

PRESUMPTION OF MOTHERHOOD ON CROSSROAD OF SURROGACY ARRANGEMENTS IN EU

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ABSTRACT

The presumption “Mater semper certa est”, that is known from Roman law, indicates that the mother is always certain as she was traditionally seen as the progenitor and the one who had given birth. However, traditional view on motherhood is lately changing due to new procreation techniques that made the content of motherhood depended on contractual arrangements and opened the possibility to differentiate the progenitor from the person who has given birth.

The surrogacy motherhood is considered as one of the new procreation techniques that made possible for single persons and couples with or without fertility problems to become parents. However, surrogacy motherhood made the notion of the mother interchangeable and depended on various arrangements between adults. It all represents a serious threat to various children’s rights including their right to know their origin and to be cared for by parents.

Many Member States of the European Union (EU) realized the dangers of surrogacy arrangements and, in pursuit of the best interest of the child, enacted legislation to ban or restrict surrogacy. However, cross-border surrogacy arrangements, that are nowadays popular and untraceable, made possible to bypass those domestic legislations. The absence of any formal consensus within the EU on how to address the problem of cross-border surrogacy represents a serious threat to the protection of children’s rights.

Keywords: *legal presumptions, motherhood, children’s rights, cross-border surrogacy*

1. INTRODUCTION

The law traditionally recognizes the mother as the woman who gives birth to a child. Thus the gestational mother is presumed to be a legal mother with all her rights and duties towards the child.¹ However, the revolution in the sphere of reproductive technology increasingly confronted the law with possibilities that challenged the presumption of motherhood and made changes to the traditional meaning of the mother and a child bond.² This is especially noticeable in surrogacy arrangements where a woman (surrogate mother), for financial and/or compassionate reasons, agrees to bear and give birth to a child and then give up her parental rights and pass the child to another woman (commissioning mother) who is incapable or, less often, unwilling to do so herself or to commissioning parents.³

There are two types of surrogacy arrangements - genetic and gestational. In a genetic surrogacy arrangement, the surrogate mother is an ovum donor while in gestational surrogacy arrangements the child is conceived with an ovum of the commissioning mother or with an ovum of a third woman who donated an ovum.⁴ Both types of surrogacy arrangements made possible that multiple women have an interest in being the mother of a child, which opens dilemmas regarding certainty and security of the legal status of a child and exercising his or her rights in the best interest.

The many EU states, including Croatia, realized the dangers of surrogacy arrangements and enacted legislation to ban or restrict surrogacy.⁵ However, cross-border surrogacy arrangements, that are nowadays popular and untraceable, made possible that couples or single persons bypass domestic legislation that prohibits

¹ "Generally, from a legal point of view, the mother who has given birth to the child is the legal mother." Boele-Woelki, K, (*Cross-border*) *Surrogate Motherhood: We need to take Action now!*, in: *A Commitment to Private International Law – Essays in honour of Hans van Loon*, The Permanent Bureau of the Hague Conference on Private International Law, Intersentia, Cambridge/Antwerp/Portland, 2013, p. 49

² Alinčić, M.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A., *Obiteljsko pravo*, Narodne novine, Zagreb, 2007, pp. 132-134; Dolgin, J. L., *The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*, Connecticut Law review, Vol. 26, Issue 4, 1994, p. 1262

³ van Niekerk, A.; van Zyl, L. *The Ethics of Surrogacy: Women's Reproductive Labour*, Journal of Medical Ethics, Vol. 21, No. 6, 1995, p. 345

⁴ See Ovan den Akker, O., *Psychosocial aspects of surrogate motherhood*, Human Reproduction Update, Vol. 13, Issue 1, 2007, pp. 53–54; Boele-Woelki, *op. cit.* note 1, pp. 48–49

⁵ For example, Croatian Act on Medically Assisted Fertilization prescribes that all contracts concerning the birth of a child for another person (surrogate motherhood), either they are commercial or free of charge (altruistic), are null and void. See Article 31 of the Croatian Act on Medically Assisted Fertilization, Official Gazette, No. 86/2012

surrogacy.⁶ The absence of any formal consensus within the EU on how to address the problem of cross-border surrogacy represents a serious threat to the protection of children's rights such as the right to identity, parentage, family environment, health and nationality.⁷

In order to justify the protection of above-mentioned children's rights, the article begins with setting out the relevance of the traditional presumption of the mother in the context of surrogacy arrangements. Secondly, the article presents analyses, from the perspective of the European Court of Human Rights (ECtHR), the extent to which the current cross-border surrogacy arrangements reflect the key elements of a children's rights protection and its importance from the standpoint of the best interest of children that are, unfortunately, the objects and not the subjects, of those agreements. Thirdly, the article considers children's rights perspective of surrogacy arrangements as subject of EU policy. In the final part of the paper key questions and concerns regarding the consequences of surrogacy arrangements are summarized.

2. TRADITIONAL NOTION OF MOTHERHOOD VS. SURROGACY MOTHERHOOD

Traditionally, biological and legal identity of a child's mother was embodied in the statement "*quia [mater] semper certa est*" written by *Paulus* in the Digest.⁸ The statement illustrated the mother as a stable element of filiation.⁹ The mother was always certain as only a woman who gave birth to a child (*mater est quam gestatio demonstrat*) could be the child's mother.¹⁰ Thus, the fact of giving birth was "a constitutive element of the legal relationship between a woman (mother) and child".¹¹ In that case, there were no legal doubts who the mother was and was she the child's progenitor, as motherhood was an irrefutable presumption. This con-

⁶ In 2010 survey researchers counted that, approximately 5% of all European fertility care involves cross-border travel. *Cross-border reproductive care: an Ethics Committee opinion, Fertility and Sterility Dialog*, Vol. 106, No. 7, 2016, p.1627

⁷ Achmad, C., *Child rights in international commercial surrogacy*, [http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-891/child-rights-in-international-commercial-surrogacy] Accessed 10.02.2019

⁸ DIG. 2.4.5., Gruenbaum, D., *Foreign Surrogate Motherhood: mater semper certa erat*, *The American Journal of Comparative Law*, Vol. 60, No. 3, 2012, p. 475; Hrabar, D., Što je s podrijetlom djeteta ako "*mater non semper certa est*", in: Grubić, V. (ed.), *Obiteljski zakon - novine, dvojbe i perspective*, Zagreb, Narodne novine, 2003, pp. 24-25

⁹ "*Mater semper certa est*": *motherhood shaken by medically assisted procreation and surrogacy*, [http://www.genethique.org/en/mater-semper-certa-est-motherhood-shaken-medically-assisted-procreation-and-surrogacy-66673.html#.XGFJXUIK2UI] Accessed 10.02.2019

¹⁰ Gruenbaum, *op. cit.* note 8, p. 475

¹¹ Hrabar, *op. cit.* note 8, p. 25

ception of motherhood had positive effects on the protection of the child's rights and interests as the law needed nothing else but the childbirth to confirm the existence of a legal relationship between a woman (mother) and child.¹²

