CRITIQUE & COMMENTARY

ITALY'S 2024 UNIVERSAL CRIMINALISATION OF SURROGACY: HEIGHTENED RISK OF STATELESSNESS?

MICHEL ROULEAU-DICK,* MEIRAF TESFAYE** AND ANGELICA CONTI***

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I INTRODUCTION

On 4 November 2024, Italy passed *Law No 169*,[1] enacting a blanket ban on international surrogacy and criminalising the practice by amending the already restrictive Italian legal framework on the issue. This new law gathered considerable attention in the media and echoes wider trends in Europe.[2] Whereas many of the discussions have focused on the reform's broad scope, this

* Dr Michel Rouleau-Dick is a TAIGA – Centre for Transdiciplinary AI Postdoctoral Research Fellow and Arctic Six Fellow affiliated with the Department of Law, UmArts and the Arctic Centre at Umeå University. His research focuses on normative change in the context of climate change and artificial intelligence, the law on statelessness and general public international law. He is also co-Editor-in-chief of the human rights blog, *Tålking Rights*.

** Meiraf Tesfaye is a Doctoral Researcher at the Institute for Human Rights, Åbo Akademi University. Her research focuses on human right protections of vulnerable persons (especially surrogate children) in the context of trans-national surrogacy arrangements. She serves as a managing editor of the human rights blog, *Tålking Rights*.

*** Angelica Conti is a Doctoral Researcher at the Institute for Human Rights, Åbo Akademi University. Her research focuses on the right to education of stateless children. She also serves as an editor of the human rights blog, *Tålking Rights*.

1 *Legge 4 novembre 2024 n 169 'Modifica all'articolo 12 della legge 19 febbraio 2004, n 40, in materia di perseguibilità del reato di surrogazione di maternità commesso all'estero da cittadino italiano'* [Law No 169 of 4 November 2024 'Amendment to Article 12 of Law No 40 of 19 February 2004, regarding the prosecution of the crime of surrogacy committed abroad by an Italian citizen'] (18 November 2024) 165(270) Gazetta Ufficialle 1 (Italy) ('*Law No 169*').

2 See, eg, Dafni Lima, 'Italy's Ban on International Surrogacy Is Part of a Drive towards an Ultra-Conservative Idea of Family', *The Conversation* (online, 20 November 2024) <http://theconversation.com/italys-ban-on-international-surrogacy-is-part-of-a-drive-towards-an-ultra-conservative-idea-of-family-243069>, archived at <perma.cc/QL4W-BQCD>.

commentary instead looks at the intersection between international surrogacy and statelessness, including the existing obligations of Italy and other European Union ('EU') member states ('EU States') under the relevant legal frameworks and the policy implications of this new development. We also investigate the compatibility of Italy's legal reform with its international legal obligations on statelessness, as children born in the context of international surrogacy arrangements are particularly at risk.

II A NEW EUROPEAN UNION DIRECTIVE

From a medical perspective, surrogacy is a practice in which a woman (the surrogate) agrees to become pregnant and give birth to a child with the intention of transferring parental rights to another person or couple (intending parents).[3] Due to the practice of splitting genetic and legal parenthood, and the involvement of compensation in exchange for reproductive services among other factors, social and legal perceptions of surrogacy are divided.[4] The majority of EU States restrict or prohibit surrogacy based on concerns about the exploitation and violation of the human rights of women and children.[5] Most EU States do not allow the practice domestically, so international surrogacy arrangements ('ISAs') only occur in a few permissive jurisdictions.

On 13 June 2024, the EU adopted *EU Directive 2024/1712* ('*Directive*') mandating member states to criminalise the 'exploitation of surrogacy' in the context of human trafficking, where the constitutive elements of that crime are fulfilled.[6] Although the preamble of the *Directive* targets criminalisation only where a woman is coerced or tricked into serving as a surrogate, the directly applicable portion explicitly frames the new obligation as one to criminalise 'exploitation' of surrogacy, rather than a clearer term such as 'forced' or 'illegal'.[7]

The use of the term 'exploitation' seems to intentionally accommodate the unresolved issue of whether surrogates are capable of consenting to surrogacy, or if it always amounts to human trafficking, irrespective of consent. This is attested to by the historical use of the term 'exploitation of the prostitution of others', which was intended to leave the scope of the obligation open to states'

