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# SWISS REVIEW OF INTERNATIONAL AND EUROPEAN LAW

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Schweizerische Zeitschrift  
für internationales und europäisches Recht  
Revue suisse de droit international et européen

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# Statelessness and International Surrogacy from the International and European Legal Perspectives

by Véronique Boillet\* & Hajime Akiyama\*\*

This article examines the possibility of statelessness resulting from international surrogacy. Although some international and European treaties consider nationality to be a human right, there are still many stateless persons. Among the many issues in international law regarding the prevention of statelessness, one concern is the outdated provisions. Significant issue in the context of statelessness and international surrogacy is related to jus sanguinis principle and the definition of «parents». In international surrogacy, there can be several parents depending on the interpretation of the term. This article examines different solutions to this problem.

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## I. Introduction

Nationality is a significant part of human rights. Without a nationality, a person may face many difficulties in daily life. A stateless person loses «the right to have rights» in the legal order of a State:<sup>1</sup> in particular, a stateless person tends to have difficulties marrying, acquiring travel documents or registering to vote.<sup>2</sup>

The office of United Nations High Commissioner for Refugees (UNHCR) estimates that there are ten million stateless persons worldwide who are defined as persons «who [are] not considered as a national by any State under the operation of its law.»<sup>3</sup> In order to prevent this statelessness, many international treaties consider nationality to be a human right and the UNHCR is determined «to end statelessness by 2024».<sup>4</sup>

Statelessness can result from conflicts of laws, territorial transfers, laws relating to marriage, administrative practices and discrimination.<sup>5</sup> In addition to these causes, international surrogacy has recently become a cause for statelessness. In a broad sense, issues arising from surrogacy can be classified as a part of conflicts of laws, but the latter generally refers to the conflict between *jus soli* and *jus sanguinis*.<sup>6</sup> Thus, surrogacy should be regarded as a separate issue.

Referring to current laws and legal practice, this article attempts to analyse the relationship between statelessness and international surrogacy and proposes solutions to the possible statelessness of children born through international surrogacy arrangements. It also critically examines each alternative.

## II. International and European Legal Framework to Prevent Statelessness

The provisions of many international instruments mention nationality as a human right, and as a result, prevention of statelessness is expected. This section analyses provisions of some influential instruments including European conventions, which may be relevant to prevent statelessness in the context of surrogacy, and demonstrates the limitations of these conventions in practice.

1 ARNAUD DE NANTEUIL, *Réflexions sur le statut d'apatride en droit international*, in: *Colloque de Poitiers, Droit international et nationalité*, Paris 2012, p. 320.

2 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES & INTER-PARLIAMENTARY UNION, *Nationality and Statelessness; A Handbook for Parliamentarians*, Geneva 2005, p. 6.

3 *Convention Relating to the Status of Stateless Persons (1954 Convention)*, 360 U.N.T.S. 130, Article 1.

4 Regarding the campaign to end statelessness by 2024, see the following website: <<http://www.unhcr.org/ibelong/>>.

5 UNHCR, *Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness (rev.)*, Geneva 1999, para. 10.

6 UNHCR, *supra* n. 5, para. 10.

## A. Statelessness in International Law

A stateless person is defined in the 1954 Convention as «not considered as a national by any State under the operation of its law». Although the number of contracting parties to the 1954 Convention is limited,<sup>7</sup> this definition is generally applicable because it is regarded as a part of customary international law.<sup>8</sup> The significance of this definition lies in its emphasis on the «operation of [...] law.» In order to determine whether or not an individual is stateless, not only provisions of law, but also a State's operation of law must be examined.<sup>9</sup> Even if an individual can be regarded as a national by *provision* of law, he or she is stateless if the State does not consider him or her to be a national by *operation* of law.<sup>10</sup>

Notable international and European conventions are examined in the following parts of this section – because of their significance with respect to children in particular –, but there are many other instruments which regard nationality as a human right. The Universal Declaration of Human Rights (UDHR) is the first instrument which mentions the right to a nationality.<sup>11</sup> Other conventions, such as the International Convention on the Elimination of all Forms of Racial Discrimination (CERD),<sup>12</sup> the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),<sup>13</sup> and the Convention on the Rights of Persons with Disabilities (CRPD)<sup>14</sup> all mention nationality in the context of human rights.<sup>15</sup> Non-European conven-

7 As of March 2017, 89 States are contracting parties to the 1954 Convention. UNITED NATIONS TREATY COLLECTION, «Convention relating to the Status of Stateless Persons» <[https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-3&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en)>, accessed on 10 March 2017.

8 INTERNATIONAL LAW COMMISSION, Report of its Fifty-eighth Session (1 May–9 June and 3 July–11 August 2006), U.N. Doc. A/61/10, 2006. 49.

9 UNHCR, Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons, Geneva 2014, paras. 23–24.

10 Regarding the significance of the State's view toward individuals rather than the provision of law, see HAJIME AKIYAMA, «Mukokusekishatoha Dareka: Kokusaihouiokeru Mukokusekishano Teigito Mitourokushano Kanrenseikara [Who is a Stateless Person? Definition of a Stateless Person in International Law and Unregistered Persons]», 22 Social-Human Environmentology (2015), 67–78.

11 Article 15(1) of the UDHR provides that «[e]veryone has the right to a nationality.» Article 15(2) provides that «[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.»

12 660 U.N.T.S. 212.

13 1249 U.N.T.S. 13.

14 2515 U.N.T.S. 70.

15 Article 5(d)(iii) CERD mentions the right to nationality. Article 9(1) CEDAW provides that women have equal rights with men to acquire, change or retain their nationality. In addition, it provides that a woman will not be stateless or forced to acquire a nationality of her husband. The second paragraph of the article provides that women have equal rights regarding the nationality of their children. Article 18 CRPD states that the right of the persons with disability to a nationality is recognised on an equal basis with others.

tions, such as the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child, also provide for the right to a nationality.<sup>16</sup>

## B. International Covenant on Civil and Political Rights

Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR)<sup>17</sup> provides that «[e]very child has the right to acquire a nationality.» Article 24 is devoted to the protection of children, and the acquisition of a nationality is included in this context.<sup>18</sup> Although there was an attempt to include all individuals during the drafting process of the ICCPR, the subject was ultimately limited to children. The idea to extend the right to adults did not receive much support due to State sovereignty on this issue and some hesitated to regard nationality as a human right in general.<sup>19</sup>

Article 31 of the Vienna Convention on the Law of Treaties (VCLT)<sup>20</sup> is applied to interpret the ICCPR,<sup>21</sup> but in practice, general comments and concluding observations published by the Human Rights Committee (HRC)<sup>22</sup> – although not legally-binding – are regarded as authoritative.<sup>23</sup> In the general comments on the rights of the child, the HRC states that although Article 24(3) does not place an obligation on States to adopt the *jus soli* principle, its purpose is to prevent statelessness.<sup>24</sup> The

16 American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 144, Article 20(1) declares that everyone has the right to a nationality. The second paragraph continues «[e]very person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.» The third paragraph ensures that all individuals are not deprived of their nationality and of the right to change it. African Charter on the Rights and Welfare of the Child, 1 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990), Article 6(3) states that «[e]very child has the right to acquire a nationality», and Article 6(4) provides that: «States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws».