The revolutionary development of biotechnology and medicine and the application of new technologies in the sphere of human reproduction made procreation possible for many single persons and couples that were not able, or willing, to have children naturally. However, revolutionary developments have rendered the notion of motherhood as uncertain and weakened it. It is harder than ever to differentiate the woman who has given birth from the progenitor, as the woman who gave birth to a child may no longer have a genetic connection with that child.¹³ This is especially evident in the case of the surrogacy arrangements, as a child may have a genetic connection with the surrogate mother, the commissioning mother or the woman who donated an ovum. Thus the notion of the mother becomes relative as the content of motherhood starts to depend on the choices and decisions of the various actors that are arranging procreation by contracts in which the child is considered as an object - a commodity.¹⁴ It all made uncertain not only the biological basis of motherhood but as well the legal basis, as more than one woman may be genetically, legally, or socially understood as the mother.¹⁵

In the period of gestation and after the birth of a child the surrogate mother has the role that is closest to the traditional notion of the mother.¹⁶ She is considered

¹² Gruenbaum, *op. cit.* note 8, p. 475

¹³ *Ibid.*, p. 476; Horsey, K., *Challenging presumptions: legal parenthood and surrogacy arrangements*, Child and Family Law Quarterly, Vol. 22, No. 4, 2010, p. 450

¹⁴ "Mater semper certa est": motherhood shaken by medically assisted procreation and surrogacy, [<http://www.genethique.org/en/mater-semper-certa-est-motherhood-shaken-medically-assisted-procreation-and-surrogacy-66673.html#.XGFJXUIK2UJ>] Accessed 10.02.2019; Fenton-Glynn, C., *International surrogacy before the European Court of Human Rights*, Journal of Private International Law, Vol. 13, No. 3., 2017, pp. 546, 558; Surrogate Motherhood: A Violation of Human Rights Report Presented at the Council of Europe, Strasbourg, 26 April 2012, European Centre for Law and Justice, p. 5 [<http://www.eclj.org>] AccessED 10.2.2019; Micković, D.; Ristov, A., *Biomedical assisted fertilization in Macedonia, Serbia and Croatia: ethical and legal aspects*, SEE Law Journal, Vol. 1, No. 1, 2014, pp. 33-34; Beaumont, P.; Trimmings, K., *Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?*, p. 16 [https://www.abdn.ac.uk/law/documents/CPIIL_2016-4.pdf] Accessed 20.02.2019; Achmad, C., *Protecting the Locus of Vulnerability. Preliminary Ideas for Guidance on Protecting the Rights of the Child in International Commercial Surrogacy*, in: Liefwaard, T., Sloth-Nielsen, J. (ed.), *The United Nations Convention on the Rights of the Child – Taking Stock after 25 Years and Looking Ahead*, Brill Nijhoff, 2017, pp. 520-521, 524

¹⁵ Achmad, C.I., *Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child right, public international human rights law perspective*, University of Leiden, 2018, p. 73, [<http://hdl.handle.net/1887/63088>] Accessed 15.02.2019

¹⁶ Achmad, *op. cit.* note 15, p. 79

the legal mother because she gave birth to a child. Some domestic legal systems within the EU, such as Ireland and England, register the surrogate mother as the legal mother in the birth certificate.¹⁷ That means that the commissioning mother cannot be recognized as the legal mother although she shares a genetic link with the child. For example, in the case of altruistic surrogacy arrangement in Ireland, both commissioning parents had a genetic link with children but they did not succeed in their intention to obtain a declaration that the commissioning mother was the legal mother of the children. The Irish Supreme Court ruled against the commissioning parents and held that the birth certificate of the children could not be changed in order to register the commissioning mother as the legal mother due to the irrefutable presumption that mother of children is the woman who gave birth to them.¹⁸ In such situations, the surrogate mother keeps the status of a legal mother as long as the legal parent-child relationship is not established between the commissioning mother and the child (e.g. through adoption).¹⁹

If the surrogate mother has a genetic connection with the child, the content of her legal position of a mother corresponds exactly to the notion of natural parent that presupposes the existence of a genetic and gestational connection with the child.²⁰ In that case, the commissioning mother can fulfil only a role of the mother that is wholly socially constructed as it is not established through a genetic or biological link and often the law cannot recognize her as a mother at all.²¹ Therefore, if she wants to become the child's legal mother, the commissioning mother has no other option than to apply to adopt the child or seek an alternative way to establish legal parentage of the child.²²

On the other hand, if the commissioning mother donated an ovum she has a genetic link with the child, which can be important for recognition of the com-

¹⁷ Fenton-Glynn, *op. cit.* note 14, p. 547; Similar standpoint is recognized also in legal systems outside the EU. Thus, in New Zealand “law always views the woman who gives birth to the child and her partner (if she has one) as the child’s legal parents at birth, based on the principle of “*mater semper certa est*”. See Achmad, *op. cit.* note 14, p. 523

¹⁸ Beaumont; Trimmings, *op. cit.* note 14, p. 10, footnote 61

¹⁹ In many jurisdictions, the surrogate is listed as ‘mother’ on the child’s birth certificate. See Achmad, *op. cit.* note 15, p. 79.; Geist, C., *Motherhood*, [http://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0110.xml] Accessed 13.02.2019

²⁰ See a discussion about the Presumption of biology and the role of gestation in Hill, J. L., *What Does it Mean to be a Parent--The Claims of Biology as the Basis for Parental Rights*, New York University Law Review, Vol. 66, Issue 2, 1991, p. 371

²¹ Achmad, *op. cit.* note 15, p. 83

²² *Ibid.*, p. 83; Rintamo, S., *Regulation of Cross-Border Surrogacy In Light of the European Convention on Human Rights & Domestic and the European Court of Human Rights Case Law*, University of Helsinki, Faculty of Law, 2016, p. 20, [https://helda.helsinki.fi/bitstream/handle/10138/164942/Sara%20Rintamo%20Masters%20Thesis.pdf?sequence=2&isAllowed=y] Accessed 19.02.2019

missioning mother as the legal mother in procedures through which she intends to acquire parental rights and responsibilities. In that case, the commissioning mother could be recognized under the law as the legal mother due to the fact that the child represents a genetic part of her.²³ Thus, the genetic link can give her legal entitlement to the child in the same way as she is entitled to anything that is considered part of her.²⁴

Although the genetic link is considered important in establishing the legal parent-child relationship between the child and the commissioning mother (and father), it is not considered crucial for recognition of the same relationship between a woman who donated an ovum and the child. Usually, between her and the child could be established only a social relationship that is completely dependent on the willingness of commissioning parents to involve the ovum donor into the child's life. However, if the woman who donated an ovum acts anonymously, the social relationship remains impossible.²⁵

