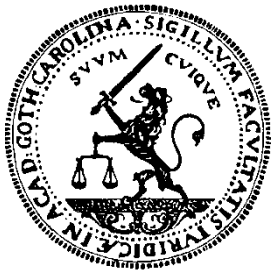

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Acquisition of nationality

A right for stateless children in Europe?

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Contents

Summary

In Europe, about 600 000 individuals, including children, are affected by statelessness today. Although the UNHCR #IBelong Campaign has shed light on the issue and set the goal of ending statelessness by 2024, there is still a lack of understanding as to which State is responsible for granting nationality to stateless children. This leads to the fundamental consequence of statelessness, where no State is responsible for the child – leaving many vulnerable to human rights violations. The research question addresses whether European States owe an obligation to grant nationality to children on their territory who would otherwise be stateless.

The thesis analyses international treaties, case law, and national legislation to gain insight into how statelessness among children is addressed globally. Sweden's national legislation is specifically examined with the purpose of showing how the relevant statelessness instruments have been incorporated into the national legislation of a European State. Further, arguments pointing to a customary international norm of granting nationality to children are explored. The most significant international instruments considered in regard to research questions are the *UN Convention on the Reduction of Statelessness*, the *UN Convention on the Rights of the Child* and the *European Convention on Nationality*. These aim to reduce statelessness by establishing a connection between the individual and the State. The thesis shows that multiple international governing bodies urge States to implement national laws and procedures that ensures that no child is left stateless. Additionally, it is repeatedly noted that States do not have full discretion in regard to who are its nationals and not.

The research establishes that there is an evident common goal among States and monitoring bodies to avoid statelessness. In order to effectively live up to the obligations under international law regarding granting nationality to children who would otherwise be stateless, the primary task is to implement a functioning system registering children at birth. The thesis holds that the right to nationality implies a positive obligation on State parties – implying a duty to fulfil the realisation of the right.

Considering the repeated case law addressing a States obligation to grant nationality to stateless children, as well as the development over the past decades in the field of nationality and statelessness, the thesis concludes that European States have an obligation under international law to ensure – either by granting their own nationality or making sure that the child is granted the nationality of another State – that no child is left stateless after birth.

Sammanfattning

I Europa påverkas cirka 600 000 personer, inklusive barn, av statslöshet. Även om UNHCR:s #IBelong-kampanj har uppmärksammat frågan och satt ett tydligt mål att statslösheten ska upphöra till 2024, råder det fortfarande tvivelaktigheter kring vilken stat som är ansvarig för att bevilja statslösa barn medborgarskap. Konsekvensen av detta blir en ökad statslöshet bland unga där ingen stat står ansvarig för barnet. Resultatet kan i värsta fall göra fler barn sårbara för kränkningar av deras mänskliga rättigheter. Arbetet utreder huruvida europeiska stater är skyldiga att bevilja medborgarskap till barn på deras territorium, som annars skulle vara statslösa.

I studien analyseras internationella fördrag, rättspraxis och nationell lagstiftning för att få en inblick i hur statslöshet bland barn hanteras globalt. Särskilt fokus riktas mot Sveriges nationella lagstiftning i syfte att visa hur de relevanta instrumenten mot statslöshet har införlivats i ett europeiskt lands nationella lagar. Vidare undersöks argument som pekar på att det finns en internationell sedvanerätt att bevilja nationalitet till barn som annars skulle vara statslösa. De viktigaste internationella instrumenten som beaktas med avseende till forskningsfrågan är *1961 års FN-konvention om begränsning av statslöshet*, *FN:s Barnkonvention* och den *Europeiska konventionen om medborgarskap*. Dessa syftar till att minska statslöshet genom att upprätta en koppling mellan individen och staten. Studien visar att flera internationella övervakningsorgan uppmanar stater att implementera nationella lagar och förfaranden som säkerställer att inget barn blir statslöst. Det påpekas upprepade gånger att stater inte har full marginal att göra en skönsmässig bedömning i frågan om vilka som är, och vilka som inte är, dess medborgare.

Arbetet visar att det uppenbart finns ett gemensamt mål bland stater och övervakningsorgan att undvika statslöshet. Den främsta uppgiften för att effektivt uppfylla de skyldigheter som följer av internationell rätt i frågan om att bevilja medborgarskap till barn som annars skulle vara statslösa är att införa ett fungerande system som registrerar alla barn vid födseln. Studien pekar på att stater har en positiv skyldighet att upprätthålla rätten till medborgarskap, det vill säga en skyldighet att förverkliga denna rättighet.

Mot bakgrund av den upprepade rättspraxis som lyfter staters ansvar att bevilja statslösa barn medborgarskap, samt den utveckling som skett under de senaste årtiondena på området ”medborgarskap och statslöshet”, dras slutsatsen att de europeiska staterna har en skyldighet enligt internationell rätt att säkerställa – antingen genom att bevilja sitt eget medborgarskap eller genom att garantera att barnet beviljas medborgarskap i en annan stat – att inget barn förblir statslöst efter födseln.

Preface

Looking back on the past five and a half years fills me with joy and pride. I am beyond thankful and want to dedicate this thesis to the friends I have made for life and the places I have had the chance to call my home.

Stockholm, 23 May 2023

Ebba Torgersson

Abbreviations

1954 Convention	Convention relating to the Status of Stateless Persons
1961 Convention	Convention on the Reduction of Statelessness
ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CoE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECN	European Convention on Nationality
EU	European Union
HRC	Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICCPR	International Convention on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund

1 Introduction

"Sometimes as a mother I try to understand. The minute my child was born, she was brought into this nightmare that is being a 'stateless person'. How is it possible a child can be born and at the same time, the most basic right that any human being is entitled to is denied to her?"[1] – Mother to stateless child in Cuba.

1.1 Background

In 2014 the United Nations High Commissioner for Refugees (UNHCR) initiated the #IBelong campaign with the aim of ending statelessness by 2024. One key action laid out in the campaign is for States to ensure that no child is born stateless.[2] This campaign has brought the discussion concerning statelessness back to the international arena and in the past years there has been an upswing in events and forums aimed at putting more pressure on States to resolve statelessness.[3] The millions[4] of people living in statelessness around the world are being denied various human rights, including the universal human right to a nationality.[5] In many cases, statelessness arises from various forms of discrimination and arbitrary laws and practices that prevent the vulnerable group from enjoying the rights and freedoms under States national legislation. One of the many problems with statelessness is that it can be passed on from one generation to another, meaning that many children are born into the insecurity of not belonging to a specific State. Only half of the Member States to the European Union (EU) have thorough safeguards guaranteeing that no child is born stateless.[6] The lack of legal provisions leaves thousands of children stateless at birth.

The UN Human Rights Council (HRC) has urged States to uphold general and fundamental principles of international law by adopting and implementing national legislation that aims to eliminate statelessness.[7] Regardless of this there is an estimate of 600 000 stateless people in Europe and according

[1] UNHCR, 'A Special Report: Ending Statelessness within 10 years', p. 9.
[2] Ibid, p. 8.
[3] Worster (2022), p. 114.
[4] UNHCR reported 4,3 million stateless people at the end of 2021. See UNHCR (2022), 'Global Trends: Forced Displacement in 2021', p. 4. The exact number of stateless people is difficult to know due to underreporting. The estimated number is around 10 million. See Nahimas (2021).
[5] See for instance the 1948 Universal Declaration of Human Rights article 15 or Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of January 19, 1984. Series A no. 4, para. 32.
[6] European Union Agency for Asylum, '7.11.1 Developments in EU+ countries', <https://euaa.europa.eu/asylum-report-2020/711-statelessness-asylum-context#ar547>, accessed on 23 May 2023.
[7] HRC, A/HRC/25/28, para. 6.

to UNHCR, approximately one third of all stateless people are children.[8] The most signed and ratified international treaty is the Convention on the Rights of the Child (CRC)[9]. Although this international framework revolves around the principle of 'the best interest of the child', there is a great discrepancy when it comes to protecting children from statelessness. According to the Council of Europe (CoE), many of the stateless children in Europe would not be stateless if the European States had implemented a comprehensive legal framework that prevents child statelessness – as required by international law.[10] Children born into statelessness are more vulnerable to various kinds of abuses such as human trafficking, prostitution and arbitrary detention. Additionally, these children often have a harder time accessing education and healthcare in the resident State due to their lack of identity.[11] The African Committee of Experts on the Rights and Welfare of the Child means that leaving a child stateless is the antithesis to the best interest of a child.[12]

Being born as a 'non-person' in the eyes of the government often leads to refused entry to public schools and other education – robbing these children of countless possibilities regarding future occupations and employment.[13] Many witnesses of the stigma that follows a stateless person through life – from pupils, teachers, co-workers etc.[14] The right to a nationality is a recurring right that can be found in some of the most fundamental human rights documents such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the CRC, among others. Aside from these widely ratified and broad treaties, the UN has drafted two specific conventions dealing with statelessness.[15]

Preventing statelessness is essential for humans to enjoy their full rights. However, by States adopting international treaties, this creates legal obligations on States that often implies more international cooperation.[16] Cooperation in the field of combatting statelessness is essential as one States refusal to grant nationality could put the burden on another State to host the stateless person. The Human Rights Committee has addressed the importance of

[8] UNHCR, 'Statelessness Around the World', <https://www.unhcr.org/what-we-do/protect-human-rights/ending-statelessness/statelessness-around-world>, accessed on 23 May 2023.
[9] With 196 State parties.
[10] CoE, Resolution 2099 (2016), para. 5.
[11] UNHCR, 'Ending Statelessness within 10 years', p. 2.
[12] See African Committee of Experts on the Rights and Welfare of the Child, Decision No 002/Com/002/2009, para. 46.
[13] UNHCR, 'A Special Report: Ending Statelessness within 10 years', pp. 10-11.
[14] Ibid, p. 4, 11.
[15] *Convention relating to the Status of Stateless Persons,* Geneva, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (from now on 'the 1954 Convention') and *Convention on the Reduction of Statelessness*, New York, 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) (from now on 'the 1961 Convention').
[16] See UN Ad Hoc Committee on Refugees and Stateless Persons, E/1112; E/1112/Add.1, p. 8.

multilateral cooperation and national frameworks that ensures every child's right to nationality at birth.[17]

According to customary international law States have an obligation to avoid statelessness when determining who are their nationals.[18] Some argue that the right to nationality for children is also a part of customary international law.[19] Pointing to the 1961 Convention on the Reduction of Statelessness (1961 Convention) as well as the ICCPR, read in the light of the CRC, scholars mean that States are required to grant nationality to children born in their territory – who would otherwise be stateless.[20] However, the 1961 Convention does not yet have universal adherence and the positive interpretation of the articles in ICCPR and CRC concerning statelessness has not yet been confirmed by the ruling bodies. This creates a knowledge gap in what the law says, how it is interpreted and what is to be seen as customary international law in the context of stateless children. These questions create problems when trying to determine which State owes the obligation of granting nationality to a child that would otherwise be stateless.

1.2 Purpose and research question

With regards to the large number of children living as stateless and facing the various challenges of not belonging to a State, the purpose of this thesis is to examine to what extent a State has an obligation, under international law, to grant nationality to children born on their territory, who would otherwise be stateless. To fulfil the purpose of this thesis the research question that will be examined is:

Do European States have an obligation to grant nationality to stateless children on their territory who would otherwise be stateless?

In light of the width that the question implies, it is necessary to divide the study into the following sub-questions:

1. What does "the right to acquire a nationality" mean and which State owes an obligation corresponding to this right?

[17] UN Human Rights Committee, 'CCPR General Comment No 17: Article 24 (Rights of the Child)' (from now on 'GC No. 17'), para. 8.
[18] CoE, 'Explanatory Report to the Council of Europe Convention on the avoidance of statelessness in relation to State succession', para. 1.
[19] See for instance research by William Thomas Worster, Laura van Waas and Barbara von Rütte.
[20] Worster (2022), p. 114.

2. How has Sweden implemented international statelessness law into its national legislation? Is the national legislation in compliance with international law?

3. Is it considered customary international law for children to be granted the nationality of the State in which they were born if they would otherwise be stateless? Is there a difference in protection between "foundlings"[21] and other stateless children?

1.3 Methodology and material

Having regard to the purpose of the thesis, the research has been conducted through a legal dogmatic method. The method is commonly used in the field of law and implies that the author has settled what is established law by looking through relevant legal sources, such as statutes, legal doctrines and legal principles, in order to systemize these laws into different principles and rules.[22]

Other materials used have consisted of analytical reports and guidelines from different international organisations such as the UNHCR and the European Network on Statelessness. Although the documents issued by the UNHCR are not legally binding, the UN refugee agency is relevant for the thesis due to its work on statelessness[23] and its authoritative nature. The UNHCR was an active participator, together with the International Law Commission, when drafting the 1961 Convention and also contributed to the work of the Working Group on Nationality which drafted both the European Convention on Nationality and the the CoE Recommendation on the Avoidance and Reduction of Statelessness.[24] Worth mentioning is the UNHCR's mediating role under article 11 of the 1961 Convention between State's and individuals in regard to nationality questions.[25] Additionally, some even argue that the UNHCR has "acquired a formal mandate over statelessness"[26] due to its work on various guidelines on statelessness and multiple UN General Assembly resolutions as well as its collaboration with States, organisations and civil society on the global action plan to end statelessness.

The legal dogmatic method has helped to provide a systematic analysis and interpretation of the relevant laws and principles on the topic of stateless

[21] Found in article 2 of the 1961 Convention on the Reduction of Statelessness and article 6(1)(b) in the European Convention on Nationality.
[22] Peczenik (1995), pp. 33–34; Kleineman (2018), p. 21.
[23] See for instance the #IBelong campaign, found on <https://www.unhcr.org/ibelong/>, accessed 23 May 2023.
[24] Batchelor (2000), p. 51.
[25] See ibid, p. 51; UNHCR, 'Preventing and Reducing Statelessness, The 1961 Convention on the Reduction of Statelessness', p. 7.
[26] European Court of Human Rights, *Ramadan v. Malta*, appl. No. 76136/12, Dissenting Opinion of Judge Pinto De Albuquerque, para. 3.

children and has further contributed to the legal analysis and discussion on if States owes an obligation to grant nationality to children on their territory who would otherwise be stateless.

In conducting the information for the thesis, databases have been used in order to filter out and get an overview of all the communications from the different committees, such as the Committee on the Rights of the Child and the Human Rights Committee.[27] On the UN Database one can filter the search on Committees, type of document and geographical regions. The same method was used for researching judgements from the European Court of Human Rights. By making an advanced search and entering keywords such as "stateless" and "children" in the HUDOC database, relevant judgements were listed of which some were of interest for the purpose of the thesis. The chosen judgements in chapter 5 all have some relevance to children and statelessness which is the reason behind the selection. Additionally, inspiration for relevant case law and communications was taken from existing literature.

When conducting research for chapter 6 regarding Sweden's adoption of international treaties and the subsequent legal framework for addressing child statelessness, information was derived through the assimilation of data from various sources. A substantial portion of the information gathered came from Swedish Government Official Reports[28], the European Network on Nationality and the UNHCR's mapping of statelessness in Sweden.

1.4 Existing research

The research in the field of international statelessness law has grown over the past decades. The following section provides an overview of some of the existing research in the field of international statelessness law concerning children that has been of use for the thesis.

In her dissertation, Dr. Mai Kaneko-Iwase examines how article 2 of the 1961 Convention on the Reduction of Statelessness should be interpreted and implemented in order to meet the object and purpose of the Convention.[29] Kaneko-Iwase puts special focus on defining a *foundling* and what rights they have in regard to being granted a nationality. Although Kaneko-Iwase does not explore to what extent *all* children should be protected from statelessness when born on a State's territory, the disputation has worked as a source of inspiration for the research of this thesis.

[27] See UN Treaty Body Database, <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en>, accessed 23 May 2023.
[28] In Swedish '*Statens offentliga utredningar (SOU)'*.
[29] Kaneko-Iwase, Mai (2021), *Nationality of Foundlings, Avoiding Statelessness Among Children of Unknown Parents Under International Law*.

