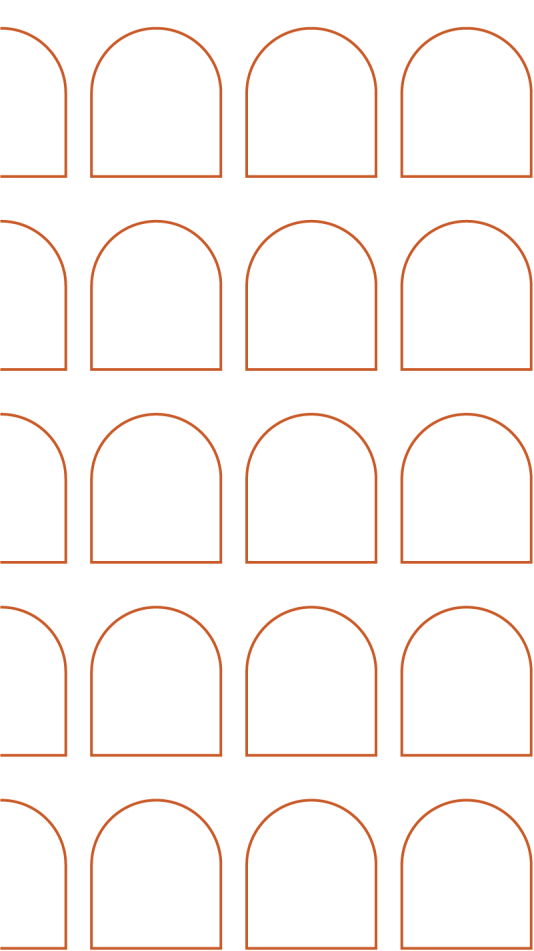




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WORKING PAPER

**Too old to be a ‘foundling’? – International
standards and comparative analysis –**

Mai Kaneko-Iwase, Ph.D. (Law)

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ABSTRACT

Building on the author's book *Nationality of Foundlings* (Springer 2021), this article examines the definition of the term 'foundling' under Article 2 of the *1961 Convention on the Reduction of Statelessness*, with particular focus on the most commonly debated issue: The maximum age of the child when found in the territory to qualify as a foundling. It first asserts that the grant of nationality to foundlings is a customary international law norm. The article then advances an evolutionary and teleological approach to interpreting the *1961 Convention* in light of its objective of reducing statelessness, considering the development of human rights law and best state practices. The analysis of the *travaux* and the comparison of the nationality laws of 193 UN member states (of which 142 states have foundling provisions) first clarify that the term 'foundling' means 'a child of unknown parents'. Further, it reveals that foundling provisions of 10 states (7% of 142 states) explicitly cover all minors of unknown parents, and that the provisions of at least 16 states (11%) encompass all minors according to available legal interpretations. This is exemplified by legal precedents in which Spain and Italy, respectively, recognised minors who were around 11 and 12 years old when found in their territories as their nationals under their foundling provisions. In light of Article 7 of the *Convention on the Rights of the Child* and the best interests of the child, this article concludes that the term 'foundling' is not restricted to a 'newborn child' or a 'young child' but covers all minors of unknown parents.

KEYWORDS

Statelessness, Foundlings Definition, Child of Unknown Parents, Abandoned or Orphaned Children, Unaccompanied or Separated Children

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I. INTRODUCTION¹

Imagine you are around 11 years old. You have been begging on the streets, moving from one place to another with people whom you believed to be your parents. You have probably never been vaccinated or attended school. One day, you are pulled away by the police, who subsequently find that your self-proclaimed 'parents' are not in fact related to you. The authorities ask you, 'Where were you born, and who are your real parents?' You can only say, 'I don't know, I have never known my real parents'.

Fortunately, a girl who found herself in this situation in Spain was confirmed as a Spanish national under the country's inclusive Civil Code provision² that grants nationality to 'minors' of undetermined parentage found within Spanish territory.³ In a number of other states, however, similar scenarios would leave a child stateless even if the child's legal parents were never identified. This is because under many other countries' nationality law containing a provision granting nationality to a 'foundling', it only directly applies (or is interpreted to apply) to a newborn baby or an infant of unknown parents who is 'too young to account for' who their parents are and where they were born. Accordingly, a child who is around 11 years old or of an age to be expected to be able to account for their parents' identity or where they were born when found in their territory, would be 'too old' to acquire nationality. Children of 'unknown parents' are among the most vulnerable in the world, not only because they would otherwise be stateless⁴ and prone to violations of fundamental human rights, but also because of the absence of parents and relatives legally responsible for their protection and care. Being a child of 'unknown parents' has traditionally been one of the typical causes of statelessness.⁵ Yet, there has been very limited literature⁶ that addresses the interpretation and application of Article 2 of the *1961 Convention on the Reduction of Statelessness* ('1961 Convention'), including the meaning of the term 'foundling'.

The exact term 'children of unknown parents' is actually *not* used in any of the 21 articles of the *1961 Convention*. Instead, to grant nationality to foundlings, Article 2 provides that:

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 (emphasis added).

¹ While most of the writing was completed before April 2025, the web links were checked in February 2026.

² Administrative precedent in Spain by Dirección General de Registros y Noariado (DGRN) on 10 June 2005. Res. DGRN de 10 de junio de 2005 (BOE, 1-VIII-2005, pp 27, 158–9 [Anexo III.3.25]). See sec 4.3.5, 6.7.3 and 7.5 in Mai Kaneko-Iwase, *Nationality of Foundlings - Avoiding Statelessness Among Children of Unknown Parents Under International Nationality Law* - (Springer 2021), 130-132, 259, 296-297, 302.

³ Article 17(1)(d) of the Spanish *Civil Code* states: 'The following persons are Spanish nationals of origin: (...). d) Those born in Spain whose parentage is not determined. To these effects, minors (*los menores de edad*) whose first known place of stay is Spanish territory are presumed to have been born in the Spanish territory.' (author translation) *Código Civil*.

⁴ 'A person who is not considered as a national by any state under the operation of its law', as is defined in art 1 of the *1954 Convention relating to the Status of Stateless Persons* ('1954 Convention'). This definition is recognized by the International Law Commission (ILC) as customary international law. ILC, *Articles on Diplomatic Protection with Commentaries* (2006) 36.

⁵ For example, in Côte d'Ivoire, the government once estimated that there were 300,000 persons who were stateless due to unknown parentage, out of the total of 700,000 persons who are stateless or of undetermined nationality. However, it later stopped providing such a breakdown stating that estimating the foundling population size was complex. Footnote 7 of the UNHCR, *Global Trends 2015*, Table 7. Mirna Adjami, *Statelessness and Nationality in Côte d'Ivoire* (2016) 57-58 and footnote 215.

⁶ In terms of academic material, the author is aware of two previous articles dedicated to clarify the concept of, and/or the nature of nationality grant to foundlings i.e. by Ryuun O, '*Kiji no kokuseki*' [*Nationality of Abandoned Children*] (1969) 4-2 *Hogaku Kenkyu* [*Hok-kaigakuen daigaku hogakkai*] (Japanese) and Attorney Ralph A. Sarmiento's blog 'The Right to Nationality of Foundlings in International Law' (3 December 2015) <<https://attyralph.com/2015/12/03/foundlingsnationality/>>. There are a few other examples of existing literature with some focus on foundlings including Gerard-René de Groot, 'Children, their right to a nationality and child statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) and Yue Fu, '*Nihon de umareta kodomono kokuseki to mukokuseki nintei*' (*Determination of Statelessness for Children Born in Japan*) (PhD dissertation, University of Tsukuba) (2016) (Japanese).

Nevertheless, what exactly does ‘foundling’ mean? Even the UNHCR’s 2012 *Guidelines on Statelessness No.4*,⁷ providing guidance on the interpretation of Articles 1-4 of the 1961 *Convention*, do not contain an explicit definition of the term ‘foundling’ itself. However, the Guidelines’ paragraph 57 rephrases the term ‘foundlings’ as ‘*children found abandoned in the territory of a Contracting State*’. In earlier UNHCR and academic materials, the term ‘orphaned or abandoned child’ was often used interchangeably with the term ‘foundling’.⁸

In 2021, the author published a book entitled *Nationality of Foundlings*,⁹ entirely dedicated to clarifying the concept of a ‘foundling’ under Article 2 of the 1961 *Convention* and the equivalent domestic nationality law provisions (hereinafter ‘foundling provisions’). However, with the majority of the book having been written before 2020, there have been several new pieces of nationality legislation, caselaw and other material made available, strengthening its assertions, which this article aims to highlight.¹⁰ In particular, among all other issues¹¹ in relation to the interpretation and implementation of Article 2, this article particularly focuses on the issue that likely *most frequently arises*, which is: How old, at most, the person concerned can be when found in the territory to be recognised as a ‘foundling’.¹² As the premise for such a discussion, this article will first elaborate on the approach to be taken in applying the rules of treaty interpretation reflected in the *Vienna Convention on the Law of Treaties* (‘VCLT’) to the 1961 *Convention*. It will then briefly introduce the basic meaning of the terms ‘foundling’, ‘unknown parents’, and relatedly, ‘being found’ in the territory. The article will then go on to discuss the maximum age of a foundling by presenting the updated comparative analysis of the nationality laws of 142 states (out of 193 UN member states) that have domestic foundling provisions, as well as the practice of some States, including recent legal precedents. This article will ultimately make a recommendation on the maximum age of a ‘foundling’, adopting an evolutionary and teleological approach to treaty interpretation in light of the object and purpose of the 1961 *Convention*, considering the best state practice and development of human rights law, including that related to the 1989 *Convention on the Rights of the Child* (‘CRC’).

7 UNHCR, *Guidelines on Statelessness No 4* (2012), paras. 57-61 <<https://www.refworld.org/policy/legalguidance/unhcr/2012/en/105120>>.

8 UNHCR, *Self-Study Module on Statelessness* (1 October 2012) 22.

9 Kaneko-Iwase, *Nationality of Foundlings* (n 2). See also the Book Review by Betsy Fisher, ‘Nationality of Foundlings: Avoiding Statelessness among Children of Unknown Parents under International Nationality Law by Mai Kaneko-Iwase’, *The Statelessness & Citizenship Review* 4(1) (2022) 183-187.

10 In Annex 1 as summarised in sec 6.3, chap 6 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 236-245 and 351-406, 139 states had been identified as having foundling provisions. With the developments and new research conducted thereafter, the total number of states with foundling provisions now stands at 142 states for this article. In particular, (i) the Philippines legislated in May 2022 - as a rare piece of legislation in the world - an Act dedicated specifically to the protection of foundlings including by granting Filipino nationality. 2022 *Foundling Recognition and Protection Act* (see Table 4). (ii) Chile enacted Law No. 21325 of 2021, on Migration and Foreign Persons <<https://www.bcn.cl/leychile/navegar?idNorma=1158549>> whose Article 173 is a foundling provision. (iii) With regard to Malaysia, the scope and nature of the relevant provision in the Federal Constitution was clarified in court in 2021. The Judgment by the Federal Court (highest court of Malaysia) Civil Appeal No.: 01(f)-35-11/2020(W) (19 November 2021) clarified that Section 19B, Part III of the Second Schedule read together with Section 1(a), Part II of the Second Schedule, Art 14(1)(b) of the Constitution was the country’s foundling provision, granting nationality to a child ‘found exposed’ in the territory. Email inquiries with Attorney Eric Paulsen, 29 November-3 December 2021. The provision was subsequently amended by the Act A1752, Constitution [Amendment] Act 2025. (iv) With regard to Grenada, Sec 2(3) of its Citizenship Act was confirmed to be its foundling provision. (v) Further it was confirmed that Israel’s nationality law no longer contained the foundling provision referred to in the book. Email exchanges with Dr. Ben Herzog on 27-28 September 2023, are on file with the author. Further, the number of states whose foundling provisions can be classified to cover ‘all minors’ increased from 15 states in Kaneko-Iwase (n 2) to 26 states (out of 142), which is of central to this article (see Table 3 and 4).

11 There are indeed a number of other issues extensively addressed in different chapters of Kaneko-Iwase, *Nationality of Foundlings* (n 2). These include: What constitutes ‘*proof to the contrary*’ which *disqualifies* the person from invoking Article 2 or have the person *lose the nationality* acquired based on Article 2 (chap 7, p.267-332)? Who bears the *burden of proof*, and what is the *standard of proof* (or the extent of ‘unknown-ness’) in establishing one’s ‘foundlinghood’ (chap 5, p.177-230)? What does a model foundling provision look like (chap 8, p333-349)? See for example Fisher’s Book Review of *Nationality of Foundlings* (n 9) which particularly explains the value of the chap 5 focusing on the burden and standard of proof in proving unknown parentage.

12 Extensively discussed in chap 6 entitled ‘Age of a Foundling, and Being ‘Found’ in the Territory’ of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 231-265. The basic meaning of the terms ‘foundling’ is discussed in chap 3 (p.77-113) and of ‘unknown parents’ in chap 4 (p.115-175).

Some of the limitations should be noted at the outset: While the author conducted a literature review and inquiries with local experts, there was a general lack of (detailed) publicly available/shareable information on how domestic foundling provisions are *actually applied* in most states beyond their application to the most 'typical cases' (abandoned newborns). This made it difficult to compare implementation across states with the same level/sets of information.¹³

II. APPLYING THE RULE OF TREATY INTERPRETATION TO ARTICLE 2 OF THE 1961 CONVENTION

In accordance with the *VCLT*, a treaty provision is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose (Article 31 [1]), taking into account factors such as subsequent practice which establishes the agreement of the parties (Article 31[3][b]) and any relevant and applicable rules of international law (Article 31 [3][c]). Recourse may additionally be had to the supplementary means of interpretation (Article 32) to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves it (a) ambiguous or obscure, or (b) manifestly absurd/unreasonable.