3. CROSS-BORDER SURROGACY CHALLENGES FROM PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The traditional notion of mother meant that a woman who gave birth to a child had the genetic, social and legal link with the child. Changes in reproductive medicine made possible that different women (and men) may be genetically, socially or legally connected with the child. It adds to the complexity of traditional parent-child relationship as it is hard to prove who the legal mother and father of the child borne through surrogacy proceedings really are. The problem with detecting child's parents has implications on the rights of the child because during the time in which the child is without a legal parent-child relationship, his right to know and be cared for by his parents is undermined.²⁶ This is because the enjoyment of the rights of the child is related to parental responsibility to up bring and care for the child by having in mind the best interest of the child as prescribed in Article 3

²³ Still, the following question stands: Is there a legal ground to recognize the legal parent-child relationship between the child and the genetically unrelated commissioning parent, e.g. the husband of the aforementioned commissioning mother? See also: Beaumont; Trimmings, *op. cit.* note 14, p. 9

²⁴ Hall, B., *The Origin of Parental Rights*, Public Affairs Quarterly, Vol. 13, No. 1, 1999, p. 76

²⁵ Achmad, *op. cit.* note 15, pp. 81-82

²⁶ Article 7 Paragraph 1 of the United Nations Convention on the Rights of the Child (1989) prescribes that the child has the right to know and be cared for by his parents. See Achmad, *op. cit.* note 14, p. 532

of the United Nations Convention on the Rights of the Child (CRC) and in Article 24 of the Charter of Fundamental Rights of the European Union (Charter).²⁷

However, the cross-border surrogacy arrangements tend to deepen the problem as they can lead to situations that a child has a legal mother (surrogate mother), two other potential mothers (e.g. ovum donor and commissioning mother), two potential fathers (e.g. husband of the surrogate mother or the commissioning mother) and still end up without legal parents. It is especially noticeable when the commissioning mother and/or father cannot demonstrate a connection (e.g. genetic link) with the child that is needed under the law for creating a parent-child relationship or when the commissioning mother and/or father cannot gain entry to home state to begin such a process, or when they enter the home state, but the child is then removed into public care.²⁸

Precisely such cases were recently the subject of dispute before the ECtHR. In this chapter we will present what conclusions has the ECtHR reached in its decisions and what is their potential impact on the human rights protection of the child and the commissioning parents, especially their right to private and family life as prescribed in Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and in Article 7 of the Charter.²⁹ Taking into account the content of the provision of Article 52, Paragraph 3 of the Charter, we consider that the above-mentioned decisions of the ECtHR will have a significant effect on Croatia, as well as on all other member states of the Council of Europe and the EU regarding their domestic legislation on cross-border surrogacy.³⁰ The main question that arises is how should domestic authorities deal with cross-border surrogacy arrangements that have been carried out legally in another jurisdiction, but are contrary to mandatory rules of the domestic law of the commissioning parents?³¹

²⁷ See also Wade, K., *The regulation of surrogacy: a children's rights perspective*, Child and Family Law Quarterly, Vol. 29, No.2, p. 116

²⁸ Achmad, *op. cit.* note 15, p. 85

²⁹ There are several rights of the child that could be breached if above-mentioned situations came true – the right to citizenship, identity, nationality and to grow up in a family environment, all prescribed by the CRC. See Achmad, *op. cit.* note 14, pp. 514, 520-521, 524

³⁰ Charter of Fundamental Rights of the European Union, Official Journal of the European Union 2007/C 303/01, Scope and interpretation of rights and principles - Article 52, Paragraph 3: “*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*”

³¹ See also Fenton-Glynn, *op. cit.* note 14, p. 547

3.1. THE TRAVEL RESTRICTION MECHANISM FROM THE PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS

In situations where the domestic law of the commissioning parents completely prohibits surrogacy (domestic and international), paradoxically, it is still possible for the commissioning parents to bypass the domestic prohibition on surrogacy by travelling abroad to a jurisdiction where they can legally conclude and carry out the cross-border surrogacy arrangement, without having any connection whatsoever with that jurisdiction.³² That kind of conduct leads to numerous problems that commissioning parents face while trying to return to their home country with the child that was borne through cross-border surrogacy arrangement, because their home country, as aforementioned, prohibits international surrogacy and therefore has legal ground to impose different mechanisms for restricting cross-border surrogacy arrangements, one of which is the travel restriction mechanism.³³

Often, the source of the problem is that the domestic law of the commissioning parents determines the origin of the child in a different way than the law of the country of the child's birth. For example, under Croatian Family law, the starting point of which is the presumption "*mater semper certa est*", legal parents of the child would be the surrogate mother (and her husband) and not the commissioning parents.³⁴ ³⁵ As a result, the child would not have the nationality of the commissioning parents³⁶ nor could he or she obtain a passport³⁷, leaving the child without the ability to travel with commissioning parents back to their home country thus creating the travel restriction mechanism.

³² Yetano rightly concludes that by "*allowing citizens to bypass domestic law by simply travelling abroad leads to the irreparable erosion of that country's domestic prohibitions and often anticipates their reform*". Yetano, M. T., *The Constitutionalisation of Party Autonomy in European Family Law*, Journal of Private International Law, Vol. 6, No. 1, 2010, p. 179

³³ Fenton-Glynn, *op. cit.* note 14, p. 547

³⁴ Croatian Family Act, Official Gazette, No. 103/2015 (CFA), Article 58 prescribes: "*A child's mother is considered to be the woman who gave birth to the child*". More importantly, Article 82 prescribes: "*A mother of a child conceived by a donated ovum or a donated embryo, in the process of medically assisted fertilization, is the woman who gave birth*"

³⁵ Concerning the origin of the child born through cross-border surrogacy, other countries of the Council of Europe and/or the EU have similar legal solutions. Who is considered to be the legal parents of the child born through cross-border surrogacy under English, Dutch, Irish and Norwegian law, see: Fenton-Glynn, *op. cit.* note 14, pp. 547, 550.; Boele-Woelki, *op. cit.* note 1, pp. 51, 55; Beaumont; Trimmings, *op. cit.* note 14, p. 10, footnote 61.; Achmad, *op. cit.* note 14, pp. 524-525

³⁶ See Article 3 of the Croatian Act on International Private Law, Official Gazette, No. 101/2017, in connection with Articles 3 to 5 of the Croatian Nationality Act, Official Gazette, No. 53/1991, 70/1991, 28/1992, 113/1993, 4/1994, 130/2011, 110/2015

³⁷ See Article 34 of the Act on Travel documents of Croatian citizens, Official Gazette, No. 77/1999, 133/2002, 48/2005, 74/2009, 154/2014, 82/2015

Such a mechanism could also be created and realized on a different legal ground. For example, surrogacy arrangements, be they commercial or free of charge are explicitly prohibited by the Croatian Act on Medically Assisted Fertilization making this a prohibition of public order.³⁸ Bearing in mind that all persons are obliged to abide by the law and respect the legal order of the Republic of Croatia³⁹, domestic authorities could refuse to issue a passport or visa for the child when commissioning parents would seek to return to Croatia, thus creating the travel restriction mechanism. That would be in line with the position that has been taken by some member states of the Council of Europe and the EU (e.g. Germany, France, Italy and Austria), which consider that public policy has been violated by the mere fact that a surrogacy arrangement has been performed.⁴⁰

