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The right to nationality for unaccompanied minors and separated children

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*"The pressure to protect the vulnerable child is in ongoing tension with the drive to punish and exclude the young tribal, rural, or ethnic outsider, the threatening juvenile, or the dangerous young terrorist. Rather than seeing them as vulnerable children in need of protection on a continuum with our children, we tend to view them as disruptive juvenile outsiders who are in need of discipline and punishment—
young adults in essence if not in age."*

- J. BHABHA

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1. Background and Introduction

1.1 Introduction

A man illegally crossed the border and entered the United States. He was carrying a false birth certificate and claimed he was a minor. With the use of X-rays, he was proven to be an adult and was detained in a secure adult immigration centre.

How different is this story when telling it from another side: a mentally disabled boy became an orphan due to political violence. Because of this violence, his house was destroyed, and he had to flee his home country, Guinea when he was 13. After three years of travelling, the 16-year-old boy entered the United States. There, the birth certificate he owned was considered false, and after controversial research, he was considered to be an adult. The child was placed in detention; a secure adult immigration centre, where he experienced several types of victimisation. When he was finally released, it was three years later, and the boy had become an adult.

This is the story of Malik Jarno.¹ He was 16 when entering the United States alone; an unaccompanied minor. The story shows the lack of protection and the vulnerability of an unaccompanied minor. Like Malik Jarno, unaccompanied minors are vulnerable to many risks. Unaccompanied minors often do not have support and protection from their parents or community and are at risk of, for example, abuse, sexual assault, neglect, and human trafficking. In migration, unaccompanied minors often miss valid identification documents and can be unable to tell their age.²

Moreover, unaccompanied minors face a substantial risk of human rights violations. One of the human rights of unaccompanied minors that is most often violated is the right to have a name and nationality, as mentioned in the Convention on the Rights of the Child.³ In this thesis, the right to nationality for unaccompanied minors will be elaborated on.

¹ Nafziger 2006, p. 358-361.

² Fazel & Stein 2002, p. 366 – 370.

³ A/HRC/33/53, §56, 16 August 2016.

1.2 Background

1.2.1 Nationality

Nationality is essential for children because of many reasons, among others:⁴

- Individual rights such as legal border crossing and education opportunities.
- Relational benefits such as the right to respect for family and private life.
- A sense of belonging for the child.
- To protect all interests of the child, since the interests of stateless persons are “of subsidiary political concern.”⁵

Nationality does not guarantee proper protection of the human rights of minors, however, not having a nationality increases the risk of human rights violations significantly.⁶ Children can acquire nationality by the *ius soli* doctrine, and by the *ius sanguinis* doctrine. In the *ius soli* doctrine, the child’s nationality is determined to depend on the place of birth. In the *ius sanguinis* doctrine, the child’s nationality is determined at birth, depending on the nationality of his or her parent or parents.⁷ In multiple states, nationality is based on the nationality of only the father.⁸

Whether the child acquires nationality through the *ius soli* doctrine or the *ius sanguinis* doctrine depends on national laws.⁹ Sometimes, states follow only one of the doctrines, *ius soli* or *ius sanguinis* very exclusively, which can create problems.¹⁰ Gaps in this system can leave children stateless.¹¹ Because of problems with using either *ius soli* or *ius sanguinis* very exclusively, many states (that have *ius sanguinis* as their leading doctrine) now have included the possibility to grant access to a nationality by *ius soli* in case a person would otherwise remain stateless in their national legislation.¹² If it is unclear whether a child has a nationality, and the child is

⁴ Institute on Statelessness and Inclusion 2017, p. 112 – 119.

⁵ Institute on Statelessness and Inclusion 2017, p. 117.

⁶ Institute on Statelessness and Inclusion 2017, p. 118.

⁷ Waldrauch 2006, p. 121.

⁸ Weissbrodt & Collins 2006, p. 254.

⁹ Kohn 2009,

<https://www.crin.org/en/library/publications/statelessness-denied-right-have-rights> [accessed 12 January 2018].

¹⁰ UNHCR, *Good Practices Paper - Action 2: Ensuring that no child is born stateless*, 2017, p. 3.

¹¹ Kohn 2009,

<https://www.crin.org/en/library/publications/statelessness-denied-right-have-rights> [accessed 12 January 2018].

¹² United Nations General Assembly 2013, p. 12.

not definitely stateless, states might be unwilling to grant them their nationality under this provision. After all, they might not need it.¹³

However, some states do grant special protection of the right to nationality to certain groups of people, like refugees or unaccompanied minors. These special protection measures can be subject to several conditions, like a certain number of years the child has been a resident in the state before becoming an adult, or that the child needs to have attended school for a certain amount of years.¹⁴

For the protection of the right to nationality, international law and domestic law are closely related. International law can leave states much room for interpretation, giving states the opportunity to set unreasonable conditions and vague clauses, leaving people stateless. The International legal framework, as well as the implementation in national law, will be elaborated on in chapter 4 of this thesis.

1.2.2 Statelessness

There are at least ten million stateless persons around the world.¹⁵ For these stateless persons, their statelessness can have enormous consequences. Stateless persons' rights are often violated; work, education, healthcare and equality before the law are not self-evident because of the high vulnerability of stateless persons.¹⁶ This is also partially due to the fact that they cannot identify themselves using identification documents.

According to article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, a stateless person is “*a person who is not considered as a national by any State under the operation of its law*”. Statelessness adds consequences for the person's ability to exercise human rights and to participate in society.¹⁷ The definition of article 1(1) of the 1954 Convention relating to the Status of Stateless Persons is valid in both a non-migration and a migration context. However, if a stateless person (including children) is also a refugee according to the 1951 Convention Relating to the Status of Refugees, extra protection under this convention might be possible.¹⁸ For stateless persons in a 'normal' migratory context

¹³ Van Waas 2017, p. 347.

¹⁴ Waldrauch 2006, p. 158.

¹⁵ UNHCR 2014, p. 6.

¹⁶ UNHCR 2014-2, p. 1.

¹⁷ UNHCR 2014-2, p. 7.

¹⁸ UNHCR 2014-2, p. 10.

and stateless persons in their “own country”, there are different protection mechanisms.¹⁹

Being stateless can harm peoples’ access to social, economic and cultural rights.²⁰ Additionally, stateless minors are very vulnerable to different forms of victimisation.²¹ Not only stateless persons face difficulties because of their status; states, in which a lot of stateless persons live, can experience a decline or stagger in the economy and social development too.²² Statelessness is a big problem, but because it is difficult to determine which persons are stateless and which persons just do not have identification documents but do have a nationality, there is inadequate documentation about the problem of statelessness. Statelessness often does not become clear until a person tries to obtain identification documents.²³ Undocumented people do not appear in statistics; they are “invisible.”²⁴

There are several causes of statelessness, namely because of a conflict of domestic legislation, state succession,²⁵ arbitrary deprivation of nationality, issues with documentation and stateless parents passing along statelessness to their children.²⁶ In Europe alone, there are approximately 600,000 stateless persons. With one reason of statelessness in Europe being state succession, another main reason of statelessness in Europe is migration. This is not always because nationality is lost during the migration; people who are already stateless can also come to Europe as a migrant, refugee or as a victim of human trafficking.²⁷

1.3 Goal

The goal of this thesis is to assess how and to what extent international norms ensure that unaccompanied minors can enjoy their right to a nationality. In order to determine whether the international norms provide adequate protection to the right to nationality for all unaccompanied minors, first, the different notions of

¹⁹ UNHCR 2014-2, p. 52 – 58.

²⁰ Weissbrodt & Collins 2006, p. 265.

²¹ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 16 November 2017, paragraphs 39 and 40, available at: <http://www.refworld.org/docid/5a12942a2b.html> [accessed 8 January 2018]

²² UNHCR 2014, p. 6.

²³ Institute on Statelessness and Inclusion 2017, p. 21.

²⁴ UNHCR 2014, p. 20.

²⁵ Institute on Statelessness and Inclusion 2016, p. 5.

²⁶ Institute on Statelessness and Inclusion 2016, p. 6

²⁷ Institute on Statelessness and Inclusion 2017, p. 73.

'unaccompanied minor' have to be unpacked. Subsequently, it will be assessed how the international framework addresses the protection of the right to nationality for all unaccompanied minors. Possible gaps in the protection of the right to nationality for unaccompanied minors will be highlighted.

1.4 Main question and sub-questions

The main research question in this thesis is: *to what extent does International Law protect the right to nationality for unaccompanied minors and separated children?*

This question will be answered by the following sub-questions:

1. What does unaccompanied minor mean? What are the different categories of unaccompanied minors? What does separated child mean?
2. Why are (the different categories of) unaccompanied and separated minors at risk of not having a nationality?
3. How does international law protect the right of unaccompanied minors and separated children to a nationality? To what extent do these norms address the situation of all categories of unaccompanied minors?

1.5 Methodology

By combining literature research (from both legal and qualitative literature) with normative legal research, I hope to give a more comprehensive understanding of the term 'unaccompanied minor', and the importance of the protection of the right to nationality for unaccompanied minors, while showing whether or not there are gaps in the current protection mechanisms for the different categories of unaccompanied minors. Because of the availability of literature, many of the examples named in this thesis are about South Africa.

1.6 Outline of the thesis

In order to achieve the goal of this thesis, namely to assess to what extent International Law protects the right to nationality for unaccompanied minors, different categories of unaccompanied minors and separated children will be discussed in chapter 2. Chapter 3 will answer the question: why are unaccompanied minors and separated children at risk of not having a nationality? In this chapter, some of the

risks of not having a nationality and risks of statelessness will be highlighted too. The international norms that address the protection of the right to nationality for unaccompanied minors are discussed in chapter 4. The international legal framework will be explored first in this chapter. This is necessary to be able to research in the following paragraphs, how international norms protect the right to nationality for all unaccompanied minors. International case law will be highlighted too, as well as the implementation of international provisions in domestic laws. The last chapter of this thesis, chapter 5, is the conclusion.

2. Unaccompanied minors

2.1 Unaccompanied minor

Unaccompanied minors are children “*who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.*”²⁸ Although the right to nationality is protected by International Human Rights Law, for example in article 15 of the Universal Declaration of Human Rights, the Convention of the Rights of the Child, the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness, state practices differ.²⁹ States can even use different definitions for the term ‘unaccompanied minor.’³⁰

In South Africa for example, all children at the border control who are under 18 years and travelling alone, are categorised as unaccompanied minors. Consequently, unaccompanied minors who have been staying in the country for a longer time (or who were born to foreign parents in South Africa), and were not categorised as unaccompanied minors at the borders, might not be able to receive the same protection and care as unaccompanied minors who were categorised as such while entering the country.³¹ It is essential to define an unaccompanied minor as such, because of the protection it could be entitled to.³²

Children can become unaccompanied due to different circumstances, including, but not limited to:

- Abandonment: (migrating) parents who leave their child behind;³³ In the South African Children’s Act, an abandoned child is defined as “*a child who has obviously been deserted by the parent, guardian or caregiver, or has for no apparent reason, had no contact with the parent, guardian, or caregiver for a period of at least three months.*”³⁴
- Abandonment of very young children: the child can become a foundling.³⁵
- Being orphaned: children who have lost their parents/caregivers.³⁶

²⁸ Committee on the Rights of the Child, General Comment No. 6, 1 September 2005.

²⁹ A/HRC/33/53, 16 August 2016.

³⁰ <http://www.refugeelaidinformation.org/unaccompanied-separated-children> [accessed 11 January 2018].

³¹ Ackermann 2017, p. 8.

³² Ackermann 2017, p. 8.

³³ Wenke 2015, p. 11.

³⁴ Chapter 1, 1(a)(b) of the South African Children’s Act 38 of 2005.

³⁵ The African Committee of Experts on the Rights and Welfare of the Child 2014, p. 5.

- Being separated: children can become separated from their parents due to natural disasters.³⁷ Another way in which separation from their parents can happen is due to armed conflicts. Armed conflicts are also reasons why children may lose their nationality. This can happen when fleeing from an armed conflict (leaving their birth documentation behind, or losing it, or having it destroyed), but also when the child has ties to states that are in conflict with each other. A child might be able to claim nationality in both states, but because they are in armed conflict with each other, both states might deny the child has a claim to nationality there.³⁸ A migration-context is not necessary; children can also be displaced within their country of habitual residence, and become separated or unaccompanied when they have fled from violence.³⁹
- Migration: children can become separated from their parents or legal caregivers due to different circumstances in a migration-context.⁴⁰ Migration is one factor that can leave children at risk of becoming stateless. However, a migratory context is not necessary; most stateless children have never migrated; they are stateless in their birth country. Being stateless as a child can also be a reason for the child to (be forced to) migrate to another state. This is because of several issues they face within their country of birth, such as discrimination and violation of their human rights. Migration³⁹ is not only a risk factor of statelessness; statelessness can also cause migration.⁴¹ This will be further elaborated on in paragraph 2.6.

