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A Public International Law approach to safeguard nationality for surrogate-born children

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International surrogacy agreements involve a child born to a surrogate mother who is of a different nationality to the commissioning parent(s) in a state other than that of which the commissioning parent(s) are nationals or reside. Many of these arrangements lead to children being born stateless, which deprives that child of many rights that are directly linked to one's nationality as well as causing significant practical problems, such as difficulty in obtaining a passport. In undertaking the first Public International Law analysis of nationality and international surrogacy agreements, we map out how various provisions can be used to guarantee protections against statelessness. Accordingly, we argue that the drafting of a proposed new convention is not the ideal solution in this respect, and should not be to the detriment of the ratification and implementation of the relevant conventions that we identify; in particular, the 1989 Convention on the Rights of the Child. We argue that these protections offer the most meaningful protection in the short term and should be used to inform any future protections under the proposed Convention. We conclude by encouraging the advancement of Public International Law arguments when petitioning in a domestic context on behalf of stateless international surrogate children.

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INTRODUCTION

International surrogacy agreements pose complex challenges for the states involved. These include the question of what should be the nationality of children born following international surrogacy agreements (hereafter 'international surrogate children'), upon which this paper focuses. Take the example of a child born to a surrogate in state A, whose intended parent(s) are from state B – how is the nationality of such a child determined?[1] As this paper explains, this question is often tied to who states A and

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1. Commissioning parent(s) refers to the person(s) who have asked the surrogate to carry a child for them, with the intention that the child will be handed over after birth to their care and will be raised by the commissioning parent(s).

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B recognise as the legal parent(s). However, questions of nationality of international surrogate children are complicated by: (i) differences in domestic provisions governing the legal parenthood of children; (ii) the absence of any overarching international framework in terms of legal parenthood; and (iii) disparities between national states on the legality of surrogacy and, in particular, the legality of commercial surrogacy. Moreover, complications are exacerbated where more than two states are involved; for instance, if the intended parent(s) are nationals of state C but reside in state D and propose to return and raise the child in state D; or where a donor egg and/or donor sperm from a national of another state is used in the creation of an embryo, which is then implanted in the surrogate. The second scenario can pose difficulties in states where nationality or legal parenthood is tied to biological links, as this means that the child may have no biological link with the intended parent(s), and may instead have a biological link with a third-party national.

Furthermore, given that many rights and responsibilities flow from the state to its nationals and this entails an economic burden for the state, states are often reluctant to recognise international surrogate children as their nationals. As a consequence, international surrogate children can be rendered stateless; that is, persons 'who [are] not considered as a national by any state under the operation of its law'.[2] The stateless person has been referred to as 'flotsam, a *res nullius*', and has been compared to 'a vessel on the open sea, not sailing under any flag'.[3] This is because nationality entitles individuals to the diplomatic protection of a state and since many civil, political and social rights (eg the right to vote, and the rights to education, medical care etc.) are directly linked to one's nationality, children born stateless are denied such protections and fundamental rights.[4] Being born stateless creates significant problems immediately from birth, such as the inability to receive a passport, and imposing a continued status of statelessness on anyone, especially a child, is entirely unsatisfactory. It amounts to a failure in fundamental rights protection for such children, as their human rights often cannot be vindicated because their rights are not opposable to any particular state. Furthermore, nationality has been conceived of as part of one's identity, which falls under one's right to a private and family life,[5] which is also flouted in such cases.

This paper illustrates the relatively untapped potential of Public International Law to determine which state, if any, has the obligation to grant nationality to international surrogate children who would otherwise be stateless. This examination contributes to the existing debate on international surrogacy agreements and statelessness by taking two novel approaches. First, this paper examines international surrogacy agreements through a deliberately pragmatic perspective, taking as its starting point the reality that international surrogacy agreements are occurring globally and increasing in rate, and that regardless of the ethical issues surrounding such agreements, all children have the right to a nationality. Consequently, an examination of the ethical questions that surround the existence and operation of international surrogacy arrangements is beyond the scope of this paper, aside from a brief reference to put this discussion in context. Secondly, this paper represents the first legal analysis of nationality and international

2. 1954 Convention Relating to the Status of Stateless Persons 360 UNTS 117, Art 1(1).
3. P Weis 'The United Nations Convention on the Reduction of Statelessness 1961' (1962) 11 (4) Int'l & Comp L Q 1073.
4. Ibid.
5. *Mennesson v France*, application no 65192/11, 26 June 2014; *Labassee v France*, application no 65941/11, 26 June 2014

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surrogacy agreements through a Public International Law lens. Much of the literature surrounding international surrogacy agreements has focused on the Private International issues – which, for the reasons outlined in the fourth section of this paper, is not necessarily the best or indeed the only way to provide protection to international surrogate children. We encourage persons petitioning on behalf of stateless children to advance the arguments rooted in Public International Law contained in this paper, as such arguments tend not to be made at present.

This paper also contributes to debates surrounding transnational/international reproductive services. Surrogacy represents a useful case study for exploring the challenges relating to the governance of transnational reproductive 'tourism', where individuals trying to evade restrictions in their state of origin – or high costs – travel to states with more permissive regulatory frameworks. The desirability of surrogacy arrangements is contested. The main objections include claims that it leads to exploitation;[6] that free consent is impossible to obtain[7] ; and that it involves the commodification of children.[8] On the contrary, others argue that surrogacy empowers women to support themselves; and/or that it supports the recognition/creation of differing family forms, particularly same-sex or single-parent families.[9] Accordingly, a fragmented patchwork of differing national regulatory responses is evident. Moreover, states with laws restricting surrogacy are often reluctant to recognise international agreements.[10] More generally, many states only recognise legal parentage, subject to specific conditions – for example, only for heterosexual married intended parents; or if there is a biological connection between the intended parent(s) and child, leading to 'fragmentation of parentage into genetic, gestational, and intentional components'.[11] We argue that the human rights of the child must prevail and must be prioritised over national public policy concerns seeking to prohibit/limit surrogacy. More broadly, this research contributes to the debates concerning areas where the law has difficulty accommodating rapid developments in technology.[12] In particular, this paper's purposive approach to treaty interpretation could by analogy inform interpretations of the law pertaining to cyberwarfare, disease control, outer space and the use of drones.

