Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective

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7 Securing children's right to a nationality in a changing world

The context of International Commercial Surrogacy and twenty-first century reproductive technology and twenty-first century reproductive technology

Abstract

The challenge of securing the rights of children to a nationality has manifested acutely in the context of ICS, where child statelessness has emerged as a problem. As such, the child's Article 7 CRC right to nationality is one of the rights most significantly under threat in ICS. ICS involves children being born in one state via assisted reproductive technology and the involvement of a surrogate, who are intended as children of commissioning parents who originate or reside in another state. Through the application of domestic nationality laws to children born through ICS, conflict of laws situations are arising, leaving children stateless and stranded in their birth state, in instances where they do not acquire the nationality of their birth state. Drawing on theory and practice utilising case examples, this Chapter examines this challenge, placing it within the wider context of challenges to the concept of 'family' and family formation in the twenty-first century. This Chapter takes a solutions-based approach to the problem of child statelessness in ICS, proposing that practical solutions founded on pre-existing public international law norms and standards must be implemented now, before the problem of child statelessness in ICS deepens, further adding to global statelessness.

Main Findings

- As evidenced by case law, children born through ICS may face difficulties in acquiring nationality in three scenarios in the context of ICS, namely a) when a lack of recognition of the child's parentage prevents nationality acquisition; b) when nationality laws of the child's birth state and their commissioning parents' state of nationality conflict; and c) when a child is abandoned in his or her birth state by his or her commissioning parents.
- As a result of these situations, the practice of ICS has become a new cause of statelessness.
- Children who are stateless following their birth through ICS not only experience a violation of their Article 7 CRC right, but their statelessness may also lead to other infringements of their rights.

- The absence of international consensus concerning the practice of ICS does not need to be a barrier to cooperation between States to prevent child statelessness in ICS.
- It is recommended that the UNHCR, together with the Committee on the Rights of the Child, issue guidance to States urging them to implement without delay practical and effective solutions to preventing child statelessness in ICS, grounded in public international human rights law.
- Such guidance should reflect that a State which is the intended State of a child's residence in ICS will grant the child nationality if he or she would otherwise be stateless, as long as a genetic link between the child and at least one commissioning parent is proved; and States will grant nationality to an otherwise stateless child born on their territory through ICS.

Contextual notes

- Since the time this Chapter was written, the risk of child statelessness in ICS persists. This emphasises the ongoing relevance of this Chapter, and the need for children's rights and best interests to guide State decisions regarding individual children and nationality acquisition in ICS.

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1 Introduction

The past decade has seen a growth in children being conceived through alternative, medically assisted methods as a result of assisted reproductive technology (ART). This is an area of scientific advancement responding to and driving the development of new methods of family formation and new family forms. During this time, International Commercial Surrogacy (ICS) has emerged as one such family formation method, resulting in families being built across borders, enabled by ART and surrogate mothers. ICS uses reproductive technology and leverages globalisation and an international regulatory lacuna to meet the demand of 'commissioning parents' from a range of States, engaging in ICS for diverse reasons. ICS presents a number of human rights challenges to the parties involved, most significantly to the rights of children conceived and born through ICS who are particularly vulnerable given factors such as their lack of agency in infancy. One such challenge is that children are being born stateless in some ICS scenarios.

All children, including those conceived and born through ICS, have the right to acquire a nationality, explicitly established by Article 7(1) of the United

Nations Convention on the Rights of the Child (CRC).[1] The challenge of securing a nationality has manifested acutely for children conceived and born through ICS, where the child does not acquire nationality at birth *jus soli* (by birthplace) or *jus sanguinis* (by descent). In ICS, children are born in one State to a surrogate mother via the use of ART, but intended as children of 'commissioning parents' originating from another State; in most ICS arrangements, such children are expected to travel to and reside in their 'commissioning parents' State of nationality or residence. Due to the application of existing domestic nationality and citizenship laws, gaps in international and domestic laws and policies regarding ICS, and a lack of public education about the implications of birth through ICS for the child's rights and legal status, such children are falling victim to conflict of laws and facing difficulties in acquiring nationality following birth. In some cases children are born stateless, stranded in their birth State, despite the fact that, as Edwards asserts, "the duty to prevent statelessness, at least in respect of children, is emerging as a norm of customary international law".[2]

This chapter examines the challenge of securing the child's right to a nationality in our changing world, where having a child through ICS is a real – although sometimes last-resort – option for a growing number of prospective parents globally. It discusses the various scenarios of child statelessness in ICS, building an understanding of ICS as a new cause of statelessness occurring within the broader context of twenty-first century family formation. The wider human rights implications of statelessness for this group of children are examined through reference to illustrative cases and situated within the framework of relevant international legal provisions and standards. This chapter demonstrates that nationality is key to unlocking the child's wider rights and that upholding the child's right to nationality is critical if this group of children is to receive the rights they are entitled to under international law, consistent with the principle of the best interests of the child established by the CRC. This chapter shows that practical solutions to statelessness in ICS are within reach and should be implemented urgently, before the scale of ICS-caused statelessness grows.[3]

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1 Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3, Art. 7(1). Nationality is also explicitly referred to as an element of the child's identity under Article 8(1) of the CRC.

2 A. Edwards, "The meaning of nationality in international law in an era of human rights: procedural and substantive aspects", in A. Edwards and L. van Waas (eds), Nationality and Statelessness under International Law, Cambridge University Press 2014, p. 29.

3 It is acknowledged that securing the child's right to a nationality does not present a stand-alone solution to the broader human rights and legal status challenges faced by children conceived and born through ICS. As discussed later in this chapter, other challenges to the child's rights may well persist, despite the child securing their right to a nationality. See, e.g. European Court of Human Rights (ECtHR), Application No 65192/11, *Mennesson v. France*, 26 June 2014; ECtHR, Application No 65941/11, *Labassee v. France*, 26 June 2014. For further discussion of these cases see, C. Achmad, "Children's rights to the fore in the

2 Understanding the problem

2.1 ICS as a new method of family formation

ICS has become more widely available over the past decade as a new method of family formation. It involves a person or persons residing in one State (the 'commissioning parents') paying money to conceive a child and to have that child carried to term by a surrogate located in another State. ICS arrangements are premised on the intention of the 'commissioning parents' that the child will not live and grow up in the State of his or her birth, but rather in the State in which his or her 'commissioning parents' reside. ICS regularly uses ART techniques and procedures and, since the child is brought to term by a surrogate, is an attractive method of family formation for same-sex couples and single persons as well as heterosexual couples. Little data has been collected to date on the numbers of children born through ICS, and gathering accurate data on ICS remains difficult.

2.2 International Commercial Surrogacy as a new cause of statelessness

ICS has developed over the last decade in a largely unregulated manner, with particular supply-side growth located in States in Asia such as India, Thailand and Nepal.[4] Demand for ICS is flowing predominantly from 'commissioning parents' living in more developed States such as Australia, New Zealand, the United Kingdom of Great Britain and Northern Ireland (UK) and the United States of America.[5] The near-certainty of having a child, decreasing intercountry adoption options[6] and the desire of many 'commissioning parents' to have their own genetic child or a child who is at least genetically related to their partner make surrogacy attractive to such parents. The availability of practices unavailable in their countries of residence, lack of regulation in supply States and the low cost and relative speed further make ICS appealing.

European Court of Human Rights' first international commercial surrogacy judgments", European Human Rights Law Review 2014, Vol. 6, p. 638-646.

4 Although certain states in the United States of America (USA) are significant ICS suppliers and have been for much longer, they are not covered in this chapter since children born in the USA through ICS always receive US nationality as a result of being born on US territory, so statelessness does not arise.

5 R. Deonandan, "Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy", Risk Management and Healthcare Policy 2015, Vol. 8, 111-119, p. 115. Australia is said to be emerging as the highest per capita user of international surrogacy: Chief Federal Magistrate J. Pascoe, "State of the Nation – Federal Circuit Court of Australia", Federal Judicial Scholarship 2014, Vol. 21.

6 J-F. Mignot, "L'adoption international dans le monde: les raisons du déclin", l'Institut national d'études démographiques Report No. 519, 2015.

Despite ICS being viewed by many prospective 'commissioning parents' as a panacea enabling them to have a child, in practice it is a complex procedure due to the involvement of multiple parties, ART techniques and processes, as well as its trans-boundary character. There is no international regulation of ICS and national laws remain patchy and piecemeal. Therefore ICS arrangements are often made in contexts with limited legal clarity and certainty regarding their ultimate outcome. Pre-existing State level surrogacy laws are often formulated with a view to domestic surrogacy only; in many States such legislation outlaws commercial surrogacy and is silent on international surrogacy. While States take diverse approaches in relation to domestic surrogacy, provisions on this subject fall largely into three categories, namely: prohibitive (all forms of surrogacy are illegal); limitedly permissive (surrogacy is allowed in some situations, limited for example to altruistic surrogacy and situations of medical necessity); or silent (says nothing about surrogacy and has no policy on surrogacy). Attempts by States to apply these laws to ICS lead to situations where national laws of the States involved conflict, or where the gaps in national laws make the situation unclear. In recent years a small number of States have adopted legislative measures explicitly addressing ICS and recognising it as a specific form of surrogacy. Some have established legislative bans on ICS within their territory;[7] others make clear that engaging in ICS amounts to a criminal offence, applying extraterritorially.[8] One rationale underlying such bans on ICS is the argument that ICS amounts to the sale of children and must be guarded against.