For unaccompanied minors there are several safeguards in international law, regional law, and domestic law, protecting their human right to a nationality. To protect the right to a nationality, there are more safeguards in the law for children whose parents are unknown, than for children who are unable to get a nationality because of their parents' nationalities or statelessness. Many unaccompanied minors

³⁶ Kanics 2017, p. 211.

³⁷ The African Committee of Experts on the Rights and Welfare of the Child 2014, p. 42.

³⁸ Kanics 2017, p. 211.

³⁹ Doná & Veale 2011, p. 1274.

⁴⁰ Legal Resources Centre, Asylum Seeker Guide Unaccompanied and Separated Foreign Children, available at: http://www.probono.org.za/Manuals/Refugee-Manual/2015_Asylum_seeker_guide_Unaccompanied_Separated_foreign_children.pdf, accessed at 8 April, 2018, p. 3.

⁴¹ Kanics 2017, p. 210.

can fall in the first group; of children whose parents are unknown. However, older children might be excluded from these safeguards as they are sometimes only established for infants. Also, unaccompanied minors whose parents are known might also be excluded from using those safeguards.⁴² Some states have safeguards for children born in their territory, who are born to stateless parents. Children who are unable to acquire their parent's nationalities, but whose parents are not stateless, are excluded from this safeguard.⁴³

Unaccompanied minors are not only at risk of not having a nationality; they also face several other grave risks. This is mostly because unaccompanied children have no parents, or other caregivers, to protect them like other children are protected. It places them in a very vulnerable situation. Research has shown that unaccompanied minors who are outside their country of habitual residence experience significantly more traumatic events than other refugee minors, who are in the company of their parent(s) or caregiver(s). This is because they lack care and protection by parents or other caregivers.⁴⁴ Unaccompanied children often do not get much chance to be children. They have lost people and stability. They must protect themselves, and sometimes also their younger siblings.⁴⁵ Unaccompanied minors have a high risk of (sexual) exploitation, smuggling, human trafficking,⁴⁶ detention, military recruitment, domestic violence, gender-based violence, and child labour.⁴⁷ However, there are no exact numbers on this since there is a lack of scientific research and literature on this phenomenon.⁴⁸

Because there are different categories of unaccompanied minors, these will be highlighted in the following paragraphs, in order to be able to assess to what extent the protection regarding their right to nationality differs, and to what extent the right to nationality is protected for all categories of unaccompanied minors. The categories do not exclude each other; they might overlap. Additionally, not all children who are orphans or foundlings will fall under the definition of 'unaccompanied minor', but certain children from these categories will.

⁴² UNHCR, *Good Practices Paper - Action 2: Ensuring that no child is born stateless*, 2017, p. 5.

⁴³ African Committee of Experts on the Rights and Welfare of the Child 2014, p. 4.

⁴⁴ Seglem et al., 2011, p. 457.

⁴⁵ International Committee of the Red Cross 2004, p. 2.

⁴⁶ Derluyn & Broekaert 2005, p. 33.

⁴⁷ Committee on the Rights of the Child, General Comment No. 6, 2005, p. 4.

⁴⁸ Derluyn & Broekaert 2005, p. 35.

2.2 Separated minor

Separated children do not fall under the definition of ‘unaccompanied minors’. Separated Children are “*children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.*”⁴⁹ Unlike unaccompanied minors, separated children can be accompanied and being cared for by adult relatives.⁵⁰ Similar to acknowledging their status as an unaccompanied minor, for separated children it is important to be acknowledged as being separated, because of (human rights) protection- and immigration-purposes.⁵¹

That separated children can face similar issues in acquiring a nationality can be illustrated by the case of Anna. Anna was born to Rwandan parents and grew up in Mozambique. However, Anna is unable to prove that she grew up in Mozambique. When she got separated from her parents, her aunt brought Anna to South Africa with her. While Anna’s aunt has an asylum claim, Anna cannot derive this claim from her aunt because “there is not a sufficient link of dependency.” Although Anna is accompanied by her aunt, she is still at risk of statelessness because she has no documentation claiming her nationality and no evident way of acquiring that type of documentation.⁵²

For separated minors too, having their birth registered and acquiring birth documents is very important regarding their right to a nationality. It is complicated to have a child’s birth registered at a later age. Some states do have certain safeguards for late birth registration, like South Africa. As with all of the international laws protecting the right to nationality, states can set certain conditions. In South Africa, one of the conditions for late birth registration is a South African national, who witnessed the birth of the child who was not immediately registered. This was also the case for a 9-year-old South African girl named Daisy. Daisy has no birth certificate. Daisy’s father is not known, and Daisy’s foreign mother has abandoned her, but left her in the care of Daisy’s aunt. Daisy is unable to acquire a birth

⁴⁹ General Comment No. 6, 2005, §8.

⁵⁰ Legal Resources Centre, Asylum Seeker Guide Unaccompanied and Separated Foreign Children, available at: http://www.probono.org.za/Manuals/Refugee-Manual/2015_Asylum_seeker_guide_Unaccompanied_Separated_foreign_children.pdf, accessed at 8 April, 2018, p. 2.

⁵¹ Ackermann 2017, p. 8.

⁵² Ackermann 2017, p. 30.

document; because there was no South African National present at her birth in South Africa, she has no witness to be able to apply for late birth registration. This leaves her at risk of statelessness.⁵³

2.3 Orphans

An orphan is a child who has “no surviving parent caring for him or her.”⁵⁴ For orphans too, there are safeguards in international, regional and national laws. For young, orphaned children, there is often a safeguard securing their right to nationality, even if they would otherwise not have an entitlement to the state’s nationality. If there is no such safeguard, or if the orphaned child is not an infant anymore, they are left at risk of becoming or staying stateless.⁵⁵ This is also because not many orphans own birth certificates.⁵⁶

One example of a national safeguard is “foundling birth registration” of South Africa. This includes orphaned children. Foundling birth registration makes late birth registration possible for orphans. This does not always apply; the foundling birth registration safeguard is said to be applied inconsistently, and it is unclear whether the safeguard also applies to orphans who are not born in South Africa.⁵⁷ For orphans who were born outside of the territory of a state, or to parents who did not possess the nationality of the state the orphan is in, it is often challenging to have their birth registered at a later time.⁵⁸ Especially for unaccompanied children, including orphans, who were not born in the territory of the state, often safeguards only apply to them if they are below twelve months old. The UNHCR however, is of the opinion that these safeguards should at least apply to children who are unable to communicate yet.⁵⁹

⁵³ Ackermann 2017, p. 26.

⁵⁴ Ackermann 2017, p. 25.

⁵⁵ The African Committee of Experts on the Rights and Welfare of the Child 2014, p. 5.

⁵⁶ Ackermann 2017, p. 25.

⁵⁷ Ackermann 2017, p. 25.

⁵⁸ Ackermann 2017, p. 25.

⁵⁹ Kanics 2017, p. 215.

2.4 Foundlings

Foundlings are “abandoned infants or small children.” They are at risk of not having a nationality.⁶⁰ In international law, laws that oblige party states to confer their nationality to foundlings found on their territory who would otherwise be stateless, protect the right to (acquire) nationality for foundlings.⁶¹ Regional laws follow this international provision, but national laws can, again, set conditions in order to apply for this provision.⁶² Some states do not even have national laws that allow foundlings to acquire a nationality.⁶³

In some states, conferring nationality is only possible at birth, on the basis of *ius soli*, *ius sanguinis*, or both. For foundlings, some states make an exception and provide nationality to foundlings found on their territory, despite the possible leading doctrine of *ius sanguinis* and only granting nationality at birth.⁶⁴ Infants are in an advantage in acquiring nationality through this provision. This is similar to the possibility for orphans to acquire a nationality; in general, the infants’ right to (acquire) a nationality is better protected through national laws than older children’s right to (acquire) a nationality. States are however encouraged also to have particular provisions for children older than 12 months, or at least for children who cannot communicate about their descent yet.⁶⁵ These provisions sometimes also apply to foreign foundlings found on the territory of the state. Most often they apply to foreign infants (or children below the age of twelve months), but sometimes they even apply to older foreign unaccompanied minors.⁶⁶

If a foundling was able to acquire a nationality because his or her parents are unknown and because he or she would otherwise be stateless, the foundling could be deprived of his or her nationality when the parents are found later. When these parents do not have a nationality or are unable to transfer it to their child, the child may be left stateless in the end.⁶⁷

In the Good Practices Paper, the UNHCR states that Kenya has made significant improvements regarding the right to nationality for foundlings. The right to

⁶⁰ The African Committee of Experts on the Rights and Welfare of the Child 2014, p. 5.

⁶¹ United Nations General Assembly 2013, p. 13.

⁶² The African Committee of Experts on the Rights and Welfare of the Child 2014, p. 42.

⁶³ The African Committee of Experts on the Rights and Welfare of the Child 2014, p. 5.

⁶⁴ African Committee of Experts on the Rights and Welfare of the Child 2014, p. 4.

⁶⁵ The African Committee of Experts on the Rights and Welfare of the Child 2014, p. 42.

⁶⁶ Kanics 2017, p. 215.

⁶⁷ Van Waas 2017, p. 352.

nationality is protected for all foundlings found on the territory of Kenya, who are or seem under the age of eight years, and whose parentage and nationality are unclear.⁶⁸ South Africa on the contrary, only lets foundlings “whose births have been registered in South Africa” acquire nationality through this provision that protects the right to nationality for children who would otherwise be stateless. This way, the child’s birth has to be registered when they are still infants, by a social worker. Late birth registration is complicated, and as a consequence, foundlings older than twelve months of age found in South Africa, whose births have not been registered, are at high risk of statelessness. Like orphans, South African provisions also exclude foundlings who seem to be foreign.⁶⁹

2.5 Age of unaccompanied minors

For unaccompanied and separated minors, their age plays a significant role in their chances of acquiring nationality. This has been illustrated for orphans and foundlings in the previous two paragraphs. Likewise, age matters for older unaccompanied minors. If the ‘unaccompanied minor’ is not a minor anymore, the legal safeguards made for unaccompanied minors do not apply to them. The Convention on the Rights of the Child for example only applies to children under the age of eighteen years, or younger in case national laws establish that adulthood is reached sooner.⁷⁰ The principle of the best interests of the child, and that children should be treated in a child-appropriate manner, of course, does not apply to adults.⁷¹

Because of a lack of identification documents, the age of unaccompanied minors can be unclear. It is up to the unaccompanied minor to prove that he or she is under the age of eighteen. Especially for unaccompanied minors who look more mature than they actually are, and for unaccompanied minors aged sixteen to eighteen, this can have a lot of negative consequences. In case the age of an unaccompanied minor is unclear, he or she can be placed in special detention centres: this can be either in detention centres for children or in adult prisons.⁷²

⁶⁸ UNHCR, *Good Practices Paper - Action 2: Ensuring that no child is born stateless*, 2017, p. 16.

⁶⁹ Lawyers for Human Rights & Institute on Statelessness and Inclusion 2016, § 30.

⁷⁰ Thevissen et al., 2012, p. 86.

⁷¹ Doná & Veale 2011, p. 1278.

⁷² Doná & Veale 2011, p. 1278.

Age assessments are done to assess the age of an unaccompanied minor, to determine whether they should be treated as children, or as adults.⁷³ According to the UNHCR, states should take multiple things into account during the age assessments. Firstly, states should consider not only the physical maturity of the child but also the psychological maturity. Second, the methods for age assessments need to be safe, and there should be margins of error in determining the age of the unaccompanied minor. If it is unsure whether the unaccompanied minor has reached the age of adulthood yet, he or she should be considered a child.⁷⁴

The UNHCR also states that: “It is not desirable that too many legal advantages and disadvantages are known to flow from the criteria because this may be an incentive for misrepresentation.”⁷⁵ Nevertheless, being considered as an adult or being considered as a child, has tremendous consequences when acquiring a nationality or applying for asylum. In Norway for example, after age assessment, the major part of the unaccompanied minors (namely 80%) was considered to be older than the age of eighteen.⁷⁶ In Belgium too, more than 80% of the children whose ages were assessed, were considered to be older than the age of eighteen.⁷⁷

2.6 Unaccompanied minors and separated children in a migration-context

Unaccompanied minors in a migration-context can be refugee children. Those are the unaccompanied minors with a refugee claim. However, not all unaccompanied minors in a migration-context are refugees.⁷⁸ Unaccompanied minors could be in a foreign country for a number of reasons, including because they get sent to another country to live with family members, or for better social or economic opportunities. They can be abroad and unaccompanied because of human trafficking. Some children migrate with their parents but are abandoned by their parents later. They can be in a foreign country because they are refugees, fleeing from war, or because they are fleeing from natural disasters and other unfortunate circumstances such as

⁷³ Thevissen et al., 2012, p. 100.