6. See S Allan 'The surrogate in commercial surrogacy' in P Greber and K O'Byrne (eds) *Surrogacy, Law and Human Rights* (Aldershot: Ashgate, 2015).
7. Ibid, pp 126–130.
8. G Corea *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artifical Wombs* (New York: Harper and Row, 1985) p 219; JG Raymond *Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom* (San Francisco, CA: HarperSanFrancisco, 1993) p 57.
9. MM Shultz 'Reproductive technology and intent based parenthood: an opportunity for gender neutrality' (1990) Wis L Rev 297; JA Robertson *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton, NJ: Princeton University Press, 1994) p 131.
10. A Stumcke 'Extra-territoriality and surrogacy: the problem of state and territory moral sovereignty' in Gerber and O'Byrne, above n 6.
11. RF Sturrow 'Surrogacy: American style' in Gerber and O'Byrne, above n 6, p 209.
12. See eg Major AJ Schaap 'Cyber warfare operations: development and use under international law' (2009) 64(1) Air Force L Rev 121; B Cheng 'United Nations resolutions on outer space: "instant" international customary law?' (1965) 5 Ind J Int'l L 23; M McNab and M Matthews 'Clarifying the law relating to unmanned drones and the use of force: the relationships between human rights, self-defense, armed conflict, and international humanitarian law' (2011) 39(4) Denv J Int'l L & Pol'y 661; DP Fidler 'SARS and international law' (2003) 8(7) ASIL Insights, available at https://www.asil.org/insights/volume/8/issue/7/sars-and-international-law (accessed 18 February 2016).

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The first section of this paper commences by outlining the scope of the problem. It provides an overview of the current context of international surrogacy agreements, how statelessness occurs and how domestic courts have dealt with such issues. In light of the problems identified with being born stateless, as discussed in the second section, the third section of this paper argues that although there are some legal provisions that regulate this area – such as the 1961 Convention on the Reduction of Statelessness and the jurisprudence of the European Court of Human Rights (ECtHR) – protection gaps nonetheless remain. The proposed Surrogacy Convention by the Hague Conference on International Law seeks to address these gaps. However, the drafters of this Convention are likely to encounter significant difficulties, with the result that it is likely to take years if not decades to finalise this Convention and it is unlikely to be ratified by those states that prohibit surrogacy arrangements. As a result, we argue that the ratification and implementation in domestic law of existing Public International Law conventions providing protection for stateless children should be given priority, as this approach offers the most meaningful solution for such children in the short term. Moreover, these existing protections should be used to inform any future protections for surrogate children against statelessness under the proposed Convention.

1. INTERNATIONAL SURROGACY AGREEMENTS: THE CURRENT LANDSCAPE

Surrogacy involves a scenario where a woman (the surrogate) agrees to become pregnant and carry a child for another couple or individual, the intended parent(s), with the intention that after birth this child is given to the intended parent(s) to raise. This is achieved either by artificial insemination – traditional surrogacy – where the surrogate is inseminated with donor/intended parent's sperm and she has a biological link with the child; or gestational surrogacy, where IVF is used to implant an embryo created using the intended parent(s) gametes/and/or donor gametes in the surrogacy, who will not have a biological link with the child. This highlights the differences in genetic links amongst the surrogate/intended parent(s) and the child, which may arise in the context of surrogacy agreements. This biological relationship may be relevant in the context of a discussion of statelessness, as some states factor this into the consideration of legal parenthood and/or nationality.

There is no international legal framework applicable to surrogacy, and the national regulatory responses also differ. Generally, states will fall into one of the following four broad categories: (i) the practice is unregulated, which means that it operates in a legal vacuum; (ii) states adopt a permissive approach where surrogacy is legal but unenforceable, and distinctions may be drawn between the legality of commercial and altruistic surrogacy;[13] (iii) states adopt a permissive approach where contracts are enforceable (again, a distinction may be drawn between commercial and altruistic surrogacy); or (iv) all forms of surrogacy are prohibited. These differing approaches are relevant in the context of nationality questions, as statelessness may arise for international surrogate children for two main reasons: (i) due to conflict of laws relating to questions of nationality and parenthood, where different approaches apply in the state where the child is born and the state of which the intended parent(s) is/are (a) national/s of, or to which s/he/they wish(es) to return, leading to difficulties in establishing the nationality of the child; and (ii) if international surrogacy agreements are illegal in the

13. In some jurisdictions, altruistic surrogacy is legal but commercial surrogacy is prohibited.

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intended parent(s) state, that state may be reluctant to recognise the legal effects of surrogacy carried out abroad – and thus the link between the intended parent(s) and the child – and therefore it is difficult to establish nationality.[14]

Notwithstanding the dearth of international guidance on this area, the Hague Conference on Private International Law (HCCH) has recognised that international surrogacy agreements are growing at a rapid pace.[15] While the HCCH acknowledged the difficulties surrounding accurate reporting of international surrogacy agreements,[16] it highlighted that there was evidence from a study by Aberdeen University of a 'tremendous growth in the "market"' with an increase of nearly 1,000% in the number of documented arrangements when it examined data from five agencies specialising in international surrogacy from 2006 to 2010.[17]

International surrogacy is also an area that is global in reach, with intended couples/individuals travelling from all regions of the world. The range of states to which such couples/individuals travel for international surrogacy agreements is diverse, although the more popular regions to which couples/individuals travel are North America, Eastern Europe and Asia.[18] Having said this, there have been recent changes to the laws in states, including Thailand and India[19] – previously popular 'destination' states for international surrogacy – which now ban foreigners availing of surrogacy services in these states. Instead of halting the practice of overseas surrogacy, such agreements may be driven underground,[20] and should foreign intended parent(s) continue to obtain

14. See generally, Hague Conference on Private International Law (HCCH), Permanent Bureau *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements* (March 2011), available at http://www.hcch.net/upload/wop/genaff2011pd11e.pdf (accessed 11 February 2016).

15. Hague Conference on Private International Law *A Preliminary Report on Issues arising from International Surrogacy* (March 2012), available at http://www.hcch.net/upload/wop/gap2012pd10en.pdf, para. 2 (accessed 11 February 2016). It has also been recognised that surrogacy is increasing within the EU: see EU Parliament Committee on Legal Affairs *A Comparative Study on the Regime of Surrogacy in EU Member States* (2013), available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf (accessed 11 February 2016) para 5.1.

16. Ibid, para 6.

17. Ibid.

18. More than two states may be involved, as noted, eg if donor gamete(s) from a third jurisdiction is used. Ibid.

19. See Government of India Ministry for Home Affairs, Circular No 462 'Foreign Nationals including Overseas Citizens of India (OCI) cardholders] seeking to visit India for commissioning surrogacy' (3 November 2015), which directed that India Missions/Posts/FRROs/FROs were to ensure that no visas would be issued to foreign nationals or permissions granted to OCIs to commission surrogacy in India. It also directed that no exit permission be given to children born through surrogacy in India to foreign nationals, including OCI cardholders. However, in cases of children born through surrogacy already commissioned before the circular was issued, exit permission would be decided on a case-by-case basis by FRROs/FROs. This information is based on the position at the time of writing (21 June 2016). Nepal introduced a similar ban on surrogacy, which included a ban for foreign nationals or arrangements initiated outside Nepal, on 18 September 2015; see http://nepal.usembassy.gov/service/surrogacy-in-nepal.html (accessed 11 February 2016).

