtHR, this violated their fundamental rights to and has consequential effects. The Article 8 depends primarily on family ties, and like it has been established, family ties do not depend only on DNA or genetics, but concerns intended parents as well. In the case of *Labassée*, where the parents had also a biological tie for the child it, the child should be recognized as theirs on the grounds of the child's right to a family life.

Furthermore, in the case of *Paradiso and Campanelli*, the intended parents, who are not biologically the child's parents, can be seen as social parents according to the court. Thus, removing the child

¹¹³ Rotabi, Mapp, Cheney, Fong, McRoy (2017). Regulating Commercial Global Surrogacy: The Best Interests of the Child. *Journal of Human Rights and Social Work*, 2(4), 145-156.

¹¹⁴ *Paradiso and Campanelli v Italy* (25358/12) European Court of Human Rights. <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-170359%22%7D>

¹¹⁵ Article 8 of the Charter of Fundamental Rights of the European Union. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT>

from its family is an extreme measure that should be taken only as a last resort, ECtHR regulated it is a violation to the child's right to a family life. ¹¹⁶ ECtHR points out how having legal parents is a need and a right to a child, regardless of the grounds whether being a biological or social. Despite national jurisdictions and laws prohibiting surrogacy, the right to a family life can be seen the priority in international surrogacy.

¹¹⁶ European Commission. (2022). Recognition of parenthood between Member States. Webpage: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law/recognition-parenthood-between-member-states_en

4. CASE LAW ON INTERNATIONAL SURROGACY IN THE EU

In EU there is no consensus about the lawfulness of surrogacy agreements neither the legal recognition between the intended parents and a child born through surrogacy.¹¹⁷ However, the case law demonstrates that unifying families and respecting the fundamental rights like the Article 8 of ECHR, ECtHR protects rights to private and family life overruling national laws that prohibit surrogacy and deny legal parents and nationality from children in international surrogacy agreements who are not legally recognised in another state. The lack of EU's regulation on international surrogacy agreements leads to these long, complex legal battles within courts when surrogacy is unlawful in national jurisdictions. Furthermore, it puts children in danger when their family ties are not established. The violations of children's rights are the extreme result of lack of legislation of surrogacies in the EU. The ethical and moral dilemmas in the public discussions can be understood and are in need to take into consideration, but as the best interest of the child principle states, the well-being of the child has to be legally recognized and exercised in cases of surrogacies. Nevertheless, whether surrogacies are illegal or lawful, they do happen and are possible to arrange due to the different jurisdictions and national laws. For this reason, it is essential that children's rights are protected and regulated on every level, because the surrogacies will happen either way.

The courts have highlighted the relevance of human being's identity through case law. The lack of surrogacy laws in Europe has led to states making wide margin of decisions related to surrogacy, especially within legal parentage.¹¹⁸ The interests between the state and individuals needed to be examined if they were balanced fairly, considering the fundamental principle that the best interest of children should always be given priority. For this exact purpose, the applicant children's rights were violated. Though, in the case of *Labassée*, the children's rights under CRC were not violated, but the court ruled that France did violate the right to respect of private life regulated in the ECHR¹¹⁹, meaning that national law was not protecting the applicant's children's rights.

¹¹⁷ *Labassée v France* (65941/11). European Court of Human Rights.

<https://hudoc.echr.coe.int/fre#%7B%22tabview%22:%5B%7B%22document%22%3A%222002-9780%22%7D%7B%22itemid%22%3A%222002-9780%22%7D%7D>

¹¹⁸ Rigon, A., & Chateau, F. (2016). Regulating International Surrogacy Arrangements – State of Play. European Parliament. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI\(2016\)571368_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI(2016)571368_EN.pdf)

¹¹⁹ Rotabi, Mapp, Cheney, Fong, McRoy (2017). Regulating Commercial Global Surrogacy: The Best Interests of the Child. *Journal of Human Rights and Social Work*, 2(4), 145-156.

The rulings of the case *Paradiso* and the case of *Campanelli and Labassée* are significant statements from ECtHR for the ongoing debates over surrogacy and the legal recognition of children born through these arrangements.¹²⁰ The statements also underscore the value of family life even in scenarios where the conventional and traditional parentage may not be applicable. The court held that in situations regarding surrogacy, the identities of children and their rights to private and family life need to be recognized in domestic law along the lines of giving the relationship with their intended parents a priority. ECtHR has demonstrated the use of the best interest of a child as the threefold concept as it is, as a principle, rule, and procedure. These rulings have supported the legalization of surrogacies and given an insight to the needed statements to the legislation.