⁷⁴ Office of the United Nations High Commissioner for Refugees 1997, p. 8.

⁷⁵ Office of the United Nations High Commissioner for Refugees 1997, p. 8.

⁷⁶ Thevissen et al., 2012, p. 91.

⁷⁷ Thevissen et al., 2012, p. 87.

⁷⁸ Legal Resources Centre, Asylum Seeker Guide Unaccompanied and Separated Foreign Children, available at: http://www.probono.org.za/Manuals/Refugee-Manual/2015_Asylum_seeker_guide_Unaccompanied_Separated_foreign_children.pdf, accessed at 8 April, 2018, p. 2.

poverty and abuse.⁷⁹ For all unaccompanied minors in a migration-context, General Comment No. 6 is made. This comment applies not only to unaccompanied minors but also to separated children outside of their country of nationality or habitual residence.⁸⁰ In General Comment No. 6, principles such as non-discrimination (article 2) and the best interests of the child (article 3) are included. Also, comments are made on the general and specific protection needs of unaccompanied and separated children in a migration-context, as well as their access and rights to asylum and family reunification.

To give an idea of the number of unaccompanied minors and separated children in a migration context: in 2016, 63 300 unaccompanied minors applied for asylum in one of the member states of the European Union alone.⁸¹ Although the number has decreased since 2015,⁸² it is still a drastic increase since 2013. Between 2008 and 2013, the average number of unaccompanied minors (per year) that applied for asylum in one of the member states of the European Union was approximately 12 000.⁸³ In 2014, 14% of all children who applied for asylum in the European Union were unaccompanied.⁸⁴

In a migration-context, there are different types of unaccompanied minors. First, there are forced-migrant children. These children have fled from violence. They can become internally displaced (when they have fled within the country of habitual residence), or they can be refugees or asylum seekers (when they have fled to another state). Returnee children have returned to the state they were born.⁸⁵ Moreover, in a migratory context, there are also legally invisible unaccompanied minors.⁸⁶ They are not only invisible to the authorities, but also to public economic, educational or health services.⁸⁷ Those children often have been trafficked into a state, or they are born to stateless migrants or to rejected asylum-seekers. That is

⁷⁹ Legal Resources Centre, Asylum Seeker Guide Unaccompanied and Separated Foreign Children, available at: http://www.probono.org.za/Manuals/Refugee-Manual/2015_Asylum_seeker_guide_Unaccompanied_Separated_foreign_children.pdf, accessed at 8 April, 2018, p. 3.

⁸⁰ General Comment No. 6, 2005, § 5.

⁸¹ Eurostat, Press release 80/2017.

⁸² Eurostat, Press release 87/2016.

⁸³ Eurostat, Press release 80/2017.

⁸⁴ Wenke 2015, p. 12.

⁸⁵ Doná & Veale 2011, p. 1274.

⁸⁶ Doná & Veale 2011, p. 1281.

⁸⁷ Ferrara 2016, p. 332.

why those children do not have an asylum claim for themselves and do not appear in statistics.⁸⁸

Many unaccompanied and separated children in a migration-context do not possess birth certificates or other identification documents. As explained earlier, this can have disastrous effects when trying to acquire a nationality.⁸⁹ Another problem unaccompanied minors and separated children in a migration-context face because of a lack of documentation is that they do not meet the requirements for family reunification for the simple reason that they are unable to prove who their family is.⁹⁰ Adding to the problems unaccompanied minors and separated children in a migration-context face is that, in case they are stateless, they can be denied the same care that is available for children with the nationality of the state. Sometimes they are denied care as a whole, and in other states, they receive care that is insufficient.⁹¹ Several states also charge much more medical costs for non-nationals.⁹²

In international law, there are safeguards for unaccompanied minors and separated children in a migration-context regarding their right to nationality and other rights and needs. These will be highlighted in the legal framework. As with many other international safeguards to protect unaccompanied minors' right to (acquire) a nationality, states can limit them, or maybe apply them in a broader manner. For refugees, twelve countries from the European Union facilitate the acquisition of nationality by setting lower requirements for the time refugees need to be a resident in the state to acquire a nationality. Other requirements are not often lowered for refugees.

Conversely, Austria set higher requirements for the time refugees need to be a resident in Austria to acquire a nationality. That requirement went from four to six years.⁹³ For the purpose of protecting the right to (acquire) a nationality for non-refugees, safeguards for orphans and foundlings can sometimes be applied to unaccompanied minors and separated children in a migration-context too, if national legislation allows nationality to be transferred to foreign foundlings or orphans.⁹⁴ For

⁸⁸ Doná & Veale 2011, p. 1281.

⁸⁹ Kanics 2017, p. 213.

⁹⁰ Sanchez Bermudez 2017, p. 230.

⁹¹ Sanchez Bermudez 2017, p. 230.

⁹² Kanics 2017, p. 221.

⁹³ Waldrauch 2006, p. 177.

⁹⁴ Kanics 2017, p. 215.

non-refugee minors in a migration-context too, children might have to wait until they reach the age of adulthood to be able to acquire a nationality. This accounts for unaccompanied and separated minors too. Despite all safeguards, research from the United Kingdom shows that unaccompanied and separated minors often find it a lot harder to claim asylum in a country, and to get legal representation, and to have their cases handled in time. Besides this, they have a smaller chance to be officially considered as refugees.⁹⁵

In the United States, for example, this is because they have to meet the same requirements as adults to be considered as a refugee.⁹⁶ Further, there are no other standards for minors than for adults, when they want to claim asylum. This means that unaccompanied and separated children have to go through the same procedures as adults, which they might not be able to understand yet. No legal guardians are appointed and unaccompanied and separated minors themselves must find their way through the complicated legal system.⁹⁷

In a migration-context, unaccompanied minors and separated children face additional risks. There have been many accounts of unaccompanied minors who have disappeared during or after their migration. It is not clear how many unaccompanied minors in a migration-context have disappeared, but according to Terre des Hommes, almost half of the female unaccompanied minors disappear each year.⁹⁸ Furthermore, unaccompanied minors and separated children in a migration context are more at risk of being sexually exploited or forced to work, regardless of whether that work would be illegal, dangerous and/or underpaid. This is because they have to pay off the debts they made in order to travel to another state, or because they have to support their families.⁹⁹ Moreover, stateless female children in a migratory context might be forced to marry adults.¹⁰⁰ For stateless migrant children, freedom of movement is limited, thereby limiting their possibilities to work and go to school in places beyond their travel-limitations.¹⁰¹

These risks actually do not only apply to unaccompanied and separated minors in a migration-context. To take South Africa as an example; unaccompanied

⁹⁵ Doná & Veale 2011, p. 1281.

⁹⁶ Dalrymple 2006, p. 133.

⁹⁷ Dalrymple 2006, p. 131.

⁹⁸ Ferrara 2016, p. 332.

⁹⁹ Ferrara 2016, p. 333.

¹⁰⁰ Kanics 2017, p. 219.

¹⁰¹ Kanics 2017, p. 220.

or separated minors born in South Africa to foreign parents, have to go through the procedures established for migrant children, in order to acquire a nationality. Therefore, unaccompanied and separated minors who are still within their country of habitual residence can face the same difficulties and risks as unaccompanied minors and separated children in a migration context.¹⁰² South Africa does not even have a national provision to facilitate the immigration of foreign migrant unaccompanied minors; the risk of statelessness is high.¹⁰³

Children in a migration-context who are stateless tend to live in poverty and adverse circumstances, unable to adequately access higher education and other opportunities, and unable to exercise cultural rights.¹⁰⁴ This does not only affect their childhood; it also affects their chances for the future. Regarding their mental health, even after they are resettled, all unaccompanied minors (regardless whether they have been in immigration detention) are at risk of experiencing depressive symptoms and developing mental health problems.¹⁰⁵

Another factor possibly damaging the futures and mental health of stateless migrant children is immigration detention. Because migrant children who do not have a nationality cannot be easily sent back to their country of habitual residence (they sometimes are not even able to enter that country¹⁰⁶), these children are at risk being kept in immigration detention for a long time. This is a massive issue because it can “*undermine a child’s psychological and physical well-being and compromise cognitive development,*” according to the UN Special Rapporteur.¹⁰⁷ If a child is not allowed to stay in a state, and cannot be sent back, authorities can either choose to let them stay illegally in the state or put them in immigration detention.¹⁰⁸ This detention can take years when no state is willing to ‘receive’ the stateless child.¹⁰⁹

This was also the case for an orphaned stateless boy, named “C”. He was in detention for almost three years, until he reached the age of adulthood.¹¹⁰ Not only stateless children get detained; in the case *Mubilanzila Mayeka and Kaniki Mitunga*

¹⁰² Ackermann 2017, p. 8.

¹⁰³ Lawyers for Human Rights & Institute on Statelessness and Inclusion 2016, §16.

¹⁰⁴ Kanics 2017, p. 221.

¹⁰⁵ Seglem et al., 2011, p. 461.

¹⁰⁶ Weissbrodt & Collins 2006, p. 267.

¹⁰⁷ Kanics 2017, p. 219.

¹⁰⁸ Weissbrodt & Collins 2006, p. 267.

¹⁰⁹ Weissbrodt & Collins 2006, p. 268.

¹¹⁰ Weissbrodt & Collins 2006, p. 268.

v. Belgium,¹¹¹ a foreign separated child got placed in immigration detention. Despite her age, only five years old, the same conditions applied to her as they did to adults, not taking into account her vulnerable position as a separated child.¹¹² More and more children are placed in asylum detention.¹¹³

¹¹¹ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application no. 13178/03, <<http://www.coe.int>> (accessed July 30, 2018).

¹¹² *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application no. 13178/03, § 103. <<http://www.coe.int>> (accessed July 30, 2018).

¹¹³ Doná & Veale 2011, p. 1278.

3. Unaccompanied and separated minors at risk of not having a nationality

Despite several safeguards in international law, unaccompanied minors are still at risk of becoming stateless. On the basis of the risk factors of statelessness, in this chapter, it will be explained why unaccompanied minors are at risk of not having a nationality.

3.1 Risk factors

Unaccompanied minors have a more significant risk of becoming stateless.¹¹⁴ This can easily be shown through several risk factors of statelessness. A person is more at risk of becoming stateless when one or more of the following circumstances are applicable:¹¹⁵

- He or she is born outside the parents' country of nationality.
- One or both parents have passed away or left.
- The person has migrated illegally across international borders.
- He or she has parents from different nationalities.
- The person has lost medical cards and other similar documents.
- He or she was not born within a registered clinic or hospital.
- The person is "*impacted by laws that do not allow dual nationality and that require adherence to administrative procedures in order to retain nationality when the person reaches the age of majority.*"¹¹⁶

All risk factors can account for many of the unaccompanied and separated minors. For example, for all categories of unaccompanied minors, the risk factor that one or both parents have passed away or left is relevant. In Kenya for example, these children might be unable to prove the nationality of their parents, and subsequently be unable to gain identity documents.¹¹⁷

Since minors can be stateless due to gaps in the system of *ius soli* and *ius sanguinis*, a migration context is not necessary in order to become stateless. It can happen, however, that a child has had a nationality, but has lost it without acquiring a

¹¹⁴ Edwards & Waas 2014, p. 259.

¹¹⁵ George & Elphick 2014, p. 8.

¹¹⁶ George & Elphick 2014, p. 8.

