

Children, their right to a nationality and child statelessness

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6.1. Introduction

The 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 may be left stateless for many years, or even a lifetime – with severe consequences. 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. This is why a child's right to acquire a nationality is laid down in numerous international instruments, including the almost universally ratified 1989 Convention on the Rights of the Child (CRC).¹ Yet new cases of childhood statelessness surface around the world every day, raising the issue to what extent states' international obligations are being effectively implemented. A second issue is whether the international standards themselves are adequate or are in need of further clarification. Guided by such questions, this chapter looks at the scope and implementation of the right to a nationality generally, and from the specific perspective of the avoidance of childhood statelessness. In this latter regard, it asks: When is a child considered to be 'otherwise stateless' for the purposes of invoking the standards to acquire a nationality under relevant instruments? How are nationality norms to be applied in the context of complex situations in order to avoid statelessness, such as those involving abandoned children, international adoption or surrogacy arrangements, or foundlings? These questions are explored through an analysis of core universal and regional human rights instruments, as well as the specific rules on the avoidance of statelessness among children

¹ Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3.

found in the 1961 Convention on the Reduction of Statelessness² (1961 Convention) and those developed within the framework of the Council of Europe, which offers the most detailed and comprehensive set of regional standards elaborated on this issue to date.

6.2. The right of children to a nationality under international human rights law

Article 15 of the 1948 Universal Declaration of Human Rights³ (UDHR) guarantees 'nationality' as a human right by prescribing that 'Everyone has the right to a nationality' and 'No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'. The obvious weakness of Article 15(1) is that it does not indicate which nationality a person may have a right to, nor which state has the obligation to grant it. This principle elaborated in Article 15 is repeated in several binding international treaties. As will be seen below, the formulation of this right in successive universal and regional human rights treaties shows a particular interest in ensuring that children have access to a nationality.

Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR)⁴ guarantees, for example, that '[e]very *child* has the right to acquire a nationality' [emphasis added]. Like the UDHR, this provision does not indicate to which state a child may claim his or her right to nationality. Additionally, Article 24(3) only guarantees a right to *acquire* a nationality, without any specification by which time this right has to be implemented. Nevertheless, a positive element of the ICCPR is that it articulates the right of a *child* to acquire a nationality.⁵ This imposes an obligation to implement the provision in a way that gives a child a meaningful opportunity to exercise their right to acquire a nationality before (s)he reaches the age of majority. Read in conjunction with Article 24(2), which requires children to be registered immediately after birth, early conferral of nationality is expected. This implies that it is not acceptable to

² Convention on the Reduction of Statelessness, New York, 30 August 1961, in force 13 December 1975, 989 UNTS 175.

³ Resolution 217 A (III), UN General Assembly, 10 December 1948.

⁴ International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171.

⁵ This term should be interpreted as 'every human being below the age of 18 years unless, under domestic law applicable, majority is attained earlier'. See Article 1 CRC.

postpone the right to acquire a nationality until a person reaches the age of eighteen years. Nor it is acceptable that children be denied access to the right to nationality on discriminatory grounds. In fact, sub-paragraph (1) of the same Article specifically provides that ‘Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.’ The United Nations Human Rights Committee (HRC) has explicitly recognized that discrimination in respect of the acquisition, deprivation or loss of nationality is prohibited.⁶ In that light the HRC stressed in General Comment No. 17 on Article 24:

While the purpose of [Article 24] is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.⁷

Article 7 of the CRC renders the obligations set forth in Article 24(3) of the ICCPR slightly more concrete. It provides:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Neither the ICCPR nor the CRC indicate which nationality a child may have a right to, nor do they guarantee that the nationality is acquired at birth.⁸ Former Chairperson of the UN Committee on the Rights of the Child (CRC Committee), Jaap Doek has observed that ‘the drafters of

⁶ Human Rights Committee, ‘General Comment No. 17: Rights of the Child (Art. 24)’, 7 April 1989, para. 4, referring to Articles 2 and 26 of the ICCPR.

⁷ *Ibid.*, para. 8.

⁸ In contrast, Principle 3 of the UN Declaration of the Rights of the Child, UNGA res. 1386 (XIV) adopted in 1959, provided that ‘the child shall be entitled *from his birth* ... to a nationality’ (emphasis added), meaning that a child should be spared even temporary statelessness by acquiring a nationality immediately at birth.

the ICCPR felt that a State could not accept an unqualified obligation to accord its nationality to every child born on its territory regardless the circumstances'.⁹ He also emphasized that the CRC Committee does not suggest that state parties should introduce 'the *jus soli* approach', but rather that 'all necessary measures are taken to prevent the child from having no nationality'.¹⁰ His views are similar to the approach adopted by the HRC.¹¹ As such, those measures to be taken to prevent a child having no nationality fall not only on the country of birth of the child, but also on the country of the nationality of the parent(s). The obligations imposed on states by Article 7(2) of the CRC are not exclusively directed to the country of birth of a child, but to all countries with which the child has a link by way of parentage, residence or place of birth.¹²

Furthermore, where nationality is attributed on the basis of descent, human rights law demands that states not discriminate on the basis of gender. In other words, a child should have equal access to the state's nationality whether it is the mother or father who holds it. This obligation is explicit in Article 9(2) of the Convention on the Elimination of All Forms of Discrimination Against Women, but also flows from the non-discrimination clauses of the ICCPR and CRC.¹³ Ensuring that women have an equal opportunity to pass on their nationality to their children plays an important part in preventing childhood statelessness, since any of a variety of reasons may preclude access to the father's nationality.¹⁴

In addition to the global instruments, several regional instruments also contain provisions on the nationality rights of children. The American Convention on Human Rights (ACHR) was the first regional instrument to reaffirm Article 15 of the UDHR's universal promise of the right to nationality.¹⁵ An interesting divergence is that Article 20(2) of the ACHR guarantees the acquisition of nationality of the country of birth (*jus soli*) if

⁹ Jaap Doek, 'The CRC and the Right to Acquire and Preserve a Nationality', *Refugee Survey Quarterly* 25 (2006) 26–32, at 26.

¹⁰ *Ibid.*, at 28.

¹¹ See Human Rights Committee, 'General Comment 17'.

¹² See also Laura van Waas, *Nationality Matters. Statelessness under International Law* (Antwerp/Oxford/Portland, OR: Intersentia 2008), 63–4.

¹³ See further on gender discrimination in nationality laws and the response of international law to this phenomenon [Chapter 7](#) by Govil and Edwards in this volume.