Within this context, ICS has emerged as one of the newest causes of statelessness in the twenty-first century. Smerdon observes that "[i]nternational surrogacy arrangements have created paradoxical situations of 'legal orphanhood' where highly desired surrogate babies with arguably multiple parents are not recognized by either the child's country of birth or the country of the child's commissioning parent(s)".[9] 'Commissioning parents' may enter into ICS arrangements without comprehending the risk of statelessness for a future child. The complications surrounding the child's ability to acquire a nationality are inherently related to their relationship with their various biological and 'commissioning' parents, which may include all those involved with the child's conception and/or birth as a 'commissioning parent', surrogate mother, or gamete donor. A child born through ICS may face difficulties in acquiring nationality in a number of ways. As the three scenarios discussed below show,

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7 See, e.g. Thailand's Protection for Children Born through Assisted Reproductive Technologies Act 2015, http://www.senate.go.th/bill/bk_data/73-3.pdf; for a detailed overview of the Act, see S. Umeda, Thailand: New Surrogacy Law, Library of Congress, 6 April 2015, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404368_text.

8 See e.g. New South Wales (Australia) Surrogacy Act 2010 (2010 No. 102), Sections 8 and 11.

9 U.R. Smerdon, "Birth registration and citizenship rights of surrogate babies born in India", Contemporary South Asia 2012, Vol. 20(3), p. 341.

the risk of statelessness for children born through ICS depends on the positions on surrogacy of the birth State, the States of nationality of 'commissioning parents' and the nationality and parentage laws applicable in those States.

2.2.1 *Scenario one: Lack of recognition of the child's parentage prevents nationality acquisition*

Statelessness can occur in ICS where the child's birth State does not grant nationality on a *jus soli* basis and the child is unable to acquire the nationality of either the 'commissioning parents' or their surrogate, as none are recognised as the child's legal parent(s). This scenario can arise when there is confusion regarding who the child's birth State recognises as a legal parent of the child, and the 'commissioning parents'' State does not recognise them as the child's legal parents, leading to no one being recognised as the child's legal parent(s). A child can also become stateless under scenario one when the 'commissioning parents'' State of nationality requires the child to have a genetic link to at least one of the 'commissioning parents' to receive that State's nationality, but DNA tests are negative.

Scenario one can also arise in instances where the surrogate is not a national of the child's birth State, but a third-country national; for example, until recently, ICS was permitted in Nepal in instances where the surrogate was not a Nepalese national (but, for example, an Indian national).[10] In such situations, given that Nepal grants nationality *jus sanguinis*, if the child is not recognised as a national by the 'commissioning parent's' State of nationality or the surrogate mother's State of nationality, the child will be stateless. Finally, under this first scenario statelessness can occur when the child's birth State introduces a temporary or permanent prohibition on ICS within that State without clarifying the legal status of children currently *in utero* through an ICS arrangement, or children born in the State through ICS following the imposition of such a ban (as arose in Nepal in 2015[11]).

10 Following a Cabinet decision by the Nepalese Government on 18 September 2014, ICS was allowed in Nepal but prohibited the involvement of Nepalese women as surrogates, the donation of gametes by Nepalese citizens, and also prohibited the use of surrogacy services by Nepalese citizens. See R. Parajuli, Surrogacy in Nepal: Threat to reproductive right, The Himalayan Times, 18 August 2015, http://thehimalayantimes.com/opinion/surrogacy-in-nepal-threat-to-reproductive-right. However, following a decision by the Nepal Supreme Court on 18 September 2015, international surrogacy in Nepal is now prohibited. See, Embassy of the United States, Kathmandu, Nepal, Surrogacy in Nepal, 14 June 2016, http://nepal.usembassy.gov/service/surrogacy-in-nepal.html.

11 L. Kerin, Australian dad pleads for Government help after twin babies stranded in Nepal, Australian Broadcasting Corporation (ABC) News, 21 October 2015, http://www.abc.net.au/news/2015-10-21/australian-twin-babies-stranded-in-nepal/6871840 .

2.2.2 *Scenario two: Application of conflicting nationality and parentage laws by child's birth State and 'commissioning parents'' State of nationality*

The second scenario in which children conceived and born through ICS can end up stateless appears, in practice, to be more common than that discussed in scenario one. Here, children are unable to acquire a nationality following their birth due to national laws and policies of the child's birth State regarding the status of children, parentage and nationality conflicting with those applied by their 'commissioning parents'' State of nationality.

The initial factor leading to children being rendered stateless in this scenario is that their birth State does not view children born through ICS within that State as nationals, given that under its laws, they are the legal children of their 'commissioning parents' and therefore regarded as nationals of their 'commissioning parents'' State of nationality. Such States do not recognise the child's surrogate mother (and her partner, if she has one) as the child's legal parents and one or both 'commissioning parents' are listed as the child's parents on any birth registration document issued by the child's birth State. This is the case, for example, in Ukraine[12] and in India.[13] Children born through ICS in Ukraine are not able to acquire Ukrainian nationality,[14] and in India such children are usually precluded from acquiring Indian nationality on the basis of their birth through ICS to foreign 'commissioning parents'.[15]

The second part of the recipe leading to child statelessness in this scenario is that the 'commissioning parents'' State of nationality takes the position that the child is not one of its nationals either. This may be because the 'commissioning parents'' State of nationality confers nationality on the basis of *jus soli* or places limitations on the transfer of nationality to children born abroad, and/or because the national law of the 'commissioning parent's' State of

12 Ukrainian law views the commissioning parents as the child's legal parents in surrogacy situations. See, Family Code of Ukraine 2004, Art. 123(2) and 139(2).

13 Indian Council of Medical Research and National Academy of Medical Sciences, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005, para. 3.5.4 states that "the birth certificate shall be in the name of the genetic parents". However, the National Guidelines do not have binding force of law in India.

14 Law on Citizenship of Ukraine 2001, Art. 7 states that "a person, whose parents or one of the parents were citizens of Ukraine at the time of his/her birth is a citizen of Ukraine". When combined with the provisions of the Family Code of Ukraine 2004, *supra* n 12, this means children born through ICS in Ukraine are unable to acquire Ukrainian nationality as they are not viewed as having a Ukrainian parent.

15 This has been the clear position taken by the Indian Government, e.g. in proceedings in the on-going case Supreme Court of India, Civil Appeal No. 8714, *Union of India and ANR v. Jan Balaz and others*, 2010. However, it is worth noting the wording of India's Citizenship Act 1955 section 3(c), which states that every person born in India shall be a citizen of India by birth where "(i) both of his parents are citizens of India; or (ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth". Smerdon, *supra* n9, p. 345 observes that "the law remains unclear as to whether a child born to an Indian surrogate is a citizen of India".

nationality (and/or residence) concerning the status of children views the child's surrogate and her partner (if she has one) as the child's legal parent(s).

A number of cases illustrate scenario two. A leading case is that of the Balaz twins who were born in India to an Indian surrogate mother on 4 January 2008 and were stateless from birth.[16] The twins are the genetic children of their 'commissioning father', Jan Balaz, and an anonymous third-party Indian egg donor.[17] Their 'commissioning mother', Susannne Lohle (married to Mr Balaz) is not genetically related to the twins. Mr Balaz and Ms Lohle are both German citizens, and initially sought to gain German visas for the twins to enter Germany, but the applications were rejected.[18] Subsequently these 'commissioning parents' sought Indian citizenship for the twins. However, India viewed the 'commissioning parents' as the twins' legal parents; without an Indian citizen parent they were unable to acquire Indian nationality.

Almost two years after the twins' birth, the High Court of Gujarat ruled that because the twins were born in India to an Indian surrogate mother, they could be regarded as having one Indian citizen parent and were entitled to Indian citizenship under section 3(1)(c)(ii) of the Citizenship Act.[19] The Court further held the twins were entitled to Indian passports, as denying them passports would not fall within the grounds of refusal of passports under the Indian Passports Act.[20] However, the twins' statelessness persisted because the Indian government continued to take the position in subsequent Supreme Court proceedings that the 'commissioning parents' were the legal parents and therefore the twins could not acquire Indian nationality.[21] Following protracted attempts by the 'commissioning parents' to leave India with the twins (during which time the German government took a hard-line approach, in line with the German prohibition on surrogacy),[22] an *ad hoc* solution was

16 High Court of Gujarat at Ahmemebad, Letters Patent Appeal No. 2151, 2009 in Special Civil Application No. 3020, 2008 with Civil Application No. 11364 Of 2009 in Letters Patent Appeal No. 2151, 2009 with Special Civil Application No. 3020, 2009, *Jan Balaz v. Anand Municipality and ANR,* 2009, para. 3.

