REVIEW OF THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON THE LEGAL STATUS OF CHILDREN BORN OUT OF WEDLOCK

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under the supervision of
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EXECUTIVE SUMMARY

The 1975 Convention on the legal status of children born out of wedlock has, over time and in the light of social and medical developments since its adoption, become progressively outdated. Furthermore, some provisions of the 1975 Convention are contrary to the case law of the European Court of Human Rights (the Court or ECtHR). The new revised Convention must therefore, in order to strengthen the legal protection of children born out of wedlock, take into account new forms of family, in the context of both legal parenthood and parental responsibilities, as well as the position of children born through assisted reproductive technologies.

This report aims to draw up a list of specific areas and issues to be examined in which improvements are needed in order to bring them in line with the case law of the ECtHR and the development of society.

According to the assessment of the state of play of the implementation of the 1975 Convention, the main gaps within it include surrogacy, same-sex parenthood and parenting, and transgender parenthood and parenting.

With regard to surrogacy, and in accordance with the ECtHR case law, States are free to outlaw surrogacy domestically. However, given that surrogacy is increasingly used to raise a family, it would be sensible to include in a new or revised Convention provisions concerning legal parenthood in surrogacy, specifying that States are free to decide whether to adopt legislation to regulate surrogacy or not. Furthermore, in order to avoid promoting commercial surrogacy, the term " commissioning parents " should be replaced by " intending parents ". A separate question arising for a new/revised Convention from the ECtHR jurisprudence on cross-border surrogacy is whether the instrument should straddle into the area of private international law. The problem with pursuing this avenue is that it would risk 'treading on the toes' of the Hague Conference on Private International Law, which is currently working on a private international law instrument on legal parenthood. On the other hand, the child-centred approach adopted in the ECtHR jurisprudence is to be welcomed and reflected in the new Convention. This will considerably strengthen the legal protection of children born through cross-border substitution. Nevertheless, care must be taken to ensure that these new provisions do not encourage potential intending parents (whose national law prohibits surrogacy) to circumvent domestic legislation in order to resort to cross-border surrogacy.

The report also notes that same-sex parental rights are not guaranteed in the same way in each European country. Indeed, the parental rights of these persons are subject to the discretion of the member States. This situation gives rise to a " patchwork of rights for children," so that the rights of children in same-sex families vary from one member State to another. Therefore, provisions to enable parental affiliation between the non-biological parent and the child to be legally established ab initio, and appropriate provisions on parental responsibilities should be included in a new/revised Convention, so as to eliminate the discrimination that continues to be faced by children born in to same-sex families.

The report also looks at the issue of transgender parenthood and parenting. Transsexualism raises complex legal, moral and social issues, so that legal parentage for transgender people is very difficult to recognise, even where legal gender recognition exists. The new convention will attempt to put in place adequate new provisions to strengthen and protect the rights of these people. However, the lack of common ground among member States of the Council of Europe concerning trans-gender issues more generally may render this proposal problematic to implement at this stage.

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Finally, the report recommends supplementing the provisions of the 1975 Convention by new articles (or to revise the existing ones) to guarantee non-discrimination of children, including in the context of succession and maintenance; the right of access to information concerning the child's origin; the right to a family name; the right to citizenship; and the legal possibility of having parental affiliation established by presumption, recognition or judicial decision. The new (or revised) articles should address in detail also paternal and maternal affiliation and provide, inter alia, general guidance on the extent to which the right to establish parental affiliation may be restricted.

Contents

1. INTRODUCTION 6
2. THE 1975 CONVENTION ON THE LEGAL STATUS OF CHILDREN BORN OUT OF WEDLOCK CONVENTION: THE NEED FOR REFORM 7
3. KEY AREAS TO BE ADDRESSED IN THE LIGHT OF RECENT ECtHR CASE-LAW AND SOCIAL DEVELOPMENTS 9
3.1. Surrogacy 10
3.1.1. Background 10
3.1.2. ECtHR case-law on surrogacy 12
3.1.3. Commentary 13
3.2. Same-sex parenthood and parenting 15
3.2.1. ECtHR case-law on same-sex partnerships 15
3.2.2. Commentary 17
3.3. Transgender parenthood and parenting 20
4. DETAILED RECOMMENDATIONS FOR THE REFORM OF THE 1975 CONVENTION IN THE LIGHT OF THE RECENT ECtHR CASE-LAW 21
4.1. General principle of non-discrimination 21
4.2. Rights of succession 22
4.3. Children's right to identity 23
4.4. Children's right of access to information concerning their origins 24
4.4.1. Paternal affiliation 24
4.4.2. Maternal affiliation: 'anonymous births' 25
4.5. Legal recognition of biological parenthood established abroad 26
4.6. Children's right to a family name 26
4.7. Children's right to citizenship 27
4.8. Parental affiliation 28
4.8.1. Maternal affiliation 31
4.8.2. Paternal affiliation 32
4.9. Parental responsibility 37
4.10. Maintenance obligations 40
5. CONCLUSION 41
APPENDIX : TABLE OF RECOMMENDATIONS 42

1. INTRODUCTION

1. Children's rights are directly affected by the changing social and legal norms concerning the notion of 'family'. These changes, particularly vivid for the past three decades, encompass the introduction of new structures of families that were not acceptable or imaginable in the past. Such family structures include single parents, parents without a genetic connection to their children and LGBT families. To accommodate the new family structures, legal concepts such as the positive presumption that a child born in a marriage is the biological child of both parents are challenged to the core. The European Court of Human Rights (the 'Court' or 'the ECtHR') has played an incremental role in allowing necessary flexibility into law with regards to new family structures. The Court has heard relevant claims primarily within the scope of Articles 8 and 14. The Court has been applauded for its treatment of the changing attitudes towards family, however, it has faced criticism too, particularly relating to its sometimes-reserved stance with regards to new structures of families.

2. This Report has been prepared at the request of the Council of Europe's Committee on Legal Co-operation (CDCJ) as a preliminary step to a possible future update of the provisions of 1975 European Convention on the Legal Status of Children born out of Wedlock (ETS No. 85) ('the 1975 Convention' or 'the Convention'). In seeking to identify gaps in issues addressed by the Convention with a view of strengthening the protection of children born out of wedlock, the study sets out areas where there have been relevant new developments at the ECtHR. The review builds on the work done in the framework previously by the Committee of Experts on Family Law (CJ-FA) of the CDCJ. The Report aims to identify a list of areas and specific matters for consideration, including gaps in issues addressed by the Convention with a view of strengthening the protection of children born out of wedlock, taking into account the changes and developments that have taken place since its drafting. The review includes a preliminary assessment of the desirability of updating the Convention whilst weighing any elements or factors that could facilitate this process or hinder the modernisation of the Convention.

3. The methodology used in this study is based on library-based research, as a type of work that is integral to legal research. The study covers both primary and secondary sources, with the primary sources being represented by pertinent case-law of the ECtHR, and secondary sources comprising relevant academic literature (books and journal articles), policy reports and online sources.[1]

[1] The key sources include: Committee of Experts on Family Law (CJ-FA), '"White Paper" on Principles Concerning the Establishment and Legal Consequences of Parentage' (CJ-FA (2006) 4 e), available at CJ-FA_2006_4 e.PDF (coe.int), last accessed 29/09/2021 ('White Paper'); N Lowe, 'A Study into the Rights and Legal Status of Children Being Brought Up in Various Forms of Marital and Non-Marital Partnerships and Cohabitation' (CJ-FA (2008) 5), available at CJ-FA_2008_5 E 25 09 09 (coe.int), last accessed 29/09/2021 ('2008 Report'); European Committee on Legal Co-operation, 'Report Containing an Evaluation of the Council of Europe Legal Instruments in the Field of Family Law', CJ-FA (2006) 1 Rev, available at https://rm.coe.int/16807004be, last accessed 29/09/2021; Directorate of Legal Affairs, 'The Right of Access to Children in Europe', CJ-FA (99) ACCESS, available at https://rm.coe.int/1680700284, last accessed 29/09/2021; European Union Agency for Fundamental Rights and Council of Europe, 'Handbook on European Law Relating to the Rights of the Child' (2015), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf, last accessed 29/09/2021; European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights' (2020), available at https://www.echr.coe.int/documents/guide_art_8_eng.pdf, last accessed 29/09/2021; European Court of Human Rights, 'Factsheet – Sexual Orientation Issues' (2021), available at https://www.echr.coe.int/documents/fs_sexual_orientation_eng.pdf, last accessed 29/09/2021; and European Court of Human Rights, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (2021), available at https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf, last accessed 29/09/2021.

Emphasis is placed on the ECtHR jurisprudence, which has been located and accessed primarily through the ECtHR case-law database HUDOC.[2] The case-law is analysed against the background of the previous review of the 1975 Convention, in particular the Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities ('the (2011) Draft Recommendation')[3] and the Draft Explanatory Memorandum to the Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities ('the (2011) Draft Explanatory Memorandum').[4] Focus is placed on post-2011 case-law so as to capture primarily the most recent developments.

4. It should be noted that only limited comparative research into domestic legislation of the member States of the Council of Europe was conducted as part of this study. Accordingly, the findings and recommendations made in this Report are based primarily on the pertinent ECtHR jurisprudence and, as such, do not fully reflect the feasibility of the proposed reforms vis-à-vis the current legal position across member States of the Council of Europe. Should a preliminary decision be taken to proceed with the modernisation of the provisions of the 1975 Convention, a detailed comparative study to assess the reform proposals against developments in the member States of the Council of Europe, would be necessary before reaching a final decision on the future of the Convention.

5. The substantive part of the Report is divided into four parts. The first part outlines the 1975 Convention, emphasising the need for modernisation of this instrument. The second part identifies the key gaps in the scope and content of the 1975 Convention as exposed by the case-law of the ECtHR, with a particular emphasis on the developments that have occurred over the past decade. This is followed by the third part, which contains detailed recommendations for the review of the 1975 Convention in the light of relevant ECtHR jurisprudence. The Report ends with a brief conclusion.

2. THE 1975 CONVENTION ON THE LEGAL STATUS OF CHILDREN BORN OUT OF WEDLOCK CONVENTION: THE NEED FOR REFORM

6. The 1975 European Convention on the Legal Status of Children Born out of Wedlock Convention, which has been ratified by 23 States and signed by a further 3,[5] seeks to align the status of children born out of wedlock with that of children born in wedlock. It has long been recognised that this Convention is in a need of reviewing and modernising.[6] In 1984, Recommendation No R(84) 4 on Parental Responsibilities[7] ('the Recommendation' or 'Recommendation 84 (4)') was adopted to complement the Convention. The Recommendation comprised 11 Principles concerning the attribution and exercise of parental responsibilities. It should be noted that there were some overlaps/potential inconsistencies between these two instruments.[8] In 2006, the White Paper on Principles Concerning the Establishment and Legal Consequences of Parentage[9] ('the (2006) White Paper') was adopted, with the ultimate objective of replacing the Convention and Recommendation (84) 4. The White Paper contained 29 Principles that generally updated and substituted those in Recommendation 84 (4), although neither in the same order nor in a comprehensive way.

[2] Available at HUDOC - European Court of Human Rights (coe.int), last accessed 08/10/2021.
[3] CDCJ (2011) 15, Appendix II.
[4] CDCJ (2011) 15, Appendix III.
[5] Council of Europe, 'Chart of Signatures and Ratifications of Treaty 085', available at Full list (coe.int), last accessed 29/09/2021.
[6] As early as in 1997, the Committee of Experts on Family Law (CJ-FA) of the Council of Europe gave Working Party No 2 on the Legal Status of Children the task of drawing up a report containing principles relating to the establishment and legal consequences of parentage. See White Paper (n 1).
[7] Available at Result details (coe.int), last accessed 30/09/2021.
[8] E.g., Article 6 of the Convention and Principle 8 of the Recommendation; and Article 7 of the Convention and Principle 7(2) of the Recommendation, respectively.
[9] White Paper (n 1).

7. The White Paper suffered also from a number of substantive weaknesses, including the lack of clarity concerning attribution and exercise of parental responsibilities; the relationship between legal parenthood and parental responsibilities; overlap with the (now completed) European Convention on the Adoption of Children (Revised);[10] and the lack of regard to the case-law of the European Court of Human Rights concerning paternity.

8. To address the shortcomings of the Convention, the Recommendation and the White Paper, a Report titled 'A Study into the Rights and Legal Status of Children Being Brought Up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation'[11] ('the 2008 Report') was prepared by Professor Nigel Lowe in 2008 and presented as a working document at the 38th plenary meeting of the Council of Europe Committee of Experts on Family Law in September 2009. Based on the 2008 Report, the Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities ('the (2011) Draft Recommendation'),[12] accompanied by the Draft Explanatory Memorandum to the Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities ('the (2011) Draft Explanatory Memorandum')[13] was prepared and presented to the member States. Unfortunately, the Draft Recommendation was not adopted, mainly due to differing views on matters related to same-sex partnerships and assisted reproduction.[14]

9. The 2008 Report rightly noted that the Convention was dated in terms of both the terminology it uses and its content, in particular in the face of the rapidly developing assisted reproductive technologies and the changing pattern of family life.[15] With regard to the former, the previously commonly used expression 'illegitimate' children referred to children whose parents were not married and therefore their birth was not 'in accordance with the law.' The synonym 'children born out of wedlock' was also prevalent to describe children born to unmarried parents. Both terms carried stigma associated with 'promiscuity' and such children faced significant social prejudice and legal discrimination. It is without doubt that the term 'children born out of wedlock' is out-of-date and should therefore not be used in a new/revised Convention. The second problem with the Convention refers to the increasing numbers of children born in cohabitating relationships, to lone parents, in LGBT families[16] or brought up in stepfamilies.[17] Undoubtedly, these changes are even more pronounced now than they were over a decade ago when the 2008 Report was drafted, underscoring the need to modernise the Convention.