¹¹⁷ UNHCR, *Good Practices Paper - Action 2: Ensuring that no child is born stateless*, 2017, p. 17.

new nationality. This is possible in a migration context.¹¹⁸ In a non-migration context, there can be a conflict in nationality laws in the states the child has ties to, a child can be born to stateless parents, and there are many more options that can leave children stateless without the children migrating.¹¹⁹ Not having a nationality is not a child's fault.¹²⁰

For unaccompanied and separated minors in a migration-context, migrating illegally across borders enhances their risk of statelessness. However, looking at the legal safeguards, migrating in general causes risks of statelessness for unaccompanied and separated minors. In South Africa as an illustration, migrant unaccompanied minors and separated children who are not born in South Africa are unable to gain a legal immigration status.¹²¹ For children whose parents do not have citizenship in South Africa, gaining citizenship is possible if their birth was registered and only once they turn eighteen.¹²²

Even unaccompanied minors and separated children who did own a nationality and subsequently got displaced (either in a non-migration-context or in a migration-context), there is a risk of statelessness because of displacement. The longer the child is displaced without identity documentation, the more significant the risk of statelessness because "it becomes harder to maintain legal links with their country of origin."¹²³

3.2 Birth Registration

Another risk factor for statelessness that emerged in this thesis is having no birth registration and subsequently no identification documents. In consequence, they can be unable to prove who they are, how old they are, who their parents are, and where they are from.¹²⁴

Nationality is closely related to birth registration. However beware, having a child's birth registered does not automatically mean that the child has a nationality. Birth registration is, however, proof of the child's existence and proof of an

¹¹⁸ UNHCR 2014-2, p. 3.

¹¹⁹ Factsheet European Network on Statelessness, p. 2.

¹²⁰ Factsheet European Network on Statelessness, p. 2.

¹²¹ Lawyers for Human Rights & Institute on Statelessness and Inclusion 2016, §16.

¹²² Lawyers for Human Rights & Institute on Statelessness and Inclusion 2016, § 22.

¹²³ Sanchez Bermudez 2017, p. 227.

¹²⁴ Committee on the Rights of the Child, General Comment No. 6, 2005, p. 4.

entitlement to a nationality the child could have acquired by domestic laws of a state; by *ius soli*, *ius sanguinis*, or a combination of both. Birth registration records relevant facts concerning the child's parentage and where a child was born.¹²⁵ In the Convention on the Rights of the Child, it is emphasised that children should be registered immediately after they are born.¹²⁶

Birth registration is a measure preventing statelessness,¹²⁷ but from all children born in the world, one third has no birth registration.¹²⁸ For some persons, registering their child's birth can be very difficult. The states' procedures for birth registration can be complex and have many requirements; requirements, that cannot be fulfilled by several groups of persons (like refugees, or nomadic populations). Because it is challenging to acquire birth documents later in life, this problem cannot easily be rectified.¹²⁹

A birth certificate is no guarantee that a child has a nationality, but if the child does, it can be a proof of nationality until the child can obtain a national ID card. In some countries, these are only issued to adults. Proof of nationality may be necessary for access to healthcare, or school-related happenings such as graduating.¹³⁰ Having a birth certificate proves that a person has certain rights.¹³¹

For abandoned, stateless, and sometimes also for separated children, birth registration makes them somewhat less vulnerable for the risks they face, which were mentioned in paragraph 1.2 of this thesis.¹³² Unfortunately, for many unaccompanied minors, orphans, abandoned, and separated children, having identity documents is not self-evident.¹³³ For unaccompanied minors, it is possible that nobody (no parent or social worker) has registered his or her birth.¹³⁴ In some states, it is normal to register a child at a later age, like when they start school. For children who become unaccompanied, separated, or orphaned before enrolment in school,

¹²⁵ UNHCR, *Good Practices Paper - Action 7: Ensuring birth registration for the prevention of statelessness*, 2017, p. 3.

¹²⁶ International Committee of the Red Cross 2004, p. 27.

¹²⁷ UNHCR, *Good Practices Paper - Action 7: Ensuring birth registration for the prevention of statelessness*, 2017, p. 3.

¹²⁸ International Committee of the Red Cross 2004, p. 27.

¹²⁹ UNHCR 2014, p. 18.

¹³⁰ UNHCR, *Good Practices Paper - Action 7: Ensuring birth registration for the prevention of statelessness*, 2017, p. 3.

¹³¹ Ackermann 2017, p. 24.

¹³² The African Committee of Experts on the Rights and Welfare of the Child 2014, p. 10.

¹³³ UNHCR, *Good Practices Paper - Action 7: Ensuring birth registration for the prevention of statelessness*, 2017, p. 3.

¹³⁴ Nonnenmacher & Cholewinski 2014, p. 259.

however, this means they have no birth registration and are at risk of statelessness.¹³⁵ Alternatively, even if their birth is registered, they could have lost the birth certificate or identity documents. This can happen when leaving in a hurry (refugees), or when the identification documents get destroyed. Identification documents are not always accessible after losing them or having them destroyed.¹³⁶

If in national law of the state the child is in, there is no safeguard for children whose parents are unknown to acquire a nationality; they might be left stateless.¹³⁷ An unaccompanied minor or separated child whose parents are known, but not available, might be even more at risk of not having birth registration because of a lack of legal safeguards to have their birth registered by another person than one of their parents when the parents are alive.¹³⁸ All categories of unaccompanied and separated minors have a high risk of not having birth registration or other identity documents.¹³⁹

Having no birth registration, and as a result, no birth certificate or other identification documents, and thus being legally invisible, stateless children remain unprotected by the state laws, such as labour law. That is why they are at risk of exploitation, human trafficking and abuse. If a human trafficker has trafficked a child who is not visible for the law, he or she cannot even be prosecuted. Furthermore, if a stateless child is the suspect of an offence and is unable to prove his or her age, he or she might be prosecuted as an adult.¹⁴⁰ Not having a birth certificate enhances the risk of poverty, exploitation and abuse.¹⁴¹ Because it is particularly hard to obtain a birth certificate later in life, this contributes to the risk of statelessness.¹⁴²

3.3 Statelessness among children

Children, who do not have a nationality and are not entitled to a nationality of any state, are stateless. Legally, these children are invisible; they do not exist.¹⁴³ As established in the previous paragraphs, children can be at risk of statelessness, or be

¹³⁵ International Committee of the Red Cross 2004, p. 27.

¹³⁶ The African Committee of Experts on the Rights and Welfare of the Child 2014, p. 26.

¹³⁷ Nonnenmacher & Cholewinski 2014, p. 259.

¹³⁸ Lawyers for Human Rights & Institute on Statelessness and Inclusion 2016, § 25.

¹³⁹ UNHCR, *Good Practices Paper - Action 7: Ensuring birth registration for the prevention of statelessness*, 2017, p. 3.

¹⁴⁰ Lynch & Teff 2009, p. 32.

¹⁴¹ Ackermann 2017, p. 24.

¹⁴² Ackermann 2017, p. 30.

¹⁴³ Doná & Veale 2011, p. 1280.

stateless, because of gaps in international, regional and national laws. This can be illustrated with examples, like the example of Caleb. When he was very young, he fled with his father to another state, where his father filed for asylum. Because his father passed away, Caleb became unaccompanied, and because Caleb was so young when fleeing, he has no individual refugee claim and he cannot be recognised as a refugee under the 1951 Convention relating to the Status of Refugees.¹⁴⁴

Protection mechanisms against statelessness, like procedures through which people can seek recognition of a nationality, might not benefit unaccompanied minors as much as they benefit other groups. This has a lot to do with starting the procedure. Do the unaccompanied minors know they might be stateless? Do they even know statelessness exists and what it means? So if they do not, why and how would they search for recognition of a nationality?¹⁴⁵

3.4 Global Action Plan to End Statelessness

According to the UNHCR Global Action Plan to End Statelessness, yearly about 70,000 children are unable to acquire a nationality. Many states (in 2014, this was 29%) do not have adequate provisions regarding the right to nationality for stateless children born in their territory, and for foundlings found on their territory. Actually, they have no national provision at all. Other states (28% in 2014) have inadequate provisions in their national laws regarding stateless children born in their territory. For foundlings, 37% of states have inadequate national legal provisions. According to the global action plan, these percentages should completely disappear by 2024.¹⁴⁶

In the Global Action Plan to End Statelessness, the UNHCR established a framework to end statelessness within ten years, starting from 2014.¹⁴⁷ This should be done by fixing existing problems with statelessness, preventing new problems, and protect stateless persons.¹⁴⁸ The success of this framework, however, depends on cooperation and political will of many actors, such as states, the United Nations, and international and regional organisations. The following actions are distinguished in the framework:

1. “Revolve existing major situations of statelessness.”

¹⁴⁴ Lawyers for Human Rights & Institute on Statelessness and Inclusion 2016, § 31.

¹⁴⁵ Gyulai 2014, p. 128.

¹⁴⁶ UNHRC 2014, p. 9.

¹⁴⁷ UNHCR 2014, p. 2.

¹⁴⁸ UNHCR 2014, p. 4.

2. "Ensure that no child is born stateless."
3. "Remove gender discrimination from nationality laws."¹⁴⁹
4. "Prevent denial, loss, or deprivation of nationality on discriminatory grounds."
5. "Prevent statelessness in cases of state succession."
6. "Grant protection status to stateless migrants and facilitate their naturalization."
7. "Ensure birth registration for the prevention of statelessness."
8. " Issue nationality documentation to those with entitlement to it."
9. "Accede to the UN Statelessness Conventions."
10. "Improve quantitative and qualitative data on stateless populations."¹⁵⁰

For the purpose of this thesis, especially action two (ensure that no child is born stateless), and action 7 (ensure birth registration for the prevention of statelessness) are particularly important. According to the UNHCR, to ensure that no child is born stateless, it is necessary that all states have domestic legislation that provides a nationality to stateless children born in the territory of the state, to foundlings found in the territory of the state, and for stateless children born abroad to parents with the nationality of said state. The ultimate goal would be that no more reports of statelessness among children are made.¹⁵¹

Most stateless persons did not lose their nationality, no, they never had one. This can be caused in several ways, but one of them is when they are "*abandoned and separated from their family and their nationality cannot be ascertained.*"¹⁵² Some, but not all of these children are refugees. It would be in the best interests of the child that states grant them their nationality if children are born in the territory of the state and did not acquire nationality from any other state. That is why, to ensure the implementation of action 2, action 7, which entails improving birth registration, is very important too.¹⁵³ As we have established, if a person does not have their birth registered, this does not automatically mean the person is stateless.¹⁵⁴ However, a

¹⁴⁹ UNHCR 2014, p. 2.

¹⁵⁰ UNHCR 2014, p. 3.

¹⁵¹ UNHCR 2014, p. 2.

¹⁵² UNHCR 2014, p. 10.

¹⁵³ UNHCR 2014, p. 10.

¹⁵⁴ UNHCR 2014, p. 19.

person can become stateless because he or she is unable to get any documents that prove his or her nationality.¹⁵⁵

¹⁵⁵ UNHCR 2014, p. 21.

4. The nationality of unaccompanied minors protected in international law

4.1 The right to nationality in international law; legal framework

In the 20th century, the right to a nationality emerged as a human right. While it was first mentioned in a regional document, which was non-binding, the first international document in which the right was established was the Universal Declaration of Human Rights.¹⁵⁶ Article 15 of the Universal Declaration of Human Right establishes the human right to a nationality. It states that “everyone has the right to a nationality”. In article 2, the Universal Declaration of Human Rights states: “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind (...).” This includes the right to nationality, from article 15 of the Universal Declaration of Human Rights. Nationality entails ‘the essential condition for securing to the individual the protection of his rights’, according to Oppenheim (1955).¹⁵⁷ Having a nationality is important for all people. In most states, we need it to exercise political, economic and social rights, and to receive the state’s protection we are entitled to.¹⁵⁸

In order to protect the right to a nationality, as stated in article 15 of the Universal Declaration of Human Rights, this human right is mentioned in many other international covenants and conventions:

- Articles 7 and 8 of the 1989 Convention on the Rights of the Child. While the right to nationality is incorporated in international law documents established for adults in particular, having a nationality is just as crucial for a child as it is for adults.¹⁵⁹ Having a nationality is very important for children to, for example, be able to attend school. While primary education is supposed to be available and free for all children regardless of their nationality, this does not always account for other forms of education (think of education before and after primary school). Children also need a nationality to legally cross borders, to have access to health care, and social and economical facilities.¹⁶⁰ For children, the right to nationality is established in the Convention on the Rights

¹⁵⁶ Ganczer 2014, p. 16.

¹⁵⁷ Hodgson 1993, p. 257 – 258.

¹⁵⁸ Weissbrodt & Collins 2006, p. 248.

¹⁵⁹ Bhabha 2017, p. 112.