17 *Ibid.*, para. 2.

18 As surrogacy is illegal in Germany: Embryonenschutzgesetz 1990 (Act on the Protection of Embryos, Germany), section (1)(1)(7).

19 *Jan Balaz v. Anand Municipality and ANR*, *supra* n16, para. 17.

20 *Ibid., para.* 17-18. In para. 22, the Court held that "[w]e, in the present legal frame-work, have no other go [sic] but to hold that the babies born in India to the gestational surrogate are citizens of this country and therefore, entitled to get the passports".

21 Smerdon, *supra* n9, p. 347.

22 See, e.g. the comments of the then German Ambassador to India, Thomas Mataussek in K. Schoch, Deutschland verweigert indischer Leihmutter die Einreise, Sudwest Presse, 4 March 2010, http://www.swp.de/ulm/nachrichten/politik/Deutschlandverweigert-indischer-Leihmutter-dieEinreise;art4306,389187 See also the comment by Ambassador Mataussek regarding the possibility of granting the twins a German entry visa: "We have to be very careful. We don't want to set a precedent […] We don't want to encourage people to go down this path. This is not the way to put children into the world." Reported in R. Bhat-

reached, enabling the intercountry adoption of the twins by the 'commissioning parents'.[23] Exit documentation was then issued by the Indian government, along with a one-off German entry visa.[24]

Three other cases similar in nature to the Balaz case and falling under scenario two demonstrate the contexts in which measures are needed to avoid statelessness in ICS. The Volden twins were stateless from their birth in India on 24 January 2010,[25] resulting from an ICS arrangement commissioned by a single Norwegian woman using an anonymous Danish sperm donor and anonymous Indian egg donor.[26] They remained stateless in India for over a year given the Indian position on legal parentage and nationality in ICS, combined with the Norwegian legal position that the twins were not Norwegian nationals given their birth to an Indian mother in India[27] and the fact that surrogacy is not permitted in Norway.[28] It was not until 15 March 2011 that Norwegian immigration authorities decided, on an exceptional basis, that they could enter and reside in Norway.[29] In May 2011 a Norwegian court granted the twins' 'commissioning mother' guardianship of the twins, including financial and legal responsibility, but did not recognise her as the twins' legal mother. As a result the twins did not acquire nationality at this point and therefore remained stateless in Norway.[30] The case of *X and Y (Foreign*

nagar, Germany might consider visas for surrogate twins, DNA India News, 5 January 2010, http://www.dnaindia.com/india/report-germany-might-consider-visas-for-surrogate-twins-1331021.

23 A. Malhotra and R. Malhotra, "All Aboard For the Fertility Express", Commonwealth Law Bulletin 2012, Vol. 38(1), p. 33.

24 Smerdon, *supra* n9, p. 351 If the twins' intercountry adoption was fully concluded, it can be assumed the twins acquired German nationality through this process; however, no evidence is publicly available confirming that this occurred. Proceedings in the Supreme Court of India remain pending in this case, with the Court yet to rule on the substantive issue of the acquisition of a nationality by children born through ICS in India: http://supremecourtofindia.nic.in/clist_bm/2012/bm_dl25022015.pdf, case 101.

25 S. Lysvold et al., Kari Ann Volden får komme hjem, Norsk rikskringkasting (NRK), 16 April 2011, http://www.nrk.no/nordland/kari-ann-volden-far-komme-hjem-1.7596488.

26 D. Deomampo, "Defining Parents, Making Citizens: Nationality and Citizenship in Transnational Surrogacy", Medical Anthropology 2014, Vol. 34(3), p. 14, n. 5.

27 M. Melhuus, Problems of Conception: Issues of Law, Biotechnology, Individuals and Kinship, Berghahn Books 2012, p. 84. Norway regarded the twins' Indian birth mother as their legal mother, applying Norway's Children Act 1981 (Act No. 7 of 8 April 1981), section 2. Also relevant is Norway's Act on Biotechnology 2003 (Act No. 100 of 5 December 2003), sections 2-15, the effect of which is that it is prohibited to implant embryos into a woman other than the egg donor herself.

28 See Norwegian Government, Surrogacy, 23 January 2015, https://www.regjeringen.no/en/topics/families-and-children/innsiktsartikler/surrogate-maternity/id660199.

29 Lysvold et al., *supra* n25.

30 B. Johansen and B.M. Pettersen, Volden får beholde tvillingene, NRK, 7 May 2011, http://www.nrk.no/nordland/volden-far-beholde-tvillingene-1.7622605. It remains unreported whether or not the twins were adopted or acquired Norwegian nationality.

Surrogacy)[31] concerned twins born stateless in Ukraine, commissioned by British 'commissioning parents' using the 'commissioning father's' sperm and anonymous donor eggs.[32] The twins' statelessness occurred given the application and subsequent conflict of the Ukrainian and UK legal regimes relating to surrogacy and nationality.[33] UK law viewed the twins as Ukrainian nationals with their legal parents being their birth mother and her partner,[34] while Ukrainian law stipulates that children born through surrogacy in Ukraine are the legal children of their 'commissioning parents' and therefore not entitled to Ukrainian nationality.[35] The twins were only able to leave Ukraine and enter the UK due to the UK granting them discretionary leave to enter for one year under exceptional circumstances following DNA tests proving the existence of a genetic link between the twins and their 'commissioning father',[36] however, even once the twins had entered the UK and their 'commissioning parents'' had been granted a parental order under UK law, they remained stateless.[37] Finally in relation to scenario two, Samuel Ghilain was born in Ukraine on 28 November 2008[38] through an ICS arrangement commissioned by a Belgian same-sex couple using the sperm of one 'commissioning father' and anonymous donor eggs.[39] Given the application of Belgian and Ukrainian laws, Samuel was born stateless,[40] stranded in Ukraine for over

31 UK High Court of Justice Family Division, Case No. FD08P01466, *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

32 *Ibid.*, para. 4.

33 E. Nelson, "Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy", The Journal of Law, Medicine and Ethics 2013, Vol. 41(1), p. 246; L. Theis, N. Gamble and L. Gheavaert, "Re X and Y (Foreign Surrogacy): 'A Trek Through a Thorn Forest'", Family Law, March 2009, p. 239.

34 UK, Human Fertilisation and Embryology Act 1990, 1990 c. 37, section 27 defines the mother as "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs".

35 Mr. Justice Hedley was explicit about the twins' statelessness, summarising the effect of the application of these conflicting laws to the twins as meaning that they "were effectively legal orphans and, more seriously, stateless". *X & Y (Foreign Surrogacy)*, *supra* n31, para. 9.

36 *Ibid.,* para. 10.

37 Mr Justice Hedley noted that "the grant of a parental order does not of itself confer citizenship although the evidence suggests that it is very unlikely to be denied if sought." *Ibid*.

38 Associated Press, Baby, stranded in Ukraine, to join Belgian parents, Fox News, 21 February 2011, http://www.foxnews.com/world/2011/02/21/baby-stranded-ukraine-join-belgian-parents-1916799428.

39 I.G. Cohen, Patients with Passports: Medical Tourism, Law and Ethics, Oxford University Press 2014, p. 376.

40 T. Lin, "Born Lost: Stateless Children in International Surrogacy Arrangements", Cardozo Journal of International and Comparative Law 2013, Vol. 21, p. 547 explains "Because Belgian law is silent on the legality of surrogacy, the Belgian government denied Samuel citizenship on the grounds that it had no legal basis to recognise the Ukrainian birth certificate, despite the fact that Samuel's biological father is a Belgian citizen. Samuel also could not be a Ukrainian citizen because Ukrainian law recognises the intended parents as the child's legal parents."

two years, finally acquiring Belgian nationality after protracted legal proceedings.[41]

2.2.3 Scenario three: Children abandoned by commissioning parents

The third scenario whereby children conceived and born through ICS are stateless is when they are abandoned in their birth State by their 'commissioning parents'. In this scenario, ICS arrangements are not completed due to 'commissioning parent(s)' deciding they do not want to parent the child they commissioned. Abandonment may occur either during the pregnancy or following the child's birth. If a child is abandoned by their 'commissioning parents' following birth in a State where they are unable to acquire nationality due to nationality laws based on *jus sanguinis* and the view that the 'commissioning parents' are the child's legal parents, they are likely stateless and parentless.