10. The Convention comprises 16 Articles and is concerned *exclusively* with children born in or outside marriage. In the light of the social and medical developments outlined above, the Convention is partly outdated, and its scope is exceedingly narrow. Moreover, some provisions of the Convention are also contrary to the case law of the ECtHR. To rectify these deficiencies, the Convention needs to be modernised by *inter alia* embracing the new family forms discussed above, in the context of both legal parenthood and parental responsibilities, as well as the position of children born through assisted reproductive technologies, including in that

[10] CETS No.: 202 (27.11.2008), available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/202, last accessed 30/09/2021.
[11] CJ-FA (2008) 5, available at CJ-FA_2008_5 E 25 09 09 (coe.int), last accessed 30/09/2021.
[12] CDCJ (2011) 15, Appendix II.
[13] CDCJ (2011) 15, Appendix III.
[14] CDCJ (2011) 15, Appendix IV.
[15] 2008 Report (n 1), 4-5.
[16] Sometimes referred to as 'rainbow families'. This term refers to 'families comprised of a same-sex couple and their child(ren) (…) [or] more complex parenting configurations, where the parental roles are divided among more than two persons" in A. Tryfonidou, 'EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?' (2019) 38(1) Yearbook of European Law 220, 221.
[17] In 2018, the proportion of live births outside marriage in the EU reached 42%, which was a 17% increase on the data recorded in 2000. Extramarital births occur in non-marital relationships, among cohabiting couples and to lone parents. Eurostat, '42% of Births in the EU are Outside Marriage', available at https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20200717-1, last accessed 30/09/2021.

context, children born into same-sex families. The result would be a new contemporary Convention on the legal status of families that would be considerably wider in scope than the 1975 Convention and reflective of the social and medical developments discussed above. Such reform is long overdue and is even more urgent now than it was in the late 2000s when it was first proposed.[18]

3. KEY AREAS TO BE ADDRESSED IN THE LIGHT OF RECENT ECtHR CASE-LAW AND SOCIAL DEVELOPMENTS

11. This section identifies the key gaps in the scope and content of the 1975 Convention as expounded by the case-law of the ECtHR, with emphasis on post-2011 decisions (i.e., those made after the previous review of the Convention). This is complemented by a brief preliminary analysis of the feasibility of a reform in each individual area. The areas discussed are: 1. Surrogacy; 2. Same-sex parenthood and parenting; and 3. Transgender parenthood and parenting.

12. As an introductory point, one must differentiate between the concepts of legal parenthood and parental responsibilities (previously termed 'parental authority'). Legal parenthood has traditionally been based upon the genetic or presumed genetic connection with the child, however, with the advancement of assisted reproductive technologies the position is now much more complicated.[19] Legal parenthood refers to who is legally recognised, either automatically *ab initio* or after taking certain steps (e.g. adoption) as the parent of a child.[20] Parental responsibilities denote day-to-day care of a child and can be defined as 'a collection of duties, rights and powers, which aim to promote and safeguard the rights and welfare of the child in accordance with the child's evolving capacities.'[21]

13. The overarching theme in most of the cases falling within the above three categories is the use of assisted reproductive technologies, e.g., egg and sperm donation and in-vitro fertilisation. There is an abundance of ECtHR case-law concerning access to assisted reproduction processes,[22] however, those cases are not the focus of this study. Rather, the below sections concentrate solely on case-law pertaining to matters of parental affiliation and parental responsibilities.

[18] See 2008 Report (n 1) 40.
[19] N. Lowe, G. Douglas, E. Hitchings and R. Taylor*, Bromley's Family Law*, Oxford University Press (2021) 388.
[20] *Ibid*. Note that adoption is outside of the scope of this study. Adoption falls within the scope of the 2008 European Convention on the Adoption of Children (Revised) (No. 202), 27.11.2008.
[21] 2011 Draft Recommendation, Principle 20.
[22] See e.g., *Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-I; *Dickson v. the United Kingdom*, no. 44362/04, 18 April 2006; *S.H. and Others v. Austria*, no. 57813/00, 1 April 2010. See also the admissibility decision of *Charron and Merle-Montet v France* (22612/15) 16.01.2018 (dec.) (concerned a female same-sex couple seeking access to IVF treatment and declared inadmissible as the applicants had failed to exhaust available domestic remedies).

3.1. Surrogacy
3.1.1. Background

14. A surrogate mother may be defined as a woman who carries a child, pursuant to an arrangement made before she became pregnant, with the sole intention of the resulting child being handed over to another person or persons and the surrogate mother relinquishing all rights to the child. There are two types of surrogacy: traditional surrogacy and gestational surrogacy.[23] In traditional surrogacy, the surrogate mother becomes pregnant with the sperm of the intended father (usually by insemination, and seldom through sexual intercourse) or is inseminated with donor sperm. As a result, the surrogate mother is genetically related to the child. In gestational surrogacy, an embryo is created by IVF, using the egg of the intended mother (or a donor egg) and the sperm of the intended father (or a donor sperm). Consequently, the surrogate mother has no genetic relationship with the child (though she does have an epigenetic relationship with the child). Surrogacy agreements can also be classified into 'altruistic' and 'commercial' surrogacy arrangements. In altruistic surrogacy arrangements the surrogate mother is reimbursed by the intended parents up to the amount of her reasonable pregnancy-related expenses. In commercial surrogacy arrangements, the surrogate mother receives a payment beyond her reasonable pregnancy-related expenses, although the line between altruistic and commercial surrogacy is often blurred.

15. Surrogacy is increasingly used as means for family formation. It is an ethically sensitive topic, and domestic legal responses to surrogacy among the member States of the Council of Europe differ. Generally speaking, some domestic legislators have regulated surrogacy, some have prohibited it,[24] and some have not addressed it at all.[25] Only a small minority of the Council of Europe member States permits and (to various extents) regulates surrogacy, e.g. the United Kingdom,[26] Greece,[27] Ukraine,[28] Russia,[29] and Portugal.[30] So far as legal parenthood at birth is concerned, two alternative approaches can be distinguished: first, the woman giving birth is treated as the legal mother and her husband or male partner, the father

[23] See e.g., J. Zuckerman, 'Extreme Makeover – Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements' (2007-2008) 32 *Nova Law Review* 661, 662.
[24] E.g., France and Germany.
[25] E.g., Belgium and the Netherlands. An up-to-date comprehensive comparative overview of national approaches to surrogacy across the Council member States is not available and would be beneficial. For older comparative sources see e.g., European Parliament, 'A Comparative Study on the Regime of Surrogacy in EU Member States' (2013), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf; K. Trimmings & P. Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, Hart Publishing (2013); and J Scherpe et.al (eds.), *Eastern and Western Perspectives on Surrogacy*, Intersentia (2019).
[26] See M. Wells-Greco, 'National Report on Surrogacy: United Kingdom' in Trimmings & Beaumont (n 26) 367; and C. Fenton-Glynn, 'The Tolerant Approach: England and Wales' in Scherpe et.al (n 26) 115. See also a recent proposal for the reform of UK surrogacy laws: Law Commission & Scottish Law Commission, 'Building Families Through Surrogacy: A New Law (A Joint Consultation Paper)' (2019), available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/Surrogacy-consultation-paper.pdf, last accessed 07/10/2021 ('Building Families Through Surrogacy').
[27] See K. Rokas, 'National Report on Surrogacy: Greece' in Trimmings & Beaumont (n 26) 143; and E. Zervogianni, 'The Regulatory Approach: Greece' in Scherpe et.al (n 26) 147.
[28] See G. Druzenko, 'National Report on Surrogacy: Ukraine' in Trimmings & Beaumont (n 26) 357.
[29] See O. Khazova, 'National Report on Surrogacy: Russia' in Trimmings & Beaumont (n 26) 311; and O. Khazova, 'The Free Market Approach: Russia' in Scherpe et.al (n 26) 281.
[30] See R. Teixeira Pedro, 'The Regulatory Approach: Portugal' in Scherpe et.al (n 26) 229.

('the gestational approach');[31] and second, the intending parents are considered the legal parents from birth ('the intent-based approach').[32]

16. The variety of domestic responses to surrogacy has led to widespread *forum shopping* where infertile heterosexual couples, gay couples or single people seeking to have a child through surrogacy travel from one country to another, purposely choosing 'surrogacy-friendly' jurisdictions as their destinations.[33] Cross-border surrogacy arrangements give rise to a variety of ethical and legal problems among which the most salient is the question of recognition in the country of residence of the intending parent(s) of legal parenthood established in the country of birth.

17. International and regional organisations have responded cautiously to the practice of surrogacy. In 2015, the European Parliament passed a resolution condemning all forms of surrogacy.[34] In 2016, the Parliamentary Assembly of the Council of Europe rejected a draft recommendation to create 'European guidelines to safeguard children's rights in relation to surrogacy arrangements', prepared by rapporteur Professor Petra De Sutter.[35] In 2019, the UN Special Rapporteur on the sale of the child expressed concerns about the practice of commercial (in particular cross-border) surrogacy in a Report presented to the Human Rights Council.[36]

18. At the same time, legislative endeavours to address the private international law issues concerning children born through cross-border surrogacy have been ongoing at the Hague Conference on Private International Law,[37] whilst the International Social Service has

[31] This is currently the rule in the UK (although the ongoing review of the UK surrogacy legislation has proposed a move towards the 'intent-based approach' – see 'Building Families Through Surrogacy' (n 27); and Russia. Nevertheless, note that the UK permits 'parental orders' which transfer parenthood from the surrogate mother to the intending parents. There are also provisions in Russia for the intending parents to be registered as the legal parents.

[32] This approach has been adopted in Greece (applies subject to a prior court approval of the surrogacy arrangement) and Ukraine (although there is a requirement that the surrogate mother provides a notarised consent for the intending parents' registration as the child's parents). In Portugal, the rule that the intending parents are the legal parents of the child from birth has been declared unconstitutional by the Decision no. 225/2018 of the Portuguese Constitutional Court.

[33] Cross-border surrogacy arrangements are typically conducted on a commercial basis, and the majority of intending parents in such arrangements are Western couples attracted by low-cost surrogacy services and a ready availability of impoverished surrogates in Asia and Eastern Europe. Additionally, certain US States (e.g., California) have emerged as centres of the global cross-border commercial surrogacy market. Nevertheless, it is to be noted that, in response to human rights abuses, a number of Asian countries have recently adopted legislation to ban access to surrogacy services for foreigners (e.g., India, Thailand and Nepal).

[34] European Parliament, 'Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter', (2015/2229(INI)), [114], available at https://www.europarl.europa.eu/doceo/document/A-8-2015-0344_EN.html?redirect, last accessed 07/10/2021.

[35] See Parliamentary Assembly, 'Vote on Recommendation', available at http://assembly.coe.int/nw/xml/Votes/DB-VotesResults-EN.asp?VoteID=36189&DocID=16001&MemberID=, last accessed 07/10/2021.

[36] 'Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material', A/74/162, 2019, available at https://undocs.org/A/74/162, last accessed 07/10/2021. In the Report, the Special Rapporteur noted the presence of abusive practices in both unregulated and regulated contexts and expressed concerns that the practice of engaging surrogate mothers in States with emerging economies to bear children for more wealthy intending parents from other States entails power imbalances and presents risks for both the children and surrogate mothers.

[37] See Hague Conference on Private International Law, 'Parentage / Surrogacy Project', available at https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy, last accessed 07/10/2021 ('HCCH Parentage / Surrogacy Project').

prepared, from the children's rights perspective, a set of Principles (so called 'Verona Principles') to assist legislators and other stakeholders in their endeavours to address the problems arising from surrogacy.[38]

3.1.2. ECtHR case-law on surrogacy

19. The ECtHR case-law in the area of surrogacy has centred on the practice of cross-border surrogacy, in particular the recognition in the country of residence of the intending parents of a parent-child relationship established in the country of birth.[39] The leading case in this field is *Mennesson v France*[40] (decided jointly with the case of *Labassee v France*[41]). The cases concerned the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of cross-border surrogacy and their intending parents. In both cases the intending parents were a married heterosexual couple. The children were conceived using the intending fathers' sperm and donor eggs. Court orders made in California and Minnesota respectively ruled that the intending parents were the children's legal parents, and birth certificates were drawn up in the United States to reflect the terms of the court orders. The French authorities, however, refused to enter the particulars of the birth certificates in the French civil status register. The couples then took the matter to the courts. Their claims were dismissed at the final instance by the French Court of Cassation, which held that the California and Minnesota court judgments were incompatible with French international public policy as they contained provisions which conflicted with fundamental principles of French law, in particular the principle of inalienability of civil status. The Court also held that recording the particulars of the birth certificates would give effect to a surrogacy agreement which was null and void on public policy grounds under the French Civil Code. The couples then brought the case before the ECtHR. In both cases the Court held that there had been no violation of Article 8 of the Convention concerning the intending parents' right to respect for their family life as, despite a lack of legal recognition of parenthood, the family was able to live together in a situation broadly comparable with other families and was not in danger of separation,[42] however, there had been a violation of Article 8 of the Convention concerning the children's right to respect for their private life.

20. The Court noted that there was no consensus in Europe either on the lawfulness of surrogacy arrangements or on the legal recognition of the relationship between intended parents and children lawfully conceived abroad as a result of such arrangements. This lack of consensus reflected the fact that recourse to surrogacy raised difficult ethical issues. Accordingly, States had to be allowed a wide margin of appreciation in making surrogacy-related decisions. However, when it comes to legal parenthood, the margin of appreciation afforded to the State must be reduced. This is because legal parenthood is intrinsically linked with a person's identity, and the right to establish one's identity is in turn connected with the

[38] International Social Service, 'Principles for the Protection of the Rights of the Child Born Through Surrogacy (Verona Principles)', 2021, available at VeronaPrinciples_25February2021.pdf (bettercarenetwork.org), last accessed 07/10/2021 ('Verona Principles'). The Principles have been endorsed by the UN Special Rapporteur on the sale and sexual exploitation of children (2012-2020) as well as members of the UN Committee on the Rights of the Child.

[39] For a detailed overview of the case-law see K. Trimmings, 'Surrogacy Arrangements and the Best Interests of the Child: The Case Law of the European Court of Human Rights' in E. Bergamini & C. Ragni, *Fundamental Rights and Best Interests of the Child in Transnational Families*, Intersentia (2019) 187-207.

[40] *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts).

[41] See also *Labassee v. France*, no. 65941/11, 26 June 2014.