The legality of the use of the travel restriction mechanism on children borne through cross-border surrogacy was brought before the ECtHR in the case of *D. and others v Belgium*.⁴¹ This case concerned a Belgian couple who had travelled to Ukraine to enter into a cross-border surrogacy arrangement. After the birth of the child, they asked the Belgian embassy in Kyiv to issue a Belgian passport for the child, but this was refused because they had not submitted sufficient evidence concerning the existence of a genetic link between at least one of them and the child. The core problem for the Belgian authorities was that there was no record of the pregnancy on the part of the commissioning mother, no information regarding a cross-border surrogacy arrangement was provided and the only evidence provided by the couple to show the genetic link between (just) the commissioning father and child was from an internet site.⁴² This travel restriction mechanism was maintained until the applicants had submitted sufficient evidence to permit confirmation of a genetic relationship with the child and resulted in the child being

³⁸ Article 31. of the Croatian Act on Medically Assisted Fertilization is presented in more detail in footnote No. 5.; Concerning the prohibition of surrogacy arrangements as a prohibition of public order, other countries of the Council of Europe and the EU, like France and Germany have similar legal solutions. See Fenton-Glynn, *op. cit.* note 14, pp. 548, 550, 552; Beaumont; Trimmings, *op. cit.* note 14, p. 3

³⁹ See Article 5 Paragraph 2 of the Constitution of the Republic of Croatia, Consolidated text, Official Gazette No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014., [https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf] Accessed 05.03.2019

⁴⁰ Fenton-Glynn, *op. cit.* note 14, pp. 548, 550, 558; Boele-Woelki, *op. cit.* note 1, pp. 55-56; Pluym, L., *Mennesson v. France and Labassee v. France: Surrogate motherhood across borders*, p. 4, [<https://strasbourgobservers.com/2014/07/16/mennesson-v-france-and-labassee-v-france-surrogate-motherhood-across-borders/>] Accessed 20.03.2019

⁴¹ The case of *D. and others v Belgium*, Application no. 29176/13, Judgment 11 September 2014.; The travel restriction mechanism is also used in legal systems outside the EU (e.g. New Zealand and Norway). See Achmad, *op. cit.* note 14, pp. 521, 524, 526

⁴² See Fenton-Glynn, *op. cit.* note 14, p. 548

separated from the applicants in a period of three months because they were no longer able to remain in Ukraine and had to return to Belgium without the child.

The applicants claimed that the travel restriction mechanism caused the separation from the child and amounted to interference in their right to respect for their private and family life. The ECtHR dismissed their application as manifestly unfounded because it considered that the ECHR could not oblige the State Parties to authorize entry to their territory of children born through cross-border surrogacy arrangements without the domestic authorities had conducted relevant legal checks that were provided for by law and pursued a legitimate aim.⁴³ Furthermore, the ECtHR noted that the applicants could reasonably have foreseen the legal checks they would face in order to bring the child into their home country.⁴⁴ In the end, the ECtHR concluded that domestic authorities are permitted to use the travel restriction mechanism and simultaneously require evidence to prove the genetic link between the child and (at least one of) the commissioning parents. The eventual separation that has arisen because of and until such actions have been completed by the domestic authorities, is not contrary to their right to private and family life as prescribed in Article 8 of the ECHR and in Article 7 of the Charter.

This kind of reasoning by the ECtHR led some academics to conclude that the travel restriction mechanism is a legitimate way to screen children coming into the country for a genetic link to one of the commissioning parents, but once that is established, that mechanism can serve no further purpose. In other words, once the genetic link is established, the travel restriction mechanism could not be further used as a mechanism for restricting cross-border surrogacy arrangements because the consequences of its use wouldn't be in line with the best interest of the child principle as prescribed in Article 3 of the CRC and Article 24 of the Charter.⁴⁵

We are fully aware that the child, not the commissioning parents, would bear the full rigour of a comprehensive use of the travel restriction mechanism after the establishment of a genetic link and that such an approach wouldn't be in line with the best interest of the child principle, considering the fact that the child wouldn't

⁴³ The ECtHR held that the legal checks were provided for by law and pursued several legitimate aims, namely the prevention of crime (e.g. trafficking in human beings) and the protection of the rights of others (e.g. surrogate mother and child); *Case of D. and others v Belgium*, Application no. 29176/13, Judgment 11 September 2014., para 59

⁴⁴ *The case of D. and others v Belgium*, Application no. 29176/13, Judgment 11 September 2014., para 60; The fact that lengthy procedures should be expected by the commissioning parents when they are trying to bring the child into their home country is often pointed out in academic literature. See Boele-Woelki, *op. cit.* note 1, p. 55

⁴⁵ Fenton-Glynn, *op. cit.* note 14, p. 549; Beaumont; Trimmings, *op. cit.* note 14, pp. 15, 17; Achmad, *op. cit.* note 14, pp. 533-535

be allowed to enter the home country of the commissioning parents and would have to be placed in alternative care in the country of birth. However, the following questions require an answer: Is there a legal ground for the domestic authorities to use the travel restriction mechanism after it has been established that there is no genetic link between the child and the commissioning parents? Would such an approach be in line with the principle of the best interest of the child that has no connection with the commissioning parents nor with their home country, in which he or she is trying to enter?

On the other hand, the limitation of use of the travel restriction mechanism, as proposed by the aforementioned academics, would, in fact, encourage the commissioning parents to circumvent domestic legislation prohibiting surrogacy.⁴⁶ If the only requirement is to (illegally) establish a genetic link between the child and one of the commissioning parents for the domestic authorities to permit the child to enter the country, then it is clear that the commissioning parents will accomplish their goal (although not speedily), despite the fact that their conduct represents a breach of mandatory rules of the domestic law (e.g. rules on the origin of the child that originate from the presumption “*mater semper certa est*” and/or rules prescribing the prohibition of surrogacy arrangements). If that is the case, then it seems that the end does justify the means!⁴⁷ The proposed resolution of this problem represents a misuse of the best interest of the child principle in favour of the commissioning parents whose conduct has placed the domestic authorities in a stalemate position. This is because the commissioning parents essentially create conditions (e.g. birth of the child through cross-border surrogacy, establishment of a genetic link with one of the commissioning parents, application to enter the country with the child) in which any action by the domestic authorities that would be in line with the domestic legislation (e.g. the use of the travel restriction mechanism) would endanger the position of the child and possibly counteract his or her best interests.

⁴⁶ Beaumont; Trimmings, *op. cit.* note 14, p. 15

⁴⁷ One could wonder what is the cause of all these problems? Is it the use of the travel restriction mechanism by the domestic authorities that restrict cross-border surrogacy (as a reflection of the legitimacy of their choice not to recognize surrogacy arrangements, because they consider them as immoral and illegal) or could it be that the problem is in the conduct of the commissioning parents who, despite the aforementioned prohibition of public order, travel abroad to conclude and carry out the cross-border surrogacy arrangements?