Examples of this third scenario of child statelessness in ICS are more difficult to detect than those falling under scenario two, given that without 'commissioning parents' involved, they may be less likely to come before national courts for resolution; moreover, cases falling under scenario three may not come to the attention of the authorities in either the child's State of birth or the 'commissioning parents'' State of nationality and/or residence at all. However, one case reported by the media involved a child abandoned in India by Australian 'commissioning parents'. In this case, following the birth of twins – a boy and a girl – their 'commissioning parents' decided they only wanted to take the girl home to Australia. As they already had a son, the girl would complete their family and they could not afford to support both the twins.[42] The Australian government warned the 'commissioning parents' that the boy could be left stateless if they did not apply for Australian citizenship for him[43] (given the application and effect of Indian and Australian laws concerning nationality and parentage in ICS situations). However, the 'com-

41 D. Melvin, Boy stuck 2 years in Ukraine arrives in Belgium, The Washington Post, 26 February 2011, http://www.washingtonpost.com/wpdyn/content/article/2011/02/26/AR2011022601088.html. The Brussels Court of First Instance formally recognised the genetic link between Samuel and one of his 'commissioning fathers', see ,C. Kindregan and D. White, "International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements", Suffolk Transnational Law Review 2013, Vol. 36(3), p. 617. The Belgian government complied with the judgment, granting Samuel a passport, see, Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation, Steven Vanackere – surrogate motherhood, 18 February 2011, http://diplomatie.belgium.be/en/Newsroom/news/press_releases/foreign_affairs/2011/02/ni_1802110_vanackere_surrogate_motherhood.

42 J. Ireland, Fresh surrogacy concerns over boy abandoned in India, Sydney Morning Herald, 14 April 2015, http://www.smh.com.au/federal-politics/political-news/fresh-surrogacy-concerns-over-boy-abandoned-in-india-20150414-1mjyj3.html.

43 *Ibid.*

missioning parents' took no such action and the boy was left stateless and parentless in India.[44]

2.3 Key findings distilled from the three ICS child statelessness scenarios and associated cases

The three scenarios and associated cases discussed above highlight the contexts within which child statelessness can arise in ICS. They show that children conceived and born through ICS may face difficulties securing a nationality following birth in a number of ways which connect to gaps and conflicts in national laws in ICS supply and demand States relating to legal parentage and nationality and the available modes of nationality acquisition. Indeed, child statelessness in ICS is often linked to challenges faced by the child regarding legal recognition of their parentage. The cases discussed show that when a conflict between parentage laws of the various States involved in an ICS arrangement occurs, the child is likely to be without legal parentage for a time. This in turn impacts on children's ability to acquire a nationality if they are born in a State which does not allow nationality acquisition by *jus soli*. However, the cases also highlight that even if legal parentage is established in ICS cases, this does not automatically lead to nationality for the child. Therefore, while there are strong connections between parentage and nationality issues in ICS cases, legal recognition of parentage does not always lead to a child gaining nationality.

The scenarios discussed illustrate the non-existence in many jurisdictions of domestic legislation and policy explicitly designed to apply to ICS situations. In the majority of States, no national laws have been adopted explicitly addressing ICS situations, including issues such as the child's nationality when conceived and born through ICS. Therefore, many States are attempting to fill a legal vacuum by applying domestic laws which legislators did not envisage applying to ICS situations. The three scenarios also bring into sharp relief the gaps at the international level regarding ICS. No international law explicitly addresses or regulates ICS, and to date no international agreements have been reached between States regarding the practice.

The cases are further significant given that they are representative of the reality that when statelessness occurs in ICS situations, it occurs from birth. As de Groot observes, birth is a key moment for children regarding nationality: "[t]he pivotal juncture in guaranteeing a person's right to a nationality is the moment of birth. If a child does not secure a nationality at birth, he or she

44 S. Hawley, S. Smith and M. McKinnon, India surrogacy case: Documents show New South Wales couple abandoned baby boy despite warnings, ABC News, 13 April 2015, http://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206.

may be left stateless for many years, or even a lifetime – with severe consequences."[45] The cases also highlight the wide range of factual variances in ICS situations: no ICS arrangement is exactly the same as another, given factors such as the States involved and therefore which national laws apply, whether or not the States have clear positions on nationality of children in ICS, and the status of the 'commissioning parents' both in relation to each other (heterosexual married; heterosexual unmarried; same-sex) and whether or not a commissioning parent shares a genetic link with the child.

2.3.1 Examining the wider child rights impacts of child statelessness in ICS

Significant findings relating to the wider child rights impacts of statelessness in ICS can be identified based on the outcomes in the cases discussed above. The first is that in all the cases, the actions taken by the States involved were inconsistent with the principle of the best interests of the child. Moreover, in all the cases, the children were arguably discriminated against on the basis of their birth status tied to their birth through ICS given (in many instances) the uncertain nature of ICS under national law, with this status being the basis for decisions leading to their statelessness.

A further finding regarding the child rights consequences highlighted by these cases is that nationality is important to access many of other rights guaranteed to all children by the CRC given the interlocking and interdependent nature of rights. As de Groot notes, "Childhood statelessness threatens access to education, an adequate standard of living, social assistance, health care and other specific forms of protection to which children are entitled".[46] As a result of their statelessness, the children's freedom of movement outside their State of birth was restricted in all the cases discussed. Statelessness also meant all of the children had a highly uncertain legal status (in some cases for years), and were unable to gain social security and the State support services that they would have been entitled to from their birth State if they were recognised as nationals. Mr Justice Hedley noted in the case of *X and Y (Foreign Surrogacy)* that "the children had no rights of residence in or citizenship of the Ukraine and there was no obligation owed them by the state other than to accommodate them as an act of basic humanity in a state orphanage".[47]

Another result of statelessness in ICS evident in the cases discussed is that this sometimes leads to the children being separated from their 'commissioning parents' and prevented from having a relationship with the very people who are often the only adults wanting to parent the children. The Balaz twins were

45 G.R. de Groot, "Children, their right to a nationality and child statelessness", in A. Edwards and L. van Waas (eds), Nationality and Statelessness under International Law, Cambridge University Press 2014, p. 144.

46 *Ibid.*

47 *X & Y (Foreign Surrogacy), supra* n31, para. 8.

separated from their 'commissioning mother'[48] and in the judgment of *X and Y (Foreign Surrogacy)* it was observed that the twins "were marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children home".[49] Both Samuel Ghilain's 'commissioning parents' were unable to remain in Ukraine, and he was initially placed with a foster family. Later, when they were unable to continue to finance this care he was placed in an orphanage for a year.[50] If we are to view the child's 'commissioning parents' as the child's parents, being separated in this way impacts on the child's right under Article 7 of the CRC to know and be cared for by his or her parents as far as possible.

A final child rights impact illustrated by the cases discussed is that such children are at risk of being trafficked or becoming the subject of illegal cross-border movement. While the risk from third parties should not be underestimated, in several cases 'commissioning parents' themselves have taken desperate measures in their attempts to secure the child's exit from their birth State and entry into their intended State of residence. Samuel Ghilain's 'commissioning parents' made a (failed) attempt to smuggle him out of Ukraine in March 2010[51] and the Volden twins' 'commissioning mother' falsified an adoption application to the Norwegian government.[52]

The fact that children are stateless as a result of their birth through ICS means that their rights under international law are being breached; the next section focuses on the standards and norms under international law governing the child's right to acquire a nationality, which help inform how we can secure the child's right to nationality in ICS.

48 Relief for German surrogate twins, The Times of India, 17 March 2010, http://www.timesnow.tv/Relief-for-German-surrogate-twins/articleshow/4340782.cms. While it is unclear why the twins' 'commissioning mother' did not stay in India with them, the practical reality in such situations is that financially it may be untenable to remain away from home and work for extended periods of time, or travel visas to remain in the child's State of birth may expire.

49 *X & Y (Foreign Surrogacy), supra* n8, para. 10.

50 Baby, stranded in Ukraine, to join Belgian parents, *supra* n38.

51 *Ibid.* The abduction or trafficking of children is prohibited under international law see, e.g. CRC, *supra* n1, Art. 36.

52 C. Kroløkke, "From India with Love: Troublesome Citizens of Fertility Travel", Cultural Politics 2012, Vol. 8(2), p. 318.