[42] For a criticism of such 'negative formulation of the right to respect for family life' see C. Fenton-Glynn, Children and the European Court of Human Rights, Oxford University Press (2021) 253, who argues that the approach creates 'a clear distinction between 'conventional' forms of reproduction and new family forms.' p. 253.

right to respect for private life under Article 8. This right 'implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship'.[43] The refusal to recognise in France the legal parent-child relationship that had been established in the United States 'undermined the children's identity within French society'.[44] Such refusal was considered particularly worrying where, as in the present case, 'one of the intended parents is also the child's biological parent.'[45] The Court then explored whether French law afforded the intending parents an alternative remedy such as allowing them to establish the legal parent-child relationship under domestic law, for example by means of a declaration of paternity or adoption. This line of inquiry, however, led to the conclusion that not only did the French authorities refuse to register the details of the US birth certificates, but other avenues such as a declaration of paternity or adoption were incompatible with the case-law of the Court of Cassation. Significantly, this situation was irreconcilable with the children's best interests.[46] Accordingly, the Court ruled that France had overstepped the permissible limits of its margin of appreciation and violated the children's right to respect for their private life.[47]

21. While automatic recognition must be given to the biological intending father, when it comes to the recognition of the legal position of the intending mother - genetically related or not – it is sufficient for her to be permitted to go through a step-parent adoption as adoption produces similar effects to registration of the foreign birth details.[48] In other words, there is no obligation to recognise *ab initio* the legal parent-child relationship between the child and the intending mother; only that the mechanism to enable the missing legal parent-child relationship to be established is sufficiently speedy and effective.[49]

3.1.3. Commentary

22. Importantly, in *Mennesson* the Court acknowledged that Article 8 does not require States to legalise surrogacy.[50] States are therefore free to outlaw surrogacy domestically, which is a prudent approach given the lack of common ground concerning the practice of surrogacy among the member States of the Council of Europe. Nevertheless, in the light of the increasing use of surrogacy as a method of reproduction, it would be sensible to include in a new/revised Convention provisions concerning legal parenthood in surrogacy. It is suggested here that such provisions should make it clear that States are free to decide whether to adopt legislation to regulate surrogacy or not. Not less importantly, a new/revised instrument should clarify that its aim is not to support commercial surrogacy. This can be achieved by, *inter alia*, a careful

[43] *Mennesson* v. France, no 65192/11, ECHR 2014 (extracts) (n 41).
[44] *Ibid* [96].
[45] *Ibid* [100]. See also *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, 24 January 2017 (absent this genetic connection no 'family life' existed between the child and the intended parents, notwithstanding the fact that they had cared for the child for the first eight months of his life. The case concerned the separation and placement for adoption of a child conceived abroad through surrogacy and brought back to Italy in violation of Italian adoption laws; and *Valdís Fjölnisdóttir and Others v. Iceland*, no. 71552/17, 18 May 2021, non-recognition of parental affiliation with a non-biological child born abroad via surrogacy, while preserving bond through foster care did not violate Article 8 rights. In this case 'family life' was found to have existed as, unlike in *Paradiso*, the child had been in the uninterrupted care of the intending parents over four years and the relationship had been strengthened not only by the passage of time but also by the legally established foster care arrangement).
[46] The Court pointed out that respect for the child's best interests must 'guide any decision', including, as in the present case, a decision concerning the recognition of legal parenthood established abroad through cross-border surrogacy. *Mennesson* (n 41) [99].
[47] Nevertheless, the Convention cannot oblige States to authorise entry to their territory of children born to a surrogate mother without the national authorities having a prior opportunity to conduct certain relevant legal checks concerning immigration - see *D. and Others v. Belgium*, n°29176/13, 8 July 2014. *Mennesson* was followed in other cross-border surrogacy cases, e.g., *Laborie v. France*, n°44024/13, 19 January 2017; *Foulon and Bouvet v. France*, nos. 9063/14 and 10410/14, 21 July 2016.
[48] Advisory opinion concerning the recognition in domestic law of a legal parent–child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (10.04.2019) ('Advisory Opinion').
[49] *Ibid*. On this point see also *D v. France*, no. 11288/18, 16 July 2020.
[50] *Mennesson* (n 41) [62]. See also *Paradiso and Campanelli* (n 46) [100].

choice of wording – e.g., refraining from using the term 'commissioning parents' and employing the term 'intending parents' [emphasis added] instead. The provisions on surrogacy in a new/revised Convention could replicate those contained in the 2011 Draft Recommendation. These provisions lay down a default rule that the birth mother should be considered as the legal mother of the child, whilst allowing States to depart from this rule in surrogacy cases, should they wish so.[51] (In this context, consideration could be given to encouraging States that are legislating or planning to legislate on surrogacy, through a suitable mechanism, to follow the Verona Principles for the protection of the rights of the child born through surrogacy,[52] so as to ensure that their legal framework on surrogacy is children rights compliant).

23. A separate question arising for a new/revised Convention from the *Mennesson* jurisprudence is whether the instrument should straddle into the area of private international law and effectively put on a statutory basis the obligations formulated in *Mennesson*, as supplemented by the Advisory Opinion.[53] The problem with pursuing this avenue is that it would risk 'treading on the toes' of the Hague Conference on Private International Law, which, as mentioned above, is currently working on a private international law instrument on legal parenthood that, it is intended, will contain a separate protocol on legal parenthood established as a result of international surrogacy agreements.[54] Also, straddling into the field of private international law would mean a departure from the approach taken generally by the 2011 Draft Recommendation, i.e. that the Recommendation does not deal with private international law issues.[55] On the other hand, however, the child-centred approach adopted in *Mennesson*[56] is to be welcomed. Importantly, it has already been influential in changes in domestic laws on surrogacy across Europe as France, Germany, and Spain now all allow the registration of a child born through surrogacy by an intended parent, provided there is a genetic link.[57] Building the *Mennesson* approach into the new/revised Convention would undoubtedly enhance the legal protection of children born through cross-border surrogacy. At the same time, however, the approach (and by extension any related provision(s) in a new/revised Convention) may raise concerns as it may be seen as unintentionally encouraging potential intending parents to circumvent domestic legislation prohibiting surrogacy and resort to cross-border (commercial) surrogacy.

[51] See Principle 7(1) and Principle 7(3) respectively.
[52] Verona Principles (n 39).
[53] Advisory Opinion (n 49).
[54] HCCH Parentage / Surrogacy Project (n 38).
[55] 2011 Draft Explanatory Memorandum [9].
[56] This approach has been aptly described as follows: 'Even if the parents had no right to be recognised in law, the child had a right that they be so.' Fenton-Glynn (n 43) 252.
[57] *Ibid* 66.

3.2. Same-sex parenthood and parenting[58]

3.2.1. ECtHR case-law on same-sex partnerships

24. Over the past decade, the Court has adopted an increasingly more liberal approach to same-sex partnerships.[59] Although it has acknowledged that States are free to restrict access to marriage to different-sex couples,[60] and have a margin of appreciation to choose the most appropriate form of registration of same-sex unions (taking into account its specific social and cultural context, for example, civil partnership, civil union, or social solidarity act),[61] it has ruled that where no legal framework capable of protecting the same-sex relationships is available under domestic law, the state has overstepped its margin of appreciation.[62] According to the Court, giving same-sex couples access to formal acknowledgment of their status in a form other than marriage is not in conflict with the traditional understanding of marriage.[63]

25. Another indication of the Court's favourable approach towards same-sex partnerships is its interpretation of the concept of 'family life' in that context. In particular, the Court has held that a same-sex couple living in a stable relationship falls within the notion of family life (as well as private life) in the same way as a heterosexual couple.[64] This principle was first set out in the case of *Schalk and Kopf v. Austria*[65] where the Court considered that the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, fell within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would.

26. The Court has also established that the relationship between two women who had entered into a civil partnership and live together, and the child conceived by one of them by means of assisted reproduction but being brought up by both of them, constituted family life within the meaning of Article 8.[66]

27. However, despite the above rulings, the Court's approach to same-sex parenthood and parenting has remained rather restrictive, to the point that, in this respect it has been rightly

[58] The distinction between 'parenthood' and 'parenting' here is deliberate as 'parenthood' refers to the status of a legal parent (i.e., the existence of a legal parent-child relationship between the child and the adult), whilst 'parenting' refers to a day-to-day care for the child (i.e., the adult being a holder of parental responsibilities in relation to the child (an older term commonly used in the past is 'parental authority')).

[59] See e.g., *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, ECHR 2013 (extracts) (exclusion of same-sex couples from 'civil unions' amounted to violation of Article 14 taken in conjunction with Article 8); *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015 (lack of legal recognition of same-sex partnerships constituted violation of Article 8); *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, 14 December 2017 (refusal to register same-sex marriages contracted abroad constituted violation of Article 8); and *Fedotova and Others v. Russia*, nos. 40792/10 and 2 others, 13 July 2021 (lack of any opportunity to have same-sex relationships formally acknowledged constituted violation of Article 8). See also *Formela v Poland*, n°58828/12, 40795/17, 55306/18, 55321/18 (pending) applications communicated to the Polish Government on 20 June 2020 (complaints brought by same-sex couples that Polish law does not allow them to marry or enter into any other type of civil union).

[60] *Schalk and Kopf v. Austria*, no. 30141/04, § 108, ECHR 2010, and *Chapin and Charpentier v. France*, no. 40183/07, § 48, 9 June 2016 (such restriction is permissible under Article 14 taken in conjunction with Article 8).

[61] *Fedotova and Others v. Russia* (40792/10, 30538/14 and 43439/14) 13.07.2021.

[62] *Ibid*.

[63] *Ibid*.

[64] *Vallianatos and Others v. Greece* (n 60) [73-74]; *X and Others v. Austria* [GC], no. 19010/07, § 95, ECHR 2013; *P.B. and J.S. v. Austria*, no. 18984/02, § 30, 22 July 2010; and *Schalk and Kopf v. Austria* (n 61) [92-94].

[65] *Schalk and Kopf v. Austria* (n 61).

[66] *Gas and Dubois v. France*, no. 25951/07, ECHR 2012; *X and Others v. Austria* (n 65) [96].

remarked that 'same-sex couples continue to be second-class citizens before the Court.'[67] This is true in respect of both legal parenthood and parental responsibilities. In *Kerkhoven and Hinke v Netherlands*,[68] the Court declared inadmissible an application made by two women in a same-sex relationship who had requested that they both be vested with parental authority over a child born to one of them through artificial insemination. Similarly, in a more recent case, *Boeckel and Gessner-Boeckel v. Germany,*[69] an application concerning a refusal to include a woman registered as the mother's civil partner on her partner child's birth certificate was declared inadmissible by the Court, since 'there was no factual foundation for a legal presumption that the child descended from the second partner.'[70] Likewise, in *Bonnaud and Lecoq v France*,[71] the Court declared inadmissible an application made by a French same-sex couple who were raising two children as part of a family unit in a situation where each of the women had given birth to one of the children following the use of assisted reproduction, and both applied to the domestic courts for the joint exercise of parental authority over each child.[72] The Court reasoned that there was no evidence to show how this would promote the best interests of the children; and that, in any event, the applicants had not encountered any practical difficulties in their day-to-day life as a family. Finally, in the 2020 decision, *Honner v. France*,[73] the Court found no violation of Article 8 where the domestic court had refused to award contact rights to the applicant in respect of the child which had been born to her former partner in Belgium using assisted reproductive techniques while the two women were a couple, despite the fact that the applicant had raised the child during his early years. The Court found that the domestic court's decision was well reasoned and based on the best interests of the child.

28. Nevertheless, in two cases (each concerning parental responsibilities), the Court did find a violation of the applicant's Convention rights on account of his/her sexual orientation. First, in the 1999 case of *Salgueiro da Silva Mouta v. Portugal*,[74] the Court held that a refusal to grant custody to a parent living in a homosexual relationship constituted a violation of his Article 14 and Article 8 rights. Second, much more recently, in a 2021 case of *X. v. Poland*,[75] the Court ruled that the domestic authorities' decision to remove the applicant's children from her custody was based solely or decisively on considerations related to her sexual orientation, and thereby amounted to a breach of Article 14 of the Convention taken in conjunction with Article 8.

[67] Fenton-Glynn (n 43) 249. See e.g., *Gas and Dubois v France* (n 67) (refusal of simple adoption order in favour of homosexual partner of biological mother did not constitute violation of Article 14).
[68] *Kerkhoven and Hinke v Netherlands* (dec.), no. 15666/89, 19 May 1992.
[69] *Boeckel and Gessner-Boeckel v. Germany*, no 8017/11, 7 May 2013.
[70] *Ibid* [30]. The Court noted that the case did not concern transgender or surrogate parenthood. Accordingly, where one partner of a same-sex partnership gives birth to a child, 'it can be ruled out on biological grounds that the child descended from the other partner.' *Ibid*.
[71] *Bonnaud and Lecoq v France* (dec.), no. 6190/11, 6 February 2018.
[72] See also pending cases: *R.F. and Others v. Germany*, no. 46808/16, application communicated to the German Government on 13 January 2017; and *S.W. and Others v. Austria*, no. 1928/19, application communicated to the Austrian Government on 12 February 2019 (refusal to issue birth certificate indicating both child's parents as her mothers in case of adoption by biological mother's partner in same-sex couple).
[73] *Honner v. France*, no. 19511/16, 12 November 2020.
[74] *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, ECHR 1999-IX.
[75] *X v. Poland*, no. 20741/10, 16 September 2021. Note: at the time of the writing, this judgment was not final yet.

3.2.2. Commentary

29. Academic commentators are in consensus that the Court's stance on parental rights of same-sex couples is not satisfactory.[76] Fundamentally, this stance is due to different approaches to the rights of same-sex couples across the member States of the Council of Europe, which in turn stems partly from the fact that, in many of the member States, the rights of same-sex persons (parental rights not excluding) constitute a political matter. Consequently, the Court's interpretation of the Convention rights in the area of same-sex parental rights has been carried out in a way that is observant of the lack of consensus on this matter among the Council Members – i.e., in a manner as non-political and uncontroversial as possible - notwithstanding the ensuing interpretational conflicts of the ECHR and the substantial difference of treatment between traditional (heterosexual families) and same-sex families. Understandably, given the lack of common ground on same-sex partnerships among the Council member States, the Court as a supranational judicial organ is in a difficult position: it 'cannot push forward too quickly, as it relies on cooperation to give it authority and ensure compliance with its judgments.'[77] This, however, weakens the legitimacy of the Court as an institution tasked with upholding human rights as 'different rules apply for socially entrenched practices than for those that are newly emerging, or are only practiced by a minority.'[78] Furthermore, contrary to Article 2 of the UN Convention on the Rights of the Child, it also leads to children being treated differently on account of the circumstances of their birth.[79] In this context, it has been rightly remarked that 'for a child born through natural reproduction to a heterosexual couple, and living with them as a family, legal integration into the family is essential to comply with Article 8. For a child in the same situation born to a same-sex couple […], it is enough that the state does not interfere with their social relationship, without any obligation to recognise it in law.'[80]

30. Same-sex parental rights fall within the State's margin of appreciation, leading to inconsistent treatment from State to State. Currently, only a few European countries provide full legal protection to same-sex families to the same degree as heterosexual families. Most European countries offer only partial protection, and some guarantee no protections at all.[81] As scholars have pointed out, this has created a 'patchwork of rights for children' that fails to warrant the enjoyment of their full rights and creates practical and emotional impediments. Children in same-sex families, without legal ties to both their social parents, risk growing up in insecurity as they can be separated from their parents in cases of divorce or the death of the only legally recognised parent. It can also result in denial of access to health insurance coverage, benefits, child maintenance, nationality, inheritance, and more.[82]

[76] See e.g., D.A. Gonzalez-Salzberg, 'Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law, Hart Publishing (2019) 150-154; A. Tryfonidou, 'The Parenting Rights of Same-Sex Couples under European Law' (2020) 25(2) Marriage, Families and Spirituality 176-194, available at http://centaur.reading.ac.uk/90835/, last accessed 06/10/2021; P. Dunne, 'Who Is a Parent and Who Is a Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families Post-Separation, Part I: The European Perspective' (2017) 30(1) Journal of the American Academy of Matrimonial Lawyers 27-54; L. Hodson, 'Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families Under the ECHR' (2012) 20 International Journal of Children's Rights 501; and Tryfonidou (n 16) 220.
[77] Fenton-Glynn (n 43) 250.
[78] *Ibid*.
[79] *Ibid* 251.
[80] *Ibid*.
[81] ILGA Europe, 'Why is the Work on LGBTI Family Issues so Important?', available at Family | ILGA-Europe, last accessed 07/10/2021.
[82] Ibid. See also Hodson (n 77) 517.