20. It has been argued that a global ban on commercial surrogacy would probably result in a black market for surrogacy, which could increase the potential for exploitation. See K Trimmings and P Beaumont *International Surrogacy Arrangements: Legal Regulation at the International Level* (Oxford: Hart Publishing, 2013) p 442.

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surrogacy services in India/Thailand, ignoring these rules, this will create further difficulties in terms of nationality for any children born, who would be unable to leave the jurisdiction. These developments are most likely to result in overseas couples going to other more liberal or less regulated jurisdictions for surrogacy services. Indeed, it has been reported that, since these changes, surrogacy has been increasing in Cambodia.[21] In effect, the problems for nationality/statelessness in international surrogacy agreements are merely moved, becoming issues involving different jurisdictions than before.

2. INTERNATIONAL SURROGACY AGREEMENTS AND THE POTENTIAL FOR STATELESSNESS

Two principles are crucial in terms of determining the nationality of a child at birth; namely, *jus soli* and *jus sanguinis*. Under *jus soli*, or 'the right of the soil', children acquire the nationality of the territory in which they are born. Some states may also adopt limited or conditional *jus soli* provisions; for instance, based on a residency period.[22] On the other hand, *jus sanguinis*, meaning 'right of the blood', is where nationality is not determined by birth but by having parents or ancestors who are nationals of that state. If the state where the child is born operates under an absolute *jus soli* principle, the child will be a national of that state once born, and so will not be stateless. However, if the state where the child is born operates a *jus sanguinis* approach, then the child's nationality is precarious, and will be dependent on who is recognised as a 'parent'. Problems arise if the state of the intended parents, state B, operates under *jus sanguinis* but differs in its rules in terms of how parentage is decided by state A.[23] For instance, if a child is born in state A, which recognises the intended parents, who are from state B, as the legal parents, state A will consider that the child should be a national of state B. However, if state B views the surrogate and her husband as the legal parents, it will consider the child a national of state A. As neither state's law can be imposed on the other, the result is that a child born through surrogacy in state A could be left stranded in state A with uncertain legal parentage,[24] and without nationality of either jurisdiction; that is, stateless. Difficulties may also arise if the state in which the child is born operates a conditional *jus soli* framework including residency requirements that, by definition, a newborn child would not meet.

The difficulties that arise because of conflicting legal frameworks for parenthood are illustrated by the 2008 case of *Re*: *X* & *Y* (*Foreign Surrogacy*), before the High Court of England and Wales.[25] This involved British intended parents who entered into an international surrogacy agreement with a married Ukrainian woman. The surrogate was implanted with an embryo created using donor eggs and the intended father's sperm and gave birth to twins. The agreement remained amicable; however, in the UK, the Human Fertilisation and Embryology Act (HFEA) provides that the surrogate is always

21. M Cook 'Surrogacy business shifts to Cambodia' *Bioedge* 7 November 2015; V Muong and W Jackson 'Three million dollar babies' *Phnom Penh Post* 2 January 2016.

22. See C Becker '*Jus soli*: a miraculous solution to prevent statelessness?'(9 April 2015), available at http://www.statelessness.eu/blog/jus-soli-miraculous-solution-prevent-statelessness (accessed 11 February 2016).

23. GL Cohen *Patients with Passports, Medical Tourism, Law and Ethics* (Oxford: Oxford University Press, 2014) p 403.

24. Hague Conference, above n 14, p 9.

25. [2008] EWHC 3030 (Fam).

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considered the legal mother of the child.[26] Moreover, as the Ukrainian surrogate was married, under the HFEA her husband, having known and consented to the treatment, was presumed to be the legal father of the child.[27] This is despite the fact that the intended father was the children's biological father.[28] However, in the Ukraine, the intended parents were seen as the children's legal parents. As Hedley J noted, 'the children had no rights of residence in or nationality 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'.[29] Instead, the children were 'marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children home'.[30]

Nonetheless, a temporary solution was found. Following the submission of DNA evidence proving that the intended father was the biological parent of the children, discretionary leave was provided for the children to enter the UK. This was aimed at allowing the children's status to be regularised by applying for a parental order that would make the intended parents their legal parents,[31] as a result of which they could then seek UK nationality for the children under the British Nationality Act 1981.[32] The parental order that was the subject of these proceedings was subsequently granted.

The case of *Baby Manji* involved an Indian surrogate and Japanese intended parents. An embryo was created using the intended father's sperm and an anonymous donor's egg, which was implanted in the surrogate, resulting in the birth of a baby girl. However, the intended parents' relationship broke down and the intended mother refused to participate in the surrogacy agreement.[33] When the child was born, the intended father sought to bring the child to Japan, but his application for a Japanese passport for the child was unsuccessful, as under Japanese law nationality was determined on the basis of the nationality of the birth mother; that is, in this case the surrogate, who was Indian.[34] His application for adoption was also unsuccessful, as Indian law at the time prohibited the adoption of a female child by a single man. He then applied for an Indian passport for the baby. In order to obtain this, a birth certificate was required, and while under Indian law the intended father could be named on the certificate, it was unclear

26. Section 33 HFEA 2008, For discussion, see UK Visas and Immigration, Surrogacy (June 2010), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/258243/surrogacy.pdf (accessed 11 February 2016). For the definition of parent for nationality purposes, see British Nationality (Proof of Paternity) Regulations 2006; see generally, UK Border Agency *Inter-Country Surrogacy and Immigration Rules*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/261435/Intercountry-surrogacy-leaflet.pdf (accessed 11 February 2016) para 34.
27. Section 28 HFEA, 1990; s 38 HFEA 2008.
28. [2008] EWHC 3030 (Fam), paras 5–6.
29. Ibid, para 8.
30. Ibid, para 10.
31. Section 54 Human Fertilisation and Embryology Act 2008. This allows for the transfer of legal parentage in cases of surrogacy subject to a number of conditions in the UK context, and avoids couples having to apply to adopt a child, which was happening previously.
32. Section 1(5) British Nationality Act 1981. Since 2010, if a parental order is granted a surrogate child automatically becomes a British national, but this would not have been automatic at the time of the case.
33. Trimmings and Beaumont, above n 20, p 508.
34. C Kindregan and D White 'International fertility tourism: the potential for stateless children in cross-border commercial surrogacy arrangements' (2013) Suffolk Transnat'l L Rev 527–626 at 548.

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who the legal mother was; namely, whether it was the surrogate or the intended mother, who did not wish to be part of the arrangement. Therefore, the birth certificate was refused.

Eventually, the Indian passport office issued an identity certificate, a legal document issued to those who cannot get a passport in their discretionary solution, valid only for the baby to travel to Japan. Subsequently, the child was issued with a Japanese visa on humanitarian grounds, on which again no reference was made to the child's nationality. Once the child was in Japan, the Japanese authorities agreed that the baby could become a Japanese citizen subject to proof of the parent–child relationship.