3 INTERNATIONAL LAW GOVERNING THE CHILD'S RIGHT TO ACQUIRE A NATIONALITY

3.1 General nationality provisions and nationality provisions pertaining specifically to children

Article 15(1) of the Universal Declaration of Human Rights (UDHR)[53] establishes the right to nationality as a universal right; Article 15(2) further states that no one shall be arbitrarily deprived of nationality. Subsequent international human rights law instruments have confirmed and elaborated on Article 15 of the UDHR with specific reference to children. Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) asserts that "every child has the right to acquire a nationality";[54] Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that "Each child of a migrant worker shall have the right to […] a nationality".[55] Regional human rights instruments also recognise the right of the child to a nationality, with the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child guaranteeing nationality to children on a *jus soli* basis where they would otherwise be stateless.[56]

The CRC also addresses the child's right to nationality. Article 7(1) restates the right of the child to acquire a nationality, alongside the right to, as far as possible, know and be cared for by his or her parents, and stipulates that the child "shall be registered immediately after birth". Importantly, Article 7(2) is directed towards guarding against statelessness, requiring States Parties to "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".

Two of the central principles of the CRC are important to note regarding the child's right to nationality insofar as they colour how the child's rights should be interpreted and implemented. Article 2 establishes the principle

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53 Universal Declaration of Human Rights, 10 December 1948, Adopted and proclaimed by General Assembly resolution 217 A (III), Art. 15.

54 International Covenant on Civil and Political Rights, 16 December 1966, entry into force 23 March 1976, 999 UNTS 171, Art. 24(3).

55 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, entry into force 1 July 3002, A/RES/45/158, Art. 29.

56 American Convention on Human Rights, 22 November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36, Art. 20; African Charter on the Rights and Welfare of the Child, 11 July 1990, entry into force 229 November 1999, OA DOC. CAB/LEG/24.9.49, Art. 4 and 6(3). In Europe, European Convention on Nationality, 6 November 1997, entry into force 1 March 2000, ETS 166, Art. 6(2) requires States Parties to provide under their domestic law for nationality to be acquired by children born on its territory who do not acquire another nationality at birth.

of non-discrimination, with the inclusion of 'birth or other status' in Article 2(1) providing scope for the application of this provision to ICS situations. The 'best interests of the child' principle enshrined in Article 3(1) of the CRC, establishes that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". De Groot notes that "the almost universal ratification of the CRC suggests that an otherwise stateless child should acquire the nationality of the country of birth immediately at birth or as soon as possible thereafter".[57] This is also reflected in the Dakar Conclusions which are based on the idea that from the moment of their birth it will never be in the child's best interests to be stateless given the adverse associated consequences.[58] Applying the principle of the best interests of the child to children seeking to acquire nationality in ICS when they would otherwise be stateless means that in making decisions regarding whether or not a child can acquire a particular nationality, the best interests of the child should be a primary consideration.[59]

3.2 Key provisions in the Statelessness Conventions

While the 1930 Hague Convention on certain questions relating to the conflict of nationality laws (1930 Hague Convention) asserts that "[i]t is for each state to determine under its own law who are its nationals"[60] and that "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State",[61] as indicated above, subsequent international human rights law instruments have imposed limits and obligations in relation to the freedom of States in this regard. A number of limits on a State's discretion in nationality matters exist, "derived either from general principles, custom or treaty obligations include: (i) the prohibition on the arbitrary deprivation of nationality; (ii) non-discrimination in nationality matters; and (iii) the duty to avoid statelessness".[62] The Convention on the Reduction of Statelessness (1961 Convention)[63] aims to give effect to the universal right to nationality and the customary norm that statelessness

57 de Groot, *supra* n45, p. 150.

58 UNHCR, Expert Meeting – Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children ('Dakar Conclusions'), September 2011, para. 5.

59 The importance of the best interests of the child to such cases was discussed by the European Court of Human Rights in *Mennesson v. France*, *supra* n3. This is discussed further in section 4.3.1 of this chapter.

60 Convention on Certain Questions Relating to the Conflict of Nationality Laws, 13 April 2013, League of Nations Treaty Series vol 179, p.89, No. 4137, Art. 1.

61 *Ibid*., Art. 2.

62 Edwards, *supra* n2, p. 25.

63 Convention on the Reduction of Statelessness, 30 August 1961, entry into force 13 December 1975, 989 UNTS 175.

should be avoided. It sets out a framework codifying the norms and standards relating to the conferral of nationality and limiting or eliminating circumstances in which the operation of national laws may result in statelessness.

The provisions of the 1961 Convention most relevant to ICS situations are those dealing with the prevention of statelessness at birth. Article 1(1) of the 1961 Convention sets out a clear primary safeguard integral to the prevention of statelessness at birth: "[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless". Applying this principle to the ICS context means that birth States of children conceived and born through ICS should, in situations where the child would otherwise be stateless, grant the child nationality. Therefore, Article 1(1) is potentially a very powerful tool in the ICS context. The 1961 Convention stipulates that such a grant of nationality can occur at birth[64] or later as a result of an application lodged on behalf of the child.[65] However, to avoid statelessness in ICS situations, ideally a grant needs to occur at or soon after the child's birth. If the child is able to leave their State of birth prior to acquiring a nationality (i.e. if the 'commissioning parents'' home State grants the child entry but not nationality), statelessness will not be avoided. States must, therefore, pay close attention to implementing the requirement under the CRC that nationality should be able to be acquired immediately after birth.

Although Article 1(1) of the 1961 Convention offers a potentially powerful mechanism to prevent statelessness in ICS situations, it is dependent on ICS supply States which are States Parties to the 1961 Convention and implementing this obligation, or on ICS supply States adopting this protection even though they are not Parties to the Convention. Currently, some of these States are not States Parties to the 1961 Convention.[66] However, Article 1(1) of the 1961 Convention should be viewed as codifying an important aspect of the customary norm that statelessness should be prevented; non-Contracting States to the 1961 Convention should be encouraged, in situations where a child would otherwise be stateless – including in ICS situations – to apply the safeguard established in Article 1(1), to implement their duty to prevent statelessness and secure the universal right to nationality. Such an approach is consistent with Articles 7(1) and 7(2) of the CRC.

Beyond the safeguard established by Article 1(1), the 1961 Convention incorporates further provisions directed at ensuring that no one falls through the cracks when it comes to nationality. Article 4(1) establishes that "[a] Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality

64 *Ibid*., Art. 1(1).

65 *Ibid.,* Art. 1(b).

66 For the current list of signatories and parties to the Convention on the Reduction of Statelessness see, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en.

of one of his parents at the time of the person's birth was that of that state". Article 1(4) codifies another relevant safeguard: "[a] Contracting State shall give its nationality to a person, otherwise stateless, who is legally precluded from assuming his/her birth nationality, where that State's nationality was held by either parent at the time of the birth". Both Article 4(1) and Article 1(4) rely on children securing the nationality of the State of one of their parents. The application of these safeguards to children who are otherwise stateless in ICS situations may therefore be problematic, since these provisions would require proof of the connection between the child and a parent in order for the child to benefit from their protection. The 1961 Convention does not envisage the possibility of a lack of clarity or agreement regarding the child's parentage through situations such as ICS; however, as discussed earlier in this chapter, when born through ICS, children may have multiple potential parents and may not be genetically related to their 'commissioning parents'. Therefore, while it is the child's 'commissioning parents' who in most ICS cases seek recognition as the child's legal parents and try to secure the child the same nationality as their own, it might be difficult to establish that the 'commissioning parents' should be recognised as the child's parents. This raises a potential hurdle to applying the safeguards of Articles 4(1) or 1(4) of the 1961 Convention to children born through ICS who are otherwise stateless.

4 Securing the Child's Right to Nationality in ICS

4.1 The limitations of the solutions applied in the cases discussed

The actions and inaction of the States involved in the cases discussed in this chapter suggest that solving statelessness and preventing it in the three scenarios discussed in section two is not currently a priority among States. This is despite the acute risk of statelessness for children conceived and born through ICS in States where they will not automatically receive nationality on the basis of *jus soli*. Solving this problem is dependent on States being willing to take steps to prevent statelessness for children born through ICS. On the supply-side of ICS, States may be hesitant to take on the perceived burden of granting nationality to children born through ICS in their territory who would otherwise be stateless, given the potential costs involved and its associated politically unpalatable nature. However, under the customary international norm that statelessness is to be avoided, all States have a responsibility to give effect to the right to nationality. In this context it should be noted that neither India nor Ukraine have a general safeguard in their nationality law ensuring the right to nationality of otherwise stateless children born in the State. India's long-awaited legislation regarding ICS continues to languish in the Indian parliamentary system, the contents of the latest draft of the Assisted Reproduct-

ive Technology (Regulation) Bill (2013) remain publically unknown.[67] However, earlier drafts have not included provisions relating to the child's nationality.

With respect to States on the demand-side of ICS, there are a number of implications for nationality policy and legislation stemming from some of the cases discussed in this chapter. However, the responses of these States to the cases do not indicate a willingness to take a prevention approach to statelessness in ICS situations.