C and E v France (1462/18 and 17348/17), two similar cases regarding transnational surrogacy have given a new direction to maternal filiation within birth certificates.

The cases regarding two French nationals, were wishing to adopt a child.¹²¹ The same-sex couple living together in France were not allowed to adopt due to French national law, which allowed adoption only by married couples or single persons at the time. However, the couple arranged surrogacy agreement in the US using the gametes of the other applicant, C, and a third-party donor.¹²² The birth took place in Florida, where the child received a birth certificate, and had the intended parents named as the child's parents. C and E requested the French consulate in Miami, Florida, to register the birth certificate. The request was denied by the Nantes public prosecutor's office. Due to this, the couple filed a lawsuit against the public prosecutor in the Nantes Tribunal seeking for the child's birth certificate to be entered to the register of marriages and deaths. C and E both invoked their claim on Articles 8 and 14 of ECHR.

The Tribunal approved the petition, however the Court of Appeal affirmed the verdict only partially. It stated that the request for the legal-father relationship was granted, however the request to the mother was nullified on the grounds of gestational surrogacy, and that C did not give birth to the child. The case facts of the other couple, E, were familiar.¹²³

¹²⁰ Rotabi, Mapp, Cheney, Fong, McRoy (2017). Regulating Commercial Global Surrogacy: The Best Interests of the Child. *Journal of Human Rights and Social Work*, 2(4), 145-156.

¹²¹ Case of *C and E v. France*, N. 1462/18 and 17348/17 European Court of Human Rights. https://www.echr.coe.int/Documents/FS_Surrogacy_eng.pdf

¹²² Case of *C and E v. France*, N. 1462/18 and 17348/17 European Court of Human Rights. https://www.echr.coe.int/Documents/FS_Surrogacy_eng.pdf

¹²³ Case of *C and E v. France*, N. 1462/18 and 17348/17 European Court of Human Rights. https://www.echr.coe.int/Documents/FS_Surrogacy_eng.pdf

As it was resulted in the case of *Mennesson v France* (65192/11), in a situation of cross-border surrogacy where the intended parent was also genetically the parent of the child with a third-party donor, the legal parent-child relationship with the intended father was recognized in the French domestic law.¹²⁴ The Court ruled that in the present case with C and E, the children are in a same position where the domestic law allows the intended mother to establish a parent-child relationship with a child through adoption. However, the Court highlighted that the parent-child relationship is possible to obtain through adoption. The effective mechanism should be able to recognize in individual cases the relationships between intended mother and a child and that adoption process due to its full duration being proximately four to five months, is not burden to children or a violating children's best interest.¹²⁵

In the *Mennesson v. France* ruling, the Court declared the application to be clearly unfounded. It held that due French authorities refusal to register the intended mother's name on the birth certificate in French register of births, marriages, and deaths was proportionate.¹²⁶ When comparing to the cases of *Mennesson v France* and *Labasse v France*, where the paternal link was established, it is clear that the best interest of the child was applied in the judgements due to centralization of genetic identity.¹²⁷ On the grounds of the Article 8 of ECHR, the significance of recognizing the legal parentage in domestic law can be seen as a step into the future, where it is possible to tie the biological intended mothers, as well as intended fathers were, to be established as legal parents of the child born through international surrogacy. In the continuation of similar cases like the cases of *C and E v France*, the ECtHR is given the chance to reform the surrogacy agreement policies. However in this case, it choosed to follow the national law of France. Due to ECtHR's flexible nature, it could have ruled in favor of more "modern" surrogacy practises and expand the use of the best interest of the child princple to safeguard the legal parentage of the surrogate child.

The violations of children's rights in international surrogacy agreements are caused due to EU member states national law. As many international institutions, such as HCCH, UN and some bodies of the European Union, have tried to regulate surrogacy agreements, national laws still are

¹²⁴ *Mennesson v France* (65192/11) European Court of Human Rights.

<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-145389%22%7D>

¹²⁵ *Case of C and E v. France*, N. 1462/18 and 17348/17 European Court of Human Rights.

https://www.echr.coe.int/Documents/FS_Surrogacy_eng.pdf

¹²⁶ *Ibid.*

¹²⁷ *Mennesson v France* (65192/11) and *Labassée v France* (65941/11) European Court of Human Rights.

