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The European Court of Human Rights and Technological Development: The Issue of the Continuity of the Family Status Established Abroad Through Recourse to Surrogate Motherhood

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1. Surrogate Motherhood from an Anthropocentric Perspective: The Human Rights Debate Underlying State Policies

Surrogate motherhood represents one of the thorniest contemporary issues, raising ethical and moral questions in addition to legal ones. It is well known that the expression 'surrogate motherhood' or 'surrogacy' refers basically to a woman who bears a child on behalf of someone else and hence relinquishes her parental rights. Nevertheless, there exists a wide variety of surrogate motherhood forms. A first distinction may be drawn between 'traditional surrogacy' and 'gestational surrogacy'. In the former, the surrogate mother provides her own genetic material and is thus genetically related to the newborn. In the latter, the newborn is not genetically related to the surrogate mother, as the embryo is generated through *in vitro* fertilisation with an egg from the intending mother or a donor and sperm from the intending father or a donor. A second distinction is usually made between altruistic and commercial surrogate motherhood. In altruistic surrogacy, the intending parents limit themselves to refunding the surrogate mother only the medical expenses entailed by pregnancy and surrogacy. Differently, in commercial surrogacy the intending parents pay the surrogate mother financial remunera-

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tion for her 'service', in addition to reimbursing the reasonable expenses associated with pregnancy and surrogacy.[1]

There are two main viewpoints in the debate about surrogate motherhood, one 'against', and the other 'in favour'. Both of them rely on human rights arguments and therefore approach the issue from an anthropocentric perspective.

Surrogacy might be deemed to be incompatible with human dignity, namely with women's and children's rights.[2] As regards women's rights, surrogacy is alleged to entail the exploitation of surrogate mothers, especially when they live in dire poverty and the surrogacy agreement is commercial. In cases like that it is difficult to assess whether surrogate mothers' consent is truly free or given owing to economic hardship. The risk of exploitation seems even greater where commissioning parents from wealthy countries have resort to surrogacy agreements in disadvantaged countries: it follows that recourse to surrogate motherhood abroad appears to be fully consistent with the more general exploitation of the South to the advantage of the North.[3] As regards children's rights, surrogacy is said to be primarily incompatible with the best interests of the child.[4] Firstly, it is claimed that it constitutes a breach of the prohibition on «the abduction of, the sale of or traffic in children» under Article 35 of the United Nations Convention on the Rights of the Child (UNCRC).[5] Secondly, resort to surrogacy abroad is alleged to entail the risk of a violation of the rights of the child to acquire a nationality, to promptly be cared for by their parents and to know their origin or identity under Article 7 UNCRC.

All the same, surrogacy might be deemed to be consonant with the reproductive rights of the intending parents, freedom of contract as well as the importance

[1] On all the said definitions, see the "Glossary" attached to "A Preliminary Report on the Issues Arising from International Surrogacy Arrangements", March 2012, drawn up by the Permanent Bureau of the Hague Conference on Private International Law, available at www.hcch.net. Since 2010 the Conference has been studying the private international law issues relating to the legal parentage of children, including issues arising from international surrogacy arrangements.

[2] But see P. DE SENA, "Dignità umana in senso oggettivo e diritto internazionale", in *Diritti umani e diritto internazionale* 2017, p. 573 ff., expressing doubts upon the very existence of human dignity as an objective or collective value in international law.

[3] On the risks to surrogate mothers, see, among many others, B. STARK, "Transnational Surrogacy and International Human Rights Law", in *ILSA Journal of International and Comparative Law* 2012, p. 369 ff., pp. 379-380; L. POLI, "Maternità surrogata e diritti umani: una pratica controversa che necessita di una regolamentazione internazionale", in *BioLaw Journal – Rivista di BioDiritto* 2015, p. 7 ff., pp. 12-13; X.C. TANG, "Setting Norms: Protections for Surrogates in International Commercial Surrogacy", in *Minnesota Journal of International Law* 2016, p. 193 ff., pp. 200-206; C. WATSON, "Womb Rentals and Baby-Selling: Does Surrogacy Undermine the Human Dignity and Rights of the Surrogate Mother and Child?", in *The New Bioethics* 2016, p. 212 ff., pp. 216-222.

[4] See again, *ex pluribus*, B. STARK, *op. cit.*, p. 386; L. POLI, "Maternità surrogata e diritti umani: una pratica controversa che necessita di una regolamentazione internazionale", cit., pp. 13-14; C. WATSON, *op. cit.*, pp. 222-225.

[5] The UNCRC was adopted by the United Nations General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990.

for needy women to have such a source of income.[6] From this standpoint surrogate motherhood would not be any more exploitative than other commercial transactions taking place against a backdrop of economic inequality.[7] Be that as it may, the risk of a misuse of surrogacy is usually a point that is conceded, hence the need for an international regulation preventing exploitation.[8]

The opposing human rights viewpoints on surrogate motherhood underlie the different State reactions thereto. By way of illustration only, the protection of human dignity is clearly the rationale of the prohibition on surrogate motherhood agreements under the French *Code civil*,[9] the ban being set out in the chapter concerning the respect for the human body,[10] exactly in the same provision enshrining the primacy of the person and forbidding any infringement of human dignity.[11] In Italy, the law on medically assisted procreation,[12] including a ban on surrogate motherhood,[13] aims at protecting the rights of newborns and embryos in particular.[14] Conversely, in the United States of America, the Family Code of California allows and regulates surrogate motherhood agreements:[15] it was amended in order for the intending parents to be recognised as the legal parents of the child born through surrogacy.[16]

[6] See B. STARK, *op. cit.*, pp. 377-378; V. PANITCH, "Global Surrogacy: Exploitation to Empowerment", in *Journal of Global Ethics* 2013, p. 329 ff.; S. WILKINSON, "Exploitation in International Paid Surrogacy Arrangements", in *Journal of Applied Philosophy* 2016, p. 125 ff.. On the existence of a 'right to surrogate motherhood' only as a contractual rather than a reproductive right, see C. STRAEHLE, "Is There a Right to Surrogacy?", in *Journal of Applied Philosophy* 2016, p. 146 ff.

[7] See C. HUMBYRD, "Fair Trade International Surrogacy", in *Developing World Bioethics* 2009, p. 111 ff., and S. WILKINSON, *op. cit.*, pp. 139-140.

[8] On the need for international regulation, see, for instance, K. TRIMMINGS, P. BEAUMONT, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level", in *Journal of Private International Law* 2011, p. 627 ff.; S. MOHAPATRA, "Adopting an International Convention on Surrogacy. A Lesson from Intercountry Adoption", in *Loyola University Chicago International Law Review* 2016, p. 25 ff.; S. WILKINSON, *op. cit.*, p. 142. But see P. LAUFER-UKELES, "Mothering for Money: Regulating Commercial Intimacy", in *Indiana Law Journal* 2013, p. 1223 ff., pp. 1275-1278, arguing for domestic regulation of surrogate motherhood as a result of the «morally and practically more problematic» nature of cross-border surrogacy (*ibid.*, p. 1279).

[9] Code civil, Article 16(7).

[10] Code civil, livre I^er^, titre I^er^, chapitre II.

[11] Code civil, Article 16.

[12] *Legge* no 40, 19 February 2004, "Norme in materia di fecondazione medicalmente assistita" [Provisions on assisted reproductive technology], in *Gazzetta ufficiale* no 45 of 24 February 2004.

[13] *Ibid*., Article 12, para 6.

[14] *Ibid*., chapters III and VI.

[15] Family Code, Division 12, Part 7.

[16] *Ibid*., Section 7962(f)(2), introduced by the Assembly Bill no 1217, chapter 466, "An Act to Amend Section 7960 of, to Amend the Heading of Part 7 (Commencing with Section 7960) of Division 12 of, and to Add Section 7962 to, the Family Code, Relating to Surrogacy Agreements", approved by Governor and filed with Secretary of State on 23 September 2012.

Generally speaking, surrogacy is forbidden in some countries whereas it is regulated or tacitly accepted in others,[17] as confirmed by the 2013 responses that States submitted to the questionnaires of the Hague Conference on Private International Law.[18] Reading those responses, it appears that any form of surrogacy was expressly prohibited by law in the Dominican Republic, El Salvador, France, Germany, Iceland, Italy, Philippines, Portugal, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland and Turkey. Despite the lack of express legislation, surrogate motherhood was deemed to be incompatible with domestic rules in such countries as Belgium, Croatia, Lithuania and Poland. In other countries, including Brazil, Denmark, New Zealand, the United Kingdom and Canada, only commercial surrogacy was forbidden. All forms of surrogate motherhood arrangements were permitted as a result of express legislation in the Russian Federation and Ukraine. Elsewhere again, namely in India, Ireland, Monaco, the Netherlands and Sri Lanka, all forms of surrogacy were permitted by reason of the lack of relevant domestic regulation. Furthermore, a variety of reactions could be observed in the internal jurisdictions of federal States such as the United States of America and Australia.

2. Surrogate Motherhood from a Technological Perspective

Given that at least 'traditional surrogacy' is not a novelty, the reasons for the current debate about surrogate motherhood must be looked for elsewhere. As the expression suggests in itself, traditional surrogacy is considered a very ancient practice, dating back to thousands of years ago. Some authors do not miss the chance to cite surrogate motherhood episodes in the Old Testament of the Bible.[19]

Of course, the increasing recourse to surrogate motherhood provides the most intuitive explanation for the growing attention paid to the issue. Despite the difficulties in determining the exact number of international surrogate motherhood agreements at the global level, in 2012 the Permanent Bureau of The Hague Con-

[17] See Y. ERGAS, "Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy", in *Emory International Law Review* 2013, p. 117 ff., pp. 133-138; M. AUDIT, "Bioéthique et droit international privé", in *Recueil des cours de l'Académie de droit international de la Haye*, vol. 373, 2014, p. 217 ff., pp. 384-388; H. FULCHIRON, "La lutte contre le tourisme procréatif: vers un instrument de coopération internationale?", in *Journal du droit international* 2014, p. 563 ff., pp. 568-571.

[18] See the "Responses to the Questionnaire on the Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements", available at www.hcch.net.

[19] For instance, see D. SPAR, "For Love and Money: The Political Economy of Commercial Surrogacy", in *Review of International Political Economy* 2005, p. 287 ff., pp. 290-291; L. POLI, "La Grande Camera e l'ultima parola sul caso Paradiso e Campanelli", in *SIDIBlog*, 21 February 2017, available at www.sidiblog.org.

ference on Private International Law reported «a percentage increase of 1000% across [five] agencies» specialising in international surrogacy from 2006 to 2010.[20]

Yet, at a closer look, it is technological development that lies at the roots of the growing recourse to surrogate motherhood and, in turn, of the associated debate.[21] Surrogate motherhood has been spreading since it became 'easier', which is to say since technique allowed surrogate mothers and genetic parents to be less and less personally involved. The participants in 'technological surrogate motherhood' might feel as though they were just contributing to the functioning of a broader mechanism.