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3 Reem Alsalem, *Report of the Special Rapporteur on violence against women and girls, its causes and consequences: The different manifestations of violence against women and girls in the context of surrogacy*, UN Doc A/80/158 (14 July 2025) 4, citing Ana Rita Igreja and Miguel Ricou, 'Surrogacy: Challenges and Ambiguities' (2019) 25(1) *The New Bioethics* 60 ('Alsalem, *Report of the Special Rapporteur*'). For more on surrogacy, see Nayana Hitesh Patel et al, 'Insight into different aspects of surrogacy practices' (2018) 11(3) *Journal of Human Reproductive Sciences* 212; *A Preliminary Report On Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 10, Permanent Bureau, Hague Conference on Private International Law, March 2012) 4–30. For a European perspective, see also Writing Group on behalf of the ESHRE Ethics Committee et al, 'Ethical considerations on surrogacy' (2025) 40(3) *Human Reproduction* 420.

4 For an overview of European legislations on surrogacy, see Pedro Brandão and Nicolas Garrido, 'Commercial Surrogacy: An Overview' (2022) 44(12) *Revista Brasileira de Ginecologia e Obstetricia* 1141.

5 See Alsalem, *Report of the Special Rapporteur* (n 3) 5.

6 *Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024* [2024] OJ L 1/13, art 2 ('*Directive*'). The *Directive* amended *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings an protecting its victims, and replacing Council Framework Decision 2002/629/JHA* [2011] OJ L 101/2, which is the main anti-trafficking instrument at EU level.

7 *Directive* (n 6) [6]. See also ibid art 2(3), the only binding portion being the latter.

interpretation.[8] Though the EU Commission has clarified that the new obligation does not call for blanket criminalisation, the openness and historical implications of the framing make the scope of the obligation debatable.[9]

Therefore, enforcement in the EU context must be seen in light of at least two important considerations: first, EU States' sentiments towards surrogacy and the latter's legal position in their domestic legal orders; and second, the already existing obligations of EU States as members of the Council of Europe ('CoE') framework, particularly the *European Convention on Human Rights* ('*ECHR*').[10] On this point, the European Court of Human Rights ('ECtHR') interprets the right to private life in the *ECHR* under art 8 as obligating member states to provide a legal avenue for recognition following legal ISAs.[11]

This context acts as the legal backdrop for *Law No* 169's enactment by the Italian government on ISAs, discussed in the next section, and the resulting gaps it opens in Italy's nationality law.

III NATIONAL POLICIES IN ITALY AND IN EU MEMBER STATES

Italy and other EU States must enact domestic legislation to implement the *Directive* in their own legal orders.[12] This obligation must also be understood in light of already existing legal orders either entirely banning surrogacy within their jurisdictions, or indirectly through domestic family law frameworks that set out the criteria for legal parenthood.[13]

Prior to the *Directive*, Italy had already criminalised surrogacy carried out *within* its territory through *Law No 40* on 19 February 2004.[14] The lack of access to clinics offering surrogacy services in Italy, mirrored by other EU or CoE States, drove many Europeans to the few *surrogacy-friendly* third states where surrogacy is legal. This influx in reproductive tourism has led to many European home states rejecting requests for recognition of legal parenthood based on their national policy against surrogacy as a practice.[15]

In Italy, due to a lack of national laws on the consequences of ISAs, the relationship between a child born through ISA and the intending parent(s) who have no biological connection to the child was delineated by the Joint Chambers

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8 ibid art 2(3). For more on the debates relating to the adoption of the European definition at the UN level, see Dominika Borg Jansson, *Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons* (Brill 2014) 73–90.

9 European Commission, *Answer given by Vice-President Jourová on behalf of the European Commission for question E-001332/24*, Doc No E-001332/2024, 19 June 2024.

10 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*').

11 *Mennesson v France* (European Court of Human Rights ('ECtHR'), Fifth Section, Application No 65192/11, 26 June 2014) [99]–[100]. Since this judgment, the Court has consistently interpreted *ECHR* (n 10) art 8 as giving positive implied obligations to states to provide a legal avenue towards recognition of ISAs that meet certain legal requirements.