31. The recognition of same-sex partnerships has not progressed at a uniform pace throughout Europe.[83] On one hand, some European countries have opened up to equality for same-sex families in the past decade, whilst on the other hand, other European countries have taken harsh measures aimed at a reduction in rights during the same period.[84] As a result, in the area of legal parenthood, some countries in Europe fully recognize same-sex parenthood and parenting rights, whereas other countries offer only an incomplete protection of same-sex families or even maintain discriminatory laws.[85] Although the lack of common ground on these matters may be seen as a factor that is likely to hinder the modernisation of the Convention, it is clear that there is a trend among the Council of Europe member States towards legal recognition of same-sex couples,[86] which has been reinforced by the recent ECtHR case-law on same-sex partnerships, as set out above. In the longer term, this trend, perhaps combined with a prompting by apposite provisions of a new/revised Convention, may be a precursor to greater willingness on the part of the Council Members to accommodate same-sex parenthood and parenting within their legal frameworks. Accordingly, it is recommended that provisions to enable parental affiliation between the non-biological parent and the child to be legally established *ab initio*, and appropriate provisions on parental responsibilities be included in a new/revised Convention, so as to eliminate the discrimination that continues to be faced by children born in to same-sex families.[87] Such provisions should, however, make it clear that States have a wide margin of appreciation in this area.

32. Another factor that can contribute to facilitating the process of modernising the Convention to protect children born into same-sex families include relevant initiatives by international or regional organisations, such as the recently adopted EU LGBTIQ Equality Strategy 2020-2025,[88] which is intended to serve as a model for national governments to follow.

[83] See e.g., M. Digoix (ed.), *Same-Sex Families and Legal Recognition in Europe*, Springer International Publishing (2020) 45-72, available at https://hal.archives-ouvertes.fr/hal-02512475/document, last accessed 07/10/2021.
[84] ILGA Europe, 'What is the Current Situation for LGBTI Families in Europe?', available at Family | ILGA-Europe, last accessed 07/10/2021. E.g., narrowing constitutional provisions on marriage and family definitions to different-sex marriage and families only in Hungary in 2012 and Croatia in 2013; introduction of laws banning or invalidating same-sex marriages; and proposals in Russia to remove children from LGBTI parents. *Ibid.* There seems to be a clear East-West divide, with 18 member States that did not yet have legislation or were plans for introducing registered partnership in 2017, all except Turkey were former communist countries in Central or Eastern Europe. K. Waaldijk, 'Extending Rights, Responsibilities and Status to Same-Sex Families: Trends Across Europe', Ministry of Foreign Affairs of Denmark (2018) 8, available at https://rm.coe.int/extending-rights-responsibilities-and-status-to-same-sex-families-tran/168078f261, last accessed 07/10/2021.
[85] S. Palmaccio, D. Mazrekaj and K. De Witte, 'Barriers to Same-Sex Parenting Remain in Europe and are Unfounded' (2021), available at Barriers to Same-Sex Parenting Remain in Europe and are Unfounded | Feature from King's College London (kcl.ac.uk), last accessed 07/10/2021. For a detailed overview see ILGA's 2021 Rainbow Europe Map - an annual benchmarking tool, which ranks 49 countries in Europe on their LGBTI equality laws and policies, available at https://www.ilga-europe.org/rainboweurope/2021, last accessed 07/10/2021.
[86] The Court remarked that 24 out of the 47 member States had legislated in favour of recognition of same-sex relationships. See also Waaldijk (n 85) 8, which shows that in 2017, marriage and/or partnership registration was nationally available to same-sex couples in 26 member States of the Council of Europe (with further three States expected to join the list soon).
[87] See Part 4, 'Parental Affiliation'.
[88] European Commission, 'LGBTIQ Equality Strategy 2020-2025', available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en, last accessed 07/10/2021.

33. Last but not least, academic commentators have suggested that the Court should adopt a 'child-centred approach'[89] as the default approach in matters concerning children, including in the context of same-sex families.[90] Such shift would mean approaching the issues from the perspective of the child, rather than the applicant adult(s), and would enable the Court to reach outcomes that are not possible when adult-centred approach is taken.

34. Finally, consideration is to be given to the question whether a new/revised Convention should cover cross-border situations whereby parental affiliation between the child and both of his/her same-sex parents has been legally established in one country and the family then seeks to have the legal parent-child relationship legally recognised in another country.[91] It is suggested here that, in the absence of ECtHR case-law specifically on this point, this aspect should not be covered in the new/revised instrument. The rationale is to avoid proliferation of legal instruments in this area in the light of the ongoing work of the Hague Conference on Private International Law on a private international law instrument on legal parenthood.[92] Moreover, in September 2021, in the European Parliament, EC President Ursula von der Leyen announced her intention to put forward legislation on mutual recognition of legal parentage between EU member States. The commitment was included also in the EU LGBTIQ Strategy, and a legislative proposal was announced for 2022.[93] Excluding cross-border matters from the scope of a new/revised Convention will also align with the 2011 Draft Recommendation on this matter. As the 2011 Draft Explanatory Memorandum explains, 'the recommendation does not deal with private international law issues. Consequently, nothing in this instrument obliges *stricto sensu* member States to recognise a status accepted by another state, for example, registered partnerships, that they do not themselves recognise, still less that they should adopt it.'[94]

[89] Such as the approach that was adopted in the case-law concerning international surrogacy. See Part 3.1.2. above.
[90] Hodson (n 77) 501. See also G. Alves de Faria, 'Sexual Orientation and the ECtHR: What Relevance is Given to the Best Interests of the Child? An analysis of the European Court of Human Rights' Approach to the Best Interests of the Child in LGBT Parenting Cases' (April 2015), available at Sexual Orientation and the ECtHR: what relevance is given to the best interests of the child? An analysis of the European Court of Human Rights' approach to the best interests of the child in LGBT parenting cases · Family & Law · Family & Law (familyandlaw.eu), last accessed 07/10/2021.
[91] Tryfonidou (n 77) 182.
[92] See HCCH Parentage / Surrogacy Project (n 38).
[93] ILGA Europe, 'Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia' (2021) 11, available at full_annual_review.pdf (ilga-europe.org), last accessed 07/10/2021. See also European Parliament News, 'Same-Sex Marriages and Partnerships Should be Recognised Across the EU' (14.09.2021), available at Same-sex marriages and partnerships should be recognised across the EU | News | European Parliament (europa.eu), last accessed 07/10/2021.
[94] 2011 Draft Explanatory Memorandum [9].

3.3. Transgender parenthood and parenting

35. The ECtHR has faced a number of cases related to gender identity issues,[95] however, only one of the decisions thus far concerned legal parenthood.[96] In *X, Y, and Z v the United Kingdom*,[97] the Court acknowledged the existence of family life between a female-to-male transsexual and his partner's child, however, held that the lack of legal recognition of the parent-child relationship between the applicant and the child did not constitute a violation of the applicant's Article 8 rights. As the applicant was able to act as the child's social parent, the lack of legal connection was not regarded problematic. The outcome of this case has been criticised on a number of grounds, not least because it demonstrates that the Court 'treats differently those families that conform with traditional heterosexual family models and those that challenge the social norms.'[98] Nevertheless, the case is now nearly a quarter of a century old; and it is possible that a different outcome would be reached today.

36. In the related area of parental responsibilities, in *A.M. and Others v. Russia*,[99] the Court made it clear that the fact that an individual is undergoing gender transition cannot be used as a reason to terminate her contact rights. Nevertheless, in *P.V. v. Spain*,[100] the Court ruled that the negative impact on the child of the applicant parent's gender transition could be considered.

37. Despite a clear and continuing international trend towards increased social acceptance of transsexuals and towards legal recognition of the new sexual identity of post-operative transsexuals,[101] transsexualism[102] continues to raise complex legal, moral and social issues in respect of which there is no generally shared approach among the Council of Europe member States, making any legislative intervention problematic at the national level, so much so at the regional level.

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[95] See e.g., *Rees v. the United Kingdom*, 17 October 1986, Series A no. 106; *Cossey v. the United Kingdom*, 27 September 1990, Series A no. 184; *B v. France*, no.13343/87, 25 March 1992; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI; *I. v. the United Kingdom [GC], no. 25680/94, 11 July 2002*; *Parry v. the United Kingdom* (dec.), no. 42971/05, ECHR 2006-XV; *R. and F. v. the United Kingdom*, no. 35748/05, 28 November 2006; *Van Kück v. Germany*, no. 35968/97, ECHR 2003-VII; *L. v. Lithuania*, no. 27527/03, ECHR 2007-IV; *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014; *Y.Y. v. Turkey*, no. 14793/08, ECHR 2015 (extracts); *S.V. v. Italy*, no. 55216/08, 11 October 2018; *Y.T. v. Bulgaria*, no. 41701/16, 9 July 2020; *X and Y v. Romania*, no. 2145/16, 19 January 2021.

[96] See also a pending case of *O.H. and G.H. v. Germany*, no. 53568/18 and 54941/18 (communicated to the German Government on 06.02.2019) (a female-to-male transsexual registered under former female forename and as child's mother in birth register seeking to be registered as the child's father). Another relevant pending case is *Y.P. v. Russia*, no. 8650/12 (communicated to the Russian Government on 23.02.2017) (a complaint that the State failed to discharge its positive obligation to recognise not only the applicant's gender transition, but also his civil status and parental ties without being required continuously to disclose that he had undergone transition).

[97] *X, Y and Z v. the United Kingdom*, 22 April 1997, Reports of Judgments and Decisions 1997-II.

[98] Fenton-Glynn (n 43) 250.

[99] *A.M. and Others v. Russia*, no. 47220/19, 6 July 2021.

[100] *P.V. v. Spain*, no. 35159/09, 30 November 2010.

[101] For a list of relevant initiatives see e.g., UNHR, Office of the High Commissioner, 'Combatting Discrimination Based on Sexual Orientation and Gender Identity', available at https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx?gclid=Cj0KCQjw-4SLBhCVARIsACrhWLWz-36rHw95dbDYUhY0O0ZDYuJD82oZi4KKVaHfScF9V0FHL430SOMaAlqHEALw_wcB, last accessed 07/10/2021.

[102] Additionally, complex legal issues may arise in respect of intersex people (i.e., individuals who cannot be classified either as 'male' or 'female' as they have a mixed gender characteristics). See e.g., pending cases of *Y v. France*, no. 76888/17 (application communicated to the French Government on 8 July 2020; *M v. France*, no. 42821/18 (application communicated to the French Government on 22 September 2020); and *L.B. v. France*, no. 67839/17) (application communicated to the French Government on 18 March 2021).

38. Among the legal issues, those pertaining to legal parenthood are particularly complex as, even where legal gender recognition is available,[103] the implications of gender transition for legal parenthood are usually not considered by the legislator. It is important for children that their birth certificates, and the law more generally, recognises the realities of their lives and relationships. Therefore, the law needs to be flexible enough to allow parents to choose the parental title recorded on their children's birth certificates, or otherwise to make all documents concerning legal parenthood gender neutral. Accordingly, it would be beneficial to include in a new/revised Convention appropriate provision(s) to achieve this objective. Nevertheless, it is recognised that the lack of common ground among member States of the Council of Europe concerning trans-gender issues more generally may render this proposal problematic to implement at this stage.

4. DETAILED RECOMMENDATIONS FOR THE REFORM OF THE 1975 CONVENTION IN THE LIGHT OF THE RECENT ECtHR CASE-LAW

39. This section contains a detailed list of recommendations for the reform of the 1975 Convention. Proposed provisions are set out under appropriate headings and examined in the light of the recent ECtHR case-law. Matters discussed in Part 3 of this Report are not commented on in this Part, and the reader is referred to the relevant section of Part 3 instead. To enhance clarity, within this Part, case-law is located in text boxes, with key judicial guidance being highlighted in blue.

4.1. General principle of non-discrimination

40. The prohibition of discrimination is guaranteed by Article 14 of the ECHR. Nevertheless, the 1975 Convention does not contain a general principle of non-discrimination. This gap should be addressed in a new/revised Convention by incorporating into its provisions a general provision against discrimination of children on the grounds such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, sexual orientation, gender identity, disability, property, birth or other status, including when such grounds relate to their parents or to other holders of parental responsibilities. This should be followed by a separate paragraph that would emphasise that children should not be discriminated against due to the civil status of their parents. This latter provision should make it clear that it is not to be read as obliging *stricto sensu* member States to recognise all forms of partnerships, for example, same-sex relationships.

[103] For a comparative overview of legislative approaches on the matter see European Network of Legal Experts in Gender Equality and Non-Discrimination, 'Trans and Intersex Equality Rights in Europe – A Comparative Analysis', European Commission (2018), 54-67, available at https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf, last accessed 07/10/2021.

As early as 1979, the Court held that restrictions on the rights of children on grounds of birth were incompatible with the Convention.[104] It has consistently reiterated this fundamental principle ever since, establishing the prohibition of discrimination on grounds of a child's birth 'outside marriage' as a standard of protection of European public order.[105] In *Fabris v. France*,[106] the Court noted that '[n]owadays, it is common ground among member States of the Council of Europe that children born within and children born outside marriage have to be treated equally. This has led to a uniform approach by the national legislatures on the subject and to social and legal developments definitively endorsing the objective of achieving equality between children.'[107] Importantly, in this case the Court explicitly mentioned the 2011 Draft Recommendation and endorsed the non-discrimination provisions contained therein.[108]
It should, however, be noted that not every difference in treatment would be contrary to Article 14. For example, differential treatment may be justified where it pursues a legitimate aim and where the means to pursue that aim are appropriate and necessary (for example, where it serves the interests of legal certainty, which is an underlying value of the Convention).[109] Nevertheless, the Court has made it clear that 'very weighty reasons have to be advanced before a distinction on grounds of birth outside marriage can be regarded as compatible with the Convention.'[110]

Recommendation

It is recommended that a general non-discrimination provision as proposed above be included in a new/revised Convention so as to align the instrument with relevant ECtHR jurisprudence**.**

4.2. Rights of succession

41. The 1975 Convention incorporates a non-discrimination provision concerning rights of succession of a child born out of wedlock in the estate of his/her mother and father and of a member of his/her father's or mother's family.[111] Such provision, possibly slightly re-worded, should be reproduced in a new/revised Convention. The proposed wording of the provision is as follows: 'Children should regardless of the circumstances of their birth have equal rights of succession to the estate of each of their parents and of those parents' family.'