Specifically, technique has increasingly weakened the surrogate mother's personal and emotional links to the child and hence 'marginalised' her role and responsibility. As regards traditional surrogacy, artificial insemination enables a surrogate mother not to be required to engage in a sexual relationship with the intending father any longer, since a baby may be conceived without any physical contact between their mother and father. As a consequence, speaking about traditional surrogacy as including both cases dating back to the distant past and cases involving artificial insemination makes little sense, in that the discontinuity marked by technological development is thus disregarded. More importantly, technique has made the separation between conceiving and carrying a baby possible in gestational surrogacy. Thanks to *in vitro* insemination, a surrogate mother is required to be the birth mother, but not the genetic mother any longer: she carries a baby who is not genetically hers. In addition, the separation between genetic and intending parents too is possible thanks to technological development, namely egg and sperm donation.[22]

In light of the above, it is little wonder that today gestational surrogacy is more common than the traditional one, despite the advantages provided by artificial insemination in traditional surrogacy. The inexistence of a genetic link between the surrogate mother and the baby renders gestational surrogacy more attractive. It is – or supposed to be – easier for a woman to bear a baby to whom she is tied neither socially nor genetically. Accordingly, the intending parents are more confident that the surrogate mother will not bring maternity claims or informally request to keep in touch with the child.

Once surrogate motherhood became technological, it spawned economic interests and business. Surrogacy being easier and more attractive, the growth in the 'supply' of surrogate mothers determines the increase in the demand for them. It is true that, as mentioned before, a distinction is usually drawn between altruistic and commercial surrogacy: the economic dimension of surrogate moth-

[20] See "A Preliminary Report on the Issues Arising from International Surrogacy Arrangements", cit., p. 8.

[21] On the role of technology in the increasing recourse to surrogate motherhood, see also D. SPAR, *op. cit.*, p. 292 ff., in addition to the abovementioned "Preliminary Report on the Issues Arising from International Surrogacy Arrangements", cit., p. 6.

[22] See D. SPAR, *op. cit.*, pp. 292-299.

erhood is said to concern only the latter. Nevertheless, while the difference between altruistic and commercial surrogacy is plain to see in theory, it tends to blur in practice since it depends on the concrete quantification of the medical expenses as well as the specific economic situation of the surrogate mother. As a result, the economic dimension of surrogate motherhood can hardly be limited to commercial surrogacy only.

3. Cross-border Surrogacy and the Issue of the Family Status Continuity Before the European Court of Human Rights

Because surrogate motherhood has become more attractive thanks to technological development, an increasingly interconnected world has seen the phenomenon of 'procreative tourism' arise out of the aforementioned divergence in State reactions to surrogacy. Individuals from countries prohibiting or just strictly regulating surrogacy have been increasingly making recourse to it in those countries permitting or tolerating surrogate motherhood.[23] Indeed, there might even be economic reasons for procreative tourism since surrogacy may well be more affordable abroad, namely in developing countries.[24]

The continuity of the family status created abroad represents one of the main legal issues deriving from the cross-border surrogacy phenomenon. The question is whether the legal parentage established in the child's State of birth is also valid in the so called receiving State, in which the intending parents are resident and to which they intend to return with the child born from surrogacy. In the State prohibiting surrogate motherhood, the public policy exception might hamper the recognition of the legal parentage established under foreign law, to wit in the foreign birth certificate, judgment or acknowledgment of parentage.

It is plain how far non-recognition of legal parentage established abroad impinges upon the legal situation of children born from surrogacy. The adverse effects might include the risk for the children born from surrogacy not to know their origin or identity as well as to be stateless if they acquire neither the nationality of their birth State under the relevant citizenship rules nor the nationality of the receiving State because of non-recognition of the intending parents' legal parentage.

Cases about the continuity of the family status established abroad through resort to surrogate motherhood have recently been brought before the European Court of Human Rights (ECtHR). Basically, the legal issue before the ECtHR is whether the right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR) requires the States parties to recognise legal parentage established abroad through recourse to surrogate motherhood, despite the domestic prohibition on surrogacy and any relevant public pol-

[23] See K. TRIMMINGS, P. BEAUMONT, *op. cit.*, pp. 629-633; Y. ERGAS, *op. cit.*, pp. 127-128; M. AUDIT, *op. cit.*, pp. 388-389; H. FULCHIRON, *op. cit.*, pp. 564-565.

[24] See P. LAUFER-UKELES, *op. cit.*, p. 1266 and the references in note 259 therein.

icy ground. Up until now, the ECtHR has dealt mainly with three cases pertaining to cross-border surrogate motherhood and the consequent question of the continuity of the family status created abroad.[25] They are *Mennesson c. France*,[26] *Labassee c. France*,[27] and more recently *Paradiso et Campanelli c. Italie*.[28]

In both the *Mennesson* and *Labassee* cases, a French married couple had resorted to a surrogacy agreement in the United States of America, respectively in California and Minnesota. The babies born from surrogate motherhood were genetically tied to their respective intending fathers, with only the female gametes coming from donors.[29] In addition, both of the United States birth certificates recorded the legal parentage of the intending parents pursuant to the relevant judgments issued locally. In the *Mennesson* case, the French judicial authorities annulled, on public policy grounds, the entries of the particulars of the United States birth certificates in the French central register of births, in view of the aforementioned prohibition on surrogate motherhood under the French *Code civil*.[30] For the same reasons, in the *Labassee* case, the French public prosecutor's office refused to record the particulars of the United States birth certificate.[31] Later, the French judicial authorities annulled the *acte de notoriété* issued in France on the basis of the foreign birth certificate, the marriage certificate, and testimonies.[32] The intending parents and the babies born through surrogacy, represented by their respective intending fathers thanks to their genetic relationship,[33] claimed a violation of Article 8 ECHR before the ECtHR. In the 2014 'twin' judgments on the *Mennesson* and *Labassee* cases, the ECtHR found a breach of the right of the children to respect for their private life but no violation of the right of the intending parents and children to respect for their family life.[34]

[25] In addition to the cases mentioned in the following text, three other cases brought before the ECtHR are concerned with the recognition of the family status established abroad through surrogate motherhood, specifically *Foulon et Bouvet c. France* and *Laborie c. France*. Nonetheless, as it will be seen later, in those cases the ECtHR limited itself to confirming its previous rulings.

[26] European Court of Human Rights, *Mennesson c. France*, Application no. 65192/11, Judgment of 26 June 2014.

[27] European Court of Human Rights, *Labassee c. France*, Application no. 65941/11, Judgment of 26 June 2014.

[28] European Court of Human Rights, *Paradiso et Campanelli c. Italie* [GC], Application no. 25358/12, Judgment of 24 January 2017.

[29] European Court of Human Rights, *Mennesson c. France*, cit., para. 8; *Labassee c. France*, cit., para. 7.

[30] For a summary of the proceedings in the domestic civil courts and the references to the relevant decisions, see European Court of Human Rights, *Mennesson c. France*, cit., paras. 17-27.

[31] European Court of Human Rights, *Labassee c. France*, cit., para. 11.

[32] For a summary of the proceedings in the domestic civil courts and the references to the relevant decisions, see European Court of Human Rights, *Labassee c. France*, cit., paras. 12-17.

[33] See, to the contrary, the statement of the ECtHR in both the judgments on the *Paradiso et Campanelli* case, *infra* text corresponding to note 36.

[34] European Court of Human Rights, *Mennesson c. France*, cit., para. 102; *Labassee c. France*, cit., para. 81.

In the *Paradiso et Campanelli* case, an Italian married couple had resorted to a surrogate motherhood agreement in Russia. After the child's birth, the Registry Office in Moscow registered the intending parents as the newborn baby's legal parents. Nonetheless, differently from the *Mennesson* and *Labassee* cases and despite the statement of the intending father alleging that he was genetically related to the newborn baby, there were no genetic ties between the child born from surrogacy and either of his intending parents because the surrogate mother had received both the male and female gametes from donors.[35] As a result, the Italian authorities not only refused to register the Russian birth certificate but also removed the child born from surrogacy from the intending parents. As the domestic remedies against the Italian refusal to register the Russian birth certificate were not exhausted, the intending parents claimed a violation of Article 8 ECHR before the ECtHR only in respect of the consequent removal of the child. Owing to the said lack of any genetic relationship between either of the intending parents and the child born from surrogacy, the ECtHR considered the intending parents as the sole applicants in the case since they did not have standing to act before the ECtHR on behalf of the child.[36] While in 2015 the Chamber found a violation of the right of the intending parents to respect for their private and family life,[37] in 2017 the Grand Chamber excluded any relevance of the right to respect for family life[38] and found no breach of the applicants' right to respect for their private life.[39]

The briefly described decisions pertaining to cross-border surrogacy differ from the increasingly wider ECtHR case law concerning the continuity of private and family status. In particular, it is difficult to reconcile the cross-border surrogacy judgments with either the trend towards the continuity of family status or the relevance of the margin of appreciation doctrine.

Since the traditionally alleged neutrality of private international law was debunked long ago,[40] the influence of human rights on private international law, including conflict of law, jurisdiction as well as recognition and enforcement of foreign decisions is now unquestioned. By reason of the 'humanisation' process of international law,[41] it is no wonder that also international human rights protection,

[35] European Court of Human Rights, *Paradiso et Campanelli c. Italie*, Application no. 25358/12, Judgment of 27 January 2015, para. 19.

[36] *Ibid.*, paras. 48-50. In this regard, see also the judgment issued by the Grand Chamber, paras. 85-86.

[37] European Court of Human Rights, *Paradiso et Campanelli c. Italie*, cit., para. 87.

[38] European Court of Human Rights, *Paradiso et Campanelli c. Italie* [GC], cit., para. 158.

[39] *Ibid.*, paras. 215-216.

[40] As regards Italy, see *Corte costituzionale* [Italian Constitutional Court], judgment of 26 February – 5 March 1987, no. 71; judgment of 25 November – 10 December, no. 477, and judgment of 21 June – 4 July 2006, no. 254.

[41] For a critical overview of the 'humanisation' process of international law, see G. PASCALE, *La tutela internazionale dei diritti dell'uomo nel continente africano*, Napoli, 2017, pp. 1-7, and the numerous relevant references there included.

in addition to constitutional law, is increasingly material to all the main branches of private international law.[42] As a result, not only constitutional courts, but international human rights monitoring bodies too have been increasingly dealing with cases concerning the impact of human rights on private international law, depending on their respective jurisdiction. In this connection, the relevant case law of the ECtHR is prominently concerned with the issue of continuity of private and family status established abroad from the perspective of Article 8 ECHR.