17 999 U.N.T.S. 172.

18 See UN GENERAL ASSEMBLY, Draft International Covenants on Human Rights, Report of the Third Committee, 17 December 1962, U.N. Doc. A/5365, para. 5.

19 See UN GENERAL ASSEMBLY, *supra* n. 18, para. 76.

20 1155 U.N.T.S. 332.

21 Article 31(1) VCLT provides that «[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose».

22 MANFRED NOWAK, U.N. Covenant on Civil and Political Rights, 2<sup>nd</sup> rev. ed., Kehl 2005, XXVII. The HRC was established pursuant to Article 28 ICCPR.

23 See HELEN KELLER & LEENA GROVER, General Comments of the Human Rights Committee and Their Legitimacy, in: Helen Keller & Geir Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, Cambridge 2012, 116–198, at 121–133.

24 HUMAN RIGHTS COMMITTEE, General Comment 17: Article 24 (Rights of the Child), 7 April 1989, para. 8.



ICCPR deals with nationality matters in order to prevent children from becoming stateless; however, this general comment does not specify which State guarantees individuals' right to nationality. The HRC merely underlines that «[S]tates are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born.»<sup>25</sup> Thus, the ICCPR and its authoritative interpretation do not specify which nationality is to be conferred.<sup>26</sup>

### C. Convention on the Rights of the Child

A children's right to acquire a nationality is set out in the Convention on the Rights of the Child (CRC),<sup>27</sup> which is nearly universally legally-binding.<sup>28</sup> The provision on nationality in the CRC is similar to that of the ICCPR. Article 7 of the CRC provides that:

«1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.»

The second paragraph goes further than Article 24(3) of the ICCPR. When nationality was discussed, there was a proposal for the application of the *jus soli* principle where no other nationality was conferred;<sup>29</sup> however, this proposal was rejected.<sup>30</sup>

25 HUMAN RIGHTS COMMITTEE, *supra* n. 24.

26 However, Article 2 ICCPR provides that «[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]». Based on this article, some argue that the *jus soli* principle should be applied if the child becomes stateless when the State does not confer a nationality to the child. NOWAK, *supra* n. 22, p. 361.

27 1577 U.N.T.S. 44.

28 196 States are contracting parties to the CRC, and it is obviously the highest number of contracting parties in human rights treaties. UNITED NATIONS TREATY COLLECTION, «Convention on the Rights of the Child», <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en)> accessed on 31 October 2016. The only UN Member State which is not a contracting party to the CRC is the United States of America.

29 See COMMISSION ON HUMAN RIGHTS, *Question of a Convention on the Rights of the Child: Note verbale dated 5 October 1979 addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva*, 17 January 1980, U.N. Doc. E/CN.4/1349\*, p. 2.

30 See COMMISSION ON HUMAN RIGHTS, *Question of a Convention on the Rights of the Child: Report of the Working Group*, 10 March 1980, U.N. Doc. E/CN.4/L.1542, paras. 37–43.

The Committee on the Rights of the Child (CRC Committee), which implements the CRC, has not published general comments on Article 7 so far, but its concluding observations to Switzerland have been with regard to nationality. In 2015, the CRC Committee expressed concern regarding the fact that «children born in [Switzerland], who would be otherwise stateless are not guaranteed the right to acquire Swiss nationality.»<sup>31</sup> As a result, the CRC Committee recommended that Switzerland confer Swiss nationality to all children born on its territory if they would otherwise be stateless.<sup>32</sup> Since nationality is also an issue in the context of adoption, the CRC Committee also mentioned that children have uncertain legal conditions during the one-year period of assessment for possible adoption,<sup>33</sup> and recommended that statelessness be avoided for children during the assessment period.<sup>34</sup> As we will see, this recommendation plays a role in international surrogacy cases in Switzerland.<sup>35</sup>

#### D. Convention on the Reduction of Statelessness

The Convention on the Reduction of Statelessness (1961 Convention) is the most comprehensive convention to prevent statelessness.<sup>36</sup> In order to interpret the 1961 Convention, UNHCR published guidelines.<sup>37</sup>

The 1961 Convention combines the *jus soli* and *jus sanguinis* principles to prevent statelessness. Articles 1 to 4 are devoted to the prevention of statelessness by birth. In the context of surrogacy, Articles 1 and 4 are particularly relevant. The principle enshrined in Article 1 is the application of the *jus soli* principle to those «who would

31 COMMITTEE ON THE RIGHTS OF THE CHILD, Concluding Observations on the Combined Second to Fourth Periodic Reports of Switzerland, 26 February 2015, U.N. Doc. CRC/C/CHE/CO/2-4, para. 30.

32 COMMITTEE ON THE RIGHTS OF THE CHILD, supra n. 31, para. 31.

33 COMMITTEE ON THE RIGHTS OF THE CHILD, supra n. 31, para. 47.

34 COMMITTEE ON THE RIGHTS OF THE CHILD, supra n. 31, para. 51. The same recommendation was made by the CRC Committee in 2002. COMMITTEE ON THE RIGHTS OF THE CHILD, Concluding Observations of the Committee on the Rights of the Child: Switzerland, 13 June 2002, U.N. Doc. CRC/C/15/Add.182, para. 36–37.

35 See infra chap. III.D.

36 For details of the 1961 Convention, see also OSAMU ARAKAKI, *Statelessness Conventions and Japanese Laws: Convergence and Divergence* (trans. by Hajime Akiyama), Tokyo 2016, pp. 23–25.