Jaap E. Doek is a prominent researcher within the subject of statelessness and children and has completed several pieces on the matter – for instance, *The Rights of the Child in International Law: Rights of the Child in a Nutshell and in Context: All About Children's Rights* and *The CRC and the Right to Acquire and Preserve a Nationality.* As a professor and chairperson to the UN Committee on the Rights of the Child his pieces have contributed to the thesis by providing relevant information on the legal framework of statelessness law and the interpretation of the same, especially in regard to article 7 of the Convention on the Rights of the Child.

Gerard-René De Groot has written extensively on the issue of statelessness and children's right to nationality. In his articles he has highlighted the importance of addressing the issue of statelessness in national laws and regulations and has emphasises the need for harmonisation of nationality laws at the European level to ensure that the rights of all individuals, including stateless children, are effectively protected. De Groot's work on statelessness has been of immense use when attempting to create a comprehensive analysis of the legal framework and the challenges that many stateless children face.

Another prominent author on the subject of statelessness among children is William Thomas Worster. He has repeatedly argued that granting nationality to children who would otherwise be stateless should be considered part of customary international law. He argues that child statelessness is a global problem that could easily be solved, but that better legal solutions are required.[30] His views and arguments have been of great use when examining the question of a customary international norm, discussed in chapter 7.

Carol A. Batchelor, Special advisor on Statelessness at the Office of the UNHCR, has also contributed to the debate on statelessness among children. She has, among other things, discussed the complexities involved in resolving nationality status for stateless persons and has contributed to the research of the thesis by providing insights into the various challenges faced by stateless individuals in accessing nationality and legal protections.

Further, The European Network on Statelessness has contributed with several reports on the matter of statelessness in Europe. Its thematic mappings of specific countries have been helpful when researching how a specific State has implemented laws and policies in order to reduce statelessness and protect those who are stateless.

1.5 Delimitations

The study has chosen to limit its research to stateless children in Europe. Regional instruments from other parts of the world will however be examined

[30] Worster (2017), p. 1.

in order to contribute to the debate on if there are signs pointing to a customary international norm for States to grant their nationality to children on their territory who would otherwise be stateless. Additionally, statelessness will be examined in general terms to get a broader understanding of the problems that arise from statelessness, but the thesis will not in a greater extent look closer at the challenges for stateless adults. There are many other rights associated with the right to nationality, for instance the right to a name, identity and birth registration. Some of these might be mentioned in brief to better grasp the context of what effect nationality has in a child's life, but the rights will not be further examined as it shifts away from the focus of the research question. The same goes for the possibility of attaining a residence permit. Being legally present in a country will enable some rights for the individual, but considering that the aim of the research is to look at the status of statelessness and not the way in which a child can access such rights as described above, limited attention will be paid to residence permits.

One possible aspect to stateless children is States willingness to withhold nationality at birth on discriminatory grounds. Discrimination will be brought up with the aim of clarifying how discriminatory nationality laws can contribute to statelessness among children. It is worth noting that no European State practises discriminatory nationality laws in the sense that there is a discrepancy between a mother's and a father's right to transmit their nationality to a child. There are however multiple States, mostly in the Middle East and North Africa, that hold national laws limiting children's right to fully be protected from statelessness. It is relevant for the research to bring these issues up, but since it is not a current problem within the European States – no in-depth analysis will be made in this regard. Further, provisions in international instruments concerning non-discrimination are important to examine to see on what grounds a State can decline a child's nationality and when those grounds are to be seen as discriminatory. When the author of the thesis refers to discrimination, this will be in relation to those national laws not allowing women to transmit their nationality to their child.

There are many ways in which children might end up stateless. Children who are adopted or born through surrogate mothers are sometimes at risk of being left without a nationality. Children of immigrant or stateless parents are also at greater risk of statelessness. Different grounds for the emergence of statelessness will not be discussed since the thesis is rather engaged with States obligations in regard to combatting statelessness among children.

There are several international instruments dealing, or at least mentioning, the right to nationality. These include the UDHR[31], ICCPR[32], CERD[33],

[31] Universal Declaration of Human Rights.
[32] International Covenant on Civil and Political Rights.
[33] International Convention on the Elimination of All Forms of Racial Discrimination.

CEDAW[34], CRC[35], CMW[36] and the CRPD[37]. Only the ones with the most relevance to the research question will be examined, i.e. the main focus will be on the CRC, ICCPR, UDHR and to some extent the CEDAW. When examining case law, it should be noted that there is relevant case law from national courts that deal with the question of statelessness and children, however due to the scope and length of the thesis, primarily cases from international bodies will be analysed and discussed.

1.6 Outline

The thesis will begin in chapter two with clarifying some relevant terms that will be used throughout most chapters, such as *nationality, statelessness* and the principles of *jus soli* and *jus sanguinis*. This chapter will additionally provide an explanation of the importance of a nationality, especially for children. Moving on to chapter three, the right for children to acquire nationality will be examined in relevant UN and regional treaties. This chapter aims to clarify how children's rights to nationality is mentioned in general human rights documents which will later provide a good ground for discussion when moving on to chapter four – dealing with specified treaties on statelessness. In the fourth chapter, the thesis will examine four of the most relevant instruments when it comes to international statelessness law. Two from the UN and two from the CoE – bringing more focus to the situation of stateless children in Europe. Case law from a variety of different monitoring bodies will be reviewed in the fifth chapter with the purpose of gaining an understanding of how the question of stateless children is dealt with in the international arena. Chapter six looks at how Sweden has interpreted international statelessness law into its national legislation and to what degree the European State is living up to the obligations set out by the international forum. The thesis will in chapter seven examine the possibilities of there being a customary international norm in regard to granting nationality to children residing on State's territories that would otherwise be stateless. The final, and eighth, chapter will conclude the research and try to answer the research questions presented in chapter 1.2.

[34] Convention on the Elimination of All Forms of Discrimination against Women.
[35] Convention on the Rights of the Child.
[36] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
[37] Convention on the Rights of Persons with Disabilities.

2 Statelessness and nationality

2.1 Definitions and legal framework

2.1.1 Nationality

For the purpose of this thesis, it is essential to lay out the definitions of some recurring and important terms that the thesis will revolve around. The initial terms to be addressed are *nationality* and *citizenship*.

The term *nationality* is dealt with by the International Court of Justice (ICJ) in the *Nottebohm* case[38] where the Court held that: "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties."[39] This means that nationality is established through an individual's social ties to the country of their nationality.[40] One can compare this to the term *citizenship* which entails an individual's participation in the social and political community in a State. Some scholars[41] working within international law, as well as the European Commission, argue that the terms can be used interchangeably.[42] The arguments for this view address the close relationship between the two terms and ultimately points to the disadvantage of making a clear-cut distinction. It is argued that the label is of less importance than for someone's ability to exercise the rights connected to the terms. In the international treaties that will be discussed throughout the thesis, the term *nationality* is often favored over *citizenship*, however the rights interlinked with *nationality* are to a great extent similar to those of *citizenship*.

In essence, both terms aim at a common notion which is State membership, but a distinction can be made noting that; *nationality* stresses the international and *citizenship* the national aspects.[43] In the European Convention on Nationality (ECN) the drafters saw it useful to address the definition of *nationality*. In the Convention's second article, *nationality* is described as "the legal bond between a person and a State and does not indicate the person's ethnic origin". According to the CoE, for a correct interpretation and implementation of the ECN, the terms *nationality* and *citizenship* are to be used synonymously – as will be done throughout the thesis. The definition entails that a State has

[38] ICJ Second Phase, Judgement of 6 April November 1955, *Liechtenstein v. Guatemala* (from now on '*Nottebohm Case'*).
[39] *Nottebohm Case*, p. 23.
[40] Edwards (2014), p. 12.
[41] See for instance, Dr. Mai Kaneko-Iwase and Dr. Barbara von Rütte.
[42] See European Parliament Research Service Briefing (2018), 'Acquisition and loss of citizenship EU Member States – Key trends and issues', p. 2; Kaneko-Iwase (2021), p. 35.
[43] Weis (1979), p. 4–5.

recognized a legal relationship between the individual and the State.[44] In the thesis the term *nationality* will imply the bond between an individual and a State, where the person has a right to be protected by the State while also being subject to obligations towards the State.[45]

2.1.2 Statelessness

Article 1(1) of the Convention relating to the Status of Stateless Persons (1954 Convention) provides the definition of a *stateless person* as 'a person who is not considered as a national by any State under the operation of its law.' This internationally recognized definition is referred to as *de jure* statelessness – meaning people who do not legally belong to any State according to its laws.

In comparison to *de jure* stateless, one can also be *de facto* stateless. *De facto* statelessness entails a person who is unable to prove their nationality by relevant identification documents or someone of undetermined nationality. One also falls under the definition if they are unable to enjoy the rights attached to their nationality[46] or if they are, in the context of State succession, attributed a nationality – other than that of the State of their habitual residence.[47] Simply put, a person who is *de facto* stateless can have a nationality, but the nationality is seen as functionally ineffective.[48] This can for instance be the case when an individual is outside the State of their nationality.[49] According to Christiana Bukalo[50] the difference between the two types of statelessness is that one is legally recognized, i.e. *de jure* statelessness, and the other is not.[51] The importance of being recognized as stateless is first of all that the person is covered by the international laws set out to regulate the special rights and protections of stateless people. Second of all, those recognized as stateless have better chances of receiving travel documents as well as applying for naturalisation[52]. In some countries a prerequisite for the application is that a person needs to have a clarified identity, i.e. stateless, meaning someone with

[44] CoE, 'Explanatory Report to the European Convention on Nationality', para. 23.
[45] Fenwick (2009), p. 77.
[46] For instance, German jews under the second world war who were nationals of the State but also considered to be non-nationals. This group was legally holding a nationality but could not enjoy the rights attached to it, for instance an effective protection from the State. See Batchelor (1995), pp. 232–233.
[47] Massey (2010), p. iii.
[48] Peter McMullin Centre on Statelessness at Melbourne Law School, 'Factsheet: An Overview of Statelessness', p. 3, <https://law.unimelb.edu.au/__data/assets/pdf_file/0007/3489676/Statelessness_overview_factsheet_Sept_2020.pdf>, accessed on 23 May 2023.
[49] Massey (2010), pp. 54–55.
[50] Stateless woman in Germany, member of the ENS and co-founder of the non-profit association *Statefree e.V* that works on statelessness.
[51] Wattenberg (2022), 'Having a nationality is not a given, it is a privilege', <https://www.bpb.de/themen/migration-integration/kurzdossiers/505454/having-a-nationality-is-not-a-given-it-is-a-privilege/>, accessed on 23 May 2023.
[52] Naturalization is nationality acquired though application by an alien to a State in which they were not born in. See Weis (1979), p. 99.

unknown nationality does not fulfil this criteria.[53] The issue is brought up in a Recommendation from the Committee of Ministers[54] where it is noted that States should as far as possible treat children as *de jure* stateless when it comes to the right of acquiring a nationality, even if they are *de facto* stateless.[55] When statelessness is mention in the international treaties the definition used is *de jure* stateless, leading the author of this thesis to use the same when analysing stateless children and their right to nationality.

The definition laid out in article 1(1) of the 1954 Convention is binding on both States that are, and are not, parties to the Convention. This is due to the definition's status as customary international law. The International Law Commission notes that the definition in article 1(1) of the 1954 Convention "can no doubt be considered as having acquired a customary nature".[56] To further examine the definition of *statelessness*, one has to look at how individual States apply their nationality law on relevant cases. According to the UNHCR Handbook on statelessness, the term 'law' should be interpreted broadly, meaning case law, legislation and even customary practice is to be considered.[57] For this reason an analysis of these pillars will be provided throughout the different chapters of the thesis.

2.1.3 Children

According to the Convention on the Rights of the Child, a *child* is defined as a person under the age of 18.[58] The same definition will be used throughout the thesis when references to children are made.

2.1.4 Foundling

The term *foundling* can be found both in the 1961 Convention article 2 as well as the ECN article 6(1)(b). In the ECN's Explanatory Report, the CoE defines *foundlings* as "new-born infants found abandoned in the territory of a State with no known parentage or nationality who would be stateless if this principle were not applied."[59] In Dr. Mai Kaneko-Iwase's disputation from 2021, the definition of a foundling is thoroughly examined. Dr. Kaneko Iwase asks questions such as if *foundlings* and *children of unknown parentage* are the same thing. The book concludes that the word *foundling* in international

[53] For instance Germany, see Wattenberg (2022), 'Having a nationality is not a given, it is a privilege', <https://www.bpb.de/themen/migration-integration/kurzdossiers/505454/having-a-nationality-is-not-a-given-it-is-a-privilege/>, accessed on 23 May 2023.
[54] CoE, CM/Rec(2009)13.
[55] Ibid, para. 7.
[56] International Law Commission (2006), 'Draft Articles on Diplomatic Protection with commentaries', p. 49.
[57] UNHCR (2020), 'Stateless person definition', p. 2 in the 4th edition of the UNHCR Emergency Handbook, <https://emergency.unhcr.org/protection/legal-framework/stateless-person-definition>, accessed on 23 May 2023.
[58] Convention on the Rights of the Child, article 1.
[59] CoE, 'Explanatory Report to the European Convention on Nationality', para. 48.

treaties[60] entails a child born to unknown parents, whether the birthplace of the child is known or unknown.[61] Foundlings and their protection under international law will be further discussed in chapter 4.3.

2.1.5 Jus sanguinis and *jus soli*

In nationality law there are two principles when determining how and from where a person should receive nationality. The principle of *jus sanguinis* intends to determine a person's nationality through that of her or his parent's nationality. *Jus soli* on the other hand is often referred to as 'birth right citizenship' and means that a child's nationality is determined by its place of birth.[62] Looking globally, the principle of *jus sanguinis* is preferred in nationality legislation, with almost three times the amount of States in comparison to those having legislation based on the principle of *jus soli.*[63] The principle of *jus sanguinis* does however not bear any obligation on the State to grant nationality to children born on their territory.[64] It is of importance to the thesis to be aware of these principles due to their reoccurring appearance in the discussion of statelessness and States obligations to eliminate the issue.

When looking at one of the main international treaties in regard to statelessness, one can find in the first article of the 1961 Convention that a State has an obligation to grant its nationality to children born on its territory, who would otherwise be stateless.[65] This creates a clear obligation on the birth State meaning that the principle of *jus soli* is applicable. As will be discussed throughout the thesis, the 1961 Convention does not have the number of ratifications so that one can solely look to its guidance when dealing with statelessness. Other Conventions, such as the CRC and the ICCPR also mention stateless children but are, contrary to the 1961 Convention, not relying on the principle of *jus soli* in their provisions.

Some argue that having an effective link to a specific State could solve the issue of statelessness, seeing that in most cases it is not a problem to identify which State(s) are the ones most logically connected to the individual in question. Manley O. Hudson, previous Special Rapporteur for the International Law Commission, argued that the elimination of statelessness could only be achieved if it resulted in both acquisition of nationality as well as an improvement of the nationality status. He meant that the nationality of an individual

[60] Such as the 1961 Convention and the ECN.
[61] Kaneko-Iwase (2021), see pp. 101 and 103.
[62] Merriam Webster, 'Jus soli', <https://www.merriam-webster.com/dictionary/jus%20soli>; Virtuelles Migrations Museum, 'Jus soli/ jus sanguinis/ principle of descent', <https://virtuelles-migrationsmuseum.org/en/Glossar/jus-soli-jus-sanguinis-principle-of-descent/#:~:text=Jus%20soli%20is%20also%20referred,as%20the%20principle%20of%20descent>, both accessed on 23 May 2023
[63] Von Rütte (2022), p. 30–31.
[64] Worster (2022), p. 125.
[65] 1961 Convention, article 1(1)(a). See also UNHCR, HCR/GS/12/04, p. 2.

should be the same as the State to which they are most closely connected to. Hudson spoke of an 'effective nationality' and argued that this would be the best way to ensure that the individual could access their full rights as a national. The idea builds on the right of attachments to a place and Hudson called this principle *jus connectionis*, i.e. an alternative to the principles of *jus soli* or *jus sanguinis.*[66] According to Carol A. Batchelor[67] this principle is to some extent present in the ECN, seen to its provisions taking into account the amount of time a person has been habitually resident in a State[68].[69] Additionally, one could argue that the principles can be seen in article 1(2)(b) of the 1961 Convention and article 5(1)(a) of the Convention on the Avoidance of Statelessness in relation to State Succession.