12 *Directive* (n 6).

13 See David de Groot, 'Surrogacy: The legal situation in the EU' (Briefing PE 769.508, European Parliamentary Research Service, February 2025) 5–8.

14 *Legge 19 febbraio 2004, n 40 'Norme in materia di procreazione medicalmente assistita'* [Law No 40 of 19 February 2004] (24 February 2004) 145(45) Gazetta Ufficiale 5 (Italy) 5 ('*Law No 40*').

15 See, eg, Susanna Marinelli et al, 'The legally charged issue of cross-border surrogacy: Current regulatory challenges and future prospects' (2024) 300 *European Journal of Obstetrics & Gynaecology and Reproductive Biology* 41, 44–5.

of the Italian Supreme Civil Court in *Ruling No 38162/2022*.[16] The Court's reasoning emphasised the absence of specific provisions regarding the status of children born via surrogacy within the existing legal framework,[17] a gap that has not been addressed by *Law No 169*. Furthermore, it was noted that birth certificates of children born to non-biological intending parent(s) through ISAs cannot be directly transcribed in Italy, as such recognition would constitute a violation of public order — meaning the core principles of the Italian legal system — including inter alia the protection of women's dignity.[18]

It is in this context that Italy was the first EU State to implement the *Directive* through the adoption of *Law No 169* of 4 November 2024,[19] and in doing so arguably legislated beyond the minimum threshold required for the implementation of the *Directive* within domestic legislation. *Law No 169* amends art 12(6) of the previous law and criminalises all ISAs carried out by Italian citizens abroad, providing for fines ranging from €600,000 to €1 million and imprisonment for up to two years.[20] The prior challenges associated with the transcription of birth certificates (ie, registration of birth details drawn up in a foreign state) are exacerbated by *Law No 169* due to the stipulations of art 361 of the Italian *Criminal Code*, which mandates that public officials, including those responsible for registering births, report any crimes of which they become aware of during their official duties without delay.[21] Therefore, intending parent(s) who have engaged in surrogacy abroad may face a difficult choice between the disclosure of their actions or their concealment. The latter choice, however, may constitute an offence under Italian law, such as alteration of status,[22] or a false declaration of identity.[23]

The principles identified by *Ruling No 38162/2022* were also channelled to support the primary argument presented by the Italian government for the criminalisation of all ISAs: specifically, the commodification of conception, described as a 'business', and the humiliation of women's dignity.[24] During the discussion in the Senate before the final approval of *Law No 169*, members of the majority highlighted that ISAs 'mini le relazioni umane, interrompa il legame biologico e riduca il corpo della donna a una macchina da riproduzione' [undermine human relationships, interrupt the biological bond, and reduce the woman's body to a reproduction machine].[25] This is in addition to the Italian government's stated aim to curb procreative tourism.[26]

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16 La Corte Suprema di Cassazione [Supreme Civil Court of Italy], No RG 38162/2022, 30 December 2022 ('*Ruling No 38162/2022*').

17 ibid 14.

18 ibid 14–5, 19.

19 As of writing, other EU States are in the process of drafting legislations that would enact various types of blanket bans. See, eg, Lydia Bracken, 'Prohibiting commercial surrogacy in Ireland' (2025) 39(1) *International Journal of Law, Policy and The Family* 1; Nola Cammu, 'How does social law (not) assess surrogacy as female reproductive labour? The Netherlands as a case study' (2024) 38(1) *International Journal of Law, Policy and The Family* 1.

20 *Law No 169* (n 1).

21 *Codice Penale* [Criminal Code] art 361 (Italy).

22 ibid art 567.

23 ibid art 495.

24 Camera dei Deputai [Chamber of Deputies], *N 887 Proposta di Legge* [Law Proposal No 887] (15 February 2023) XIX Legislatura (Italy).

25 Senato della Repubblica [Senate of the Republic], *Resoconto stenografico allegati, Mercoledì 16 Ottobre 2024 - 232ª Seduta pubblica* [Stenographic Report, Wednesday 10 October 2024 - Public Session No 232] (16 October 2024) XIX Legislatura (Italy).

26 ibid.