<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-145389%22%7D>

able to violate children's rights in practise. ¹²⁸ ECtHR case law has highlighted that the interest of the children should be prioritized over national law in case the children's benefits and welfare at stake, and if applying national law does not guarantee the protection of the children's rights laid down by CRC and ECHR. These violations specifically against children's rights in the Article 8 regulating the right to private and family life, nationality and legal parentage demonstrate the need for an international regulation or a convention that binds all signed parties, even giving permission to interfere in cross-border situations when needed. The best interest of a child principle, also as a rule and as a protocol needs to be the guideline for every decision made that concerns a child. This way, children's right to private and family life can be safeguarded and individualised for diverse situations. International convention on surrogacy should apply the principle to prevent the violations against children's rights and regulated from human rights perspective. ¹²⁹

However, creating international regulations on surrogacy can be a slow development processes and might take years while the practise of violating children's rights continues. Therefore, regulations by state basis might be a solution before international and cross jurisdictional agreements are in force. Australia has been a leading state on creating a regulation applied to surrogacies with International Social Services (ISS). ¹³⁰ ISS has identified list of a need for regulations in various aspects of surrogacy, including ensuring cross jurisdictional recognition of birth certificates and parentage orders, obtaining informed consent from surrogates, providing counselling, education, and legal advice for all parties involved. In addition, the assessment the suitability of intending parents and surrogates, preserving information for the child's born through surrogacy arrangement future access to their origins and identity are in need for regulation. ¹³¹ The need to safeguard children's right to family life and the process of safe international surrogacy is significant and is likely to guarantee the child's best interest.

¹²⁸ Storrow, R. F. (2014). International surrogacy in the European Court of Human Rights. *Journal of Social Welfare and Family Law*, 36(1), 97-110.

¹²⁹ Sheldon, S. (2011). To Prohibit or Permit: What Is the Human Rights Response to the Practice of International Commercial Surrogacy? *International and Comparative Law Quarterly*, 60(1), 51-77.

¹³⁰ Rotabi, Mapp, Cheney, Fong, McRoy (2017). Regulating Commercial Global Surrogacy: The Best Interests of the Child. *Journal of Human Rights and Social Work*, 2(4), 145-156.

¹³¹ Rotabi, Mapp, Cheney, Fong, McRoy (2017). Regulating Commercial Global Surrogacy: The Best Interests of the Child. *Journal of Human Rights and Social Work*, 2(4), 145-156.

CONCLUSIONS

This thesis has examined the violations against children's right to private and respect for family life in international surrogacy agreements. The scope of violations examined from CRC and ECHR Article 8 have been the children's family life, nationality, identity, and legal parentage, as they have raised as a common issue within cross border surrogacies and have a strong link between them. Thus, it has aimed to focus on the various legislation regulating surrogacies on national level and the lack of EU legislation to safeguard the right to private and respect for family life for children. The thesis has introduced the various international institutions aims for the harmonization of rules to international surrogacy arrangements.

The thesis has demonstrated the violations against children with case law from ECtHR. ECtHR has emphasized over the principle of the best interest of a child, demonstrating precedence over public policy in regards surrogacy arrangements. Within the cases of *Paradiso and Campanelli* and *Mennesson*, court highlighted that the principle should guide any decision regarding a child, including the rights regulated in the Article 8. The possible new direction with the case of *C and E v France*, is an important statement from ECtHR to the relevant debates over surrogacy and the legal recognition of children born through these arrangements. The understanding of family life has been given a new, modern approach where traditional parentage has developed. Due to the rulings of the ECtHR, national laws regarding surrogacy must recognize the relationship between children and their intended parents, while protecting their identity and right to private and family life. They need to be implemented using the principle of best interest of the child and used as the principle as meant to be used, not only as principle but as a rule and procedure in addition, even if using the principle overlaps with the national laws regarding surrogacy. The well-being of the child is the priority and must be examined case by case, to understand individual situations.

However, there is a missing consensus of surrogacies in EU. Due to this, the thesis has focused on inspecting the lack of legislation on international surrogacies on the EU level. It can be concluded that due to the lack of regulations, violations against children born through surrogacy arrangements happen. ECtHR case law has identified this issue between national and international jurisdictions. These violations against children might result to children being removed from their family environment, lose their legal parentage and nationality, end up stateless and into orphanage. The

need for convention that protects this right has been highlighted through the thesis, so children can enjoy and exercise their rights to full.