2.2 Importance of nationality

When looking at the right to nationality one quickly becomes aware that the right is interlinked with many other essential human rights. The right to nationality can be seen as an enabling right as it creates a pathway to services in a States' territory that a child might otherwise be deprived of.[70] Some of the most distinctive rights a national has is the right to reside and return to their State as well as the right to take an active part of the countries' administration.[71] To have a nationality has sometimes been described as "the right to have rights"[72], however some argue that with the development of human rights the enjoyment of certain rights are attainable to everyone – despite having a nationality or not.[73] A stateless person being deprived of nationality is nonetheless more vulnerable of being affected by poverty, social exclusion and having limited access to legal aid. This will impact the person's enjoyment of several social, political, cultural and civil rights.[74] Additionally, even if stateless people have certain rights – violations of these often go unnoticed due to their invisibility in the eyes of society.[75] In short, one could say that nationality is the notion of who is, and who is not, included in the community of a particular State.[76] The right to identity, health and education are only some of the many fundamental rights that a person not belonging to a State can be robbed of.

[66] Hudson (1952), p. 49.
[67] Special Advisor on Statelessness at UNHCR.
[68] See for instance article 6(2)(b) and 6(3) ECN.
[69] Batchelor (2000), p. 61.
[70] Arkadas-Thibert & Lansdown (2022), p. 55.
[71] Kaneko-Iwase (2021), p. 35.
[72] Arendt (1958), p. 296.
[73] Kaneko-Iwase (2021), p. 35.
[74] See Report of the Secretary General, A/HRC/31/29, para. 27.
[75] Ibid, para. 28.
[76] Inter-American Court of Human Rights (IACtHR), *Case of the Yean and Bosico Children v. the Dominican Republic*, Judgement of 8 September 2005 (from now on '*Yean and Bosico v. Dominican Republic*'), para. 137.

The barriers some children face to receive education further becomes an obstacle when they, later in their life, have limited job opportunities.[77] Stateless people have described it as being a 'non-person'. Finding a job is one of the key issues for stateless people as it has a direct link to the person, and their families, possibility to live a functioning life in a modern-day society. In many sectors, for instance public service, teaching or practising law, some countries have made it impossible for non-nationals to join the labour market.[78] When looking at nationality from an EU-perspective; having a nationality to one of the EU States becomes even more relevant due to one's acquisition of an EU-citizenship. In the Treaty of the Functioning of the European Union article 20(1) it is established that "every person holding the *nationality* [emphasis added] of a Member State shall be a citizen of the Union". The EU-citizenship entails certain rights such as freedom of movement and residence within the EU.[79]

Being a national of a State entails both rights and obligations. One can look at nationality as a bond between an individual and a State in the sense that the person belonging to a nation is protected by the State inside and outside of its borders, at the same time as the individual owes duties towards the State. The rights one can claim is for instance the right to vote or the right to be protected by the State, whereas the obligations can take the form of paying taxes or following laws.[80] As Hannah Arendt, political philosopher and holocaust survivor, describes in her book *The Origins of Totalitarianism*; the concept of human rights can only be claimed if a person belongs to a group, i.e. territorial, social, or political. Arendt uses this idea to conclude that nationality is essential for placing responsibility on States as duty bearers in regard to individuals as right holders.[81]

One important distinction to make when discussing a stateless person's rights is that although stateless, the person can still be legally residing on a States territory. The impacts that statelessness has on a person is partly dependent on their residence status. The author is aware of the rights attached to residence permits, for instance housing and education, but considering that the aim of the thesis is not to examine the *access* to these rights but rather the status of statelessness, the following paragraph will only briefly discuss residence permits and how a stateless person could receive one.

One way to receive a residence permit is through a statelessness determination procedure. This mechanism is used to establish who qualifies as stateless and can therefore claim the rights set forth in the 1954 Convention. These

[77] HRC, A/HRC/31/29, para. 34.
[78] UNHCR, 'A Special Report: Ending Statelessness within 10 years', p. 14.
[79] See Treaty on the Functioning of the European Union, article 21.
[80] See Weis (1979), pp. 29ff.
[81] Arendt (1958), pp. 291ff.

rights include the right to education, health care and residence.[82] Although the statelessness determination procedure is a good step forward to protecting the rights of stateless people, only a few countries have dedicated procedures in place to deal with the question.[83] It should also be noted that it falls within a State's sovereignty to control both the entry and stay of people who are non-nationals. In accordance with the State's right to sovereignty, there is no international law regulating a right for non-citizens to reside or enter territories of which they are not nationals.[84] One limitation that most stateless people have, no matter the rights received from their residence status, is that they cannot fully partake in the democracy of the State, seeing their usual lacking right to vote.[85]

Like noted above, the list can be made long when identifying the complications people with no nationality face. It is however worth noting that having a legal identity and possessing a nationality is not equivalent of having a life where all one's rights are protected and respected, but with the legal relationship to a State one can presume to have easier access to such rights. As noted in a report of the Secretary General on childhood statelessness; a child that is deprived of nationality is a child that has been violated their right to be free from discrimination and whose best interests are not being looked after. These prerequisites leave the child more vulnerable to not being able to enjoy all other human rights.[86]

2.3 Conclusion

The terms *nationality* and *citizenship* will be used interchangeably, however as *nationality* is the preferred term in international treaties and most doctrine, this is something that will be mirrored in the thesis as well. The thesis will further focus on *de jure* stateless children, but as noted by the Committee of Ministers to Member States on the nationality of children, even those who are *de facto* stateless should in the context of them being children be viewed as *de jure* stateless in the eyes of international law. When *foundlings* are discussed, this implies children born to parents who are unknown. Noting that a majority of States implement the principle of *jus sanguinis* it is important to

[82] The convention will be further looked at in chapter 4.1.1.
[83] As of July 2020, about 20 States worldwide had these procedures in place. See UNHCR, 'Good Practices Paper - Action 6. Establishing Statelessness Determination Procedures for the Protection of Stateless Persons', p. 5.
[84] Perks & De Chickera (2009), p. 50
[85] Wattenberg (2022), 'Having a nationality is not a given, it is a privilege', <https://www.bpb.de/themen/migration-integration/kurzdossiers/505454/having-a-nationality-is-not-a-given-it-is-a-privilege/>, accessed on 23 May 2023. It should be noted that some States, for instance Sweden, allows for those with a residence permit, who have resided in Sweden for at least three consecutive years before the election, to vote in the county councils (*"landsting"*) and municipalities (*"kommuner"*). This group can however not vote in the parliamentary elections (*"riksdagen"*). See Kommunallag (2017:725), article 7(3).
[86] HRC, A/HRC/31/29, para. 30.

see how these States have adapted their national legislation in a way that it is in compliance with international law. This will be further explored in chapter six.

Looking at the purpose of this thesis, i.e. State's obligation to grant nationality to children who would otherwise be stateless, it is worth acknowledging the importance of nationality and the rights connected to ones belonging to a State. The ability to partake in a society's administration as well as being able to access the full spectrum of rights enshrined as a national, such as education, healthcare and being protected by the State once outside of its territory is vital. The ultimate consequence of statelessness is that there is no State, regardless of one's legal or illegal status as a residence in the State, that is responsible for the individual in question. Not belonging to a State implies that the obligation of ensuring one's rights is not put on a specific State. These insecurities can in the long run lead to multiple human rights violations which is why acquiring a nationality, especially for the vulnerable group of children, is of immense importance.

3 The right to acquire a nationality

Chapter three aims to look at international treaties where the right to acquire a nationality is mentioned. Widely ratified UN treaties as well as regional instruments will be examined to get an understanding of how the issue is dealt with and if there are any similarities between the provisions. The content from this chapter will further contribute to the discussion on if there is a possible international customary norm when it comes to States obligation to eliminate statelessness among children.

3.1 Article 7 of the Convention on the Rights of the Child and Article 24(3) of the International Covenant on Civil and Political Rights

One of the most essential instruments when discussing children's rights is the Convention on the Rights of the Child (CRC). Being the most ratified treaty in the world[87], one could argue that the weight it has is incomparable to other international instruments. One of the core principles of the Convention is that all decisions concerning children should be made in the "best interest of the child".[88] In this chapter the CRC will be discussed, and parallels will be drawn to the International Covenant on Civil and Political Rights (ICCPR) due to the similar formulations of the provisions regarding child statelessness. Examining the CRC and the ICCPR is of great importance and relevance for the research question, seeing the strong number of ratifications and their general adherence worldwide. It is also essential to look at the monitoring bodies of these conventions to gain useful information on the implementation, interpretation and purpose of their provisions.

In the CRC article 7(1) it stipulates that every child has "the right to acquire a nationality". This right is also reflected in ICCPR article 24(3), where the Human Rights Committee has issued a General Comment noting that the provision is "designed to promote recognition of the child's legal personality."[89] Looking closer at the right to nationality in CRC article 7(1) one can note that it does not mention whose responsibility it is to grant its nationality to the child. The articles second paragraph reads: "States Parties shall ensure the

[87] The USA has signed but not ratified the CRC – leaving it being the only country not party to the Convention.
[88] See CRC, article 3.
[89] Human Rights Committee, General Comment No. 17, para. 7.

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* [emphasis added]".[90] This section of the article refers to the 1961 Convention which aims to put an obligation on the State of which a child is born in, if the child is not granted nationality from any other State. The obligations imposed by this paragraph can be interpreted as a responsibility on all States with which the child has a connection to; for instance, place of birth, residence or a parental link.[91]

The article creates a presumption that a child has a right to a nationality but does not in its wording establish an absolute guarantee against statelessness.[92] In the drafting process of the CRC article 7 it was proposed that a child should have the right to acquire the nationality of the State in which they were born. This was however overturned as there was an unwillingness to force States to implement the principle of *jus soli* instead of the principle of *jus sanguinis*.[93] States warned for reservations being made to article 7[94], leading the drafters to the current text that gives room for States to resolve the question of nationality in their national law.

In a General Comment the Human Rights Committee discusses the notion of ICCPR article 24(3), that holds the same wording as part of CRC article 7(1), and notes:

> While the purpose of this provision 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* [emphasis added] 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.[95]

According to the Human Rights Committee, States do not have an obligation to grant their nationality to every child born on their territory but does however need to ensure that the child is not left stateless. In an annual report of the Secretary-General[96] the UNHCR states that the two most essential criteria for establishing the legal bond of nationality is through birth on the territory

[90] CRC, article 7(2).
[91] De Groot (2014), p. 147.
[92] Tobin & Seow (2019), p. 241.
[93] Tobin & Seow (2019), p. 254.
[94] OHCHR (2007), 'Legislative History of the Convention on the Rights of the Child', p. 374, para 17.
[95] Human Rights Committee, General Comment No. 17, para. 8.
[96] HRC, A/HRC/10/34.

of the State or birth to a national of the State. In this context UNHCR means that in the case where a child is born on the territory of a State, and has no other link to any other State, it is the birth-State that bears the obligation of granting nationality to the child. UNHCR argues that if this is not the case then article 24(3) ICCPR and article 7 CRC are to be considered meaningless. Finally, looking at the consequences of not granting nationality to foundlings or children born to stateless parents, UNHCR means it would be deemed arbitrary to abstain from granting them a nationality.[97] The CRC Committee has recommended States to take the appropriate measures, for instance in the case where it is highly unlikely or impossible for a child to be granted nationality from another State, to acquire the nationality of the State in which they were or are living in.[98] This can be done through naturalisation or similar. According to professor and chairperson to the UN Committee on the Rights of the Child, Jaap E. Doek, the CRC Committee is not forcing States to implement the *jus soli* principle but rather pushing States to take their responsibility in the case where a child is bound to end up stateless. Drawing from article 7 CRC and article 24(3) ICCPR, he means that in the case where a child cannot acquire the nationality of another State, it is the obligation of the birth State to grant their nationality.[99] Doek further holds that in order to implement a child's right to nationality it is essential to have a proper system registering children at birth.[100]

From the current wording in article 7 of the CRC it is unclear whether States *must* grant nationality to a child born on their territory who would otherwise be stateless. In the case a State implements the *jus soli* principle, children born within the territory would automatically become nationals of that State. The question appears when a child is born to stateless parents or parents of unknown nationality in a State that adopts the principle of *jus sanguinis.* The same goes for children born in a State with discriminatory nationality laws – prohibiting a child from taking the nationality of their mother. The latter is however, like previously noted, not an issue today in the European States.

To date, no General Comment on article 7 of the CRC has been written, however the CRC Committee often mentions the right to nationality in its recommendations to States. The Committee on the Rights of the Child has together with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families issued a General Comment where the problem of stateless children is addressed. In its comment it notes that States are obliged to "adopt every appropriate measure, both internally and in cooperation with other States to ensure that every child has a nationality when he or

[97] HRC, A/HRC/10/34, para. 64.
[98] See for example, Concluding Observations on Indonesia (2004), CRC/C/15/Add.223, para. 66; Mongolia (2005), CRC/C/15/Add.264, para. 57 and the Czech Republic (2003), CRC/C/15/Add.201, para. 38.
[99] Doek (2006), p. 28.
[100] Ibid, p. 27.

she is born."[101] This paragraph is aimed at the State in which the child is born in and looking closer at the wording, it can be interpreted as an obligation on the specific State to prevent the child's possible statelessness. According to scholars, looking at the drafting history of article 7, the idea was never to impose such an obligation on State parties. Although one can say that there is a strong commitment to avoid and reduce statelessness the article should, in accordance with some, be read as a presumption against stateless children, rather than an absolute right against the same.[102]

The CRC Committee has further mentioned statelessness in three of its General Comments[103], where they state that the enjoyment of the rights stipulated in the CRC is available to all children, no matter of their legal status as a national or non-national of a State.[104] The same is noted by the Human Rights Committee in regard to the rights set forth in the ICCPR.[105] The CRC Committee further notes that the children being at greater risk of becoming stateless due to non-registration at birth are those of indigenous groups. In regard to this issue, the CRC Committee urges States to take special measures to ensure that all children, even those living in remote areas, are properly registered at birth.[106]

In the UN implementation handbook for the CRC, UNICEF[107] notes that the right to acquire a nationality implies "a right to all the benefits derived from nationality."[108] Examining the second paragraph of article 7 in the CRC, the Convention states that the rights shall be implemented in accordance with the States *national law* and other obligations "*under the relevant international instruments in this field*".[109] The reference to national law indicates the principle of State sovereignty and gives States the freedom of denying a child nationality on the basis of their internal nationality laws and principles. In spite of States control over national laws, these cannot be used to defeat the object and purpose of article 7 CRC. This means that States can only formulate their national laws to the extent where the interpretation is not restricting the nature or the scope of the rights being protected.[110] According to scholars, the second paragraph of article 7 serves two functions; it 1) welcomes States' own practices on what measures should be implanted to best deal with

[101] UN Committee on the Protection of Migrant Workers and their Families and the Committee on the Rights of the Child, CMW/C/GC/4-CRC/C/GC/23, para 24.
[102] Tobin & Seow (2019), p. 255.
[103] See Committee on the Rights of the Child General Comments; CRC/GC/2005/6, CRC/C/GC/11 and CRC/C/GC/12.
[104] CRC/GC/2005/6, para. 12.
[105] See UN Human Rights Committee, 'CCPR General Comment No. 15: The Position of Aliens Under the Covenant', para. 1.
[106] CRC/C/GC/11, paras. 41–42.
[107] United Nations International Children's Emergency Fund.
[108] UNICEF, 'Implementation Handbook for the Convention on the Rights of the Child', p. 103.
[109] CRC, article 7(2).
[110] Tobin & Seow (2019), p. 275.