[104] *Marckx v. Belgium*, 13 June 1979, Series A no. 31.
[105] *Fabris v. France [GC]*, no. 16574/08, ECHR 2013 (extracts).
[106] *Ibid* [35]. [Note: On various occasions, the Court found violations of Article 14 rights belonging to the child's parents (as opposed to the child him/herself); e.g. in *Sporer v. Austria*, no. 35637/03, 3 February 2011, and *Leitner v Austria*, no. 55740/10, 08 June 2017 (discrimination in the context of custody against the applicant as the father of a child born out of wedlock); *Yocheva and Ganeva v. Bulgaria*, nos. 18592/15 and 43863/15, 11 May 2021 (discriminatory denial of surviving parent allowance to single mother of minor children who had not been recognised by their father); and *J.M. v. the United Kingdom*, no. 37060/06, 28 September 2010 (discriminatory treatment on grounds of sexual orientation in relation to child-support regulations).
[107] *Fabris v. France [GC],* no. 16574/08, ECHR 2013 (extracts) (n 106) [58].
[108] *Ibid* [35].
[109] *Ibid* [56] and [66]; and *Wolter and Sarfert v. Germany*, nos. 59752/13 and 66277/13, §57 and 60, 23 March 2017.
[110] See e.g., *Fabris v. France* [GC], no. 16574/08, ECHR 2013 (extracts) (n 106) [59]; and *Wolter and Sarfert v. Germany* (n 111) [58].
[111] *'A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock.'* 1975 Convention, Article 9.

42. To take account of the advances in assisted reproduction that have enabled the posthumous use of sperm, a caveat could be added that States that allow posthumous conception or posthumous embryo transfer may impose appropriate restrictions on the succession rights.[112]

EctHR jurisprudence concerning difference in treatment of legitimate and illegitimate children for succession purposes has driven the abolishment of discrimination on the basis of birth throughout Europe.[113] As there is no right to inherit guaranteed by the ECHR, relevant cases have been argued within the framework of Article 14 (protection from discrimination against children born out of wedlock), in conjunction with either Article 8 or Article 1 of Protocol 1 ('Protection of Property').[114] In its decisions, the Court has consistently emphasised the imperative of equal treatment and upheld the view that distinguishing between children born within and out of wedlock for the purposes of succession amounted to discrimination within the meaning of Article 14.

Recommendation

It is recommended that a specific non-discrimination provision concerning rights of succession, similar to that contained in Article 9 of the 1975 Convention but modified as proposed above, be included in a new/revised Convention so as to align the instrument with relevant EctHR jurisprudence and factor in new scientific developments in the area of assisted reproduction.

4.3. Children's right to identity

43. Articles 7 and 8 of the United Nations Convention on the Rights of the Child ('UNCRC')[115] provide identity protections for every child: the right to a name, nationality and family relations. Family relations include connections that encompass biological parents, gamete donors, siblings, grandparents and others, and in this context refer to the right of each child to know his or her origins.[116] Moreover, the ECtHR has consistently held that the right to identity, which includes the right to know one's biological parentage, is an integral part of the notion of private life protected by Article 8 of the Convention. When it comes to biological parentage, the Court has distinguished two facets of the child's right to identity: the first one being related to the establishment of parenthood and the second one being related to the legal recognition of a parental status established abroad.[117]

44. The 1975 Convention contains no provisions concerning the child's right to identity. Given the Convention's age it is not surprising, however, this gap makes the instrument misaligned with the ever-growing ECtHR jurisprudence in this important area. The below sections set out, under requisite headings, the Court's jurisprudence concerning the children's right to identity, and make proposals for apposite provisions to be included in a new/revised Convention.

[112] See also Section 'Parental Affiliation' below.
[113] Fenton-Glynn (n 43) 209.
[114] See e.g., *Marckx v Belgium* (n 108); *Inze v. Austria*, 28 October 1987, Series A no. 126; *Mazurek v. France*, no. 34406/97, ECHR 2000-II; *Brauer v. Germany*, no. 3545/04, 28 May 2009; *Mitzinger v. Germany*, no. 29762/10, 9 February 2017; and *Wolter and Sarfert v Germany* (n 111).
[115] United Nations Convention on the Rights of the Child (1989) E/CN.4/RES/1990/74 ('UNCRC').
[116] See Child Identity Protection (CHIP), Home - Child Identity Protection (child-identity.org), last accessed on 30/09/2021.
[117] E.g., *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I; and *Mennesson v France* no 65192/11, ECHR 2014 (extracts) (n 41) respectively. See also Fenton-Glynn (n 43) 57-61.

4.4. Children's right of access to information concerning their origins[118]

45. A new/revised Convention should set out the general right of children to have access to information concerning their origins. This right may not be an absolute right as a balance has to be struck between the child's right to know his or her origins and the right inter alia of a biological parent to remain anonymous. Nevertheless, competent authorities should be empowered to override any legal right to anonymity and disclose relevant (in particular non-identifying) information, taking into account the circumstances and the respective rights of the child and the persons involved.

4.4.1. Paternal affiliation

46. The above proposal would bring the instrument in line with the Court's seminal ruling in the 2002 case of Mikulić v. Croatia,[119] which concerned the establishment of paternity.

In *Mikulić v. Croatia*, the Court highlighted the applicant's right to uncover the truth about a vital aspect of their identity – a right protected by Article 8 - however, at the same time acknowledged the need to protect third persons from compelling them to make themselves available for medical tests, including DNA tests, that they did not wish to undertake. Accordingly, the Court ruled that it was not mandatory for States to compel putative fathers to undertake DNA tests as long as the legal system provides alternative avenues enabling an independent authority to speedily[120] determine the paternity claim.[121] Importantly, more recent cases concerning access to information on biological origins in the context of paternity proceedings, although decided within the framework of the seminal ruling in *Mikulić,* seem to indicate a subtle shift towards a greater emphasis on the applicant child's right to identity over the rights of the putative father. The cases concerned the putative father's refusal to cooperate in paternity proceeding and the ensuing actions of domestic authorities as they inferred/refused to infer the paternity from this conduct. In *Canonne v France*,[122] the Court held that by taking into account the applicant's refusal to submit to the genetic testing and by giving priority to his daughter's right to respect for private life, which encompassed the right to identity, over that of the applicant, the domestic courts had not exceeded the wide margin of appreciation available to them.[123] In *A.M.M. v Romania*,[124] which concerned a child born outside of marriage and with a number of disabilities, the Court ruled that in declining to draw any inference from the putative father's refusal to undergo a paternity test, the domestic courts had not struck a fair balance between the right of the child to have his interests safeguarded in the paternity proceedings and the right of his putative father not to cooperate in the

[118] The right of children to have access to information about their origins can arise in a variety of situations such as the establishment of paternity or maternity (e.g., the practice of 'anonymous births'); an adopted child seeking information about their origins and the identity of their biological parents; a child born through surrogacy seeking information about their biological origins and the identity of the surrogate mother; and a child born from donor gamete(s) seeking information about their genetic origins and the identity of the gamete donor(s).

[119] *Mikulić v. Croatia* (n 118). This case followed *Gaskin v. the United Kingdom*, 7 July 1989, Series A no. 160.

[120] The requirement of 'speedy' determination of paternity through alternative means where necessary was later highlighted in *Jevremović v. Serbia*, no. 3150/05, 17 July 2007, and *Ebru and Tayfun Engin Çolak v. Turkey*, no. 60176/00, 30 May 2006 (proceedings lasting 8 and 9 years respectively amounted to violations of Articles 8 and 6(1) respectively).

[121] As no such procedure was available to the applicant in the present case, there was a violation of Article 8. The Court revisited this issue in 2006 in the case of *Jäggi v. Switzerland*, no. 58757/00, ECHR 2006-X. In this case, national authorities refused permission to authorise a DNA test on a deceased person where the request was made by a putative son of the deceased who sought to establish his paternity. The Court held that the applicant's interest in ascertaining the identity of his biological father prevailed over that of the remaining family of the deceased which opposed the taking of DNA samples. Accordingly, the Court found that the applicant's Article 8 rights had been violated by the conduct of the national authorities.

[122] *Canonne v France*, no. 22037/13, 2 June 2015.

[123] See also ECtHR, 'A Judicial Declaration of Paternity Based, Among Other Factors, on a Refusal to Undergo Genetic Testing Was Not Contrary to the Convention', Press Release, 25.06.2015.

[124] *A.M.M. v. Romania*, no. 2151/10, 14 February 2012.

proceedings.[125] The Court noted that States must ensure that procedures exist that enable children with disabilities to access information about their paternity.[126]
The child's right to know his/her identity featured also in a case that concerned a time limit to institute paternity proceedings. Although a time limit for instituting paternity proceedings is not necessarily incompatible with the Convention as it is justified by the need to ensure legal certainty, in *Çapın v. Turkey*[127] the Court held that a fair balance needed to be struck between the interests of a child who has the right to know his or her identity and the putative father's interest in being protected from allegations concerning circumstances that date back many years.[128] On the facts of the given case, the Court concluded that although the time limits provided for by the national legislation were not absolute, their application by the courts lacked a balancing of the rights and interests at stake, and violated the applicant's right to respect for his private life under Article 8.

4.4.2. Maternal affiliation: 'anonymous births'

47. The question of children's access to information concerning their origins has arisen also in relation to maternal affiliation, specifically in the context of 'anonymous births'. This practice is permitted for example in France, where it is lawful for mothers to give birth anonymously, and unless the mother changes her mind, her identity cannot be revealed.[129]

In *Odièvre v France*,[130] the Court ruled that this practice did not violate Article 8 as the State had struck a fair balance between the competing rights and interests at stake, in particular by making it possible for the applicant to access non-identifying information (which would enable her to trace some of her roots), and by permitting the mother to change her mind and release identifying information at a later stage. More recently, in *Godeli v. Italy*,[131] the Court confirmed that where national law did not attempt to strike any balance between the competing rights and interests, the practice of anonymous births violated the Convention. In particular, Italy was found to be in violation of Article 8 rights, as a child abandoned at birth was unable to gain access to non-identifying information, nor could the mother's identity be disclosed at a later stage, even with her consent.[132] The Court found that such restrictions gave blind preference to the birth mother's rights and prevented any balancing of interests.

48. Although the Court's approach in Godeli is 'a (small) step in the right direction'[133], the Court continues to endorse a practice that instead of promoting children's rights to know their parents' identity, denies the child the right to information concerning a key aspect of their identity, without the possibility of an autonomous balancing process. Indeed, unless the mother changes her mind at a later stage and decides to reveal her identity to the child, her Article 8 rights automatically trump the child's right to know one's biological parentage, which is an integral part of the notion of private life under Article 8 of the Convention.

Recommendation
Over the past three decades, the Court has been a strenuous advocate of the right to identity as a subset of private life protected by Article 8, in particular in the context of the establishment of paternity and, to a lesser extent, in the context of maternal affiliation (anonymous births). This trend seems to be even more pronounced in recent case-law. In the light of this, it is imperative that a new/revised Convention addresses the children's right of access to information concerning their origins, either by including within its provisions the general right of children to have access to information concerning their origins - as a non-absolute right, or

[125] Accordingly, these shortcomings of proceedings to establish paternity of a child with disabilities amounted to a violation of the child's Article 8 rights.
[126] *A.M.M. v Romania* (n 125) [58-65].
[127] *Çapın v. Turkey*, no. 44690/09, 15 October 2019.
[128] *Ibid* [87].
[129] Code de l'action sociale et des familles, Article L 222-6.
[130] *Odièvre v. France [GC]*, no. 42326/98, ECHR 2003-III.
[131] *Godelli v. Italy*, no. 33783/09, 25 September 2012.
[132] *Ibid* [57-58].
[133] Fenton-Glynn (n 43) 61.

by going even further and establishing an absolute right of a child to know his or her origins, subject only to the child's best interests.[134] This would be in line with Articles 7(1) and 8 of UNCRC.

4.5. Legal recognition of biological parenthood established abroad[135]

49. Another aspect of the child's identity as it relates to biological parenthood concerns not the establishment of parenthood, but the legal recognition of a parental status established abroad.

In a series of recent cases, starting with the pivotal case of *Mennesson v. France*,[136] the Court faced the question of the inability of children born in a foreign jurisdiction through a gestational surrogacy arrangement and their intended parent(s), to obtain recognition in the country of residence of the intended parent(s) of the parent-child relationship legally established between them in the country of birth. The Court ruled that the child's right to respect for his or her private life, which encompasses the right to identity, required that domestic law provide a possibility of recognition of the legal relationship between a child born through a surrogacy arrangement abroad and the intended father, where he is the biological father.[137] The Court emphasised that 'respect for private life require[d] that everyone should be able to establish details of their identity as individual human beings, which include[d] the legal parent-child relationship' and that 'an essential aspect of the identity of individuals [was] at stake where the legal parent-child relationship [was] concerned'.[138]

Comment

The approach adopted by the Court in *Mennesson* can rightly be described as ground-breaking as the Court did not shy away from confirming that the right to identity as a tenet of a child's private life protected by Article 8, extended also to the ethically sensitive area of (commercial) cross-border surrogacy. For a more detailed analysis of the consequences of this approach and pertinent recommendations see Part 3 above.

4.6. Children's right to a family name

50. In the absence of a provision concerning the child's right to identity in the 1975 Convention, a new/revised Convention should contain a general principle that all children have the right to acquire a family name from birth, regardless of inter alia the circumstances of the child's birth or the relationship between the child's parents. States are free to regulate the conditions for determining the choice of family name,139 however, the law should not result in discrimination against children or against one of the parents.

In 2014, the non-discrimination provision proposed above was endorsed by the Court in *Cusan and Fazzo v Italy*.[140] The applicants (a married couple) sought to register their child under the mother's surname. This was, however, refused as under the domestic (Italian) legislation, 'legitimate children' were given the father's surname at birth, without the option of derogation, even where the spouses agreed to use the mother's surname. The Court held that the inability for a married couple to give their child the wife's surname amounted to a violation of the prohibition against discrimination (arising from the parents' sex) (Article 14), taken together with the right to respect for private and family life (Article 8). While the traditional practice of passing the father's surname to children born to a married couple was not necessarily

[134] The provision could be formulated as follows: 'Subject to their best interests, children shall have the right to obtain information about their biological/genetic origins.'
[135] See also Section 'Parental Affiliation' below.
[136] *Mennesson v. France* no 65192/11, ECHR 2014 (extracts) (n 41).
[137] *Ibid.* The same conclusion was reached in *Labassee v France* (n 42); *Foulon and Bouvet v France* (n 48); and *Laborie v France* (n 48). See Part 3, section 3.1.2. above.
[138] *Mennesson v France* no 65192/11, ECHR 2014 (extracts) (n 41) [96].
[139] See *Cusan and Fazzo v. Italy*, no. 77/07, 7 January 2014 below.
[140] *Cusan and Fazzo v. Italy, no. 77/07, 7 January 2014*.

incompatible with the Convention, the fact that it could not be derogated from when registering a new child's birth was unduly rigid and discriminatory towards women.[141]

Recommendation

In the light of the foregoing, it is recommended here that a general principle that all children have the right to acquire a family name from birth, as set out above, should be included in a new/revised Convention.

4.7. Children's right to citizenship

51. In December 2009, the Committee of Ministers of the Council of Europe adopted 'Recommendation of the Committee of Ministers to member States on the nationality of children'.[142] In the light of this development, it may be argued that a new/revised Convention should not straddle into the area of nationality as a proliferation of instruments addressing the same matter should be avoided. On the other hand, however, it may be argued that given the importance for children of acquiring nationality and avoiding statelessness, as a minimum, a provision on nationality embodying a particular application of the basic principle of non-discrimination should be considered for inclusion in a new/revised Convention. The latter argument is endorsed here and the following wording is proposed: 'Children shall derive nationality from either their mother or father regardless of the parents' marital status.'