But how specifically shall those general rules of treaty interpretation reflected in *VCLT* be applied in interpreting the term 'foundling' under Article 2 of the *1961 Convention*, which is an international human rights treaty?¹⁴ As discussed below, there is a widespread view that human rights treaties, as a form of special regime, warrant a special interpretive methodology, which is to adopt a non-restrictive and evolutive interpretation method to ensure the effective realisation of their objective.¹⁵ As a *CRC* expert, John Tobin notes, however, care must be taken in order to avoid stretching the treaty beyond what its terms can bear.¹⁶

A. Evolutionary and Teleological Interpretation of the 1961 Convention

The commonly-cited International Court of Justice (ICJ)'s 1971 *Advisory Opinion on Namibia* articulates the need for an evolutionary and dynamic approach to treaty interpretation, stating that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'¹⁷ As Richard Gardiner acknowledges, although subsequent legal developments are relevant to the interpretation of many treaties, they are particularly significant when examining human rights instruments.¹⁸ Guy Goodwin-Gill, an authoritative refugee law scholar, notes that human rights treaties call for a more dynamic approach to interpretation than is offered by the methods that focus on the text of the treaty or intentions of the parties.¹⁹ This is

¹³ **Translation-related limitations:** Another limitation is that the research for this article was conducted directly in English, Spanish and Japanese (and to a limited extent French). Materials in other languages referred to throughout this article were read through English translations wherever possible with assistance from persons proficient in these languages with knowledge on legal matters. Inaccuracies or missed nuances in translation (starting with the local term equivalent to 'foundling'), however, cannot be ruled out.

¹⁴ For example, Michelle Foster acknowledges 'the 1961 Convention is *one of the earliest human rights treaties* of the modern era (emphasis added).' Michelle Foster, 'The 1961 Convention on the Reduction of Statelessness', *The Statelessness & Citizenship Review* 4(1) (2022) 190.

¹⁵ Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press [OUP] 2015) 473–74; John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation,' *Harvard Human Rights Review*, Vol. 23 (2010) 220–221; The relevant ILC Report refers to human rights bodies' tendency 'to adopt readings of human rights conventions that look for their *effet utile* to an extent perhaps wider than regular treaties'. See para 428 of ILC, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalised by Martti Koskenniemi', A/CN.4/L.682 (13 Apr 2006) 87.

¹⁶ Tobin, 'Seeking to Persuade' (n 15), in particular 222; Emma Dunlop, 'Applying the Rule of Treaty Interpretation to the 1951 Convention,' in *Access to Courts for Asylum Seekers and Refugees: State Obligations under the 1951 Refugee Convention* (OUP 2024), 50 and 75; Guy Goodwin-Gill, 'The Search for the One, True Meaning . . .' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonisation and Judicial Dialogue in the European Union* (Cambridge University Press 2010) 240–41.

¹⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security, Council Resolution 276* (1970), *Advisory Opinion* [1971] of the ICJ Rep 16, 22 (South West Africa Opinion) para 53.

¹⁸ Gardiner, *Treaty Interpretation* (n 15) 333.

¹⁹ Goodwin-Gill, 'The Search' (n 16) 220.

grounded in different factors, such as the non-reciprocal nature of human rights law, which is distinct from other treaties²⁰, with their aim being human rights protection of third parties.²¹ The content of each human right is often ambiguous, and there is no authoritative adjudicative body²² whose interpretations are binding for state parties.

A prominent manifestation of this trend is seen in the interpretation of the *European Convention on Human Rights* ('ECHR'). This is a 'living instrument'²³ whose 'evolutive' interpretation the European Court of Human Rights (ECtHR) develops²⁴ so that it 'is most appropriate in order to achieve the objective of the treaty, and not to restrict to the greatest possible degree the obligations undertaken by parties'.²⁵ The UN and regional human rights treaty mechanisms generally adopt this approach.²⁶

Emma Dunlop, as echoed by other refugee law scholars, has specifically asserted that the *1951 Convention relating to the Status of Refugees* ('1951 Convention') warrants this teleological, normative and evolutionary approach. This allows the development of human rights law to be more broadly considered in its interpretative process, ensuring its effectiveness in achieving its object and purpose, i.e., the widest possible exercise of fundamental rights by refugees.²⁷ As Jane McAdam notes, this has the effect of giving weight to domestic state practice, including court decisions, as evidence of state practice in its interpretative exercises.²⁸

The same applies to the *1961 Convention*, which is interconnected with the *1954 Convention relating to the Status of Stateless Persons* (the *1954 Convention*), which is substantively identical to the *1951 Convention*.²⁹ The *1961 Convention*'s preamble states that its object and purpose is to 'reduce statelessness', which is ultimately aimed at protecting the right to a nationality.³⁰ This, in turn, serves to assure 'stateless persons' widest possible exercise of (...) fundamental rights and freedoms', which is the objective and purpose as stated in the preamble of the *1954 Convention*. Indeed, the conclusions of the meeting of experts convened by UNHCR to discuss the interpretation of Articles 1 to 4 of the *1961 Convention* acknowledge that the provisions must be read in light of subsequent developments in international law, in particular international human rights law.³¹

Among other issues, the following sections will clarify key interpretational issues that may arise out of this article, i.e. its intentions behind referring to (i) The trends of domestic founding provisions and legal precedents; (ii) legislation and practice of non-state parties to the *1961 Convention* and (iii) Article 7 of the *CRC* and other relevant standards in defining the term 'foundling' under Article 2 of the *1961 Convention* including the maximum age when found.

20 Tobin, 'Seeking to Persuade' (n 15) 220-221.

21 Dunlop, 'Applying the Rule of Treaty Interpretation' (n 16) 55.

22 Goodwin-Gill, 'The Search' (n 16) 207. Jane McAdam and Emma Dunlop 'Interpretation of the 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Second edition, OUP 2024) 79-80.

23 See for example *Tyrer v United Kingdom*, Application no 5856/72, ECtHR (25 April 1978) para 31.

24 Gardiner, *Treaty Interpretation* (n 15) 471.

25 *Wemhoff v. Germany*, Application No. 2122/64, ECtHR (27 June 1968) para 8.

26 Tobin, 'Seeking to Persuade' (n 15) 220.

27 Dunlop, 'Applying the Rule of Treaty Interpretation' (n 16) 55.

28 McAdam and Dunlop (n 22) 118.

29 Laura van Waas, 'The UN statelessness conventions', Alice Edwards and Laura van Waas eds., *Nationality and Statelessness Under International Law* (Cambridge University Press 2014) 65-71.

30 Summary Conclusions of the UNHCR-convened expert meeting, 'Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children: ('Dakar Conclusions')' (September 2011) para 1.

31 *ibid* (n 30) para 2. 'Reliance on other treaties (...) is thus an important supplement to the 1961 Convention' by Michelle Foster, 'The 1961 Convention on the Reduction of Statelessness', *The Statelessness & Citizenship Review* 4(1) (2022) 192.

B. Legislation and Legal Precedents of State Parties as Supplementary Means of Interpretation

The ILC's *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties* of 2018 ('2018 ILC Draft Conclusions on Subsequent Practice' or 'Draft Conclusions'),³² Conclusion 5(1) clarifies what constitutes 'subsequent practice' both under Article 31 (3) (b), and also as 'supplementary means of interpretation' under Article 32 of the VCLT:

Subsequent practice under Articles 31 and 32 may consist of *any conduct of a party* in the application of a treaty,³³ whether in the exercise of its *executive, legislative, judicial* or other functions (emphasis added).³⁴

It is thus clear that *domestic legislation* as well as *administrative and judicial precedents* in the implementation of a treaty may constitute 'subsequent practice' both under Article 31(3)(b) and Article 32. However, establishing that subsequent practice shows 'agreement of the parties' under Article 31(3)(b) of VCLT is more challenging. The *Draft Conclusion* 10(1) notes that an 'agreement' under Article 31(3)(b) requires 'a common understanding regarding the interpretation of a treaty which the parties are aware of and accept'. Nevertheless, as paragraph 9 of the Commentary to the *Draft Conclusion* 2(4) states, subsequent practice in the application of the treaty, which does not meet the high standard of Article 31(3) (b), but establishes the agreement of *only one or more parties*, may be used as a 'supplementary means of interpretation' under Article 32 of the VCLT³⁵ which may, according to *Draft Conclusion* 7(2), 'contribute to the clarification of the meaning of a treaty'.³⁶

The review of foundling provisions around the world, as well as judicial decisions in some states, in this article will thus be utilised to identify subsequent practice either under Article 31 or 32 of VCLT.

C. Relevance of Practice of Non-State Parties - Nationality Granted to Foundlings as Customary International Law

It should first be noted that, as summarised in Table 1, among the 142 states that have domestic foundling provisions as of February 2026, 77 states, or approximately 54%, are *not*, in fact, state parties to the *1961 Convention*. In addition to the laws and practice of state parties to the *1961 Convention*, this article refers to nationality laws and legal precedents in several non-state parties to the *1961 Convention*, such as Japan,³⁷ France and the USA. This is because the article asserts that Article 2 of the *1961 Convention* codifies a customary law norm granting nationality to foundlings that had already existed at the time the Convention was drafted.³⁸

32 ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties with Commentaries' in Report of the International Law Commission, A/73/10 (70th session, 2018) <https://legal.un.org/ilc/texts/1_11.shtml>.

33 It is noted that the ILC Commentary on the Draft Conclusion 4 at paragraph 18 states 'the enactment of domestic legislation (...) *for the purpose of implementing a treaty*' constitutes 'subsequent practice', thus it is arguable that nationality law provisions that had already existed before a particular country's accession to the *1961 Convention* might not count as 'subsequent practice'. Nevertheless, it is recalled here that Article 2 of the *1961 Convention* (foundling provision) is a codification of a principle already common in nationality laws around the world at the time of drafting. It is thus reasonable to refer to nationality laws adopted before the countries' accession to the *1961 Convention* as 'subsequent practice'.

34 See also for example Irina Buga, 'The meaning of "practice", in *Modification of treaties by subsequent practice* (OUP 2018) 25.

35 See also Goodwin-Gill, 'The Search' (n 16) 210, and Dunlop, 'Applying the Rule of Treaty Interpretation' (n 16) 57 among others.

36 Goodwin- Gill promotes a third way of characterizing the interpretative value of domestic judicial decisions, i.e. as 'subsidiary means for the determination of rules of law' under Article 38(1)(d) of the *ICJ Statute*. Goodwin- Gill, 'The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law' ('Sources') 69 *International and Comparative Law Quarterly* 1(2020) 31.

37 Japanese courts have issued several judgments and rulings that are considered exemplary at the global level, as referred to in sec 3 and 4 below. See Shoichi Kidana, *Chikujo kokusekiho – Kadai no kaimei to jobun no kaisetsu [Nationality Act on an Article-by-Article Basis – Clarification of Issues and Commentaries on the Articles]* (Nihon kajo shuppan 2021) 319-329. See also Yasuhiro Okuda, *Kazoku to kokuseki [Family and Nationality]* (Akashi Shoten 2017); Ayane Odagawa and Sosuke Seki eds., *Typology of Stateless Persons in Japan* (UNHCR Japan 2017) <<https://www.refworld.org/reference/countryrep/unhcr/2017/en/121868>>.

38 This was also already asserted ('arguably') by Laura van Waas, *Nationality Matters* (Intersentia 2008) 70-71 and 90.

Table 1: UN Member States that are Parties/Non-State Parties to the 1961 Convention with Foundling Provisions(as of 13 December 2024)

1961 Convention State parties	1961 Convention Non-State parties	Total no. of UN Member States
82 (42% out of 193)	111 (58% out of 193)	193
States with foundling provisions	States without foundling provisions	
142 (74% out of 193)	51 (26% out of 193)	
1961 Convention State Parties with Foundling Provisions	1961 Convention Non-State Parties with Foundling Provisions	Total no. of UN Member States with Foundling Provisions
65 (46% out of 142)	77 (54% out of 142)	142 (74% out of 193 States)

Customary international law arises when there is general (widespread and consistent) state practice accepted as law (*opinio juris*).³⁹ The prevention of statelessness itself is regarded as a fundamental principle of international law,⁴⁰ and assertions are made that it is now part of the norms of customary international law.⁴¹ Reservations might be expressed as to whether the grant of nationality to all children born in the territory, otherwise stateless, has actually attained the status of customary law norm due to the gaps in nationality laws and practice. However, William Thomas Worster asserts, for example, that, with the UNHCR's #IBelong Campaign creating momentum, it can now be confidently concluded that state practice and *opinio juris* support the customary norm, with states increasingly reforming their practices and acknowledging their statelessness prevention obligations, and divergent practice widely characterised as wrongful.⁴² While the number of state parties to the *1961 Convention* remains relatively small, it has more than doubled since UNHCR launched an accession campaign in 2010, i.e. from 37 States as of 1 October 2010 to 82 as of February 2026. The right to acquire nationality is enshrined in a number of international and regional treaties and other instruments, including in Article 15 of the *Universal Declaration of Human Rights*⁴³ as well as Article 7(1) of the *CRC* and Article 24(3) of the *International Covenant on Civil and Political Rights* ('*ICCPR*')⁴⁴ and is, therefore, considered a 'fundamental human right'.⁴⁵ In particular, Article 7(1) of *CRC*, contracted by 192 UN member states, stipulates 'the child shall be registered immediately after birth and shall have

39 Statute of the International Court of Justice, Article 38(1)(b). Conclusion 2 and 8, of the ILC *Draft Conclusions on the Identification of Customary International Law* (2018) <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf>.

40 See for example UN General Assembly, *Resolution 50/152* (1995) para 16 'calls upon States to adopt nationality legislation with a view to reducing statelessness, consistent with the *fundamental principles of international law* (...)' <<https://www.refworld.org/legal/resolution/unga/1996/en/17284>>.