3.2. THE MECHANISM OF NON-RECOGNITION OF LEGAL PARENTAGE FROM THE PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The second mechanism for restricting cross-border surrogacy arrangements is the non-recognition of legal parentage mechanism. This has been the preferred mechanism in member states of the Council of Europe and the EU (e.g. Germany, France and Italy) whose domestic law explicitly prohibits cross-border surrogacy by a prohibition of public order.

Another state of the Council of Europe and the EU with similar legislation is the Republic of Croatia. Under the Croatian Act on Medically Assisted Fertilization, all contracts concerning surrogate motherhood are considered to be null and void.⁴⁸ Bearing in mind that the entry of the commissioning parents as the legal parents of the child in the register of births would give effect to a cross-border surrogacy arrangement that was, by operation of law, null and void, Croatian authorities could refuse to recognise the commissioning parents as the legal parents of the child, thus creating the aforementioned mechanism. It is very important to distinguish the registration of the child in the register of births, from the registration of commissioning parents in the register of births as the legal parents of that child. This is because to refuse to register the child in the register of births would mean to undermine the child's right to be registered immediately after birth as prescribed by Article 7 of the CRC and to violate the non-discrimination principle prescribed in Article 2 of the CRC.⁴⁹ On the other hand, to refuse to register the commissioning parents as the legal parents of the child in the register of births would mean to act in accordance with the aforementioned prohibition of public order prescribed by the Croatian Act on Medically Assisted Fertilization and with the presumption "*mater semper certa est*" that is woven in the mandatory provisions of the Croatian Family Act regulating the origin of the child.⁵⁰ Such actions of the domestic authorities would also be in line with the provision of Article 35 of the CRC which obliges all states parties to take appropriate measures to prevent the sale of children⁵¹, as well as with the provision of Article 2, Paragraph 1(f)

⁴⁸ See note 5

⁴⁹ See also Achmad, *op. cit.* note 14, pp. 529-534

⁵⁰ Croatian Family law, the starting point of which is the presumption "*mater semper certa est*", perceives the surrogate mother (and her husband) as legal parents of the child and not the commissioning parents. See Croatian Family Act, Official Gazette, No. 103/2015, Article 58 and 82 in note 34

⁵¹ Tobin and Achmad rightly conclude that the argument that cross-border commercial surrogacy amounts to the sale of children is convincing in many aspects. Both authors point to the provision of Article 2(a) of the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (CRC Optional Protocol). See Achmad, *op. cit.* note 14, pp. 520-521; Tobin, J., *To prohibit or permit: What is the (human) rights response to the practice of International Commercial Surrogacy?*,

of the UN Convention on the elimination of all forms of discrimination against women which obliges all states parties to take appropriate measures to modify or abolish existing customs and practices which constitute discrimination against women.⁵² Finally, such actions of the domestic authorities wouldn't amount to a violation of the right to respect for family life of the commissioning parents, as determined in the case law of the ECtHR.

The legality of the use of the non-recognition of legal parentage mechanism was brought before the ECtHR in the cases of *Mennesson v. France* and *Labassee v. France*.⁵³ The cases concerned the refusal of domestic authorities to recognise the legal parent-child relationship that had been established in the United States (US) between the child and the commissioning parents. Both the *Mennessons* and the *Labassee*s obtained children through commercial cross-border surrogacy arrangements in the US. The children were conceived using the sperm of the commissioning father and the ovum of a donor. Courts in California and Minnesota ordered that the commissioning parents are to be considered the children's legal parents and not the surrogate mother. After returning to France, domestic authorities refused to enter the US birth certificates in the French register of births, marriages and deaths thus creating the non-recognition of legal parentage mechanism. Domestic authorities argued that recording such entries in the French register of births, marriages and deaths would give effect to a cross-border surrogacy arrangement that was null and void under French law and would recognize a practice that was explicitly forbidden by a prohibition of public order.

The couples then brought the cases before the ECtHR claiming that the non-recognition of legal parentage mechanism caused the inability to obtain recognition of their legal parent-child relationship in France, which had already been established in the US. They argued that the use of such a mechanism was in collision with their right to respect for private and family life (Article 8 ECHR and Article

International and Comparative Law Quarterly, British Institute for International and Comparative Law, Vol. 63, Issue 2, 2014, pp. 319, 326, 332-333; See also Beaumont; Trimmings, *op. cit.* note 14, p. 16; Micković, D., Ristov, A., *op. cit.* note 14, pp. 33-34; The case of *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment 24 January 2017 – concurring opinion of Judges de Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov, para 6

⁵² Many academics point out the problem of exploitation of surrogate mothers especially in developing countries. See Tobin, *op. cit.* note 51, p. 319. and 344.; Beaumont; Trimmings, *op. cit.* note 14, p. 16; Pluym, *op. cit.* note 40, p. 4; Micković, Ristov, *op. cit.* note 14, p. 33-34; Boele-Woelki, *op. cit.* note 1, p. 51; Fenton-Glynn, *op. cit.* note 14, pp. 546, 558

⁵³ The case of *Mennesson v. France*, Application no. 65192/11, Judgment 26 June 2014. This case was heard simultaneously with the case of *Labassee v. France*, Application no. 65941/11, Judgment 26 June 2014; The non-recognition of legal parentage mechanism is also used in legal systems outside the EU (e.g. New Zealand and Norway). See Achmad, *op. cit.* note 14, pp. 523-524

7 of the Charter). The ECtHR examined the issues separately from the perspective of the applicants and from the perspective of the children.

With regard to the right to respect for family life, the ECtHR took into account that the applicants admitted that the obstacles, caused by the failure to obtain recognition of their legal parent-child relationship, were not insurmountable. The ECtHR acknowledged that the applicants failed to demonstrate that they had been prevented from the enjoyment in France of their right to respect for their family life. Consequently, the ECtHR considered that the French authorities had struck a fair balance between the interests of the applicants (commissioning parents) and those of the state and, therefore, there was no violation of their right to respect for family life.⁵⁴

A different conclusion was reached with regard to the right to respect for private life of children. As French law refused to recognise the legal parent-child relationship between the commissioning parents and the children, the ECtHR found that the children were in a state of “legal uncertainty” as they could not obtain the nationality of the commissioning parents, nor did they have the right to inherit the commissioning parents as descendants (just as legatees). Considering the fact that the ECtHR identified legal parentage, nationality and the right to inherit as relevant elements of children’s identity and taking into account the fact that the right to establish identity is encompassed within the children’s right to respect for private life, the ECtHR concluded that children’s right to respect for their private life was considerably affected and that the situation was irreconcilable with the paramountcy of the best interests of the child principle as prescribed in Article 3 of the CRC and Article 24 of the Charter.⁵⁵ That is why the ECtHR held that by preventing the recognition of the legal parent-child relationship between the children and the commissioning father as their genetic father, France had overstepped the margin of appreciation and had violated the children’s right to respect for their private life as prescribed in Article 8 of the ECHR and in Article 7 of the Charter.