The question of denial of citizenship to a child born out of wedlock came before the ECtHR in 2011 in the case of *Genovese v Malta*.[143] The child was born out of wedlock to a British mother and a Maltese father. Following a judicial establishment of the father's paternity, the mother applied for her son to be granted Maltese citizenship. Her application was rejected on the basis that Maltese citizenship could not be granted to an illegitimate child whose mother was not Maltese. Alarmingly, the child was in an analogous situation to other children with a father of Maltese nationality and a mother of foreign nationality; the only distinguishing factor, which had rendered him ineligible to acquire citizenship, was the fact that he had been born out of wedlock. The Court recognised that citizenship was an important aspect of a person's social identity, and therefore fell within the ambit of private life under Article 8. There was nothing to justify such difference in treatment on the ground of birth, and it was precisely this type of distinction that Article 14 was intended to protect against. Accordingly, the Court found that the child's Convention rights had been breached. Before reaching its decision, the Court recalled *inter alia* the 1975 European Convention on the Legal Status of Children Born out of Wedlock.

Recommendation

In the light of the ruling in *Genovese* (and despite the existence of the Recommendation of the Committee of Ministers to member States on the nationality of children) there is a compelling case for citizenship to be addressed in a new/revised Convention. Therefore, it is suggested here that, a provision along the lines proposed above be included in a new/revised Convention.

[141] The decision follows the approach adopted previously in *Burghartz v. Switzerland*, 22 February 1994, Series A no. 280-B.

[142] Recommendation of the Committee of Ministers to member states on the nationality of children, CM/Rec(2009)13, available at Result details (coe.int), last accessed on 01/10/2021.

[143] *Genovese v. Malta*, no. 53124/09, 11 October 2011.

4.8. Parental affiliation

52. The 1975 Convention contains only four articles that deal with parental affiliation. In the light of the societal developments related to same-sex relationships and medical developments in the field of assisted reproduction over the past few decades, combined with evolving ECtHR jurisprudence, the Convention provisions on parental affiliation are both largely incomplete and partially obsolete. In order to address these deficiencies, a number of gaps need to be closed, and apposite recommendations for a new/revised Convention are made below, accompanied by corresponding ECtHR case-law, where available. The recommendations are made under three separate headings: 'General recommendations', 'Maternal affiliation' (i.e., recommendations pertaining specifically to maternity) and 'Paternal affiliation' (i.e., recommendations pertaining specifically to paternity).

General Recommendations

1. Provisions on parental affiliation should not be confined to children born out of wedlock.
2. To include a general rule[144] that States must provide the legal possibility of establishing parental affiliation (by presumption, recognition or judicial decision).

The ECtHR has long established that a lack of legal mechanism to establish (or to challenge) paternity is a violation of Article 8 of the ECHR.[145] Accordingly, in *Koychev v. Bulgaria*,[146] the Court found a violation of Article 8 where an applicant claiming to be the biological father was unable to seek to establish paternity because another man had already recognised the child, and where there had been no detailed assessment by the domestic courts, including that the courts had not heard the parties concerned, particularly the child.

Moreover, it will not suffice if such legal mechanism exists without affording the applicant an 'effective, proper and satisfactory presentation of his case.'[147] This was the case in *Tsvetelin Petkov v. Bulgaria*,[148] where the applicant complained that he had been declared the father of a child in proceedings conducted in his absence and in the absence of a DNA test and that his subsequent request for reopening had been refused. The Court held that ensuring effective respect for the applicant's right to private life had meant giving him an opportunity to present his case, including by providing DNA evidence. His personal participation in the paternity proceedings had been crucial for the reliability of the outcome and his representation by an *ex officio* lawyer had not been sufficient to secure the effective, proper and satisfactory presentation of his case. Consequently, the authorities had not struck a fair balance between the applicant's right to private life and the right of the child to have a father established, and of the mother to have child support awarded.

Recommendation

To include a provision providing general guidance on the extent to which the right to establish parental affiliation may be restricted.

[144] Provision should only be made for a general rule because it may not always apply to the establishment of maternal affiliation and because different rules might apply, for example, to cases of rape or incest.

[145] *Johnston and Others v. Ireland*, 18 December 1986, Series A no. 112; *Różański v. Poland*, no. 55339/00, 18 May 2006; *Shofman v. Russia*, no. 74826/01, 24 November 2005; *Paulík v. Slovakia*, no. 10699/05, ECHR 2006-XI (extracts); and *Mizzi v. Malta, no. 26111/02, ECHR 2006-I (extracts)*.

[146] *Koychev v. Bulgaria*, no. 32495/15, 13 October 2020. Additionally, specific factual circumstances arose in *Krušković v. Croatia*, no. 46185/08, 21 June 2011, where the applicant father, who had been divested of his legal capacity, was unable to acknowledge paternity of his child. The Court held that although restrictions in the sphere of private and family life on the rights of persons divested of their legal capacity could not in principle be regarded as contradictory to Article 8, such restrictions should be subject to relevant procedural safeguards. Accordingly, the State had violated the applicant's Article 8 right to respect for private and family life.

[147] *Tsvetelin Petkov v. Bulgaria*, no. 2641/06, 15 July 2014.

[148] *Ibid*.

In *Znamenskaya v. Russia*,[149] the ECtHR ruled that any restrictions have to be proportionate to the legitimate aims being pursued, such that while some restrictions, for example time limits, might be justifiable, they must not be arbitrary, discriminatory or pointless.[150] More recently, in *Jüssi Osawe v. Estonia*,[151] the Court held that any limitations applied must not restrict or reduce the individual's access to a court in such a way or to such an extent that the very essence of the right is impaired**.** In this case, the applicant mother sought to bring an action for contestation of paternity against her husband who was not the biological father of her child (and from whom she was legally separated), and to bring an action against the child's biological father seeking the establishment of her daughter's descent from him. Estonian law recognised a mother's right to challenge an entry in the birth register and to seek the establishment of the filiation of her child from the father to whom she was not married. The applicant, however, was unable to challenge the entry in the birth register concerning her child's father before the courts because she did not know the registered father's actual address and the court documents could therefore not be served on him. This issue resulted in the impossibility of bringing judicial proceedings for the establishment of the filiation of the child from her actual father, whose residence was known. The Court rejected the applicant's argument that this situation constituted a violation of her Article 6 right of access to a court in order to have the filiation of her child established.

[149] *Znamenskaya v. Russia*, no. 77785/01, 2 June 2005.
[150] See also *Rasmussen v. Denmark*, 28 November 1984, Series A no. 87, in line with which the Court also accepts restrictions on contestation of paternity, *inter alia* by providing for strict time limits.
[151] *Jüssi Osawe v. Estonia*, no. 63206/10, 31 July 2014.

Recommendation
To include a provision providing general guidance on carrying out a balancing exercise in paternity proceedings.

The ECtHR has long established that in carrying out the balancing exercise to scrutinise the interests of those involved in the context of paternity, the discretionary power afforded to national authorities is significantly wider than the one in the context of contact.[152] 'While Article 8 does not require that biology must triumph',[153] leaving a significant margin of appreciation in this area, it does require an assessment of the circumstances of the individual case, including in particular an examination of what is in the best interests of the child. This guidance is well demonstrated by the following cases.
In *Ahrens v Germany*,[154] a biological father wished to challenge the acknowledgement of paternity by the mother's cohabiting partner. Unlike in the cases analysed under point 3. above, the applicant in the present case (and the other cases within this section) had the legal standing to initiate the proceedings. His petition was, however, rejected by the domestic courts on the ground that where a social and family relationship has already been established between the legal father and the child, paternity could not be challenged. The Court agreed with this assessment, and the same conclusion, on very similar facts, was reached also in *Kautzor v Germany*[155] (decided on the same day as *Ahrens*). Similarly, in *R.L. and Others v. Denmark*[156] the Court found no violation of Article 8 in a case involving the refusal, in the best interests of the children concerned, to recognise their biological father. The Court observed that the domestic courts had taken account of the various interests at stake and prioritised what they believed to be the best interests of the children, in particular their interest in maintaining the existing family unit. In contrast, in *Mandet v France,*[157] the national authorities held that the paternity of the biological father should be recognised, although the child already had a legal father, who was also his social father. The rationale behind this approach was that the child's best interests required that the truth about the child's origins be established. This objective not only outweighed the aim of preserving the existing legal family structure but also justified the overriding of the child's strong objections to the contrary.
Further, in *Krisztián Barnabás Tóth v. Hungary*,[158] the Court held that attaching particular weight to the best interests of the child while not ignoring those of others, including the applicant, secures sufficient procedural safeguards for the applicant.[159] On the facts of this case, the Court held that the fact that it was impossible for a biological father to have his biological paternity established in a situation where the paternity had been recognised by a man, whose wife then adopted the child with the consent of the mother, and the child had developed emotional ties with, and was integrated into the adoptive family, did not amount to a violation of the biological father's rights under Article 8.

[152] See e.g., *Krisztián Barnabás Tóth v. Hungary*, no. 48494/06, § 37, 12 February 2013 and *Kautzor v. Germany*, no. 23338/09, § 72, 22 March 2012.
[153] Fenton-Glynn (n 43) 237.
[154] *Ahrens v. Germany*, no. 45071/09, 22 March 2012. See also *Kautzor v Germany* (n 153).
[155] *Kautzor v Germany* (n 153).
[156] *R.L. and Others v. Denmark*, no. 52629/11, 7 March 2017.
[157] *Mandet v. France*, no. 30955/12, 14 January 2016.
[158] *Krisztián Barnabás Tóth v. Hungary*, no. 48494/06, § 37, 12 February 2013.
[159] *Ibid* [37].

Recommendation
To include a general provision emphasising the need for a speedy resolution of paternity proceedings.

The timing of paternity proceedings was at the core of the ECtHR's decision in *Vissa v. Latvia*,[160] where a biological father, who sought to contest the paternity of a man who had voluntarily recognised the child and was registered as the legal father, alleged that his right to a hearing within a reasonable time guaranteed by Article 6(1) of the Convention had been breached in the civil proceedings in which he had sought to contest the voluntary acknowledgement and be officially recorded as the father of the child. The Court ruled that '[t]aking into account the overall length of the proceedings [note: over 5 years] and the fact that no delays in the examination of the case are attributable to the applicant's conduct', there had been a violation of the applicant's Article 6(1) right.[161]

Recommendation
To include a general provision addressing the use of DNA testing in paternity proceedings. Such provision would serve to update/expand on Article 5 of the 1975 Convention which provides that: 'In actions relating to paternal affiliation scientific evidence which may help to establish or disprove paternity shall be admissible.'

The matter of genetic testing was addressed by the ECtHR in its recent decision in *Mifsud v. Malta*.[162] In this case, the applicant complained about the Maltese law which made it mandatory to provide a genetic sample in paternity proceedings, and that such an order had been imposed on him contrary to his will. The Court found that, procedurally, seen as a whole, this law had provided the applicant with requisite protections of his rights under Article 8. In particular, the DNA test was ordered in judicial proceedings in which the applicant participated and in which his rights of defence were respected along with those of his adversary. A balancing exercise of the interests at stake was carried out. The Court concluded that the law pursued the legitimate aim of protecting the rights of the child. There was a positive obligation on the state to allow the child to discover the truth concerning the identity of his parents, which outweighed the putative father's right to physical integrity.

4.8.1. Maternal affiliation

Recommendation
To permit states to qualify the general rule on the establishment of maternity (i.e., that the woman who gives birth to the child is to be considered the legal mother ('the birth rule')) to accommodate practices such as anonymous births. This would bring a new/revised Convention in line with relevant ECtHR jurisprudence, in particular *Odièvre v. France*[163] and *Godeli v. Italy*,[164] in which the Court declared the practice of anonymous births compatible with Article 8, as long as a fair balance between the competing rights and interests is struck.[165]
To permit states to make procedures available to contest maternal affiliation on the basis that the alleged mother is not the woman who gave birth to the child.

[160] *Veiss v. Latvia*, no. 15152/12, 28 January 2014.
[161] *Ibid* [80-81]. The Court noted that 'the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute.' [77].
[162] *Mifsud v. Malta*, no. 62257/15, 29 January 2019.
[163] *Odièvre v. France* (n 131).
[164] *Godeli v. Italy* (n 132).
[165] For a detailed analysis of these decisions see Section 'Children's Right to Identity' above.

To incorporate rules that reflect developments in assisted reproduction, including surrogacy.[166] These should include:

a. In line with established case-law of the ECtHR,[167] the 'birth rule' set out in the 1975 Convention[168] should remain the default rule on maternal affiliation. However, this rule should be supplemented by an additional clause that will clarify that the gestational mother will be regarded the legal mother regardless of her genetic connection with the child [emphasis added]. This is to reflect the reality that, in assisted reproduction, gestation and genetics may not coincide in the same woman; this being the case where an egg donor is involved.

b. States that have legislation on surrogacy arrangements should be permitted to deviate from the default rule on maternal affiliation in surrogacy cases (e.g., by adopting the 'intent-based' approach to legal motherhood whereby the intending mother (as opposed to the gestational mother) is considered the legal mother at birth.[169]

4.8.2. Paternal affiliation

53. As the 1975 Convention is confined to children born out of wedlock, the Convention provisions on paternal affiliation are limited accordingly, and cover only the establishment of paternity as pertinent to unmarried fathers - i.e., by voluntary recognition or judicial decision. This should be rectified in line with the above proposal to extend the scope of a new/revised Convention to cover all children. Accordingly, the Convention provisions on paternal affiliation should include all requisite avenues to establish paternity - i.e., by presumption, recognition or judicial decision. Related to that, and beyond, it is recommended that the following revisions be made to the provisions on paternal affiliation.

The establishment of paternity by presumption of paternal affiliation

Recommendation

To include the traditional presumption of paternity according to which the husband of the woman who has given birth is automatically presumed to be the father and is thus deemed to be the legal father.[170]

To permit states to provide a time limit within which the presumption of paternity can apply. This should be a two-prong provision, the proposed wording of which is as follows: '(1) A child born within a time limit determined by national law, after the end of the marriage of his or her mother, should be presumed to be the child of the mother's husband. (2) States are free not to apply this presumption if a child was born after the dissolution of the marriage by annulment or divorce.'