statelessness and 2) obliges States to implement legislation, in accordance with article 4 CRC[111], to ensure an effective protection of the right to nationality.[112]

The articles' reference to "relevant international instruments" refers in a great deal to the 1961 Convention. This Convention, that will further be discussed in chapter 4.1.2, can be seen as one of the main legal instruments dealing with statelessness. Although the Convention does not *per se* provide an absolute right to nationality, it does impose certain obligations on States that goes beyond the framework of for instance article 7 CRC. The 1954 Convention is also worth mentioning when discussing relevant treaties on statelessness. Instead of requiring States to confer its nationality to people, the 1954 Convention aims at providing certain safeguards to those living as stateless.[113]

Discussing nationality is sensitive in the manner that it indirectly is a discussion about State sovereignty and States' different legal and cultural presumptions on under what circumstances one should be granted nationality.[114] Some States[115] practise discriminatory nationality laws, meaning for instance that children automatically inherit the nationality of their father. It is not uncommon in these cases that it is not possible for mothers to pass on their nationality to their child, meaning that even a child born to a woman with a nationality might risk being stateless if the woman is a single mother.[116] Children born out of wedlock or to parents of mixed marriage are often the ones most affected by discriminatory nationality laws.[117] This issue is addressed in article 9(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) where it states that women should have an equal right with men in regard to the nationality of their children. The CRC Committee has stated that article 2[118] read together with article 7 of the CRC should be interpreted as a child's right to inherit their mother's nationality in the case that they have not been legally recognized by their father.[119] The CRC Committee has in several concluding observations addressed that a child

[111] Article 4 CRC states that parties to the convention are obliged to undertake the appropriate measures to implement the rights of the CRC.
[112] Tobin & Seow (2019), p. 275.
[113] Ibid, pp. 276–278. The 1954 Convention will be further explored in chapter 4.1.1.
[114] UNICEF, 'Implementation Handbook for the Convention on the Rights of the Child', p. 103.
[115] Mostly countries in the Sub-Saharan Africa and the Middle East and North Africa. See Equality Now, 'The State we're in: Ending Sexism in Nationality Laws 2022 Edition – Update for a Disrupted World', p. 9, <https://www.equalitynow.org/resource/state/>, accessed on 23 May 2023.
[116] UNICEF, 'Implementation Handbook for the Convention on the Rights of the Child', pp. 104–105.
[117] Doek (2006), p. 27.
[118] Non-discrimination clause. A child should not be discriminated by irrespective of, *inter alia*, their birth or other status.
[119] Doek (2006), p. 27.

should be able to acquire a nationality both through the parental and maternal line, in order to minimise the risk of leaving children stateless.[120]

In a resolution adopted by the HRC it is reaffirmed that every child has the right to acquire a nationality. The HRC further urges States to take the necessary steps in order to ensure that all children are registered after birth so that no child is born into statelessness.[121] If a child is born into statelessness, this legal state should be as short as possible. According to the UNHCR Guidelines on Statelessness, article 3 and 7 of the CRC should be interpreted as a child's right to nationality either (i) automatically at birth or (ii) upon application shortly after birth.[122] This mirrors what is held by the 1961 Convention article 1(1). Additionally, the European Parliament has addressed article 7 CRC in its resolution from 2018[123] where it states that the Member States of the EU should in their national legislation address child statelessness in an adequate way that is "in full compliance" with the article.[124]

3.2 Article 15 of the Convention on Certain Questions Relating to the Conflict of Nationality Law

The Convention on Certain Questions Relating to the Conflict of Nationality Law[125] (1930 Hague Convention) was the first international attempt that tried to ensure nationality for all. It adds value to the thesis to look at the provisions of this Convention since it has inspired future treaties on international statelessness law, such as the 1954 Convention and the 1961 Convention – which has further inspired the formulations in the statelessness provisions in the CRC, ICCPR, ACRWC etc. Looking at its first paragraph one can see that the idea of State sovereignty in regard to issues on nationality might be limited by international law. Article 1 holds that:

> It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.[126]

[120] See for example, the Concluding Observations on Togo (2005), CRC/C/15/Add.255, para. 36 and on Saudi Arabia (2006), CRC/C/SAU/CO/2, para. 39.
[121] HRC, A/HRC/RES/20/5, paras. 8–9.
[122] UNHCR, HCR/GS/12/04, para. 34.
[123] European Parliament, 2018/2666(RSP).
[124] Ibid, para. 17.
[125] League of Nations, Treaty Series, vol. 179, p. 89, No. 4137. Entered into force 1 July 1937.
[126] 1930 Hague Convention, article 1.

In this provision references are made to the three primary sources – something that is further mentioned in the ECN[127] article 3. When looking at the 1930 Hague Convention and in what ways it brings focus to the rights of the child, the Convention provides in its 15th article the right for children to obtain the nationality of the State in which they are born in. The article reads:

> Where the nationality of a State is not acquired automatically by reason of birth on its territory, a child born on the territory of that State of parents having no nationality, or of unknown nationality, may obtain the nationality of the said State. The law of that State shall determine the conditions governing the acquisition of its nationality in such cases.[128]

Worth noting when reading the provision is its choice of words when it comes to the State's obligation to provide its nationality to the child born to stateless parents or those of unknown nationality. The term "may" does not pose a direct obligation on the State to grant its nationality to the children described above. Further, it is the State itself that determines the conditions for the acquisition, which could result in a weaker obligation on the State.[129]

3.3 Article 6(3) of the African Charter on the Rights and Welfare of the Child

Although the focus of the thesis is on stateless children in Europe, knowledge can be drawn from looking at regional treaties outside of Europe. Getting an understanding of these treaties will additionally contribute to the discussion on if granting nationality to children in European States territories should be considered customary international law. Section 3.3 and 3.4 will explore how the right to nationality is mentioned in regional instruments outside of Europe. Likewise in the CRC's 7th article, the African Charter on the Rights and Welfare of the Child (ACRWC) provides a provision aiming at reducing the number of stateless children. In article 6(3) ACRWC the same wording is used as discussed in section 3.1, i.e., 'every child has a right to acquire a nationality'. In addition to this paragraph, the ACRWC goes further than the CRC in adding a second part that reads:

> State Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth he is not granted nationality by any other State in accordance with its laws.[130]

[127] See more on European Convention on Nationality in chapter 4.2.1.
[128] 1930 Hague Convention, article 15.
[129] De Groot (2013), p. 4.
[130] ACRWC, article 6(4).

This addon, in comparison to the CRC article 7, offers more protection against statelessness in the sense that States are forced to adopt the principle of *jus soli* when the child would otherwise be stateless. As discussed above, the CRC does not invoke the principle of *jus soli* on its parties to the Convention. One could however argue that the Committee on the Rights of the Child has in its General Comment made implications that would entail obligations, similar to the one stipulated in article 6(4) ACRWC, that States do have a responsibility to make sure that a child is not left stateless. The Committee notes that "a key measure is the conferral of nationality to a child born on the territory of the state at birth or as early as possible after birth, if the child would otherwise be stateless."[131]

The African Committee of Experts on the Rights and Welfare of the Child has in a General Comment addressed statelessness and notes that the aim of article 6(3) is to prevent statelessness and that the fourth paragraph of the provision "harmonizes the Charter with the principles established in the 1961 Convention".[132] The Committee means that the ACRWC reaffirms that there is an obligation for the birth State to grant its nationality to a child born on its territory if the child has no other nationality.[133] The Committee further notes that States should not only grant nationality to children born on their territory, but also to those children who have been residing in the State for a "substantial portion of their childhood".[134]

3.4 Article 20 of the American Convention on Human Rights

The American Convention on Human Rights (ACHR) was the first regional instrument to address the right to nationality, initially stipulated in article 15 of the UDHR. The ACHR has based its nationality clause on article 1(1) of the 1961 Convention and article 20 ACHR reads: "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." This provision implements the principle of *jus soli* and provides a substantive right to nationality that is incomparable to other general international human rights instruments.[135] The provision in the ACHR goes further than the right to nationality in the CRC and the ICCPR, as the American Convention guarantees the right for everyone, not only children.

[131] UN Committee on the Protection of Migrant Workers and their Families and the Committee on the Rights of the Child, CMW/C/GC/4-CRC/C/GC/23, para 24.
[132] African Committee of Experts on the Rights and Welfare of the Child, ACERWC/GC/02, para. 88.
[133] Ibid, para. 88.
[134] Ibid, para. 92.
[135] Tobin & Seow (2019), p. 278

Something that can be seen as a paradigm shift in international law was the Advisory Opinion No. 4 from the IACtHR, where the Court characterised nationality. Article 20 of the ACHR is a reflection of the development of international law and it subjectifies granting and acquiring a nationality. The case law from the IACtHR further confirms that States bear an obligation to prevent statelessness.[136] Additionally, seen to the development of international law, the IACtHR in its Advisory Opinion argued that matters of nationality cannot be dealt with solely under a State's jurisdiction due to the shift of it being an inter-State matter to a human right.[137] The right to nationality under the ACHR is a non-derogable right[138] – meaning that parties to the Convention cannot under any circumstances step away from their obligations under article 20 ACHR. Worth noting is that the provision has not been subject to any reservations or declarations when States have ratified the Convention.[139] According to the UNHCR, State parties to both the CRC and the ACHR have an "explicit obligation" to, automatically at birth, grant their nationality to children born on their territory if they would otherwise be stateless.[140]

3.5 Otherwise stateless

The wording "otherwise stateless" found in for instance article 1 of the 1961 Convention and article 7(1) of the CRC is essential to look closer at since the responsibility falls on the State to identify and determine a child's potential statelessness. When addressing this question, one has to go back and look at the definition set out in article 1 of the 1954 Convention of who is considered to be stateless. The article states that a stateless person is someone who "is not considered as a national by any State under the operation of its law". In its Recommendation 2009/13, the CoE provides useful insights on how States should act when it comes to determining if someone is, or is at risk of being, stateless. The Recommendation was drafted by a Committee of Experts with the aim of paying special attention to statelessness as well as children's access to the nationality of their birth and residence State.[141] In its 6th principle the drafters of the Recommendations note the importance of cooperation between States when it comes to exchanging information regarding details on an individual's nationality.[142] The importance of cooperation when dealing with statelessness cannot be stressed enough – for a State to determine if the issue of statelessness is at hand the authorities need comprehensive information of

[136] Hennebel & Tigroudja (2022), pp. 602, 610; Inter-American Court of Human Rights, Advisory Opinion OC-4/84, para. 33.
[137] IACtHR Advisory Opinion OC-4/84, para. 32. See also Hennebel & Tigroudja (2022), p. 602.
[138] See ACHR, article 27(2).
[139] Hennebel & Tigroudja (2022), p. 604
[140] UNHCR, 'Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children: Summary Conclusions', para. 6.
[141] De Groot (2014), p. 156.
[142] CoE, CM/Rec(2009)13, principle 6.

a person's acquisition, or non-acquisition, of a foreign nationality. With always holding the principle of the best interest of the child in mind it is essential to recognize a child's nationality, or non-nationality, as soon as possible to prevent any prolonged periods of statelessness for the child.[143]

To simplify it, one could say that a child is stateless if they are born and cannot acquire the nationality of their parents nor the nationality of the State in which they were born in. In the UNHCR's guidelines on statelessness, it is noted that restricting 'otherwise stateless' only to children born to stateless parents would not be sufficient due to the many different ways in which a child could end up stateless.[144]

Proving if someone has acquired a nationality or not can in many cases be difficult and the burden of proof is therefore split between the State and the individual. The person claiming the right to nationality has to provide relevant information and documentation whereas the authorities in the contracting State must gather the evidence available to them so that it can be settled if the individual would otherwise be stateless.[145] The UNHCR guidelines suggest that the standard of proof should be at a "reasonable degree" when it comes to determining if a child would otherwise be stateless. Providing a higher degree of proof would underestimate the object and purpose of the 1961 Convention and article 7 of the CRC. Coming to an incorrect conclusion on the issue if a child has acquired, or is to acquire, another nationality would mean that the child in question would be left stateless.[146]

3.6 Conclusion

There are some essential aspects to take from the third chapter. Looking at the international and non-European instruments mentioning statelessness one can conclude that there is a will, especially from the instruments governing bodies, to ensure that children are registered at birth and that all are ensured a nationality. The Committees in different ways urge States to implement national laws and procedures that ensures that no child is left stateless. From looking at the General Comments on the issue of nationality it is clear that the threshold for States to do everything in their power in order to ensure that all children have a nationality is high. However, as previously noted, determining which State owes the obligation of actually granting their nationality is not clear which is why further examination of specialised treaties dealing with statelessness, and reviewing current case law on the subject, is essential for the purpose of answering the research question.

[143] De Groot (2014), p. 159.
[144] UNHCR, HCR/GS/12/04, para. 18.
[145] Ibid, para. 20.
[146] Ibid, para. 21.

The effect of States having discriminatory nationality laws, where it is not allowed for women and men to equally transfer their nationality to their child, is that there is an increased risk of children being born into statelessness. Although this is not a current problem for the European States, it is worth noting in the context of statelessness on a global level. What can also be noted from the chapter above is that the regional treaties from Africa and America goes further than the UN Conventions in regard to a child's right of acquiring a nationality at birth. The regional treaties from the CoE, as well as UN Conventions on statelessness, will be discussed in the coming chapter.

4 Conventions on statelessness

This chapter aims to contextualise some of the core articles in the UN and European instruments dealing with international statelessness law. As the thesis aims to examine European State's obligations to grant nationality to children on their territory it is important to look at both international and regional documents to see in what ways there are similarities and differences and what impact these have on State obligations. A result of the upswing that the statelessness debate has had in the past decade, partly due to the UNHCR #IBelong campaign, is that one can detect the engagement in the increasing number of State parties to the conventions that will be discussed below. From 2010 to April 2023, the 1954 Convention went from having 65 to 96 State parties and the 1961 Convention from 33 to 78 State parties.