41 See for example the UNHCR-convened expert meeting 'Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality' ('*Tunis Conclusions*') (March 2014) para 2; Ineta Ziemele, *Commentary on the United Nations Convention on the Rights of the Child: Article 7 The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents* (Martinus Nijhoff 2007) 25; William Thomas Worster, 'Customary International Law Requiring States to Grant Nationality to Stateless Children Born in Their Territory', *Statelessness & Citizenship Review* 4(1) (2022) 113-139.

42 Worster (n 41) 116.

43 While UDHR is non-binding, some of the norms it contains are now considered to constitute customary international law or general principles of law. See for example James Crawford and Ian Brownlie, *Brownlie's principles of public international law* (Ninth edition 2019 OUP) 612.

44 See for example Hajime Akiyama, 'Jiyuken Kiyaku ni okeru kodomo no kokuseki shutokuken to kokka no gimu – Jiyuken Kiyaku dai 2 jo no kanten kara' [The right of the child to acquire nationality under the ICCPR and states' duties – From the perspective of Article 2 of the ICCPR] (2019) 30 *Kokusaijinken [Journal of International Human Rights]* 115-119.

45 See for example a series of the resolutions adopted by the UN Human Rights Council, including Resolution 32/5 (2016) para 1.

(...) the right to acquire a nationality'.⁴⁶ It is 'never in the best interests of the child to be rendered stateless'—the primary consideration for States in all actions concerning children as stipulated in Article 3 of the *CRC*.⁴⁷ The right to nationality is enshrined in different regional instruments including in Article 6(3) and (4) of the 1990 *African Charter on the Rights and Welfare of the Child* ('ACRWC'), which explicitly obliges states to adopt legislation under which a child would acquire nationality of the country where born if she or he 'is not granted nationality by any other state in accordance with its laws'. Further, Article 5(2) of the 2024 *Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa* of the African Union (AU) is a foundling provision granting nationality to a child of unknown parents.⁴⁸

Possible disputes over the customary law nature of nationality granted to all children born in the territory who are otherwise stateless cannot be fully resolved in this article. However, this article asserts that *at least the* nationality granted to *foundlings* found in the territory of the state can comfortably be described as a norm of international customary law for the following reasons. Article 2 of the 1961 *Convention* is, together with Article 14 of the 1930 *Hague Convention on Certain Questions Relating to the Conflict of Nationality Law* ('1930 Convention'), a *codification* of the provisions commonly found among the nationality laws of states at the time of drafting granting nationality to foundlings. At the time of the *travaux* of the 1931 *Convention* and 1961 *Convention*, foundling provisions were already *more common* than the provisions to grant nationality to children born in the territory of the state whose parents are *known* but cannot pass on nationality to their children.⁴⁹ As Roberto Córdova, in preparing the grounds for the 1961 *Convention* stated:

[P]ractically all national legislations contain provisions which, by means of the presumption assimilate the foundlings to those persons which have been born in the territory of the state where they are found. This fact has actually placed foundlings in a better situation than other stateless persons, since *practically all* legislations extend to them the *jus soli* principle (emphasis added).⁵⁰

As summarised in Table 1 above, at the time of writing (13 December 2024), at least 142 states (approx. 74%) out of 193 member states of the United Nations have explicit 'foundling provisions' equivalent to Article 2 of the 1961 *Convention* in their legislation. This is *significantly more* than the number of states with provisions granting nationality to children otherwise stateless (including when parents are stateless) born in the territory, which is at least 92 states or 48% out of 193 UN member states (as of 2022, as identified by GLOBALCIT).⁵¹

46 That said, Article 7(2) of *CRC* has a compromising phrase allowing the implementation of these rights to be 'in accordance with their national law', leading to the evaluation by John Tobin and others that Article 7(1) only creates 'a strong presumption rather than an absolute right against statelessness for children'. John Tobin eds, *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 255. Nevertheless, Article 4 of *CRC* obliges state parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the *CRC* rights. The *CRC* Committee also advises in its General Comment No. 23 para 24 that states are 'to ensure that every child has a nationality when he or she is born. A key measure is the *conferral of nationality* to a child born on the territory of the state (...) if the child would otherwise be stateless.' Joint General Comment No 4 of CMW and No 23 of the *CRC* (2017), CMW/C/GC/4-CRC/C/GC/23.

47 See for example the *Tunis Conclusions* (n 41) para 62.

48 Author thanks Dr. Bronwen Manby for providing a copy of the final version of the Protocol.

49 See the states' responses to the questionnaire on their existing nationality law provisions recorded in the League of Nations, *Bases of Discussion Drawn up for the Conference by the Preparatory Committee*, Volume I Nationality (Volume I-C.73.M.38.1929. V-BI-Geneva) (Conference for the Codification of International Law, May 1929).

50 Roberto Córdova, *Nationality, including Statelessness-Report on the Elimination or Reduction of Statelessness* (1953) 176. See also Manley O. Hudson, *Report on Nationality, including Statelessness*, in Yearbook of the International Law Commission (ILC 21 February 1952) 18 and 44. Brownlie also points this out. Ian Brownlie, *Principles of Public International Law* (OUP 2003) 383.

51 Non-UN member states excluded for statistical consistency. Vink, Maarten, Luuk van der Baaren, Rainer Bauböck, Jelena Džankić, Iseult Honohan and Bronwen Manby (2023). Global Citizenship Observatory (GLOBALCIT) Citizenship Law Dataset, v2.0, Country-Year-Mode Data (Acquisition). <<https://hdl.handle.net/1814/73190>>.

The drafting process shows that the formulation of Article 14 of the *1930 Convention* and Article 2 of the *1961 Convention* (on foundlings) was much less controversial than that of Article 15 of the former and Article 1 of the latter Convention (on otherwise-stateless children). In fact, the drafting process of reaching the final version of Article 2 of the *1961 Convention* reflects some of the drafters' intention to impose on states a *stronger obligation* to grant nationality automatically to *foundlings* under Article 2, as opposed to the obligation towards children born in the territory 'otherwise stateless' under Article 1(2) of the same, which allows for non-automatic grant that might leave some children stateless⁵² until they reach 18 years of age. While this appears to be mainly due to the common assumption that foundlings were highly likely to be children of nationals,⁵³ the drafters were also aware of the possibilities that the parents were foreigners, but still *recognised the particular vulnerabilities of foundlings* due to the absence of parents legally responsible for their protection/care, justifying the stronger footing in their views. The Representative of Denmark, for example, stated:

'[E]ven if a foundling were the child of *foreign parents*, those *parents would not be present to undertake the child's education*. Instead, he would be educated in the national institutions of the state in whose territory he had been found, and it was surely better that the child should *acquire at birth* the nationality of that country than that he should have to wait *until the age of eighteen* (emphasis added).'⁵⁴

In practice, a number of states *without* explicit foundling provisions in their nationality laws have granted nationality to foundlings, including in Asia, with a relatively low ratio of states with foundling provisions (see Table 1 above). The Philippines, for example, did not have a provision equivalent to Article 2 of the *1961 Convention* in its domestic law until it acceded to the *1961 Convention* in March 2022 and enacted the relevant legislation⁵⁵ in May 2022. The Philippines' 2016 Supreme Court ruling⁵⁶ acknowledged that children whose parents are both unknown and who were found in the territory had traditionally been treated as Filipino nationals, stating that granting nationality to foundlings is part of the *norms of customary international law* as a general practice with *opinio juris*, which led to the adoption of the above-mentioned legislation. The low ratio of states with foundling provisions in the Americas (**Table 2**) can be explained by the widespread existence of unconditional *jus soli* provisions. A number of states in Africa, such as Côte d'Ivoire, have pledged to introduce explicit foundling provisions in recent years.⁵⁷

Based on the above, there is sufficient basis to assert that at least *granting nationality to foundlings* is a customary law norm, with the norm being acknowledged as common since before the adoption of the *1961 Convention*, with states engaging in this practice under a sense of obligation. The practice of non-State parties to the *1961 Convention* is, therefore, relevant in clarifying the concept of a 'foundling' in Article 2 of the same.

52 See sections 3.4.5.1 to 3.4.5.2 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 96-99. Article 2 of the Draft Convention on the Reduction of Future Statelessness adopted by ILC in 1954 was dependent on its Article 1 in the sense that the *jus soli* rule of Article 1 (nationality grant for an otherwise stateless child born in the territory) was to be extended to foundlings. The drafters disconnected those two provisions in the final version of the *1961 Convention*.

53 For example, Germany stated 'it was very probable that a foundling was the child of nationals of the country in whose territory he was found. For that reason alone, it was justifiable to place the deserted child in a *better position than a stateless person*' (emphasis added). United Nations, Summary Records, 5th Meeting of the Committee of the Whole held on 3 April 1959, A/CONF.9/C.1/SR.5, UN Conference on the Elimination or Reduction of Future Statelessness, Geneva, 1959 (3 April 1959) 8 <http://legal.un.org/docs/?path=../diplomaticconferences/1959_statelessness/docs/english/vol_2/a_conf9_c1_sr5.pdf&lang=E>.

54 The reference 'than that he should have to wait *until the age of eighteen*' is in relation to the fact that children born in the territory whose parents are *known* (not unknown like those of foundlings) and would otherwise be stateless might have had to wait for the maximum period of 18 years to acquire nationality under the provision which became Article 1 of the 1961 Convention. Ibid 8-9.

55 2022 *Foundling Recognition and Protection Act* (see Table 4).

56 *Poe-Llamanzares v Commission on Elections* (Supreme Court of the Philippines, GR No.221697/221698-700, 8 March 2016) 782 Phil 292, 13 and 29.

57 UNHCR, *High-Level Segment on Statelessness: Results and Highlights* (2020).

Table 2: Foundling Provisions of UN Member States by Region

Note: As of 13 December 2024. Only states with explicit foundling provisions are included. Several states with provisions which possibly or indirectly apply to foundlings excluded, e.g. Greece's nationality law Article 1(2) (c), which grants nationality to a 'child is of unknown citizenship' born in Greece.

By UNHCR-classified Regions	No. of UN member States with Explicit Foundling Provisions	Total no. of UN Member States in the Region	Percentage of States with Foundling Provisions
Middle East and North Africa	17	18	94%
Europe	46	48	96%
Africa	34	48	71%
Asia and the Pacific	26	44	59%
Americas	19	35	54%
Total	142	193	74%

D. Reference to Other Treaties including CRC

Article 31(3)(c) of *VCLT* provides that, along with context, 'any relevant rules of international law applicable in the relations between the parties' shall be 'taken into account'. According to ILC, 'relevant rules' encompass 'all the sources of international law, including custom, general principles, and, where applicable, other treaties'.⁵⁸ Mark E Villiger noted that '[t]hese rules need have no particular relationship with the treaty other than assisting in the interpretation of its terms. On the whole, they will provide a contemporary interpretation of the ordinary meaning of a term'⁵⁹ and referenced the *ICJ Advisory Opinion on Namibia* above.

This article in section III.C refers to the provisions of the *1930 Convention* to infer the basic definition of the term 'foundling'. The *1930 Convention* is the first international treaty to focus on the prevention and reduction of statelessness, and its Article 14 codifies the grant of nationality to foundlings (determined to be an international customary law norm in section II.C above). The provisions of the *1930 Convention* were referred to throughout the drafting process when developing the *1961 Convention*,⁶⁰ thus providing useful background to examine the provisions of the *1961 Convention*. Given that all contracting states (82 states) to the *1961 Convention* are also parties to the *CRC*, Benyam Mezmur, among others, refers to Article 7 of the *CRC* as being of paramount importance in determining the scope of Articles 1 to 4 of the *1961 Convention* (along with regional instruments, such as the 1990 *ACRWC*). This article, therefore, makes reference to other relevant treaties and standards related to the right to nationality (as referred to in sections II.A, B and C)⁶¹, when interpreting Article 2 of the *1961 Convention*.

⁵⁸ ILC, *Fragmentation of International Law* (n 15), para 426(b) 87. Section 4.4 <https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf>. Gardiner, *Treaty Interpretation* (n 15) 326.

⁵⁹ Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 432 (footnotes omitted).

⁶⁰ United Nations, Summary Records, 9th Plenary Meeting held on 15 April 1959, A/CONF.9/SR.9, UN Conference on the Elimination or Reduction of Future Statelessness, Geneva, 1959 and New York, 1961 (15 April 1959) 3-4. The *1930 Convention* is also referred to throughout Córdova, Nationality, including Statelessness (n 50) and Hudson, Report on Nationality (n 50); United Nations Economic and Social Council, The Problem of Statelessness-Consolidated Report by the Secretary-General, A/CN.4/56 and Add.1 (26 May 1952); United Nations, A Study of Statelessness (August 1949). van Waas, Nationality Matters (n 38) 41-42.

⁶¹ See Laura van Waas, 'The UN statelessness conventions', Alice Edwards and Laura van Waas eds., *Nationality and Statelessness Under International Law* (Cambridge University Press 2014) 86, footnote 89.

E. Reference to Soft Law Standards

This article will also refer to so called soft law standards, mainly General Comments of the *CRC* Committee and the *UNHCR Guidelines No.4*. While ILC considers that the views of treaty bodies or international organizations are, in themselves, neither legally binding or constitute ‘subsequent practice’ under Article 31(3)(b) (or under Article 32) of *VCLT*, they are given considerable weight by ILC, States and courts in interpreting the relevant treaties.

With regard to the views of expert treaty bodies, Conclusion 13 (3) of the *ILC 2018 Draft Conclusions on subsequent practice* states that:

‘[a] pronouncement of an expert treaty body may *give rise to, or refer to*, a subsequent agreement or subsequent practice by parties under Article 31, paragraph 3, or subsequent practice under Article 32 (Note: of *VCLT*; emphasis added).’