¹⁴ UNHCR, 'Background note on gender equality, nationality laws and statelessness' (2014).

¹⁵ Article 20 of the American Convention on Human Rights, 22 November 1969, in force 18 July 1978, OAS Treaty Series No. 36 reads as follows: '1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it.'

a person does not have the right to another nationality.¹⁶ This clear choice for a default *jus soli* rule can be explained by the strong preference for *jus soli* for the acquisition of nationality at birth in the Americas.¹⁷

The African Charter on the Rights and Welfare of the Child enshrines the right to a nationality for children in its Article 6(3) and (4).¹⁸ Like the ACHR, Article 6(4) contains a clear default to *jus soli* acquisition of nationality for otherwise stateless children. Of particular note is that the African Children's Charter provision requires 'constitutional recognition' of the principles for the granting of nationality by states where children who would otherwise be stateless are born.¹⁹

The foregoing shows that, within the realm of human rights law, there is broad recognition of the child's right to acquire a nationality, but some variation in the manner in which this right is formulated. There is also limited guidance on how the right is to be exercised. The next sections study how the right to acquire a nationality has inspired the elaboration of more concrete norms in other treaties, in particular the UN's 1961 Convention and the detailed regional standards developed by the Council of Europe.

6.3. Access of children to a nationality under the 1961 Statelessness Convention

The 1961 Statelessness Convention²⁰ obliges contracting states to grant nationality to persons born in their territory who without such nationality

¹⁶ See for an application of Article 20 by the Inter-American Court of Human Rights the decision on the enjoyment of nationality by children of Haitian descent in the Dominican Republic Inter-American Court of Human Rights, *Yean and Bosico v. Dominican Republic*, Series C, Case 130, 8 September 2005.

¹⁷ van Waas, *Nationality Matters*, 60, 61.

¹⁸ African Charter on the Rights and Welfare of the Child, 11 July 1990, in force 29 November 1999, OAU DOC. CAB/LEG/24.9.49; Article 63(3) and (4) provides: '3. Every child has the right to acquire a nationality. 4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognise the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.'

¹⁹ See for an application of Article 6(3) and (4) African Committee of Experts on the Rights and Welfare of the Child, *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v. The Government of Kenya ('Nubian Children case')*, Communication No. Com/002/2009, 22 March 2011.

²⁰ This paragraph is based on a considerably more detailed description of and comments on Articles 1–4 of the 1961 Statelessness Convention in Gerard-René de Groot, 'Preventing Statelessness Among Children: Interpreting Articles 1–4 Convention on the

would not be recognized by any state as a national, and would thus be stateless ('otherwise stateless'). In obliging states to grant nationality to these otherwise stateless children, Article 1 of the 1961 Convention gives contracting states several alternatives in implementing this requirement. The state of birth of an otherwise stateless person can either provide for an automatic (*ex lege*) acquisition of its nationality upon birth in its territory or provide for acquisition on application. Article 1 also allows contracting states to provide for automatic (*ex lege*) acquisition of nationality at an age determined by domestic law, if certain conditions are fulfilled. It is important to underscore that the reference to persons 'who would otherwise be stateless' refers to the status of the child born on the territory and not that of the parents of the child. Children of parents who have nationality are also covered by the convention if they are stateless because the parents cannot transmit their nationality to them.²¹

States that do not provide for an *ex lege* acquisition of their nationality for otherwise stateless children at birth may require the fulfilment of one or more of the conditions exhaustively listed in Article 1(2) of the 1961 Convention (acquisition by application). Imposing any other conditions than those elaborated would violate the terms of the 1961 Convention. Moreover, the exhaustive character of the list implies that the state does not have any discretionary power to deny nationality if the conditions mentioned under domestic law in conformity with Article 1(2) are met. To provide for a discretionary naturalization procedure for otherwise stateless children is thus not in conformity with the 1961 Convention.²²

The first permissible condition for acquiring nationality through application is that a state can require an individual to lodge an application during a period of time beginning not later than after the applicant reaches the age of eighteen years and ending not earlier than the age of twenty-one years. Moreover, the person concerned shall be allowed at least one year during which to make the application without having to obtain

Reduction of Statelessness and relevant international human rights norms', Background paper, UNHCR: Geneva (March 2012), 70. See also: UNHCR, 'Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children', Expert meeting, ("Dakar Conclusions"), September 2011; and UNHCR, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness', HRC/GS/12/04, 21 December 2012 (Guidelines No. 4).

²¹ A further exploration of how the notion of 'otherwise stateless' should be interpreted and applied is offered in [section 6.4.1](#) of this chapter.

²² See 'Summary Record of the 3rd Meeting of Committee 1' A/CONF.9/C.1/SR.3 (2–4-1959), p. 7. See also No. 4, para. 37.

authorization of the parent or guardian to do so. In light of provisions of several more recent treaties already mentioned above,²³ which oblige states to facilitate the acquisition of a nationality by *children* who otherwise would remain stateless, it is no longer acceptable to leave children stateless for a significant period by fixing a late start date for the application period, e.g. at reaching the age of eighteen years. Indeed, 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 after birth.

A second permissible condition is that a state can require an applicant to establish habitual residence in a country for a period not exceeding five years immediately preceding the lodging of the application nor ten years in all. The notion 'habitual residence' has to be distinguished from 'residence' or 'domicile' as regulated in domestic law. 'Habitual residence' is very much fact oriented: it indicates 'a stable factual residence'²⁴ and does not imply a legal or formal qualification. The expression 'habitual residence' refers to an autonomous, international concept and, for example, is also used in The Hague Conventions on Private International Law.²⁵ Thus, it is important to stress that it is only permitted to require a period of 'habitual residence' and the 1961 Convention does not allow a state to make a successful application conditional on *lawful* residence. It also follows from Article 1(2)(b) that a state may *not* require a certain period of uninterrupted habitual residence *since birth*. A stateless person born on the territory of a certain contracting state who did not acquire the nationality of this state at birth may later lodge an application for the acquisition of this nationality, even if (s)he was living for a considerable period of time in another country.²⁶

The text of Article 1(2)(b) of the 1961 Convention can be interpreted in two different ways:

- 1) A continuous habitual residence of five years directly preceding the application may be required, but an application must also be allowed if

²³ In particular Article 24(3) of the ICCPR, Article 7(1) of the CRC, Article 6(3) of the African Charter on the Rights and Welfare of the Child.

²⁴ See Article 1 of the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession 19 May 2006, ETS No. 200. Compare also No. 10 of the Explanatory Report to that Convention.