As can be seen, the diplomatic and/or discretionary 'solutions' adopted to resolve these cases are fraught with uncertainties for intended parents and surrogate-born children. They are also often ad hoc in nature, can take considerable time to arrange, can be expensive and can require the intended parents to stay for a considerable period of time in state A with the child(ren). Moreover, these are often temporary solutions provided to allow the child to travel to state B with the intended parents, but (most importantly for the purposes of this paper) they do not necessarily resolve the nationality status of the child, which may involve further processes after the child is in state B. These 'solutions' are also of little practical benefit to children abandoned by intended parents following an international surrogacy agreement, who are left in a highly precarious position under this current framework, as in many cases the temporary solutions described must be petitioned for through the legal system in either/both states. Without the intended parent(s) involved, it is questionable who will apply for such rights on behalf of the surrogate child. Moreover, even if the child has a surrogate willing to petition on his/her behalf, the reality is that the surrogate may not have the resources or means to access the legal services necessary to do so.[35] Furthermore, as it is the child's nationality that is at issue in such cases, there is no recognisable state that will step in for their protection.

For these reasons, we argue that the current framework surrounding the nationality of surrogate children does not sufficiently safeguard children against statelessness. Recourse to Public International Law is warranted as, although it has its limitations, it nonetheless goes some way towards safeguarding human rights for such children.

3. INTERNATIONAL PROTECTION OF STATELESS CHILDREN BORN UNDER INTERNATIONAL SURROGACY AGREEMENTS

The literature on international surrogacy agreements has taken a Private International Law approach,[36] which implies complete state sovereignty over nationality. The key argument we are making is that existing provisions of *Public* International Law offer protection to children born stateless as a result of international surrogacy agreements.

35. There will be exceptions to this, such as the case of Baby Gammy, whose Thai surrogate decided to raise him after the commissioning parents refused to. Subsequently, she successfully petitioned – amidst much international media coverage – on behalf of the child for Australian citizenship See 'Baby Gammy granted Australian citizenship' BBC News (20 January 2015), available at http://www.bbc.co.uk/news/world-australia-30892258 (accessed 11 February 2016).
36. Y Ergas 'Babies without borders: human rights, human dignity, and the regulation of international commercial surrogacy' (2013) 27 Emory Int'1L Rev 117; K Trimmings and P Beaumount 'International surrogacy arrangements: an urgent need for legal regulation at the international level' 7 J Private Int'1L 627; Trimmings and Beaumount, above n 20.

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In becoming parties to particular treaties, states have consented to be bound to certain provisions that limit their powers in determining nationality. In the words of the Inter-American Court of Human Rights:

> The classic doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues.[37]

The default position in international law is that it is the sovereign right of every state to determine under its own laws who are its nationals.[38] Thus children born as a result of international surrogacy agreements do not have a de facto right of nationality vis-à-vis the state in which they were born. This position is a result of the traditional reluctance of the international community to find practical solutions to the problem of statelessness. However, since the First World War, there have been developments in the prevention of statelessness and in the protection of stateless persons. These developments are not specific to the context of international surrogacy agreements, as surrogacy as a practice was not in existence until relatively recently.

The first international instrument referring to the problem of statelessness was the 1948 Universal Declaration of Human Rights (UDHR).[39] Article 15 proclaims that '[e]veryone has the right to a nationality' and that '[n]o one shall be arbitrarily deprived of his nationality'. However, this article does not identify which state is obliged to grant nationality, nor under what circumstances nationality should be granted. More importantly, the UDHR, as a General Assembly resolution, is not ipso facto legally binding. Thus Art 15, while an indication of political will in this respect, does little in practical terms to combat the problem of statelessness.[40]

However, an attempt was made to find solutions to the problem of statelessness in 1961, when the Convention on the Reduction of Statelessness (CRS) was completed.[41] Article 1 sets out the primary rule, which is that a Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Articles 1(a) and (b) set out that such nationality shall be granted: '(a) At birth, by operation of law, or; (b) Upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law.' This provision seems quite straightforward in the context of the problem identified – a

37. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, 19 January 1984, Inter-Am Ct HR (Ser A) No 4 (1984), at [32]–[35].
38. *Nottebohm Case (second phase)*, Judgment of 6 April 1955, ICJ Reports 1955, p 4. See also the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Law 179 LNTS 89; Art 1 provides that 'it is for each state to determine under its own laws who are its nationals. This shall be recognised by other states in so far as it is consistent with international conventions, international custom, and the principles of international law generally recognised with regard to nationality.'
39. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).
40. See Weis, above n 3, at 1074–1075. An argument could be made that Art 15 is part of Customary International Law. For example, the Inter-American Court of Human Rights has referred to Art 15 of the UDHR as supporting its conclusion that '[t]he right of every human being to a nationality has been recognized as such by international law'. See *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, 19 January 1984, Inter-Am Ct HR (Ser A) No 4 (1984), at [33].
41. 1961 Convention on the Reduction of Statelessness, 989 UNTS 175.

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child born as a result of an international surrogacy agreement in a Contracting State is entitled to the nationality of that state, if s/he would otherwise be stateless (ie if s/he does not receive nationality on the basis of the *jus soli* or *jus sanguinis* principles as outlined above).

Nonetheless, the provision suffers from significant procedural hurdles. Article 1 may be subject to the condition that the child has been habitually resident in the Contracting State for such period as may be fixed by that state, not exceeding 5 years immediately preceding the lodging of the application nor 10 years in total.[42] Unless a state adopts a 0 days residency period, a child who has just been born will not fulfil residency requirements where such requirements are applicable, and thus not be entitled to nationality of the state in which he/she was born. For those children, Art 4 provides a 'safety net' in the sense that he/she would be entitled to the nationality of one of his/her parents, provided that one of his parents was from a Contracting State. This, once again, may be subject to a residency period of up to 3 years preceding the lodging of the application for nationality. However, a further significant problem that may arise is where the parent(s) of the child do not lodge an application for nationality.[43] This could happen where the parent(s) decide they no longer want to raise the child. In such a case, it is unclear whether the child would remain stateless and much would depend on who was to become the guardian of the child.