In general the ECHR might require either the continuity or the discontinuity of the private and family status created abroad. On the one hand, the situation to be recognised or its underlying judicial procedure may be incompatible with the ECHR, which State recognition would consequently violate. On the other hand, a State's non-recognition of the private and family status created abroad would be incompatible with the right to respect for private and family life, should the non-recognition be an unlawful or unnecessary public interference in a democratic society contrary to the requirements of Article 8 ECHR.

Be that as it may, some authors glimpse the trend of the ECtHR to read Article 8 ECHR as demanding continuity of the private and family status established abroad provided that certain conditions are met. Such an interpretation of the right to respect for private and family life was seemingly inaugurated in the judgments delivered in the *Wagner*[43] and *Negrepontis*[44] cases, respectively pertaining to a single parent adoption and an adoption by a monk.[45] The right to respect for private and family life might therefore entail a right to recognition of the status created abroad, whether judicially established or not. In the latter case, indeed, the ECtHR could be said to contribute to the affirmation of the *méthode de*

[42] See P. KINSCH, "Droits de l'homme, droits fondamentaux et droit international privé", in *Recueil des cours de l'Académie de droit international de la Haye*, vol. 318, 2005, p. 9 ff.; P. PIRRONE, "I diritti umani e il diritto internazionale privato e processuale tra scontro e armonizzazione", in *Circolazione dei valori giuridici e tutela dei diritti e delle libertà fondamentali*, P. PIRRONE (ed.), Torino, 2011, p. 3 ff.; A. DAVÌ, "Diritto internazionale privato e diritti umani. Introduzione", in *La tutela dei diritti umani e il diritto internazionale*, A. DI STEFANO, R. SAPIENZA (eds), Napoli, 2012, p. 209 ff.; F. SALERNO, "Il vincolo al rispetto dei diritti dell'uomo nel sistema delle fonti del diritto internazionale privato", in *Diritti umani e diritto internazionale* 2014, p. 549 ff.

[43] European Court of Human Rights, *Wagner et J.M.W.L. c. Luxembourg*, Application no. 76240/01, Judgment of 28 June 2007. For some remarks on the judgment, see P. PIRRONE, "Limiti e 'controlimiti' alla circolazione dei giudicati nella giurisprudenza della Corte europea dei diritti umani. Il caso *Wagner*", in *Diritti umani e diritto internazionale* 2009, p. 151 ff.

[44] European Court of Human Rights, *Negrepontis-Giannisis c. Grèce*, Application no. 56759/08, Judgment of 3 May 2011. For a comment on the judgment, see P. FRANZINA, "Some Remarks on the Relevance of Article 8 ECHR to the Recognition of Family Status Judicially Created Abroad", in *Diritti umani e diritto internazionale* 2011, p. 609 ff.

[45] For a contextualisation of the cited judgments in the framework of the influence of human rights protection on private international law, see A. DAVÌ, "Le renvoi en droit international privé contemporain", in *Recueil des cours de l'Académie de droit international de la Haye*, vol. 352, 2012, p. 9 ff., pp. 439-446; F. MARONGIU BUONAIUTI, "La continuità internazionale delle situazioni giuridiche e la tutela dei diritti umani di natura sostanziale: strumenti e limiti", in *Diritti umani e diritto internazionale* 2016, p. 49 ff.

la reconnaissance, as opposed to the traditional *méthode des conflits de lois*, meaning that State sovereignty and national values underpinning the public policy exception could well fade away. Solely the relevance of the margin of appreciation doctrine, as mainly proportionate to the lack of a common consensus among the States parties to the Council of Europe, would hamper the ECtHR from guaranteeing the continuity of private and family status.[46]

It is here submitted that it is the technological nature of the surrogate motherhood phenomenon that lies at the root of the inconsistency that is a distinguishing feature of the cross-border surrogacy case law of the ECtHR. Without any human rights concerns, technique affords the opportunity to resort to surrogate motherhood. Whether and to what extent surrogacy is compatible with international human rights law is accordingly uncertain, as the aforementioned still ongoing human rights debate and lack of uniformity across State legal orders demonstrate. The ECtHR was seemingly reluctant to read the right to respect for private and family life as demanding the continuity of the legal parentage established abroad through surrogacy since that would have been tantamount to endorsing a phenomenon that potentially violates women's and children's human rights. Correspondingly, the ECtHR was seemingly reluctant to decisively rely on the margin of appreciation doctrine, as that would have been tantamount to hindering a phenomenon potentially coherent with the emergence of reproductive rights.

4. Uncertainties about the Application and Scope of the Right to Respect for Private and Family Life

The ECtHR reluctance to read Article 8 ECHR as also requiring the continuity of the legal parentage established abroad through surrogacy firstly emerges from the lack of any explanation for the general application of the provision to internation-

[46] On the said trend of the ECtHR, see A. BUCHER, "La famille en droit international privé", in *Recueil des cours de l'Académie de droit international de la Haye*, vol. 283, 2000, p. 9 ff., p. 96 ff., especially p. 100 ff.; A. DAVÌ, "Le renvoi en droit international privé contemporain", cit., pp. 439-446; C. CAMPIGLIO, "Il diritto all'identità personale del figlio nato all'estero da madre surrogata (ovvero, la lenta agonia del limite dell'ordine pubblico)", in *Nuova Giurisprudenza Civile Commentata* 2014, p. 1132 ff. The erosion of State sovereignty and national values would be even more definite within the case law of the European Union Court of Justice, considering the European Union goal of «creating an ever closer union among the peoples of Europe», under Article 1 of the Treaty on European Union. In this regard, it is worth reminding the case law pertaining to the right to a name and, in particular, the judgments on the *Garcia Avello* (case C-148/02, Judgment of 2 October 2003) and *Grunkin and Paul* (case C-353/06, Judgment of 14 October 2008) cases. *Contra*, see G. CARELLA, "La Convenzione europea dei diritti dell'uomo e il diritto internazionale privato: ragioni e prospettive di una ricerca sui rapporti tra i due sistemi", in *La Convenzione europea dei diritti dell'uomo e il diritto internazionale privato*, G. CARELLA (ed.), Torino, 2009, p. 1 ff.; ID., "Sistema delle norme di conflitto e tutela internazionale dei diritti umani: una rivoluzione copernicana?", in *Diritti umani e diritto internazionale* 2014, p. 523 ff., observing that international human rights protection, rather than just eroding State sovereignty and national values, would be substituting State sovereignty as the very foundation of private international law.

al surrogacy situations. So far leaving aside the question as to whether *in the concrete case* a breach was found, the ECtHR has constantly applied Article 8 ECHR to cross-border surrogate motherhood cases.[47] Indeed, at least *prima facie,* an obligation to recognise the legal parentage created abroad through surrogacy might be inferred from that repeated application.[48] If non-recognition of the family status created abroad through surrogacy interferes with the right to respect for private and family life and thus triggers the application thereof, that seemingly implies that that right also includes the right to the continuity of the family status, despite any domestic ban on surrogacy. Otherwise, there would be no interference.

Nonetheless, an explanation was necessary for the application of Article 8 ECHR to such a new and controversial issue like the continuity of family life in international surrogacy cases. At a closer look, any deduction of an obligation to recognise the legal parentage created abroad through surrogacy from that application would therefore be far from persuasive.[49]

In particular, albeit the existence of a private and family life seems to represent a necessary as well as sufficient condition of application for Article 8 ECHR,[50] what is really at stake is not the private or family life in itself but the associated rights.[51] Consequently, although the concepts of private and family life are autonomous and subject to contingent circumstances,[52] the relevant rights and obligations are not, depending on the interpretation of Article 8 ECHR.[53] As

[47] Suffice it to think of the cases examined in the present work, namely *Mennesson c. France*, *Labasse c. France*, *Foulon et Bouvet c. France*, *Laborie c. France* and *Paradiso et Campanelli c. Italie*.

[48] For a broad reading of Article 8 ECHR as protecting, *inter alia*, the right to respect for the decision to become a parent, including through medically assisted reproduction, see A. MULLIGAN, "Reproductive Rights under Article 8: The Right to Respect for the Decision to Become or Not to Become a Parent", in *European Human Rights Law Review* 2014, p. 378 ff., pp. 384-385.

[49] Indeed, any such deduction would raise misgivings from the perspective of the risk of trivialisation of human rights because of their inflation. For a general overview of such a risk, see A. PETERS, *Beyond Human Rights. The Legal Status of the Individual in International Law*, Cambridge, 2016, pp. 443-445.

[50] For some critical remarks on the said approach, see C. WARBRICK, "The Structure of Article 8", in *European Human Rights Law Review* 1998, p. 32 ff. From a philosophical perspective, the ECtHR seemingly adopts an 'interest-based approach' of the rights under Article 8 ECHR. In this connection, see the critical comment of G. LETSAS, "What Triggers the Applicability of Article 8 ECHR?", in *Mélanges en l'honneur de / Essays in Honour of Dean Spielmann. Liber Amicorum Dean Spielmann*, J. CASADEVALL, G. RAIMONDI, E. FRIBERGH, P. TITIUN, P. KEMPEES, J. DARCY (eds), Oisterwijk, 2015, p. 343 ff.

[51] In the telling words of G. LETSAS, *op. cit.*, p. 346: «to have an interest is a necessary, but not a sufficient, condition for the existence of a right».

[52] See, *ex pluribus*, L.-A. SICILIANOS, "La vie familiale en tant que notion autonome au regard de la CEDH", in *Mélanges en l'honneur de / Essays in Honour of Dean Spielmann. Liber Amicorum Dean Spielmann*, cit., p. 595 ff.

[53] See C. WARBRICK, *op. cit.*, *passim*, stressing that the problem of the definition of the content of the right to respect for private and family life, under Article 8 ECHR, comes into consideration especially where a positive obligation is at stake. Indeed, what is here at issue is exactly the *positive* obligation to recognise the family status created abroad through recourse to surrogate motherhood.

mentioned before, there is no common consensus in the field of recognition of the family status established abroad through surrogate motherhood.[54] In spite of the nature of the Convention as a living instrument and the particularly open-ended scope of Article 8,[55] the lack of a common standard among the States parties usually hinders an extensive interpretation of the ECHR.[56]

However, the ECtHR decided on the application of Article 8 ECHR based on the mere existence of a private or family life rather than the connected rights and obligations. Such an approach seemingly led the Grand Chamber to an unconvincing finding in the *Paradiso et Campanelli* case. Instead of reflecting on the relevance of the right to respect for private and family life in cross-border surrogacy cases, the ECtHR merely denied the existence of a family life by reason of the shortness of the relationship and the lack of genetic and legally recognised ties between the intending parents and the child born from surrogacy.[57] Nonetheless, a balance should have been struck between the duration of the relationship and the quality thereof. Moreover, the consideration of genetic and legal circumstances is at variance with the autonomous relevance of the 'de facto family life' notion. From a broader perspective, the room for the application of the right to respect for family life would risk being remarkably reduced.[58]

Furthermore, one may observe some inconsistencies also as far as the scope of relevance of Article 8 ECHR is concerned. They confirm the need for a more care-

[54] See *supra*, Section 1. About the influence of the absence of a common consensus among the States parties to the ECHR on the breadth of their margin of appreciation, see *infra*, Section 6.