²⁵ See also Resolution (72)1 of the Council of Ministers of the Council of Europe on the standardization of the legal concepts of 'domicile' and 'residence', 18 January 1972, in particular at no. 7: 'The residence of a person is determined solely by factual criteria; it does not depend upon the legal entitlement to reside'; and several Regulations of the European Union, e.g. Regulation EU 2201/2003 (the so-called Brussels Ibis regulation).

²⁶ See 'Summary Record of the 9th Plenary Meeting' A/CONF.9/SR.9 (15 April 1959), p. 2.

the total duration of shorter periods of habitual residence exceeds ten years;²⁷ or

- 2) A habitual residence of ten years may be required, of which a period not exceeding five years directly precedes the lodging of the declaration.

The drafting history of the convention provides no clear view on the intention of the drafters. It only becomes clear that the maximum term of five years' residence immediately before the application was inserted because the drafters realized that young people may go abroad for a period for the purposes of education. States should therefore avoid requiring too long a period of uninterrupted residence immediately preceding the application.²⁸ Again, it should be underlined that a period of ten years, and even a period of five years, could be considered long in light of the principles contained in more recent human rights treaties and the overall objective of the treaty to reduce the cases of statelessness. States that apply an application procedure requiring a certain period of habitual residence are, therefore, encouraged to provide for a period as short as possible.²⁹

The third permissible condition that can be imposed upon otherwise stateless persons who apply to acquire citizenship of the country of birth is a criminal conviction test. States can require that an individual has neither been convicted of an offence against national security nor sentenced to imprisonment for a term of five years or more on a criminal charge. Article 1(2)(c) refers to the criminal history of an otherwise stateless person and not to acts of his or her parents.

Finally, Article 1(2)(d) of the 1961 Convention allows states to require that an applicant 'has always been stateless'. It follows from the exhaustive character of the permissible grounds for rejection that there should be a presumption that the applicant has always been stateless and the burden of proof rests with the state to prove the contrary.³⁰ If a state does not explicitly require that a person has always been stateless, they might then allow a person born on their territory the right to acquire their nationality if, for example, a person was not born stateless or was born stateless, acquired a nationality but lost this nationality again with statelessness the consequence.³¹

²⁷ van Waas, *Nationality Matters*, 62 seems to interpret the provision in this way.

²⁸ 'Summary Record of the 3rd Meeting of Committee 1' A/CONF.9/C.1/SR.3 (2 April 1959), p. 6.

²⁹ This also applies for the period of habitual residence which may be imposed under Articles 1(5) and 4(2), 1961 Convention.

³⁰ See 'Guidelines No. 4', para. 48.

³¹ See 'Summary Record of the 3rd Meeting of Committee 1', p. 6.

As already noted, providing that nationality can be acquired upon application – rather than automatically at birth – can leave a child stateless for a considerable number of years, with all of the negative consequences for the enjoyment of other rights that this may entail in the interim. Alternatively, states could provide for the loss of the nationality acquired by birth on the territory in order to avoid statelessness if it is later discovered that the child actually does hold, or has acquired, another nationality.³² It is therefore preferable to provide for children born on the territory of a state who would otherwise be stateless to be able to acquire the nationality of that state at birth or shortly after birth with retroactivity. However, the 1961 Convention allows for states to provide for the acquisition of nationality without retroactive effect.³³

Automatic acquisition of nationality by otherwise stateless children under Article 1 of the 1961 Convention may have as a consequence that the mere ‘accidental’ birth on the territory would also give the right to acquire the nationality of the state of birth. Even though the number of such cases is small, some states are afraid that such a rule could be abused. To avoid this, a state makes the *ex lege* acquisition of its nationality by potentially stateless children conditional on the lawful and habitual residence of a parent on its territory. However, if states do so, they will – in order to meet the standards of Article 1 of the 1961 Convention – also have to provide for the grant of nationality by application for those children who do not acquire the nationality of the country of birth immediately, due to the fact that their parent did not reside lawfully and habitually in that country. Contracting states must then also observe the fact that the 1961 Convention does not allow the requirement of *lawful* residence of the applicant as a condition for a successful application.

A special rule is given in Article 1(3) of the 1961 Convention. The approach taken to the avoidance of statelessness of the 1961 Convention was a compromise between *jus soli* and *jus sanguinis* countries. An essential element of this compromise was Article 1(3). At the time of negotiating the text, most *jus sanguinis* countries applied *jus sanguinis a patre*. In those countries, in principle only male nationals could transmit their nationality to their children. Female nationals could transmit their nationality to children born out of wedlock, often only if paternity could not be

³² See e.g. Article 7(1)(f) European Convention on Nationality (ECN), 6 November 1997, ETS No. 166, see 6.4 of this chapter.

³³ Compare Principle 2 of ‘Recommendation 2009/13 of the Committee of Ministers of the Council of Europe on the nationality of children’, CM/Res(2009)13, 9 December 2009 and the Explanatory Memorandum on the Recommendation, at Nr. 11.

established or recognized. Consequently, in these states the children of a mother who is a national and a stateless father, or a father who could not transmit his nationality, would be born stateless. Inspired by the earlier League of Nations' Protocol on a Certain Case of Statelessness³⁴ to the 1930 Hague Convention on Certain Questions Relating to the Conflicts of Nationality Laws.³⁵ Article 1(3) of the 1961 Convention prescribes the acquisition of the nationality of the country of birth for children born on the territory of a state of which their mother is a national, if they otherwise would be stateless.³⁶

Attention should also be devoted to the obligations that arise under Article 1(4)–(5) and Article 4 of the 1961 Convention. Article 1(4)–(5) addresses the nationality position of a stateless person who was not able to acquire the nationality of the contracting state of birth due to the age or residence conditions of Article 1(2).³⁷ In principle, their acquisition of a nationality is no longer facilitated by the convention unless a parent is a national of another contracting state. In the latter case, the country of nationality of this parent has to grant its nationality, *ex lege* or upon application. An application may only be rejected on the grounds exhaustively mentioned in Article 1(5). These grounds have strong similarities with those of Article 1(2), but differ in some details.³⁸ Article 1(4) also addresses cases where a stateless person is the child of two parents who are nationals of two different contracting states by allowing states to determine whether the child can acquire the nationality of the father or of the mother under national law.