Further, treaty bodies’ pronouncements in themselves are often considered by courts as at least ‘supplementary means of interpretation’ under Article 32 of *VCLT*, and they also contribute to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty (as per Article 31[1]).⁶² Furthermore, the legal significance of the pronouncements of treaty bodies has also been characterised as ‘subsidiary means for the determination of the rules of law’ under Article 38(1)(d) of the *ICJ Statute*.⁶³

On the other hand, UNHCR does not have an institutional role equivalent to that of a ‘treaty supervisory body’ for either of the *1951 Convention* (despite its Article 35) and its *1967 Protocol*, the *1954 Convention* and *1961 Convention*. Nevertheless, as Dunlop states, whilst in the context of the *1951 Convention*, the acceptance of the handbook (and guidelines) as evidence of State practice is significant:

UNHCR has effectively positioned itself as a potential source of agreed interpretations that reflect the general position of Contracting States. This is a more robust authority than UNHCR would have if its statements were considered merely on par with State practice. Rather than being viewed as one voice amongst 149, UNHCR is considered capable of synthesising and compiling the practice of multiple parties.⁶⁴

The *UNHCR Guidelines on Statelessness No.1 to No.5* were issued between 2012 and 2020 (the first three having been combined into the *Handbook on the Protection of Stateless Persons* in 2014) pursuant to UNHCR’s mandate responsibilities to address statelessness given by the General Assembly.⁶⁵ The *ILC Draft Conclusion 5(2)* states that while the conduct of non-state actors, like those of international organisations such as UNHCR, do not constitute ‘subsequent practice’ per se under Articles 31 and 32 of the *VCLT*;

[s]uch conduct may, however, be relevant *when assessing the subsequent practice* of parties to a treaty (emphasis added).

⁶² Para 24 of the Commentary to the ILC Draft Conclusion 13; see Yuji Iwasawa (the then Chairperson of the Human Rights Committee (the President of ICJ as of March 2025), *Jiyukenkiyaku iinkai no kiyaku kaishaku no hoteki igi* (the legal significance of the ICCPR interpretation by the Human Rights Committee [HRC]) Sekai-ho-nenpo No.29 (2010) 50-85.

⁶³ Ibid, para 24.

⁶⁴ Dunlop, ‘Applying the Rule of Treaty Interpretation’ (n 16) 61.

⁶⁵ See the preface parts of each guideline. Article 11 and 20 of the *1961 Convention* envisages the establishment within the framework of the United Nations a body to which a person claiming the benefit of the *1961 Convention* may apply for the examination of his claim and for assistance in presenting it to the appropriate authority. The UN General Assembly assigned the mandate to UNHCR as per Article 11 and 20 of the *1961 Convention* by Resolutions 3274 (XXIV) of 1974 and 31/36 of 1976. The UNHCR’s mandate to address statelessness has been expanded through subsequent GA Resolutions 49/169 of 1994 and 50/152 of 1995 and now covers not only state parties to the two statelessness Conventions but the entire world. Subsequently, in Resolution 61/137 of 2006, the General Assembly endorsed Executive Committee Conclusion 106 which sets out four broad areas of responsibility for UNHCR: the identification, prevention and reduction of statelessness and the protection of stateless persons. See also Mark Manly, ‘UNHCR’s Mandate and Activities to Address Statelessness’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 95-97.

As the first example of such conduct, the Commentary to the Draft Conclusion 5(2) paragraph 14 refers to the UNHCR's Handbook related to the *1951 Convention*;

Reports by international organisations, which are prepared on the basis of a mandate to provide accounts on State practice in a particular field, may be very important when assessing such practice. For example, the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (...) is an important work that reflects and thus provides guidance for State practice (emphasis added).

Further, some authors characterise the interpretative value of UNHCR guidance as possibly falling within the scope of supplementary means of interpretation under Article 32 of the VCLT, and Goodwin-Gill as 'subsidiary means' under Article 38(1)(d) of the ICJ Statute.⁶⁶

While the above was said about the *1951 Convention*-related handbook and guidelines, and much less has been said about the UNHCR's handbook and guidelines on statelessness published only in recent years, this description by analogy can be applicable to these materials. Indeed, for example, a decision by the Hungarian Constitutional Court on 23 February 2015 commented on the authoritative nature of UNHCR's guidelines on statelessness, stating that:

[W]hile the [UNHCR] Guidelines belong to the so-called non-binding international instruments, it is nevertheless indisputable that UNHCR is the most authentic entity to interpret international legal questions and practice related to the Statelessness Convention.⁶⁷

Essentially, the reasons why states and courts generally do take into consideration soft-law standards such as the recommendations of treaty bodies or UNHCR guidelines are not because they are 'legally binding' (indeed, they are not) but because these standards are developed for the purpose of ensuring the proper and harmonised interpretation,⁶⁸ and because of the evolutive nature of international human rights law.

F. Conclusions of Section II: Need for evolutionary and teleological interpretation

This section explained how *VCLT* rules would be applied in interpreting Article 2 of the *1961 Convention*. Section II.A asserted that as an international human rights treaty, the *Convention* warranted an evolutionary and teleological approach to ensure an effective realisation of its objective, which is to reduce statelessness. Section II.B explained how the comparative analysis of 142 states' founding provisions and practice in some states (discussed in sections III and IV below) were relevant in interpreting the *1961 Convention*, which was because domestic legislation and judicial precedents qualified as subsequent practice either under Article 31(3)(b) or as supplementary means under Article 32 of *VCLT*. Section II.C asserted that the grant of nationality to foundlings is a customary international law norm. Thus, the legislation/practices of *non-state* parties to the *1961 Convention* (referred to in sections III and IV below) are relevant in interpreting its Article 2. Section II.D explained how provisions of other treaties, including the *1930 Convention* and the *CRC*, are to be considered as per Article 31(3)(c) of *VCLT*. Section II.E asserted that the soft law standards, such as the CRC Committee's *General Comments* and *UNHCR Guidelines No.4*, that reflect the subsequent

66 Gardiner (n 15) 402; see also Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 627; 'Returning to UNHCR, it can be appreciated that its views, guidelines and interventions could occupy a similar place, even if it is a different type of treaty supervisory body (...)'. Goodwin-Gill, 'Sources' (n 36) 31.

67 'Resolution 6/2015 (II.25.) of the Constitutional Court on the determination whether the term 'lawfully' in section 76(1) of Act II of 2007 on the Conditions of Entry and Stay of Third-Country Nationals is contrary to the Fundamental Act and the annulment thereof' (25 February 2015) <<http://www.refworld.org/docid/5542301a4.html>>.

68 This is well stated by ICJ when confirming that pronouncements of the Human Rights Committee are relevant for the purpose of interpreting the ICCPR: 'Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body (...). The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.' Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment (30 November 2010) 664. <<https://www.icj-cij.org/sites/default/files/case-related/103/103-20101130-JUD-01-00-EN.pdf>>.

development of international human rights law, are to be taken into consideration for the harmonised but evolutionary and inclusive interpretation of the *1961 Convention* to best achieve its objective.

III. BASIC DEFINITION OF ‘FOUNDLING’

Before making a detailed analysis of the maximum age of a foundling in the next section, we must start by first clarifying the basic definition of the term ‘foundling’. The following sub-sections focus on the general meaning of the term ‘foundling’. The issue of the maximum age is unavoidably touched upon, as the age of a foundling is an integral part of the foundling definition.

A. Ordinary Meaning

Article 31(1) of *VCLT* states ‘A treaty shall be interpreted in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and *in the light of its object and purpose* (emphasis added).’ Courts and authorities often make an attempt at finding an ordinary meaning ‘by use of a dictionary or, particularly in technical areas, specialist books that define the term in issue.’⁶⁹ It was thus decided to first refer to dictionaries, while keeping in mind that ‘the reference to “ordinary meaning” *did not mandate a narrow dictionary approach*’.⁷⁰

The English term ‘foundling’ is defined in non-law dictionaries as ‘a *baby* that has been *abandoned* by its parents, often in a public place, and that has then been found by someone’⁷¹ or ‘an *infant* found after its *unknown parents* have abandoned it;’⁷² and ‘a young child who is left by its parents and then found and cared for by someone else.’⁷³ The *Black’s Law Dictionary* also defines it as ‘A deserted or exposed *infant*; a *child* found without a parent or guardian, its relatives being *unknown*’.⁷⁴ Thus, while there is no consistent definition within ordinary non-law and law dictionaries, especially in terms of the adjectives, i.e. ‘abandoned’ or ‘unknown parents’ and ‘left by its parents’ etc., the clear understanding is that the term ‘foundling’ has the element of being a *child*, and *not* an adult.⁷⁵

B. Travaux Préparatoires

The *travaux* are given particular importance as a non-exhaustive reference to supplementary means of interpretation under Article 32 of the *VCLT*. Nevertheless, in the accessible materials documenting the drafting process of both the *1930 Convention* and the *1961 Convention*, there was *no particular discussion*⁷⁶ on the definition of a foundling per se. Rather, during the UN Conference on the Elimination or Reduction of Future Statelessness, Geneva, 1959, the main points of dispute concerned the legal technique for granting nationality to foundlings and what happens when a parent or birth abroad is discovered.⁷⁷

⁶⁹ Gardiner, *Treaty Interpretation* (n 15) 181.

⁷⁰ Ibid.

⁷¹ Collins Dictionary <<https://www.collinsdictionary.com/dictionary/english/foundling>>.

⁷² Merriam Webster Dictionary <<https://www.merriam-webster.com/dictionary/foundling>>.

⁷³ The Cambridge Dictionary <<https://dictionary.cambridge.org/ja/dictionary/english/foundling>>.

⁷⁴ Black’s Law Dictionary Online, <<https://thelawdictionary.org/foundling/>>.

⁷⁵ In this regard, it is notable that the Philippines’ Foundling Recognition and Protection Act (2022) is the only legislation known to the author which includes persons above 18 years of age in the concept of ‘foundling’. See Table 4.

⁷⁶ For details, please refer to the dedicated section on the evolution of the foundling definition during the *travaux* in section 3.4 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 87-103.

⁷⁷ Detailed in chapter 7 of *ibid*.

That said, one of the preparatory studies leading up to the drafting conferences does indeed contain a mention '[a] foundling being, *by definition, without known parents and without a known birthplace* (...)'.⁷⁸ This gives rise to the assumption that a foundling under Article 2 of the *1961 Convention* is of unknown parents *and* unknown birthplace. Nevertheless, the same study as well as an earlier study does contain references to distinctive terms, i.e. (a) 'a child of unknown parents *born* in the territory' and (b) 'a foundling *found* in the territory,' without clarifying the relationship between the two.⁷⁹ This distinction between the two categories is indeed evident in Article 14 of the *1930 Convention*. Thus, examining Article 14 of the *1930 Convention* provides a useful background to infer the definition of the term foundling under the *1961 Convention*, as also mentioned in section II.D above.

C. Evolution - From Article 14 of the 1930 Convention to Article 2 of the 1961 Convention

Article 14 of the *1930 Convention* provides in the first sentence that 'A *child whose parents* are both *unknown* shall have the nationality of the country of birth (emphasis added)', while stating in the third sentence that 'A *foundling* is, until the contrary is proved, presumed to have been born on the territory of the state in which it was found (emphasis added)'. While it is not explicitly written, from the context, it can be inferred that the parents of a 'foundling', i.e. category (b), are *unknown*. In other words, the *1930 Convention* makes a distinction between two categories:

(a) a *child whose parents* are *unknown* who is *known* to have been *born* in the territory (**Note:** Typically a child born of an 'anonymous birth' scheme, see sec III. G.[ii] below) and

(b) a *foundling* whose parents are *unknown* who is found on the territory, but whose *birthplace* is *unknown* (**Note:** Typically, a child abandoned on a street, church or another place, as in sec III.G[i] below)

The *common feature* between (a) and (b) is *unknown parentage*. The difference between the two categories is whether the concerned person's *country of birth* is *known*.

Article 2 of the *1961 Convention*, on the other hand, only says '*foundling found* in the territory' (as in category [b] of the *1930 Convention*), with *no reference* to a 'child of unknown parents born in the territory' (category (a) of the *1930 Convention*). One might wonder then - where do 'children of unknown parents born in the territory' (category [a]) fit in, within the *1961 Convention*? One might wonder whether they are covered by Article 1 of the *1961 Convention*, which obliges states to grant its nationality to 'a person born in its territory who would otherwise be stateless'. Nevertheless, this cannot be the case, because, as discussed in section II.C above, during the *travaux*, states clearly distinguished children *without parents* responsible for their protection, covered under Article 2, from children of *known* parents, otherwise stateless, covered under Article 1, and imposed on States a stronger obligation towards the former.⁸⁰

This means that the categories (a) and (b), which were separately categorised in Article 14 of the *1930 Convention*, were '*merged*' in Article 2 of the *1961 Convention*.⁸¹ Therefore, the term 'foundling' in Article 2 of the *1961 Convention* encompasses both categories (a) and (b) under the *1930 Convention* above. The term 'found' on the territory in Article 2 of the *1961 Convention* is therefore interpreted to encompass 'having been born' in the territory.

⁷⁸ Córdova, *Nationality, including Statelessness* (n 50) 176.

⁷⁹ *ibid.* United Nations, *A Study of Statelessness* (August 1949); Hudson, *Report on Nationality* (n 50).

⁸⁰ For more details, see sec 3.4.7 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 100-101.

⁸¹ See more reasonings to lead to this conclusion in 3.4.1-3.4.6 of *ibid* (n 2) 87-99.

D. Equivalents of 'Foundling' in Other UN Language Versions of the 1961 Convention

In addition, while four versions of the 1961 Convention in UN official languages (excluding Arabic) are equally authentic, each has slightly different connotations. The French version refers to '*enfant trouvé*' (literally 'child who is found'), while the Spanish version uses the term '*un expósito*' (literally 'exposed child'); the Russian version adopts the term 'Найденный' (literally 'found child') deriving from the word 'be found' in Russian, and the Chinese version uses the term '弃儿' ('abandoned child').