4.1 UN instruments

In the UN there are two instruments dealing with statelessness. These specified treaties have not been ratified to the same extent as the previous UN Conventions discussed in chapter 3.1, but their importance is however ever the more important seeing as both the 1954 Convention and the 1961 Convention were adopted before the CRC and the ICCPR. The provisions dealing with statelessness in the CRC and ICCPR are largely influenced by the work and wording of these instruments and the principles set out in the statelessness conventions are to a great extent reflected in other international instruments.[147] The most prominent convention in regard to the research question is the 1961 Convention on the Reduction of Statelessness. Examining the framing leading up to article 1 and 2 of the 1961 Convention is essential for the future discussion on how the obligations in the provisions should be interpreted. Before looking closer at the 1961 Convention, focus should be drawn to the 1954 Convention relating to the Status of Stateless Persons as it has contributed with valuable provisions in regard to international statelessness law. The 1954 and 1961 Conventions are two of the primary international instruments that can serve as reference points when discussing the right to nationality and the elimination of statelessness.[148]

4.1.1 The 1954 Convention relating to the Status of Stateless Persons

The 1954 Convention relating to the Status of Stateless Persons was adopted in 1954 and came into force in June 1960. It has been adopted by a majority

[147] For instance, UDHR article 15 and CERD article 5.
[148] Batchelor (1998), p. 158.

of the European States[149], meaning its influence on statelessness law in Europe is considerable. One of the main contributions to international law from the 1954 Convention is its definition of *a stateless person* stipulated in the Convention's first article[150]. The definition has claimed the status of customary international law[151] and is therefore applicable to all States, no matter if they are parties to the Convention or not. The Convention aims at ensuring certain rights for stateless people, such as the right to work, receive education and obtain identity and travel documents[152], and is seen as the primary treaty defining the legal status of a stateless person.[153] Although an overarching aim when discussing the issue of statelessness is to eliminate it all together – having an international framework addressing the protection of stateless people in cases where acquisition of nationality is not possible is of great importance. However, one weakness of the 1954 Convention that is often pointed out is its limited protection of stateless people, as it only offers protection to *de jure* stateless persons and not to those who are *de facto* stateless.[154]

Looking at the 1954 Convention from the angle of the research it is of less importance than for instance the 1961 Convention due to its lacking discussion of a child's right to nationality. The 1954 Convention does not address children in any specific provision nor is it the core purpose or scope of the Convention to deal with reducing statelessness. However, one important aspect that the 1954 Convention contributes with, that additionally plays a big role for children's rights to acquire a nationality, is the implicit obligation to determine and identify stateless people.[155] This has further been reiterated by the Human Rights Committee[156], the ECtHR[157] and the UNHCR[158]. In order for States to live up to the obligations under both the 1954 and the 1961 Convention it is essential that the stateless people on their territory are identified. Additionally, article 32 of the 1954 Convention provides that States shall facilitate and expedite naturalisation proceedings for stateless persons, which urges States to work towards a reduction of statelessness. The identification

[149] European States that are *not* parties to the 1954 Convention are: Andorra, Cyprus, Estonia, Monaco, Poland, Russia and San Marino.
[150] A stateless person is "a person who is not considered as a national by any State under the operation of its law."
[151] See for instance the decision by the African Committee of Experts on the Rights and Welfare of the Child, No. 002/Com/002/2009, para. 44.
[152] See the 1954 Convention articles 22, 24, 27 and 28.
[153] Perks & De Chickera (2009), p. 43.
[154] See for example ECtHR *Ramadan v. Malta*, appl. no. 76136/12, Dissenting Opinion of Judge Pinto de Albuquerque, para. 3.
[155] UNHCR, 'Statelessness Determination Procedures and the Status of Stateless Persons: Summary Conclusions', para. 1. See also Gyulai (2014), pp. 116–117.
[156] UN Human Rights Committee, *Zhao v. the Netherlands*, CCPR/C/130/D/2918/2016, para. 10.
[157] ECtHR *Sudita Keita v Hungary*, appl. no. 42321/15, para. 36.
[158] UNHCR, 'Good Practices Paper - Action 6. Establishing Statelessness Determination Procedures for the Protection of Stateless Persons', p. 4.

and definition of a stateless person are the two main takeaways from the 1954 Convention with regard to the purpose of the thesis.

4.1.2 The 1961 Convention on the Reduction of Statelessness

In 1959, representatives from 35 States met at the United Nations Conference on the Elimination or Reduction of Future Statelessness to discuss the drafted 1961 Convention and provisions aiming at reducing statelessness at birth.[159] The Convention came into force in December 1975. It does not have universal adherence but the number of States becoming parties to the treaty is rapidly increasing[160], giving the Convention ever more importance. The aim of the Convention is to prevent and reduce statelessness – implying everyone's, not least children's, right to nationality.[161] Between 2010–2014, the UNHCR held expert meetings on how to interpret and implement both the 1954 and the 1961 Conventions. These meetings were summarised in four separate *summary conclusions*. The conclusions laid the ground for the UNHCR's work on the UNHCR Handbook and the UNHCR Guidelines which are of great use when interpreting the provisions in the mentioned Conventions. According to the UNHCR's guidelines on statelessness, the 1961 Convention shall be read and interpreted in the light of current international human rights law.[162]

One element that is significant for the 1961 Convention is that it, in some circumstances, imposes a positive obligation on the contracting State to grant its nationality. The Convention's first article binds States to grant nationality to children born on their territory if the child would otherwise be stateless.[163] The contracting State must either by operation of law (*ex lege)* or upon application grant its nationality to the child in question.[164] The 1961 Convention should be interpreted in the light of the CRC seeing as all State parties to the 1961 Convention are also parties to the CRC.[165] Many of the provisions set out in the CRC is of importance to the 1961 Convention. CRC Article 7, discussed in chapter 3.1, has the clearest connection to the 1961 Convention, but even looking at articles 2, 3 and 8 one can find guidance in how to interpret the 1961 Convention. The provisions deal with non-discrimination, best

[159] Kaneko-Iwase (2021), p. 41.
[160] Comparison can be made from 2010 (33 States) to 2023 (78 States). European States that are *not* parties to the 1961 Convention are: Andorra, Cyprus, Estonia, Greece, Malta, Monaco, Poland, Russia, San Marino, Switzerland, Slovenia and Türkiye. See United Nations, Treaty Series, vol. 989, p. 175, <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&clang=_en>, accessed 23 May 2023.
[161] UNHCR, HCR/GS/12/04, para. 1.
[162] Ibid, para. 8.
[163] 1961 Convention article 1(1).
[164] UNHCR, HCR/GS/12/04, para. 2.
[165] Ibid, para. 9.

interest of the child and a child's right to preserve her or his identity, including nationality.

Article 1(3) of the 1961 Convention provides a settlement between the countries practising the principle of *jus soli* and those of the *jus sanguinis* principle. The article reads: "… a child born in wedlock in the territory of a Contracting State, whose mother has the nationality of that State, shall acquire at birth that nationality if it otherwise would be stateless." This article resolves the problem where a child is born in a State with nationality laws based on *jus sanguinis* and where the nationality can only be passed on from the father. The article can be seen as a safeguard that acknowledges discriminatory nationality laws on the basis of gender. Like previously noted, this is not an issue in any of the European State's national legislation. Additionally, according to the UNHCR, this article has limited importance due to that many of the State parties to the 1961 Convention now are gender equal in their nationality law – a result of the ICCPR and CEDAW.[166]

4.2 European instruments

Before looking closer at the regional instruments on nationality in Europe it is worth addressing some of the main human rights documents in the European Union and the CoE. Neither the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) nor the Charter of Fundamental Rights of the European Union addresses the issue of statelessness or someone's right to acquire nationality. The closest one of these instruments comes to the question of nationality is in the discrimination clause of the Charter where it states that "any discrimination on grounds of nationality shall be prohibited".[167] The words citizen(ship), nationality or stateless(ness) are not mentioned once in the ECHR, however the question of nationality has sometimes been brought up under ECHR article 8[168] which concerns the right to respect for private and family life. In addition to the conventions discussed below, the CoE has in its recommendations addressed the question of statelessness.[169]

4.2.1 European Convention on Nationality

Due to the lack of regulation on statelessness in the ECHR or any of its Protocols, the CoE's Committee of Experts for the Development of Human Rights started to examine the possibility of inserting the right to nationality in an additional protocol to the ECHR. This was however not popular among

[166] UNHCR, 'Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children: Summary Conclusions', paras. 8–9.
[167] Charter of Fundamental Rights of the European Union, article 21(2).
[168] See for example ECtHR *K2 v United Kingdom*, appl. no. 42387/13, *Ramadan v Malta*, appl. no. 76136/12 or *Genovese v Malta*, appl. no. 53124/9.
[169] See for instance, CoE, CM/Rec(99)18.

the Member States and as a result, in 1992, an expert committee began formulating a new convention that would solely deal with the question of nationality.[170] In 1997 a working group on nationality drafted the European Convention on Nationality (ECN), and although the main goal was to reduce multiple nationalities[171] the Convention also guarantees the right to a nationality to *everyone* – extending the same right that is stipulated for only children in CRC article 7. The ECN is built on principles such as the prevention of statelessness and non-discrimination when it comes to dealing with questions of nationality.[172] An initial remark that is necessary to make is that the ratification of ECN is far from coherent. To date, 21 States have ratified the Convention and another 8 have signed but not ratified.[173] This means that 25 members of the CoE have not implemented the treaty into their national legislation.

The ECN is strongly influenced by other human rights treaties, for instance the 1961 Convention and the UDHR. Everyone's right to nationality can be found in article 4 of the ECN, which reiterates the ideas set up in article 15 of the UDHR. The ECN grants special protection for children in its 6th article where it demands States to grant nationality to otherwise stateless children born on their territory, i.e. implementing the principle of *jus soli*. Article 6(2) provides that: "Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality." The wording of the article has drawn inspiration from both the CRC and the 1961 Convention.[174] Although similarities to the provisions in the 1961 Convention, the ECN goes further in placing a time limit as to when a child should be able to access a States' nationality. The 1961 Convention allows States to postpone the right up until that the child is 18 years old, whereas in the ECN the stateless child shall be granted nationality when she or he is still a minor and has had lawful and habitual residence in the State for a maximum of five years.[175]

4.2.2 Convention on the Avoidance of Statelessness in relation to State Succession

[170] *Ramadan v. Malta*, Dissenting Opinion of Judge Pinto De Albuquerque, para. 7.
[171] De Groot (2000), p. 118.
[172] CoE, 'Details of Treaty No. 166', <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=166>, accessed 23 May 2023.
[173] European States that are ***not*** parties to the ECN are: Andorra, Armenia, Azerbaijan, Belgium, Cyprus, Estonia, Georgia, Ireland, Liechtenstein, Lithuania, Monaco, San Marino, Serbia, Slovenia, Spain, Switzerland, Türkiye and the United Kingdom. See CoE, 'Chart of signatures and ratifications of Treaty 166', <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=166>, accessed 23 May 2023.
[174] CoE, 'Explanatory Report to the European Convention on Nationality', para. 49.
[175] See ECN article 6(2)(b) and 1961 Convention article 1(2)(a). See also De Groot (2014), p. 154.

The Convention on the Avoidance of Statelessness in relation to State Succession[176] from 2006 has not attracted as many States as the ECN. To date, only 9 States have signed and 7 have ratified the Convention, meaning its influence is somewhat limited.[177] This Convention is not of the biggest relevance when it comes to determining what obligation a State has in regard to granting nationality to children, but it is worth looking at to see in what notions children are given special attention. The Convention aims at preventing statelessness in the case of State succession and is a build on to chapter VI of the ECN.[178] Children are only mentioned in article 10 when it comes to the avoidance of statelessness at birth. The Convention, like the ECN, implements the principle of *jus soli* when stating that nationality shall be granted to "a child born following State succession on its territory to a parent who, at the time of State succession, had the nationality of the predecessor State if that child would otherwise be stateless."[179] According to this article, States owes an obligation to prevent child statelessness during times of State succession – meaning that even if the parent of the child has not been granted the nationality of the successor State, the child would still have the acquisition right. The aim of article 10 is to avoid children being born into statelessness as a result of their parents being stateless.[180]

Article 8 of the Convention deals with the burden of proof for people who after State succession are, or are at risk of becoming, stateless. The provision notes that States are to adjust their requirements of providing the necessary proof for the granting of the States nationality. It further holds that people previously resident on the territory that has been subject to States succession do not need to prove their non-acquisition of another nationality before being granted the nationality of the succession State.[181] This article acknowledges the situation where a person might not be able to provide their full documentation proving their decent.[182]

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[176] CoE, *Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession*, 15 March 2006, CETS 200.
[177] European States that are ***not*** parties to the Convention on the Avoidance of Statelessness in relation to State Succession are: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Monaco, North Macedonia, Poland, Portugal, Romania, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Türkiye and the United Kingdom. See CoE, 'Chart of signatures and ratifications of Treaty 200, <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=200>, accessed 23 May 2023.
[178] CoE, 'Explanatory Report to the Council of Europe Convention on the avoidance of statelessness in relation to State succession', para. 4.
[179] Convention on the Avoidance of Statelessness in relation to State Succession, article 10.
[180] CoE, 'Explanatory Report to the Council of Europe Convention on the avoidance of statelessness in relation to State succession', para. 42.
[181] Convention on the Avoidance of Statelessness in relation to State Succession, article 8.
[182] CoE, 'Explanatory Report to the Council of Europe Convention on the avoidance of statelessness in relation to State succession', paras. 32–33.

4.3 Foundling under international law

The aim of this section is to examine how the term *foundling* is dealt with in the provisions of international law. The importance of having a foundling-provision derives from a foundling's vulnerability to statelessness if not protected by a specific safeguard. In many cases, foundlings do not possess the information of their place of birth nor their parents' status as nationals – meaning neither of the requirements for nationality in a *jus soli* or *jus sanguinis* State would be fulfilled.[183] Article 2 of the 1961 Convention protects foundlings from statelessness. The article reads:

> 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.

This article presumes that the child is born within the territory of the State, to parents who are nationals of the same. The article draws on the same ideas as from article 14 of the 1930 Hague Convention which in its second paragraph states that "a foundling is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found."[184] With these presumptions at hand, it ultimately leaves the child in a *jus soli* State to inherit the nationality of the birth State, and a child in a *jus saguinis* State inheriting that of her or his presumed parents.[185]

The term *foundling* is defined in section 2.1.4 but one question that arises is if the foundling-provision is only applicable to infants, i.e. very young children, or if the protection covers older children as well. Some argue that it would leave a protection gap if a non-new-born child is found on a State's territory and would not be covered under the term *foundling*.[186] When reading the provision in light of the object and purpose of the CRC, the 1961 Convention and the ECN one could argue that a State should approach abandoned children, without known parentage, found on their territory in a manner that prevents them from being left without a nationality. This idea goes especially for young children that do not yet have the ability to speak or give useful information as to their place of birth or who their parents are.[187]

The foundling-provision is often argued to have a stronger standing when it comes to granting nationality to children in comparison to article 1 of the 1961 Convention where children are covered by the wording "otherwise stateless".[188] This outcome comes partly from the presumption that the foundling-

[183] Kaneko-Iwase (2021), p. 51.
[184] Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, League of Nations, article 14(2).
[185] Kaneko-Iwase (2021), p. 99.
[186] For instance, De Groot (2014), p. 161.
[187] De Groot (2014), p. 161-162.
[188] Kaneko-Iwase (2021), p. 24.

child is born from a national of the State, but the drafters also seemed to take into consideration the particular vulnerability of foundlings due to their lack of caretakers. One could therefore argue that article 2 of the 1961 Convention made States more eager to implement their, otherwise general obligation, of preventing statelessness.[189]

Article 6(1)(b) of the ECN also mentions *foundlings* as a group that shall be of special protection. One important aspect to note in regard to the mentioned article is that the provision is not limited to only infants, but rather covers all children, i.e. everyone below the age of 18. A minor can lose the nationality gained from the foundling provision in the case where it is discovered who the parent(s) of the child is and therefore also clarified from where the child can derive their nationality. The same goes for children who acquire nationality based on her or his place of birth.[190] There may arise several challenges from this, but it is beyond the scope of the thesis to go further into these questions as it does not leave the child stateless, which is the main focus.

Some scholars[191] mean that granting nationality to foundlings is part of customary international law. They argue that there is a widespread practice where countries, not party to the 1961 Convention or the ECN and practising both the principle of *jus soli* and *jus sanguinis*, are transferring their nationality to foundlings both with and without national provisions regulating the matter.[192]

4.4 Conclusion

Looking at the Conventions dealing with statelessness one can draw some conclusions. Both the ECN and the 1961 Convention aim to provide a legal framework that works to reduce statelessness by proving a connection between the individual and the State. These two conventions are of the most relevance in regard to the research question but all conventions discussed above, to some extent, acknowledge the vulnerable situation that some people find themselves in, for instance when being a foundling or a stateless person as a result of State succession. The instruments discussed above are used as reference points when identifying the minimum steps that European States are to take in order to reach the goal of globally reducing statelessness. Noting the importance that the 1961 Convention has had for other treaties, such as the CRC and the ECN, it is safe to say that the 1961 Convention is the guiding instrument when it comes to the issue of reducing statelessness among children.

According to De Groot, the instruments from the CoE are dominated by the principle of *jus sanguinis* rather than by that of the *jus soli* principle. Looking

[189] Ibid, p. 24.
[190] De Groot (2000), p. 132.
[191] For instance, Laura van Waas and Robert Córdova. See Kaneko-Iwase (2021), p. 21–22.
[192] Kaneko-Iwase (2021), p. 27.

at the CoE Recommendation 2009/13 in comparison to the 1961 Convention one can note that article 1 of the 1961 Convention implies obligations inspired by *jus soli*. The first article has precedence over article 4 of the Convention, where the latter derives from the principle of *jus sanguinis*. The opposite can be said when looking at principle 1 and 2 of the CoE Recommendation where *jus sanguinis* is superior to *jus soli.*[193] Looking more specifically to the ECN and the Convention on the Avoidance of Statelessness in relation to State Succession, it is obvious that the object and purpose of these are narrower than that of the UN Conventions in the sense that these aim at harmonising the nationality laws only in the European context. Noting that the principle of *jus sanguinis* is the dominant way of granting nationality to people in Europe one needs to examine how States implement the obligation of granting nationality to those children on their territory, who do not have parents that are nationals of the State, and who are at the risk of being stateless. In the following chapter case law from different governing bodies will be examined to get an understanding of how nationality, child statelessness and State obligations in regard to this is dealt with in the international arena.