The Committee on the Rights of the Child asked the German government to "provide measures taken by the State party to address the rights of children residing in the State party territory but whose surrogate mothers are not from the State party […] please provide information on measures to prevent children in such situations from becoming Stateless".[68] Germany responded by outlining that pursuant to Section 4(1) of the Nationality Act, children attain German citizenship by birth when one parent is a German national and that on the basis of Section 1591 of the Civil Code, the mother of a child is always the woman who bore the child; moreover Section 1592(1) establishes the child's father is the mother's husband (at the time of the child's birth). Germany said "In order to derive a claim to German citizenship from a (German) sperm donor, it is not sufficient to simply determine biological paternity by submitting a DNA analysis, parentage must be determined in the legal sense",[69] and that "Even if a child born in a foreign country to a surrogate mother generally does not attain the genetic father's (German) citizenship by birth, it is still not stateless, since as a rule, it at least attains the mother's citizenship".[70] Germany's response is problematic, failing to address the reality of the situation in the Jan Balaz case, since States such as India do not recognise the surrogate mother as the child's legal mother and therefore do not grant nationality on the basis of a *jus sanguinis* relationship with the surrogate mother, leaving the child stateless. Unfortunately, the Committee on the Rights of the Child's Concluding Observations did not follow-up on this issue.[71]

The case of the Volden twins triggered public debate in Norway regarding ICS and new family forms facilitated by ART. Human rights lawyer Gro Hillestad Thune argued that by rejecting Ms. Volden's adoption application Norway

67 A. Malhotra, Ending discrimination in surrogacy laws, The Hindu, 3 May 2014, http://www.thehindu.com/opinion/op-ed/ending-discrimination-in-surrogacy-laws/article5970609.ece. The most recent publicly available version of Bill is the 2010 version: http://icmr.nic.in/guide/ART REGULATION Draft Bill1.pdf.

68 Committee on the Rights of the Child, List of issues in relation to the combined third and fourth periodic reports of Germany, 23 December 2013, CRC/C/DEU/3-4, para. 7.

69 Committee on the Rights of the Child, List of issues in relation to the third and fourth periodic reports of Germany: Addendum, Replies of Germany to the list of issues, 23 December 2013, CRC/C/DEU/Q/3-4/Add.1, para. 43.

70 *Ibid.*, para. 45.

71 Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Germany, 25 February 2014, CRC/C/DEU/CO/3-4.

had inflicted statelessness on the twins, in breach of international law.[72] She further criticised the government for attaching little weight to the children's rights and interests, noting that the children themselves did not ask to be born.[73] However, Budfir (Norwegian Directorate of Child Welfare and Adoption) said because of the commercial nature of the surrogacy arrangement, it fell under the international definition of sale of children[74] and approving the adoption would be inconsistent with the CRC. Budfir held the view that significant public interests outweighed the interests of the twins in the case and said rejecting the adoption application would set an example discouraging other prospective 'commissioning parents' from entering into ICS arrangements. Hillestad Thune argued that Bufdir was wrong to use the CRC to justify its decision rather than using it to protect child rights; she said the balance should have led to a decision ensuring that the children were placed in a safe situation as regards their care.[75]

Despite the position taken by the Norwegian government in the Volden case, Norway subsequently passed 'provisional' (temporary) legislation dealing directly with the nationality of children born through ICS with the involvement of Norwegian 'commissioning parents'. Article 5(a) was added to the Norwegian Nationality Act,[76] which refers to a provisional law passed at the same time pertaining to transfer of legal parenthood for children born abroad to surrogate mothers.[77] Article 5(a) has the effect that children born through ICS to a Norwegian 'commissioning parent' who are residing in Norway and whose legal parenthood is transferred to a Norwegian national automatically become Norwegian nationals (if the child is under 18 years at the date of the decision on legal parenthood). However, applications for transfer of legal parenthood under the temporary parenthood legislation had to be made by 01 January 2014.[78] The effect of these laws is therefore likely to have been quite limited in practice. Olsen notes "[t]he law was passed to secure the rights of children born by surrogate mothers before a more permanent legal solution is decided by the Norwegian Parliament. It is still unclear what a more perma-

72 N.M. Smith Rustad and G. Pettersen, Mener norske myndigheter gjør tvillinger statsløse, NRK, 23 March 2011, http://www.nrk.no/fordypning/statslose-tvillinger-1.7553860.

73 *Ibid.*

74 *Ibid*. See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 25 May 2000, entry into force 18 January 2002, Article 2(a).

75 Smith Rustad and Pettersen, *supra* n72.

76 Temporary amendment to the Norwegian Nationality Act (Lov om norsk statsborgerskap (statsborgerloven)) June 10 2005, passed by the Stortinget 8 March 2013.

77 Temporary law on the transfer of parenthood for children in Norway born through a surrogate mother abroad (Midlertidig lov om overføring av foreldreskap for barn i Norge født av surrogatmor i utlandet mv), passed by the Stortinget 8 March 2013.

78 *Ibid*., Art. 4.

nent solution may look like as surrogacy is at present not legal under Norwegian law".[79]

In the UK, in the years since *X & Y (Foreign Surrogacy)*, the UK government has issued policy guidance on nationality for children in ICS situations involving British 'commissioning parents'.[80] This makes clear that "[e]ven if the surrogate mother's home country sees the commissioning couple as the 'parents' and issues documentation to this effect, UK law and the Immigration Rules will not view them as 'parents'. Only where the surrogate mother is single is there a chance of UK law viewing the sperm donor/commissioning male as the legal 'father'".[81] Therefore, even in instances where 'commissioning parents' are named on birth certificates in the child's birth State, "a baby born to a foreign national surrogate mother who is married will not be automatically eligible for British nationality".[82] The guidance outlines a number of situations and the relevant steps which can be taken for the child to acquire British nationality.[83] Some of these envisage children entering the UK while they are stateless and subsequently having their legal parentage regularised through a parental order (under section 30 of the Human Fertilisation and Embryology Act 2008), with the possibility of applying for British nationality based on this recognition of the parent-child relationship. However, in instances where the child has no genetic link to a British 'commissioning parent', the guidance states that recognition of legal parentage in the UK will not be possible;[84] the child will not be able to acquire British nationality. This means that not all children born through ICS will have the possibility of acquiring nationality.

Finally, in Belgium the resolution of Samuel Ghilain's case did not trigger a discussion of the wider implications of the case. Given that the resolution to Samuel's statelessness was a passport issued under Ministerial discretion, it remains true that "the legal and nationality status of a child born abroad

79 E.D.H. Olsen, Update on 2012 and 2013 Revisions of Norwegian Citizenship Law: Procedural issues and citizenship for infants born abroad to surrogate mothers, Citizenship News, European Union Democracy Observatory on Citizenship, 12 January 2014, http://eudo-citizenship.eu/news/citizenship-news/1030-update-on-2012-and-2013-revisions-of-norwegian-citizenship-law-procedural-issues-and-citizenship-for-infants-born-abroad-to-surrogate-mothers.

80 See U.K. Foreign and Commonwealth Office, Surrogacy Overseas, June 2014 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324487/Surrogacy_overseas__updated_June_14_.pdf and U.K. Home Office, Inter-country Surrogacy and The Immigration Rules, 1 June 2009, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/261435/Intercountry-surrogacy-leaflet.pdf.

81 *Ibid.*, p. 2.

82 *Ibid.*, p. 2.

83 *Ibid.*, pp. 6-11.

84 *Ibid.*, para. 50 reads "If you know that neither of you will be able to provide any genetic material towards the creation of a child, you will not be able to commission a child under a surrogacy arrangement and then obtain a Section 30 Parental Order".

in a commercial surrogacy arrangement to a Belgian citizen is completely uncertain".[85]

4.2 Possible solutions to child statelessness in ICS

4.2.1 Jus soli based solutions

One possible solution to the challenge of securing the child's right to acquire a nationality in ICS is the implementation of the safeguard established by Article 1(1) of the 1961 Convention in conjunction with Article 7 CRC, by the birth States of such children. This means all children born through ICS in the territory of a State would acquire the nationality of that State at birth if they would otherwise be stateless, resulting in the outcome that no child is born stateless through ICS. This solution would ensure at least one State recognises the child as a national, avoiding discrimination on the basis of the child's birth status and resolving any conflict of domestic nationality laws. It would also ensure that children who have no genetic link to their 'commissioning parents' or who are abandoned by their 'commissioning parents' in ICS situations are not left without nationality as a result of their 'commissioning parents'' actions. As already indicated, to be fully effective in avoiding statelessness in ICS, this would need to be an automatic conferral of nationality at birth or soon after birth.

From a statelessness prevention perspective, this solution would mean all the instances of child statelessness in the cases discussed would have been avoided, enabling the children to secure their right to nationality under Article 7(1) CRC. Although not all States are States Parties to the 1961 Convention and therefore bound by its provisions, it is suggested that all States should implement Article 1(1) including for children born on their territory through ICS. Such a solution is consistent with the customary norm that statelessness should be avoided and that all States have a duty to give effect to the universal right to nationality.