As concluded in the thesis, surrogacy raises a lot of moral and ethical debates, so it can be seen as controversial topic. However, in principle traditional surrogacy does not differ from normal artificial insemination, after which the surrogate mother delivers the child for the intended parents. As established in the case law, family ties do not depend only on genetics, but the closeness of the relationship between the child and intended parents. This thesis argues that all though the legal and ethical issues concerning surrogacies do exist and are complex, the safety of children and protection of their rights to private and family life is more significant than the on-going debates. Surrogacies will happen either way, so the development of clear legal framework and guidelines are essential to ensure the children's right to private and family life.

Furthermore, ECtHR does recognize the broad margin of appreciation for EU member states within sensitive topics, such as surrogacy agreements. The appreciation has its limits when it comes to the European values. These values do include the fundamental rights to child's identity, nationality, legal parentage and overall, the aspects of the right for private and family life, which are protected under Article 8 of the Convention. When it comes to the best interest of the child, the highlight of protection child's identity, care, protection, safety, and family environment is the key for stable, secure childhood. Child's rights and needs need to be examined through the best interest principle and exercised through international surrogacy agreements.

This thesis has concluded that the current legal framework violates children's right for private and family life and the lack of regulation on EU level does not safeguard children enough. The right to private and family life is stated in the CRC and the ECHR, but due to national laws and jurisdictions the practise of Article 8 is narrow in EU member states. This makes the violations against the children's right to private and family life possible. The hypothesis was that children's rights are not protected properly in surrogacy agreement due the lack of legislation and the hypothesis was right. However, this thesis does support international surrogacies, so the need for developing the legislation must be done to safeguard safe surrogacies and the best interest of the child.

As we go forward, international institutions have taken the steps to create a consensus over regulations to harmonize surrogacies globally. The lack of regulation of surrogacies in the EU

might change in the future, as EU has taken an interest on the topic with releasing recommendations and guidelines for the protection of the rights of the child in surrogacy agreements. ECtHR has not taken a specific stand on the matter yet, but indirectly expressed an opinion over international surrogacies when ruling in favour of the Article 8. Overall, the practise of surrogacy should be regulated on a children's-rights based approach, as this thesis has argued.

LIST OF REFERENCES

Scientific books

1. Council of Europe (2022). *Handbook on European law relating to the rights of the child*. Strasbourg, France: Council of Europe Publishing.
2. Kaime (2011). *The Convention on the Rights of the Child: A Cultural Legitimacy Critique*. Europa Law Publishing.
3. Craig, P., De Burca, G. (2015). *EU Law, Texts, Cases and Materials*. Sixth Edition. Oxford University Press.

Scientific articles

4. Foret F. (2021) *How the European union deals with surrogacy. Birth without borders as a driver of value conflicts?* Gender Technology and Development, Volume 25, Issue 2
5. Patel N., Jadeja Y., Bhadarka H., Patel M., Patel N., Sodagar N. (2018). *Insight into Different Aspects of Surrogacy Practices*. Journal of Human Reproductive Sciences, 11(4), 309-315.
6. Jadvá V., Murray C., Lycett., MacCallum., Golombok S. (2003). *Surrogacy: the experiences of surrogate mothers*. Human Reproduction, Volume 18, Issue 10.
7. Saxena P., Mishra A., Malik S. (2012). *Surrogacy: Ethical and Legal Issues*. Indian Journal of Community Medicine, 37(4), 221-223.
8. United Nations, Office of the High Commissioner (2018). *Surrogacy and the sale of children*. Summary of the Side event, 37th session of the Human Rights Council, 6 March 2018.
9. Brinsden, P. R. (2003). *Gestational surrogacy*. Human Reproduction Update, 9(5), 483-491.
10. Piersanti, B., Consalvo, M., Signore, F., Del Rio, A., & Zaami, S. (2021). *Surrogacy and "Procreative Tourism". What Does the Future Hold from the Ethical and Legal Perspectives?* Journal of Clinical Medicine, 10(5), 914.
11. Glynn, C. (2016). *International surrogacy before the European Court of Human Rights*. Human Reproduction, 31(8), 1639-1646.
12. Siboni, S. (2014). *Protecting the voiceless: Rights of the child in transnational surrogacy agreements*. Vanderbilt Journal of Transnational Law, 47(1), 63-103.