[55] For instance, see D. FELDMAN, "The Developing Scope of Article 8 of the European Convention on Human Rights", in *European Human Rights Law Review* 1997, p. 265 ff.

[56] On the margin of appreciation doctrine as a factor limiting the potential expansion of the scope of Article 8 ECHR, see, *ex pluribus*, D. FELDMAN, *op. cit.*, pp. 273-274; C. WARBRICK, *op. cit.*, p. 35, and, as specifically regards surrogate motherhood, M. ARDEN, "Surrogacy Cases Throw Light on the Role of the Court", in *Mélanges en l'honneur de / Essays in Honour of Dean Spielmann. Liber Amicorum Dean Spielmann*, cit., p. 3 ff., p. 7. See also F. SUDRE, "Rapport introductif. La « construction » par le juge européen du droit au respect de la vie familiale", in *Le droit au respect de la vie familiale au sens de la Convention européenne des droits de l'homme*, F. SUDRE (ed.), Brussels, 2002, p. 11 ff., p. 16, observing that, differently from its own *dicta*, the ECtHR primarily adopted a 'constructive' interpretation aimed at meeting the need of effectiveness of the right to respect for family life and only slightly an interpretation based on the European consensus.

[57] European Court of Human Rights, *Paradiso et Campanelli c. Italie* [GC], cit., paras. 142-158.

[58] For a critical comment on the reasoning leading the Grand Chamber to find no family life in the *Paradiso et Campanelli* final judgment, see M. GERVASI, "Vita familiare e maternità surrogata nella sentenza definitiva della Corte europea dei diritti umani sul caso *Paradiso et Campanelli*", in *Osservatorio costituzionale* 2017, p. 1 ff., pp. 4-8, available at www.osservatorioaic.it; and A. VIVIANI, "*Paradiso e Campanelli* di fronte alla Grande Camera: un nuovo limite per le 'famiglie di fatto'?", in *GenIUS. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere* 1/2017, p. 78 ff., pp. 80-82, available at www.articolo29.it. But see the comment of O. FERACI, Maternità surrogata conclusa all'estero e Convenzione europea dei diritti dell'uomo: riflessioni a margine della sentenza *Paradiso e Campanelli c. Italia*, in *Cuadernos de derecho transnacional* 2015, p. 420 ff., pp. 430-432, to the effect that, in the 2015 judgment on the *Paradiso et Campanelli*, the Chamber should have weighted the absence of genetic links and the illegality of the situation in establishing the existence of family life.

ful approach by the ECtHR in applying the provision, as well as the previously mentioned misgivings about any deduction of a right to continuity of the family status established abroad through surrogacy just from the constant application of Article 8 ECHR. In the *Mennesson* and *Labassee* judgments, the ECtHR applied the right of the intending parents to respect for their family life.[59] On the contrary, in the *Paradiso et Campanelli* final judgment, the Grand Chamber excluded *expressis verbis* any relevance of the right of the intending parents to respect for their family life, thereby assessing the Italian conduct only against the right to respect for private life.[60] In view of the aforementioned perplexities concerning the determination of family life in the *Paradiso et Campanelli* final judgment, it is hard to explain the said difference as depending on the shortness of the relationship and the existence or inexistence of genetic and legally recognised links between the child born from surrogacy and either of their intending parents.

It is true that sometimes the ECtHR abstains from clarifying whether it is the private life or family life interest that comes into consideration under Article 8 ECHR.[61] Yet, particularly as regards the recognition of the family status established abroad through recourse to surrogate motherhood, how Article 8 is actually considered appears to be crucial. In this connection, the *Paradiso et Campanelli* case is especially telling. As mentioned above, in 2015 the ECtHR Chamber found a breach of the right of the intending parents to respect for their private and family life, whereas in 2017 the Grand Chamber found no breach of the applicants' right to respect for their private life. The insistence of the Grand Chamber on the non-application of the right to respect for family life seemingly alludes to what would have been a different outcome had that right been relevant.[62]

[59] European Court of Human Rights, *Mennesson c. France*, cit., para. 45; *Labassee c. France*, cit., para. 37.

[60] European Court of Human Rights, *Paradiso et Campanelli c. Italie* [GC], cit., paras. 161-164.

[61] C. PITEA, L. TOMASI, "Art. 8 – Diritto al rispetto della vita private e familiare", in *Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (eds), Padova, 2012, p. 297 ff., p. 298; M. LAFFERTY, "Article 8: The Right to Respect for Private and Family Life, Home, Correspondence", in *Harris, O'Boyle and Warbrick. Law of the European Convention on Human Rights*, D. HARRIS, M. O' BOYLE, E BATES, C. BUCKLEY (eds), Oxford, 2014[3], p. 522 ff., p. 524; W. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, 2015, p. 366.

[62] In particular, the Grand Chamber more than once observed that the *Paradiso et Campanelli* case was concerned not with the preservation of the family unity, but with the private life of the intending parents. For instance, see European Court of Human Rights, *Paradiso et Campanelli c. Italie* [GC], cit., paras. 198 and 208-209.

5. Difficulties in Identifying a Basis for the Continuity of the Family Status Established Abroad Through Resort to Surrogate Motherhood

5.1. Protection of Genetic Ties

As mentioned before, the ECtHR found a violation of Article 8 ECHR in two cross-border surrogacy cases, namely *Mennesson* and *Labassee*.[63] At least *prima facie*, the finding of a breach of the right of the child born from surrogacy to respect for private life seems to indicate that such a right requires the continuity of the family status created abroad. As the French Government had the opportunity to remark,[64] following the *Mennesson* and *Labassee* twin judgments some French courts and tribunals permitted the registration of the foreign birth certificate establishing the parenthood of both the intending parents, including the non-genetic one, as a result of a surrogate motherhood agreement.[65] Also the Italian *Corte di cassazione* read the *Mennesson* and *Labassee* judgments as decreeing the incompatibility of non-recognition of the foreign family status with the rights of the child born abroad from surrogate motherhood.[66] The importance some authors attach to the *Mennesson* and *Labassee* judgments as precedents leading to the continuity of the family status established abroad and eroding any contrary public policy is therefore conceivable.[67]

Nonetheless, a careful reading of the *Mennesson* and *Labassee* twin judgments shows that the ECtHR did circumscribe the French breach of Article 8 ECHR exclusively to the non-recognition of the genetic paternity of the children born from surrogacy such that the violation did not include the French refusal to

[63] See *supra*, Section 3.

[64] "Plan d'action mis à jour (14/04/2016). Communication de la France concernant l'affaire Mennesson contre France (Requête n° 65192/11)", pp. 5-6, www.hudoc.exec.coe.int.

[65] Tribunal de Grande Instance de Nantes, jugement du 13 mai 2015, minute n. 14/07497; jugement du 17 septembre 2015, minute n. 15/02603; jugement du 17 septembre 2015, minute n. 15/02604. The mentioned judgments are available as annexes to the cited "Plan d'action mis à jour".

[66] See again, with regard to France, Tribunal de Grande Instance de Nantes, jugement du 13 mai 2015, cit. See also, in Italy, *Corte di cassazione*, judgment no 19599, 21 June – 30 September 2016, para 10.3. For some remarks on the Italian judgment, see F. MARONGIU BUONAIUTI, "Il riconoscimento della filiazione derivante da maternità surrogata – ovvero fecondazione eterologa *sui generis* – e la riscrittura del limite dell'ordine pubblico da parte della Corte di Cassazione, o del diritto del minore ad avere due madri (e nessun padre)", in *Dialoghi con Ugo Villani*, E. TRIGGIANI, F. CHERUBINI, I. INGRAVALLO, E. NALIN, R. VIRZO (eds), Bari, 2017, vol. II, p. 1141 ff.

[67] See C. CAMPIGLIO, "Il diritto all'identità personale del figlio nato all'estero da madre surrogata (ovvero, la lenta agonia del limite dell'ordine pubblico)", cit., pp. 1136-1137 *et passim*; I. REIN LESCASTEREYRES, "Recognition of the Parent-child Relationship as a Result of Surrogacy and the Best Interest of the Child. How Will France Adapt after the ECtHR Rulings", in *ERA Forum* 2015, p. 149 ff.; S. TONOLO, "Identità personale, maternità surrogata e superiore interesse del minore nella più recente giurisprudenza della Corte europea dei diritti dell'uomo", in *Diritti umani e diritto internazionale* 2015, p. 202 ff., pp. 204-208; F. MARONGIU BUONAIUTI, "La continuità internazionale delle situazioni giuridiche e la tutela dei diritti umani di natura sostanziale: strumenti e limiti", cit., p. 74.

recognise the entire family status created abroad.[68] Of course, as regards the right of the children to respect for their own private life, the ECtHR took as its point of departure the French rejection to recognise the legal parentage, which indeed the applicants had complained about. Yet, in the end the ECtHR held that France had gone beyond its margin of appreciation only in failing to ensure any recognition of the genetic paternity of the children born from surrogacy.[69]

The French *Cour de cassation* confirmed the interpretation of the *Mennesson* and *Labassee* twin judgments as only requiring the protection of genetic paternity as a fundamental part of the child's identity.[70] In particular, on 5 July 2017 it clarified that, according to the *Mennesson* and *Labassee* findings, only the non-recognition of the genetic paternity as established in a foreign certificate was incompatible with the right of the child born abroad from surrogacy to respect for private life.[71]

Equally, in the judgment in the *Laborie c. France* case,[72] the ECtHR itself confirmed the interpretation of the *Mennesson* and *Labassee* twin judgments as exclusively demanding the protection of genetic ties, rather than the recognition of the family status as a whole. In the *Laborie* case, a French married couple had resorted to a surrogate motherhood agreement in Ukraine. The children born from surrogacy were genetically linked only to their intending father, but the Ukrainian birth certificate established the legal parentage of both the intending parents, including the non-genetic mother. The French authorities had then refused to register the birth certificate as contrary to the domestic prohibition on surrogate motherhood.[73] The ECtHR took into account that since the twin judgments on *Mennesson* and *Labassee* the French *Cour de cassation* had revised its position: recourse to surrogacy as such could no longer impede the recognition of biological affiliation.

[68] See also R. BARATTA, "Diritti fondamentali e riconoscimento dello *status filii* in casi di maternità surrogata: la primazia degli interessi del minore", in *Diritti umani e diritto internazionale* 2016, p. 309 ff., p. 323, and S. TONOLO, "L'evoluzione dei rapporti di filiazione e la riconoscibilità dello *status* da essi derivante tra ordine pubblico e superiore interesse del minore", in *Rivista di diritto internazionale* 2017, p. 1070 ff., pp. 1077-1078.