The obligations of the state of nationality of a parent are stronger under the 1961 Convention if the otherwise stateless child is born in the territory of a non-contracting state, but has a parent who possesses the nationality of a contracting state at the time of birth of his or her child. In that case the state of nationality of a parent may have an immediate obligation to grant its nationality to the child, because the 1961 Convention

³⁴ League of Nations, Protocol Relating to a Certain Case of Statelessness, 12 April 1930, No. 4138, 179 LNTS 115.

³⁵ League of Nations, Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, 179 LNTS 89.

³⁶ See further on gender discrimination in nationality laws and the response of international law to this phenomenon [Chapter 7](#) by Govil and Edwards in this volume.

³⁷ The obligations of the country of birth under the 1961 Convention take precedence over the obligations of the country of citizenship of a parent.

³⁸ For a comparative table regarding the grounds for rejection of an application under Article 1(2), Article 1(4)–(5) and Article 4 of the 1961 Convention, see de Groot, 'Preventing Statelessness Among Children'.

cannot force the non-contracting state of birth to confer its nationality. According to Article 4, acquisition of nationality by an otherwise stateless person may occur *ex lege* at birth or subsequently on application. If the state opts for the application route it may make this subject to one or more of the conditions listed in Article 4(2). These conditions are similar to those of Article 1(4).

Lastly, it should be noted that Article 2 of the 1961 Convention deals specifically with the acquisition of nationality by foundlings. A detailed discussion of this provision can be found under [section 6.4.2](#) below.

6.4. Access of children to a nationality under Council of Europe standards

Regional standard setting in relation to children's rights to a nationality has progressed the furthest in the Council of Europe by means of the European Convention on Nationality 1997 (ECN) and a significant body of soft law instruments. Some jurisprudence of the European Court of Human Rights (ECtHR) is also relevant to this issue. As such, the Council of Europe framework for the nationality rights of children makes an interesting comparator for the international standards discussed.

The 1961 Convention had considerable influence on the provisions of the ECN and several of its provisions address the avoidance of cases of statelessness among children. First of all, Article 4(a)–(c) of the ECN repeats the message of Article 15 UDHR, i.e. that everyone has the right to a nationality and no one may be arbitrarily deprived of nationality. Article 6(1)(b) of the ECN prescribes the acquisition of nationality to foundlings found in its territory, which is dealt with later in this chapter. Article 6(2) regulates access to nationality for otherwise stateless children and will be looked at here.

Article 6(2) ECN, dealing with access to the nationality of the country of birth for otherwise stateless children born in the territory of that state has many similarities with the regime of the 1961 Convention, but there are some important differences. The 1961 Convention allows a state to postpone access to their nationality to the moment the stateless person concerned reaches the age of eighteen, whereas according to the ECN access has to be given after five years of lawful and habitual residence, while a child is still a minor. The 1961 Convention also allows states to reject an application because of a sentence for a crime which constitutes a threat to national security, or more than five years' imprisonment. The ECN does not allow this ground for a rejection of the application. As such, the obligations of the ECN are stricter than those under the 1961

Convention, reflecting developments in the prohibition of statelessness under international law.

However, the 1961 Convention guarantees that a person born stateless has – in principle – at least one year after attaining the age of majority to take a decision on the acquisition of the nationality of his country of birth.³⁹ Furthermore, the ECN allows states to require a period of *lawful* and habitual residence, whereas the 1961 Convention only allows states to require *habitual* residence during the relevant period. The drafters of the 1961 Convention sought to guarantee a right to nationality and were concerned that by allowing states to require a *lawful* residence, a state could avoid obligations by refusing a stateless person a residence permit.

Article 6(1)(a) ECN is also of importance to the avoidance of statelessness, where it prescribes that a child of a national should acquire the nationality of the parent (*jus sanguinis*), subject to exceptions made for children born abroad. Furthermore, it requires that states:

provide that children whose parentage is established by recognition, by court order or similar procedures acquire the nationality of the parent concerned, subject only to a procedure determined by their internal law.

It must be stressed that only procedural requirements may be imposed and not any substantive conditions. In addition, since the decision of the ECtHR in *Genovese v. Malta*,⁴⁰ it is clear that a different treatment of children born out of wedlock in respect of their access to the nationality of their father violates Article 14 in conjunction with Article 8 of the ECHR. Although the ECHR does not expressly guarantee access to a nationality, the ECtHR states that the non-acquisition of, in this case, Maltese nationality (the court speaks of ‘the denial of citizenship’) had an impact on the applicant’s social identity. Discriminatory rules regarding access to nationality, therefore, affect a person’s private life as safeguarded by Article 8 ECHR.

It is worthwhile noting that the ECtHR presumed that states are under no obligation to provide for acquisition of nationality *jus sanguinis* by children born abroad to one of their nationals. This becomes clear from the fact that the court stated that Malta ‘has gone beyond its obligations under Article 8’. Yet, if a country provides for such a mode of acquisition, it should be applied in a non-discriminatory manner. The statement by the ECtHR that (non-)access to a nationality has an impact on the social identity of a person and thereby on his or her private life, is also highly

³⁹ See on this difference van Waas, *Nationality Matters*, 61, 62 (in particular footnote 55).

⁴⁰ European Court of Human Rights, *Genovese v. Malta*, Application 53124/09, 11 October 2011.

relevant for the formulation and application of rules for the avoidance of statelessness, that is, those rules have to be non-discriminatory.

In addition to the ECN and the ruling of the EctHR in *Genovese v. Malta*, another tool for tackling statelessness among children in the Council of Europe is Recommendation 2009/13, adopted by the Committee of Ministers on 9 December 2009.⁴¹ This was drafted by a Committee of Experts, appointed by the Secretary-General in April 2008⁴² to further develop the Council of Europe's work on nationality issues. The committee was asked to pay special attention to statelessness issues and to the access of children to the nationality of their parents and of their country of birth and residence. Furthermore, the committee had to draft rules to improve the nationality position of adopted children.

Recommendation 2009/13 contains twenty-three principles, the first ten of which deal with the avoidance of statelessness. Principle 1 prescribes that states should 'provide for the acquisition of nationality by right of blood (*jus sanguinis*) by children without any restriction which would result in statelessness'. According to Article 6(1) ECN each state party shall provide in its internal law for its nationality to be acquired automatically by a child, one of whose parents possesses, at the time of the child's birth, the nationality of that state. However, states are allowed to make exceptions, first for children born abroad and second, to provide for special procedural rules for the acquisition of nationality *jus sanguinis* for children whose parenthood is established by recognition, court order or similar procedures. In several countries, a child of a national born abroad does not automatically acquire the nationality of the parent, but has the right to acquire this nationality either by registration or by option.⁴³ Principle 1 already underpinned that such a construction should be drafted in a way which does not cause statelessness. Principle 3 recommends that the state of birth or residence should provide the child 'with any necessary assistance' to exercise their right to acquire the nationality

⁴¹ Council of Europe, *Recommendation CM/Rec(2009)13 of the Committee of Ministers to member States on the nationality of children*, 9 December 2009, CM/Rec(2009)13 Recommendation CM/Re (2009). This type of recommendation is an important soft law instrument within the Council of Europe, adopted through a consensus procedure and directed towards all Council of Europe member states.