The ECtHR’s reasoning from *Mennesson* and *Labassee* was approved in the most recent cases of *Foulon and Bouvet v. France*.⁵⁶ The ECtHR reiterated that children’s right to respect for private life had been violated by the refusal of domestic authorities to transcribe their foreign (Indian) birth certificates onto the French

⁵⁴ The case of *Mennesson v. France*, Application no. 65192/11, Judgment 26 June 2014., para 92-94; The case of *Labassee v. France*, Application no. 65941/11, Judgment 26 June 2014, para 71-73

⁵⁵ The case of *Mennesson v. France*, Application no. 65192/11, Judgment 26 June 2014, para 96-100.; The case of *Labassee v. France*, Application no. 65941/11, Judgment 26 June 2014, para 75-79

⁵⁶ The case of *Foulon and Bouvet v. France*, Application nos. 9063/14 and 10410/14, Judgment 21 July 2016

register of births, marriages and deaths, on the grounds that children were borne through cross-border commercial surrogacy arrangements that were considered to be null and void and were explicitly prohibited in France. In both these cases, the commissioning father was, in fact, the genetic father of the children concerned.

It appears that the genetic link with the commissioning father was framed by the ECtHR as the crucial component that was necessary and sufficient to provide protection for children's private life.⁵⁷ It is clear from the judgment that once the genetic link is proved, domestic authorities are obliged not to use the non-recognition of legal parentage mechanism.⁵⁸ This would mean that member states of the Council of Europe and the EU that prohibit both domestic and cross-border surrogacy, refusing to recognise the legal parent-child relationship that has been established abroad, will have to change course to act in accordance with Article 8 of the ECHR and Article 7 of the Charter (bearing in mind the content of the provision of Article 52, Paragraph 3 of the Charter).⁵⁹ It seems that the only way for member states to prevent a violation of children's right to respect for private life is to legally recognize the parent-child relationship established abroad between a child born through cross-border commercial surrogacy and his or her biological parent.⁶⁰

However, the following question stands: Is there a legal ground to recognize the legal parent-child relationship between the child and the genetically unrelated commissioning parent, e.g. the commissioning mother? If we consider the fact that the final goal of the commissioning parents is for both of them to be entered into the birth registry of the child as his or her parents (despite the fact that only the father has a genetic link with the child), such a development would be contrary to the presumption "*mater semper certa est*" on which the establishment of legal motherhood is traditionally based.⁶¹ Another problem with such a solution is that the child won't have any information available to him about his genetic mother (e.g. surrogate mother and/or the ovum donor). The situation in which the child cannot trace his or her origin is contrary to the right of the child to know his or her origin as guaranteed by Article 7 of the CRC. Given the fact that the biologi-

⁵⁷ See Beaumont; Trimmings, *op. cit.* note 14, p. 5; Fenton-Glynn, *op. cit.* note 14, p. 554; Pluym, *op. cit.* note 40, p. 3

⁵⁸ See Beaumont; Trimmings, *ibid.*, pp. 9, 17; Fenton-Glynn, *op. cit.* note 14, pp. 555, 561-562; Pluym, *op. cit.* note 40, p. 4

⁵⁹ See note 30

⁶⁰ Beaumont; Trimmings, *op. cit.* note 14, pp. 9, 17; Fenton-Glynn, *op. cit.* note 14, pp. 555, 561-562; Pluym, *op. cit.* note 40, p. 4

⁶¹ Beaumont; Trimmings, *ibid.*, p. 10

cal parentage is a part of the child's identity, the child's right to preserve his or her identity, as prescribed by Article 8 of the CRC, would also be undermined.⁶²

The Mennesson/Labasse approach of the ECtHR will have significant consequences on member states of the Council of Europe and the EU regarding their domestic legislation on cross-border surrogacy. Some academics have rightly observed that the ECtHR's approach indirectly challenges the member states choice to outlaw surrogacy and compels them to accept the legal effects of cross-border commercial surrogacy arrangements.⁶³ We believe that such a position of the ECtHR amounts in essence to a denial of freedom and legitimacy of each member states choice not to recognise surrogacy arrangements and to view them as immoral and illegal.⁶⁴ We wonder does the ECtHR have the authority to, albeit in an indirect way, interfere with a member states choice not to recognise the legal effects of surrogacy arrangements (especially the commercial ones) or is that a matter that falls within the exclusive competence of member states to regulate national substantive family law (e.g. the question of the origin of children)? We believe that systems of substantive family laws of member states of the Council of Europe and the EU are national systems in which member states continue to retain exclusive competence to create their national substantive family law as they see fit and that the ECtHR should resist the temptation to act as "a back door legalisation of surrogacy".^{65 66}

If we accept the Mennesson/Labasse approach of the ECtHR, which undermines the presumption "*mater semper certa est*" on which the establishment of legal

⁶² Boele-Woelki, *op. cit.* note 1, pp. 49-50, Achmad, *op. cit.* note 14, pp. 527, 529; Beaumont; Trimmings, *ibid.*, pp. 9, 17

⁶³ Beaumont; Trimmings, *ibid.*, p. 11

⁶⁴ It should be noted that in both judgments (Mennesson/Labasse) freedom of the member states to outlaw surrogacy was in fact acknowledged by the ECtHR (see Mennesson v. France, no. 65192/11, 26 June 2014, § 79, and Labasse v. France, (no. 65941/11), 2 June 2014, § 58). See joint partly dissenting opinion of judges Raimondi and Spano in the Case Of Paradiso and Campanelli v. Italy, Application No. 25358/12, Judgment of 27 January 2015, para 15; Beaumont; Trimmings, *op. cit.* note 14, p. 11, footnote 65

⁶⁵ See Yetano, *op. cit.* note 32, pp. 179-180; Beaumont; Trimmings, *ibid.*, p. 12; Majstorović, I., *Obiteljsko pravo kao različitost u jedinstvu: Europska unija i Hrvatska*, in: Korać Graovac, A., Majstorović, I. (eds.), *Europsko obiteljsko pravo*, Narodne novine, Zagreb, 2013, p. 14; Majstorović, I., *Europski pravni kontekst i značenje za hrvatsko materijalno obiteljsko pravo*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol. 4, No. 1, 2013, p. 88.; Šimović, I., Ćurić, I., *Europska unija i obiteljsko pravo međunarodnoprivratnopravni, procesnopravni i materijalnopravni aspekti*, Ljetopis socijalnog rada, Vol. 22, No. 2, 2015, pp. 176-177, 185