¹⁶⁰ Bhabha 2017, p. 113.

of the Child. In several international law documents, the human right is not ‘a nationality’, but it is the right to *acquire* a nationality.¹⁶¹ That is also the case in article 7 of the Convention on the Rights of the Child (CRC). Because of the importance of the Convention on the Rights of the Child in protecting the right to a nationality for unaccompanied minors and separated children, the convention will be even more elaborated on in paragraph 4.2.

- The 1961 Convention on the Reduction of Statelessness complements the 1954 Convention relating to the Status of Stateless Persons and gives, according to the preamble of the 1961 Convention, effect to article 15 of the Universal Declaration of Human Rights. The 1954 and the 1961 conventions will be elaborated on in paragraph 4.3.
- Like in the Convention on the Rights of the Child, under article 24(3) of the International Covenant on Civil and Political Rights (1966), a child has the right to acquire a nationality. Article 24(2) mentions birth registration, and that “every child shall be registered immediately after birth (...).”
- Article 5(d)(iii) of the 1965 Convention on the Elimination of All Forms of Racial Discrimination guarantees the right to nationality, “without distinction as to race, colour, or national or ethnic origin, to equality before the law.” Article 9(1) of the Convention on the Elimination of All Forms of Discrimination against Women (1979) ensures that this right to nationality is not only for men, but women too have the right to “acquire, change or retain their nationality.”
- In the 2006 Convention on the Rights of Persons with Disabilities, in article 18(1)(a), the right to acquire and change a nationality (and “the right not to be deprived of their nationality arbitrarily”) is secured for persons with disabilities.
- For children of migrant workers, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families protects the rights to nationality and to have their birth registered in article 29.
- For refugees, which includes unaccompanied or separated refugee minors, the 1951 Convention relating to the Status of Refugees is a significant international source of protection. Because the Convention Relating to the Status of Refugees was originally designed for refugees within Europe, fleeing from events before 1 January 1951, this Convention was later supplemented

¹⁶¹ Hodgson 1993, p. 258.

by the Protocol Relating to the Status of Refugees (1967). The protocol turned the limited scope of the Convention Relating to the Status of Refugees into a universal scope, which made the Convention applicable for all persons with refugee status.¹⁶² For unaccompanied or separated minors, to fall within the scope of the Convention Relating to the Status of Refugees, they need to have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”, be outside his or her country of nationality or habitual residence, and be unable or unwilling to return to that country because of said well-founded fear.¹⁶³ As well as in the Convention on the Rights of the Child, one of the fundamental principles in the Convention Relating to the Status of Refugees is the principle of non-discrimination, mentioned in article 3.

While the right to (acquire) a nationality is evident in international law, few provisions state which nationality, of which state, a person has a right to. A person could have a right to the nationality of the state he or she was born, the country he or she is currently in, or other states he or she has ties with, but it is not clear which nationality he or she is entitled to.¹⁶⁴ This is the case in among others, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child.¹⁶⁵ These only mention the right to (acquire) a nationality but do not specify which nationality this has to be.

In this aspect, the American Convention on Human Rights has an interesting article, which seems to partially solve this problem. The American Convention on Human Rights entails the right to nationality for all persons, in article 20(1). However, article 20(2) makes a more evident statement on which nationality a person should be entitled to. In the article, you can read: “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.” The state in which a person is born is thus very important in order to determine which nationality this person is entitled to. Unfortunately, this is not foolproof. The first problem with this article is that it might be hard to prove that there are really no other nationalities a person could have a right to. For

¹⁶² Introductory Note by the UNHCR in the 1951 Convention Relating to the Status of Refugees.

¹⁶³ Article 1(A)(2) of the 1951 Convention Relating to the Status of Refugees, and article 1(2) and 1(3) of the 1967 Protocol Relating to the Status of Refugees.

¹⁶⁴ De Groot 2014, p. 146.

¹⁶⁵ De Groot 2014, p. 145.

unaccompanied and separated minors, it might pose another problem: do they even know (and maybe even more importantly: can they prove) in the territory of which state they are born?

The American Convention on Human Rights is not the only regional legislation on the right to nationality. The right to nationality is protected by regional legislation in Africa and Europe too for example. While the African Charter on Human and Peoples' Rights does not include the right to a nationality, this right is included in the African Charter on the rights and welfare of the child. Article 6 of this charter entails the children's right to acquire a nationality, and states that each child "shall be registered immediately after birth." The 1997 European Convention of Nationality mentions several principles state parties need to base their rules of nationality on. One of those principles is the general right to a nationality in article 4(a), another one being that "statelessness shall be avoided (4(b))." For the right to acquire a nationality for foundlings and children who would otherwise be stateless, the European Convention of Nationality mentions in articles 6(1)(b) and 6(2), that all State Party's have to "provide in its internal law" for this purpose. In 2009, the Committee of Ministers of the Council of Europe also established several principles to reduce statelessness among children in a recommendation to member states. State Parties should, among others, provide for the acquisition of nationality without restrictions that could cause statelessness, and assist children on their territory who have a right to nationality of another state.¹⁶⁶

Contrary to other human rights issues, nationality is a domestic matter. Although nationality is a human right, established in international law, states have jurisdiction over this right. States have a large margin of appreciation when incorporating the international human right to nationality in their domestic legislation. As a result, states practices differ and depend on the interests of the states.¹⁶⁷ This will be elaborated on in paragraph 4.5

¹⁶⁶ Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2009)13 and explanatory memorandum of the Committee of Ministers to member states on the nationality of children*, 9 May 2009, principles 1 – 10.

¹⁶⁷ Ganczer 2014, p. 15.

4.2 The Convention on the Rights of the Child

Before the Convention on the Rights of the Child was created in 1989, the right to nationality for children in particular, was included in other children's rights documents, such as the non-binding Declaration on the Rights of the Child (1959). Principle 3 entitles a child from birth to a name and a nationality.¹⁶⁸ A 1986 recommendation, the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, states in article 8 that children should have a nationality, and have the right to acquire a nationality.¹⁶⁹ On 2 September 1990, the Convention on the Right of the Child was put into force, containing the right to acquire a nationality. The provisions in the United Nations Convention on the Rights of the Child are available for all children, including (possibly stateless) unaccompanied minors, and the Convention on the Rights of the child is the most ratified convention in the world: only Somalia and the United States are not parties of this convention. Although the Convention on the Rights of the Child seems to be effective, the magnitude of its effect seems to differ in various states.¹⁷⁰

The Convention on the Rights of the Child recognises the right to a nationality in articles 7 and 8. Article 7(1) entails, among others, that a child has a right to a nationality, and shall be registered immediately after birth. Article 7(2) adds that state parties have to implement the rights mentioned in article 7(1) "*in accordance with their national law and their obligations under the relevant international instruments in this field.*" Situations in which children would otherwise be left stateless are emphasised in this article. Like many other international laws, article 7 does not specify which nationality a child has a right to. In its reports, the Committee on the Rights of the Child has made recommendations to several countries about this: in case a child would otherwise be left stateless, the child should acquire the nationality of the state in which territory the child was born.¹⁷¹

For children, the right to (acquire) a nationality is not self-contained, but it is connected with the right to a legal identity, the right to a name and the right for a child to have its birth registered. This is mentioned in articles 7 and 8 of the

¹⁶⁸ Ganczer 2014, p. 18.

¹⁶⁹ Ganczer 2014, p. 20.

¹⁷⁰ Simmons 2009, p. 202.

¹⁷¹ For example § 31 of the Concluding Observations to Switzerland in Committee on the Rights of the Child, CRC/C/CHE/CO/2-4, 26 February 2015.

Convention on the Rights of the Child (CRC).¹⁷² According to article 8, a child's legal identity includes not only the personality of a child, but also his or her name, family, and nationality. Thus, nationality is a part of the legal identity of a child.¹⁷³ Not having a nationality, even if a child obtains one when he or she becomes an adult, can have lifelong consequences.¹⁷⁴ According to article 8(2), if a child is "illegally deprived of some or all of the elements of his or her identity", state parties have to provide "assistance and protection" to mend the child's identity.

The right to acquire a nationality, as mentioned in the CRC, is informed by several principles mentioned in the CRC. Article 2 of the CRC entails the principle of Non-discrimination. This means that the right to acquire a nationality should be respected and ensured for all children within jurisdiction of the member states, regardless of the child's "parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." For states, the principle of non-discrimination is both positive and negative. States should not prevent children from acquiring a nationality, and states should make it possible for children to acquire a nationality. The principle of non-discrimination is fundamental in preventing childhood statelessness.¹⁷⁵

If this vital principle would be fully incorporated, not having a nationality would have fewer consequences. If the principle of non-discrimination would be fully incorporated in international law, regional legislation and domestic law, each person, regardless of its nationality, would have access to basic needs.¹⁷⁶ Second, the best interests of the child, mentioned in article 3 CRC, need to be a primary consideration in all decisions concerning children. In Paragraph 4.2.1, the best interests of the child will be further elaborated on. The third principle that informs the right to acquire a nationality is mentioned in article 6 of the CRC; the right to life, survival and development. The fourth and last principle is that views of the child, depending on its age and maturity, need to be incorporated in decisions concerning the child.¹⁷⁷

The Committee on the Rights of the Child has made several recommendations to states on how the right to acquire a nationality, from article 7 CRC, should be interpreted, and while the Convention on the Rights of the Child itself does not

¹⁷² Articles 7 and 8 CRC, see further: Hodgson 1993, p. 255.

¹⁷³ Article 8 CRC, see further: Institute on Statelessness and Inclusion 2018, p. 15.

¹⁷⁴ Bhabha 2017, p. 114.

¹⁷⁵ Institute on Statelessness and Inclusion 2016, p. 8.

¹⁷⁶ Bhabha 2017, p. 112.

¹⁷⁷ Institute on Statelessness and Inclusion 2016, p. 8.

mention unaccompanied minors or separated children, the Committee on the Rights of the Child has defined unaccompanied minors and separated children in General Comment No. 6. Unaccompanied minors are, according to the Committee on the Rights of the Child, “*children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.*”¹⁷⁸ This accounts for all children under eighteen years, according to article 1 of the CRC. However, this can be different under domestic law, when this states adulthood is reached at an earlier age than eighteen.¹⁷⁹

Separated Children are “*children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.*”¹⁸⁰ Unaccompanied minors and separated children often face similar issues in securing their right to a nationality.¹⁸¹

In general, data on unaccompanied minors and separated children is scarce and insufficient for “a detailed analysis of the implementation of the rights” of unaccompanied minors and separated children, according to the Committee on the Rights of the Child.¹⁸²

While General Comment No. 6 of the Committee on the Rights of the Child only applies to unaccompanied minors and separated children “outside of their country of nationality” or habitual residence, the guidelines can also be constructive in protecting unaccompanied minors and separated children who are “displaced within their own country.” That is why the Committee on the Rights of the child also urges states to take these guidelines into account when providing (legislation or guidelines on the) protection of unaccompanied and separated minors within their own country.¹⁸³

In General Comment No. 6, the Committee on the Rights of the Child provides guidelines on protecting several children’s rights, as mentioned in the Convention on the Rights of the Child. These rights and principles include, but are not limited to:

¹⁷⁸ Committee on the Rights of the Child, General Comment No. 6, 2005, §7.

¹⁷⁹ Committee on the Rights of the Child, General Comment No. 6, 2005, p. 5.

¹⁸⁰ Committee on the Rights of the Child, General Comment No. 6, 2005, §8.

¹⁸¹ Ackermann 2017, p. 30.

¹⁸² Committee on the Rights of the Child, General Comment No. 6, 2005, p. 25.

¹⁸³ Committee on the Rights of the Child, General Comment No. 6, 2005, p. 5.

non-discrimination (§ 18), the best interests of the child (§ 19), and the right to life, survival and development (§ 23). In § 31, the Committee on the Rights of the Child emphasises the importance of identifying an unaccompanied minor or separated child as such, and that identification measures, such as age assessments shall be done in an appropriate and safe manner. On several occasions, the Committee on the Rights of the Child also recognises the vulnerability of unaccompanied minors and separated children, such as their vulnerability to exploitation and abuse, in § 50. § 16 also recognises the vulnerability of unaccompanied minors and separated children, and it is stated in § 17 that their rights shall not be limited because of “reservations made by state parties.” However, the risk of not having a nationality is not mentioned in this general comment, whereas at particular risk of not having a nationality, are unaccompanied minors.¹⁸⁴

4.2.1 The best interests of the child

In the Convention on the Rights of the Child, the best interests of the child play a crucial role. The best interests of a child should prevail above other interests in the case. This means that in all decisions concerning a child, the best interests of the child should be a primary consideration.¹⁸⁵ This thus includes decisions concerning the right to nationality of unaccompanied minors. When looking at the best interests of displaced children, for example, the best interests of the child need to be a primary consideration during all stages of the displacement that may impact the life of the unaccompanied or separated child significantly, and these best interests need to be documented.¹⁸⁶

According to the Committee on the Rights of the Child, the elements that can be important to assess the best interests of the child are:¹⁸⁷

- The child’s views and identity.
- Preservation of the family environment and maintaining relations.
- Care, protection and safety of the child.
- Situation of vulnerability.
- The child’s right to health.