Beyond the explicit reasons cited by the Italian government, deeper motives can also be outlined, including the dominant position afforded to 'traditional families' composed of heterosexual parents and any resulting biological conception.[27] In particular, the practice of adopting a child by the 'social parent' within a same-sex gay couple, commonly referred to as 'step-child adoption' and possibly associated with ISA, is also notably opposed by conservative factions in Italy and the broader Catholic community.[28]

IV OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Within the CoE framework, the ECtHR passed its first judgment on ISAs in *Mennesson v France*, concerning a state's refusal to recognise legal parenthood established abroad via an ISA.[29] The Court clarified that in regards to matters where no European consensus exists, EU States enjoy a wide margin of appreciation to regulate domestic access to surrogacy. However, the right to private life under art 8 *ECHR* and the best interest of surrogate children resulting from ISAs require states to provide a legal avenue for recognition of parenthood, provided that there is a genetic link with either or both intending parent(s) and the arrangement is legal under the law of the host state and international law.[30]

In reaching this conclusion, the Court emphasised that the right to identity of the surrogate child supersedes a member state's interest to deter its nationals from accessing assisted reproductive techniques that are illegal within its jurisdiction.[31] Although the surrogate children in this case were able to travel to France with American passports owing to being born in the USA, the Court still drew a direct link between the protection of private life under art 8 and the right to acquire French nationality, stating that nationality is an element of a person's (genetic) identity which requires recognition to avoid the negative repercussions of legal uncertainties in society.[32] Although art 8 does not guarantee the right to a *particular* nationality, it grants legal protection to genetic identity and its legal consequences.

In 2017, the ECtHR Grand Chamber reversed its hitherto mostly pro-recognition approach in the case *Paradiso and Campanelli v Italy*.[33] This case was markedly different from *Mennesson* as the intending parents entered into a surrogacy arrangement in Russia, where the surrogate child was born using donor gametes.[34] The child was removed from the applicants who were undergoing criminal prosecution in relation to the ISA.[35] The Court determined that where there is no genetic link with either parent or where the ISA followed illicit

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27 Corinna S Guerzoni and Tatiana Motterle, 'Sul corpo delle surrogate. Analisi del discorso pubblico italiano sulla gestazione per altri' [2018] (5) *gender/sexuality/italy* 160, 163–4.

28 ibid 165.

29 *Mennesson v France* (n 11).

30 ibid [97]–[99].

31 ibid [89]–[100]. See also ibid [67]–[74] for more detailed discussions on nationality and the right to family life and private life respectively.

32 ibid [97].

33 *Paradiso and Campanelli v Italy* (ECtHR, Grand Chamber, Application No 25358/12, 24 January 2017).

34 See ibid [9]–[14] for the merits.

35 ibid [21]–[56].

practices, removal of the child from the custody of the intending parent(s) is not contrary to the surrogate child's right to private life.[36]

Despite this, in the Court's first advisory opinion in 2019 on enforcement measures required by France following the *Mennesson* judgement, the Court determined that where there is a genetic link with only one of the intending parents, a surrogate child is entitled to have legal recognition (including nationality) of their relationship with a *non-genetic* parent once the relationship with the genetic parent is given recognition.[37]

Unfortunately, the Court's lack of normative engagement with substantive questions on what amounts to the legality of surrogacy under international law has created a normative blackhole, with EU States using the *Directive's* obligation to prevent exploitation of surrogacy as a carte blanche to categorise all ISAs as human trafficking and therefore circumventing their concurrent obligations under the *ECHR*.

V RISK OF STATELESSNESS

Since ISAs involve the nationality and parenthood laws of more than one state, children born from ISAs are already particularly at risk of statelessness, but this risk is further heightened by Italy's reform and blanket criminalisation of ISAs. Indeed, since countries where surrogacies take place may not necessarily acknowledge a parental link with the surrogate in the absence of a genetic connection (and therefore grant their nationality), children born from ISAs may find themselves reliant solely on the country of nationality of their intending parent(s) to avoid statelessness. If legal parenthood is recognised with the intending parent(s), there is usually no issue in Italy since the nationality law primarily operates on the *jus sanguinis* principle, ie, nationality is transmitted through parental link. Owing to *Law No 169*, however, this genetic link no longer enjoys legal protection as the intending parent(s) are now considered criminals under Italian law. With no viable connection to the state, surrogate children run a very real risk of being rendered stateless, meaning 'not considered as a national by any State under the operation of its law'.[38]