⁶⁶ Some academics consider that "*The ECtHR jurisprudence will thus become a vehicle of the pro-surrogacy lobby groups that have commercial interests in the area of surrogacy in the receiving countries*". See Beaumont; Trimmings, *ibid.*, p. 12

motherhood is traditionally based⁶⁷, the ECtHR is *de facto* interfering in the creation of substantive family law of the member states. For example, if Croatia as a member state prohibits both domestic and cross-border surrogacy and, despite that, still has to legally recognize the parent-child relationship established abroad between a child born through cross-border commercial surrogacy and his or her biological parent, then the ECtHR has in fact introduced a new mode of acquisition of parental care which has not existed within Croatian family law – acquisition of parental care through cross-border surrogacy arrangements. So far, parental care has been *ex lege* acquired exclusively by: a) parents at the time of the birth, on the basis of the child's origin, through three different systems – presumption of maternity and paternity, acknowledgement of paternity⁶⁸ and the establishment of maternity and paternity by a court decision (Article 91 in connection with Articles 58-60. and Articles 82-83.), b) adoptive parents on the basis of the adoption decision that has become final.⁶⁹ It seems that the Mennesson/Labasse approach of the ECtHR has indeed introduced a fourth system of acquisition of parental care by the commissioning parents – through cross-border commercial surrogacy arrangements. We believe that the consequences of such an approach largely overreach beyond the ECtHR's authority, because its competence concerning substantive family law of member states is clearly non-existent.⁷⁰ Finally, such an approach is not suitable to tackle a complex phenomenon such as surrogacy because it does

⁶⁷ Yetano rightly points out that such an approach is „...especially contradictory in the domain of family law, which is, for the most part, composed of rules that are purportedly mandatory...” and goes on to conclude that those rules of substantive family law, in fact, become “semi-mandatory”. See Yetano, *op. cit.* note 32, p. 179; It has to be emphasized that one of the main characteristics of Croatian family law, including the regulation of the origin of the child, is regulated by mandatory rules. See Alinčić *et al.*, *op. cit.* note 2, p. 4

⁶⁸ The possibility of acquiring parental care through the system of acknowledgment of maternity has been abolished in the Croatian Family Act (Official Gazette, No. 103/2015) because the legislator was afraid of the possibility of misuse of this institute for the purpose of establishing maternity of a child borne through cross-border surrogacy in favour of the commissioning mother (bearing in mind that Croatian Act on Medically Assisted Fertilization explicitly prohibits domestic and cross-border surrogacy). See Explanation of the final draft of the proposal of the Family Act, p. 16, [<https://mdomsp.gov.hr/user-docs/images/arhiva/files/71832/Obrazlo%C5%BEEenje%20Nacrta%20prijedloga%20Obiteljskog%20zakona-11.9.2013..pdf>] Accessed 26.03.2019

⁶⁹ See Korać Graovac, A., *Od zajedničkog do samostalnog ostvarivanja roditeljske skrbi i natrag – kako zaštititi prava djece i roditelja*, Godišnjak Akademije pravnih znanosti hrvatske, Vol. 8, No. special edition, 2017, p. 54

⁷⁰ Yetano rightly concludes that “*The ECJ and the ECHR are stopping states from effectively regulating family law issues, without nonetheless providing an alternative regulation, throwing the field into disarray. This is not something that should be encouraged, for whatever the view one may have on family law issues, this is a domain that needs limits and careful thought.*” See, Yetano, *op. cit.* note 32, pp. 180, 192

not address some serious issues that arise from cross-border commercial surrogacy (e.g. dual treatment of surrogacy arrangements).⁷¹

4. CHILDREN'S RIGHTS AS THE SUBJECT OF EU SURROGACY POLICY

The practice of the ECtHR has shown that some mechanisms that aim to prevent cross-border surrogacy, which is prohibited by legal norms of the domestic legal systems, are not sufficient to protect the best interests of the child.⁷² We find the reason for this standpoint in the notion that the ECtHR in its effort to protect the best interests of the child is actually legalizing surrogacy by enabling that the commissioning parents become legal parents.

As the EU law does not specifically regulate surrogacy, many questions regarding the authorization, prohibition or management of surrogacy arrangements and the protection of the parties involved have never been answered by the EU legislator. Although the legal regulation of the cross-border surrogacy arrangements remains largely absent, there is a series of recent recommendations that point to prohibit surrogacy arrangements from the standpoint of children's right protection.

Thus, in 2010, the Special Commission of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption expressed its concern over the uncertainty surrounding the status of the children who are born as a result of surrogacy arrangements.⁷³ That triggered the Hague Conference on Private International law (HCPIIL) to start the "Parentage/Surrogacy Project" with an aim to gather country information and draft reports with a view to the creation of an instrument regarding the cross-border surrogacy.⁷⁴ The HCPIIL made announced report at the end of 2018 where it stressed that the absence of uniform rules on legal parentage can lead to limping parentage across borders in a number of cases and can create significant problems for the

⁷¹ Concerning the problem of dual treatment of surrogacy arrangements in member states that prohibit such arrangements see: Beaumont; Trimmings, *op. cit.* note 14, p. 11-12; Fenton-Glynn, *op. cit.* note 14, p. 564-566

⁷² According to recent comparative studies, only the United Kingdom, Greece, Romania and Portugal expressly allow surrogacy and even then exclusively within the confines of strict regulation. See Thomale, C., *State of play of cross-border surrogacy arrangements – is there a case for regulatory intervention by the EU?*, *Journal of Private International Law*, Vol. 13, Issue 2, 2017, p. 464

⁷³ Blauwhoff, R.; Frohn, L., *International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law*, in: C. Paulussen *et al.* (eds.), *Fundamental Rights in International and European Law*, 2016, p. 218

⁷⁴ See the relevant documentation the website of the Hague Conference on Private International law, [www.hcch.net] Accessed 28.03.2019

children.⁷⁵ The report also recalled that uniform rules could assist the Member States in resolving cross-border surrogacy conflicts and could introduce safeguards for the prevention of fraud involving public documents while ensuring that the diverse substantive rules on legal parentage of the Member States are respected.⁷⁶

In 2013, the European Parliament (EP) published a study on the regime of surrogacy in the Member States, which deal with some important aspects of the cross-border surrogacy arrangements of the EU regime.⁷⁷ Whatever the nature of the EU regime, the study suggested that one of the principal aims, which it should seek to deliver, is certainty as to the legal parenthood of the child, and the child's entitlement to leave the state of origin, and to enter and reside permanently in the receiving state.⁷⁸

The European Parliament (EP), in its Resolution of 5 April 2011 on priorities and outlines of a new EU policy framework to fight violence against women (2010/2209(INI)) and in Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)), stressed that surrogacy commodifies children, and violates the legal norm of the CRC, which protects a child's "right to know and be cared for by his or her parents".⁷⁹ Further, the EP pointed that the surrogacy also violates the European Convention on Human Rights and Biomedicine, which in Article 21 prescribes that "the human body and its parts shall not, as such, give rise to financial gain."⁸⁰

Since 2014, the protection of children's right in cross-border surrogacy arrangements was the subject of discussion at Committee on Social Affairs of the Parlia-

⁷⁵ The Report of the Experts' Group on the Parentage / Surrogacy Project, [<https://assets.hcch.net/docs/c25b558d-c24e-482c-a92b-d452c168a394.pdf>] Accessed 28.03.2019