¹⁸⁴ Nonnenmacher & Cholewinski 2014, p. 259.

¹⁸⁵ Abramson 2003, p. 10.

¹⁸⁶ Committee on the Rights of the Child, General Comment No. 6, 2005, p. 8.

¹⁸⁷ General Comment Committee on the Rights of the Child 2013, paragraph 52-79.

- The child's right to education.

These factors should be considered on a case-by-case basis. To determine the child's best interests, professionals should carefully assess the child's identity (which includes personality and nationality, but also their needs of protection), as described in the legal framework of this thesis. This assessment should be done in a safe and "friendly" environment, with the environment and interview (and thus the professionals) being suited for the age and gender of the child.¹⁸⁸ Considering the best interests of the child in the context of the right to nationality, it is of course never in the best interests of the child not to have a nationality. For a child, being stateless is contrary to the best interests of the child.¹⁸⁹ According to the best interests of the child-principle, children should acquire a nationality immediately after birth.¹⁹⁰

However, despite the importance of the best interests of the child, and a framework on how to assess those interests, unaccompanied minors still face the risk of becoming stateless.¹⁹¹ In § 42 of joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, it is stated that special attention needs to be paid to "the protection of undocumented children, whether unaccompanied and separated or with families."¹⁹² Despite several comments on the right to liberty and due process guarantees and access to justice, and general remarks on the right to a name, identity, and a nationality of children, no remarks are made on the right to nationality for unaccompanied minors in particular in joint general comments No. 4 and No. 24.¹⁹³ In Paragraphs 39 and 40 however, the risks

¹⁸⁸ Committee on the Rights of the Child, General Comment No. 6, 2005, p. 8.

¹⁸⁹ Institute on Statelessness and Inclusion 2017, p. 110.

¹⁹⁰ UNHCR, *Good Practices Paper - Action 2: Ensuring that no child is born stateless*, 2017, p. 2.

¹⁹¹ Edwards & Waas 2014, p. 259.

¹⁹² UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, available at: <http://www.refworld.org/docid/5a1293a24.html> [accessed 3 January 2018]

¹⁹³ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4

unaccompanied (and maybe stateless) minors are particularly vulnerable to, are recognised. Naturally, these risks are not in the best interests of the child.

4.3 The 1961 Convention on the Reduction of Statelessness

In the 1954 Convention Relating to the Status of Stateless Persons, not only the definition of statelessness is given, but also the ‘minimum standards of treatment’, as described in the introductory note by the Office of the United Nations High Commissioner for Refugees. These include the right to housing, mentioned in article 21, freedom of religion in article 4, access to courts in all state parties of the Convention, and article 24 of the Convention mentions the right to labour legislation and social security.¹⁹⁴ In the Introductory note of the Convention Relating to the Status of Stateless Persons, the Office of the United Nations High Commissioner for Refugees states that the Convention requires “that stateless persons have the same rights as citizens with respect to freedom of religion and education of their children.” However, as the introductory note of the 1954 Convention Relating to the Status of Stateless Persons also reads, “protection as a stateless person is not a substitute for possession of a nationality.”

In 1961, this Convention was complemented by the Convention on the Reduction of Statelessness. While the convention does not elaborate on the human right to (acquire) a nationality, the convention gives several clear safeguards to diminish statelessness (with “rules on acquisition, renunciation, loss and deprivation of nationality”¹⁹⁵).

The 1961 Convention on the Reduction of Statelessness does not impose on states to choose either *ius soli* or *ius sanguinis* but uses a combination of these principles to solve gaps in nationality law.¹⁹⁶ For example, state parties shall grant their nationality to people born in the state, if they would otherwise remain stateless, according to article 1. Article 2 too, can be very important for unaccompanied minors

CRC/C/GC/23, available at: <http://www.refworld.org/docid/5a12942a2b.html> [accessed 8 January 2018].

¹⁹⁴ UNHCR 2014, p. 23.

¹⁹⁵ UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, §1, available at: <https://www.refworld.org/docid/50d460c72.html> [accessed 4 November 2018].

¹⁹⁶ UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, §30, available at: <https://www.refworld.org/docid/50d460c72.html> [accessed 4 November 2018].

and separated children: “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 way, the risk of statelessness is minimised for foundlings.

In the Guidelines on Statelessness No.4, the UN Refugee Agency has set out guidelines concerning the 1961 Convention and uses articles 1 to 4 of this convention to ensure “every child’s right to acquire a nationality.” Even children, who did not have their birth registered, can apply to the safeguards of the 1961 Convention.¹⁹⁷ Article 2, with its provision for foundlings, is elaborated on by the UN Refugee Agency too. Because the term foundling in the 1961 Convention is not limited to children of a certain age; while the minimum of this provision is that it applies to all children who are unable to communicate yet, state practice shows that this article is applied in a much broader way, for children of different ages.¹⁹⁸ Besides this, children who might not fall within the scope of the definition of ‘foundling’ can be recognised as such in certain occasions.¹⁹⁹

In paragraph 2.4 of this thesis, one of the gaps in international law for foundlings was mentioned, namely that foundlings who have acquired a nationality, may lose this nationality when their parents are found and cannot transfer their nationality to the child. The UN Refugee Agency also included a guideline to solve this gap, namely that “*Nationality acquired by foundlings pursuant to Article 2 of the 1961 Convention may only be lost if it is proven that the child concerned possesses another State’s nationality.*”²⁰⁰

Contrary to the vague laws in other international declarations and conventions, the 1961 Convention on the Reduction of Statelessness succeeds in providing clear descriptions of how statelessness shall be avoided in member states. Although this convention would solve many of the ambiguities caused by the gaps in international

¹⁹⁷ UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, §55, available at: <https://www.refworld.org/docid/50d460c72.html> [accessed 4 November 2018].

¹⁹⁸ UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, §57 - §58, available at: <https://www.refworld.org/docid/50d460c72.html> [accessed 4 November 2018].

¹⁹⁹ UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, §61, available at: <https://www.refworld.org/docid/50d460c72.html> [accessed 4 November 2018].

²⁰⁰ UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, §60, available at: <https://www.refworld.org/docid/50d460c72.html> [accessed 4 November 2018].

law, only 73 states have ratified the 1961 convention.²⁰¹ Compared to the 140 signatories and 196 state parties of the Convention on the Rights of the Child, this is a big contrast.²⁰²

4.4 International Case Law

In previous chapters and paragraphs, both the right to (acquire) a nationality and the different categories of unaccompanied minors and their risks of not having a nationality are explained. Although international law has a number of provisions and principles protecting a child's right to a nationality, this does not always shine through in national legislation.²⁰³ International law on the right to (acquire) a nationality for children leaves a big margin of appreciation for states, which can create gaps in the protection of this human right; some circumstances and restrictions exclude children from acquiring a nationality.²⁰⁴ Age of the unaccompanied minor or separated child is a crucial factor in whether they will be able or unable to acquire a nationality. Furthermore, the information a child is able to give (and prove!) is vital regarding their ability to acquire a nationality.²⁰⁵

Because no exact data of unaccompanied minors and their risk of statelessness could be found, and because no case law on unaccompanied minors and their right to (acquire) a nationality could be found either, in this chapter case law on children's right to nationality will be highlighted. Afterwards, it can be assessed whether the principles arising from this case law would solve the gaps in international, regional and national law, which can leave unaccompanied minors and separated children at risk of statelessness.

4.4.1 *Genovese v. Malta*

In the case *Genovese v. Malta*, it became clear that although the right to (acquire) a nationality is not in the European Convention on Human Rights as such, denial of

²⁰¹ Status of the Convention on the Reduction of Statelessness, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&clang=_en, accessed 11 October 2018).

²⁰² Status of the Convention on the Rights of the Child, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en, accessed 11 October 2018.

²⁰³ Van Waas 2017, p. 344.

²⁰⁴ Van Waas 2017, p. 347.

²⁰⁵ Van Waas 2017, p. 353.

nationality can lead to a violation of article 8 ECHR (in this case in combination with the non-discrimination principle from article 14), because nationality is part of one's legal identity.²⁰⁶ *Genovese v. Malta* is about a boy, who was born in Scotland out of wedlock. His mother is British and his father Maltese, but the father did not recognise his son. Subsequently, Maltese citizenship could not be recognised for the boy. Even when the father recognised the boy as his son, he was still excluded from Maltese citizenship because the Maltese Citizenship Act excludes children born out of wedlock to a non-Maltese mother and a Maltese father.²⁰⁷ This domestic law was discriminatory, and there was thus ruled that there was a violation of articles 8 and 14 ECHR.²⁰⁸ In the Dissenting opinion of Judge Valenzia, the issue is raised that the Court did not elaborate on what one's identity entails and why nationality is related to this. This would be elaborated on three years later, in the case *Mennesson v. France*.

4.4.2 *Mennesson v. France*

In *Mennesson v. France*, a couple with French nationality was unable to have children and went to the United States for surrogacy despite surrogacy being not allowed in France. In the year 2000, the surrogate mother gave birth to two girls; Valentina and Fiorella. Birth certificates were issued in the United States, but because of the surrogacy agreement, France refused to recognise them as children of the *Mennesson* couple.²⁰⁹ While actually the right to respect for private and family life (article 8 ECHR) was at trial, in this case, useful remarks were made on the right to (acquire) a nationality because it was possible that the children would be unable to acquire French nationality. In § 97, the court emphasises that nationality is an integral part of a child's legal identity. The uncertainty about whether or not being able to acquire French nationality could hurt developing the child's identity. It is, of course, never in the best interests of the child not to have a nationality. With regard to the best interests of the child, this principle sometimes prevails above other rights and

²⁰⁶ ECtHR, *Genovese v. Malta*, 11 October 2011, Application no. 53124/09, Council of Europe: European Court of Human Rights, § 30, available at: <https://www.refworld.org/cases,ECHR,509ea0852.html> [accessed 6 October 2018].

²⁰⁷ ECtHR, *Genovese v. Malta*, 11 October 2011, Application no. 53124/09, Council of Europe: European Court of Human Rights, § 7 – 15, available at: <https://www.refworld.org/cases,ECHR,509ea0852.html> [accessed 6 October 2018].

²⁰⁸ ECtHR, *Genovese v. Malta*, 11 October 2011, Application no. 53124/09, Council of Europe: European Court of Human Rights, § 49, available at: <https://www.refworld.org/cases,ECHR,509ea0852.html> [accessed 6 October 2018].

²⁰⁹ ECtHR, *Mennesson v. France*, 26 June 2014, Application no. 65192/11 (French).

prohibitions and must be considered in all decisions concerning children.²¹⁰ In this case, children should not be the victims of facts they were not responsible for.²¹¹

4.4.3 Case of the Nubian Children in Kenya v. Kenya

Under African regional law, Nubian children were unable to acquire a nationality at birth. While Nubian parents face difficulties in registering their child's birth (hospitals even refuse to grant birth certificates to Nubian children²¹²), birth certificates do not entail citizenship or nationality in Kenya.²¹³ Before acquiring citizenship when they reach the age of adulthood, Nubian had to go through a process of vetting.²¹⁴ The process is only required for several groups living in Kenya In this process, including the Nubian people. Several security agencies investigate adult Nubians before they can apply for citizenship. It can take a long time before people are able to acquire documentation; first, they need to pass the vetting process, and after that, they need to wait for the documents.²¹⁵

In international as well as in African regional law (article 6(3) African Charter on the Rights and Welfare of the child), the child's right to acquire a nationality is recognised. For Nubian children, however, this was not self-evident. A General Comment of the African Committee of Experts on the Rights and Welfare of the Child later indicated that statelessness has grave consequences for the child's other human rights. In the Case of the Nubian Children in Kenya v. Kenya, the African Committee of Experts on the Rights and Welfare of the Child explains the right to a nationality in relation to the principle of the best interests of the child; it is in a child's best interests to acquire a nationality at birth and not only when reaching the age of eighteen.²¹⁶ However, this is not in the African formulation of the right to a nationality; it is not stated that it should be acquired at birth. That is why the court purposively

²¹⁰ ECtHR, *Mennesson v. France*, 26 June 2014, Application no. 65192/11 (French), § 99 – 101.