⁴² Chairman of the Committee was Frans van der Velden, whereas Gerard-René de Groot was appointed as expert-consultant.

⁴³ M. Vink and G. de Groot, 'Birthright Citizenship: Trends and regulations in Europe', Comparative Report, RSCAS/ EUDO-CIT-COMP. 2010/5, paras 2 and 3; Table 1. See also on the nationality position of children born out of wedlock also nn. 63–4 below.

of the parent. The obligation to document the existence of the child and his parentage in a birth certificate is of paramount importance in this context and is laid down in the Recommendation's principle 23. But the Explanatory Memorandum also mentions that it may be necessary to appoint a special guardian *ad litem*, who can inter alia apply for registration or lodge a declaration of option as representative of the child.

Principle 2 recommends states to 'provide that children born on their territory who otherwise would be stateless acquire their nationality subject to no other condition than the lawful and habitual residence of a parent'. This principle is supplementary to the obligations already existing in Article 6(2) ECN and the corresponding provisions of the 1961 Convention. A clear majority of member states of the Council of Europe grant their nationality to otherwise stateless children born on their territory automatically at birth. Some states do so with the additional condition that the parents have lawful and habitual residence in the state at the time of the birth of the child.⁴⁴ Most other states provide for a right of registration as a national or acquisition of nationality via the lodging of a declaration of option after a certain period of lawful and habitual residence. The Recommendation's Explanatory Memorandum indicates that acquisition of nationality by a child born in the territory who is otherwise stateless should ideally occur at birth or shortly after birth, with retroactivity, but the principle allows for the acquisition of nationality without retroactive effect.

Even if states implement all of the aforementioned principles and the obligations derived from both the 1961 Convention and the ECN, some children will still not possess any nationality. The ECN does not include a provision on the individual naturalization of children. Many European states do not permit children to acquire their nationality individually.⁴⁵ Consequently, stateless children often have to wait until they reach the age of majority before they can apply for naturalization in the state of residence. Such a long period of statelessness is contrary to the best interests of the children concerned. Principle 5 of the Recommendation therefore underlines: 'stateless children have the right to apply for their nationality after lawful and habitual residence on their territory for a period not exceeding five years immediately preceding the lodging of the applica-

⁴⁴ *Ibid.*, para. 5 and Table 4.

⁴⁵ S. Wallace Goodman, 'Naturalisation Policies in Europe: Exploring patterns of inclusion and exclusion, Comparative Report', EUDO Citizenship Observatory, 2010.

tion'. A state may require that they must be represented by their legal representative.⁴⁶

A striking difference between the Council of Europe Recommendation 2009/13 on the one hand and the 1961 Convention on the other has to do with the relationship between Article 1 and Article 4 of the 1961 Convention: the *jus soli*-inspired obligations of Article 1 of the 1961 Convention have precedence over the *jus sanguinis*-inspired rules of Article 4. In Recommendation 2009/13 the opposite can be observed: the default *jus sanguinis* rule of principle 1 has precedence above the default *jus soli* rule of principle 2. This difference may be explained by the fact that within the Council of Europe the *jus sanguinis* tradition is stronger than that of *jus soli*.

The principles of Recommendation 2009/13 are a welcome supplement to the rules enshrined in the ECN. Ideally, they should constitute the basis for the drafting of a Protocol to the ECN. The principles are also a source of inspiration for other international and regional debates on the improvement of rules avoiding and reducing cases of statelessness. One such debate took place during an expert meeting on the interpretation of Articles 1–4 of the 1961 Convention, convened by the UNHCR in 2011 in Dakar, Senegal. In the conclusions of the Dakar Meeting and in the guidelines that followed, the influence of Recommendation 2009/13 is obvious.⁴⁷

6.5. Specific challenges in relation to children's access to a nationality

In the sections above, the general standards developed under international law for the avoidance of statelessness among children have been outlined in some detail. Already, a number of challenges inherent in the application of these standards has been highlighted. In the following paragraphs, some further questions are considered, including those relating to the specific difficulty of implementing safeguards that rely on states identifying 'otherwise stateless' children and how to deal with particular categories of children who find themselves more acutely at risk of statelessness.

⁴⁶ Compare the Principles 19–22 of Recommendation CM/Rec(2009)13.

⁴⁷ UNHCR, 'Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children: ("Dakar Conclusions")', September 2011; and UNHCR, 'Guideline No. 4'.

6.5.1 *Establishing that a child is 'otherwise stateless'*

A general difficulty with the application of every statelessness avoidance rule is the determination of potential statelessness – that is, the identification of a child as 'otherwise stateless'. Article 1 of the 1954 Convention on the Status of Stateless Persons⁴⁸ defines a stateless person as a person 'who is not considered as a national by any State under the operation of its law'. This definition is also used for the determination of the scope of application of the statelessness avoiding rules in the 1961 Convention and the ECN, thus available guidance on the determination of statelessness under the 1954 Convention is also relevant here.⁴⁹ In addition, to deal with particular questions surrounding the determination that a child is – or was, at birth – otherwise stateless, the Council of Europe's 2009 Recommendation provides a number of helpful insights.

Firstly, in order to determine whether rules concerning the avoidance of statelessness are applicable, authorities often need detailed information, in particular on the acquisition or non-acquisition of a certain foreign nationality. Not providing information could under the circumstances cause or prolong statelessness of the child involved. Of course, states have to observe data protection rules, but they should provide relevant data to another state if this is required in the best interests of the child. Therefore, principle 6 calls on states to 'co-operate closely on issues of statelessness of children, including exchanging information on nationality legislation and public policies, as well as on nationality details in individual cases, subject to applicable laws on personal data protection'.

Some states are keen to avoid the acquisition of nationality by *jus soli* or any other preferential access to the nationality of their state of birth by children who could easily acquire the nationality of one of their parents and will expressly exclude children who could acquire the nationality of a parent by registration.⁵⁰ The Explanatory Memorandum of Recommendation 2009/13 has the following to say about such constructions:

This is in line with the object and purpose of rules for avoiding statelessness in international instruments, like the 1961 United Nations Convention on the Reduction of Statelessness and the ECN. The rules of these conventions can clearly not lead to an obligation for the contracting

⁴⁸ Convention relating to the Status of Stateless Persons, New York, 28 September 1954, in force 6 June 1960, 360 UNTS 117.