To encourage states to provide rules for cases where the application of presumptions leads to contradicting results, for example where a woman re-marries shortly after the death of her husband and gives birth to a child soon after the re-marriage.[171]

[166] See also discussion in Part 3, section 3.1.3 above.
[167] *Marckx v. Belgium* (n 105); and *Kearns v. France*, no. 35991/04, 10 January 2008.
[168] 1975 Convention, Article 2.
[169] E.g., Greece (Greek Civil Code, Art. 1464(1) (on condition that the surrogacy arrangement has been authorised by the court)), and the proposed reform of surrogacy legislation in the UK (see 'Building Families Through Surrogacy' (n 27) [7.78]).
[170] E.g., *Kroon and Others v. the Netherlands*, 27 October 1994, Series A no. 297-C; and *Anayo v. Germany*, no. 20578/07, 21 December 2010. To take account of relevant variations in national laws, States should be permitted not to apply this provision if the child was born after the factual or legal separation of the spouses.
[171] Without being prescriptive about the appropriate solution.

To permit states to apply, *mutatis mutandis*, the presumption of paternity (and the associated provisions, as appropriate) to registered/civil partnerships of different-sex couples and/or cohabiting different-sex couples.

Additionally, to permit states to apply, *mutatis mutandis*, the presumption of paternity (and the associated provisions, as appropriate) to same-sex married couples, registered/civil partnerships of same-sex couples and/or cohabiting same-sex couples.[172] The optional nature of such provisions should be emphasised. The rationale behind this proposal relates primarily to the relevant social and legal developments that have taken place over the past decade, in particular: 1.) an increasing number of the Council of Europe member States have legalised same-sex marriage; 2.) some member States have opened up registered/civil partnerships to different-sex couples; and 3.) Some member States have put cohabiting same-sex couples on the same footing as cohabiting different-sex couples. Nevertheless, a comparative survey of relevant legislation in the member States of the Council of Europe is required to establish to what extent there is a common ground in this area.

The establishment of paternal affiliation by voluntary recognition
Recommendation
To include provisions on the establishment of paternal affiliation by voluntary recognition that will update and expand on Article 3 the 1975 Convention. Article 3 states with brevity: *'Paternal affiliation of every child born out of wedlock may be evidenced or established by voluntary recognition [or by judicial decision].'* The new provisions should, *inter alia*, permit States: 1.) to impose conditions on such recognition (e.g., the consent of the child and/or the child's mother); and 2.) to allow voluntary recognition, which has effect from the birth, during the mother's pregnancy.

The establishment of paternal affiliation by decision of a competent authority
Recommendation
To include provisions on the establishment of paternal affiliation by decision of a court or other competent authority that will update and expand on Article 3 the 1975 Convention. Article 3 states with brevity: *'Paternal affiliation of every child born out of wedlock may be evidenced or established by [voluntary recognition or by] judicial decision.'* The new provisions should, *inter alia*, establish the right of the child – either him/herself or through his/her legal representative – to institute proceedings to establish paternal affiliation, and permit States to allow other persons to be given the right to institute such legal proceedings.

To include guidance on the possibility of placing time limits on the right to initiate paternity proceedings.

[172] See also discussion in Part 3, section 3.2.2 above.

The ECtHR has established that the introduction of a time-limit for instituting paternity proceedings is justified by the desire to ensure legal certainty and thus not per se incompatible with the Convention.[173] Nevertheless, in *Phinikaridou v. Cyprus*,[174] the Court ruled that States must strike a fair balance between the competing rights and interests at stake, and the application of a rigid time limit for instituting paternity proceedings, regardless of the circumstances of an individual case, in particular, the knowledge of the facts concerning paternity, impairs the very essence of the right to respect for private life under Article 8. Moreover, in *Çapın v. Turkey*,[175] the Court held that a fair balance needs to be struck between the child who has the right to know his or her identity and the putative father's interest in being protected from allegations concerning circumstances that date back many years.[176] Therefore, it will depend on the nature of the time limit and the manner in which it is applied. The fundamental question is whether the law strikes a clear balance between the interests of the applicant to uncover the truth about an important aspect of their personal identity, the interests of the child to stability, and the general interests of the community as a whole to legal certainty.[177]

Applying the above principles, in *Silva and Mondim Correia v Portugal*,[178] where the applicants had ten years after the date of achieving majority, with an additional three years' extension if the child became aware after the time limit that paternity should be questioned, the Court held that applicants had waited 20 years and 56 years respectively after reaching the age of majority to institute proceedings, and their interest in establishing biological truth did not exempt them from complying with reasonable time limits. Nevertheless, in *Călin and Others v. Romania*,[179] the Court found a violation of Article 8 where the applicants were unable to establish their paternity due to a strict statute of limitations. Similarly, in *Laakso v. Finland*,[180] the Court found that the application of a rigid time-limit for the exercise of paternity proceedings and, in particular, the lack of any possibility to balance the competing interests by the national courts, led to a violation of the applicant's Article 8 rights.[181] Finally, in *Çapın v. Turkey*,[182] the Court concluded that although the time limits provided for by the national legislation were not absolute, their application by the courts lacked a balancing of the rights and interests at stake, and violated the applicant's right to respect for his private life under Article 8.

Related to the above jurisprudence are two recent cases that concerned a time-bar to reopen paternity proceedings. In *Boljević v. Serbia*,[183] the Court ruled that a time-bar precluding DNA test of deceased man and review of final judgment approving his disavowal of paternity, without applicant's knowledge, before such tests became available amounted to a violation of the applicant's Article 8 rights.

[173] *Phinikaridou v. Cyprus*, no. 23890/02, 20 December 2007; and *Shofman v Russia* (n 146).
[174] *Phinikaridou v. Cyprus* (n 174).
[175] *Çapın v. Turkey* (n 128).
[176] Ibid [87]. See also Section 'Children' right to identity' above.
[177] *Mizzi v Malta* (n 146).
[178] *Silva and Mondim Correia v. Portugal*, nos. 72105/14 and 20415/15, 3 October 2017.
[179] *Călin and Others v. Romania*, nos. 25057/11 and 2 others, 19 July 2016.
[180] *Laakso v. Finland*, no. 7361/05, 15 January 2013. See also *Grönmark v. Finland*, no. 17038/04, 6 July 2010.
[181] The applicant alleged that the time-limit for establishing the paternity of children born before the entry into force of the new Paternity Act on 1 October 1976 gave rise to a violation of his rights under Articles 8 and 14 as he could not have paternity established, while children born after 1 October 1976 did not face any such restrictions. *Ibid* [3]. The same complaint was raised and the same outcome reached by the Court in *Röman v. Finland*, no. 13072/05, 29 January 2013.
[182] *Çapın v. Turkey* (n 128).
[183] *Boljević v. Serbia, no. 47443/14, 16 June 2020*. See also ECtHR, 'Information Note on the Court's Case-Law 241: Boljević v. Serbia - 47443/14' (June 2020).

The Court held that the objective to preserve legal certainty could not suffice in itself as a ground for depriving the applicant of the right to establish his parentage.[184] Similarly, in *Bocu v. Romania*,[185] the Court found a violation of Article 8 where all the parties concerned were in favour of establishing the biological truth concerning the paternity, on the basis of scientific evidence which had not been available at the date of the paternity proceedings, but domestic courts rejected the application to reopen the proceedings.[186]

Contesting paternal affiliation

54. The 1975 Convention addresses the matter of contesting paternity only briefly, in Article 4, which provides: 'The voluntary recognition of paternity may not be opposed or contested insofar as the internal law provides for these procedures unless the person seeking to recognise or having recognised the child is not the biological father.' To take account of relevant ECtHR jurisprudence, and provide more clarity on this important aspect of paternity actions, the following recommendations are made:

Recommendation

To include a general rule that the paternal affiliation established by a presumption or by voluntary recognition may be contested in proceedings under the control of the competent authority.

The ECtHR has established that any presumption of paternity has to be effectively capable of being rebutted and not amount to a *de facto* rule.[187] Accordingly, in the joint cases of *L. D. and P. K. v Bulgaria,*[188] where the domestic law did not allow a putative biological father to bring an action to contest the paternity of the legal father, and this power lay solely in the hands of certain state authorities that had unlimited discretion as to how this should be exercised and were under no obligation to examine the balancing interests or justify its decision, the Court ruled that despite the wide margin of appreciation afforded to States in this area, the applicants' Article 8 rights had been violated.

To specify the ground(s) upon which paternity may be contested. Reflecting Article 4 of the 1975 Convention, the only ground of contestation should be that the legal father is not the biological father of the child.

To specify who has the right to contest paternal affiliation. It is suggested here that this right should be given to the legal father and the child (or his/her legal representative); and may also be given to the mother; the man claiming to be the father (and other persons justifying a special interest; e.g., the parents of the father if he is dead) and public authorities.

To permit States to prohibit contestation of paternity, where appropriate, on the grounds of the best interests of the child.[189]

[184] *Boljević v. Serbia* [55].
[185] *Bocu v. Romania*, no. 58240/14, 30 June 2020.
[186] *Ibid* [§33-36].
[187] *Kroon and Others v. the Netherlands* (n 186).
[188] *L.D. and P.K. v. Bulgaria*, nos. 7949/11 and 45522/13, 8 December 2016.
[189] See e.g., *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI and *X, Y and Z v. the United Kingdom*, 22 April 1997, Reports of Judgments and Decisions 1997-II.

Assisted reproduction

Recommendation

To include provisions requiring States that permit the use of assisted reproductive technologies to provide for appropriate rules for establishing parental affiliation.

These rules should ensure that those concerned are adequately informed and that the procedures are carried out only with their informed consent. The new provisions should be based on the expectation that the establishment of parental affiliation in cases involving assisted reproduction should be based on the same rules as natural procreation. Nevertheless, special rules may be needed in particular cases and guidance should be provided for those cases. Such cases include those involving the use of donor gametes/donor embryos or posthumous conception/embryo transfer. With regards to the former, States should be free to determine that the gamete or embryo donors are not considered the legal parents.[190].With regards to the latter, States should be permitted to treat a deceased person whose gamete was used, or embryo transferred posthumously as the legal parent; however, appropriate restrictions to the succession rights may apply.[191]

The new provisions should also allow States to provide that the man who is the spouse or (in States that permit different-sex registered/civil partnerships) the registered/civil partner or the cohabitant of the woman whose child was conceived by such a procedure is considered the legal father unless it is established that he did not consent to the procedure. The same optional provision should be made, where permitted by national law, for the woman who is the spouse or registered/civil partner or the cohabitant of the woman whose child was conceived as a result of such a procedure. Optional nature of such provisions should be emphasised.

Recommendation

To include provisions requiring States that permit the use of assisted reproductive technologies to provide for appropriate rules for contesting parental affiliation.

The possible grounds for contesting parental affiliation should be that the person who is considered to be the legal parent did not consent to the procedure or that the child was not born as a result of that procedure. The right to contest parental affiliation should be given to the person who is considered to be the legal parent and the child (or his/her legal representative). Finally, States should be permitted to prohibit contestation of paternity, where appropriate, on the grounds of the best interests of the child.

The above proposals reflect the legislative changes that have taken place in many member States of the Council of Europe over the past few decades, in particular: 1.) an increasing number of member States have legalised the use of assisted reproduction; 2.) an increasing number of member States have legalised same-sex marriage; 2.) some member States have opened up registered/civil partnerships to different-sex couples; and 3.) some member States have put cohabiting same-sex couples on the same footing as cohabiting different-sex couples. Nevertheless, a comparative survey of relevant legislation in the member States of the Council of Europe is required to establish to what extent there is a common ground in this

[190] *J.R.M. v. the Netherlands*, (dec.), no. 16944/90, 8 February 1993.
[191] See section 'Rights of Succession' above.

area. A comparative survey would also be useful with respect to the posthumous use of a man's sperm/posthumous embryo transfer to assess the feasibility of the provision contained in the second paragraph above.[192]

4.9. Parental responsibility

55. The 1975 Convention's provisions on 'parental authority' are confined to two short articles and, understandably, address the topic exclusively within the context of children born 'out of wedlock'.[193] Legal parenthood and parental responsibility are inextricably linked to the child's position and any investigation into children's rights and legal status must necessarily embrace the legal position of parents and carers. It is therefore recommended that a detailed framework on parental responsibility be included in a new/revised Convention. In addition, a few specific areas are highlighted below.

56. The area where there appears to be a need for greater clarity is contact. It can be questioned whether, given the existence of the 2003 European Convention on Contact Concerning Children[194] ('the 2003 Convention'), there is a case for including contact within a new/revised Convention. Moreover, enforcement of domestic orders on contact is one of the issues that has attracted the most attention of the ECtHR in this area.[195] Consideration should therefore be given to addressing the matter in a new/revised Convention, in particular as the 2003 Convention contains only a very brief general provision concerning enforcement of contact orders.[196]

57. Similarly, it is suggested here that consideration be given to incorporating provisions on procedural aspects such as the need for speedy resolution of parental responsibility disputes,[197] the privacy requirements of the court process, and the provision of legal assistance into a new/revised Convention. This is in particular given the abundance of Court case-law in these areas.[198]

58. The below section provides, under appropriate headings, an overview of the key principles to be applied in the context of parental responsibilities, as expounded by recent ECtHR case-law. It is suggested here that these principles be integrated into a new/revised Convention, either directly in the Convention provisions or preamble, or in an explanatory report to accompany the Convention.

Best interests assessment

59. In parental responsibility proceedings, domestic authorities must conduct 'an in-depth examination of the entire family situation and a whole series of factors, in particular factors of

[192] The outcome of such survey may impact also on the content of the proposed revised provision on succession. See section 'Rights of Succession' above.

[193] Article 7(1): *'Where the affiliation of a child born out of wedlock has been established as regards both parents, parental authority may not be attributed automatically to the father alone. 2 There shall be power to transfer parental authority; cases of transfer shall be governed by the internal law.'* Article 8: *'Where the father or mother of a child born out of wedlock does not have parental authority over or the custody of the child, that parent may obtain a right of access to the child in appropriate cases.'*

[194] Convention on Contact concerning Children (2003) ETS192, available at https://rm.coe.int/168008370f, last accessed 07/10/2021.

[195] E.g., *A.B.V. v. Russia*, no. 56987/15, 2 October 2018; *Krasicki v. Poland*, no. 17254/11, 15 April 2014; *P.K. v. Poland*, no. 43123/10, 10 June 2014; *Płaza v. Poland*, no. 18830/07, 25 January 2011; and *Sbârnea v. Romania*, no. 2040/06, 21 June 2011.

[196] Article 9 of the 2003 Convention provides: *'The carrying into effect of contact orders States Parties shall take all appropriate measures to ensure that contact orders are carried into effect.'*

[197] See e.g., *Kijowski v. Poland*, no. 33829/07, 5 April 2011.