[193] De Groot (2014), p. 158.

5 Case law

None of the international treaties solely dealing with statelessness[194] have a monitoring body, which means that there is no case law originating from these. The question of statelessness and children's rights has however been dealt with by other monitoring bodies such as the Human Rights Committee, the African Court of Human and Peoples Rights, the Inter-American Court of Human Rights and the European Court of Human Rights. Additionally, the field has been reviewed by several High Courts of various States.[195] For the purpose of the thesis it is essential to look at how child statelessness is discussed in the international forum in order to get valuable insights for the discussion on what obligations States have to grant nationality to children who would otherwise be stateless. Additionally, it is interesting to see the reasoning of Courts and Committees from different parts of the world in order to better grasp what support there is in regard to if granting nationality should be a part of customary international law. Sections 5.1, 5.2 and 5.3 will examine a variety of cases that will later be analysed in section 5.4 to see if there are any possible similarities or differences in the Court and Committees reasoning.

5.1 Human Rights Committee and the European Court of Human Rights

5.1.1 Zhao v the Netherlands

One of the more prominent cases in regard to stateless children is *Zhao v the Netherlands*[196]. This is the first time the Human Rights Committee issued a decision on a child's right to acquire a nationality. The Committee has previously mentioned statelessness in its case law, but it has not been the primary question and none of the previous communications are relevant for the purpose of the thesis.

Zhao v the Netherlands concerns a child (D.Z.) born in the Netherlands to a mother who was classified as an "illegal alien" in the same country. The mother was born in China but never registered in the civil registry which prevented her from proving her Chinese citizenship. As a teenager she was trafficked to the Netherlands and upon application for asylum she was rejected asylum status. When she, for the second time, reported her trafficking to the

[194] I.e., the 1954 Convention, the 1961 Convention, the ECN or the Convention on the Avoidance of Statelessness in relation to State Succession.
[195] For instance, judgements from the High Court of Uganda, the US Supreme Court and the Supreme Court of the Philippines.
[196] UN Human Rights Committee, CCPR/C/130/D/2918/2016.

police an investigation was commenced to identify her traffickers. During the time of the investigation she received a temporary residence permit, which was later revoked once the investigation was closed. The mother had since been an illegal alien in the Netherlands. Due to the mother's inability to provide any proof of the petitioner's nationality, and the father not recognizing his paternity, D.Z.'s nationality was registered as "unknown".[197] After the mothers numerous failed attempts at obtaining Chinese nationality for D.Z. she turned to the Dutch officials in an attempt to change her son's status from "unknown nationality" to "stateless".[198] Upon the mother's application for the change of status for her son, the Dutch authorities denied the request since they could not with certainty determine that D.Z. was not a Chinese national, i.e. not stateless.[199] Being registered as "unknown" instead of "stateless" limited D.Z.'s right to the international protection offered to stateless children, and ultimately made it impossible for him to claim his right to nationality based on his place of birth.[200] D.Z. and his mother appealed the decision from the Dutch authority but all instances upheld that the burden of proof in regard to proving ones nationality, or statelessness, was on the petitioner.[201] The highest court of appeals, the Dutch Council of State, acknowledged that with regard to the lacking procedures of determining statelessness, people entitled to protection were falling through a gap in legislation. The Council however noted that only legislature could provide a remedy for this gap.[202]

The applicant complained to the Human Rights Committee and claimed that the Netherlands were denying him his right to acquire a nationality under article 24(3) of the ICCPR. Additionally, he claimed that the Netherlands had violated his rights under article 24 read in conjunction with article 2(2) of the ICCPR by not having appropriate national procedures to determine statelessness and using this gap to deny his application for Dutch nationality. Ultimately D.Z. claimed that he had not received an effective remedy, implying the responding State had violated article 24 read in conjunction with article 2(3) of the ICCPR.[203]

In its decisions, the Human Rights Committee both recalled its General Comment no. 17[204] and drew attention to the best interest of the child. From General Comment no. 17, the Committee noted that a State is "required to adopt every appropriate measure, both internally and in cooperation with other States" in order to ensure that no child is left stateless when they are born.[205] In its reasoning the Committee notes that nowhere in the decisions from the

[197] *Zhao v the Netherlands*, para. 2.3.
[198] Ibid, para. 2.5.
[199] Ibid, para. 2.5.
[200] Ibid, para. 2.4.
[201] Ibid, para. 2.6.
[202] Ibid, para. 2.6.
[203] Ibid, paras. 3.1-3.3.
[204] See chapter 3.1.
[205] *Zhao v the Netherlands*, para. 8.2.

Dutch authorities were there guidelines on further steps that the mother could have taken in order to obtain documents from the Chinese authorities. Additionally, the Netherlands had lacked in their obligation to investigate D.Z.'s nationality status. Noting that the Dutch Council of State had acknowledged the lack of a status determination procedure and therefore been aware that D.Z. was unable to enjoy his rights to acquire a nationality, the Committee came to the conclusion that there had been a violation of article 24(3). It also concluded that the lack of remedy provided for the applicant amounted to a violation of article 24(3) read in conjunction with article 2(3) of the Covenant.[206]

In this case the Committee takes note of other relevant international treaties that the State is a party of, such as the CRC and the 1961 Convention. In regard to the CRC, the Human Rights Committee brought up the concluding observations from the Committee on the Rights of the Child where the Netherlands had been recommended to "ensure that all stateless children born in its territory, irrespective of residency status, have access to citizenship without any conditions".[207] Looking at the UNHCR Guidelines on Statelessness No. 4, the Committee notes that a State party to the 1961 Convention should share the burden of proof with the claimant due to the difficulties that often arise when determining an individual's acquisition, or non-acquisition, of a nationality.[208]

5.1.2 Karassev and Family v. Finland

Even though the European Convention on Human Rights (ECHR) does not mention or deal with the question of statelessness, the right to nationality and citizenship has however been brought up by the European Court of Human Rights (ECtHR) in a few cases. In *Karassev and Family v. Finland*[209] the Court held that although the right to citizenship is not guaranteed by neither the ECHR nor its protocols, this does not exclude the ECtHR from looking at the question of an arbitrary denial of nationality under its competence of article 8 ECHR[210] – due to the impact on the person's private life.[211] Although the possibility is there, the threshold for the question of nationality to fall under article 8 is somewhat high.

Detailed facts of the case are not of great relevance, but what can be noted about the circumstances is that the family had been citizens of the former Soviet Union and had after its breakup not acquired the nationality of the Russian Federation. The Karassev family had lived in Finland for over five

[206] Ibid, para. 8.5.
[207] Ibid, para. 8.4. See also UN Committee on the Rights of the Child, CRC/C/NDL/CO/4, para. 33.
[208] *Zhao v the Netherlands*, para. 8.3.
[209] Appl. No. 31414/96, Decision of 12 January 1999.
[210] Right to respect for private and family life.
[211] *Karassev and Family v. Finland*, p. 10–11.

years and had not expressed any willingness to take up the ties with the Russian Federation – who on repeated occasions held that the family were not citizens of the State. The applicant was born in Finland and claimed his right to nationality upon application, based on his place of birth. The Finnish authorities however denied this application on the grounds that they found the applicant, and his family, to be citizens of the Russian Federation.

In *Karassev and Family v. Finland* the Court did not consider that the Finnish authorities' denial of citizenship to the applicant was arbitrary in a way which amounted to a violation under article 8 of the ECHR.[212] The Court held that on the basis of the communications from the Citizenship Commission of the Russian Federation, it was not clear if the applicant could have acquired Russian nationality at birth. This meant that the interpretation by the Finnish authorities of the applicant's status as stateless was not unreasonable and their denial did therefore not amount to an issue under article 8 ECHR. In its reasoning the Court noted that the applicant was not threatened with expulsion from Finland, nor were his parents, and further that the applicant could issue a residence permit and an alien's passport. Additionally, the applicant enjoyed social benefits such as child allowance and municipal day care. Taking these factors into consideration the ECtHR did not consider that the refusal of Finnish citizenship amounted to the degree of seriousness that an issue under article 8 of the ECHR could be raised.[213]

5.1.3 Genovese v. Malta

In the case of *Genovese v. Malta*[214] the ECtHR found a violation of article 8 in conjunction with article 14[215] of the ECHR in regard to the question of access to citizenship. The case does not concern statelessness but is interesting to look at with the purpose of examining how the ECtHR deals with children born out of wedlock and their right to nationality. Similar to the case of the *Girls Yean and Bosico v the Dominican Republic,* discussed below in section 5.2.1, this case also concerns the issue of discrimination. The applicant was born out of wedlock to a British mother and a Maltese father. Upon the mother's application for her son to obtain Maltese citizenship, Malta rejected the application on the ground that a child born out of wedlock was only eligible the citizenship if the mother was Maltese.[216]

In its reasoning the Court noted that the term "private life", found in article 8 of the ECHR, is to be understood broadly and covers both the physical and psychological integrity of a person.[217] This entails that impacts on a person's social identity can amount to interferences with an individual's private and

[212] *Karassev and Family v. Finland*, p. 12.
[213] Ibid, p. 12.
[214] Appl. No. 53124/09, Judgement of 11 October 2011.
[215] Prohibition of discrimination.
[216] *Genovese v. Malta*, paras. 10–14.
[217] *Genovese v. Malta*, para. 30.

family life so that it falls within the scope of article 8. In this case the Court meant that the denial of Maltese citizenship was not alone such that it would amount to a violation of article 8 ECHR, but seeing the impact it had on the applicant's social identity the ECtHR considered it to be "within the general scope and ambit of that Article."[218] The Court noted that a difference in treatment is discriminatory if there is no legitimate aim or if there is no proportionality between the means and the aim. In the case, the applicant would have been granted Maltese nationality if his parents would have been married upon his birth. Looking at the evolution of domestic and international law, the Court concluded that there are no reasonable or objective grounds to justify the difference in treatment between the applicant, born out of wedlock, and those born in wedlock. Accordingly, the ECtHR found a violation of article 14 in conjunction with article 8 ECHR.[219]

5.2 Inter-American Court of Human Rights

5.2.1 The Girls Yean and Bosico v. the Dominican Republic

The case of the *Girls Yean and Bosico v the Dominican Republic*[220] revolves around two girls who were refused recognition of their Dominican nationality due to their Haitian descent. Some of the consequences of the denial of nationality was that the girls were not allowed to go to school and were vulnerable to the possibility of being arbitrarily expelled from the Dominican Republic. In large, the judgement is about discriminatory nationality laws which is not the focus of the thesis, but in its reasoning the Inter-American Court of Human Rights (IACtHR) draws attention to the general question of statelessness and the right to nationality – specifically a child's right to nationality. It should also be pointed out that this case is from 2005, i.e. more than 10 years before the case of *Zhao v the Netherlands.*

In the case the IACtHR, among other things, established that the discretionary authority of a State's domestic jurisdiction when it comes to deciding who its nationals are is gradually being reduced seen to the development of international law. The Court notes that the authority is limited due to two reasons; firstly, a State's obligation to protect and ensure individuals equality before the law and secondly, a State's obligation to prevent, avoid and reduce statelessness.[221] In the case the Court argues that an individual being deprived of a nationality is in a position of "extreme vulnerability" due to their lacking

[218] Ibid, para. 33.
[219] Ibid, paras. 44–49.
[220] Judgement of September 8, 2005.
[221] *Yean and Bosico v. Dominican Republic,* para. 140.

ability of enjoying civil and political rights.[222] The IACtHR brings special attention to the fact that the claimants in the case were children, noting that "the vulnerability arising from statelessness affected the free development of their personalities, since it impeded access to their rights and to the special protection to which they are entitled."[223]

5.2.2 Expelled Dominicans and Haitians v. Dominican Republic

In the case of *Expelled Dominicans and Haitians v. Dominican Republic*[224] the IACtHR addresses the question of at what point in time a State's obligation to grant nationality is actualized. Relying on the General Comment no. 17 of the HRC, as well as article 7 of the CRC, the Court notes that in accordance with international law a State is obliged to "respect the right to nationality and to prevent statelessness … at the time of an individual's birth."[225] The Court further iterates that article 20(2) of the ACHR[226] should be interpreted as State's owing an obligation to "be certain that a child born in its territory may truly acquire the nationality of another State immediately after birth, if he does not acquire the nationality of the State in whose territory he was born."[227] The IACtHR held that in the case where a State cannot be sure if a child born on their territory will acquire the nationality of another State, the birth State is obliged to grant its nationality *ex lege* in order to avoid statelessness at birth.[228]

5.3 African Court on Human and Peoples Rights and African Committee of Experts on the Rights and Welfare of the Child

5.3.1 Robert John Penessis v. United Republic of Tanzania

[222] Ibid, para. 142.
[223] Ibid, para. 167.
[224] Judgement of August 28, 2014. Series C No. 282.
[225] *Expelled Dominicans and Haitians v. Dominican Republic*, para. 258.
[226] Right to the nationality of the State in which a person is born in, if the person does not have the right to any other nationality.
[227] *Expelled Dominicans and Haitians v. Dominican Republic*, para. 259.
[228] Ibid, para. 261.

The African Court on Human and Peoples' Rights issued a judgement in 2019 where it for the second time brought attention to the right to nationality.[229] The facts of the case in *Robert John Penessis v United Republic of Tanzania*[230] is not of great importance when discussing a child's right to nationality, what however is worth noting is the Court's reasoning when discussing the issue of a person's right to nationality. The Court notes that the right to nationality is to be considered "a fundamental aspect of the dignity of the human person". It further reasons that it is a crucial principle under international law that a person's dignity is protected and that human dignity is considered to be a fundamental human right.[231] A denial of a person's right to nationality would, according to the Court, be in conflict with the fundamental right to dignity. This would further not be in accordance with international law which requires States to take the necessary measures in order to avoid statelessness.[232]

The Court goes on to broaden the 5th article[233] of the African Charter on Human and People's Rights by noting that the right to nationality is to be considered as a part of a person's right to "legal status". The right to legal status is not found in any of the big European instruments such as the ECHR or the Charter of Fundamental Rights of the European Union, but the idea can be found in the UDHR article 6 where it is noted that "Everyone has the right to recognition everywhere as a person before the law".

Looking at the reasoning of the Court one could argue that there is a tendency to broaden the application of the right to nationality by encompassing the right into already existing provisions. Seeing that the African Charter does not have a specific provision dealing with statelessness or people's right to nationality, the *Robert John Penessis v United Republic of Tanzania* judgement can be seen as a positive trend towards more responsibility on States when it comes to their obligations in taking the necessary measures to avoid statelessness.