As noted earlier, the term 'abandoned child' is often used interchangeably with 'foundling' in general terms, but it is only referenced in the Chinese definition. This is one of the grounds which gives rise to a doubt whether being 'abandoned' is a requisite for being a foundling.

E. English Language Nationality Laws - Rarely Use 'Foundling'

The author next compared the existing nationality laws of 142 states among 193 UN member states which have foundling provisions. Among the nationality laws of 30 states⁸² whose texts are originally drafted in English, the term 'foundling' was used by *only two states* in the main text⁸³ of the foundling provisions.⁸⁴ 13 states out of 30 states rather used terms such as 'a child' (expressed either as 'newborn' or equivalent, 'infant', 'child' or 'minor') whose parents are unknown in their foundling provisions. The term 'abandoned' was used in 12 other states, 'deserted' in seven states and 'exposed' in two states.

82 The original list of 27 states contained in sec 3.3.1 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 83 was the following: i.e. Antigua and Barbuda (sec 3[1]), Antigua and Barbuda Citizenship Act <<http://laws.gov.ag/wp-content/uploads/2018/08/cap-22.pdf>>; Australia (sec 14) Australian Citizenship Act, 2007 <<https://www.legislation.gov.au/C2007A00020/latest/text>>; Barbados Sec 4(1), Barbados Citizenship Act, Cap. 186, 30 November 1966 (as amended up to 1982) <<http://104.238.85.55/en/showdoc/cs/186>>; Belize (sec 7), Belizean Nationality Act, 31 December 2000, <<http://www.refworld.org/docid/4e5ccdc02.html>>; Canada (sec 4[1]), Canadian Citizenship Act, R.S.C., 1985, c. C-29 <<http://laws-lois.justice.gc.ca/eng/acts/C-29/page-1.html#h-3A>>; Eswatini (formerly Swaziland) (sec 47), Constitution of the Kingdom of Swaziland Act 2005 <<http://www.refworld.org/docid/4c598cc72.html>>; Fiji (sec 7), Citizenship of Fiji Decree 2009, Decree No. 23, 8 July 2009 <<https://laws.gov.fj/Acts/DisplayAct/3173>>; Ghana (art 6[3]), Constitution of the Republic of Ghana (Amendment) Act, 1996 <https://data.globalcit.eu/NationalDB/docs/Ghana-Constitution-of-Ghana-Amendment-Act-1996%20%5bENGLISH%5d_1.pdf>; and Citizenship Act of 2000, 29 December 2000 <https://data.globalcit.eu/NationalDB/docs/Ghana_Citizenship_Act_with_forms_591_2000%20%5bENGLISH%5d_1.pdf>; Guyana (sec 8[2]) Guyana Citizenship Act, Chap. 14:01, 26 May 1966 <https://data.globalcit.eu/NationalDB/docs/Guyana%20Citizenship%20Act_consolidated%202012_compressed.pdf>; Ireland (sec 10), Irish Nationality and Citizenship Act 1956 <https://www.refworld.org/topic/50ffbc524d.50ffbc525c.3ae6b4ebc.0..LEGISLATION_IRL.html>; Kenya (art 14[4]), The Constitution of Kenya, 27 August 2010 <<https://www.refworld.org/docid/4c8508822.html>>; Malta (art 17[3]), Maltese Citizenship Act 1965 (as amended up to 2020) <<https://legislation.mt/eli/cap/188/eng/pdf>>; Mauritius (Sec 2[2][e]), Citizenship Act 1968, RL 3/585, 14 December 1968 <<http://www.refworld.org/docid/4c592d0e2.html>>; New Zealand (sec 6[3] [b][i] and [j]), Citizenship Act 1977 (1977 No 61) <<http://www.legislation.govt.nz/act/public/1977/0061/latest/whole.html#DLM443841>>; Papua New Guinea (sec 77[1]) and 77[2]), Constitution of the Independent State of Papua New Guinea, 16 September 1975 <<http://www.parliament.gov.pg/images/misc/PNG-CONSTITUTION.pdf>>; Rwanda (art 9), Organic Law N° 30/2008 of 25/07/2008 relating to Rwandan Nationality, 25 July 2008 <<http://www.refworld.org/docid/4c569f4dc.html>>; Saint Kitts and Nevis (sec 95[5][c]) Constitution of Saint Kitts and Nevis, 10 September 1983 <<https://www.refworld.org/docid/3ae6b50214.html>>; and Saint Christopher and Nevis Citizenship Act (as amended up to 2017) <<https://aglskn.info/documents/Act17TOC/Ch%2001.05%20Saint%20Christopher%20and%20Nevis%20Citizenship%20Act.pdf>>; Saint Lucia (sec 7[2][a]) Citizenship of Saint Lucia Act <<http://attorneygeneralchambers.com/laws-of-saint-lucia/citizenship-of-saint-lucia-act/section-7>>; Singapore (Third Schedule, art 140 [13]) Constitution of the Republic of Singapore, 1 October 2015 (as amended up to 2020) <https://data.globalcit.eu/NationalDB/docs/2020_Constitution%20of%20the%20Republic%20of%20Singapore.pdf>; South Sudan (sec 8[4]), The Nationality Act, 2011, 7 July 2011 <<http://www.refworld.org/docid/4e94318f2.html>>; Sri Lanka (sec 7), Citizenship Act, 15 November 1948 <<https://www.refworld.org/docid/3ae6b50414.html>>; Tuvalu (art 43[2]), Constitution of Tuvalu, 15 September 1986 <<http://www.refworld.org/docid/3ae6b5554.html>>; Uganda (art 11[1]), Constitution of the Republic of Uganda <<http://citizenshiprightsfrfrica.org/wp-content/uploads/2016/05/Uganda-Constitution-1995-as-amended-2005.pdf>>; United Kingdom of Great Britain and Northern Ireland (sec 1[2]), British Nationality Act 1981 <<https://www.legislation.gov.uk/ukpga/1981/61>>; USA (Sec 301[f]), Zambia (art 35[2]), Constitution of Zambia (Amendment) [No. 2 of 2016 9] <<https://www.refworld.org/legal/legislation/natlegbod/1991/en/15038>>; Zimbabwe (art 36[3]), Constitution of Zimbabwe Amendment (No. 20) Act, 2013, 22 May 2013 <<http://www.refworld.org/docid/51ed090f4.html>>. Three additional States have been added for the purpose of this article, which are Grenada, the Philippines and Malaysia (see also n10). Grenada (sec 2[3]), Citizenship Act (as amended up to 2002) <https://data.globalcit.eu/NationalDB/docs/Citizenship%20Act%201976_consolidated%202002.pdf>; the Philippines (sec 3), Foundling Recognition and Protection Act (Republic Act 11767) (6 May 2022) <<https://www.officialgazette.gov.ph/downloads/2022/05may/20220506-RA-11767-RRD.pdf>>; and Malaysia (sec 19B, Part III of the Second Schedule), Federal Constitution (amended by Act A1752 Constitution [Amendment] Act 2025)

83 While so-called 'titles' of the provisions for several states contained the term 'foundling', this fact was not taken into consideration as their legal nature (effect or force) was not clear.

84 Papua New Guinea (sec 22) and Tuvalu (art 43).

F. Nationality Laws of 142 States Often Use Child of Unknown Parents

Many of the existing nationality laws drafted in the above-mentioned four UN official languages, in particular French, Spanish and Russian, use the terms equivalent to '(newborn, infant, child or minor) whose parents are both unknown', rather than the term used in Article 2 of the 1961 Convention in their respective versions, to express the concept equivalent to the term 'foundling'. The same applies to nationality laws drafted in languages other than the UN official languages, including in Article 1(2) of the Italian nationality law of 1992 that states '*figlio di ignoti*' (a son or daughter of unknown [parents]) and '*fubo ga tomo ni shirenai ko*' (a son or daughter both of whose parents are unknown) in Article 2(iii) of Japan's Nationality Act.

G. Categories of Cases Recognised as Foundlings

The next step is to provide a brief overview of legal precedents around the world where children were granted nationality based on foundling provisions,⁸⁵ in order to examine what it means to be 'foundlings' or of 'unknown parents', and whether every person of unknown parents always manages to be found in the territory when being a baby or a young child as commonly expected.

Abandoned babies: The most typical category of cases granted nationality based on foundling provisions worldwide, based on actual precedents, consists of babies of unknown parents and birthplaces who have been abandoned on streets, in front of religious institutions or hospitals, and in 'baby boxes/hatches' and so on. Indeed, as stated above, the term 'abandoned child' is often used interchangeably with the term 'foundling'. There are also common scenarios where the babies are considered to be of 'unknown parents' while their births in the territory are firmly established, as in categories (ii) and (iii) below.

Babies born of anonymous birth scheme: In a relatively small number of countries, 'anonymous birth' or 'confidential birth' systems allow the birth mother to choose to give birth without revealing her identity on the child's birth record or certificate or vis-à-vis the civil registration authorities. In France, women have long had the established choice to give birth anonymously, at least since around 1780, especially when it involved extramarital children, stigmatised at the time⁸⁶. In France and also in Italy and Germany, where an 'anonymous/confidential birth' regime is institutionalised, some hundreds of cases occur every year in which the biological mother of a child born in a medical or other facility is factually and to some extent 'known' to the medical personnel but legally 'unknown' to the competent authority for administering nationality laws. Some states explicitly provide for the application of the foundling provision to anonymous or confidential birth in their nationality laws.⁸⁷

Babies left behind in hospitals: In states where anonymous birth is not institutionalised, nationality has been granted based on foundling provisions where birth mothers do not necessarily 'abandon' their children on the street or baby hatches, but abscond after delivering their children at medical institutions, making it impossible to ascertain the mothers' identity or the fathers' identity. Such cases are observed, for example, in Hungary, Romania, and Japan (notably in a Supreme Court judgement containing an in-depth analysis of the meaning of 'unknown-ness' of parents).⁸⁸

Despite the above, there are many other categories of children who are often found at *much older* ages than babies or infants, and whose parents are still unknown.

⁸⁵ For more details and other (rarer) categories of cases, see sec.4.3., Kaneko-Iwase, *Nationality of Foundlings* (n 2) 118-158.

⁸⁶ Nadine Lefaucheur, 'The French "tradition" of anonymous birth: the lines of argument' 18 *International Journal of Law, Policy and the Family* (2004) 319-320.

⁸⁷ See Kaneko-Iwase, sec 4.3.10, *Nationality of Foundlings* (n 2) 147-152.

⁸⁸ Baby Andrew case, *Minshu* Vol 49, No 1, Supreme Court judgment of 27 January 1995 (*Heisei 7 nen*) 56. See sec 5.6.3 of Kaneko-Iwase (n 2) 205-218 for detailed analysis of this case and subsequent caselaw.

Informally adopted children: Even in the contemporary era, children who have been cared for by strangers after having been informally ‘adopted’ without legal process continue to be observed in industrialised countries such as Spain,⁸⁹ the United States,⁹⁰ Malaysia⁹¹ and Japan.⁹² These cases tend to occur in situations of unknown parentage at relatively older ages, as in the Spanish and Italian cases discussed in section IV.G.

Undocumented Parentage: Persons whose parentage ends up being undocumented have been recognised as being of unknown parents in countries such as Spain⁹³ and Japan.⁹⁴ In some of these cases, nationality has been confirmed for persons who have been cared for by their (presumed) biological parents whose identity could not be proven, or the parentage could not be established due to the parents’ death or other factors.

In Côte d’Ivoire, with the once-estimated 300,000 children of unknown parents, a number of them have likely become stateless due to informal adoption (category [iv] as noted above) and undocumented parentage (category [v]), including after having been orphaned. Some have been confirmed as having nationality under the Circular issued in 2019 by the Ministry of Justice and the direct application of Article 2 of the *1961 Convention*.⁹⁵

Persons Who Suffer Memory Loss or Are Mentally Disabled Whose Parents Cannot be Identified: In Albania, the registration rules applicable to children of unknown parents found in the territory apply to: ‘children with unknown parents who suffer *memory loss or are mentally disabled* and cannot be identified (...)’⁹⁶ who then acquired Albanian nationality.⁹⁷ Further, the said registration rules also apply to ‘an *adult person* who has lost his/her memory, are [sic] mentally disabled, is found with a deceased parent or unidentified parent (...)’.⁹⁸ In Japan, some cases of individuals who suffer memory loss as to their own identity, including parentage, have been confirmed as Japanese nationals based on the foundling provision.⁹⁹ While the person can even be found when an *adult*, presumption can be made for having been born in the territory or having been found during childhood based on the persons’ account.

From the brief review of the categories of cases granted nationality based on foundling provisions around the world, two conclusions can be drawn. First, the term ‘a child of unknown parents’ does not necessarily mean that the parents are factually unknown; rather, it essentially means the parents are legally unknown. This means there exists either no legally recognised parent for the person concerned, or a legal parent(s) is supposed to exist, but such existence cannot be proven. Especially in cases of anonymous birth or babies left behind in hospitals, or informally adopted children, there are often fragments of evidence available as to the identity of a biological parent. However, even if the parent(s) are factually known (to some extent), it is impossible to acquire or confirm nationality under nationality law unless the existence of a legally recognised parent is proven.¹⁰⁰ Second, while in most typical cases, foundlings can be found as babies or young children, in some more atypical

⁸⁹ See, for example, the DGRN resolution June 2005 (n 2).

⁹⁰ Chris Nugent and Doug Burnett of the Holland & Knight Community Services Team, ‘The Foundling Statute’ (23 January 2007) <<https://www.ilw.com/articles/2007.0123-nugent.shtm>>.

⁹¹ *Federal Court Judgment, Civil Appeal No. 01(f)-35-11/2020(W)* of 19 November 2021.