[69] European Court of Human Rights, *Mennesson c. France*, cit., para. 100; *Labassee c. France*, cit., para. 79.

[70] Thus, there is no surprise that, on account of the aforementioned domestic decisions extensively reading the *Mennesson* and *Labassee* twin judgments (*supra*, text corresponding to the note 65), France admitted the inconsistency of its domestic case law following the twin judgments on *Mennesson* and *Labassee*. According to the French government, the said inconsistency would be due to the complexity and novelty of the issues at stake. In this connection, see the "Plan d'action mis à jour", cit., p. 6.

[71] Cour de cassation, arrêt n° 824 du 5 juillet 2017 (15-28.597); arrêt n° 825 du 5 juillet 2017 (16-16.901; 16-50.025); arrêt n° 826 du 5 juillet 2017 (16-16.455); arrêt n° 827 du 5 juillet 2017 (16-16.495). See also the press release on "Gestation pour autrui (GPA) réalisée à l'étranger, transcription d'acte de naissance et adoption simple", available at www.courdecassation.fr.

[72] European Court of Human Rights, *Laborie c. France*, Application no. 44024/13, Judgment of 19 January 2017.

[73] *Ibid*., paras. 4-14.

In spite of the *res iudicata* force of the domestic judgment refusing to register the foreign birth certificate, paternity actions were possible, although the ECtHR explicitly abstained from assessing the concrete availability and adequateness of those means to protect genetic ties (*sic*!).[74] Finally, the ECtHR found a violation of the right of the children to respect for private life because of the lapse of time between their birth and the adaptation of the French legal order to the requirements of protection of genetic ties as stated in the *Mennesson* and *Labassee* twin judgments.[75] Thus, the ECtHR alluded to the fact the *Mennesson* and *Labassee* precedents could be considered as complied with even if just genetic paternity were safeguarded irrespective of the continuity of the family status as a whole.

The limitation of the *Mennesson* and *Labassee* rulings to the protection of genetic ties is just another instance of the ECtHR's reluctance to read the right to respect for private and family life as demanding the continuity of the family status created abroad through surrogacy. To the extent that the *Mennesson* and *Labassee* twin judgments only required the safeguard of genetic links, they are scarcely indicative of any obligation to recognise the family status created abroad through surrogate motherhood.[76] That may be observed from a twofold perspective.

In the first place, the circumstance of the existence of genetic links between the child born from surrogacy and either of their intending parents may or may not occur in surrogate motherhood cases. Suffice it to think of an artificial procreation where both the male and female gametes come from external donors rather than the intending parents,[77] as in the *Paradiso et Campanelli* case.

In the second place, the protection of biological ties stands alone and is independent from cross-border surrogacy, falling more properly within the field of the right to know one's origin.[78] In the light of the *Mennesson* and *Labassee* twin

[74] *Ibid*., para. 31.

[75] *Ibid*.

[76] See also C. DANISI, "Superiore interesse del fanciullo, vita familiare o diritto all'identità personale per il figlio nato da una gestazione per altri all'estero? L'arte del compromesso a Strasburgo", in *articolo29*, 15 July 2014, available at www.articolo29.it; M WINKLER, "Senza identità: il caso *Paradiso e Campanelli c. Italia*", in *GenIUS. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere* 1/2015, p. 243 ff., p. 255, available at www.articolo29.it.

[77] See M. AUDIT, *op. cit.*, pp. 421-422.

[78] By way of illustration only, one may think of an abandoned or adopted child as well as a child born out of wedlock seeking to know his or her origins including the identity of his or her natural parents or at least non-identifying information thereabout. In that regard, see, among several cases, European Court of Human Rights, *Mikulić v. Croatia*, Application no. 53176/99, Judgment of 7 February 2002; *Pascaud c. France*, Application no. 19535/08, Judgment of 16 June 2011; *Godelli c. Italie*, Application no. 33783/09, Judgment of 25 September 2012; *Laakso v. Finland*, Application no. 7361/05, Judgment of 15 January 2013; *Röman v. Finland*, Application no. 13072/05, Judgment of 29 January 2013. For some remarks on the relevant Grand Chamber Judgment of 13 February 2003, *Odièvre v. France*, Application no 42326/98, see T. CALLUS, "Tempered Hope? A Qualified Right to Know One's Genetic Origin: *Odièvre* v *France*", in *Modern Law Review* 2004, p. 658 ff. On the right to know one's origin in cases concerning assisted reproductive technology, including surrogate motherhood, see L. POLI, "Il diritto a conoscere le proprie origini e le tecniche di fecondazione assistita: profili di diritto internazionale", in *GenIUS. Rivista di studi*

judgments, the domestic prohibition or restriction on surrogate motherhood does not allow States parties to completely disregard the right to know one's origin under Article 8 ECHR. That says little about the continuity of the family status created abroad through surrogacy, since biological ties may be protected regardless.[79]

In particular, in order to execute the *Mennesson* and *Labassee* twin judgments, France significantly limited itself to issue nationality certificates to the children involved, without any concern for their family status as a whole.[80] Consistent therewith, the French *Conseil d'État* recalled the twin judgments as only protecting the link between nationality and private life.[81] Beyond French borders, in 2015 the *Mennesson* and *Labassee* judgments induced the Spanish *Tribunal Supremo* to find that the refusal to register the foreign birth certificate of children born abroad from surrogacy was compatible with their right to respect for private life, owing to the other ways to establish legal parentage in Spain.[82]

It is apparent that the protection of genetic ties irrespective of the continuity of the family status established abroad leaves open the problem of the legal parentage of the non-genetic parent, where either the male or the female gamete comes from one of the intending parents and only the other one comes from an

giuridici sull'orientamento sessuale e l'identità di genere 1/2016, p. 43 ff., available at www.articolo29.it. More generally, on the right to respect for private life as implying the right to know one's origin, see B. RAINEY, E. WICKS, C. OVEY, *Jacobs, White & Ovey. The European Convention on Human Rights*, Oxford, 2014[6], pp. 381-383; M. LAFFERTY, *op. cit.*, pp. 537-538; W. SCHABAS, *op. cit.*, p. 376.

[79] See G. CANO PALOMARES, "La procréation médicalement assistée devant la Cour européenne des droits de l'homme: évolutions et impact", in *Mélanges en l'honneur de / Essays in Honour of Dean Spielmann. Liber Amicorum Dean Spielmann*, cit., p. 73 ff., p. 79; F. PESCE, "La tutela europea dei diritti fondamentali in materia familiare: recenti sviluppi", in *Diritti umani e diritto internazionale* 2016, p. 5 ff., pp. 42-43.

[80] See the individual measures as reported in the "Plan d'action (26/03/2015). Communication de la France concernant l'affaire Mennesson contre France (Requête n° 65192/11)", pp. 2-3, available at www.hudoc.exec.coe.int. Indeed, the intending parents complained about the *Mennesson* judgment execution and alleged the incompatibility of the French refusal to recognise the legal parentage between the intending parents and the children born abroad from surrogacy. In this regard, see "Communication du représentant du requérant (22/05/2015) dans l'affaire Mennesson contre France (Requête n° 65192/11) et réponse des autorités (12/06/2015)", pp. 4-7 and, in more general terms, pp. 10-12, available at www.hudoc.exec.coe.int. France accounted for the non-recognition of the foreign birth certificates, as a result of the abovementioned issue of nationality certificates, on the basis of the *res iudicata* force of the domestic decision refusing that recognition. In this regard, see the "Plan d'action mis à jour", cit., p. 3. Later, France introduced a systematic amendment allowing the review of final decisions about civil status found by the ECtHR to be incompatible with the ECHR, at least to the extent that the consequences of the breach cannot be adequately repaired only by just satisfaction under Article 41 ECHR. In this regard, see Article 42 of the *LOI n. 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle*, adding Article L452-1 of the *Code de l'organisation judiciaire*.

[81] See the decision the French Conseil d'État issued on 12 December 2014, summarised in the "Plan d'action", cit., p. 2, and available as Annex 4 thereto. For a comment, see also G. CANO PALOMARES, *op. cit.*, p. 82.

[82] See G. CANO PALOMARES, *op. cit.*, p. 82.

external donor. In this connection, the possibility of a 'stepchild adoption', which is to say the possibility for the non-genetic intending parent to legally adopt the child born from surrogacy, depends on the relevant domestic legal order.[83]

Indeed, the stepchild adoption problem came into consideration before the ECtHR precisely in the *Mennesson* and *Labassee* cases, but remained unsolved. With regard to the right to respect for family life, the ECtHR declared that it understood the concern for the maintenance of family life between the non-genetic parent and the child born from surrogate motherhood in case of separation of the intending parents or death of the genetic one.[84] Yet, that statement had no consequences, since the ECtHR limited its judgment to the *concrete* effects of the French failure to recognise the family status created abroad.[85] This approach would explain why the ECtHR completely refrained from considering the stepchild adoption issue when assessing compliance with the right of the children born from surrogacy to respect for private life.

The same may be said with regard to the ensuing problem of the hereditary succession of the child born from surrogacy to their intending parents, including the non-genetic one. In the *Mennesson* and *Labassee* twin judgments, the ECtHR declared that it would take into account the issue of the children's succession to their intending non-genetic mothers,[86] but eventually abstained from any assessment thereof in its finding that breach had occurred.

5.2. The Risk of Distortion Arising from the Exclusive Protection of Genetic Ties in Cross-border Surrogacy Cases

The safeguarding of genetic ties is not only scarcely relevant to the continuity of the family status established abroad through surrogate motherhood but also risks resulting in a legal distortion of the family situation, as genetic ties may be blindly protected irrespective of the complex reality behind the recourse to surrogate

[83] It is significant that, in the context of the Italian debate on the introduction of the same-sex civil partnership, the draft provision on the stepchild adoption was eventually excised also because some Senators alleged that it would have been an input to recourse to surrogate motherhood abroad, despite the domestic prohibition thereon. In that regard, see for instance the record of the general discussion held at the 569th (2 February 2016), 570th (3 February 2016), 571st (3 February 2016), 572nd (4 February 2016) and 574th (9 February 2016) Public Sessions of the Italian Senate, available at www.senato.it. For some critical remarks on the elimination of the stepchild adoption provision, see A. SCHILLACI, "Un buco nel cuore. L'adozione coparentale dopo il voto del Senato", in *articolo29*, 26 February 2016, available at www.articolo29.it, and L. POLI, "Gestazione per altri e *stepchild adoption*: gli errori del legislatore italiano alla luce del diritto internazionale", in *DPCE online* 3/2016, p. 97 ff., available at www.dpce.it.

[84] European Court of Human Rights, *Mennesson c. France*, cit., para. 91; *Labassee c. France*, cit., para. 70.

[85] European Court of Human Rights, *Mennesson c. France*, cit., para. 92; *Labassee c. France*, cit., para. 71.