Thus the general position under the CRS is that a child will be given the nationality of the state in which s/he was born unless the child does not fulfil residency requirements set out by that state (where applicable), in which case the child will be entitled to the nationality of one of his/her parents. The exhaustive nature of the list of possible requirements means that states cannot establish conditions for the grant of nationality additional to those stipulated in the CRS. However, problems remain. First, similar to the issues raised in the first half of this paper (where it was noted that difficulties in terms of nationality often revolve around the definition of parentage for this purpose), the meaning of 'parent' under the CRS is also unclear: does it mean the biological parent or birth mother? At the time of the drafting of the CRS in 1961 – before the advent of assisted reproductive technologies – the birth mother and biological parent were synonymous concepts,[44] so it is unclear whether the CRS can accommodate children born by surrogacy. However, we argue that a modern-day understanding of the term 'parent' could be applied, in line with the object and purpose of the treaty,[45] which is to reduce statelessness,[46] and the evolutionary approach to treaty interpretation, which provides that the meaning of a term in a treaty is capable of changing over time.[47]

The second, and arguably most significant, problem is that only states that have consented to be bound to the CRS are indeed bound by it. At the time of writing, the CRS has only 65 States Parties of the 193 or so states in the world. Thus the above-

42. Ibid, Art 2(b).
43. The meaning of 'parent' is discussed below.
44. The first baby born via *in vitro* fertilisation was Louise Brown, born in 1978; see A Eley 'How has IVF developed since the first "test-tube baby"'? BBC News (23 July 2015), available at http://www.bbc.co.uk/news/health-33599353 (accessed 11 February 2016).
45. 1969 Vienna Convention on the Law of Treaties 1155 UNTS 331, Art 31(1).
46. Preamble, 1961 Convention on the Reduction of Statelessness, 989 UNTS 175. The preamble forms part of the Convention's context, in accordance with 1969 Vienna Convention on the Law of Treaties 1155 UNTS 331, Art 31(2).
47. *Dispute Regarding Navigational and Related Rights, Costa Rica v Nicaragua*, Judgment, ICJ Reports 2009, p 213, at [64].

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mentioned legal framework set out by the CRS is not applicable in most states – including India, Cambodia, the USA and Thailand, states in which a significant amount of children have been born as a result of international surrogacy agreements.[48] This lacuna of non-participation is anticipated by the CRS in Art 4, which provides that a Contracting State will grant its nationality to a person born in the territory of a non-Contracting State, if the nationality of one of that child's parents was of that Contracting State. Putting aside the definitional issues surrounding who is deemed a 'parent', further questions are raised by Art 4. What if the child is born in a non-Contracting State, and both of that child's intended parents are from a non-Contracting State? This is the most likely scenario, as the majority of states in the world are indeed non-Contracting States.[49] In such a scenario, the CRS would have no applicability whatsoever and the child would be rendered stateless. Thus the problem identified in the first half of this paper is not necessarily solved by application of the CRS.

Even if the CRS were applicable, problems still arise in terms of enforcement. Although individuals may enforce their rights under the CRS at a domestic level by virtue of the relevant legislation that incorporates the CRS rights into domestic law, there is little, if any, recourse on the international level for those who feel that the CRS has not been applied correctly, or has not been applied at all. This is due to a general lack of standing of individuals in the international judicial system, and due to the fact that the CRS does not provide for an individual complaints mechanism. Generally speaking, states are often reluctant or unable to hold other states accountable for denial of nationality, and the UN High Commissioner for Refugees (UNHCR) – which has a mandate for the assistance of stateless persons since 1974 – does not have a mandate to declare the denial of nationality illegal.[50]

In light of the abovementioned problems, it is necessary to determine whether there are other provisions of Public International Law that would protect international surrogate children who are born stateless. Article 24(3) of the International Covenant on Civil and Political Rights (1966) (ICCPR) stipulates a child's right to be registered after birth and to acquire a nationality.[51] The ICCPR has significantly more State Parties than the CRS – 168 at the time of writing – yet, similar to Art 15 of the UDHR, Art 24 of the ICCPR does not identify which state is obliged to grant nationality, nor under what circumstances nationality should be granted. In addition, in General Comment 17, the Human Rights Committee stated that Art 24(3) 'does not necessarily make it an obligation for States to give their nationality to every child born in their territory'.[52]

48. Ukraine is party to the Convention as of 25 March 2013. It is unclear whether the numbers of international surrogate children born in India and Thailand will reduce following the recent criminalisation of international surrogacy arrangements in these jurisdictions.
49. There does not seem to be significant state practice or *opinio juris* to the effect that Art 4 represents customary international law. Therefore Art 4 is only binding on States Parties to the CRS.
50. UNGA Res 3274 [XXIX] [10 December 1974]; UNGA Res 31/36 [30 November 1976].
51. 1966 International Covenant on Civil and Political Rights 999 UNTS 171.
52. Office of the High Commissioner for Human Rights 'General comment no. 17: rights of the child (Art. 24): 07/04/89', at [8]. During the course of drafting, the original proposal of Art 24(3) provided that 'The child shall be entitled from his birth to … a nationality.' During the ensuing debate, the word 'acquire' was inserted and the words 'from his birth' were deleted. According to Detrick, these amendments were made because the majority felt that a state could not assume an unqualified obligation to afford its nationality to every child born on its territory regardless of the circumstances.

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Accordingly, the right in Art 24 is not to be considered a right of the individual, but was accorded by the state at its discretion.[53] However, the Human Rights Committee has urged states to enforce Art 24(3) in a meaningful manner, for example, in its comments on Ecuador, Colombia and Zimbabwe.[54]

The Convention on the Rights of the Child (CRC) is the most widely ratified international treaty.[55] The CRC deals with the rights of children generally and not stateless children specifically, but six provisions (Arts 2, 3, 7, 8, 9 and 10) within the CRC are nonetheless relevant to stateless children born by international surrogacy agreements.[56] The first, most important, aspect of the CRC is its applicability. Article 2 sets out that States Parties only have an obligation towards children within their jurisdiction.[57] However, this does not mean that the CRC does not have extraterritorial application. The drafting history of the CRC reveals that the original proposal of Art 2 referred to 'all children in their territories' and thus the replacement of this terminology strongly indicates that the CRC does not apply exclusively on a territorial basis.[58] Many of the provisions in the CRC have international aspects, such as those dealing with custody and access (Art 10), adoption (Art 21) and refugees (Art 22).[59] More generally, there is significant international jurisprudence indicating that a treaty can be applicable where a state acts extraterritorially.[60]

Article 3 provides that in all actions concerning children, the 'best interests of the child shall be a primary consideration'. Such actions would, of course, include applications on behalf of a child for the granting of nationality. More specific to the problem identified by this paper, Art 7 provides that:

> 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.
>
> 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.