⁹² See the cases including *Kagetsu Vol 36, No 7, p 82 [29 June 1983 (Showa 58 nen)] (Tokyo High Court)* and more recent unpublished adjudication in May 2023 discussed in sec 4.3.5, Kaneko-Iwase, *Nationality of Foundlings* (n 2) 129-137.

⁹³ See e.g. a DGRN decision in Spain. Res. DGRN de 9 de agosto de 1993 (188) (BIMJ, núm. 1685, 1993, pp. 4645–8; RAJ, 1993, núm.6899).

⁹⁴ See, for example, *Nagoya Family Court, Adjudication, Unpublished [23 April 2021 (Reiwa 3 nen)]*. Author wishes to thank Attorney Fumie Azukizawa for sharing the adjudication.

⁹⁵ *UNHCR Cote d’Ivoire Report on Statelessness 2023 (2024)* 4 <<https://data.unhcr.org/en/documents/details/107563>>.

⁹⁶ Article 49 (4) of *Albania’s Law No 10129 on Civil Status* (5 November 2009).

⁹⁷ Article 8(1) of the *Law on Albanian Nationality* provides nationality grant to a child of unknown parents born or found in the territory.

⁹⁸ Except when the person speaks only a foreign language, where he/she will be registered as a stateless person’. Article 49(6) of *Law on Civil Status No 10129* (5 November 2009).

⁹⁹ Among them, a well-known case was 46 years of age when he was confirmed a Japanese national (although the presumption was made that he was born in Japan). *Adjudication, Kagetsu Vol 41, No 4, p 82 [7 October 1988 (Showa 63 nen)] (Mito Family Court)*.

¹⁰⁰ See detailed discussion on the meaning of unknown-ness in sec 4.4 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 158-160.

cases, such as in cases of informal adoption from the countries reviewed, they tend to be found as older children, as also seen in section IV.G.

H. Meaning of Being 'Found' in the Territory

An important question closely linked to the maximum age of a foundling when found is the definition of being 'found' in the territory under Article 2 of the *1961 Convention*. In the above section III. C above, it was concluded that 'having been born in the territory' is included in the term 'found'. The question then is: when a child's birth in the territory has *not* been established, what circumstances can constitute 'being found' in the territory? Some may link the term 'found' with an abandoned newborn who is passively 'discovered' by the police while crying out for help on a street. However, paragraph 59 of the *2012 UNHCR Guidelines No. 4*, in the context of addressing the issue of the age limit for the foundling provision to apply, states:

If a state provides for an age limit for foundlings to acquire nationality, the age of the child at the date the child was found is decisive and *not* the date *when* the child came to the *attention of the authorities* (emphasis added).

This means that a person of unknown parentage *can be found by any third person* other than the authorities. This is supported by some legal precedents.¹⁰¹ Ultimately, being 'found in the territory' under Article 2 of the 1961 Convention can be broadly defined as 'having been born in the territory or having been seen or observed in the territory by a person other than one's parents', or something to that effect. Alternative interpretations would render many children stateless, which is against the object and purpose of the 1961 Convention and equivalent national legislation.

I. Conclusions of Section III: Foundling is a Child of Unknown Parents

Based on the analysis of the evolution from Article 14 of the *1930 Convention* to Article 2 of the *1961 Convention*, the comparative analysis of the 142 domestic foundling provisions and their actual applications in some states, this article first clarified that the term 'foundling' indeed should be defined as 'a child of unknown parents'. As reflected in legal precedents in different countries in section III.G, there are a variety of circumstances where human beings qualify as being of 'unknown parents'. Terms such as 'abandoned child' or 'child found (in the territory)' are not the most suitable definition or translation of the term 'foundling'. Abandoned children are not always of 'unknown parents' or otherwise stateless, and one does not have to be intentionally and physically 'abandoned' to be of unknown parents. Section III.G further demonstrated that 'a child of unknown parents' does not necessarily mean that the parents are factually unknown. Rather, it essentially means the parents are *legally* unknown; either there exists no legally recognised parent for the person concerned, or, a legal parent(s) is supposed to exist, but such existence cannot be proven. While a foundling's 'place of birth' is frequently 'unknown', it is often the case that the place of birth of a foundling is 'known', as is the case for newborns left behind at hospitals by their birth mothers. In order for a child to be regarded as a 'foundling', therefore, being of 'unknown parents' is a necessary condition, but being of 'unknown place of birth' is *not*; this is why the latter is not included in the foundling definition. Furthermore, being 'found in the territory' itself is a 'condition' giving rise to the obligation of the state where the foundling was found but does not constitute part of the definition of who or what a foundling is.¹⁰²

¹⁰¹ The definition of being 'found' in the territory is extensively discussed in chap 6, especially sec 6.5 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 253.

¹⁰² See sec. 3.1, Kaneko-Iwase, *Nationality of Foundlings* (n 2) 78.

IV. MAXIMUM AGE OF FOUNDLING

The question of ‘up to what age a person can be called a foundling’ when ‘found’ in the territory is one of the most frequently arising issues surrounding Article 2 of the *1961 Convention*. It is important to note that neither Article 2 nor any other provisions of the *1961 Convention* set an upper age limit.

A. Ordinary Meaning

As stated in section III.A, the definitions of a ‘foundling’ in English contained in both non-legal and legal dictionaries describe the age to be either a ‘baby’ ‘infant’ or a ‘child’. ‘Infant’ can be defined as ‘a very young child or baby’¹⁰³ in the non-legal sense, but in the legal field, ‘infant’ is also defined as ‘[a] person who has not attained legal majority (full age),’¹⁰⁴ i.e. a minor. The age of majority varies around the world, but in many states it is under 18 years old. An infant could also mean a person ‘before the time of commencement of elementary school’, depending on the language, contexts and the relevant law.¹⁰⁵

The English term ‘child’ - which can also mean ‘son or daughter’ of any age¹⁰⁶ - is normally defined legally as a person under the legal age of majority,¹⁰⁷ but can also refer to a pre-pubescent person,¹⁰⁸ especially in ordinary terms. While it is noted that the meaning contained in non-legal dictionaries tends to point towards a young child, i.e. a baby or an infant, the ILC states, ‘the *ordinary meaning* of a term is *not to be determined in the abstract* but in the context of the treaty and in the light of its object and purpose (emphasis added).’¹⁰⁹

For this reason, reference to the wording of domestic foundling provisions of nationality laws valid *at the time of drafting* of the *1961 Convention* also provides some insights on what can be contained within the ordinary meaning of the term ‘foundling’. While most of the accessible nationality laws valid at the time of the *1961 Convention*’s drafting used the age-neutral term ‘foundling’ (or ‘*enfant trouvé*’ in French), it is notable that Article 4 of Peru’s Political Constitution of 1933¹¹⁰ already granted nationality to ‘*minors* (menores) resident in the territory who are of unknown parents’. Also, section 9 (a) of Israel’s nationality law as enacted in 1952¹¹¹ provided ‘[w]here a *minor*, not being an Israel national, is an inhabitant of Israel, and his *parents* (...) are *unknown*’, the government may naturalise her or him. Section 13 of the same law provides ‘“minor” means a person under eighteen years of age’. Thus, it can be concluded that at least for some states of the era when the *1961 Convention* was being drafted, the term ‘foundling’ also encompassed *minors* in general. This is complemented by the object and purpose of the *1961 Convention* and the analysis to be followed below, making the conclusion possible that the ‘ordinary meaning’ of the term ‘foundling’ in Article 2 encompasses not only young children that non-law dictionaries tend to point towards, but older children.

103 Oxford Learners Dictionary <https://www.oxfordlearnersdictionaries.com/definition/english/infant_1>.

104 Black’s Law Dictionary <<https://thelawdictionary.org/infant/>>; Merriam Webster <<https://www.merriam-webster.com/dictionary/infant>>. and <<https://www.collinsdictionary.com/dictionary/english/infant>>.

105 The definition of ‘yoji’, the Japanese equivalent for ‘infant’ or toddler, defined in Article 4(ii) of ‘Child Welfare Act (Act No 164 of December 12, 1947) (Japan)’ (1947).

106 Black’s law dictionary <<https://thelawdictionary.org/child/>>.

107 Merriam Webster <<https://www.merriam-webster.com/dictionary/child>>.

108 *ibid*.

109 ILC, *Draft Articles on the Law of Treaties with Commentaries*, Yearbook of the ILC, vol II (1966) 221, para 12.

110 Constitución Política del Perú (29 de Marzo de 1933) <https://data.globalcit.eu/NationalDB/docs/PERU_Constitucion%20Politica%20del%20Peru%201933.pdf>.

111 Section 9 (a) of the *Israeli Nationality Law* (as adopted 1952) <[https://data.globalcit.eu/NationalDB/docs/Israeli%20Nationality%20Law%20\(1952\).pdf](https://data.globalcit.eu/NationalDB/docs/Israeli%20Nationality%20Law%20(1952).pdf)>.

B. UN Official Language Versions

Further, some of the UN official-language versions of Article 2, as discussed in section III.D, use different terms that may cover different age ranges of children.¹¹² Article 33 of *VCLT* sets out that when a comparison of the authentic texts discloses a difference of meaning, and the application of Articles 31 and 32 of *VCLT* does not resolve such a dispute, the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, is to be adopted. It is to be noted here that the French version of the *1961 Convention* uses '*enfant (trouvé)*.' The French term *enfant* – according to *Larousse Dictionary* – apart from meaning a 'son or daughter' of a parent, or 'boy or girl before adolescence'. However, it also means a minor in a legal sense, as per the equivalent term to the English word 'child' in the French version of *CRC*, which is defined in its Article 1 as a 'human being below the age of eighteen years' unless majority is attained earlier in accordance with domestic law. It can be said that, at least based on the ordinary meaning of the French term *enfant*, the age of a foundling in Article 2 of the *1961 Convention* can be beyond newborn babies or young children.

C. Travaux Préparatoires

As stated in section III.B, during the *travaux* of the *1961 Convention*, there was no particular discussion on the definition of a foundling per se, let alone the maximum age of a foundling. Nevertheless, it should be noted that throughout the records of drafting conference sessions where the foundling provision was discussed, the term 'foundling' or 'child' ('*enfant*' in French, in the context of the *1930 Convention travaux*)¹¹³ was consistently used to refer to its beneficiary. *Neither* the term 'infant' nor a 'baby' was used.¹¹⁴ Notably, there is at least one mention by the representative of Israel indicating that Israel regarded minors (of unknown parents) as 'foundlings':

In most countries represented at the Conference, *foundlings* in any case enjoyed government protection *during their minority* (emphasis added).¹¹⁵

Indeed, as mentioned in section IV.A, Israel's nationality law before the adoption of the *1961 Convention* had a foundling provision granting, while through discretionary naturalisation, nationality to a *minor* of unknown parents. No particular dissenting opinions were raised. Thus, it can be said that at least for some states during the *travaux*, the term 'foundling' encompassed a minor.

¹¹² For more details see Kaneko-Iwase, sec 3.3.2. *Nationality of Foundlings* (n 2) 84-86.

¹¹³ POINT VII, League of Nations, *Bases of Discussion Drawn up for the Conference by the Preparatory Committee*, Volume I Nationality (Volume I-C.73.M.38.1929. V-BI-Geneva) (Conference for the Codification of International Law, May 1929) 61-67.

¹¹⁴ United Nations, Summary Records, UN Conference on the Elimination or Reduction of Future Statelessness, Geneva, 1959, 9th Plenary Meeting held on 15 April 1959, A/CONF.9/SR.9; 5th Plenary Meeting held on 31 March 1959, A/CONF.9/SR.5; and the 5th Meeting of the Committee of the Whole held on 3 April 1959, A/CONF.9/C.1/SR.5.

¹¹⁵ *ibid*, 5th Meeting of the Committee of the Whole held on 3 April 1959, A/CONF.9/C.1/SR.5 (3 April 1959) 8.

D. Comparison of 142 Nationality Laws for the Age of a Foundling

Below is a review of the age at which a child is found in the territory, as stipulated in the foundling-provisions of at least 142 of the 193 UN member states.¹¹⁶

As laid out in Table 3 below, the survey found that, out of at least 142 states which have foundling provisions, the nationality laws of 15 states required that the child concerned was ‘born in the territory’ (rather than ‘found’ in the territory)¹¹⁷ and that at least 37 states required that the child concerned is a ‘newborn’ or a child ‘recently born’ or ‘born within six months’. Seven states use the word ‘infant’ (in English and Catalan) or ‘infante’ (in Spanish), which might mean young children, but remains unclear at the moment.¹¹⁸

Conversely, 10 states set specific age limits ranging from under *three* to under *fifteen* years. Most importantly, the foundling provisions of at least 26 states, or more than 18% of the 142 states surveyed, either explicitly included *all minors* or were understood to cover all minors, according to available legal interpretation (sources detailed in Table 4).

Table 3: How Old Could a Foundling Be When Found?¹¹⁹

Note: Article or section numbers are within the relevant nationality legislation unless otherwise indicated (such as ‘Constitution’). Please note that the expression ‘XX years and *under*’ includes the age indicated (used in this table), while ‘*under* XX years old’ does *not*. Percentages were calculated from the original counts using unrounded values. Category percentages are shown as whole numbers; therefore, their arithmetic sum may differ from the reported total. The total of 100% is based on the unrounded percentages.

Maximum Age of a Foundling	# of states	%
(1) ‘Birth’ in the territory required: Chad (art 11[2] and 12), DPRK (art 5[4]), Djibouti (art 6), Eritrea (art 2[3]), Haiti (art 4), Iran (art 976[3]), Japan (art 2[iii]) (Note: Under Japanese Family Register Act art 57, in-country birth not required in practice. See n 122 of this paper), Lebanon (art 1), Libya (sec 3), Monaco (art 1[6]), Oman (Article 11[5]), Saint Lucia (sec 7[2][a]), San Marino (art 1[6]), Tajikistan (art 13[8]), Timor-Leste (sec 3.2[b] Constitution and sec 8[1][b] Law on Citizenship).	15	11%

¹¹⁶ Sec. 6.3, Kaneko-Iwase, *Nationality of Foundlings* (n 2) 236-245.