[86] European Court of Human Rights, *Mennesson c. France*, cit., para. 98; *Labassee c. France*, cit., para 77.

motherhood. In surrogacy cases the major problem lies exactly in the clash between the genetic reality and the *de facto* family.[87] Hence the paradox of a formal protection of genetic ties under the right to respect for private life, the material family situation being different.[88]

Specifically, in two judgments issued on 3 July 2015,[89] which is to say following the *Mennesson* and *Labassee* decisions, the French *Cour de cassation* held that registration of the foreign birth certificate of a child born from surrogacy was then permitted subject to the usual conditions despite the domestic ban on surrogate motherhood and any public policy consideration.[90] Under French law these 'usual conditions' are the regularity and non-falsification of the foreign birth certificate as well as the truth of its content.[91] Yet, the French *Cour de cassation* interpreted the truth requirement as concerning the *biological* truth, whether corresponding or not to the material and effective family situation. As a consequence, since the birth certificates to be registered recorded not the intending parents but the intending genetic father and the presumed surrogate mother as the legal parents of the children born abroad from surrogacy, the French *Cour de cassation* found that evidence of the recourse to surrogate motherhood abroad could not prevent the domestic registration of the birth certificates issued in the Russian Federation since neither the formal regularity nor the truth of the content of the document was disputed.

Nonetheless, though corresponding to the biological reality, the foreign birth certificates to be registered did not correspond to the effective family situation. In this regard, suffice it to note that, at least in one of the two mentioned cases,[92] the surrogate mother had authorised, soon after the birth of the child, his transfer to France under the custody of his intending genetic father. Moreover, the genetic father was the legal partner of another man under the French law.

[87] Indeed, biological reality and effective reality collide also where both the male and the female gamete come from the intending parents, since in such a case the genetic (and intended) mother is different from the birth mother, which is to say the surrogate mother.

[88] But see C. ACHMAD, "Children's Rights to the Fore in the European Court of Human Rights' First International Commercial Surrogacy Judgments", in *European Human Rights Law Review* 2014, p. 638 ff., p. 643, describing the ties of the child born from surrogacy with both their genetic mother (*i.e.*, the egg donor) and their birth mother (*i.e.*, the surrogate mother) as «another significant aspect of their identity, and one which steps should be taken to protect and preserve knowledge of». Correspondingly, the rights of gamete donors and surrogate mothers should be given importance too (*ibid.*). But see European Commission of Human Rights, *J.R.M. v. the Netherlands*, Application no. 16944/90, Decision of 8 February 1993, where the Commission held that the mere donation of male gametes for artificial insemination was insufficient to demonstrate the existence of a family life between the child born from assisted reproduction and the genetic father.

[89] Cour de cassation, Assemblée plénière, audience public du 3 juillet 2015, n. de pourvoi 14-21323; *ibid.*, n. de pourvoi 15-50002.

[90] See the "Plan d'action mis à jour", cit., pp. 4-5.

[91] Article 47 of the French *Code civil*.

[92] Cour de cassation, n. de pourvoi 14-21323, cit.

As far as the facts are concerned, the said cases before the French *Cour de cassation* are very similar to the joined cases *Foulon et Bouvet c. France* before the ECtHR, also concerning a French refusal to register the foreign birth certificates of children born abroad from surrogacy.[93] The ECtHR confirmed the *Mennesson* and *Labassee* precedents in finding a breach of the children's right to respect for their private life because of the non-recognition of their genetic ties with the respective genetic fathers. However, unlike in the *Mennesson* and *Labassee* cases, in the *Foulon et Bouvet* cases the birth certificates recorded the parenthood of the respective genetic fathers and Indian birth mothers, *i.e.*, the surrogate mothers who had relinquished their parental rights.[94]

5.3. The Best Interests of the Child

The cross-border surrogacy case law shows that the ECtHR constantly took into account the interests of the child born abroad from surrogate motherhood.[95] In the *Mennesson* and *Labassee* twin judgments, the ECtHR mentioned the protection of the best interests of the child as the leading principle in all cases involving children.[96] As for the *Paradiso et Campanelli* case, in the 2015 judgment the ECtHR Chamber assessed the proportionality of the removal of the child born from surrogacy against his best interests.[97] In the 2017 final judgment, the Grand Chamber emphasised the relevance of the child's best interests despite the fact that he was neither an applicant before the ECtHR nor a member of the applicant's family under Article 8 ECHR.[98]

Some authors are under the impression that the principle of the best interests of the child basically favours the continuity of the family status.[99] Accordingly,

[93] European Court of Human Rights, *Foulon et Bouvet c. France*, Applications nos. 9063/14 and 10410/14, Judgment of 21 July 2016.

[94] *Ibid*., paras 55-58.

[95] From a broader perspective, C. RAGNI, "Gestazione per altri e riconoscimento dello *status* di figlio", in *GenIUS. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere* 1/2016, p. 6 ff., p. 8, available at www.articolo29.it, seemingly observes in the ECtHR case law a sort of application of the obligation to primarily consider the best interests of the child in all the applications concerning children, as enshrined by Article 3(1) UNCRC. On some of the numerous questions arising from the application of the provision, see *Implementing Article 3 of the United Nations Convention on the Rights of the Child. Best Interests, Welfare and Well-being*, E. SUTHERLAND, L-A BARNES MACFARLANE (eds), Cambridge, 2016. Be that as it may, at least *prima facie*, the very existence of an *obligation* for the ECtHR to primarily consider the best interests of the child is puzzling.

[96] European Court of Human Rights, *Mennesson c. France*, cit., para. 99; *Labassee c. France*, cit., para 78.

[97] European Court of Human Rights, *Paradiso et Campanelli c. Italie*, cit., paras. 75 and 78-80.

[98] European Court of Human Rights, *Paradiso et Campanelli c. Italie* [GC], cit., para. 208.

[99] See C. CAMPIGLIO, "Lo stato di figlio nato da contratto internazionale di maternità", in *Rivista di diritto internazionale privato e processuale* 2009, p. 589 ff., p. 599; A.K. BOYCE, "Protecting the Voiceless: Rights of the Child in Transnational Surrogacy Agreements", in *Suffolk Transnational Law Review* 2013, p. 649 ff., pp. 667-669; R. BARATTA, *op. cit.*, pp. 327-330; L. POLI, "Gestazione per altri e *stepchild adoption*: gli errori del legislatore italiano alla luce del diritto internazionale", cit.,

the rationale of the ECtHR case law pertaining to the recognition of the legal parentage created abroad through surrogacy would lie in the protection of the best interests of the child.[100] Specifically, in the *Mennesson* and *Labassee* twin judgments, the protection of the best interests of the child is said to have required the recognition of the genetic ties of the children born from surrogacy.[101] In the 2015 *Paradiso et Campanelli* judgment, the consideration of the best interests of the child is alleged to have led the ECtHR Chamber to find a violation of his intending parents' right to respect for private and family life.[102] With regard to the *Paradiso et Campanelli* final judgment, the Grand Chamber is said to have found that there was no breach of the intending parents' right to respect for their private life since they themselves had undermined the child's best interests in creating a situation of legal uncertainty.[103]

Nevertheless, interpreting the child's best interests protection as the crucial determinant of the continuity of the family status created abroad through surrogacy is far from persuasive. The inconsistency of the application of the child's best interests principle denotes the reluctance on the part of the ECtHR to read the right to respect for private and family life as demanding, in the light of that principle, the continuity of the family life created abroad through surrogacy. Such an inconsistent application of the child's best interests principle is unsuited to laying a sound foundation for any obligation to recognise the family status created abroad through surrogacy.

It is true that there is a definite clash between the legal uncertainty of the situation of the child born abroad from surrogacy and their best interests. Yet, in the light of the ECtHR case law, it is difficult to determine whether the cause of that legal uncertainty lies in the State's non-recognition of the family status or in

p. 110; C. RAGNI, *op. cit.*, p. 1073. *Contra*, see M. DISTEFANO, "Maternità surrogata ed interesse superiore del minore: una lettura internazionalprivatistica su un difficile *puzzle* da ricomporre", in *GenIUS. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere* 1/2015, p. 160 ff., pp. 171-172, available at www.articolo29.it, observing that the best interests of the child principle may require or not the continuity of the family status depending on specific circumstances.

[100] See C. ACHMAD, *op. cit.*, p. 639 *et passim*; R. BARATTA, *op. cit.*, pp. 327-328; L. POLI, "Gestazione per altri e *stepchild adoption*: gli errori del legislatore italiano alla luce del diritto internazionale", cit., 105-108. For some general remarks on the ECtHR application of the best interests of the child principle, see K. TURKOVIC, A. GRGIC, "Best Interests of the Child in the Context of Article 8 of the ECHR", in *Mélanges en l'honneur de / Essays in Honour of Dean Spielmann. Liber Amicorum Dean Spielmann*, cit., p. 629 ff.

[101] See R. BARATTA, *op. cit.*, p. 323 *et passim*, and S. TONOLO, "L'evoluzione dei rapporti di filiazione e la riconoscibilità dello *status* da essi derivante tra ordine pubblico e superiore interesse del minore", cit., p. 1078. But see C. DANISI, *op. cit.*, highlighting the difference between the right to know one's origin and the best interests of the child, the former coming possibly into consideration also where the adults' right to respect for private life is at stake.

[102] See M. DISTEFANO, *op. cit.*, p. 172; L. POLI, "Maternità surrogata e diritti umani: una pratica controversa che necessita di una regolamentazione internazionale", cit., pp. 24-25; ID., "Bioethics, Human Rights and Their Interplay in the Legal Reasoning of ECtHR's Case Law on Artificial Reproductive Technologies", in *Federalismi* 2017, p. 1 ff., p. 15, available at www.federalismi.it.

[103] See L. POLI, "La Grande Camera e l'ultima parola sul caso *Paradiso e Campanelli*", cit.

the intending parents' choice to resort to surrogacy abroad despite the domestic prohibition against it in their home country. In particular, in the *Mennesson* and *Labassee* twin judgments, the ECtHR seemingly imputed the uncertainty of the situation of the children born from surrogacy to France, and thus found a breach of their right to respect for private life.[104] Conversely, in the *Paradiso et Campanelli* final judgment, the Grand Chamber considered that the applicants themselves had determined the uncertainty of the situation of the child born from surrogacy and therefore found the Italian conduct compatible with the ECHR.[105] It would be clearly arbitrary, should the identification of the cause of the legal uncertainty of the child's situation depend on the existence or inexistence of genetic links between the child born from surrogacy and either of their intending parents.[106]

From a broader perspective, one may question whether the ECtHR is supplied with means that are adequate to assess the best interests of the child, especially in comparison to domestic courts. In this connection, suffice it to bear in mind the peculiar sensitiveness of the child's best interests to the relevant circumstances. Since cases are usually brought before the ECtHR years after the State conduct allegedly incompatible with the ECHR has occurred, the best interests of the child might have changed in the meantime. By way of illustration only, in the 2015 *Paradiso et Campanelli* judgment the ECtHR Chamber found a violation of the applicants' right to respect for their private and family life but in the end held that the child would not be returned to his intending parents because of the development of emotional ties between him and the foster family where he had then been living for two years.[107] In addition, leaving aside the

[104] European Court of Human Rights, *Mennesson c. France*, cit., para. 99; *Labassee c. France*, cit., para. 78, where the ECtHR held that the State's non-recognition of the family status established abroad had an adverse impact on the right of the children born from surrogacy to respect for their private life and was irreconcilable with the child's best interests principle. The point is also remarked by C. ACHMAD, *op. cit.*, p. 641, and L. POLI, "Gestazione per altri e *stepchild adoption*: gli errori del legislatore italiano alla luce del diritto internazionale", cit., pp. 106-107. In general terms, see A.K. BOYCE, *op. cit.*, p. 668.