⁴⁹ See further [Chapter 5](#) by Gyulai in this volume.

⁵⁰ See for details Vink and de Groot, 'Birthright Citizenship, para. 5, Table 4.

States to grant their nationality to a person who decided for strict personal convenience not to exercise a right to acquire the nationality of another state.⁵¹

However, the non-use of the right to register a child as a national of the country of a parent is not in all cases unacceptable, for instance where the parent has disappeared or has ‘good reasons that his or her child will not be registered (not even through a representative) as a national of this parent’s State of origin [as] is e.g. the case if the parent left that State as a refugee’.⁵² With such cases in mind, principle 4 of the Recommendation asks states to ‘provide that children who, at birth, have the right to acquire the nationality of another state, but who could not reasonably be expected to acquire that nationality, are not excluded from the scope of principles [allowing for acquisition of nationality for the avoidance of statelessness]’.

In light of the difficulty involved in establishing a child’s exact nationality entitlement, authorities sometimes register a person as being of unknown or undetermined nationality or classify the nationality of a person as being ‘under investigation’. Such classification is quite often necessary, but only reasonable as a transitory measure during a brief period of time. Again, the Council of Europe Recommendation 2009/13 is helpful here:

Register children as being of unknown or undetermined nationality, or classify children’s nationality as being ‘under investigation’ only for as short a period as possible.

The Explanatory Memorandum also refers to Article 8 of the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, requesting states to lower the burden of proof for statelessness.⁵³ It urges states to implement their obligations under international

⁵¹ Recommendation CM/Rec(2009)13 and explanatory memorandum of the Committee of Ministers to member States on the nationality of children, pp. 18–19.

⁵² Compare the facts in European Court of Justice, *Gerardo Ruiz Zambrano v. Office national de l’emploi*, C-34/09, 8 March 2011. See on *Zambrano* S. C. G. Van den Bogaert, G. R. de Groot and A. P. van der Mei., ‘De arresten Ruiz Zambrano en McCarthy: Het Hof van Justitie en het effectieve genot van EU burgerschapsrechten’, *Nederlands tijdschrift voor Europees Recht* (2011), 188–99.

⁵³ Article 8 (1) reads: ‘A successor State shall not insist on its standard requirements of proof necessary for the granting of its nationality in the case of persons who have or would become stateless as a result of State succession and where it is not reasonable for such persons to meet the standard requirements.’

law by not indefinitely leaving the nationality status of an individual as undetermined.⁵⁴

6.5.2 *Foundlings and their access to a nationality*

Foundlings present a particular challenge to states in terms of guaranteeing access to nationality since key facts about their origin are unknown. Article 2 of the 1961 Convention provides as follows:

A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.

The rule established in Article 2 reflects that of Article 14 of the 1930 Hague Convention.⁵⁵ However, an important difference is that Article 2 of the 1961 Convention only mentions ‘foundlings’ and not, as Article 14 of the 1930 Hague Convention, also ‘children of unknown parentage’. Article 6(1)(b) ECN also prescribes a state to grant nationality to a foundling found on its territory. Three questions arise from these provisions: 1) When is a child a ‘foundling’? 2) What happens if evidence demonstrates that the child was born abroad or that the child has non-national parents? 3) What is the position of children of unknown parentage?

The term ‘foundling’ in itself requires clarification on whether it refers only to new-born babies or whether it also can include children. The English term ‘foundling’ seems to point in the direction of very young children. The Oxford English Dictionary defines this word as ‘an infant that has been abandoned by its parents and is discovered and cared for by others’.⁵⁶ The word ‘infant’ is defined as ‘a very young child or baby’.⁵⁷ Also in the light of the majority of the language versions of the 1961 Convention it could be argued that a restriction of the foundling rule to new-born children is not contrary to the obligations of the convention.⁵⁸

Nevertheless this leaves a gap with regard to the avoidance of statelessness of children found abandoned if it is obvious that the child concerned

⁵⁴ Compare the ‘Explanatory Report, Nr. 32–37’. See also De Groot ‘Preventing statelessness’, at 26, 27. See ‘Guidelines No. 4’, para. 22.

⁵⁵ League of Nations, Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, 179 LNTS 89.

⁵⁶ Oxford English Dictionary, Oxford University Press, 1989.

⁵⁷ *Ibid.* ⁵⁸ The same would apply for Article 6 ECN.

is not a new-born baby.⁵⁹ Therefore, in light of the object and purpose of Article 2 of the 1961 Convention, Article 6(2) ECN and Article 7 CRC, states should be encouraged to treat children found abandoned on their territory with no known parentage, as far as possible, as foundlings with respect to the acquisition of nationality. At a minimum, the safeguard for contracting states to grant nationality to foundlings should apply to all young children who are not yet able to communicate accurate information pertaining to the identity of their parents or their place of birth. A contrary interpretation would leave some children stateless.

A state could decide to extend the provision on foundlings to all minors found abandoned on their territory, as some states already do,⁶⁰ but a state could also determine an age limit. It has to be underscored that in all cases where a state sets an age limit for foundlings to acquire nationality, the age of the child at the date the child was found should be decisive and not the date when a child came to the attention of the authorities.⁶¹

The 1961 Convention does not expressly regulate the situation in which evidence is subsequently found of the parents or place of birth of the foundling. However, the interpretation given during the preparatory negotiations was that ‘the child would possess the nationality of the country in which he had been found until shown to be entitled to another nationality’.⁶² As a general rule, and in keeping with the object and purpose to reduce statelessness, one could argue that the discovery of parents who hold another nationality or birth abroad does not lead to loss of the nationality acquired on the basis of the Article 2 safeguard for foundlings if statelessness would be the consequence.⁶³

Notwithstanding the question of the age of the child, as discussed above, if the parentage of the child is factually unknown, the child is of course a foundling. But under the family law of several countries it is

⁵⁹ This gap is also identified by Recommendation CM/Rec 2009/13. See Principle 9 of that Recommendation.

⁶⁰ See e.g. Article 3(2) of the Kingdom Act on Netherlands Nationality. EUDO Citizenship, ‘Comparing Citizenship Laws: Acquisition of Citizenship’, online database, available at <http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=&search=1&modeby=idmode&idmode=A03a>, last accessed 10 April 2013.