5.3.2 Children of Nubian descent in Kenya v. The Government of Kenya

In the decision of *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*[234] the African Committee of Experts on the Rights and Welfare of the Child notes that a child does not, with regard to

[229] The first judgement from the African Court dealing with statelessness is *Anudo Ochieng Anudo v Tanzania*, appl. No. 012/2015.
[230] Appl. No. 013/2015.
[231] *Robert John Penessis v United Republic of Tanzania*, para. 87.
[232] Ibid, para. 88.
[233] That reads: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status…".
[234] Decision No 002/Com/002/2009.

the wording of article 6(3) of the ACRWC, have a right to nationality from their birth. This is in contrast to article 6(1) ACRWC which regulates a child's right to a name, and where the provision states "every child shall have the right *from his birth* [emphasis added] to a name." However, with this in mind, the Committee means that by looking both at the purpose of article 6(3) as well as the principle of the best interest of the child[235], one can argue that children should have a nationality from the day of their birth.[236] The Committee also notes the importance of birth registration and means that registering children at birth is the State's "first official acknowledgement of a child's existence".[237]

The Committee reiterates what has previously been established by other Courts and Committees; that a State's discretion when it comes to granting and denying nationality to children is limited by international human rights standards as well as customary international law.[238] In its decision, the Committee clarifies the intent of article 6(4) and states that "if a child is born on the territory of a State Party and is not granted nationality by another State, the State in whose territory the child is born, in this particular case Kenya, should allow the child to acquire its nationality."[239] The Committee further brings attention to the words "undertake to ensure" found in article 6(4) ACRWC and means that this is not an obligation of conduct, but rather an obligation of result – meaning that a State needs to ensure that *all* necessary steps are taken in preventing that any child is left stateless.[240] The Committee concludes that making children wait until they turn 18 years old in order to obtain a States nationality is a violation of the African Charter on the Rights and Welfare of the Child and ultimately found a violation of article 6(2), 6(3) and 6(4) of the ACRWC.[241] This case clarifies that birth State owes the primary responsibility of ensuring that the child is not left stateless. This State must take effective control and cooperate with other States – if the birth State is not the one that will ultimately grant nationality to the child.

5.4 Conclusion

Looking at the case law presented throughout this chapter one primary fact is worth pointing out. The international monitoring bodies have, to different degrees, addressed the question of where the line goes as to a State's obligation in granting nationality to children, on their territory, who would otherwise be stateless. They have additionally provided useful guidance on how to address the issue of stateless children, or children of unknown nationality. The Courts

[235] Stipulated in ACRWC, article 4.
[236] *Children of Nubian descent in Kenya v The Government of Kenya*, para. 42.
[237] Ibid, para. 38.
[238] Ibid, para. 48.
[239] Ibid, para. 50.
[240] Ibid, para. 52.
[241] Ibid, para. 54.

and Committees have held that the burden of proof is to be shared between the applicant and the State, effective procedures should be in place in order to identify stateless persons and that there is an obligation to cooperate with other States in order to clarify if someone is to acquire another nationality or not.

It is multiple times clarified that States do not have full discretion in regard to the question of who its nationals are and not. The case law shows that States must take account of international law and general principles when implementing its national legislation on issues regarding statelessness. The authoritative bodies have additionally strengthened States obligation to be certain that a child will acquire another nationality if the birth State does not. This clarification, as well as the obligation on States to grant nationality *ex lege* (automatically) if no other State can ensure the child their nationality, should result in limited cases of children with unknown nationalities. Noting the importance of nationality as a part of one's human dignity, one can draw the conclusion that for vulnerable groups, such as children, the right to their dignity and identity is of even more gravity.

To find a violation under article 8 of the ECHR, in regard to the question of acquisition of nationality for otherwise stateless children, seems to be difficult. Noting that the ECtHR did not oblige a State to grant their nationality to a child due to him, and his family, not being in danger of expulsion and them receiving benefits from the State, implies that there is a high threshold when it comes to infringing on States sovereignty under the ECHR in regard to questions of nationality. The ECHR cannot, with the case of *Karassev and Family v. Finland* as proof, claim to have an aim of eliminating statelessness. There are however multiple other instruments available for this purpose and provisions in broadly ratified conventions that aim to solve the issue of statelessness.

Overall, looking at the different governing bodies from various parts of the world, one can note an overarching trend in regard to the issue of statelessness. There is a general will to oblige States to take the necessary means in order to reach the goal of ending statelessness. In the case of *Children of Nubian descent in Kenya v The Government of Kenya* the African Committee of Experts on the Rights and Welfare of the Child goes as far as to interpret the right to nationality to mean a right to nationality from birth. These jurisprudences are of great relevance when entering the coming chapters that will look at Sweden's implementation of international statelessness law and if the obligation to grant nationality to otherwise stateless children should be seen as customary international law.

6 Sweden's implementation of international treaties

In order to get an understanding for how the treaties discussed throughout the thesis have been applied in Member States this chapter aims to look at Sweden and how child statelessness is addressed in its national legislation. Sweden is a party to the 1954 Convention, the 1961 Convention and the ECN. It has however not signed or ratified the Convention on the avoidance of statelessness in relation to State succession. Choosing Sweden as the country to examine is still relevant due to its ratification of the 1961 Convention and the ECN, which are the two main international instruments that has specified provisions aimed at ending child statelessness.

In Sweden, the principle of *jus sanguinis* is implemented in the nationality law.[242] The latest mapping of statelessness in Sweden by the UNHCR is from 2016, but the European Network on Statelessness has in its *Statelessness Index* reviewed Sweden and notes that in 2022 there were approximately 14 500 stateless people and 13 000 of unknown nationality living in Sweden.[243] Only those who have a residence permit in Sweden are registered in the Swedish Population Register[244], meaning that those living in Sweden illegally are not included in the administrative data. Children born to those who are not registered, i.e. those without a residence permit, are at risk of being stateless at birth either due to the parent's inability to confer their nationality to the child or due to the parents status as stateless.[245]

The UNHCR has warned of there being a risk of a large unknown number of stateless people in Sweden due to the country's lack of a Statelessness Determination Procedure. Additionally, The European Network on Statelessness holds that there are reasons to believe that there is an underreporting on statelessness in Sweden.[246] However, although Sweden is lacking a dedicated Statelessness Determination Procedure, there are other ways in which stateless people can be identified and registered. These other sources of identifying statelessness include naturalisation, seeking asylum or registering the birth of a child.[247]

[242] See Act on Swedish Citizenship, article 2.
[243] European Network on Statelessness, 'ENS Statelessness Index Survey 2022: Sweden', p. 2, <https://index.statelessness.eu/sites/default/files/ENS_Statelessness_Index_Survey-Sweden-2022.pdf>, accessed on 23 May 2023.
[244] In Swedish *Folkbokföringsdatabasen*.
[245] UNHCR, 'Mapping Statelessness in Sweden', p. 24.
[246] See ibid; European Network on Statelessness, 'ENS Statelessness Index Survey 2022: Sweden', pp. 6–7.
[247] UNHCR, 'Mapping Statelessness in Sweden', p. 33.

6.1 National legislation

In Swedish law there is no definition of a *stateless person*, but Swedish authorities apply the same definition as is stated in article 1 of the 1954 Convention.[248] Article 6 in the Act on Swedish Citizenship[249] addresses the question of children born on Sweden's territory who are at risk of being stateless and one aim of the provision is to prevent the occurrence of statelessness.[250] If the child has a permanent residence permit and habitual residence their parents can through notification register the child for Swedish citizenship before they have turned 18 years old. The prerequisite to have a permanent residence permit does not apply if the child has either had a habitual residence[251] for the past 5 years or for a total of 10 years in Sweden. The child also needs to have been granted a temporary residence permit in accordance with provisions in the 5th or 12th chapter of the Aliens Act[252]. Article 6 of the Act on Swedish Citizenship does not require the child to have lived in Sweden for all their life, but they have to have been born in Sweden and at the time of application for citizenship needs to fulfil the prerequisites prescribed above.[253]

In the case the parents or guardian of the child does not notify for acquisition of Swedish citizenship for their child before they reach the age of 18, the child has the possibility through article 8 of the Act on Swedish Citizenship to apply to become a Swedish national from they are 18 until 21 years old. This provision aims to ensure that those born in Sweden or those who have lived in Sweden for the required time has the possibility of acquiring Swedish nationality.[254]

Article 3 of the Act on Swedish Citizenship brings attention to foundlings and notes that a foundling found in Sweden shall be seen as a Swedish national until the opposite is proven. Worth noting in regard to this provision is that no age limit is mentioned, only the reference to "a child" – meaning a person up until the age of 18.

In a Government Bill[255] and Swedish Government Official Report[256] from 1999 it was noted that the best way of fully living up to the obligations of Sweden's international commitments in regard to eliminating statelessness is to provide children with a Swedish nationality automatically at birth. The

[248] SOU 2021:54, p. 60.
[249] 6 § Lag (2001:82) om svenskt medborgarskap.
[250] SOU 2021:54, p. 60.
[251] In Swedish the term '*hemvist'* is used. This implies a person's habitual residence and an intention to stay in Sweden. See Prop. 1997/98:178 Medborgarskap och identitet, p. 9, MIG 2008:17 and MIG 2013:22.
[252] Utlänningslagen (2005:716).
[253] SOU 2021:54, p. 65.
[254] Ibid, p. 68.
[255] Prop. 1999/2000:147.
[256] SOU 1999:34.

Government however also noted that there can be cases in which the parents of the child do not wish for the child to acquire Swedish nationality and concludes that implementing automatic acquisition of Swedish nationality at birth would be inappropriate – leaving Sweden with legislation that allows for parents or guardians to apply for citizenship for their child.[257]

In 2021 a new Swedish Government Official Report[258] was issued where the question of automatic nationality at birth was brought up for a second time. The report discussed if children born on the territory of Sweden should automatically acquire Swedish nationality at birth if otherwise stateless – in the same way that children born to a Swedish parent automatically becomes a Swedish national. The report lifts the argument that changing the legislation so that stateless children acquire nationality automatically at birth can contribute to the prevention of the emergence of statelessness. It further notes that such legislation would better fulfil the obligations under the CRC, noting every child's right to a nationality. Changing the Swedish legislation would, according to the report, imply that Sweden takes another step forward in implementing the ECN and the 1961 Convention.[259] The report addresses the concerns previously brought up in the Government Official Report from 1999 and notes that although one cannot overlook that some parents might not wish for their child to acquire Swedish nationality, it is clarified that not being a national to a State creates disadvantages for the individual. To reach the overarching goal of ending statelessness – creating legislation that facilitates for people, especially children, to obtain a nationality is a key aspect on the way. The report holds that a parent's eventual wish for their child's non-acquisition of nationality should not have the weight that it hinders a change in the Swedish legislation that would allow for all children born in Sweden who would otherwise be stateless to acquire Swedish nationality.[260] It is further noted that in the case a child acquires dual nationality due to another State's recognition of the child as a national, the parents can through application apply for exemption from the Swedish nationality.[261]

Ultimately however, the Swedish Government Official Report concludes that no changes shall be made to article 6 of the Act on Swedish Citizenship in regard to automatic acquisition of Swedish nationality at birth to otherwise stateless children. The conclusion is based on facts such as high costs and the need to involve both the Tax and Migration agencies – resulting in lengthy processing times which would conclusively not provide the desired result. The report also notes that the need for a change in the legislation is relatively low due to the general decrease of stateless children in Sweden. Between 2016 and 2020 approximately 115 000 children were born in Sweden and

[257] See SOU 1999:34, p. 242 and Prop. 1999/2000:147, p. 36.
[258] SOU 2021:54.
[259] Ibid, p. 83.
[260] Ibid, p. 84.
[261] See SOU 2021:54, p. 85 and Act on Swedish Citizenship article 15.

during these years around 300 to 900 children were registered as stateless per year – a total of 3 024 children. During the same period, approximately 3000 children per year were registered with an unknown nationality – a total of 15 679. At the end of 2020, looking at those born between 2016 to 2020, 1 252 children were still registered as stateless and 7 532 were still registered with an unknown nationality. These numbers show that about 50 per cent of those born stateless or with an unknown nationality had by the end of 2020 acquired a nationality. The Report notes that one reason for this can be that some have migrated or passed away, but with this in mind the Report draws the conclusion that those children who are born in Sweden and registered as stateless or with unknown nationality is decreasing over time.[262] In a written observation from the UNHCR it is stated that the organisation "regrets the conclusion of the Proposal that a system of automatic acquisition should not be introduced in Sweden" and that implementing automatic acquisition would be the best way for Sweden to avoid statelessness among children.[263]

6.2 Compliance with international law

Looking at the Swedish legislation in accordance with the international instruments that the State is a party to one can note that Sweden has chosen the second alternative of granting nationality to children in regard to article 1 of the 1961 Convention. The provision allows for States to decide if they want to grant nationality to children born on their territory who would otherwise be stateless either automatically by birth or upon application to the competent authority. Like the Government Official Report lays out, there are certain benefits with choosing the first option available through article 1 of the 1961 Convention, but like stated in the previous section Sweden has chosen to continue with granting nationality through application.

Sweden is in a large degree upholding its commitments to the 1961 Convention, but as noted by the UNHCR in their report *Mapping Statelessness in Sweden,* Sweden is not fully in compliance with the Convention when it comes to the prerequisite of having a *permanent residence permit* in article 6 and 8 of the Act on Swedish Citizenship. This condition is in contradiction with article 1(2)(b) of the 1961 Convention where the term *habitual residence* is used. The difference here is that Sweden is posing a requirement to be *lawfully* resident in Sweden, whereas the Convention text should be understood as a person having a *factual* residence in the contracting State. This wording has an effect on stateless persons with a temporary residence permit and UNHCR feared that this prerequisite would exclude those children born stateless on Swedish territory from acquiring Swedish nationality either at birth or soon after birth.[264] Requiring for either the child or the parent(s) to be a lawful

[262] SOU 2021:54, p. 97–98.
[263] UNHCR, 'Observations on the "Final report of the inquiry on language and social studies requirements for Swedish citizenship and other citizenship issues"', para. 5.
[264] UNHCR, 'Mapping Statelessness in Sweden', p. 61–62.

residence of the State in order to acquire the State's nationality is prohibited by the 1961 Convention. Not allowing for children to acquire the State's nationality independent of their residence status would be contrary to the best interest of the child and the principle of non-discrimination.[265] In 2013 there were 85 children at the age of 4 or up who were registered as stateless in the Netherlands and who could not acquire Dutch nationality due to their lacking of a residence permit.[266] The Committee on the Rights of the Child has in a concluding observation to the Netherlands noted that they "recommends that the State party ensure that all stateless children born in its territory, *irrespective of residency status*, [emphasis added] have access to citizenship without any conditions."[267]

Even if article 6 of the Act on Swedish Citizenship is lacking in some sense – article 8 of the same Act goes further than what is asked for in the 1961 Convention. Except for allowing for children born in Sweden to apply for citizenship between the age of 18 to 21 – which is an obligation under article 1(2) of the 1961 Convention – the Swedish Citizenship Act provides for stateless persons who have lived in Sweden since at least 15 years of age to apply for citizenship. Like noted in the previous section, foundlings are protected in accordance with article 6 ECN and article 2 of the 1961 Convention.

One positive trend in Sweden is its withdrawal of two reservations to the 1954 Convention[268] and its support to UNHCR's work towards ending statelessness.[269] During the 2019 High-Level Segment on Statelessness and the Global Refugee Forum, Sweden promised to continue its work in addressing statelessness in accordance with the challenges pointed out by UNHCR in its report on mapping statelessness in Sweden.[270]

6.3 Conclusion

When reviewing the Swedish legislation on nationality and the prevention of statelessness one can conclude that, although some improvements can be made in order to fully live up to the obligations under international law, Sweden has implemented the main principles rooted in the ECN and the 1961 Convention. The provisions set out in the Act on Swedish Citizenship aims at preventing statelessness and overall, Swedish law includes acceptable safeguards in the aspect of preventing and reducing statelessness. However, one could wish for Sweden to go even further in its national legislation and implement nationality *ex lege* from birth in order to minimise the risk of any

[265] Van Waas (2015), p. 16.
[266] Van Waas (2013).
[267] UN Committee on the Rights of the Child, CRC/C/NDL/CO/4, para. 33.
[268] One to article 8 and one to article 24(1)(b) – however, none of these relating to child statelessness.
[269] UNHCR, 'Observations on the "Final report of the inquiry on language and social studies requirements for Swedish citizenship and other citizenship issues", para. 5.
[270] UNHCR, 'Results on High-Level Segment on Statelessness'.

child being born into statelessness. Further, Sweden's lack of a statelessness determination procedure affects the State's possibility of fully identifying those stateless on Sweden's territory. Although there are alternative ways in which Sweden can identify statelessness, these procedures are leaving gaps in procedural safeguards and in the protection of stateless people.