[105] European Court of Human Rights, *Paradiso et Campanelli c. Italie* [GC], cit., para. 209. The Grand Chamber held that the applicants created an unlawful situation placing Italian authorities before the hard choice of legalising or putting an end to a *fait accompli*. The reiteration of the point in the ECtHR conclusions confirms the importance thereof (*ibid.*, para. 215). But see A. VIVIANI, *op. cit.*, pp. 82-85, especially p. 85, casting doubts upon the consonance of the said line of reasoning with the child's best interests principle.

[106] In this connection, see also the critical remarks of L. BRACKEN, "Assessing the Best Interests of the Child in Cases of Cross-border Surrogacy: Inconsistency in the Strasbourg Approach?", in *Journal of Social Welfare and Family Law* 2017, p. 1 ff., p. 9, observing that, differently from the twin judgments on the *Mennesson* and *Labassee* cases, in the final judgment on the *Paradiso et Campanelli* case, the ECtHR gave the illegality of the situation priority over the best interests of the child because of the lack of genetic ties between the child and his intending parents.

[107] European Court of Human Rights, *Paradiso et Campanelli c. Italie*, cit., para. 88. See also O. FERACI, *op. cit.*, p. 439, remarking upon the said inconsistency in the 2015 *Paradiso et Campanelli* judgment.

temporal issue, the ECtHR is not endowed with specific expertise in contrast to domestic courts or sections thereof specialised in child protection. Indeed, it is no surprise to witness the ECtHR endorsing the Italian Government description of the *Tribunale dei minori* as a specialised court in the 2017 *Paradiso et Campanelli* final judgment.[108]

5.4. Confidence in the Stability of the Situation

The relevance of the legal uncertainty arising from recourse to surrogate motherhood abroad is not circumscribed to the child's best interests principle. The ECtHR also took into account the awareness of the intending parents about the instability of the family situation created abroad through recourse to surrogate motherhood.

In that regard, one scholar finds the rationale of the cross-border surrogacy case law in the stability of the family situation: the right to respect for private and family life is said to require the continuity of the family status created abroad in the event of the intending parents' confidence in the stabilisation of the status.[109] In the *Mennesson* and *Labassee* twin judgments, the ECtHR found no breach of the right of the intending parents to respect for their family life since they could have not been genuinely confident in the stability of the family status created in the United States through surrogacy because of the French prohibition thereof.[110] It is seemingly for that same reason that, in the *Paradiso et Campanelli* final judgment, the ECtHR found no breach of the right of the intending parents to respect for their private life. By contrast, in the *Mennesson* and *Labassee* twin judgments, the ECtHR held that France had violated the right of the children to respect for their private life, since they should not have to bear the consequences of the intending parents' ill-founded confidence in the continuity of the family status created abroad.[111]

[108] European Court of Human Rights, *Paradiso et Campanelli c. Italie* [GC], cit., para 212.

[109] See P. KINSCH, "L'article 8 de la Convention et l'obligation de reconnaître les situations familiales constituées à l'étranger: à la recherche du fondement d'une solution jurisprudentielle", in *Mélanges en l'honneur de / Essays in Honour of Dean Spielmann. Liber Amicorum Dean Spielmann*, cit., p. 273 ff., pp. 274-278, observing also that human rights protection would then be specifically coherent with the logic behind the *méthode de la reconnaissance* under private international law, or at least the moderate declination thereof. In this connection, Article 10:9 of the Dutch Civil Code (available at www.dutchcivillaw.com) is especially telling, as it provides that «[w]here a fact has certain legal effects under the law that is applicable according to the private international law of a foreign State involved, a Dutch court may, even when the law of that foreign State is not be applicable according to Dutch private international law, attach the same legal effects to that fact, *as far as a non-attachment of these legal effects would be an unacceptable violation of the parties' justified confidence or of legal certainty*» (emphasis added).

[110] See P. KINSCH, "L'article 8 de la Convention et l'obligation de reconnaître les situations familiales constituées à l'étranger: à la recherche du fondement d'une solution jurisprudentielle", cit., p. 280.

[111] *Ibid*.

Nevertheless, the intending parents' confidence in the stability of the family situation may scarcely be deemed the foundation of an obligation to recognise the family status created abroad through recourse to surrogate motherhood. Rather, the predictability of the legal uncertainty of the family status is merely relevant to the ECtHR's assessment of the satisfaction of the 'accordance with law' parameter under Article 8 ECHR, which knowingly requires not only the existence of a legal basis for the State interference but also the accessibility and predictability of that legal basis.[112]

In particular, in the *Mennesson* judgment the ECtHR considered the predictability of the instability of the family status exclusively in the assessment of the quality of the law in accordance with which the State interference was alleged to be.[113] The text of the *Mennesson* and *Labassee* twin judgments plainly shows that eventually the ECtHR found no violation of the right to respect for family life not because the intending parents could not have genuinely been confident in the stability of the family status but because the French *Cour de cassation* had struck a fair balance between the applicants' interests and the State ones.[114] Even in the *Paradiso et Campanelli* final judgment, where striking weight was indeed attached to the illegality of the situation,[115] the ECtHR took proper account of the predictability of the State interference only in the assessment of the 'accordance with law' parameter.[116]

6. ECtHR Reluctance to Decisively Apply the Margin of Appreciation Doctrine in Order to Deny the Continuity of Family Status

In light of the above, the ECtHR refrained from applying and interpreting the right to respect for private and family life under Article 8 ECHR as demanding the continuity of the family status established abroad through surrogate motherhood. In abstaining from asserting any obligation to recognise the family status created abroad through surrogacy, the ECtHR could have crucially relied on the lack of a common consensus among the States parties to the ECHR. Yet, the ECtHR did not do so.

There is indeed a lack of consensus among the States parties to the ECHR in the matter of surrogate motherhood and the ensuing issue of the recognition of

[112] See, *e.g.*, C. PITEA, L. TOMASI, *op. cit.*, pp. 304-306; B. RAINEY, E. WICKS, C. OVEY, *op. cit.*, pp. 310-314; W. SCHABAS, *op. cit.*, pp. 402-404.

[113] European Court of Human Rights, *Mennesson c. France*, cit., para. 58.

[114] European Court of Human Rights, *Mennesson c. France*, cit., para. 94; *Labassee c. France*, cit., para. 73. Indeed, as mentioned before (Section 5.1.), in assessing the said balance the ECtHR considered the concrete effects of the non-recognition of the family status and the broad margin of appreciation of France, rather than the predictability of the stability of the family status.

[115] European Court of Human Rights, *Paradiso et Campanelli c. Italie* [GC], cit., para. 215.

[116] *Ibid*., para. 173.

the family status established abroad through surrogacy.[117] It is well known that the absence of a common European standard usually entails a broad margin of appreciation for the States parties to the ECHR.[118] In this regard, in the cross-border surrogacy case law, the ECtHR remarked on the breadth of the State margin of appreciation as a result of the absence of a European consensus.[119] Accordingly, at least as far as the right of the intending parents to respect for their *private* life is concerned, the *Paradiso et Campanelli* final judgment seemingly suggests the predominance of the State margin of appreciation, in that public interests eventually prevailed on the applicants' ones.[120] This despite the fact that the margin of appreciation doctrine did not really play a crucial role in the ECtHR case law on the continuity of family status in cross-border surrogacy situations, as explained hereunder.

Firstly, as regards the right of the child born from surrogacy to respect for their private life, one cannot overestimate the ECtHR finding that the State margin of appreciation had to be shrunk since such an essential part of child's identity as their biological origin was at stake.[121] It is true that also on the basis of that premise the ECtHR eventually held that France had exceeded its margin of appreciation in failing to recognise the genetic link of the children born from surrogacy with their respective father.[122] However, as pointed out above, the protection of the genetic ties of the child born from surrogacy under their right to respect for private life is but incidentally relevant for the continuity of the family status created abroad through surrogate motherhood.[123]

Secondly, uncertainties remain about the interplay between the wide margin of appreciation of States and the right of the intending parents to respect for their *family* life, at least in the event of a concrete interference in the maintenance of family unity. In this connection, there comes to mind the State removal of the child born from surrogacy, like in the *Paradiso et Campanelli* case. Albeit such a hypothesis is unlikely where a genetic link exists between the child born from

[117] See the comparative law analysis in the twin judgments on *Mennesson c. France*, cit., paras. 40-42, and *Labassee c. France*, cit., paras. 31-33.

[118] See, *ex pluribus*, E. BENVENISTI, "Margin of Appreciation, Consensus, and Universal Standards", in *New York University Journal of International Law and Politics* 1999, p. 843 ff., pp. 850-853.

[119] European Court of Human Rights, *Mennesson c. France*, cit., paras. 78-79; *Labassee c. France*, cit., paras. 57-58; *Paradiso et Campanelli c. Italie* [GC], cit., para 194.

[120] European Court of Human Rights, *Paradiso et Campanelli c. Italie* [GC], cit., para. 215, where the ECtHR Grand Chamber stated that, in comparison to the heavy weight of the public interests at stake, less weight had to be conferred to the intending parents' interest in their personal development through the preservation of their relationship with the child born from surrogacy.

[121] European Court of Human Rights, *Mennesson c. France*, cit., para. 80; *Labassee c. France*, cit., para. 59.

[122] European Court of Human Rights, *Mennesson c. France*, cit., para. 100; *Labassee c. France*, cit., para. 79; *Foulon et Bouvet c. France*, cit., para. 58.

[123] See *supra*, Section 5.1.

surrogacy and either of their intending parents, it may well come into consideration in the absence of genetic ties, which is to say in *de facto* family situations.

There is some evidence to suggest that the right to respect for family life may require the recognition of the family status created abroad through recourse to surrogate motherhood, despite the breadth of the State margin of appreciation. In the *Mennesson* and *Labassee* twin judgments, the ECtHR seemingly held that even the wide margin of appreciation deriving from the controversial issue of surrogate motherhood did not allow States to remove children born from surrogacy from their intending parents.[124] Specifically, in finding that the French *Cour de Cassation* had struck a fair balance between the applicants' interests and the State ones, the ECtHR took into account the State's broad margin of appreciation and the maintenance of the family unity between the intending parents and the children born from surrogacy.[125] Nevertheless, in the *Mennesson* and *Labassee* cases, the family unity had just been preserved.