37 The UNHCR is mandated to work on issues of statelessness (see UNITED NATIONS GENERAL ASSEMBLY, Office of the United Nations High Commissioner for Refugees, 9 February 1996, U.N. Doc. A/RES/50/152, para. 14). Guidelines are expected to «provide interpretive legal guidance». UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, U.N. Doc. HCR/GS/12/04, p. 1.

otherwise be stateless».<sup>38</sup> The meaning of «would otherwise be stateless» is interpreted in the guidelines published by the UNHCR as «the child would be stateless unless a Contracting State with which he or she has a link through birth in the territory or birth to a national of that State grants that child its nationality».<sup>39</sup> Article 1 requires Contracting States to confer a nationality to a child born in the territory of the State if he or she does not acquire another nationality. Article 4 establishes that the *jus sanguinis* principle is to be applied if no other nationality is conferred on the child. The 1961 Convention attempts to prevent statelessness through provisions combining the *jus soli* and *jus sanguinis* principles.

The 1961 Convention seems to be the most advanced convention, placing an obligation on States to prevent statelessness, though there are only 68 contracting parties.<sup>40</sup> In other words, the legal effect of the Convention is limited, and Switzerland is not a party to the Convention.<sup>41</sup>

## E. European Convention on Nationality

The European Convention on Nationality (ECN), adopted by the Council of Europe on 6 November 1997, sets out different important principles which must be introduced in the nationality laws of the different States. In particular, every individual has the right to a nationality, statelessness must be avoided and no one shall be arbitrarily deprived of his nationality (Article 4). Regarding children, the ECN provides that those who do not acquire nationality at birth are entitled to acquire the nationality of the State Party in which they were born (Article 6, Paragraph 2) and, more generally, that the naturalisation of stateless persons should be facilitated (see Article 6, Paragraph 4, let. g). While the ECN is considered to be particularly exhaustive, its scope is still limited since supervision of its application is not ensured by a court or a committee.<sup>42</sup> To date, Switzerland has not yet acceded to this Convention. However, the Federal Council is in favour of Switzerland's accession to demonstrate its will to combat statelessness at the international level. It was announced in the official Message of the Federal Council that Switzerland's accession to this Convention

38 Under Article 1(1), States can choose whether they confer their nationality by application of law or application submitted by the person. If the State chooses the latter option, statelessness cannot be completely prevented by birth.

39 UNHCR, *supra* n. 37, para. 18.

40 As of January 2017. UNITED NATIONS TREATY COLLECTION, *supra* n. 7 accessed on 31 January 2017.

41 The Swiss parliament recently rejected a proposal to examine an accession to the 1961 Convention, see Postulate Nadine Masshardt, Convention sur la réduction des cas d'apatridie (15.3269), <<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20153269>>.

42 NICOLAS CARIAT, Le retrait de nationalité au regard du droit européen et international, *Journal de droit européen* (2010), 245–250, at 245.

would be considered once the new revision of the Nationality Act had been adopted.<sup>43</sup> Although the law has now been enacted, no decision has been taken to date.

## F. European Convention on Human Rights

Though the European Convention on Human Rights (ECHR) does not guarantee a right to nationality, the European Court of Human Rights recently recalled that the denial of recognition of nationality or the loss of nationality already acquired «might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual.»<sup>44</sup> The European Court of Human Rights does not examine the extent to which States must confer nationality or the conditions under which nationality may be denied. Rather, it examines whether decisions taken by State courts have incompatible consequences on the rights enshrined in the Convention.<sup>45</sup> Ultimately, it is admitted that the European Court of Human Rights can play a role in the fight against statelessness, but it can be deduced from the small number of judgments – four to date – that the role of the Court remains limited, mainly because of the difficulties encountered by individuals in «hanging up [their] situation with one of the guarantees provided for by the Convention».<sup>46</sup>

However, in the French case *Mennesson* – which concerned an international surrogacy agreement –, the European Court has already admitted that the uncertainty of the acquisition of the French nationality «is liable to have negative repercussions on the definition of [the] personal identity» of the children.<sup>47</sup>

## G. Limits of the International Instruments

The issue of statelessness was the subject of relatively early international regulation. However, the phenomenon of statelessness has not yet been eradicated. There are now ten million stateless people in the world. Most international conventions which provide for the right to a nationality have difficulty preventing statelessness in practice

43 Message of 4 March 2011 from the Federal Council Regarding the Complete Revision of the Federal Act on the Acquisition and Loss of Swiss Citizenship, FF 2011, 2639, ch. 1.3.2.

44 ECtHR, Case of Ramadan v. Malta, 21 June 2016, Application no. 76136/12, para. 84–85; FRÉDÉRIC SUDRE, *Droit européen et international des droits de l'homme*, 13<sup>th</sup> ed., Paris 2016, p. 727 para. 481. For other examples: Case of Karassev v. Finland, 12 January 1999, Application 31414/96; Case of Genovese v. Malta, 11 October 2011, Application no. 53124/09; Case of Kuric and others v. Slovenia, 26 June 2012, Application 26828/06.

45 FABIEN MARCHADIER, *L'articulation des sources du droit de la nationalité*, in: *Colloque de Poitiers, Droit international et nationalité*, Paris 2012, p. 69; DE NANTEUIL, *supra* n. 1, pp. 321–322 and 327.

46 CARIAT, *supra* n. 42, p. 245.

47 ECtHR, Case of Mennesson v. France, 26 June 2014, Application no. 65192/11, para. 97 and Case of Labassee v. France, 26 June 2014, Application no. 65941/11, para. 76.

for the following reasons. First, many conventions are not specific enough to place a positive obligation on States. As a result, the effect of the provision of the right to a nationality is not clear. Second, although the 1961 Convention provides that States have an obligation to confer a nationality, which is necessary to prevent statelessness, the number of States Parties to the Convention is limited.

For universal conventions, the more fundamental, practical difficulty in applying the right to a nationality is the absence of a legally binding interpretation of these conventions, as compared with the ECHR. Unlike the European Court of Human Rights, the Committees' views of the ICCPR and CRC are not regarded as legally binding although they are sometimes regarded as authoritative interpretation.

Moreover, State sovereignty regarding nationality remains an issue: the criteria for obtaining nationality are different from one State to another and States are not inclined to coordinate their legislation.<sup>48</sup> This lack of coordination then leads to new cases of statelessness – some of them in the area of international surrogacy. And international law does not provide a real solution, since neither customary international law nor international conventions alleviate this principle of sovereignty and provide for a genuine condemnation of statelessness.<sup>49</sup>

### III. International Surrogacy and Statelessness

The last section discussed the international and European legal framework to prevent statelessness and explained the different reasons why the framework ultimately fails to prevent statelessness. The case of international surrogacy provides a good illustration of this finding since it creates new cases of statelessness. This section introduces international surrogacy and explains how it can create more statelessness.