⁶¹ See ‘Guidelines No. 4’, para. 59.

⁶² ‘Summary Record of the 5th Meeting of Committee 1’ A/CONF.9/C.1/SR.5 (3 April 1959), p. 10.

⁶³ Compare Article 7(1)(f) ECN: If later the child’s parents or the place of birth are discovered, and the child derives a citizenship from (one of) these parents or acquired a citizenship because of his place of birth, the citizenship acquired because of the foundling provision may be lost. However, according to Article 7(3) such discovery may never cause statelessness.

also possible that a child has no *legal* parent, although a biological parent may be known. This is, for example, the case with the so-called ‘delivery under X’ (*accouchement sous X*) in France.⁶⁴ French law allows a woman who gives birth to a child out of wedlock to ask not to be mentioned as the mother on the birth certificate of the child. Consequently, the child will not have a family relationship with that woman.⁶⁵ Such children are legally in a similar vulnerable position as foundlings, and should enjoy the benefit of the relevant statelessness avoiding rules.⁶⁶ This is also the case if there are strong indications that the woman who gave birth to the child is a foreigner.

6.5.3 *Adopted children and their nationality*

Through adoption, a family relationship is created between the adopted child and his or her adopted parent(s). Consequently, the adopted child’s legal position in nationality law should be, as far as possible, identical to the position of a biological child. This is *inter alia* prescribed by the Hague Convention on Protection of Children and Cooperation in respect of Inter country Adoption of 29 May 1993⁶⁷ as well as the European Convention on the Adoption of Children (revised).⁶⁸ The latter states that: ‘Upon adoption a child shall become a full member of the family of the adopter(s) and shall have in regard to the adopter(s) and his, her or their family the same rights and obligations as a child of the adopter(s) whose parentage is legally established’.⁶⁹

It is nevertheless unfortunate that few international treaties deal with the nationality position of adopted children. Those treaties that contain a provision on adopted children provide exclusively that the loss of

⁶⁴ Article 326 French Code civil: ‘Lors de l’accouchement, la mère peut demander que le secret de son admission et de son identité soit préservé.’ [During childbirth, the mother may request that her admission and identity is not disclosed.]

⁶⁵ The same applies for legal systems which still require that a mother has to recognize her child born out of wedlock in order to establish a family relationship. The ECtHR concluded that such requirement of recognition violates Article 8 ECHR. European Court of Human Rights, *Marckx v. Belgium*, C-6833/74, 13 June 1979. As a consequence of that decision, this requirement was abolished in the member states of the Council of Europe.

⁶⁶ Compare also Article 7(3) of the 2005 Organization of the Islamic Conference, Covenant on the Rights of the Child in Islam, June 2005, OIC/9-IGGE/HRI/2004/Rep. Final, adopted by the 32nd Conference of Foreign Ministers, Sana’a, Yemen.

⁶⁷ Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (Hague Convention), 1870 UNTS 167, in force 1 May 1995.

⁶⁸ European Convention on the Adoption of Children (revised), 24 April 1967, in force 26 April 1968, CETS No. 058.

⁶⁹ *Ibid.*, Article 11(1).

nationality as the result of adoption shall be conditional on the possession or acquisition of another nationality.⁷⁰ An exception is the ECN, which prescribes the facilitation of the acquisition of the nationality of a state for children adopted by one of their nationals (Article 6(4)(d)), as well as stating that the adoption of a child should not lead to statelessness (Article 7(1)(g) *juncto* (2)). The same rules are also included in Article 12 of the 2008 European Convention on the Adoption of Children (revised). However, neither convention prescribes concrete rules for this to take place, which are needed.⁷¹

Given this gap, the principles enshrined in Recommendation 2009/13 deserve attention: in no other international instrument can more concrete guidelines improving the nationality position of adopted children be found. Some of the core principles found in the Recommendation that could helpfully be used as a basis for specific rules to be included in a Protocol to the ECN or a Protocol to the 1961 Convention are discussed here. Principle 13 of Recommendation 2009/13 underlines that states should:

Subject the granting of their nationality to children adopted by a national to no other exceptions than those generally applicable to the acquisition of their nationality by right of blood, if as a consequence of the adoption the family relationship between the child and the parent(s) of origin is completely replaced by the family relationship between the child and the adopter(s).⁷²

The Explanatory Memorandum stresses, too, that it should be irrelevant whether the adoption decree was issued in the state of the adopting parents or abroad. In the latter case, the mere fact of the recognition of the foreign adoption by the state of the nationality of the adoptive parents should have nationality consequences.

Another issue relevant to inter-country adoption is what happens in the event of the revocation or annulment of an adoption. Principle 10 of Recommendation 2009/13 deals with the avoidance of statelessness in the case of a revocation or annulment of an adoption. Such revocation or annulment of an adoption should not cause the loss of the nationality acquired by this adoption, if statelessness would be the consequence. It

⁷⁰ Article 17, 1930 Hague Convention; Article 5(1) 1961 Convention.

⁷¹ On current state practice see Vink and de Groot, 'Birthright Citizenship', para. 4 and Table 3.

⁷² Recommendation CM/Rec(2009)13 and explanatory memorandum of the Committee of Ministers to member States on the nationality of children, p. 10.

should not matter whether or not the revocation or annulment operates with retroactivity.

Principle 15 makes an additional step by providing that 'revocation or annulment of an adoption will not cause the permanent loss of the nationality acquired by the adoption, if the child is lawfully and habitually resident on their territory for a period of more than five years'. In the exceptional and tragic circumstances of a child taking up residence in a country with a view to being adopted, but the adoption never being finalized, the child should be entitled to apply for the acquisition of the nationality of the state of residence. Principle 16 recommends: 'States should not in this case require a period of more than five years of habitual residence on their territory.' Here, the Explanatory Memorandum mentions: 'As a result of the child's residence on this territory he or she acquires a genuine link with the State involved, whereas insufficient ties are developed with his or her country of origin. Furthermore, due to the residence of the child on its territory the State has a special responsibility for the future of this particularly vulnerable child.'⁷³

6.5.4 *Avoiding statelessness of children born through surrogate mothers*

Most births of children conceived through medically assisted reproductive techniques do not cause special problems in the field of nationality law. Births resulting from medically assisted reproductive techniques involving only the biological parents will result in a *jus sanguinis* acquisition of the nationality of the parents, subject to the normal exceptions the state involved makes on this principle. However, problems may arise if a third person is involved who does not share the nationality of the biological parents, in particular in the growing number of cases of children being born through surrogacy arrangements. In those cases, there is a serious risk of statelessness for a child if the state of the surrogate mother's nationality does not attribute her nationality to the child and the state of the commissioning mother does not attribute its nationality because the commissioning mother did not give birth to the child and is thus not considered by that state as the child's mother.⁷⁴

⁷³ Recommendation CM/Rec(2009)13 and explanatory memorandum of the Committee of Ministers to member States on the nationality of children, p. 28.