7 Granting of nationality – part of customary international law?

7.1 What is customary international law and why is it important to look at?

The focus of the thesis is on Europe and looking at the international treaties discussed above one can note that not all European States have ratified these.[271] In order for *everyone* to have a right to nationality, State practice would have to be uniform and harmonised when it comes to the assessment of who should be granted nationality or not. The question of if there is a harmonisation in State practice and law when it comes to determining the nationals of a State does not hold a simple answer.

According to article 38(1) of the Statue of the International Court of Justice, the three primary sources for international law are international conventions, international custom and general principles of law. Noting that not all European States are parties to the international conventions dealing with statelessness, there is a need to look at statelessness and its possible status as customary international law. Proving something to be customary international law is difficult, it provides that two elements are established. Firstly, there needs to be State practice[272] that is generally consistent and secondly, it needs to be shown that there is *opinio juris*[273].

	Council of Europe Member States, <u>not</u> parties to the convention
1954 Convention Relating to the Status of Stateless Persons	Andorra, Cyprus, Estonia, Poland, Monaco, San Marino.
1961 Convention on the Reduction of Statelessness	Andorra, Cyprus, Estonia, Greece, Malta, Monaco, Poland, San Marino, Switzerland, Slovenia, Türkiye.
1997 European Convention on Nationality	Andorra, Armenia, Azerbaijan, Belgium, Cyprus, Estonia, Georgia, Ireland, Liechtenstein, Lithuania, Monaco, San Marino, Serbia, Slovenia, Spain, Switzerland, Türkiye, United Kingdom.

[271] See table below.
[272] The objective element.
[273] The subjective element. *Opinio juris* can be explained as States' subjective understanding that they are confirming to what amounts to a legal obligation. See International Court of Justice, *North Sea Continental Shelf Cases*, para. 77.

2006 Convention on the Avoidance of Statelessness in Relation to State Succession	Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Monaco, North Macedonia, Poland, Portugal, Romania, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Türkiye, United Kingdom.

7.2 Arguments for customary international law

It has been established by the CoE that the principle of *avoiding statelessness* has crystalized into being a part of customary international law.[274] Some scholars, for instance senior lecturer within international law William Thomas Worster, argue that also granting nationality to children is part of the customary international law – meaning that States owe an obligation to fulfil a child's right to nationality. Pointing to case law, Worster means that some authorities have gone as far as labelling the right to nationality as a non-derogable right.[275] Worster acknowledges that providing a rule, under customary international law, obliging State's to grant nationality to children on their territory who would otherwise be stateless would imply limitations on State's sovereignty as well as a need to cooperate with other States and international organisations. Even with regard to these infringements on States, Worster means that without minimum standards regulating States obligations of granting their nationality, those States that are hosting stateless people must accommodate to other States domestic policies. This ultimately results in some States having to bear the burden of hosting stateless people if other States refuse to grant them their nationality.[276]

Worster means that looking at the strong contributions on the right to nationality in the international treaties, as well as the strong norm to eliminate statelessness, the clarification of identifying which State ultimately owes the obligation of granting their nationality is to be seen as a mere clarification of already existing obligations. Pointing to the #IBelong Campaign and the general discussions on statelessness, Worster holds that both State practice and *opinio juris* supports the norm of a right to nationality. He adds that when, in the rare cases, there is a divergences of State practice it is increasingly being viewed as wrongful. Taking all of this into consideration, Worster reaches the conclusion that it can be considered to be a norm holding States responsible

[274] CoE, 'Explanatory Report to the European Convention on Nationality', para. 33.
[275] Worster (2019), p. 206.
[276] Worster (2022), p. 120.

for granting their nationality to children born on their territory, if they would otherwise be stateless.[277]

Looking at the *opinio juris*, Worster argues that the increased interest in the 1961 Convention, by ratifications and States objections to certain reservations[278], is an indication of States expectations to comply with the obligations set forth in the 1961 Convention – i.e. an emerging *opinio juris*.[279] Worster further argues that there is only one State that can be seen as responsible when a child is born on their territory. He means that seen to the jurisdiction that the State has over the child, due to their effective control over their territory, the birth State should be the one obliged to ensure that the child's right to nationality is protected. This does however not mean that the birth State needs to grant nationality to *all* children born on their territory, but it is their duty to make sure that the child is not left stateless.[280] He further argues that it is not a question of *if* a child should be granted a nationality, but rather *which* State should grant nationality to which child.[281] Looking to case law and reports from the HRC he claims that if no State grants its nationality to a child, this would result in an arbitrary refusal of nationality.[282]

Although the somewhat lacking presence of the statelessness debate within the ECtHR, there are examples when the question of statelessness has come up. In the case of *Ramadan v. Malta*[283] Judge Pinto De Albuquerque argued in his dissenting opinion that the principles set out in article 4[284] of the ECN are to be considered of customary international nature.[285] Pinto De Albuquerque further claims that States do not have the mandate to solely regulate the matter of nationality only within their jurisdiction, even if this was traditionally the case[286]. He means that State's discretion over citizenship and nationality questions now has limits due to international law and that States do not have an absolute right to decide who their citizens are.[287] In his reasoning, Pinto De Albuquerque holds that parities to the ECHR have a positive obligation under the Convention to provide its citizenship to persons born, or

[277] Worster (2022), p. 120.
[278] See ibid, p. 122, footnote 69.
[279] Ibid, p. 123.
[280] Ibid, p. 124–125.
[281] Ibid, p. 124.
[282] Ibid, p. 126. See also *Yean and Bosico v. Dominican Republic* para. 140; HRC, A/HRC/10/34, para. 61; HRC, A/HRC/25/28, para. 28.
[283] Appl. No. 76135/12.
[284] Including everyone's right to a nationality, avoidance of statelessness and the prohibition of arbitrarily depriving someone of their nationality.
[285] *Ramadan v. Malta,* Dissenting Opinion of Judge Pinto De Albuquerque, para. 7.
[286] See The 1930 Hague Convention, article 1 and ECN, article 3. This has earlier been brought up by the Inter-American Court of Human Rights in the case of *Yean and Bosico v. Dominican Republic* where the Court notes that nationality is to be viewed as the competence of the State, but also as a human right. See para. 138.
[287] *Ramadan v. Malta,* Dissenting Opinion of Judge Pinto De Albuquerque, paras. 11 and 24.

found, on their territory.[288] When concluding his dissenting opinion, Pinto De Albuquerque urges the Court to recognize that citizenship is an essential part of someone's identity – a right which is protected under article 8 of the ECHR. The link between the ECHR and the right to a nationality is further mentioned in the CoE's Explanatory Report on the ECN where it states that albeit the right not being explicitly mentioned in the Convention, there are provisions where the question of nationality might fall within the scope.[289]

A foundling's right to acquire the nationality of the State in which they are found has also been argued as being a part of customary international law.[290] Laura van Waas, Co-Director of the Institute on Statelessness and Inclusion, points to the CoE and the ECN and notes that the development in international law has been reflected in article 6(1)(b)[291] and that one could argue for *opinio juris* in the sense that States feel obliged to address foundlings and their vulnerable situation. Waas however states that for the question of foundlings right to nationality to be a matter of international custom, an increased number of parties to the 1961 Convention would further provide support of a customary international law.[292] Acknowledging that this was stated by Waas in 2008, when the 1961 Convention had a notable lesser number of Member States, one could assume that with the increase of ratifications to the Convention this would result in added support to proving a customary international norm in regard to foundlings automatic right to nationality in the State in which they are found. In Dr. Kaneko-Iwase's disputation a reference to the Supreme Court of the Philippines is made, where the Court notes that granting nationality to foundlings "are generally accepted principles of international law" and that these are binding upon the Philippines – regardless of the State not being a party to the 1961 Convention nor the 1930 Convention of which the principles are drawn.[293] The HRC has in an annual report from 2013 addressed the avoidance of statelessness and noted that the action should be recognized as a "fundamental principle of international law"[294] and is repeatedly urging States to implement legislation that aims to avoid statelessness in accordance with this principle.[295] In light of the above, Dr. Kaneko-Iwase argues that granting of nationality to foundlings is a customary international norm.[296]

[288] *Ramadan v. Malta,* Dissenting Opinion of Judge Pinto De Albuquerque, para. 11.
[289] See articles 3, 6, 8, 14 of the ECHR; article 4 of Protocol No. 4; CoE, 'Explanatory Report to the European Convention on Nationality', para. 16.
[290] Van Waas (2008), p. 71.
[291] Stating an obligation on States to automatically provide their nationality to children found on their territory.
[292] Van Waas (2008), p. 71.
[293] Kaneko-Iwase (2021), p. 21.
[294] HRC, A/HRC/25/28, para. 6.
[295] HRC, A/ HRC/RES/20/5, para. 5.
[296] Kaneko-Iwase (2021), p. 28.

7.3 Conclusion

The question of whether granting nationality to children is a part of customary international law is complex and multifaceted. However, noting the uneven ratification of international statelessness treaties, it would be beneficial for the purpose of reducing child statelessness to find coherence in what States are obliged to do in a situation where a stateless child is residing on their territory. Looking at what the scholars in the present chapter has put forward, as well as the case law presented in chapter 5, one could argue that the right to nationality and the avoidance of statelessness are increasingly being viewed as important principles in international law.

The increased interest and ratifications of international treaties dealing with statelessness support the argument that there is an emerging *opinio juris* when it comes to the right to nationality. However, due to the lack of uniformity in State practice and law, and noting that proving customary international law requires both consistent State practice and *opinio juris*, it can be difficult to fully establish if there is a customary norm. What however can be concluded from the chapter above is that a foundling's right to acquire nationality could, with the support of a growing interest and jurisprudence from High Courts, be argued to have claimed customary nature. Further ratifications of the relevant conventions would add more weight to this argument.

8 Conclusions

When concluding the thesis and having analysed the question of if European States have an obligation to grant nationality to stateless children on their territory who would otherwise be stateless, there are multiple aspects to take note of. Avoiding statelessness is a common goal in the international arena, but as seen throughout the thesis there is no common understanding as to which State owes the obligation of reducing and ultimately eliminating statelessness. It has been suggested that one of the most effective ways to avoid statelessness is by ensuring that the effective links between a State and an individual are recognised in a sufficient manner. This recognition should be through links such as place of birth, descent, habitual residence and certain connections to one's family.[297] These ties are recognised in many of the international treaties discussed in chapter four. According to Carol A. Batchelor, elimination of statelessness is not in any way impossible to achieve, seeing that everyone has a bond to a State through one, or all, of the links listed above. Many even have all of the bonds to the same State.[298]

In order to effectively live up to the obligations under international law when it comes to granting nationality to children who would otherwise be stateless, the primary task is to implement a functioning system registering children at birth. As pointed out in section 3.1, this is the fundamental action to be taken in order to effectively implement the child's right to acquire a nationality. The CoE and the HRC has further called on States to ensure comprehensive birth registration of those born on their territory – in particular those born into vulnerable communities.[299] Additionally, the right to nationality implies a positive obligation on State parties, which in other words means that there is a duty to fulfil the realisation of the right. This duty can take the form of actively providing legislation and mechanisms that ensures the full implementation of the right to acquire a nationality. Having a framework that allows for children who would otherwise be stateless to quickly acquire a nationality is essential for the elimination of statelessness and for the full realisation of the standards in international law.

As noted by Jaap E. Doek, when reading article 7 CRC and article 24(3) ICCPR in light of the object and purpose of the conventions, one could make a predominant interpretation that the birth State bears the obligation to grant their nationality to children who cannot, and will not, obtain nationality from any other State. This reasoning leaves us with a default *jus soli* rule that identifies which State has an obligation to effectively guarantee that the right for a child to acquire a nationality is upheld. Without this effect one could argue that the right for a child to acquire a nationality, found in multiple

[297] Batchelor (2000), p. 60.
[298] Ibid, p. 60.
[299] CoE, Resolution 2099 (2016), para. 12.2.4.

international treaties, would be deemed meaningless. In order to provide the safeguard for children to not be stateless, as is an accepted international aim, granting nationality to those who are born on a State's territory seems like an effective and appropriate means.

Taking into consideration the development in the field of nationality and statelessness over the past decades and looking at the way in which these developments have become the reference points for State's national legislation, the author believes that it is fair to say that there is a presumption of everyone having a right to nationality, especially children. The parent(s) to the stateless child lives and/or gives birth to the child in a specific State – a State which could be argued has a legal connection to the child. Even if a State has implemented the possibility of acquiring the nationality through application, like in Sweden, there is a possibility that the parents, or the child, do not understand the full importance of applying for citizenship and therefore remain stateless. The author of this thesis argues that the aim of reducing and ultimately ending statelessness requires States to allow for those born on their territory, who would otherwise be stateless, to automatically at birth acquire the nationality of the State in which they were born. This view is further supported by Nils Muižnieks, CoE Commissioner for Human Rights, who has noted that granting nationality *ex lege* to children at birth who would otherwise be stateless is the best tool to prevent statelessness from passing on from generation to generation.[300] The risk of not granting nationality *ex lege* at birth is that it imposes a responsibility, firstly on the parent(s), and later on the child, to understand the importance of nationality and what consequences and impacts it has on a person who does not belong to a State.

Drawing conclusions from the case law of various governing bodies it is repeatedly noted that the responsibility of granting nationality to a child who would otherwise be stateless falls on the State in which the child was born. It is additionally urged by the authoritative bodies that States should implement a framework, in accordance with international human right standards, that prevent children from ending up stateless. Taking note of the recommendation from the CRC Committee that encourages States to grant their nationality to children in the State of which they are residing, if they are highly unlikely to be granted nationality from another State, further suggests an obligation on States to account for the stateless children on their territory.

Looking at the research question from a proportionality perspective, one can ask the question of if granting nationality to the roughly 200 000 stateless children in Europe would influence State's and their territorial integrity. In the authors opinion, with regard to the global aim of ending statelessness, the disadvantages for stateless children and the overarching discussion in the international arena on States obligations with reference to issues of

[300] Van Waas (2015), p. 10.

statelessness, it can be argued proportional and reasonable to assume that States have an obligation to fully ensure that no child on their territory is left stateless. In the case where a child does not have any other State providing their nationality, the birth State should be obliged to ensure that the child's right to a nationality, stipulated in for instance CRC article 7, is upheld by granting their nationality to the otherwise stateless child. Although most research and case law suggest that the core responsibility falls on the birth State, it is worth taking into consideration those stateless children living in a State that is not the same as their birth State. The obligation for the resident State to reduce statelessness should also be acknowledged. Drawing inspiration from the Swedish legislation, as well as communications from governing bodies where the time of residence in a State is taken into consideration, one could argue that if a child has spent a considerable number of years in a European State – that State becomes responsible for granting the otherwise stateless child their nationality. Even with regard to State sovereignty, the author does not believe that the aim of having full discretion over one's territory should be to the extent that children are left stateless.

In attempting to answer the research question of if European States have an obligation to grant nationality to stateless children on their territory who would otherwise be stateless the author of the thesis would argue that yes, there is an obligation for the birth State to ensure – either by granting their own nationality to the child or making sure that the child is granted the nationality of another State – that no child is left stateless after birth. As Worster argues, acknowledging the effective control a State has over their territory and thereby the jurisdiction of the children on their territory – the State in which a child is residing should bear the obligation to make sure that the child is not left stateless. As proven by extensive case law and legislation, a stateless child born on the territory of a European State has a strong entitlement to the nationality of the birth State, if the child would otherwise be stateless. The author argues that the same goes for stateless children who have been resident in a European States territory for a substantial number of years.

With special regard to the UNHCR's campaign to end statelessness by 2024 it is of great importance that States uphold their commitments under international law when it comes to granting nationality to children. Seeing the engagement that the #IBelong Campaign has gathered – with one effect being the increased number of ratifications to international statelessness conventions – the author believes that there is a general will to end statelessness. The only possible solution to reducing, and ultimately ending, statelessness is to grant nationality to those who need it the most.

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