Read in conjunction with Art 2 (which provides that it is the state in whose jurisdiction the child is has the obligation to implement the CRC), the obligation in Art 7 is thus primarily addressed to the state in which the child is born. However, as the right is 'to acquire' a nationality, the same considerations regarding Art 24 of the ICCPR apply; that is, that there may be an element of state discretion involved in the bestowal of nationality. It is difficult to reconcile this with the words 'shall ensure' in the second part of Art 3, which

53. S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague: Martinus Nijhoff, 1999) p 150.
54. (1998) UN Doc CCPR/C/79/Add 92; (1997) UN Doc CCPR/C/79/Add 76; (1998) UN Doc CCPR/C/79/Add 89.
55. 1989 Convention on the Rights of the Child 1577 UNTS 3. The USA and Somalia are the only UN members that are not States Parties to the CRC.
56. D Hodgson 'The international legal protection of the child's right to a legal identity and the problem of statelessness' (1997) 7 Int'l J L & Fam 255; JE Doek 'The CRC and the right to acquire and to preserve a nationality' (2006) 25(3) Refugee Surv Q 26.
57. 1989 Convention on the Rights of the Child 1577 UNTS 3, Art 2; Detrick, above n 53, p 69.
58. UN Doc E/CN.4/1349, p 3.
59. Detrick, above n 53, p 71.
60. See eg *Al-Jedda v United Kingdom*, application no 27021/08, 7 July 2011; *Hirsi Jamaa and Others v Italy*, application no 27765/09, 23 February 2012.

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entail an obligation of result.[61] This means that the state in which the child is born must successfully implement the right to acquire a nationality. The CRC does not specifically say the nationality granted should be the nationality of that state specifically; however, we argue that in line with the object and purpose of the treaty (which is to protect the rights of the child)[62] and the principle of effectiveness,[63] the State Party in which the child is born has at the very least an obligation to grant nationality where the child would otherwise be rendered stateless.

In addition, Art 8 of the CRC provides that the State Party has a continuing obligation to preserve the child's identity, which includes their nationality, name and family relations, and Art 9 provides that as a general rule, a child shall not be separated from his/her parents against their will. Thus where a child is awaiting determination of nationality, it can be argued that the state has an obligation not to expel his/her parent(s). This is supported by Art 10, which provides that applications by a child or his/her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with in a positive, humane and expeditious manner; and Art 3, which provides that the best interests of the child are paramount. Clearly, being accompanied by their intended parents in the best interests of a newborn child. However, similar to the CRS, the term 'parent' is undefined by the CRC.

Finally, it should be noted that Optional Protocol III to the CRC, which provides for an individual complaints mechanism,[64] entered into force in April 2014.[65] It currently has 26 States Parties, although the Committee has yet to deliver its views on any complaint received.

The European Convention on Human Rights (ECHR) does not explicitly refer to nationality rights.[66] However, Art 8(1) provides that 'everyone has the right to respect for his private and family life'. The relationship between this paper and international surrogacy agreements was examined in the recent cases of *Labassee v France* and *Menneson v France*.[67] Both cases concerned a husband and wife who conducted surrogacy arrangements in the USA, using the gametes of the husband and an egg from the surrogate. The cases examined the refusal of the French authorities to legally recognise the family tie between a child, his biological father and his intended mother; and the ECtHR decided that the proceedings should be considered simultaneously.[68] In its judgment, the ECtHR said that a distinction was to be drawn between: (i) the

61. Detrick, above n 53, pp 68–69.
62. 1969 Vienna Convention on the Law of Treaties 1155 UNTS 331, Art 31(1).
63. This principle provides that the objective of treaty interpretation is to advance the aims of that treaty. See RK Gardiner *Treaty Interpretation* (Oxford: Oxford University Press, 2008) p 190.
64. States can also submit a declaration pursuant to Art 12 that they recognise the competence of the Committee to receive inter-state complaints.
65. UN General Assembly 'Optional Protocol to the Convention on the Rights of a Child on a Communications Procedure' (19 December 2011).
66. 1955 European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221.
67. *Mennesson v France*, application no 65192/11, 26 June 2014; *Labassee v France*, application no 65941/11, 26 June 2014. See G Puppinck and C de La Hogue 'ECHR: towards the liberarisation of surrogacy', English translation of an original study published in French in (2004) 118 Revue Lamy de Droit Civil 78.
68. The child in question was not stateless; however, the concept of a 'family link' may be relevant in future cases, where such a link must be established for the purposes of granting nationality.

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applicants' right to respect for their family life; and (ii) the right of the children to respect for their private life. Regarding point (i), the ECtHR decided that because the children were not prevented from living in France and because of the doctrine of margin of appreciation,[69] a fair balance had been struck between the interests of the parents and those of the state. Regarding point (ii), the ECtHR said that although the ECHR does not grant a right to nationality, nationality is an element of a person's identity and it has consequences for the enjoyment of other rights, in particular for inheritance rights. The ECtHR accepted that France may wish to deter its nationals from going abroad to undertake surrogacy agreements, but the effects of non-recognition of the children's relationship with a parent affects the children, whose right to private life was substantially affected. The ECtHR therefore held in both cases that France's refusal to legally recognise both families constituted a violation of right to private life under Art 8 ECHR.

To draw this decision back to the question posed in this paper, it appears that the ECtHR was willing to interpret Art 8 of the Convention broadly to find an obligation to recognise a family link between the intended mother, the biological father and a child born outside a Contracting State by an international surrogacy agreement. In future cases, this decision may be relevant for establishing nationality, particularly given the reference in the case to nationality forming part of a person's identity. Indeed, there is some evidence of the influence of this reasoning in recent domestic cases relating to surrogacy, especially in states that previously adopted a restrictive approach.[70] The HCCH has stated that *Mennesson* and *Labasse* have had an impact, and argue that a trend can, albeit cautiously, be discerned in recent cases in favour of the broader recognition of legal parentage following international surrogacy agreements under certain conditions.[71] However, a notable feature of *Mennesson* and *Labasse* was that these children were present on French territory, which triggered France's obligation in this regard. Had the children concerned never entered France, the ECHR would not apply. This is because Art 1 ECHR provides that it will only apply to persons within the jurisdiction of the States Parties,[72] and it is only in exceptional circumstances that a decision of a state that has extraterritorial effects can be held as a violation of the ECHR.[73] Thus in order for Art 8 – and by extension, the above case-law – to be applicable, the child concerned would need to be present in a Council of Europe Member State to rely on the ECHR.[74] As aforementioned, one of the first problems that a stateless child often faces is entering the state of his intended parents; thus it is unclear how much assistance this case will give in practical terms as, ipso facto, children born

69. This refers to space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the ECtHR.
70. See generally, Hague Conference on Private International Law *The Parentage/Surrogacy Project: An Updating Note* (February 2015), available at http://www.hcch.net/upload/wop/gap2015pd03a_en.pdf (accessed 11 February 2016) p 8.
71. Ibid. See the German Bundesgerichtshof, decision of 10 December 2014 (No XII ZB 463/13), which held in favour for the recognition in Germany of a California judgment recognising two intending fathers as the parents of a child born through surrogacy;
72. 'Jurisdiction' may also include acts carried out extraterritorially, but this is not relevant in the context of this paper.
73. See eg *Soering v United Kingdom*, application no 14038/88, 7 July 1989.
74. The ECHR may nevertheless provide protection to children born in the Ukraine and Russia, where many ISAs are carried out.

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by virtue of international surrogacy agreements are born outside of the state of nationality and/or residence of their intended parents.