#### A. Surrogacy

In this article, surrogacy is defined as «the agreement-based practice whereby one woman carries a child for another with the intention that the child should be handed

<sup>48</sup> MARCHADIER, *supra* n. 45, p. 65.

<sup>49</sup> MARIE-HÉLÈNE MARESCAUX, *Nationalité et statut personnel dans les instruments internationaux des Nations Unies*, in: Michel Verwilghen (ed.), *Nationalité et statut personnel – Leur interaction dans les traités internationaux et dans les législations nationales*, Brussels 1984, p. 51. See also ANNA EVA KROHNE, *Die Ausbürgerung illoyaler Staatsangehöriger*, Thesis, Frankfurt 2013, p. 194; MARCHADIER, *supra* n. 45, p. 65; DE NANTEUIL, *supra* n. 1, pp. 322 and 326–327.

over after birth.»<sup>50</sup> Although the exact number of surrogacy cases is not known, International Social Service estimates that at least 20,000 surrogate children are born each year.<sup>51</sup>

The most important feature of surrogacy is that a surrogate mother bears the child based on the will of intended parents. There are two types of surrogacy: traditional surrogacy and gestational surrogacy.<sup>52</sup> When the traditional surrogacy is conducted, an egg of the surrogate mother is used, and the sperm of either the intended father or a donor is inseminated into the surrogate mother's egg.<sup>53</sup> In gestational surrogacy, the ovum of the intended mother or a donor and the sperm of the intended father or a donor are used.<sup>54</sup> Depending on the form chosen, a child born of a surrogate mother can have a genetic link with both of his or her parents of intention, with his or her surrogate mother, or none of them, if the egg and sperm come from donors.<sup>55</sup> In summary, there are some possibilities of paternity and maternity: paternity can be twofold when the genetic procreator – who has donated sperm – is not the intended father, and the motherhood can be triple, when the genetic mother – who has donated an egg – is distinguished, on the one hand, from the surrogate mother – who carries and gives birth to the child – and on the other hand from the intended mother who raises the child.<sup>56</sup> It must also be noted that a homosexual couple can be the intended parents.

50 This definition is based on the well-cited definition of surrogacy formulated in the «Warnock Report» in 1984. DEPARTMENT OF HEALTH & SOCIAL SECURITY, UNITED KINGDOM, Report of the Committee of Inquiry into Human Fertilisation and Embryology (Reprinted), London 1988, sec. 8.1. However, this Article adds the element of «agreement-based» because without agreement, at least legally, a woman who carries a child is regarded as a mother, not as a surrogate mother, who may be able to renounce rights and obligations concerning the child after the birth of the child. Since this possibility of renunciation of rights and obligations concerning the child is significant to consider a surrogacy in relation to statelessness, this Article adds the new element to the definition of the Warnock Report. Although this «agreement» seems to be similar to a «contract», this Article does not use the word «contract» because it is commonly said that a surrogacy agreement is not legally-binding, and unenforceable. See MICHEL WELLS-GRECO, *The Status of Children Arising from Inter-Country Surrogacy Arrangements*, The Hague 2016, pp. 39–40.

51 INTERNATIONAL SOCIAL SERVICE NETWORK, «Call for Action 2016: Urgent Need for Regulation of International Surrogacy and Artificial Reproductive Technologies», 5 January 2016, <[http://www.iss-ssi.org/images/Surrogacy/Call\\_for\\_Action2016.pdf](http://www.iss-ssi.org/images/Surrogacy/Call_for_Action2016.pdf)>.

52 WELLS-GRECO, *supra* n. 50, p. 37.

53 WELLS-GRECO, *supra* n. 50, p. 37.

54 WELLS-GRECO, *supra* n. 50, p. 38.

55 VÉRONIQUE BOILLET & ESTELLE DE LUZE, *Mère porteuse, parents d'intention, homoparentalité... Et l'enfant?*, Jusletter 5 October 2015, para. 4.

56 BOILLET & DE LUZE, *supra* n. 55, para. 4.

Since surrogacy is legalised in a limited number of States,<sup>57</sup> surrogacy agreements tend to be made internationally: intended parents go abroad to find surrogate mothers where such agreements are allowed. When the intended parents return home, the recognition of the decision or judgment regarding parentage between the child and the intended parents may raise difficulties from the point-of-view of private international law because States do not necessarily share the same definition of a legal parent.

The study carried out by The Hague Conference on Private International Law already provides a descriptive panorama of the legal regimes adopted by the different States.<sup>58</sup> In sum, the majority of States adopt the «*mater semper certa est*» principle, which provides that the woman who gives birth is automatically the legal mother.<sup>59</sup> In case of surrogacy, most States also apply the *mater certa* principle such that «the birth mother will still be the legal mother at birth and legal parentage will be transferred to the intending mother after the birth of the child».<sup>60</sup> When the surrogacy has an international character, difficulties occur when the home State does not recognise the transfer.

Regarding fatherhood, most States adopt three principal methods to establish legal paternity: by legal presumption (the husband of the woman who gave birth to the child is the legal father), by voluntary acknowledgment (with or without proof of a genetic link), or by administrative or judicial decision.<sup>61</sup> In case of surrogacy, the general principles are applied: either the birth mother – the surrogate – is married, and her husband becomes the legal father and has to transfer his rights to the intended parent, or the intending father is allowed to make a voluntarily acknowledgment – in principle because he is genetically linked to the child.<sup>62</sup> Again, difficulties can arise when the fatherhood has to be recognised in another State.

Finally, these principles may have to be applied to same-sex couples who can also enter into surrogacy agreements. In such cases, the regulation of the legal status of the parent who is not genetically linked to the child varies from one State to another.<sup>63</sup>

57 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW [HCCH], «The Parentage / Surrogacy Project: an Updating Note» (Prel. Doc. No 3 A of February 2015), pp. 16 ss; LAURENCE BRUNET et al., A Comparative Study on the Regime of Surrogacy in EU Member States, European Parliament (Directorate General for Internal Policies – Policy Department C: Citizens' Rights and Constitutional Affairs), PE 474.403, 2013, p. 37 ss.