²¹¹ ECtHR, *Mennesson v. France*, 26 June 2014, Application no. 65192/11 (French), § 105.

²¹² ACERWC, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, 22 March 2011, Decision No. 002/Com/002/2009, § 38.

²¹³ ACERWC, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, 22 March 2011, Decision No. 002/Com/002/2009, § 4.

²¹⁴ ACERWC, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, 22 March 2011, Decision No. 002/Com/002/2009, § 5.

²¹⁵ Yousif 2017, p. 198.

²¹⁶ Institute on Statelessness and Inclusion 2017, p. 23.

interpreted the article. This interpretation is in line with the best interests of the child-principle- that a child should receive a nationality at birth. Letting a child acquire a nationality only when he or she turns eighteen, and thus is not a child anymore, is not fulfilling the right to (acquire) a nationality for children.²¹⁷

One of the gaps in international law is that the safeguard for children, who would otherwise be stateless, is not always applied to children in case they might not be stateless (but it is unclear in which state they would be able to acquire a nationality). The African Committee of Experts on the Rights and Welfare of the Child states in § 51 of the decision that in such cases, states should cooperate in order for the child to acquire a nationality. Kenya had not taken those efforts.²¹⁸

As a result, the African Committee of Experts on the Rights and Welfare of the Child decided that Nubian children had been denied their right to acquire a nationality. In the judgement, several recommendations are done, including the following:

- *“(...)the Government of Kenya should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth.”*
- *“the Government of Kenya should implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth.”*

Kenya however, did not adequately implement the judgement, still leaving Nubian children at risk of statelessness.²¹⁹

4.4.4 Case of the girls Yean and Bosico v. Dominican Republic

It is clear that in cases regarding children’s right to (acquire) a nationality, the principle of non-discrimination is not always implemented adequately. This is obvious

²¹⁷ ACERWC, Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya, 22 March 2011, Decision No. 002/Com/002/2009, § 42.

²¹⁸ ACERWC, Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya, 22 March 2011, Decision No. 002/Com/002/2009, § 51.

²¹⁹ Yousif 2017, p. 199.

in states where the leading doctrine is *ius sanguinis*, but could even happen in states that apply the *ius soli* doctrine. This was the problem in the case of the girls Yean and Bosico v. Dominican Republic.²²⁰ The girls were born in the Dominican Republic, which applies the *ius soli* doctrine, but they were denied birth certificates because of their origin and status of their parents. The girls experienced several difficulties because of this; one of them was even unable to receive education for a year because she had no identity documents.²²¹

In the Dominican Republic, reservations were made regarding the *ius soli* doctrine. Typically, a newborn would be able to acquire the nationality of the state he or she is born in if that state's leading doctrine is *ius soli*. In the Dominican Republic, however, an exception was made for "foreigners in transit", thus excluding those persons from acquiring Dominican nationality based on the *ius soli* doctrine. There was, however, no description of who would be considered foreigners in transit. Authorities were granted the freedom to decide who fall within the scope of "foreigners in transit", sometimes including people who had been in the state for more than fifteen years. In § 111, the Inter-American Commission on Human Rights stated that "any restriction of the right to nationality that is not based on a child's place of birth directly contradicts" the principle of *ius soli*. In § 155, the Court agreed with this; the application of the *ius soli* principle cannot discriminate. The representatives stated that the right to a nationality is fundamental and cannot be "suspended".²²² The Court agreed with this statement by stating: "nationality is a fundamental human right."²²³ Discriminatory conditions are not allowed.²²⁴ They also stated that the human rights violations of children are "particularly serious", that their best interests should prevail, and that cases of vulnerable groups like female children should get special attention.²²⁵

Furthermore, the Court highlighted the balance between the jurisdiction of the state regarding the right to nationality and the human rights in international law in § 140 with the following statement:

²²⁰ IACtHR, Case of the Girls Yean and Bosico v. Dominican Republic, 8 September 2005.

²²¹ IACtHR, Case of the Girls Yean and Bosico v. Dominican Republic, 8 September 2005, § 3.

²²² IACtHR, Case of the Girls Yean and Bosico v. Dominican Republic, 8 September 2005, § 119.

²²³ IACtHR, Case of the Girls Yean and Bosico v. Dominican Republic, 8 September 2005, § 136.

²²⁴ IACtHR, Case of the Girls Yean and Bosico v. Dominican Republic, 8 September 2005, § 141 & 155.

²²⁵ IACtHR, Case of the Girls Yean and Bosico v. Dominican Republic, 8 September 2005, § 134.

“The determination of who has a right to be a national continues to fall within a State’s domestic jurisdiction. However, its discretionary authority in this regard is gradually being restricted with the evolution of international law, in order to ensure a better protection of the individual in the face of arbitrary acts of States. Thus, at the current stage of the development of international human rights law, this authority of the States is limited, on the one hand, by their obligation to provide individuals with the equal and effective protection of the law and, on the other hand, by their obligation to prevent, avoid and reduce statelessness.”

4.5 Implementation in National Law

While the right to (acquire a) nationality is included in international and regional law provisions, domestic laws can create gaps in the protection of the right to nationality, hindering a child’s right to (acquire) a nationality, possibly leaving them stateless.²²⁶ Implementation of the right to (acquire) a nationality is very different in states, sometimes with only partial safeguards, unreasonable conditions children need to fulfil in order to really be able to acquire the nationality of that state,²²⁷ discriminatory protection measures or just ineffective implementation of the right to (acquire) a nationality for children.²²⁸

In this paragraph, several of these implementation problems will be highlighted, in order to illustrate how implementation in national law can cause gaps in the protection on the right to nationality for unaccompanied minors and separated children.

4.5.1 State Parties

The first situation in which gaps are created is by states not becoming state parties of certain conventions. For this thesis, the most significant example is the low number of states that have ratified the 1961 Convention on the Reduction of Statelessness. Despite its beneficial provisions regarding the protection of the right to (acquire) a nationality, many states have not implemented this convention.

²²⁶ Vales 2017, p. 166.

²²⁷ Vales 2017, p. 166.

²²⁸ Bhabha 2017, p. 160.

4.5.2 Vague norms and implementation issues

When states are parties of the conventions mentioned in the legal framework of this thesis, gaps in the protection of the right to (acquire) a nationality can be created because of vague norms, and incorrect implementation. While several examples of this are mentioned in previous chapters, another example is Fiji's approach to foundlings. In its national legislation, Fiji has implemented a provision for foundlings, according to the Convention on the Rights of the Child. This provision states that foundlings are considered born in Fiji. However, to this provision, Fiji has added a 'stipulation': "*unless there is evidence to the contrary.*" According to the Committee on the Rights of the Child, this condition can "*carry a risk of statelessness for Children of whom it can be proven that they have not been born in Fiji, but whose nationality can nevertheless not be established.*"²²⁹

4.5.3 Non-compliance with conventions

As explained, the 1961 Convention on the Reduction of Statelessness has explicit provisions, which enable many stateless children to acquire a nationality. However, even with sharp-cut phrasing in international law, states can still implement conventions in the wrong way, or simply not comply with the convention or the national laws that have followed from it. A striking example of this is the Netherlands. While the Netherlands is a state party of the 1961 Convention on the Reduction of Statelessness and the 1954 Convention Relating to the Status of Stateless Persons (which entails a responsibility to identify statelessness²³⁰), the Netherlands does not have an instrument in place to identify statelessness.²³¹ According to the website of the Dutch Government, a mechanism will be introduced.²³²

The Committee on the Rights of the Child has also critiqued the Dutch approach to granting nationality. This is because the Netherlands, in its Nationality Act, has set several conditions a child has to fulfil in order to be able to acquire the Dutch Nationality, even when he or she is born in the territory of the Kingdom of the

²²⁹ § 26 of Committee on the Rights of the Child, *Concluding observations on the combined second to fourth periodic reports to Fiji*, CRC/C/FJI/CO/2-4, 13 October 2014.

²³⁰ UNHCR 2014, p. 52.

²³¹ Institute on Statelessness and Inclusion, ASKV Refugee Support, European Network on Statelessness and Defence For Children – The Netherlands 2016, § 23.

²³² <https://www.government.nl/topics/dutch-nationality/statelessness>, accessed at 2 November 2018.

Netherlands and would otherwise be stateless.²³³ The Committee on the Rights of the Child even urged the Netherlands not to adopt an amendment the Netherlands proposed to their citizenship act; one of the proposed conditions was not allowed by the 1961 Convention on the Reduction of statelessness.²³⁴ In the 1961 Convention, in article 1(2) an exhaustive list of possible conditions is included, other conditions are not allowed.

4.5.4 National case law: MK vs. SSHD

Implementation of the right to a nationality cannot only be adversely affecting the protection of this right; certain gaps in international law can also be solved by implementation in national law. An important decision concerning the right to a nationality for a stateless person, in case this person might also have a right to another nationality, was made quite recently by the United Kingdom High Court of Justice; in February 2017. This case is about a child born in the United Kingdom in 2010. Her parents are Indian nationals, but the child did not acquire the Indian nationality. While in India the leading doctrine is *ius sanguinis*, granting nationality by descent, evidence is necessary to register the child's birth if he or she is born abroad.²³⁵ The child's parents claimed they were unable to show such evidence and wanted her to acquire British nationality.²³⁶

In the British Nationality Act, it is stated that a person born in the United Kingdom, who has been stateless since birth, is under the age of twenty-two, and who has been in the United Kingdom for at least five years without going to other states for more than 450 days, is able to acquire British nationality.²³⁷ While the Secretary of State was of the opinion that the girl was able to acquire Indian nationality, the High Court of Justice decides that the ability to acquire a nationality somewhere is irrelevant for applying the article from the British Nationality Act. This is because it is relevant whether someone is, and has always been stateless, and not

²³³ Committee on the Rights of the Child, Concluding observations on the fourth periodic report of the Netherlands, CRC/C/NDL/CO/4, § 32 - § 33, 8 June 2015.

²³⁴ Committee on the Rights of the Child, Concluding observations on the fourth periodic report of the Netherlands, CRC/C/NDL/CO/4, § 33, 8 June 2015. See further: § 22 of Institute on Statelessness and Inclusion, ASKV Refugee Support, European Network on Statelessness and Defence For Children – The Netherlands 2016

²³⁵ [2017] EWHC 1365, MK vs. SSHD, § 9.

²³⁶ [2017] EWHC 1365, MK vs. SSHD, § 10.

²³⁷ [2017] EWHC 1365, MK vs. SSHD, § 1.

whether he or she can acquire a nationality in some state.²³⁸ As a consequence, the girl is able to acquire British nationality if she can prove that she does not have and has never had the Indian nationality.²³⁹ This judgement has possibly been a very important precedent for other cases. In the case, it is stated that there were a number of similar cases awaiting the decision of *MK vs. SSHD*.²⁴⁰

4.6 International Principles

In international law and case law, the following principles emerged regarding the right to a nationality for children:

- Nationality is an integral part of a child's legal identity.
- Nationality is a fundamental human right.
- It is never in the best interests of a child not to have a nationality.
- The best interests of the child must be considered in all decisions concerning children.
- It is in the best interests of the child to acquire a nationality as soon as possible after birth.
- If nationality is only conferred to a person upon reaching the age of adulthood, this does not contribute to protecting the right of a *child* (under eighteen) to acquire a nationality.
- Discriminatory conditions for acquiring a nationality are prohibited.
- To apply the safeguard of conferring nationality to a child on the territory of the state who would otherwise be stateless, it is necessary that states cooperate in case a child has a right to acquire a nationality of another state but has not acquired that nationality yet. Otherwise, states do leave children stateless.
- Children born on the territory of a state that applies the *ius soli* doctrine cannot be excluded from acquiring the nationality of that state.
- If according to national legislation, a child is able to acquire the nationality of a state, it is irrelevant whether the child can acquire a nationality somewhere else too, unless this is mentioned in the law.

²³⁸ [2017] EWHC 1365, *MK vs. SSHD*, § 36.

²³⁹ [2017] EWHC 1365, *MK vs. SSHD*, § 48.

²⁴⁰ [2017] EWHC 1365, *MK vs. SSHD*, § 3.