One would expect that the 1961 *Convention on the Reduction of Statelessness* ('*1961 Convention*'),[39] to which Italy became a party in 2015,[40] would help fill the gap since it places an obligation on Italy to grant its nationality to children that would otherwise be stateless if they are born in Italian territory.[41] However, as children born from ISAs are born abroad, the obligation on Italy shifts to rely instead on the parental link under art 1(4) of the *1961 Convention*. Namely, art 1(4)

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36 ibid [202].

37 *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* (ECtHR, Grand Chamber, Request No P16-2018-001, 10 April 2019) [40]. Note that the Court's reliance on genetics has been criticised, see Meiraf Tesfaye, 'What makes a Parent? Challenging the Importance of a Genetic Link for Legal Parenthood in International Surrogacy Arrangements' (2022) 36(1) *International Journal of Law, Policy and the Family* 1.

38 *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1(1).

39 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('*1961 Convention*').

40 The *1961 Convention* has been implemented domestically by Italy and has force of law.

41 *1961 Convention* (n 39) art 1(1).

states that Italy shall grant its nationality to persons who would otherwise be stateless, even if born outside of Italy, as long as one of their parents was an Italian national at the time of the person's birth and they are not eligible for the nationality of the country they were born in. This first presents an issue from the perspective of the recognition of legal parenthood, which is not protected under the *ECHR* in the absence of a genetic link and far from straightforward even in its presence. Considering the latter, and even if this possibility exists under art 1(4), implementation is not automatic and requires the parents to act proactively. That very possibility is also actively hampered by the criminalisation of ISAs and the fact that the transcription of a foreign birth certificate in this context constitutes a violation of the public order under Italian law, as detailed in section III of our commentary.[42] This compounds the previously identified shortcomings of the *1961 Convention* in relation to international surrogacy.[43]

Considering the devastating impacts of statelessness on a child's life and the heightened risk of trafficking it entails,[44] Italy must consider how it regulates the complex and sensitive issue of ISAs more carefully, as indiscriminate criminalisation of all ISAs stretches states' margin of appreciation dangerously thin. The impossibility of legalising surrogate children's genetic identity through transcription or adoption leaves an unacceptable gap that is likely to result in multiple cases of statelessness. Italy's haphazard regulation of ISAs also highlights shortcomings of the law on the prevention of statelessness that had already been noted before Italy enacted *Law No 169*.[45]

In fact, although *Law No 169* is still recent, there have already been reports of statelessness resulting from Italy's legal reform. In one of the cases described, Italian authorities refused to transcribe a Ukrainian birth certificate because the transcription would constitute an offense to the public order, even if requested by the father who had a biological link to the child.[46] This not only renders the child stateless, but it also has a significant impact on their legal identity; due to the lack of an ID code received upon official registration, they cannot, for example, be assigned a paediatrician or be enrolled in a nursery school.[47] This was emphasised *not* to be an isolated case by a lawyer interviewed by in a local news outlet.[48]

Moreover, the parents, in addition to being investigated for alteration of status, cannot benefit from rights connected to a child's birth, such as parental leave. This

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42 *Ruling No 38162/2022* (n 16) 14–5.

43 See, eg, Laura van Waas, 'The UN Statelessness Conventions' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 84–5.

44 See, eg, Conny Rijken, Laura van Waas, Martin Gramatikov and Deirdre Brennan, *The Nexus between Statelessness and Human Trafficking in Thailand* (Wolf Legal Publishers 2015).

45 Giulia Bittoni, 'Surrogacy Arrangements: Can Article 8 of the ECHR Combat Child Statelessness?', *European Network on Statelessness* (Blog Post, 16 November 2023) <https://www.statelessness.eu/updates/blog/surrogacy-arrangements-can-article-8-echr-combat-child-statelessness>, archived at <perma.cc/UX4Z-ME9A>. See also Ashley Mantha-Hollands, 'Italy's New Surrogacy Law Could Leave Children at the Risk of Statelessness' *Global Citizenship Observatory* (Web Page, 28 October 2024) <https://globalcit.eu/italys-new-surrogacy-law-could-leave-children-at-the-risk-of-statelessness/>, archived at <perma.cc/HEW2-PCNG>.