58 HCCH, Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements, Prel. Doc. No 3 C of March 2014.

59 HCCH, supra n. 58, para. 11.

60 HCCH, supra n. 58, para. 27.

61 HCCH, supra n. 58, para. 13.

62 HCCH, supra n. 58, para. 27.

63 HCCH, supra n. 58, para. 21.

## B. Possible Relationship between International Surrogacy and Statelessness

Typically, nationality is conferred through *jus soli* or *jus sanguinis*. *Jus soli* means «right of the soil»: a nationality is conferred if a child is born in the territory of the State. *Jus sanguinis* means «right of blood»: the acquisition of nationality is based on the nationality of the child's parent(s).<sup>64</sup>

As underlined by The Hague Conference on Private International Law, the *jus sanguinis* principle raises one important question:<sup>65</sup> is the acquisition of nationality issued from child's genetic or legal parents (if they are not the same)? Most of the nationality laws «have not yet <caught up> with developments in science and, in some cases, family laws concerning the establishment and contestation of legal parentage»,<sup>66</sup> which means that the nationality laws do not make any distinction between genetic and legal parents and consider that they are always the same.<sup>67</sup> Difficulties then appear when this is not the case.<sup>68</sup> Another problem may arise where the notion of «parents» is not the same in the applicable law on nationality and the family laws regulating the parent-child relationship: in such cases, it can happen that the child has legal parents according to the applicable family law, but that these parents cannot transmit their nationality to the child due to the applicable law on nationality.<sup>69</sup>

As mentioned above, international surrogacy cases can even complicate the situation, in particular when both the State of birth and the home State of the intended parents recognise different legal parents: this can result in a child's statelessness. In case of an international surrogacy in a State adopting the *jus soli* principle, the child should be able to acquire the nationality of the territory of his or her birth. However, if the surrogacy occurred in a State adopting the *jus sanguinis* principle, the child does not acquire the nationality of the territory of his or her birth. The issue, then, is to determine if the parent-child relationship – which is the basis for conferring nationality – is recognised by the State of nationality of the possible «parents».<sup>70</sup>

64 WELLS-GRECO, supra n. 50, p. 421. Although many States adopting the *jus sanguinis* principle confer a nationality if either of parents is a national of the State, there are a variety of interpretations of *jus sanguinis*. Some States confer a nationality only when a child's father is a national of the State. Burma, for example, confers a nationality only when both parents are Burmese.

65 HCCH, supra n. 58, para. 39.

66 HCCH, supra n. 58, para. 45.

67 It should be noted, however, that out of 39 States, 7 States rely on the genetic link, HCCH, supra n. 58, para. 40, note 184.

68 HCCH, supra n. 58, para. 45.

69 For example, a genetic link must be present for the child to acquire nationality by descent from a parent, HCCH, supra n. 58, para. 40 et seq.

70 Regarding the parent-child relationship, see GILLAN DOUGLAS, «Marriage, Cohabitation, and Parenthood – from Contract to Status?» in: Sanford N. Katz, John Eekelaar & Mavis MacLean (eds.), *Cross Currents: Family Law and Policy in the US and England*, Oxford 2000, 211–233, at 223–230.



When surrogate children become stateless, they face many difficulties in their lives. In particular, they are unable to cross national borders. In international surrogacy cases, surrogate children are usually born outside of the State of residence of the intended parents. Therefore, the intended parents must travel to the surrogate's State to meet «their» children. If the surrogate child is stateless, he or she cannot legally leave the State of birth and enter the State of residence of his or her intended parents.<sup>71</sup> This seems to be the first and biggest issue that the surrogate child faces if he or she becomes stateless.

The European Court of Human Rights had to deal with such an issue when the Belgian authorities refused to issue a travel document for a child born in Ukraine pursuant to an international surrogacy arrangement with intended Belgian parents. Considering that the biological link between the child and the intended father was not sufficiently established and that public-order concerns remain, to date, unresolved, the Belgian authorities refused to issue a travel document for the child. The European Court found that the Belgian authorities' refusal constituted an interference in the applicants' right to respect for their family life because the child had to stay in Ukraine and was separated from the intended parents for three months and twelve days (during this time, the applicants managed to spend two separate weeks in Ukraine). The Court, however, considered that the interference was based on the law, pursued legitimate aims, and that the separation was not excessive. Thus, the Court held that the Belgian authorities remained within their margin of appreciation.<sup>72</sup>

Finally, it must be noted that Article 28 of the 1954 Convention requires Contracting Parties to issue travel documents for stateless persons lawfully staying in the territory. Paragraph 7 of the Schedule of the 1954 Convention requires Contracting Parties to recognise the validity of the travel document. The role of this provision should, however, remain limited because both the State of the child's birth and the State of residence of the intended parents have to be Contracting Parties to the 1954 Convention, which is not the case for the most popular «States of birth»,<sup>73</sup> *i.e.* India, the Russian Federation, Thailand and the United States.

### C. The Manji Case

The well-known Manji case illustrates how statelessness can occur in surrogate cases as a result of the different understandings of the term «parents» in different States.<sup>74</sup> A Japanese couple, Mr and Mrs Yamada, signed an international surrogacy agree-

71 For an example, see ECtHR, *Case of D. and Others v. Belgium* (dec.), 8 July 2014, Application no. 29176/13, summarised *infra*.

72 ECtHR, *Case of D. and Others v. Belgium* (dec.), *supra* n. 71.

73 HCCH, *supra* n. 58, para. 130.

74 For other examples of the surrogacy cases, see HCCH, *supra* n. 58.

ment with an Indian surrogate, Mrs Mehta.<sup>75</sup> The agreement stipulated that if the Yamadas separated, Mr Yamada would have responsibility over the child.<sup>76</sup> Mr Yamada's sperm and anonymous donor's egg was used for surrogacy.<sup>77</sup> Just before the birth of the child, the Yamadas separated.<sup>78</sup> After the birth of the baby, the determination of the legal parents became an issue.<sup>79</sup> In India, the birth certificate indicated the names of the genetic parents of the surrogate child.<sup>80</sup> At trial in India, Mr Yamada was listed as the father because of his genetic link to baby Manji, while Mrs Yamada could not be listed as the mother because she was not genetically related to the child.<sup>81</sup> Since the biological mother of baby Manji – the egg donor – was anonymous, she could not be identified. In such a situation, there could be several possible mothers, and no one was listed on the birth certificate of baby Manji.<sup>82</sup>

In this case, baby Manji did not acquire any particular nationality. Based on the Japanese law, baby Manji could not acquire the Japanese nationality. Japan follows the *jus sanguinis* principle, and a child becomes a Japanese national when at least one of his or her parents is Japanese.<sup>83</sup> Under Japanese law, the legal mother is the woman who bears the child.<sup>84</sup> Thus, the Indian surrogate should, in this case, have been considered to be the mother of the child. Since the Indian birth certificate did not specify a mother, the Japanese authorities had difficulty identifying the legal mother of the child in practice.