The decisions of *Labassee* and *Mennesson* were followed by the decision of *Paradiso and Campanelli v Italy* in 2015.[75] In this case, Italy refused to transcribe the birth certificate of a child born to a surrogate in Russia. When it emerged that the intended father had no genetic link with the child (contrary to the information that the intended parents had provided the authorities), the applicants were charged with distorting the civil state, forging and violating the law on adoption. The child was subsequently placed in care and the applicants were found to no longer have standing in the adoption proceedings.

The ECtHR ruled that the applicants could not act on behalf of the child, who had a guardian since October 2011. However, the ECtHR held that the decision to separate the child from the intended parents amounted to a violation of the parents' right to family life as protected by Art 8 of the ECHR, as the child had been with the couple for 6 months and thus there existed a de facto family environment. The focus of the case was therefore on the removal aspect, as the ECtHR found that the claim regarding the transcription was inadmissible on account of the applicants' failure to exhaust domestic remedies.

This judgment is of significance for stateless children born from international surrogacy agreements for the following reasons. First, in recognising that a de facto family environment was created despite (i) a surrogacy contract that would be illegal in Italy, (ii) false statements being made in respect of parentage and (iii) no genetic link between the intended parents and the child, the ECtHR has significantly broadened the decisions in *Labassee* and *Mennesson*. In this sense, the ECtHR does not address questions of public policy (ie the desirability of surrogacy) or the morality of the actions of the intended parents when determining whether a family relationship exists for the purposes of Art 8. The ECtHR focuses only on the child's/intended parents' rights to private and family life, concentrating on the de facto links between the intended parents and the child. To apply this by analogy to stateless children born from international surrogacy agreements, it could be argued that this decision has made it easier for intended parents to show the necessary link to a stateless child for the purposes of applying for nationality. In the words of Judges Raimondi and Spano, in their Separate Opinion:

> […] the position of the majority essentially denies the legitimate choice of states to not recognise the effects of surrogacy arrangements. If creating an illegal link with a child abroad is sufficient to create a 'family life', it is clear that the freedom of states to not recognise the legal effects of surrogacy agreements, a freedom previously recognised in the jurisprudence of this Court, is reduced to nothingness.[76]

Secondly, it may be recalled that in *Labassee* and *Mennesson*, the Court was unwilling to find that the parents' Art 8 rights had been violated. By finding that the parents' Art 8 rights had been violated, the *Paradiso* decision has broadened the scope of Art 8 in relation to international surrogacy agreements. The result is that the ECtHR has taken a purposive approach to Art 8 that is in line with the approach put forward by this paper. Put simply, although the banning surrogacy is a prerogative of the state, the human rights of the child and of the parents is a separate human rights issue that is protected by the ECHR.

75. *Paradiso et Campanelli c Italie*, application no 25358/12, 27 January 2015.
76. At [15]. This is the authors' translation from the French judgment.

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Finally, although the decision in *Paradiso* recalled that the ECHR needs to be interpreted in accordance with the principles of international law, it is regrettable that the discussion of international law principles was limited to a brief mention of the 1961 Hague Convention Eliminating the Requirement of Legalisation of Foreign Public Documents. Many of the conventions discussed in the previous section also contain provisions that are particularly relevant to the facts in *Paradiso*. By analogy, in future ECtHR cases involving statelessness, the ECtHR should follow the logic of its position and take into account all the provisions discussed in this paper in its interpretation of the ECHR.

4. IS A NEW CONVENTION THE BEST SOLUTION?

Most of the literature to date on international surrogacy agreements identifies the problems that arise by virtue of these agreements and generally agrees with the position of the HCCH that a new convention regulating international surrogacy agreements is necessary.[77] However, a new convention will simply not solve the problems outlined by this paper. Intended parents usually participate in international surrogacy agreements because commercial surrogacy is illegal in their own national jurisdiction. Therefore states that have banned commercial surrogacy would have to ratify such a convention in order for it to be successful; that is, so that the state of the intended parents would be obliged to grant nationality to international surrogate children. We argue that this simply is not going to happen. Even if states are willing to participate in the convention, it could take years for the convention to enter into force. This was the case for the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,[78] which only entered into force 12 years after its initial adoption by the General Assembly,[79] and has been ratified by only 49 states.

Secondly, the negotiation of a new convention could take years, if not decades. Negotiation on the proposed convention has not yet begun, as the HCCH is still in the very early stages of preliminary research. Thirdly, there is no guarantee that a convention will ever be completed. The discussion of statelessness and nationality in this paper is but one of many controversial issues on which the drafters of the Convention will have to find agreement. As any new Convention would necessitate the drafting of a framework for legal parentage in the Convention, negotiating what this would entail would be extremely difficult, if not impossible. Moreover, the context of how international surrogacy agreements operate, and particularly, the reasons why surrogates participate in such agreements occur in 'highly differentiated localities'[80] throughout the world, where practices/motivations vary significantly. For instance, in India, ethnographic studies have demonstrated that many of those who act as egg donors and surrogates do so in order to relieve permanent or temporary

77. Ergas, above n 36; Trimmings and Beaumount, above n 20; Trimmings and Beaumount, above n 36.

78. UN General Assembly 'International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families' Res A/RES/45/158, 18 December 1990.

79. Human Rights Watch 'Migrant workers need protection: UN treaty comes into force', Press Release (30 June 2003), available at https://www.hrw.org/news/2003/06/30/migrant-workers-need-protection (accessed 11 February 2016).

80. B Parry 'Narratives of neoliberalism: "clinical labour" in context' (2015) 14 Med Human 32 at 34, 37. See also L Dolezal 'Considering pregnancy in commercial surrogacy: a response to Bronwyn Parry' (2015) 41(1) Med Human 38.

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indebtedness,[81] and this may differ significantly from motivations of surrogates in states such as the USA. Moreover, significant differences and inequalities may exist in terms of intended parents and surrogates involved in international surrogacy agreements.[82] Any attempt to achieve a global consensus on the regulation of surrogacy, such as in the form of an international convention, 'must necessarily be informed by detailed ethnographic research that elucidates the complex lived experience of clinical labour *in situ*'[83] and would need to 'attend to the question of how power relations within the neoliberal economy are shaped by longer histories of unevenness and geopolitical and social in equality'.[84] Finally, no matter how comprehensive the negotiation process is, there will inevitably be cases that will fall outside the parameters of the convention. For these reasons, we argue that a realistic approach should be taken as to when and if a convention will ever enter into force, and it needs to be borne in mind that a convention will not prevent all instances of statelessness from surrogacy arising.