However, there are some limitations to this first proposed solution. It centres on avoiding statelessness, and is therefore a solution founded on a safeguard rather than a positive recognition of the child's right to a nationality. More problematic is the underlying premise of all ICS arrangements that the 'commissioning parents' intend the child to reside with them. Therefore, the child's acquisition of the nationality of their birth State on a *jus soli* basis does not align with the intention upon which ICS arrangements are premised, and may have limited practical benefit and effect for children in ICS, other than preventing statelessness. Although the fact they have a nationality may enable

85 Kindregan and White, *supra* n41, p. 618.

them to gain a passport and travel to their 'commissioning parent's' State of nationality or residence, once in that State, given their foreign-national status, they may not have access in practice to social and health services, education and social security.[86] In such situations, the child will continue to be in a position of legal insecurity with consequent impact on his or her life and access to services, inconsistent with his or her best interests; ultimately, the child may not retain the right to reside in his or her 'commissioning parents'' State of nationality or residence after a certain duration or at a certain age, depending on applicable national laws.

Although this chapter has not discussed in detail the decision of the European Court of Human Rights (ECtHR) in the case of *Mennesson v. France*[87] because it did not involve child statelessness, in the search for solutions it is worth noting some key principles reflected in that judgment. The case dealt with twins who acquired US nationality at birth (as a result of the USA's *jus soli* law) but who were not recognised as nationals by France (their 'commissioning parents'' State of nationality), since surrogacy is illegal in France.[88] The Mennesson twins lived as foreign nationals in France for the first 15 years of their lives until the ECtHR decision was implemented in 2015.[89] The ECtHR found a violation of the twins' right to respect for private life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[90] Key elements of the judgment relating to the child's right to nationality and not to be stateless are:

- The child's right to identity is a central aspect of the right to respect for private life, and essential parts of this are legal parentage and nationality;[91]
- Uncertainty regarding the acquisition of the nationality of their State of residence, consistent with that of their 'commissioning parents' is likely to have a negative impact on children's ability to form their identity;[92]

86 This is what happened to the twins in the case of *Mennesson v. France* and *Labassee v. France* supra n3; the children involved in these cases were born through ICS in the USA in 2000 and 2001 and gained US nationality upon birth. However, France (their 'commissioning parent's' State of nationality) refused to register the children in France and recognise them as French nationals. The European Court of Human Rights found a violation of the children's right to respect for private life.

87 *Mennesson v. France*, *supra* n3.

88 *Ibid.,* para. 18-25.

89 For details of the implementation of the judgment by France, including the delivery of certificates of French nationality to the Mennesson twins see, http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=mennesson&StateCode=&SectionCode.

90 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, entry into force 3 September 1953, ETS 005.

91 *Mennesson v. France*, *supra* n3, para. 96-101.

92 *Ibid.,* para. 97.

- The existence of a biological (genetic) link between a child and a 'commissioning parent' is another important aspect of identity that should be recognised under law. Not to do so fails to reflect the reality of the child's situation and has a negative impact on the child's identity formation;[93] and
- The best interests of the child must be appropriately weighed and upheld.[94]

The ECtHR is clear that legal recognition of both nationality and legal parentage in the State in which children reside is likely to be in their best interests, even where surrogacy remains illegal in a given State. The ECtHR is therefore of the view that the acquisition of nationality on a *jus soli* basis is unlikely to be enough to give effect to the child's best interests under the CRC in ICS situations where the child is intended to reside and grow up in a different State.

However, it is important to recognise that this solution is likely to be consistent with the best interests of the child in instances of scenario three, where the child is abandoned by 'commissioning parents' in the State of birth either before or after birth through ICS. Given the uncertainty in scenario three situations regarding whether the 'commissioning parents' State of nationality will assume responsibility for the child's care and protection, it is likely to be in the children's best interests to acquire the nationality of the birth State, given that in the foreseeable future following their abandonment they will remain in and be reliant on that State to give effect to their rights under the CRC. Therefore, the first proposed solution – whilst having significant associated limitations – remains important to bear in mind for situations of child abandonment in ICS. It may also be relevant in situations where the child has no genetic link with the 'commissioning parents', as discussed below.

4.2.2 Jus sanguinis based solutions

An alternative approach which could overcome the limitations inherent in the first proposed solution is for the State of residence of the 'commissioning parents' (that is, the State they intend the child to live with them in) to grant the child nationality *jus sanguinis*, either pre-birth through a court order granting nationality prospectively in the event that the child is born, or after birth. This would not only result in the child being able to secure the right to a nationality, but the nationality acquired would be more aligned with best interests in terms of the child's lifetime outcomes. The acquisition of nationality *jus sanguinis* presupposes that the 'commissioning parents'' State of nationality recognises that a parent-child relationship exists between the child and at least

93 *Ibid.*, para. 100.
94 *Ibid.*, para. 99.

one of their 'commissioning parents'.[95] A pre-birth grant, contingent on the child's birth with a proven genetic link to a 'commissioning parent', is an attractive option as it would secure legal certainty for the child regarding nationality status. It has the benefit of putting the process of nationality acquisition in motion at the earliest possible stage (that is, prior to the child being born), making the acquisition of nationality a non-issue for the child once born (as long as a genetic link can be proved, so in practice, nationality would be acquired shortly after birth). However, securing the child's nationality *jus sanguinis* via a pre-birth grant contingent on a genetic link being proved post-birth may well be cumbersome to implement in practice. Additionally, this would be a completely new approach, outside the usual methods of nationality acquisition at birth.

A solution centring on a post-birth *jus sanguinis* grant of nationality may be more workable and sit more comfortably with existing legal norms regarding conferral of nationality. As previously mentioned, this has been the solution applied by some ICS demand States on an *ad hoc* basis to regularise the nationality status of children born through ICS in a foreign territory but who have entered and reside in their State. The Council of Europe (CoE) has also suggested this to avoid statelessness in international surrogacy.[96] Principle 12 of CoE Recommendation CM/Rec(2009)13 proposes that "[i]f the child-parent family relationship is recognised in the state of nationality of the commissioning mother or father the provisions of that state on the acquisition of nationality *jure sanguinis* have to be applicable. The child will be fully integrated into the family of the 'commissioning parents', which justifies – as in the case of adopted children – the acquisition of the nationality of the parents."[97]

However, Principle 12 does not go as far as ensuring that all children born through ICS will have the right to a nationality on a *jus sanguinis* basis. The CoE states that "[i]t should be stressed, however, that principle 12 does not oblige the recognition of the child-parent relationship as an automatic consequence of the use of surrogacy. Whether such recognition takes place depends on the private international law and, if applicable, the domestic law of the country of the commissioning parents."[98] The fact that this is not a comprehensive safeguard is further stressed by the caveat that "[t]he principle simply

95 From a best interests of the child perspective, it remains questionable whether it will always be in the child's best interests to be in the care of their 'commissioning parents'. For example, in instances where a child's 'commissioning parent' has previous convictions for child abuse or sexual abuse, it is unlikely that a best interests of the child assessment would lead to the child remaining in their care. However, a balancing exercise will likely be necessary, especially in instances where the child is genetically related to such a person. However, this is outside the scope of this chapter.

96 Council of Europe Committee of Ministers, Recommendation CM/Rec(2009)13 and explanatory memorandum of the Committee of Ministers to member states on the nationality of children, adopted 9 December 2009, CM/Rec(2009)13.

97 *Ibid.*, Explanatory Memorandum, para. 32.

98 *Ibid.*, para. 33.

underlines that if recognition takes place this should also have consequences in nationality law".[99]

Moreover, there are significant limitations to the efficacy of a solution based on a *jus sanguinis* mode of acquisition to the challenge of securing nationality for children in ICS. As the CoE has identified, this relies on the recognition of the 'commissioning parents' legal parentage. This raises a large problem in the ICS context, given that a blood tie will not always exist between 'commissioning parents' and the child, because of the involvement of third-party gamete or embryo donors. This puts such children without a genetic link to their 'commissioning parents' beyond the reach of a solution based on acquisition of nationality *jus sanguinis* in instances where 'commissioning parents' are not recognised as the child's legal parents in States requiring such a genetic link to be in existence in order to recognise legal parentage. Although States requiring a genetic link to at least one 'commissioning parent' in order to recognise legal parentage and nationality in ICS have not explained the rationale underpinning this requirement, one possible reason is the need to avoid the sale of children. The strict genetic link requirement of some States exposes the limitations of such a *jus sanguinis* solution to avoiding child statelessness in ICS. For children born through ICS, nationality acquisition contingent on legal parentage will not be feasible in all cases, given the complexities arising from the multiple possible 'parents' involved, and the inability to guarantee a blood tie/genetic link between at least one 'commissioning parent' and the child. Furthermore, single female 'commissioning parents' or same-sex female 'commissioning parents' may in some instances be unable to confer nationality by descent on the child even if they have a genetic connection, given the discriminatory nature of some States' nationality laws.