When applying these to the gaps in international, regional and national law regarding the right to nationality for unaccompanied minors and separated children, some gaps will be solved at least partially. A striking example is the provision for foundlings in South Africa. In South Africa, only stateless foundlings with correct birth registration in South Africa can acquire a nationality through South-African domestic law. Because of the difficulties of late birth registration in South Africa, foundlings who are older than 12 months thus face a risk of becoming stateless, and also foreign looking orphans are excluded from using the national provision to protect foundlings against statelessness. When applying international law to these gaps, the non-discrimination principle and the 1961 Convention on the Reduction of Statelessness would solve this. For the 1961 Convention on the Reduction of Statelessness, birth registration is not a requirement to be able to acquire a nationality. Unfortunately, South Africa is not a party to this convention.

For unaccompanied minors and separated children, it is important to acquire a nationality as soon as possible after birth. If this would be implemented in all national laws, the risk of statelessness for unaccompanied minors and separated children would decrease. Unaccompanied minors and separated children often face difficulties with late birth registration and acquiring a nationality only when they have reached the age of adulthood. Being able to acquire a nationality as soon as possible while still being a child would also decrease the risk of statelessness for these children. For unaccompanied minors and children trying to apply to the safeguard for children who would otherwise be stateless, could benefit greatly when states would cooperate in deciding in which state a child has a right to acquire a nationality, so no unaccompanied minor or separated child will be left stateless.

Unfortunately, even when all these principles would be implemented in international, regional and national law, some gaps in the right to nationality for unaccompanied minors and separated children as previously mentioned in this thesis would still exist. This is due to the many conditions, and clauses states can make in the 'protection' of the right to a nationality. Even if all gaps, which can leave unaccompanied minors and separated children at a risk of statelessness, would be covered in international law, it is uncertain whether all categories of unaccompanied minors and separated children would be able to navigate through the legal maze of protection mechanism, procedures, vague clauses, unreasonable conditions, and

apply to the right authorities in order to be able to acquire a nationality or have their nationality recognised by states.

As became clear in the legal framework of this thesis, the right to (acquire) a nationality as a human right is recognised in several provisions of international law, as well as regional legislation. By way of contrast, the number of stateless children in the world and the risks they face shows that the right to nationality is not protected for all children.²⁴¹ Despite the principle of non-discrimination, states are still unable (or unwilling?) to solve and prevent issues of statelessness.²⁴² In the end, much depends on the domestic legislation of the state in issues of acquiring a nationality. States must provide safeguards for this purpose in their national law; especially safeguards that let a child acquire a nationality as soon as possible after it is born.²⁴³

According to the United Nations General Assembly, it is also unclear “to what extent children are able, in practice, to access the nationality of the country in which they are born.” This is because there is not much data, nor much research on this problem.²⁴⁴ This gap is also identified by the Secretary-General of the United Nations General Assembly: not only is there a lack of reliable data on the accessibility to procedures for children to acquire a nationality, but there is also a lack of data of the legal safeguards protecting the right to (acquiring) a nationality.²⁴⁵

²⁴¹ Institute on Statelessness and Inclusion 2017, p. 110.

²⁴² Ackermann 2017, p. 23.

²⁴³ United Nations General Assembly 2013, p. 16.

²⁴⁴ United Nations General Assembly 2013, p. 13.

²⁴⁵ UN Human Rights Council, *Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless*, 16 December 2015, § 16, A/HRC/31/29, available at: <https://www.refworld.org/docid/56c42b514.html> [accessed 10 October 2018].

5. Conclusion

The introduction described the story of Malik Jarno, an unaccompanied minor in a migration-context because of armed conflict. 16-Year-old Malik struggled and failed to prove his age, resulting in the fact that an already vulnerable unaccompanied child was put in a precarious position where he was treated as an adult, and placed in an adult detention centre. Unaccompanied minors and separated children are vulnerable children because of the many risks they face, and because of the lack of protection. Unaccompanied minors and separated children also face the risk of statelessness. Therefore, in this thesis, it was researched to what extent international law protects the right to nationality for unaccompanied minors.

In summary, nationality can be acquired at birth, by the doctrines of *ius soli* and *ius sanguinis*. When these doctrines are applied almost exclusively from each other, this can cause gaps and leave certain people stateless. That is why several safeguards are made to protect the right to a nationality.

The right to a nationality has been a human right since the 20th century. Because states have jurisdiction over this human right, state practices differ greatly. The importance of a nationality, however, cannot be denied. The right to nationality can impact a number of other human rights, including the right to education, the right to health, and is associated with the right to an identity. Because of the possible grave consequences, the right to nationality is protected by certain principles of international law, including the principle of non-discrimination and the best interests of the child-principle. The right to nationality in international law is, among others, protected in the Universal Declaration of Human Rights, the 1961 Convention on the Reduction of Statelessness, the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of Persons with Disabilities, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention relating to the Status of Refugees, and the Convention on the Rights of the Child. One gap that can easily be detected in international law is that few provisions protecting the right to a nationality state which nationality a person is entitled to. Other gaps can be created by domestic legislation.

Nationality is closely related to birth registration. Birth registration does not necessarily mean that a child has a nationality, but it is proof of the child's existence

and relevant facts the child needs to be able to acquire a nationality, such as parentage and place of birth. Without birth certificates and other identification documents, a child might be unable to prove their nationality, or if they have not acquired one yet, to acquire a nationality. This can leave them stateless.

A person is stateless when he or she is not considered as a national by any state under the operation of its law. Statelessness brings about many risks, for example, the risk of human rights violations, and different forms of victimisation. Stateless persons are protected under the Convention Relating to the Status of Stateless Persons. Prevention of statelessness is promoted under the Convention on the Reduction of Statelessness. At risk of not having a nationality are unaccompanied minors and separated children. These children are a vulnerable group; they are not only at risk of not having a nationality but also risk several other human rights violations and forms of victimisation because of a lack of care and protection from caregivers.

All categories of unaccompanied minors, including separated minors, orphans, foundlings, and unaccompanied minors and separated children in a migration-context, are at risk of not having a nationality. Factors that contribute to this risk include for all unaccompanied minors and separated children: that they are not in the company and protection of their parent or regular caregiver, the circumstances under which they got separated, not having birth registration, not having identity documents, human trafficking and displacement. Safeguards differ in each state, leaving all categories of unaccompanied minors at risk of statelessness. As an example: for newborn babies, in general, there are many national safeguards to protect their right to acquire a nationality. For newborn babies who appear to be foreign, however, this is more difficult. They are sometimes excluded from safeguards that grant nationality to foundlings. Late birth registration is generally tricky, especially for foreign unaccompanied children. Another critical factor in statelessness among unaccompanied minors and separated children is their age. Which safeguards are applicable, and to what extent the state is willing to grant its nationality to a child, very much depends on the child's age. This can leave foundlings who are not infants anymore but are still unable to express themselves about their parentage and place of birth at risk of not being able to acquire a nationality. One more group at risk because of their age is adult-looking teenagers. They might be considered to be adult and treated accordingly.

In a migration-context, which protection they may receive regarding their right to (acquire) a nationality depends on whether they are illegal immigrants, refugees, asylum seekers, returnees, or invisible unaccompanied minors. Besides the risks other unaccompanied minors face, children in a migration-context are also at risk of disappearing or being locked up in immigration detention. For unaccompanied minors and separated children in a migration context too, national legislation resulting from international law creates gaps, leaving them at risk of statelessness. States can limit the international safeguards to quite an extent, turning protection measures into exclusion measures.

There is no case law on the right to nationality for unaccompanied minors, but principles deriving from case law regarding the right to nationality for children in general can be applied to the situation of unaccompanied minors and separated children. These principles include, but are not limited to:

- The best interests of the child. It is in the best interests of the child to acquire a nationality as soon as possible after birth
- If nationality is only conferred to a person upon reaching the age of adulthood, this does not contribute to protecting the right of a *child* (under eighteen) to acquire a nationality.
- Discriminatory conditions for acquiring a nationality are prohibited.

When applying these principles, and all international law concerning the right to (acquire) a nationality to the gaps mentioned in this thesis, many nationality-problems would be solved for unaccompanied minors and separated children. Of course, if the principles of the best interests of the child and non-discrimination would prevail in each decision concerning children's right to acquire a nationality, no child would be stateless. Unfortunately, this is not the case. The first problem in addressing statelessness is identifying statelessness. In international law, this would be solved when all states would ratify and measure up to the 1954 Convention Relating to the Status of Stateless Persons. Another problem that emerges in the protection of the right to (acquire) a nationality, is that international law leaves states too much room for interpretation, which causes vague clauses and unreasonable conditions. However, the 1961 Convention on the Reduction of Statelessness sets clear safeguards to prevent implementation issues. For children whose parents are not stateless, but are unable to pass on their nationality to the child, the 1961 Convention has a provision too, in article 1.

Some gaps were found to be especially relevant for unaccompanied minors and separated children. First of all, it would be beneficial if, among all states, one definition of 'unaccompanied minor' and 'separated child' is used. Second, many of the gaps in national legislation, leaving foundlings stateless, would be solved by article 2 of the 1961 Convention on the Reduction of Statelessness and the non-discrimination principle.

Many of the problems relating to the right to acquire a nationality for unaccompanied minors and separated children are related to birth registration. Because the child is unaccompanied or separated, it may have difficulties proving where he or she is born. While the provisions for foundlings would apply to children who are not yet able to communicate, according to the Committee on the Rights of the Child, older unaccompanied or separated minors without birth registration could be left stateless. This depends on the states; they can decide whether or not older children can apply for the provisions for foundlings, such as article 3 of the 1961 Convention. However, ensuring that all children are registered immediately after birth would prevent the risk of statelessness. Not only is the right for the child to have their birth registered included in many conventions in international law, but the Global Action Plan to End Statelessness might also benefit this. Again, cooperation and will of states is very important.

A risk factor that might not yet be solved through international law for unaccompanied minors and separated children is their age. For unaccompanied minors and separated children not born in the territory of the state they are in, and even more for those who don't know or cannot prove in which state they were born (this again underlines the importance of birth registration, also because of the controversial age determination procedures, despite the recommendations of the Committee on the Rights of the Child concerning this subject), the risk of statelessness remains. While birth registration and the decision in the Case of the Nubian Children in Kenya v. Kenya would reduce this risk, a gap in international law can be identified. Older unaccompanied minors and separated children might be able to acquire a nationality through domestic procedures, but because of the open terms in international law, states can add unreasonable requirements and vague clauses to these procedures.

Concluding, to answer the research question to what extent the right to nationality for unaccompanied minors is protected: much more needs to be done. In

theory, when only looking at international law, it would appear as if the right to (acquire) a nationality for unaccompanied minors is sufficiently protected. In practice, the international protection offered regarding the right to nationality for unaccompanied minors almost appears to be insignificant when looking at the implementation in national frameworks; implementation in domestic legislation leaves many gaps, which cause a risk of statelessness for unaccompanied minors and separated children. The balance between state sovereignty and ensuring that no child is left stateless is difficult. The right to a nationality is crucial, gaps in the protection of this right have grave consequences for a minor's childhood, but also for the entire future of the child and adult he or she will become. In my opinion, international law should offer more binding safeguards to protect the right to nationality for unaccompanied minors. There are too many gaps that leave them at risk of statelessness because of their vulnerable position.

Additionally, while many conventions such as the 1954 Convention Relating to the Status of Stateless and the 1961 Convention on the Reduction of Statelessness have quite clear safeguards, it would be beneficial if clear safeguards would be included in the Convention on the Rights of the Child. The reason for this is the almost universal coverage of this binding convention. This way we can make sure that states who are not parties of some of the other international treaties protecting the right to nationality, will also be urged to include safeguards to protect the right to nationality for unaccompanied minors and separated children, and not to exclude them. Vague terms leaving too much space for interpretation should be avoided as the right to nationality is essential for all unaccompanied minors and separated children, regardless of which country they are in.

As for the limitations of this research, the reader should bear in mind that the study is based on literature only. In practice, unaccompanied minors and separated minors might have different experiences regarding the protection of their right to (acquire) a nationality. Because almost no data is available on unaccompanied minors and separated children and their experiences in acquiring a nationality and protecting that nationality, the results of this research might differ from practice. There is a general lack of data on unaccompanied minors' nationality issues. Accordingly, the implementation of the rights of unaccompanied minors and separated children cannot be analysed in detail. Hence, in my opinion, research

regarding the aforementioned would be valuable in highlighting and solving the gaps in the protection of the right to nationality for unaccompanied minors.

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