13. Shaffer, G. C. (2013). *Surrogacy, privacy, and the American Convention on Human Rights*. Yale Journal of International Law, 38(1), 1-55.
14. Kriari, I., & Valongo, A. (2019). *International issues regarding surrogacy*. Italian Journal of Public Law, 11(1), 301-316
15. Pillai, A. V. (2014). Intended parents and the legal concerns in surrogacy practices. Rostrum Law Review (RLR), 1(3), 75-84.
16. van Beers, B. (2018). A revolution by stealth: *A legal-ethical analysis of the rise of pre-conception authorization of surrogacy agreements*. Journal of Law and Medicine, 25(1), 36-57.
17. K Wade. (2017). *The regulation of surrogacy: a children's right's perspective*. Child and Family Law Quarterly Child and Family Law Quarterly, 29(1), 63-78.
18. Stark, B. (2012). *Transnational surrogacy and international human rights*. ILSA Journal of International & Comparative Law, 18(2), 359-374.
19. Pande, A. (2010). *Transnational commercial surrogacy in India: Gifts for global sisters?* Reproductive BioMedicine & Society Online, 1, 47-64.
20. Ghodrati, F. (2013). *A comparative study of surrogacy rights in Iran and European countries: A review article*. Journal of Reproductive Healthcare and Medicine, 3(1), 11-17.
21. Sheldon, S. (2011). *To Prohibit or Permit: What Is the Human Rights Response to the Practice of International Commercial Surrogacy?* International and Comparative Law Quarterly, 60(1), 51-77.
22. O'Callaghan, E. (2021). *Surrogacy reform and its impact on the child's right to birth registration*. Reproductive Biomedicine & Society Online, 13, 152-161.
23. Storrow, R. F. (2014). *International surrogacy in the European Court of Human Rights*. Journal of Social Welfare and Family Law, 36(1), 97-110.

EU and international legislation

24. Convention on the Rights of the Child
25. European Convention of Human Rights
26. The Treaty on the Functioning of the European Union (TFEU)
27. The Charter of Fundamental Rights of European Union (ECHR)
28. Directive 2011/95/EU of the European Parliament
29. Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

ECtHR court decisions

30. Court decision, 24 January 2017, *Paradiso and Campanelli v Italy* (Application no. 25358/12), European Court of Human Rights.
31. Court decision, 12 April 2018, *Labassée v France* (Application no. 65941/11), European Court of Human Rights.
32. Court decision, 20 October 2020, *C and E v France* (Applications nos. 1462/18 and 17348/17), European Court of Human Rights.

Other sources

33. HCCH (2023). *Parentage / Surrogacy Experts' Group: Final Report "The feasibility of one or more private international law instruments on legal parentage"*.
34. Rotabi K., Mapp S., Cheney K., Fong R., McRoy R. (2017). *Regulating Commercial Global Surrogacy: The Best Interests of the Child*. *Journal of Human Rights and Social Work* 2.
35. Bhatia, K., Kalsang, S., Martindale, E. A., Rustamov, O., & Nysenbaum, A. M. (2009). *Surrogate pregnancy: An essential guide for clinicians*. *The Obstetrician & Gynaecologist*, 11(2), 97-102.
36. European Parliament (2016). *Regulating international surrogacy arrangements – state of play*.
37. European Commission (2010). *Action Plan on Unaccompanied Minors (2010–2014)*, COM (2010) 213 final, Brussels, p. 3.
38. Committee on the Rights of the Child. (2013). *General Comment No. 14 on the right of the child to have his or her best interest taken as a primary consideration*. United Nations. <https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx>
39. HCCH. (2023). *About the HCCH*. <https://www.hcch.net/en/about>
40. European Commission. (2022). *Recognition of parenthood between Member States*. https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law/recognition-parenthood-between-member-states_en
41. Rigon, A., & Chateau, A. (2019). *Regulating international surrogacy arrangements – State of play*. European Parliament.
42. European Court of Human Rights (2022). *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence*.

43. Unicef and Child Identity Protection (2022). *KEY CONSIDERATIONS: CHILDREN'S RIGHTS & SURROGACY. Briefing Note.*
44. Piersanti, V., Consalvo, F., Signore, F., Del Rio, A., & Zaami, S. (2021). *Surrogacy and "procreative tourism". What does the future hold from the ethical and legal perspectives?* *Medicina (Kaunas)*, 57(1), 47.
45. Council of European Portal, The European Convention on Human Rights. *Right to respect for private and family life.*
46. Csortan O. (2020). *Surrogacy Arrangements and The Best Interests Of The Child: European perspective.* Independent written essay within the field of constitutional law and human rights, Umeå University.
47. Coutinho D. (2019). *Surrogacy in the light of European Union law: brief considerations.* UNIO EU Law Journal, Law School of UMinho.

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