In the meantime, it is equally, if not more, important to focus on existing binding provisions that regulate the bestowal of nationality for children born stateless pursuant to international surrogacy agreements. This is because states cannot use provisions of its domestic laws as an excuse for failing to carry out its international treaty obligations.[85] The CRC, which is the most widely ratified international treaty, offers the most comprehensive protection in this respect, particularly when the provisions on nationality and the principle of the 'best interests of the child' are read in conjunction with each other. Moreover, increasing the number of States Parties to the CRS will have a direct impact on reducing statelessness, as states usually undertake accession in addition to other measures aimed at reducing statelessness, such as reforming nationality laws, conducting surveys of stateless populations and creating statelessness determination procedures. In addition, encouraging accession can involve engagement with a wide range of stakeholders at the national level, including politicians, government officials, community organizations and civil-society groups.[86] Such engagement provides an ideal opportunity to lobby for change on behalf of children born stateless as a result of international surrogacy agreements.

Moreover, it is notable that following the successful outcomes of *Paradiso*, *Mennesson* and *Labassee*, a number of cases are pending before the ECtHR. This includes *Laborie et autres c. France* (concerning the refusal of the French authorities to transcribe Ukrainian birth certificates of children born through international surrogacy agreements);[87] and *Foulon c. France*[88] and *Bouvet et autres c. France* (both cases concerning the refusal of the French authorities to transcribe Indian birth certificates of children born through international surrogacy agreements).[89] Given

81. Parry, ibid, at 34, who also cites: M Cooper and C Waldby *Clinical Labor: Tissue Donors and Research Subjects in the Global Bioeconomy* (Durham, NC: Duke University Press, 2014); L Boltanski and E Chiapello *The New Spirit of Capitalism* (London: Verso, 2005).
82. See eg A Pande 'Transnational commercial surrogacy in India: gifts for global sisters?' (2011) 23(5) Reprod Biomed Online 618–625; A Pande *Wombs in Labor: Transnational Commercial Surrogacy in India* (New York: Columbia University Press, 2014).
83. Parry, above n 80, at 37.
84. Ibid.
85. 1969 Vienna Convention on the Law of Treaties 1155 UNTS 331, Art 27.
86. UNHCR 'Good practices paper: acceding to the UN Statelessness Conventions' (2014).
87. *Laborie c France*, application no 44024/13, 16 January 2015.
88. *Foulon c France*, application no 9063/14, 24 January 2014.
89. *Bouvet c France*, application no 10410/14, 29 January 2014.

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the broad approach that the Court took in *Paradiso*, it is likely that the ECtHR will find a violation of Art 8 of the ECHR in the above cases. It remains to be seen whether the ECtHR will use the principles of Public International Law as highlighted in this paper to inform its rulings.

We also argue that lawyers should be encouraged to make Public International Law arguments in domestic cases, while being mindful of the limits of those arguments as outlined above. For states such as the Netherlands that have a monist legal system, international law is directly applicable in the domestic legal system and thus the arguments canvassed in this paper are similarly directly applicable in a domestic court.[90] For states such as the UK that operate a dualist legal system, the national legislature must 'transform' the international obligation into a rule of national law, and the national judge will then apply it as a rule of domestic law.[91] However, a domestic judge should interpret that domestic rule in accordance with its original source as an international instrument. As was stated by Lord Hope of Craighead, with reference to the 1951 Refugee Convention:[92]

> The point is commonly made in regard to the Convention that it is not right to construe its language with the same precision as one would if it had been an Act of Parliament. The Convention is an international instrument […] its choice of wording must be taken to have been the product of the inevitable process of negotiation and compromise […] And the general rule is that international treaties should, so far as possible, be construed uniformly by the national courts of all states. This point also suggests that the best guide to the meaning of the words used in the Convention is likely to be found by giving them a broad meaning in the light of the purposes which the Convention was designed to serve.[93]

Finally, we agree with the argument put forward by Yasmine Ergas that the drafting of any new convention should be informed by existing human rights obligations.[94] The ECJ held that human rights law limits Member States' domestic conduct and the scope of their international agreements.[95] Similarly, the ICJ has held that even where a particular *lex specialis* applies, its provisions are to be interpreted in view of human rights law,[96] and human rights norms continue to apply unless they have been specifically suspended.[97] Indeed, as aforementioned, the obligation to take into

90. E Denza 'The relationship between international and national law', in MD Evans (ed) *International Law* (Oxford: Oxford University Press, 2nd edn, 2006) p 428.
91. Ibid, p 429.
92. 1951 Convention Relating to the Status of Refugees 189 UNTS 137.
93. *Horvath v Secretary of State for the Home Department* [2000] UKHL 37.
94. Ergas, 'Thinking "through" human rights: the need for a human rights perspective with respect to the regulation of cross-border reproductive surrogacy', in Trimmings and Beaumont, above n 20, pp 427–439 at p 430.
95. Joined cases C-402/05 P & C-4015/05 P, *Yassar Abdulla Kadi & Al Bakaraat International Foundation & Council of the European Union and EC Commission* [2008] ECR I-6351.
96. *Legality of the Threat or Use of Nuclear Weapons,* 1996 ICJ 226.
97. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 2004 ICJ 131. Although both the *Nuclear Weapons* and *Wall* Advisory Opinions were dealing with the overlap between International Humanitarian Law and International Human Rights Law in situations of armed conflict, the principle is generalizable as such that International Human Rights Law will be applicable unless excluded by derogation or the application of *lex specialis*.

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account international law was explicitly stated in the ECtHR decision of *Campenelli*, which dealt with the issue of international surrogacy agreements. Thus, it would in fact be a breach of international law for a state to carry out obligations under a new convention that conflicted with its existing human rights obligations, and therefore the proposed convention would need to be in conformity with its existing obligations. We advocate in particular for the inclusion of those set out in the CRC, as most states in the world are a party to that Convention.

CONCLUSION

As identified above, the numbers of international surrogacy agreements are on the increase globally. With no international legal framework and significant disparities amongst national laws, children born as a result of international surrogacy agreements are in a precarious position. In such circumstances, as seen above, states have generally sought to achieve a temporary resolution, but these solutions are often ad hoc in nature and can take considerable time and money to arrange.

It is simply not satisfactory, given the general agreement internationally on the need to end statelessness, that children, who are one of the most vulnerable groups in society, and whose human rights and dignity must therefore be given the utmost legal protection, are born under the shadow of 'statelessness', with all the attendant risks this position entails. Although the proposed Hague Convention on Surrogacy, if completed, will address such issues, it is likely that it will take considerable time to conclude and that states that ban commercial surrogacy will be reluctant to participate. A better solution to the problems faced by international surrogacy agreement children is found in the provisions governing statelessness in Public International Law. These provisions – particularly those contained in the CRC and the jurisprudence of the ECtHR – offer protection to international surrogacy agreement children, and such provisions should be relied upon to interpret domestic legal provisions in litigation relating to international surrogacy agreements. Finally, the drafting of any new convention should be informed by existing international law obligations; particularly those set out in the CRC, which is the most widely ratified treaty in the world.

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