Mr Yamada, the intended father, was not recognised as the legal father either: Under Japanese law, when a child is born to a married woman, the child's father is presumed to be the husband of a woman who gave birth to the child. Since the surrogate mother was married, the child's father was presumed to be the husband of the

75 SARAH MORTAZAVI, «It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy», 100 *Georgetown L. J.* (2012), 2249–2290 at 2274.

76 KARI POINTS, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*. Kenan Institute for Ethics, Durham 2009, p. 4.

77 MORTAZAVI, *supra* n. 75.

78 MORTAZAVI, *supra* n. 75.

79 MORTAZAVI, *supra* n. 75.

80 MINISTRY OF HEALTH AND FAMILY WELFARE, GOVERNMENT OF INDIA, *National Guidelines for Accreditation, Supervision & Regulation of ART Clinic in India*, New Delhi 2005, para. 3.5.4.

81 POINTS, *supra* n. 76, p. 5.

82 POINTS, *supra* n. 76, p. 5.

83 Article 2(i) of the Japanese Nationality Act.

84 This was the interpretation of the Supreme Court in 1962. The interpretation is still valid today, and the decision of the Supreme Court regarding surrogate mothers stated that the «mother-child relationship is not established even if a woman provides an ovum». The Supreme Court of Japan, Decision, 23 March 2007 (*Heisei 19 Nen*), *Saikou Saibansho Minji Hanreishu [Supreme Court Reports on Civil Cases]* Vol. 61 No. 2 p. 619. See TEIKO KIYOSUE, «*Dairi Shussanniokeru Boshi Kankei: Bunben Shugino Genkai [Mother-Child Relationship in Surrogacy: Limitations of Childbirth Doctrine]*», 18 *Hokudai Housei J.* (2011), 1–24, at 3.

surrogate.<sup>85</sup> In other words, there was no possibility for baby Manji to acquire Japanese nationality.

Finally, since – like Japan – India follows the *jus sanguinis* principle, Manji – a child of an unknown mother and a Japanese father, had no right to acquire the Indian nationality. This case was heard by the Supreme Court of India, and two months after baby Manji's birth, the Court accepted to grant baby Manji the necessary documents to leave India.<sup>86</sup> She was then able to enter Japan and acquired a humanitarian visa to stay in the country.<sup>87</sup> This issue was, however, resolved by exceptional treatment.

The Manji case, thus, sheds light on legal and interpretational issues and illustrates the different understandings of the status of legal parents. Such differences not only had an impact on legal parentage, but also on the granting of nationality. Since there was no shared understanding of the notion of «parents», the child became stateless.

#### D. Switzerland

As illustrated in the Manji case, international surrogacy can cause statelessness, and Switzerland must also recognise the possibility that a child of a Swiss national may become stateless. In Switzerland, surrogacy is prohibited under Article 119 al. 2 let. d of the Federal Constitution of the Swiss Confederation<sup>88</sup> and under Article 4 of the Federal Act on Medically Assisted Reproduction.<sup>89</sup> However, some Swiss citizens go abroad to make international surrogacy arrangements. The majority of these cases are not announced and not known by the authorities. Only a minority of intended parents decide upon their return to Switzerland (or are forced, based on evidence of their age or homosexuality) to have the decision or judgment regarding their relationship to the surrogate child recognised in Switzerland.<sup>90</sup> To date, only a few cases have been dealt with by the Swiss Federal Court (the first judgments were delivered on 21 May 2015, 14 September 2015 and 1 December 2016).<sup>91</sup> In the cases of 21 May 2015 and 1 December 2016, the Federal Court only partially recognised the Californian judg-

85 This presumption can be denied if the absence of the father-child relationship is confirmed by the court.

86 POINTS, supra n. 76, pp. 6–7.

87 POINTS, supra n. 76, p. 7.

88 Classified Compilation [CC] 101.

89 CC 810.11.

90 BOILLET & DE LUZE, supra n. 55, para. 7.

91 ATF 141 III 312 ; ATF 141 III 328; Federal Court, cases of 1. December 2016, 5A\_317/2016 and 5A\_324/2016. For an analysis of the first judgment, see BOILLET & DE LUZE, supra n. 55; ANDREA BÜCHLER & LUCA MARANTA, Nr. 2 Bundesgericht, II. zivilrechtliche Abteilung Entscheid vom 21. Mai 2015 i.S. Eidgenössisches Justiz- und Polizeidepartement, handelnd durch das Bundesamt für Justiz gegen A.B., C.B. – E., D.B. – 5A\_748/2014, FamPra.ch 2016, p. 236 ss; SANDRA HOTZ, Kritik am ersten kollisionsrechtlichen Leihmutterchaftsurteil des Bundesgerichts, AJP 2015, pp. 1325 ss.

ment insofar as it establishes parentage between the genetic father and the surrogate child. Due to the absence of a genetic relationship with the child, the legal status of the second father (in a same-sex couple) was not recognised. The case of 14 September 2015 differs essentially on two points: the intended parents were a heterosexual and married couple and both the egg and sperm came from anonymous donors such that the intended father and mother had no genetic link to the twin children. The Federal Court refused to recognise the birth certificate, and the consequence was that the children had no legal parents.

Since the children in all of the cases were born in the United States where the *jus soli* principle applies, none of the children became stateless. Furthermore, in the cases of 21 May 2015 and 1 December 2016, the children acquired the Swiss nationality because of the recognition of the legal status of one of the Swiss intended fathers; the *jus sanguinis* principle is enshrined at Article 1 of the Federal Act of 29 September 1952 on the Acquisition and Loss of Swiss Citizenship.<sup>92</sup>

Nevertheless, extrapolating from the case of 14 September 2015 points to certain difficulties that could have arisen had the children not been born in the United States, but rather in a State which does not follow the *jus soli* principle. In such a case, the refusal of the Swiss authorities to recognise the parent-child relationship could have led to statelessness. The Federal Court anticipated this risk and noted that in such cases, the adoption of the child by the intended parents should avoid this risk.<sup>93</sup> The reality is that surrogacy takes place and the law needs to deal with this. One common method to overcome legal hurdles is for intended parents to adopt the child, but the procedure for adoption is not sufficient: a judicial decision in favour of adoption after a surrogacy is indeed not guaranteed<sup>94</sup> and may follow a lengthy procedure during which the child would be stateless. This view is shared by the CRC Committee which expressed its concern about children that are subject to uncertain legal conditions during the period of assessment for possible adoption.<sup>95</sup> The Committee recommends that the child not be stateless during the assessment period.<sup>96</sup>