46 Liana Milella, 'È nato prima della legge contro la maternità surrogata, ma per lo Stato non esiste: storia del bambino fantasma', *Il Fatto Quotidiano* (online, 10 April 2025) <https://www.ilfattoquotidiano.it/2025/04/10/nato-prima-legge-contro-maternita-surrogata-per-lo-stato-non-esiste-storia-bambino-fantasma/7947168/>, archived at <perma.cc/4MTR-PQMK>.

47 ibid.

48 ibid.

case shows that the risk of statelessness for surrogate children is real if the best interest of the child is not taken into consideration in individual cases; the lack of transitionary norms further worsens the issue. It remains to be seen whether the Italian Constitutional Court will decide on the matter and whether it will be possible to apply the legal institution of the 'adoption in particular cases',[49] as was previously permitted.[50]

VI A WORRYING PRECEDENT

Overall, Italy's *Law No 169* has wide-ranging implications that remain to be fully explored. In attempting to regulate a complex and sensitive issue, we note that Italy's clumsy effort to enact a blanket ban on ISAs is not only at serious risk of clashing with the State's obligations under the *ECHR*, but is also creating a set of conditions that are likely to result in statelessness that directly contravenes the spirit and possibly the letter of the *1961 Convention*.

The risk of statelessness created by Italy's reform should act as a canary in the coal mine, as it is an early consequence of a much broader policy and normative danger. Indeed, by criminalising surrogacy even beyond its borders, Italy essentially designates, unilaterally and in the absence of a broad consensus, surrogacy to be a universal crime. Moreover, Italy's *Law No 169* clearly shows where it stands when its politics and its international and regional obligations clash, with the former being given clear priority.[51] By enacting a blanket criminalisation, Italy signals its position, on one hand 'in favour of the international abolition of surrogacy by means of a treaty; on the other, it marks the refusal of the Italian authorities to have automatic recognition imposed on filiations resulting from surrogacy carried out abroad'.[52]

Additionally, Italy's exceedingly broad regulation of ISAs and surrogacy should be read in light of its questioning of the international and regional legal framework regulating migration. In May 2025, Italian Prime Minister Giorgia Meloni spearheaded an open letter to the ECtHR signed by nine European leaders, which called for the Court to allow policy changes on migration and pushbacks.[53] This positions Italy in direct conflict with the international obligations it willingly agreed by ratifying the *ECHR*.

Regulating ISAs, regardless of one's political stance, must be done carefully and dexterously to balance the multiple dimensions of the phenomenon, be they the possible gaps in nationality laws, the risk of trafficking and exploitation of surrogates, the possible trafficking of children, and the ethical and moral issues surrogacy entails. Instead, as we have shown in this commentary, Italy's *Law No*

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49 *Legge 4 maggio 1983, n 184 'Disciplina dell'adozione e dell'affidamento dei minori'* [Law No 184 of 4 May 1983] (17 May 1983) 133(28) Supplemento ordinario alla Gazetta Ufficiale art 44 (Italy).

50 *Ruling No 38162/2022* (n 16).

51 'Italy recognises surrogacy as a "universal crime": symbolic measure or first step towards a global ban?', *European Institute of Bioethics* (Web Page, 29 October 2024) <https://www.ieb-eib.org/en/news/early-life/surrogacy/italy-recognizes-surrogacy-as-a-universal-crime-symbolic-measure-or-first-step-towards-a-global-ban-2300>, archived at <perma.cc/4MTR-PQMK>.

52 ibid.

53 Gabriele Barbati, 'Nine EU Countries Seek Human Rights Convention's Rethink on Migration', *Euronews* (online, 23 May 2025) <https://www.euronews.com/my-europe/2025/05/23/nine-eu-countries-seek-european-human-rights-conventions-rethink-on-migration>, archived at <perma.cc/Y54C-5WYP>.

169 will likely result in cases of avoidable statelessness, all the while leaving doubts as to its compatibility with Italy's international and regional obligations.