In the *Paradiso et Campanelli* final judgment the ECtHR held that there was no family life at stake, and thus did not need to assess the Italian broad margin of appreciation against the applicants' right to respect for their family life. That avoided a difficult balancing act having to be undertaken between the maintenance of family unity and the application of the margin of appreciation doctrine in a case where the child born from surrogacy had been removed from his intending parents. If the ECtHR had ascertained the existence of a family life, that would have implied the application of the right to respect for family life and therefore the ECtHR would have been at a crossroads.[126] Had it found a breach of Article 8 ECHR, it would have disregarded the Italian broad margin of appreciation. Had it held that the child's removal was compatible with the ECHR in consideration of the broad State margin of appreciation, it would have disregarded the importance consistently attached to the protection of family unity.[127] Even though the Grand Chamber insisted on the inexistence of a family life and thus alluded to a potentially different outcome had the right to respect for family life been relevant,[128] so far the ECtHR has not yet weighed up the right to respect for family life against the broad State margin of appreciation in cross-border surrogacy cases where there has been an interference in the family unity.

Indeed, the lack of a relevant common consensus would not have prevented the ECtHR from stating that the right to respect for family life requires the States

[124] See also C. ACHMAD, *op. cit.*, p. 643, and G. CANO PALOMARES, *op. cit.*, pp. 79-80. Indeed, as C. ACHMAD, *op. cit.*, p. 645 rightly observes, «the Court did not explicitly state that the existence of a genetic link between a child and a commissioning parent is so critical that it must be present for filial recognition in law in [international commercial surrogacy] situations».

[125] European Court of Human Rights, *Mennesson c. France*, cit., para. 94; *Labassee c. France*, cit., para. 73. See also R. BARATTA, *op. cit.*, pp. 321-323.

[126] On the perplexities arising from the application of Article 8 ECHR according to the mere existence of a private or family life, see *supra*, Section 4.

[127] See M. GERVASI, *op. cit.*, pp. 11-14.

[128] See also *supra*, text corresponding to the note 62.

parties to recognise the family status established abroad through surrogate motherhood. It is true that ignoring the absence of a common consensus usually implies the risk of non-execution of the relevant decision and possibly undermines the legitimacy of the ruling.[129] However, as mentioned before, in the *Mennesson* and *Labassee* twin judgments the ECtHR announced the need for a reduction of the width of the State margin of appreciation just by reason of the importance of the child's genetic identity.[130] In the same way, the ECtHR could have just stated that the non-recognition of the family status established abroad through surrogate motherhood was incompatible with such an important right like the right to respect for family life.

In short, the case law allows the ECtHR to find the existence of a family life in the future, and therefore hold that the right to respect for family life requires the continuity of the family status created abroad through surrogacy, to the extent that it is essential for the maintenance of the family unity. All seemingly depends on the ECtHR finding of the existence of family life, rather than on the common consensus and ensuing breadth of the State margin of appreciation. In the event that the ECtHR finds the existence of family life in a cross-border surrogacy case where the family unity has been breached, the absence of any precedent will leave the door open for the ECtHR to disregard the wide State margin of appreciation and find the incompatibility of the non-recognition of the family status established abroad through surrogacy with the right to respect for family life.

7 Surrogate Motherhood Beyond the Human Rights Perspective: The ECtHR Before Technological Development

In the light of the demonstrated reluctance of the ECtHR to both interpret the right to respect for private and family life as demanding the continuity of the family status created abroad through surrogacy and crucially apply the margin of appreciation doctrine, the question arises whether the ECtHR could have provided a more coherent answer to the issue of the recognition of the family status established abroad through surrogate motherhood. Of course, the ECtHR is not expected to generally determine the compatibility of surrogacy with human rights.[131] It is well established that the role of the ECtHR is to ensure in concrete cases the Parties' observance of the ECHR undertakings, and its jurisdiction is confined to issues arising out of the interpretation and application of the ECHR.[132] Nonetheless, that should have not hindered the ECtHR from providing

[129] As specifically concerns such risk in surrogate motherhood cases, see also M. ARDEN, *op. cit.*, pp. 8-9.

[130] European Court of Human Rights, *Mennesson c. France*, cit., para. 80; *Labassee c. France*, cit., para. 59.

[131] See M. ARDEN, *op. cit.*, pp. 8-9.

[132] Articles 19 and 32 ECHR.

a sound interpretation of Article 8 as regards the specific issue of the family status continuity in cross-border surrogacy cases.

Considering the missed opportunity for the ECtHR to clearly affirm an obligation to recognise the family status created abroad through surrogate motherhood as well as give essential importance to the State margin of appreciation, it is here submitted that the ECtHR found itself unable to assess the issue through the lens of human rights, *rectius* the ECHR. That inability has its roots in the technological nature of the surrogate motherhood practice and in the consequent 'silence' of the right to respect for private and family life in regard to surrogacy. It is difficult to observe the same reluctance on the part of the ECtHR when it comes to dealing with cases concerning the continuity of transnational family status other than those involving recourse to surrogate motherhood abroad, as the abovementioned judgments on the *Wagner* and *Negrepontis* cases indicate.

Specifically, in itself the right to respect for private and family life under the ECHR is silent about any requirement for the States parties to recognise the family status created abroad through recourse to surrogate motherhood. The relevant human rights debate on the issue broke out later once recourse to surrogate motherhood spread.[133] This is because the origin of the increasing resort to surrogate motherhood falls outside the human rights discourse and within the field of technological development.

Technique always knows *how* to do something, never *whether* something should be done.[134] As a consequence, technique does not factor in any human rights concern or even reason itself but its own development, in this case the technique that has made it increasing attractive for someone to request a woman to bear a child on their behalf.[135] The economic advantage underlying surrogacy, especially in its commercial form, has encouraged this trend.[136] Even States' control over such a technological and economic development is limited, especially in cross-border surrogacy cases. There they find themselves facing a *fait accompli*: they cannot but recognise, accept or refuse the situation arising from recourse to surrogate motherhood abroad.[137] In addition, one may doubt the correct func-

[133] About the concept of human rights as emerging from the outcome of a social clash, see C. FOCARELLI, *International Law as Social Construct. The Struggle for Global Justice*, Oxford, 2012, pp. 393-395; ID., "Il pianeta dei balocchi. A proposito della definizione dei diritti umani", in *Diritti umani e diritto internazionale* 2016, p. 659 ff., pp. 661-664. On the dependence of human rights on contingent circumstances, including technical transformations, see N. BOBBIO, "Sul fondamento dei diritti dell'uomo", in *Rivista internazionale di filosofia del diritto* 1965, p. 301 ff., pp. 304-305. But, on the evolution of Bobbio's thoughts, see F. SALERNO, "Bobbio, i diritti umani e la dottrina internazionalista italiana", in *Diritti umani e diritto internazionale* 2009, p. 485 ff.

[134] See U. GALIMBERTI, *Psiche e techne. L'uomo nell'età della tecnica*, Milano, 2011[8], pp. 269-270; ID., *I miti del nostro tempo*, Milano, 2016[6], p. 217.

[135] See *supra*, Section 2.

[136] See U. GALIMBERTI, *I miti del nostro tempo*, cit., p. 222.

[137] See H. FULCHIRON, *op. cit.*, pp. 573-576, observing tellingly that «[f]ace au développement d'un tel phénomène [le tourisme procréatif], les États sont à bien des égards impuissants» (*ibid.*, 565).

tioning of democratic mechanisms behind State decisions in such a field because of the need for technical expertise in order for people to consciously take a position on surrogacy.[138]

The aforementioned fact that the ECtHR has arguably left open the chance to find a violation of the right to respect for family life in the future, at least where family unity is at stake, may also be read in light of the technological nature of the practice of surrogate motherhood. It is reasonable that the ECtHR did not disregard the possibility that the human rights debate on surrogacy may eventually result in the protection of the continuity of the family status established abroad through recourse to surrogate motherhood.[139] Technique, as supported by economics and investments, is unlikely to permit any solution escaping its own logic.[140] The ultimate affirmation, in the human rights debate and State practice, of a right to recognition of the family status created abroad through recourse to surrogate motherhood would be consonant with technological development as well as the economic interests underlying surrogacy. Bearing in mind that the safeguarding of certain rights necessarily implies corresponding duties and even losses, including economic ones,[141] the ECtHR would have run the risk of remaining at odds with the possible evolution of State practice had it closed any door to the chance to apply in the future the right to respect for family life as requiring the continuity of the family status created abroad through surrogacy.

ABSTRACT. The European Court of Human Rights and Technological Development: The Issue of the Continuity of the Family Status Established Abroad Through Recourse to Surrogate Motherhood

Surrogate motherhood is one of today's controversial issues. It is debatable whether or not surrogacy is consistent with human rights. Consequently, State reactions to surrogacy range widely. People from countries where surrogacy is banned or strictly regulated have been increasingly resorting to surrogate motherhood abroad. Hence the question about the continuity of the family status created abroad through surrogacy. Also the European Court of Human Rights (ECtHR) has dealt with that problem, mainly in the *Mennesson*, *Labassee*, and *Paradiso et Campanelli* cases. On the one hand, the ECtHR was reluctant to determine whether the right to respect for private and family life entails a right to recognition of the legal parentage established abroad through surrogacy as well as to find a basis for the continuity of the family status. On the other hand, the ECtHR abstained from

[138] See U. GALIMBERTI, *Psiche e techne. L'uomo nell'età della tecnica*, cit., pp. 450-451; ID., *I miti del nostro tempo*, cit., pp. 218-219.

[139] For instance, M. ARDEN, *op. cit.*, observes that «society is undergoing rapid change in its acceptance of reproductive autonomy and liberty» (p. 7). As a consequence, «[w]ith the increasing use of surrogacy, it is likely that [the United Kingdom] Parliament will have to give further thought in the future to whether the limitations in the present legislation are realistic and appropriate in the 21st century» (p. 6).

[140] On the trend towards the technological dominance over politics and economics, see E. SEVERINO, *Il tramonto della politica. Considerazioni sul futuro del mondo*, Milano, 2017.

[141] See C. FOCARELLI, *International Law as Social Construct. The Struggle for Global Justice*, cit., pp. 397-398; ID., "Il pianeta dei balocchi. A proposito della definizione dei diritti umani", cit., pp. 665-667.

crucially relying on the margin of appreciation doctrine. The author argues that the technological nature of contemporary surrogate motherhood is the reason for the hesitance of the ECtHR.

Keywords: surrogate motherhood; continuity of family status; European Convention on Human Rights; right to respect for private and family life; margin of appreciation; technique.