¹¹⁷ However, some states presume birth in the territory when children are found in the territory under some circumstances. This includes Article 2 (iii) of *Nationality Act of Japan* read together with Article 57 of the Family Register Act: An ‘abandoned child’ (*kiji*) who was ‘found’ in the territory of Japan is to be registered in a family register, by a written notification, and to acquire nationality pursuant to Article 2 (iii) of the Nationality Act. As such, the Japanese legislation in practice does not require a child to be ‘born in the territory’.

¹¹⁸ Costa Rica (art 13[4]), Honduras (art 23[4]), Nicaragua (art 16[4]), Paraguay (art 146 [4]) (‘infante’ in Spanish), South Sudan (sec 8[4]) and Fiji (sec 7) (‘infant’ in English) and Andorra (art 4; ‘infant’ in Catalan). There was no accessible and reliable information as to what ‘infant’ in the given legislation meant. In general terms however, the word ‘infant’ in English in a common usage means young children but also may mean a minor in legal terms. See IV. A and B. The term infante in Spanish (mainly in Latin America) may mean a person less than seven years of age but might also mean a smaller child or an older child depending on the context. See e.g. Real Academia Española, *Diccionario de la Lengua Española* (2001).

¹¹⁹ **Note on translation and accessibility to the latest amendments:** While the author directly referred to the latest accessible English, Spanish, French and Japanese versions/translations of domestic foundling provisions (and cross-checked their current validity with the latest original language versions on the relevant government/parliamentary webpages) by utilising the databases of the European University Institute i.e. globalcit.eu, complemented by UNHCR’s refworld.org and Citizenship Rights in Africa Initiative citizenshiprights-africa.org, inaccuracies or missed nuances when it involves translation cannot be ruled out. Further, there is possibility that the versions consulted did not reflect the latest amendments to the relevant laws. Emphasis in *italics* is added by the author; translation of Spanish and French laws is by the author.

(2) Newborn/recent born: Angola (art 9[3] Constitution; art 9[2] and art 15[b] of Nationality Act), Antigua and Barbuda (sec 3[1]), Austria (art 8), Barbados (sec 4[1]), Belgium (art 10[3]/article 10[4]), Belize (sec 7), Burkina Faso (art 141/art 142), Cabo Verde (art 7[2]), Cambodia (art 9[2]), Cameroon (sec 9/sec 10), Congo (Republic of) (art 9[3]), Democratic Republic of the Congo (sec 8), France (art 19/art 19-2 and art 58), Gabon (art 11 and 12), Grenada (sec 2[3]), Guinea Bissau (art 5[2]), Guyana (sec 8[2]), Indonesia (art 4 [10]), Ireland (sec 10), Malaysia (sec 19B, Part III of the Second Schedule), Mali (art 225/226), Malta (art 17[3]), Mauritania (art 10), Mauritius (sec 2[2][e]), New Zealand (sec 6[3][b] [i]and[ii]), Niger (art 10), Portugal (art 1[2]), Saint Kitts and Nevis (Sec 95[5][c] Constitution/ sec 3[1] Citizenship Act), Sao Tome and Principe (art 5[2]), Senegal (art 3), Singapore (Section 13 Third Schedule), Sri Lanka (art 7), Tunisia (art 9 and 10), Ukraine (art 7), UK (sec 1[2]).		35	25%
(3) Infant: Costa Rica (art 13[4]), Honduras (art 23[4]), Nicaragua (art 16[4]), Paraguay (art 146 [4])('infante' in Spanish), South Sudan (sec 8[4]) and Fiji (sec 7) ('infant' in English) and Andorra (art 4; 'infant' in Catalan). See footnote 12 of this paper.		7	5%
(4) 2-5 years old and under: 2 y.o and under (Czech Republic, sec 10); 4 y.o and under (USA, sec 301[f]); and Togo, Child Code art 19); 5 y.o and under (Uganda, Constitution art 11[1]).		4	3%
(5) 6-8 years old and under: 6 y.o and under (Canada, sec 4[1]); 7 y.o and under (Ghana, sec 8; Swaziland, sec 47; and Kenya, art 14[4]); 8 y.o and under (Zambia Constitution art 35[2]).		5	4%
(6) 14 years and under: Zimbabwe, Constitution art 36[3])		1	1%
(7) All minors	Explicitly (foundling provision uses 'minor,' or 'child' which is defined within the same law [or its regulation] as 'minor' - see Table 4 for details): Georgia (art 11), Kyrgyzstan (art 12 [6]), Luxemburg (art 5 [3]) Moldova (art 11 [2]), Peru (art 2 [2]), Philippines (art 3), Russian Federation (art 12 [2]), Spain (art 17 [1][d]), Sudan (art 5), and Switzerland (art 3).	10	7%
Total of 26 States (18%)	By Interpretation (Info available that 'child' in foundling provision is interpreted to mean 'minor' - see Table 4 for details): Armenia (art 20), Australia (art 14), Azerbaijan (art 13), Belarus (art 13), Croatia (art 7), Hungary (art 3 [3][b]), Italy (art 1[1][b] and art 1[2]), Kazakhstan (art 13), Latvia (sec 2 [1] 5 and 2 [2] 2)), Lithuania (art 16), North Macedonia (art 6), Romania (art 5[3]), Serbia (art 3), Slovenia (art 9), Turkmenistan (art 11[1] 8 and 11 [3]), and Uzbekistan (art 15).	16	11%

(8) No age specified (Foundling provision uses term ‘foundling’ or ‘child’ [niño or niña in Spanish/enfant in French] which may mean ‘small child’ or ‘minor’ but no further info unavailable): Afghanistan (art 12), Albania (art 7[1]), Algeria (art 7[1]), Bahrain (art 5[B]), Benin (art 21), Bosnia and Herzegovina (art 7/art 28[3]), Bulgaria (art 11), Burundi (art 3), Central African Republic (art 10), Chile (art 173), Comoros (art 13), Denmark (sec 1[3]), Egypt (art 2[2]), Estonia (art 5[2]), Ethiopia (art 3[2]), Finland (sec 12[1]), Germany (sec 4[2]), Guinea (art 58 and 59), Iceland (art 1[2]), Iraq (art 3[b]), Jordan (art 3[5]), Kuwait (art 3), Lao People’s Democratic Republic (art 17), Liechtenstein (sec 3[a][3] and sec 4a), Mexico (art 7), Mongolia (art 7[4]), Montenegro (art 7), Morocco (art 7), Nepal (sec 3[3]), Netherlands (art 3[3]), Norway (sec 4), Panama (art 9[1], art 32, art 63), Papua New Guinea (sec 77[1] and 77[2]), Poland (art 14[2] and art 15), Qatar (art 2), Republic of Korea (art 2[1][iii], 2[2]), Rwanda (art 2[2] and art 10), Saudi Arabia (art 7), Slovakia (sec 5[2][b]), Somalia (art 15) (Note: The title of article 15 states in brackets ‘Minors in Special Circumstances.’), Suriname (art 4[b]), Sweden (sec 3), Syrian Arab Republic (art 3[c]), Turkey (art 8[2]), Tuvalu (art 44[2]), UAE (art 2[e]), Viet Nam (art 18), Yemen (art 3[d]).	49	35%
Total	142	100%

Out of the 26 states that are classified to be open to ‘all minors’, 10 states (7% out of 142 States) either use the term ‘minor’ (*menor de edad* in Spanish and *[enfant] mineur* in French) in their foundling provisions in their nationality legislation, or use the term ‘child’ (or its equivalents) and define it as meaning ‘minor’ within the same legislation (and for the Philippines, the relevant Implementing Rules), as detailed in Table 4 below.

The remaining 16 out of the 26 states (11% of 142 States) use the neutral term ‘child’ or its equivalent in their nationality laws without defining ‘child’ within the same legislation. For these 16 states, while formal written positions issued by the competent authorities could not be accessed directly, there were, nevertheless, available comments made by the government and/or local experts that the term is indeed interpreted to mean a ‘minor’. More specifically, for 7 out of 16 states i.e. Hungary, Italy, Kazakhstan, Lithuania, Serbia, Slovenia, and Uzbekistan, authors of the country chapters of European Network on Statelessness (ENS)’s Statelessness Index (whose PRS.3.b addresses the age limit of a foundling) as well as UNHCR staff members cited government positions (that ‘child’ means a minor) either in their published reports or in their emails to the author. Regarding the remaining 9 countries, local experts in their emails to the author and/or in their published reports confirmed that the local language term equivalent to ‘child’ in foundling provisions meant a ‘minor’. This was mostly because the local term equivalent to ‘child’ is defined as a ‘minor’ in separate child protection-related legislation. In the absence of the original definition of ‘child’ in the nationality law legislation, the general legal rule is that the definition in the former applies to the latter (see detailed justifications on individual states in **Table 4**).

While the remaining 49 states (35% of the 142 states with foundling provisions) either use the term ‘child’ (*niño* in Spanish, *enfant* in French) or ‘foundling’ or an equivalent expression in the local languages without limiting the age of the persons concerned, the number of states whose foundling provisions ‘cover all minors’ is *expected to increase* as more information is gathered. In this context, it would be effective for States that have not done so to develop proper operational guidance to clarify the scope of their foundling provisions (along with the procedures for the nationality grant) in light of the provisions’ object and purpose.

Table 4: Details of Legislation Which Is Open to Minors

Explicitly (the foundling provision uses 'minor,' or 'child' which is defined within the same law as 'minor')	
(1) Georgia	Article 11 provides 'A <i>minor</i> who is living in Georgia and whose both parents are unknown shall be deemed to be a Georgian citizen unless proved otherwise.' Article 2(e) provides 'minor – a person under the age of 18.' <i>Organic Law on Georgian Citizenship</i> , 30 April 2014 < https://matsne.gov.ge/ka/document/view/2342552?publication=8 >
(2) Kyrgyzstan	Article 12(6) states 'A <i>child</i> located on the territory of the Kyrgyz Republic, both of parents of who are unknown, is a citizen of the Kyrgyz Republic.' Article 3 (entitled 'Main definitions') of the same says 'a <i>child</i> is a person at the age of <i>up to 18 years old</i> .' <i>Law of the Kyrgyz Republic on Citizenship of the Kyrgyz Republic</i> , 21 March 2007 < https://cbd.minjust.gov.kg/202103/edition/1272039/kg >
(3) Luxembourg	Article 5 (3)) states 'The following is Luxembourgish: [...] 3° a minor born in Luxembourg of legally unknown parents; a minor [<i>le mineur</i>] found on Luxembourg territory is presumed, until proof to the contrary, to have been born in the territory.' <i>Nationality Law of Luxembourg</i> , 8 March 2017 < http://legilux.public.lu/eli/etat/leg/loi/2017/03/08/a289/jo >
(4) Moldova	Article 11(2) 'The <i>child</i> [<i>Copilul</i>] found in the territory of the Republic of Moldova shall be considered its citizen, unless otherwise proven, before the age of 18.' Article 1 of the same law states: For the purposes of this law, the following notions mean: <i>child</i> [<i>copil</i>] - a person until the age of 18.' This reading is confirmed by the email from Marin Roman (the then Statelessness Officer, UNHCR Central Asia) to the author (5 January 2021). <i>Law No.1024/2000 on Citizenship of the Republic of Moldova</i> < https://www.legis.md/cautare/getResults?doc_id=122079&lang=ro >
(5) The Philippines	Article 3 of The Philippines' dedicated foundling law contains the term 'For purposes of this Act, a foundling shall be a deserted or abandoned <i>child or infant</i> with unknown facts of birth and parentage. This shall also include those who have been duly registered as a foundling during her or his infant childhood, but <i>have reached the age of majority</i> without benefitting from adoption procedures upon the passage of this law.'(emphasis added), without further defining the term 'child'. <i>Foundling Recognition and Protection Act</i> (or Republic Act 11767) (6 May 2022) < https://www.officialgazette.gov.ph/downloads/2022/05may/20220506-RA-11767-RRD.pdf >. Implementing Rules and Regulations of Republic Act No.11767, Foundling Recognition and Protection Act < https://www.officialgazette.gov.ph/downloads/2022/09sep/20220909-IRR-RA-11767-FRM.pdf > section 4 (e) states 'For the purpose of R.A. No.11767 (....) (e) <i>Child</i> refers to a person below eighteen (18) years of age or a person eighteen (18) years of age or over but who is unable to fully take care or protect himself or herself from abuse, neglect, cruelty, exploitation, or discrimination because of physical or psychosocial disability or condition'. Notably, the Philippines' Foundling Act is the only legislation known to the author which includes <i>persons above 18 years of age</i> in the concept of 'foundling'. Author wishes to thank Aerial Ann Gonzales of the UNHCR National Office in the Philippines for referring her to the relevant materials.