In situations where nationality is acquired *jus sanguinis* either pre- or post-birth, in practical terms it may be some days or weeks after a child is born before the acquisition of nationality can be confirmed, given that States may require proof of a genetic link through DNA testing in ICS situations. Furthermore, it is important to recognise that a post-birth grant of nationality *jus sanguinis* after the child has already entered and is residing in the 'commissioning parents'' State of nationality and/or residence does not resolve the problem that in order to have entered and be residing in that State, the child may have had to secure an entry permit or a visa for that State, which may be time-limited. An exit permit may also be required from the child's birth State.

99 *Ibid.*

4.2.3 *A practical and effective solution and residual secondary safeguards to secure the child's right to nationality in* ICS

The above discussion highlights that it is difficult to find a solution centring on a positive obligation to ensure a child's right to acquire a nationality. Acquisition of nationality *jus soli* has the advantage of securing the child's right to a nationality from birth, thereby preventing children born through ICS being stateless at birth. Beyond this, however, having secured the nationality of their birth State may have little practical benefit for children who reside in their 'commissioning parents'' State of nationality, since as foreign nationals they will remain without the full protection flowing from nationality of that State. It may not align with what is in the child's wider best interests, in terms of giving effect to rights under the CRC and safeguarding lifetime outcomes. Indeed, as the *Mennesson v. France* illustrates, significant issues around the child's identity may remain. However, acquisition of nationality *jus sanguinis* is dependent on recognition of the 'commissioning parents'' legal parentage. Although this solution is likely to be more consistent with the best interests of the child, the weakness of a *jus sanguinis* approach to securing the child's nationality in ICS is that recognition of 'commissioning parents' as legal parents is far from guaranteed, for example due to the lack of a genetic link between the child and one or both of the 'commissioning parents'.

On the basis of the preceding discussion of possible solutions to secure nationality for children born through ICS who would otherwise be stateless, the optimum solution is one which not only guarantees the right to a nationality, but also avoids discrimination on the basis of birth status and aligns with and gives effect to the best interests of the child. On balance, nationality acquisition based on a *jus sanguinis* approach is preferred in the context of ICS. This could be undertaken on a pre-birth or post-birth basis; however, the ultimate aim should be to ensure that the child secures nationality as soon as possible following birth, thereby limiting the time during which the child's nationality is uncertain.

As the optimum solution outlined above will not secure nationality for all children in ICS (where a genetic link does not exist with 'commissioning parents' or the child is abandoned by 'commissioning parents'), implementing additional safeguards is necessary to avoid child statelessness in ICS. In such situations, birth States should apply the principle codified in Article 1(1) of the 1961 Convention to ensure that otherwise stateless children born in their territory through ICS acquire nationality. For this group of ICS children, this mode of nationality acquisition is most likely to be consistent with their best interests as it will mean they are not stateless, even though the acquisition of nationality will not necessarily have the effect of resolving other aspects of their situation. For children without a genetic link to their 'commissioning parents', this will mean they have a nationality, but it will not necessarily lead to resolution of the question of their legal parentage. For abandoned children,

applying this solution will mean they are recognised as nationals of the State they are likely to remain in, even if their wider legal status in terms of guardianship remains uncertain.

Given the gaps in international guidance and the need for cooperation between States in the context of ICS,, an international agreement would be helpful in ensuring that safeguards are in place in all States. An instrument or guidance developed under the auspices of an international organisation with global reach in the area of nationality and statelessness would provide a useful starting point, as it would provide States with information on how to approach ICS situations to ensure that statelessness is avoided and the best interests of the child are protected. Such an instrument or guidance document should reflect and re-assert the pre-existing international law norms codified in the 1961 Convention and the CRC. Eventually it may be useful for States to negotiate a legally binding agreement, which and could for example take the form of a protocol to the 1961 Convention. However, in the first instance any new tools to address the problem of statelessness in ICS need to be simple and flexible enough to encourage as many States as possible to take action to prevent children from being born stateless through ICS. The development of non-legally binding guidance could thus provide a useful initial roadmap for States to follow in ICS situations where they are faced with children who would otherwise be stateless.

In light of these observations, UNCHR may wish to consider the possibility of issuing guidance on securing nationality for all children in international surrogacy situations so as to avoid childhood statelessness. This would help to shine a spotlight on child statelessness as a particular problem within ICS and to identify ways in which problems can be avoided. This could happen in the short-term without having to wait for long-term international agreement on the broader practice of ICS (a matter more suited to the mandate of the work of the Experts Group relating to international surrogacy convened by the Hague Conference on Private International Law[100]). Ideally, UNHCR would prepare and issue this guidance in cooperation with the Committee on the Rights of the Child, as this would send a strong message to States regarding the need to take cooperative, targeted action to solve the problem of child statelessness in ICS. Such guidance should rest on the principle of shared State responsibility and encourage States to cooperate to ensure that all children born through ICS can secure a nationality, consistent with their right under Article 7(1) of the CRC. Substantively, it is suggested the guidance reflect the following:

1) A State which is the intended State of a child's residence will, either prior to the birth of that child through ICS or as soon as possible following birth, grant nationality to the child if he or she would otherwise be stateless, as

100 See, https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

long as a genetic link between the child and one of his or her 'commissioning parents' is proved.

1(1) In order to ensure that the child is able to acquire nationality as soon as possible after birth through ICS, DNA testing will be made available immediately following the child's birth.

2) States will grant nationality to an otherwise stateless child born on their territory through ICS. The child should be assumed to be stateless if he or she:
   a. has no genetic link to either of their 'commissioning parents' on the basis of DNA testing; or
   b. is abandoned pre- or post-birth by their 'commissioning parents' in the territory of the birth State, regardless of whether or not he or she has a genetic link to his or her 'commissioning parents'.

Guidance of this kind can function perfectly well despite the current absence of international agreement on the legality or illegality of ICS. Currently, given the wide divergence of views among States regarding the practice of ICS, achieving consensus on this issue itself remains extremely challenging. However, as children continue to be conceived and born through ICS, this lack of consensus on the practice of ICS itself should not hinder States from cooperating to solve the particular problem of child statelessness, consistent with international principles concerning the right to nationality and the importance of avoiding statelessness.

5 Conclusion: the future of the child's right to acquire a nationality in ICS

This chapter has provided an overview of the problem of child statelessness in the context of ICS and the challenges associated with securing the child's right to acquire a nationality in this setting. ICS has emerged as a new cause of statelessness at a time when the international community is seeking to galvanise around the goal of eradicating statelessness by 2024. Statelessness has a negative impact on children's ability to access other human rights and thus diminishes their chances for better futures.[101] However, the push and pull factors drawing 'commissioning parents' to engage in ICS in situations leading to child statelessness remain, and the conception and birth of children through ICS in is unlikely to end anytime soon.

Despite the considerable complexities involved, children do not need to be born stateless in ICS. The solutions proposed in this chapter provide an approach to addressing the challenge of ensuring the right to acquire a nation-

101 United Nations Secretary General, Guidance Note of the Secretary-General: The United Nations and Statelessness, June 2011 http://www.refworld.org/pdfid/4e11d5092.pdf, p. 2.

ality is secured for every child born through ICS. Such an approach is consistent with the objective that no child should be born stateless and, as Boll observes, "a grant of nationality has important practical as well as emotional consequences for the individual".[102] While the proposed solutions rely on States prioritising the rights of children born through ICS, they are intended to be practical and achievable, without States needing to make comprehensive changes to their nationality and parentage laws. If applied to the cases of child statelessness in ICS discussed in this chapter, statelessness would have been prevented in all instances. Implementation of the guidance outlined in this chapter would ameliorate the vulnerability of such children by providing a degree of certainty as regards acquisition of nationality, drawing on the framework provided by international human rights law. This would enable the child to establish the nationality element of their identity, and will facilitate access to other rights.

In the long-term, States should consider the harmonisation of national laws and policies regarding the nationality of children born through ICS. Harmonisation on an international scale in this regard would be a complex and challenging task. It must be informed by the principle of the best interests of the child and the right of every child to acquire a nationality. Any development of an international agreement addressing or regulating ICS (which is certainly desirable if a comprehensive solution to the problems arising from ICS is to be found) will need to grapple with larger questions concerning whether forming families through the practice of ICS is consistent with international human rights standards and norms, States' policy preferences and whether and to what extent States are willing to facilitate ICS. Given that such discussions could take years, if not decades, it's important that action be taken sooner, ideally by UNHCR and the CRC in concert, to at least provide States with guidance about practical steps to prevent children being born stateless in ICS.

102 A.M. Boll, Multiple Nationality and International Law, Brill 2007, p. 11.