[198] For a detailed overview of the relevant case-law see Fenton-Glynn (n 43) 297-302.

a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person'.[199]

60. In undertaking this assessment, the authorities must show that the child's best interests have been a primary consideration. The examination of the child's interests must go beyond simply evaluating whether a parent can provide adequate living conditions, nor can it rely on general considerations—for example, the fact that one party had an extra-marital affair,[200] or the parent's sexual orientation[201] or disability[202] or religious beliefs.[203] Rather, it must involve an assessment of the parenting abilities of each parent, the children's attachment to each of them, and where best the children will be able to develop and thrive.[204]

61. The domestic courts have to provide sufficient reasons to justify the interference with the applicant's rights.[205]

62. There is a need for individualised decision-making. Accordingly, although states have a wide margin of appreciation in deciding where children's best interests lie, this must not be determined on the basis of an inflexible legal presumption.[206]

In *Sporer v. Austria*[207] and *Leitner v Austria*,[208] the Court underscored the need for individualised decision-making. In both cases the Court scrutinised Austrian law on the basis that it denied an unmarried father who had never obtained joint custody a full judicial review of the attribution of parental authority, although such judicial review was available to separated parents in cases in which the father once held parental authority, either because the parents were married or, if they were unmarried, had concluded an agreement to exercise joint custody. The Court found a violation of Article 14 taken in conjunction with Article 8 of the Convention.

Child's views

63. In line with Article 12 of the UNCRC, which requires States to ensure that a child who is capable of forming his or her own views has the right to express them freely in all matters affecting them, and those views being given due weight in accordance with their age and maturity, domestic authorities must seek the opinion of children who are able to formulate their own views in proceedings concerning parental responsibilities.[209]

64. Direct versus indirect participation (i.e., hearing of the child not by the judge but by an expert whose report is then submitted to the court): direct participation is not inevitable to meet the requirements of Article 8 as long as the views of the child are presented to the court in some way.[210]

[199] *Babayeva v. Azerbaijan*, no. 57724/11, 30 January 2020.
[200] *Ibid*.
[201] *Salgueiro Da Silva Mouta v. Portugal* (n 75).
[202] *Mamchur v. Ukraine*, no. 10383/09, 16 July 2015.
[203] See *Palau-Martinez v. France*, no. 64927/01, ECHR 2003-XII, and *Hoffmann v. Austria*, 23 June 1993, Series A no. 255-C.
[204] *Zelikha Magomadova v. Russia*, no. 58724/14, 8 October 2019; and *Babayeva v Azerbaijan* (n 200).
[205] *Naltakyan v. Russia*, no. 54366/08, 20 April 2021; *Schneider v. Germany*, no. 17080/07, 15 September 2011; and *Ilya Lyapin v. Russia*, no. 70879/11, 30 June 2020.
[206] Fenton-Glynn (n 43) 268.
[207] *Sporer v. Austria* (n 107). See also older case of *Zaunegger v. Germany*, no. 22028/04, 3 December 2009.
[208] *Leitner v Austria* (n 107).
[209] See, e.g., *Mustafa and Armağan Akın v. Turkey*, no. 4694/03, 6 April 2010; *Płaza v. Poland*, no. 18830/07, 25 January 2011; and *N.Ts. and Others v. Georgia*, no. 71776/12, 2 February 2016.
[210] *Sahin v. Germany [GC]*, no. 30943/96, ECHR 2003-VIII. See also *NTS and others v Georgia* (n 210).

65. Weight to be given to child's views: children's wishes do not necessarily have to be followed; rather, they have to be considered in the context of the child's overall best interests.[211]

The right of the child to be consulted and heard was elaborated on by the Court in *M and M v Croatia*.[212] The Court explained that the concept of 'private life' in Article 8 included the right to personal autonomy. Although children lack the full autonomy of adults, they are, nevertheless, subjects of rights. Their autonomy 'gradually increases with their evolving maturity' and 'is exercised through their right to be consulted and heard.'[213] The Court highlighted the relevance of Article 12 of the UN Convention on the Rights of the Child. Interestingly, in *Iglesias Casarrubios and Cantalapiedra Iglesias v Spain*,[214] the matter was considered from the perspective of the applicant mother's Article 6(1) right to a fair trial. The Court held that, although domestic courts were not always obliged to hear a child when a right of access is at stake (as this depends on the age and maturity of child concerned), Article 6 encompassed the right of parties to present observations that they consider relevant to their case. This includes the right for children to be heard, if they so wish, or at the very least, that the court give reasons for any refusal.

With regards to the weight to be given to children's views, the Court has held that a lack of due weight to children's views renders even the most robust participation mechanism meaningless.[215] However, this does not mean that children's wishes must be followed; rather, they have to be considered in the context of the child's overall best interests. In *AV v Slovenia*,[216] the Court summarised its jurisprudence in this area as follows: 'While the Court's case-law requires children's views to be taken into account, those views are not necessarily immutable and children's objections, which must be given due weight, are not necessarily sufficient to override the parents' interests, especially in having regular contact with their child. In particular, the right of a child to express his or her own views should not be interpreted as effectively giving an unconditional veto power to children without any other factors being considered and an examination being carried out to determine their best interests; such interests normally dictate that the child's ties with his or her family must be maintained, except in cases where this would harm his or her health and development.'[217]

The above guidance was endorsed indirectly in *Osman v Denmark*,[218] where the Court implicitly recognised the need for a more child-centred approach in private law child disputes. It endorsed the necessity to weigh children's best interests in any decision concerning the extent of parental authority and emphasised the child's own autonomy and individual rights by holding that '[…] in respecting parental rights, the authorities cannot ignore the child's interest including its own right to respect for private and family life.'[219]

[211] *A.V. v. Slovenia*, no. 878/13, 9 April 2019.
[212] *M. and M. v. Croatia*, no. 10161/13, ECHR 2015 (extracts).
[213] *Ibid* [171].
[214] *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain*, no. 23298/12, 11 October 2016.
[215] *M and M v Croatia* (n 213).
[216] *A.V. v. Slovenia*, no. 878/13, 9 April 2019.
[217] *Ibid* [72].
[218] *Osman v. Denmark*, no. 38058/09, 14 June 2011.
[219] *Ibid* [73].

Disputes between parents and third parties

66. While a parent does not have a right to be given preference in a custody dispute concerning the child's other parent, the Court has made clear that their rights must prevail over third parties.[220]

67. Where the parent and the child have been separated, either as a result of actions of domestic authorities221 or not,222 there is a positive obligation on the state to take necessary measures to enable reunification of the parent and child.

68. Sometimes, preparatory measures (such as steps to reintroduce the child and parent through increasing contact) are required before reunification can happen and, in such circumstances, domestic authorities must act swiftly to take such measures. A failure to take such preparatory measures before attempting to transfer the child's residence might amount to a violation of the Convention.[223]

4.10. Maintenance obligations

69. The 1975 Convention incorporates a non-discrimination provision concerning maintenance obligations of parents and other family members towards a child born out of wedlock.[224] The scope of this provision should be extended to cover all children (as opposed to only children born out of wedlock). The extended provision should be two-prong and it should: 1.) require States to provide in their national law that parents have a duty to maintain the child; and 2) permit States to provide in their national law that other persons are liable to maintain the child.

There have been no significant developments at the ECtHR in the area of child maintenance over the past decade. Several older cases have dealt with the allocation, quantification, and taxation of child maintenance and applicants have tried to argue violations of their rights under Articles 6 and 8, as well as under Article 1, Protocol 1. Thus far, however, none of these challenges has been successful.[225] The only cases in which applicants have had some success in the area of child maintenance is where a claim under Article 14 was made.[226] The final aspect of child maintenance that has arisen before the Court was in relation to measures taken by national authorities in respect of enforcement of child maintenance payments.[227]

Recommendation

It is recommended that an extended provision concerning maintenance as proposed above, building on Article 6 of the 1975 Convention, be included in a new/revised Convention.

[220] Fenton-Glynn (n 43) 264.
[221] *Görgülü v. Germany*, no. 74969/01, 26 February 2004.
[222] *Lyubenova v. Bulgaria*, no. 13786/04, 18 October 2011.
[223] *NTS and others v Georgia* (n 210).
[224] The provision is divided into two paragraphs. Article 6(1): *'The father and mother of a child born out of wedlock shall have the same obligation to maintain the child as if it were born in wedlock.'* Article 6(2): *'Where a legal obligation to maintain a child born in wedlock falls on certain members of the family of the father or mother, this obligation shall also apply for the benefit of a child born out of wedlock.'*
[225] Fenton-Glynn (n 43) 210. See *Burrows v the United Kingdom*, no. 27558/95, 27 November 1996 (Article 1, Protocol 1); and *Logan v the United Kingdom*, no. 24875/94, 6 September 1996 (Articles 6 and 8).
[226] *P.M. v. the United Kingdom*, no. 6638/03, 19 July 2005 (discrimination against an unmarried father on the ground that, although he was under the same obligation to pay child maintenance as a married father, he did not qualify for the same tax deductions for child maintenance payments); and *J.M. v. the United Kingdom*, no. 37060/06, 28 September 2010 (difference in treatment on grounds of sexual orientation in relation to child-support regulations).
[227] *Battista v. Italy*, no. 43978/09, ECHR 2014; and *Torresi v. Italy (dec.)*, no.68957/16, 17 December 2020.

5. CONCLUSION

70. This Report has demonstrated that in order for the 1975 Convention to continue serving a practical purpose, the instrument is in an urgent need of a reform. Any such reform, however, has to adopt a child-centred approach, taking account of the obligations imposed on the member States by the UNCRC, and placing the rights and legitimate interests of children above other considerations. The process of modernisation of the Convention should go hand in hand with expanding the scope of the Convention, as proposed above, and incorporating relevant ECtHR jurisprudence, as set out throughout this Report.

71. The discrimination that was once faced by children born 'out of wedlock' has now been largely eliminated and a new/revised Convention would assist in eradicating any remaining gaps, in the context of both the establishment of parental affiliation and the attribution and exercise of parental responsibilities, and including through a general non-discrimination provision, specific non-discrimination provisions applicable to succession and maintenance, and guarantees to protect the child's right identity.

72. A new/revised Convention must, however, aspire to address also the gaps in the protection of children that have arisen more recently – over the past few decades – as a result of the emergence of new family forms and advances in assisted reproductive technologies. These changes have produced categories of children whose rights are not fully protected and who, in many member States, are subjected to unequal treatment, including when it comes to formalising their relationships with their biological and non-biological parents and day-to-day carers. As discussed in Part 3 of this Report, this includes in particular children born to same-sex and transgender parents, and children born with the help of assisted reproductive technologies, in particular through surrogacy.

APPENDIX : TABLE OF RECOMMENDATIONS

Provision of ETS 85	Issue	Recommendation
N/A	Principle of non-discrimination	New article to include a general provision against discrimination of children on grounds specified in the provision + new article to emphasise that children should not be discriminated against due to the civil status of their parents.
Article 9	Rights of succession	New article or revised Article 9 to provide that children have equal rights of succession to the estate of their parents and of their parents' family, regardless of the circumstances of their birth.
N/A	Right of access to information concerning the child's origin	New article to set out the general right of children to have access to information concerning their origins
N/A	Right to a family name	New article to provide that children have the right to acquire a family name from birth.
N/A	Right to citizenship	New article to provide that children derive nationality from either their mother or father, regardless of the parents' marital status.
Articles 2-5	Establishing parental affiliation	New article that will apply to all children (not only children born out of wedlock) to guarantee that States provide the legal possibility of establishing parental affiliation by presumption, recognition or judicial decision.
Articles 2-5	Restrictions on the right to establish parental affiliation	New article to provide general guidance on the extent to which the right to establish parental affiliation may be restricted.

Articles 2-5	Balancing exercise in paternity proceedings	New article to provide general guidance on carrying out a balancing exercise in paternity proceedings.
Articles 2-5	Need for speedy resolution of paternity proceedings	New article to emphasise the need for a speedy resolution of paternity proceedings.
Article 5	Use of DNA testing in paternity proceedings	New article or revised Article 5 to provide that in actions relating to paternal affiliation scientific evidence which may help to establish or disprove paternity shall be admissible.
Article 2	Maternal affiliation: general rule	Revised Article 2 to clarify that the gestational mother will be regarded the legal mother regardless of her genetic connection with the child.
Article 2	Maternal affiliation: possibility to qualify the general rule	New article to permit States to qualify the rule that the gestational mother will be regarded the legal mother (to accommodate practices such as anonymous births).
Article 2	Maternal affiliation: surrogacy	New article to permit States that have legislation on surrogacy to deviate from the general rule on maternal affiliation in surrogacy cases (e.g., to enable the gestational mother to be considered the legal mother at birth).
Article 2	Contesting maternal affiliation	New article to permit states to make procedures available to contest maternal affiliation on the basis that the alleged mother is not the woman who gave birth to the child.

N/A	Establishing paternity by presumption of paternal affiliation	New article to include the traditional presumption of paternity according to which the husband of the woman who has given birth is automatically presumed to be the father and is thus deemed to be the legal father.
N/A	Establishing paternity by presumption of paternal affiliation: time limit	New article to permit states to provide a time limit within which the presumption of paternity can apply.
N/A	Establishing paternity: contradictory results	New article to encourage states to provide rules for cases where the application of presumptions leads to contradicting results.
N/A	Applicability of the presumption of paternal affiliation to registered/civil partnerships of different-sex couples and cohabiting different-sex couples	New article to permit states to apply, *mutatis mutandis*, the presumption of paternity to registered/civil partnerships of different-sex couples and/or cohabiting different-sex couples.
N/A	Applicability of the presumption of paternal affiliation to same-sex married couples, registered/civil partnerships of same-sex couples and cohabiting same-sex couples	New article to permit states to apply the presumption of paternity to same-sex married couples, registered/civil partnerships of same-sex couples and/or cohabiting same-sex couples
Article 3	Establishing paternal affiliation by voluntary recognition	Revised Article 3 to provide for establishment of paternity by voluntary recognition + new article(s) to permit states to impose conditions on such recognition and to allow voluntary recognition, which has effect from the birth, during the mother's pregnancy.
Article 3	Establishing paternal affiliation by decision of a court or other competent authority	Revised Article 3 to provide for establishment of paternity by decision of a court or other competent authority + new article(s) to establish the right of the child to institute proceedings to establish paternity; permit States to allow other persons to be given the right to institute such legal proceedings; and

		to provide guidance on the possibility of placing time limits on the right to initiate paternity proceedings.
Article 4	Contesting paternal affiliation	Revised Article 4 to set out a general rule that the paternal affiliation established by a presumption or by voluntary recognition may be contested in proceedings under the control of the competent authority + revised Article 4 to specify that the only ground of contestation should be that the legal father is not the biological father of the child + new article to specify who has the right to contest paternal affiliation + new article to permit states to prohibit contestation of paternity, where appropriate, on the grounds of the best interests of the child.
N/A	Establishing parental affiliation in cases involving assisted reproduction	New article to require states that permit the use of assisted reproductive technologies to provide for appropriate rules for establishing parental affiliation.
N/A	Contesting parental affiliation in cases involving assisted reproduction	New article to require states that permit the use of assisted reproductive technologies to provide for appropriate rules for contesting parental affiliation.

Articles 7 and 8	Parental responsibility	Revised Articles 7 and 8 to address in detail parental responsibility, including contact. These provisions should incorporate *inter alia* the principles of the best interests of the child and the child's views.
Article 6	Maintenance	Revised Article 6 to cover all children (not only children born out of wedlock); require states to provide in their national law that parents have a duty to maintain the child; and permit states to provide in their national law that other persons are liable to maintain the child.