#### IV. Possible Solutions

Although many international instruments consider (the acquisition of a) nationality to be a human right, some children born through international surrogacy arrange-

92 CC 141.0. See also Article 1 Federal Act of 20 June 2014 on Citizenship (that will be in force on 1 January 2018).

93 ATF 141 III 328, para. 75.

94 BOILLET & DE LUZE, *supra* n. 55, paras. 60 ss.

95 COMMITTEE ON THE RIGHTS OF THE CHILD, *supra* n. 31, para. 47.

96 COMMITTEE ON THE RIGHTS OF THE CHILD, *supra* n. 31, para. 51. The same recommendation was made by the CRC Committee in 2002. COMMITTEE ON THE RIGHTS OF THE CHILD, *supra* n. 34, paras. 36–37.

ments remain stateless. As illustrated above, the international/European legal framework to prevent statelessness is insufficient, in particular when the process of surrogacy implies international arrangements which call into question the traditional notion of parents, and thus the *jus sanguinis* principle.

International surrogacy is the cause of many other concerns such as, for example, the instability of the civil legal status of children and the risk of exploitation of women.<sup>97</sup> There is consequently a need for a large and international reflection involving the different actors and countries; this reflection has already begun within the framework of The Hague Conference on Private International Law.<sup>98</sup> The objective is to identify the problems caused by international surrogacy and then to attempt to answer them by establishing an instrument of international cooperation.<sup>99</sup> In February 2017, the Experts Group on Parentage / Surrogacy met in The Hague and agreed on «the feasibility of developing a binding multilateral instrument dealing with the recognition of foreign judicial decisions on legal parentage».<sup>100</sup> Considering the lack of consensus between the States, the work of The Hague Conference may take a long time. This study thus attempts to propose possible solutions regarding the prevention of statelessness (which could later be used in the framework of The Hague Conference).

One way to resolve this issue is to use a shared criterion to confer nationality in the case of international surrogacy arrangements.<sup>101</sup> This section proposes some possible solutions<sup>102</sup> that will be examined in relation to the principle of the «best interests of the child».<sup>103</sup>

## A. Jus Soli if the Child is to be Stateless

One possible solution to prevent statelessness in case of international surrogacy is to adopt the *jus soli* principle if the child could otherwise be stateless. States do not have to adopt the *jus soli* principle as a primary method of conferring nationality, but they

97 HCCH, Report of the February 2016 Meeting of the Experts' Group on Parentage/Surrogacy, February 2016, para. 15.

98 BOILLET & DE LUZE, *supra* n. 55, para. 86.

99 BOILLET & DE LUZE, *supra* n. 55, para. 87.

100 HCCH, Report of the February 2017 Meeting of the Experts' Group on Parentage/Surrogacy, February 2017, para. 38.

101 For other possible solutions, see MORTAZAVI, *supra* n. 75.

102 Note that options proposed in this section do not necessarily prevent statelessness in every circumstance. For instance, there are some States that follow the *jus sanguinis* principle through the paternal line. In other words, a mother cannot pass her citizenship on to her child. If a father has a different nationality, and he does not pass on his nationality to the child, the child may be stateless. The following proposals attempt to resolve the issue of statelessness caused by surrogacy and the inability to determine legal parents.

103 Article 3(1) CRC writes that the best interests of the child shall be a primary consideration in all actions concerning children.

can do so subsidiarily when the child would otherwise become stateless. This option can be supported by existing international law since Article 1 of the 1961 Convention requires States to adopt the *jus soli* principle when a child becomes stateless otherwise.<sup>104</sup>

However, this can be problematic from the perspective of the best interests of the child insofar as the child's nationality and intended parents' nationality will be different. Also, if the child will not live in the State in which he or she was born, the child will be a «foreigner» in the country of domicile. These negative points do not support the adoption of the *jus soli* principle.

In addition, if the *jus soli* principle is applied where the child would otherwise be stateless, effective determination of statelessness is necessary. As explained in the cases described above, States have different understandings of the status of legal parents. In the Manji case, India assumed that the father of baby Manji was Mr Yamada, a Japanese national. If Mr Yamada had also been recognised as a father in the Japanese legal system, baby Manji would have acquired the Japanese nationality. In other words, India could assume that baby Manji was not stateless, but rather a Japanese national. However, Japan had a different understanding of the notion of a «legal father»; as a result, baby Manji was stateless. Therefore, without a shared understanding of the status of legal parents in different States, baby Manji was not regarded as stateless by either state. Taking into account different definitions of «parents» in other States, States should prevent statelessness by adopting the *jus soli* principle. However, most States do not yet have a fixed practice with respect to international surrogacy. Even if a State adopts one definition of «parenthood», that definition may not be recognised in another State when it comes to cases of international surrogacy. This could create difficulty, as the State of birth may be unable to determine if the child would otherwise be stateless.

## B. Jus Sanguinis by Surrogate Mother

If States follow the *jus sanguinis* principle, the definition of legal parents must be examined. As explained, even in cases of international surrogacy, many States interpret that a woman who gave birth is the mother of the child in the first place.<sup>105</sup> The child should therefore acquire the nationality of the surrogate mother according to the *jus sanguinis* principle. The question is then what happens regarding nationality if the legal parentage – which is based in principle on a civil agreement – is transferred to the intending mother/father after the birth of the child. Since there tends to be an agreement between the intended parents and the surrogate mother in which the sur-

104 See also Article 6 (2) ECN.

105 HCCH, A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements, The Hague, March 2014, para. 17; MORTAZAVI, *supra* n. 75.

rogate mother renounces her rights and duties with respect to the child, the answer depends not only on the recognition of the civil transfer by the State of residence of the intended parents, but also on the law regulating nationality. The notion of parents cannot be the same in the laws regulating nationality and family relationships.<sup>106</sup> If, however, the assumption is made that the civil transfer has no impact on nationality such that the child retains the nationality of the surrogate, what are the consequences?

Apart from potentially preventing a case of statelessness, this option does not present any advantages. Since the objective of the international surrogacy arrangement is to transfer the parental rights from the surrogate to the intended parents, and the child will, in principle, live in the State of residence of the intended parents, it is contrary to the child's best interests to maintain an artificial relationship with the surrogate through her nationality. This argument is even more convincing if the surrogate and the child are not biologically linked. Moreover, with such a criterion, the child will also be «foreigner» in the country of the intended parents' domicile. Finally, the surrogate mother would have difficulties with this option too, as she expressly renounced all her rights and obligations with respect to the child.