⁷⁶ *Ibid.*; In March 2019 it will be determined whether work on "The Parentage/Surrogacy Project" will go forward. [<http://conflictoflaws.net/2018/reports-of-hcch-experts-groups-on-the-surrogacy-parentage-and-the-tourism-projects-available/>] Accessed 28.03.2019

⁷⁷ Brunet, L.; Carruthers, J.; Davaki, K.; King, D.; Mccandels, J., *A comparative study on the regime of surrogacy in the EU Member States*, European Parliament, 2013, p. 191, [<http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL>] Accessed 28.03.2019.; Blauwhoff; Frohn, *op. cit.* note 73, p. 213

⁷⁸ *Ibid.*

⁷⁹ European Parliament Resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women (2010/2209(INI)), [<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0127+0+DOC+XML+V0//EN>]; Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)), [http://www.europarl.europa.eu/doceo/document/A-8-2015-0344_EN.html?redirect] Accessed 28.03.2019.; See Article 7(1) of the CRC

⁸⁰ Article 21 of the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, [<https://rm.coe.int/168007cf98>] Accessed 28.03.2019

mentary Assembly of the Council of Europe (PACE). The PACE had a task to adopt the draft resolution “Human Rights and ethical issues related to surrogacy” that raised concerns about the practice of surrogacy, in particular commercial surrogacy, whose unregulated nature poses a serious problem regarding children’s rights as it open opportunity for developing of the black market of baby selling.⁸¹ The two versions of the report regarding the draft resolution were made and they were both rejected by the PACE Social Affairs Committee in 2016 as they were pure guidelines how to protect children born from surrogacy, without explicitly condemning the practice of surrogacy itself.⁸²

The European citizens and the international collective group *No Maternity Traffic* had the decisive role in rejecting draft resolution as they gathered over 100,000 signatures requesting to explicitly condemn all forms of surrogacy.⁸³ This petition was validated by the Council of Europe and the Bureau of the Parliamentary Assembly and taken in to account during the debates.⁸⁴

All these EU policy issues regarding cross-border surrogacy are only showing us that, although children’s rights perspective takes an important role in prohibiting surrogacy arrangements, we can expect that EU will be soon affected with new efforts that will strive to legalize surrogacy arrangements by presenting to the public that the children’s rights will be worthily protected. This kind of practice is actually a “Trojan horse” which offers provisional protection of children’s rights, without condemning the practice of surrogacy. Therefore, the EU institutions have to be very cautious as such practice is opposed to the child’s best interest and abuses children by causing them irreparable damage.⁸⁵

5. CONCLUSION

Surrogacy is presented as a method of medically assisted reproduction, among others, which meant to help couples who cannot naturally have children. Although

⁸¹ Human rights and ethical issues related to surrogacy, [<https://agenda.europe.files.wordpress.com/2015/04/surrogacy-preliminary-report-3.pdf>] Accessed 28.03.2019; Council of Europe Rejects Surrogacy recommendations: Alliance VITA’s reaction, [<https://www.alliancevita.org/en/2016/10/council-of-europe-rejects-surrogacy-recommendations-alliance-vitas-reaction/>] Accessed 28.03.2019

⁸² *Ibid.*; On 11 October, the Council of Europe must reject the recommendation on surrogacy, 2016, [<http://www.abolition-gpa.org/2016/10/07/on-11-october-the-council-of-europe-must-reject-the-recommendation-on-surrogacy/>] Accessed 28.03.2019

⁸³ Maternité de substitution : No Maternity Traffic salue le rejet de la recommandation par le Conseil de l’Europe. [<https://www.nomaternitytraffic.eu/cp-maternite-de-substitution-no-maternity-traffic-salue-le-rejet-de-la-recommandation-par-le-conseil-de-leurope/>] Accessed 29.03.2019

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

surrogacy is prohibited among most of member states, cross-border surrogacy enables couples or single persons to bypass domestic legislation in order to become parents. However, the surrogacy arrangements create a situation that is not only legally but as well ethically doubtful as they contribute that humans are treated as commodities which, among others, disregards children's rights in many aspects.

Besides the notion that cross-border surrogacy arrangement treats the child as an object of a law, which raises deep ethical resentment in the many member states, they are calling into question the idea of the legal parentage especially in cases when there is no genetic link between the child and the commissioning parents. Thus, the surrogacy arrangements can lead to a situation where as many as five people can claim a parental status over the child: the commissioning parents, the genetic mother and father, and the surrogate.

The law considers as parents those persons who are entitled to the parenthood by the law. The maternal affiliation of the child is usually based solely on the fact of the birth of the child, so the birth mother is presumed to be the legal mother of the child (lat. *mater semper certa est*). On the contrary, the paternal affiliation may be established by acknowledgement or a juridical decision, if it is not established by marriage with the mother. However, the cross-border surrogacy arrangements represent the problem regarding the determination of legal parentage as the commissioning parents usually do not fulfil assumptions for creating a parent-child relationship; or they cannot gain entry to home state to begin such a process; or they enter the home state, but the child is then removed into public care.⁸⁶ In order to prevent bypassing of the legal norms that prohibit cross-border surrogacy member states created two mechanisms: the travel restriction mechanism and the mechanism of non-recognition of legal parentage. However, both mechanisms have a negative impact on the best interest of the child as they aim to protect the domestic legal system and leave children without legal parents. Such domestic practice is the subject of dispute before the ECtHR as it represents a serious threat to children's rights (e.g. right to know his/her parents or right to identity). The ECtHR took a stand that is in the child's best interest to seek for the genetic link between the child and at least one of the commissioning parents (usually the father) in order to create a legal relationship between them. Although this practice has a goal to protect the best interest of the child, this practice contributes to bypassing the domestic legal norms that prohibit surrogacy arrangements. Additionally, it opens the possibility for other commissioning parent (e.g. mother) who doesn't have a genetic link to become a legal parent. This is especially applicable in Croatia as the Article 185 of the Family Act prescribes that the child could be

⁸⁶ Achmad, *op. cit.* note 15, p. 85

adopted either by spousal or non-marital partners together, by one spouse or non-marital partner if the other spouse or non-marital partner is the parent or adoptive parent of the child, and one spouse and non-marital partner with the consent of the other spouse.

The EU policy regarding surrogacy arrangements still aims to prohibit surrogacy but recently there were some unsuccessful attempts of introducing altruistic surrogacy under the notion of the protection of the best interest of the child. However, it is important for a legislator to have in mind that every type of surrogacy arrangement endangers the child's rights and his best interests. The reason for such a standpoint is arising from the notion that surrogacy separates the biological, social and legal relationship between the child and his/hers parents by introducing into their legal relationship persons who are not traditionally the legal subjects of that relationship and thereby contributing to the child's lack of the right "to know and be cared for by his / her parents". Therefore, when the ECtHR, with the best intentions for child's interests, "legalizes" surrogacy arrangements, its judgment is obligatory for the member states and creates the perfect environment for a "back door" approach in changing domestic legislation. For all those reasons, the prohibition of all forms of surrogacy would be the only complete solution in favor of respecting rights and dignity of not only a child but of every human being as well.

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