⁷⁴ Compare Royal Courts of Justice, *Re X and Y (Foreign Surrogacy)* London [2009] 1 FLR 733 and Supreme Court of India, *Baby Manji Yamada v. Union of India* JT 2008 (11) SC 150.

To date, no treaty provisions deal with the nationality position of children born through surrogate mothers with a different nationality to the commissioning parents. Instead, it is possible to turn to Council of Europe Recommendation 2009/13 for some much-needed guidance. Principle 12 is concerned with children conceived through medically assisted reproductive techniques, in particular children born by a surrogate mother. It requests member states to apply to children their provisions on acquisition of nationality by right of blood if, as a result of a birth conceived through medically assisted reproductive techniques, a child–parent family relationship is established or recognized by law. Recommendation 2009/13 does not oblige states to recognize the child–parent relationship between the child and the commissioning parent(s) as an automatic consequence of the use of surrogacy. Whether such recognition takes place depends on private international law and – if applicable – the domestic law of the country of the commissioning parents.⁷⁵ However, Principle 12 underlines that *if* recognition takes place this should also have consequences in nationality law.⁷⁶

More generally one could argue that the state of nationality of the commissioning parents has a strong obligation to give access to the nationality of that state if the child involved already has habitual residence on the territory of that state. A recent decision of the Austrian Constitutional Court (‘Verfassungsgerichtshof’) of 14 December 2011 illustrates this very well.⁷⁷ An Austrian couple concluded a surrogacy contract with an American woman who gave birth, in the United States of America, to two children. The Austrian spouses were the genetic parents of these children. By birth in the US, the children were American citizens, but American courts recognized the Austrian couple as their parents. They were brought to Austria and were registered as Austrian citizens by the city of Vienna. When the mother claimed child benefits, however, the Ministry

⁷⁵ Compare K. Saarloos and J. van Berkel, ‘From Russia with love: ouderschap na draagmoederschap en de Wet conflictenrecht afstamming’, *Nederlands Internationaal Privaatrecht* (2008) 117–24.

⁷⁶ Recommendation CM/Rec(2009)13 and explanatory memorandum of the Committee of Ministers to member States on the nationality of children, 9 May 2009, CM/Rec(2009)13 at p. 25.

⁷⁷ Case B 13/11–10 of 14 December 2011 of the Austrian Constitutional Court, available at www.eudo-citizenship.eu. See also the summary of this case by Rainer Bauböck on EUDO Citizenship Observatory of 25 January 2012, available at <http://eudo-citizenship.eu/news/citizenship-news/565-constitutional-court-confirms-austrian-citizenship-for-children-born-by-american-surrogate-mother> (both sites last accessed 10 April 2013).

of Interior determined that the children did not possess Austrian nationality because surrogate motherhood was illegal under Austrian law and the Austrian mother could not be recognized as the legal parent of the child.

The Constitutional Court rejected the arguments raised by the Ministry. After some preliminary observations on the application of conflicts of laws rules, the court stated that it would be against the best interests of the child to force the American surrogate mother into the position of the legal mother against her will through the application of Austrian law, given that she was neither the biological mother nor, according to US law, the legal mother, nor did she ever establish family life with the children. If Austria did not respect the US courts' decision to recognize the Austrian couple as the children's parents, the children would lose all their rights against their genetic mother, who is also their 'factual mother' due to their family life. The court held that such far-reaching negative consequences cannot be viewed as in the best interest of the child.

This decision of the Austrian Constitutional Court has to be welcomed as a 'best practice' which should be followed by courts in other countries. Certainly, we have to admit that the Austrian case was special, in so far as the children were genetically the children of the Austrian couple, had family life with them and had their residence in Austria. But the main line is clear: the best interest of the child has to be the guiding principle in answering the question of whether the family relationship established abroad had to be recognized, with all the attendant consequences for nationality law.

6.6. Conclusion

From the foregoing the following general propositions are supported by Recommendation 2009/13 and/or UNHCR's Guideline No. 4:

- a) States should always attribute their nationality to the child of a national, if this child would otherwise be stateless (see Recommendation 2009/13 and Guidelines No. 4);
- b) States have to offer access to their nationality to otherwise stateless children born on their territory, at birth or as soon as possible after birth (preferably with retroactivity) (see Recommendation 2009/13 and Guidelines No. 4);
- c) Foundlings and small children left abandoned on the territory of a state should be presumed to be born on the territory of that state as children

of parents with the nationality of that state; they should only lose the nationality acquired on the basis of this presumption if it is proven that they possess another nationality (see Recommendation 2009/13 and Guidelines No. 4);

- d) Children with legally unknown parentage should be treated as foundlings (see Guidelines No. 4);
- e) Rules on the nationality position of adopted children should follow the principles enshrined in Recommendation 2009/13;
- f) Children born as a result of a surrogacy arrangement should acquire the nationality of a commissioning parent under the same conditions as a child born to a parent outside such a context, if the family relationship between the child and this parent is recognized. The answer to the question of whether the family relationship is recognized or not should be given in light of the best interests of the child and should be certainly affirmative if the child is genetically the daughter or son of the commissioning parent or there is family life between the child and the commissioning parent (see Recommendation 2009/13).

Questions to guide discussion

1. In which international and regional human rights instruments can the child's right to acquire a nationality be found and what differences are there in the way this norm is formulated?
2. What safeguard is prescribed in Article 1 of the 1961 Convention on the Reduction of Statelessness and what conditions may states require potential beneficiaries to meet?
3. When is a child deemed to be 'otherwise stateless' for the purposes of international law standards that guarantee a child's right to a nationality?
4. Describe three considerations or challenges in the context of guaranteeing the right to a nationality for foundlings.
5. The European Convention on Human Rights does not protect the child's right to acquire a nationality, yet the Council of Europe can be considered at the forefront of standard setting in relation to the avoidance of childhood statelessness. Use examples to explain why this is the case.
6. How can international adoption and surrogacy arrangements create problems for a child's right to acquire a nationality and what solutions does international law prescribe in such cases?