### C. Jus Sanguinis by Genetic Parentage

Another possibility is to focus on the genetic link since the current technology allows us to identify the biological parents.

This option also has shortcomings. First, legal parents are not always the genetic ones. For example, in Switzerland, the Civil Code (CC)<sup>107</sup> defines certain parent-child relationships in the absence of any genetic link – and the nationality law relies on it: references can be made here to children born in the context of medically-assisted procreation with sperm donation (Article 23 (2) Federal Act on Medically Assisted Reproduction) and children born within a married couple when the husband of the mother is not the biological father (Article 255 (1) CC). This is also the case in international surrogacy cases: when the egg and/or the sperm of donors is/are used, the intended parents are not the genetic ones. In such cases, it would not make sense that the child acquires the nationality of the donors. Moreover, donors can be anonymous, such that the biological parents cannot be identified.<sup>108</sup>

106 See *supra* ch. III.B.

107 CC 210.

108 This concern is also expressed by MORTAZAVI, *supra* n. 75.

## D. Jus Sanguinis by Intended Parents

In cases of international surrogacy, there is a legal transfer of the parental rights and obligations from the surrogate – and eventually her husband – to the intended parents, such that the latter can be considered legal parents. Although the agreement's validity in the State of residence of the intended parents is not clear, such an agreement is usually valid in the State of the surrogacy. If the validity of the agreement is taken for granted, the acquisition of their nationality will be in line with the best interests of the child since the intended parents will have rights and obligations with respect to the child and will live with him or her in their country of residence.

This seems to be the best option for all actors involved in the surrogacy process, but there are many outstanding issues from a theoretical perspective. First, this definition of legal parents is not recognised in several States.<sup>109</sup> Traditionally and currently, the parental relationship is established by birth based on a physical or biological relationship to the child, which is transcribed in the *jus sanguinis* principle. If intended parents are regarded as parents, this means that the *jus sanguinis* principle catches up with the social reality such that States accept that, like for adoption, intended parenthood prevails over biological truth in terms of their nationality laws. Whether this new understanding of «legal parents» can find a place in the nationality regulations is of course a policy matter, which is linked to the positions of States regarding the regulation or prohibition of surrogacy. If a State prohibits surrogacy and refuses to recognise the legal status of the intended parents in case of international surrogacy, the child will not be able to acquire the nationality of the intended parents.<sup>110</sup>

## E. An Ad Hoc Approach to Prevent Statelessness

Creating a shared criterion would of course be the best option to prevent statelessness. However, as explained above, States are very attached to their sovereignty and have different principles for conferring nationality. This is all the more complicated by international surrogacy cases that raise many new difficulties and call into question certain principles such as *jus sanguinis*, which should therefore apply without a blood relationship.

While awaiting results in the framework of The Hague Conference regarding the recognition of the status of the intended parents – which could allow the principle of *jus sanguinis* to apply to intended parents –, the last solution could be to adopt an *ad hoc* approach relating to children born through international surrogacy. The French

109 See *supra* ch. III.

110 See *supra* ch. III.D.



practice offers a good example. A circular<sup>111</sup> issued by the former Minister of Justice, Christine Taubira, clarified the question of acquisition of the French nationality for children born of a foreign surrogate mother. First, it is important to underline that the circular neither legalises surrogacy in France nor recognises foreign practices. It only allows the child to enter France and acquire French nationality when parentage with a French citizen results from a foreign probing birth certificate according to Article 47 of the French Civil Code.<sup>112</sup> The Australian legislation includes a similar practice,<sup>113</sup> which cuts the traditional link between civil law and nationality law, and allows nationality to be conferred even where the legal parents are undetermined by civil law.

This is a good practice in order to prevent statelessness because the child's nationality as that of the intended parents is ensured if the child would otherwise be stateless. It resolves one of the most serious issues for stateless surrogate-born children, *i.e.* their inability to leave the State of birth and to enter the State of residence of the intended parents. In addition, the child is able to live in the State of residence of the intended parents. However, this approach has some drawbacks as well. From a theoretical perspective, it is difficult to justify the cut of the link between civil law and nationality. If they are cut, the basis for conferring a nationality to the child is unclear. If the basis for conferring nationality is the principle of *jus sanguinis* then the legal parents are the source of the child's nationality; if the basis for conferring nationality is the principle of *jus soli*, then the land of the child's birth is the source of the child's nationality. An *ad hoc* approach is more difficult to justify: legal parents become difficult to identify from a civil law perspective, the child may still face many obstacles on a daily basis, and this practice may be problematic in terms of legal stability.

## V. Conclusion

The issue of statelessness was a subject of international regulation relatively early on. However, there are now ten million stateless people in the world. Although the UNHCR actually runs a campaign to end statelessness within the next ten years, a new cause of statelessness has recently appeared: international surrogacy. This new cause raises particularly delicate questions insofar as they relate not only to the nationality laws of different States but also to the civil laws of these States. From this angle, international surrogacy sheds light on the dated conventions regarding the

111 Min. Justice, circ. n° NORJUSC1301528C.

112 NICOLAS MATHEY, Circulaire Taubira – Entre illusions et contradictions, La Semaine Juridique Edition Générale n° 7, 11 Février 2013, p. 162; ECtHR, Case of Foulon and Bouvet v. France, 21 July 2016, Applications no. 9063/14 et 10410/14, para. 38.

113 HCCH, *supra* n. 105, para. 156.

prevention of statelessness. With the emergence of surrogacy, the definition of «legal parents» becomes one of significance and highlights the urgent need for solutions to prevent the statelessness of surrogate-born children.

The best solution to prevent statelessness would be to regulate the nationality of surrogate-born children within the framework of a Hague Convention by finding a shared criterion. However, States are not only very attached to their sovereignty regarding nationality laws, but they have also developed very different responses to the new questions raised by international surrogacy – in particular the definition/recognition of legal parents – which means that the results will have to wait. To counter the hurry, the *ad hoc* approach as developed by the French government – though it presents some difficulties by cutting the link between civil and nationality laws – could constitute a temporary solution to prevent statelessness.



## CONTRIBUTIONS

Gotovina and the ICTY (Robert Kolb)

Vorgaben des EU-Binnenmarktrechts für Massnahmen zur Förderung erneuerbarer Energie und die Schweiz (Benedikt Pirker)

Statelessness and International Surrogacy from the International and European Legal Perspectives (Véronique Boillet & Hajime Akiyama)

Europe v. USA: Different Standards and Procedures in Human Rights Protection (Stephan Breitenmoser & Chiara Piras)

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