(6) Peru	Article 2 (2) 'The following persons are Peruvians by birth (...) Minors [<i>Los menores de edad</i>] in a state of abandonment, residing in the territory of the Republic, who are sons or daughters of unknown parents.' <i>Ley N° 26574 - Ley de la nacionalidad</i> , 11 January 1996 < https://leyes.congreso.gob.pe/documentos/Leyes/26574.pdf >
(7) Russian Federation	Article 13.3 states 'A <i>child</i> who is found in the Russian Federation and whose parents are unknown acquires citizenship of the Russian Federation by birth if, within six months from the date of his discovery, it is not established that she or he has citizenship of the Russian Federation or citizenship (nationality) of a foreign state.' Article 4.1(12) on the basic concepts provides that a " <i>Child</i> " means a person under the age of 18'. <i>Federal Law of 28 April 2023 N 138-FZ on Citizenship of the Russian Federation</i> < http://publication.pravo.gov.ru/Document/View/0001202304280013?index=22 >
(8) Spain	Article 17(1)(d) of the Civil Code of Spain states 'The following persons are Spanish nationals of origin: (...). d) Those born in Spain whose parentage is not determined. To these effects, <i>minors</i> [<i>los menores de edad</i>] whose first known place of stay is Spanish territory are presumed to have been born in the Spanish territory.' <i>Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil</i> < https://www.boe.es/eli/es/rd/1889/07/24/(1)/con >
(9) Sudan	Article 5 of Sudan's nationality law states 'A person shall be Sudanese by birth until the contrary is proved, if found as a deserted <i>minor</i> of unknown parents.' Article 3 defines 'minor' as 'In this act, unless the context otherwise requires:(...)'. "Minor" means any person who has not attained the age of majority.' Article 3 of the same law also states '(...) a person reaches the age of majority if he has completed eighteen years[...].') The Sudanese Nationality Act 1994 and Sudanese Nationality Act (Amendment) 2011 and 2018, 30 December 2018, < https://www.refworld.org/docid/503492892.html >
(10) Switzerland	Article 3 of Switzerland's nationality law states '(1)A <i>minor</i> child of unknown parentage who is found [<i>L'enfant mineur</i>] in Switzerland acquires citizenship rights of the canton in which he or she was found, and thus acquires Swiss citizenship.(...)'. <i>Swiss Citizenship Act of June 20, 2014</i> < https://www.fedlex.admin.ch/eli/cc/2016/404/de >.
By Interpretation (Info available that 'child' in foundling provision is interpreted to mean 'minor')	
(1) Armenia	Article 20 of the nationality law states 'A <i>child</i> on the territory of the Republic of Armenia whose parents are unknown is a citizen of the Republic of Armenia. (...)' <i>Law of 1995 on Citizenship of the Republic of Armenia</i> < http://www.parliament.am/legislation.php?sel=show&ID=1731&lang=eng > Article 1 of the Armenia's child rights law states '(...) Each person which did not (sic) reach 18 years is considered the <i>child</i> , except as specified, when in the procedure established by the law it acquires capacity to act or acknowledged capable earlier.' <i>Law of the Republic of Armenia about the Child's Rights of 31 May 1996 No. ZR-59</i> < https://cis-legislation.com/document.fwx?rgn=3037 >. According to the email from Susanna Grigoryan, Assistant Protection Officer, UNHCR Armenia to the author on 22 August 2022, the definition of the term child in this law is applicable to the term 'child' in the nationality law.

(2) Australia	Section 14 of the <i>Australian Citizenship Act of 2007</i> states 'A person is an Australian citizen if the person is found abandoned in Australia as a <i>child</i>, unless and until the contrary is proved'. <https://www.legislation.gov.au/C2007A00020/latest/text>. According to Professor Kim Rubenstein of the Faculty of Business Government and Law at the University of Canberra, author of <i>Australian Citizenship Law</i> and consultant to the government in its development of the 2007 Act, a child for the purposes of all sections of the <i>Australian Citizenship Act</i> is a person as defined under section 3 of the Act, and while the age is not defined directly, is a person under the age of 18. Email on file with the author, 28 September 2024. It is also noted that in a Federal Court of Australia (FCA)'s decision in 2015 in examining the applicability of the previous version of the foundling provision i.e. section 5(3)(b) of the 1948 Citizenship Act containing the same term 'when a child', while mentioned only as <i>obiter dictum</i>, the Court effectively affirms the fact that the claimant, who was already 16 years old at the time when he was separated from his mother, was (found) abandoned in Australia 'when a child'. Para 24 of <i>Nicky v Minister for Immigration and Border Protection</i> [2015] FCA 174 [5 March 2015] as well as para 29 of <i>Nicky v Minister for Immigration</i> [2014] FCCA 2569 (12 November 2014). (Note: However, the claimant was denied nationality due to birth abroad/possession of another nationality. See Mai Kaneko-Iwase, <i>Nationality of Foundlings</i> (2021) sec 6.3, p.243, 261, 279, 289-293)
(3) Azerbaijan	Article 13 of the nationality law states 'A <i>child</i>, who lives on the territory of Azerbaijan and both parents of whom are unknown, is a citizen of Azerbaijan Republic. <i>Law of 1998 on Citizenship of the Azerbaijan Republic</i>, 30 September 1998 <http://e-qanun.az/framework/3187> According to Ms. Asima Nasirli, a lawyer based in Azerbaijan (referred by a GLOBALCIT Azerbaijan Country Expert Dr. Maxim Tabachnik), Article 1 the <i>Law of the Republic of Azerbaijan on Child's Rights</i> (19 May 1998) available at <https://e-qanun.az/framework/3292> defines a child as a person who has not reached the age of 18 (adulthood), and this definition applies to the term 'child' in Article 13 of the nationality law, and that the term 'uşaqlar' (children)/ 'uşaq' (child) in legal terminology in Azerbaijan always means a minor. Email exchanges between Ms. Asima Nasirli to the author, 9 January and 1 February 2024, on file with the author.
(4) Belarus	Article 13 of the nationality law states '(...) A <i>child</i> who is situated on the territory of the Republic of Belarus and whose parents are unknown becomes citizen of the Republic of Belarus.' <i>Law on the Citizenship of the Republic of Belarus</i> <http://world_of_law.pravo.by/text.asp?RN=H10200136>. Article 1 of the Belarus's child rights law contains the definition of the term 'child' stating, 'for the purpose of this Law a child is an individual who has not reached the age of eighteen years (majority) if, according to the law, she or he has not previously acquired civil capacity in full'. <i>Law on the Rights of the Child</i> of 19 November 1993 No. 2570-XII <https://cis-legislation.com/document.fwx?rgn=1844>. The definition of 'child' in Article 1 of the <i>Law on the Rights of the Child</i> is considered to govern that of Article 13 of the <i>Law of Citizenship</i>. Information obtained from UNHCR Representation in Belarus following a thematic email query on the definition of the child in Article 13 of the Law of Citizenship on 24 August 2022.

(5) Croatia	Article 7 of the nationality law states ‘A <i>child</i> born or found within the area of the Republic of Croatia, whose both parents are unknown (...) acquires Croatian citizenship. (...)’ (emphasis added). <i>Law on Croatian Citizenship</i> in force from 01 January 2022. <https://www.zakon.hr/z/446/Zakon-o-hrvatskom-dr%C5%Beavljanstvu> ENS Statelessness Index item PRS.3.b. states ‘An age limit is set in law by using the term “child”, which means that it applies to a child until the age of 18.’ ENS Statelessness Index 2022: Croatia (2022) 22 <https://index.statelessness.eu/sites/default/files/ENS_Statelessness_Index_Survey-Croatia-2022.pdf> A local expert additionally confirmed that the Croatian term ‘dijete’(child) used in the nationality law always means a person under 18 and any other meaning is specified in the relevant laws and regulations, having also consulted two professors of the Law Faculty in Zagreb. Email exchanges between Milana Kreca, President, Civil Rights Project Sisak (co-author of the Index) and author between 7-22 November 2023, on file with the author.
(6) Hungary	Article 3 (3)(b)) of the Hungarian nationality law states ‘Until proven to the contrary, the following persons shall be recognised as Hungarian citizens (...) <i>children</i> born of unknown parents and found in Hungary.’ <i>Act LV of 1993 on the Hungarian Nationality</i> https://njt.hu/jogszabaly/1993-55-00-00>. The ENS Statelessness Index states ‘The term ‘foundling’ reads as “found child born to unknown parents” (<i>ismeretlen szülőtől származó talált gyermek</i>) in Hungarian law. Since the word ‘child’ is part of this term, and in the absence of any other restriction, there are no legal grounds for this to apply to any age sub-group among children (defined in law as under 18). This interpretation was confirmed by an official letter sent by the competent ministry to UNHCR.’, citing <i>Letter No. 437-3068/2/2013 of 7 December 2013, Ministry of Public Administration & Justice to UNHCR Regional Representation for Central Europe.</i> ‘ENS Statelessness Index 2022: Hungary’ (ENS 2022) 31<https://index.statelessness.eu/sites/default/files/ENS_Statelessness_Index_Survey-Hungary-2022.pdf>. Also see Gábor Gyulai, ‘Nationality Unknown?’ (Hungarian Helsinki Committee, 2014) 7<https://www.refworld.org/docid/5310640b4.html>.
(7) Italy	Article 1(1)(b) the Italian nationality law states ‘The following shall be citizens by birth: [...] (b) (A son or daughter) who was born in the territory of the Republic both of whose parents are unknown [...].’ Article 1(2) states ‘A son or daughter (figlio) found in the territory of the Republic whose parents are unknown shall be considered citizens by birth in the absence of proof of their possession of any other citizenship.’ <i>Legge n. 91, 5 febbraio 1992, Nuove norme sulla cittadinanza</i> <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1992-02-05:91!vig=2019-11-09> As stated in footnote 135 of this paper, the author is informed that after the Decision of 2 March 2022 of Court of Naples, XIII Civil Section, Italy’s Ministry of Interior adopted its position that the Italy’s foundling provision is not only applicable to newborns, but to children up to 18 years old in general. Email responses from Enrico Guida, UNHCR Italy, dated 28 September and 18 October 2023 to the author’s inquiry, on file with the author.

(8) Kazakhstan	Article 13 of the nationality law states 'A <i>child</i>, located in the territory of the Republic of Kazakhstan and whose both parents are unknown, shall be a citizen of the Republic of Kazakhstan.' Kazakhstan: Law No. 1017-XII dated 20 December 1991 of the Republic of Kazakhstan, On Citizenship of the Republic of Kazakhstan, as amended as of July 2025 <refworld.org/legal/legislation/natlegbod/1991/en/151211>. According to the email from Marin Roman (the then Statelessness Officer, UNHCR Central Asia) to the author (11 February 2022), the <i>Law on the Rights of the Child in the Republic of Kazakhstan</i> <https://cis-legislation.com/document.fwx?rgn=3146>, item 2 of Article 1 provides: '«Child» means a person under the age of eighteen years (age of majority)', and this applies to the term 'child' in Article 13 of the nationality law, which was confirmed with the competent authority.
(9) Latvia	Section 2 (1) 5) and 6) of the nationality law states '(1) A Latvian citizen is: (...) 5) a <i>child</i> who has been found in the territory of Latvia and whose parents are unknown, or other child left without parental care who is under extra-familial care in Latvia, except a child for whose parents the custody rights have been suspended; 6) an orphan who is under extra-familial care in Latvia.' Section 2 (2) provides 'The volition to register a child as a Latvian citizen in accordance with Paragraph one of this Section shall be expressed by: 1) the lawful representative of the child, if the <i>child</i> has not reached the age of 15 years; 2) the <i>child</i> himself or herself between 15 to 18 years of age.' <i>Law on Citizenship 1994</i> <https://likumi.lv/ta/id/57512-pilsonibas-likums>. It is the general rule in reading laws that the same term has the same meaning within the same piece of legislation; thus, the term 'child' in section 2(1)5) should cover a person before the age of 18. The ENS Statelessness Index supports this reading. Question PRS.3.b asks 'Is there an age limit (e.g. 'new-born' or 'infant') in law or practice specifying when a foundling would qualify for nationality?' and the response by the Latvian Centre for Human Rights states 'Nationality is acquired upon birth registration. The age limit for registration of a foundling as a Latvian citizen by their legal representative is 15 years-old, or the child may register themselves between the ages of 15 and 18.' ENS, 'ENS Statelessness Index Survey 2023: Latvia' (2023) 27 <https://index.statelessness.eu/sites/default/files/ENS_Statelessness_Index_Survey-Latvia-2023_0.pdf>. LCHR also reports 'If registration of the birth, including the nationality, of a foundling (...) is not conducted by the General Registry Office within the period prescribed by the law, the legal representative can submit an application for registration of Latvian citizenship to the OCMA if the child has not reached the age of 15 years; an application may also be submitted by the child between 15 and 18 years of age.' at ENS, 'Ending Childhood Statelessness: A Study on Latvia, Working Paper 07/15' (June 2015)14-15 <https://www.refworld.org/reference/countryrep/ens/2015/en/113462>.

(10) Lithuania	Article 16 of the nationality law uses the term ‘A <i>child</i> found or living in the territory of the Republic of Lithuania, both of whose parents are unknown, shall be considered to be born in the territory of the Republic of Lithuania and acquire citizenship of the Republic of Lithuania (...)’. <i>The Law on Citizenship of the Republic of Lithuania</i> of 2010 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.387811/asr>. Article 2 of the Lithuania’s child protection law states ‘A <i>child</i> is a human being below the age of 18 years, unless otherwise established by laws.’ The <i>Law on Fundamentals of Protection of the Rights of the Child</i> (14 March 1996 No I-1234) <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.382481?jfwid=q8i88lquy>. UNHCR’s mapping study states ‘An expert at the Migration Department has confirmed to the researcher that under circumstances relevant to the citizenship of foundlings, the age limit is 18 years.’, with the accompanying footnote 335 stating ‘Under Lithuanian law, a child is a person younger than 18 years.’ UNHCR, ‘Mapping Statelessness in Lithuania’, (May 2016) 75 <https://www.refworld.org/docid/580f649c4.html>.
(11) North Macedonia	Article 6 states ‘Citizenship of the Republic of Macedonia shall be acquired by a <i>child</i> found or born on the territory of the Republic of Macedonia whose parents are unknown (...)’. <i>Law on Citizenship of the Republic of Macedonia</i> <https://mvr.gov.mk/zakon/11>. The ENS Statelessness Index states that ‘The Law on Citizenship stipulates that only children can benefit from this safeguard, meaning that they must be under 18 years of age.’ PRS. 3.b, ‘ENS Statelessness Index Survey 2022: North Macedonia’ (2022) 21 <https://index.statelessness.eu/sites/default/files/ENS_Statelessness_Index_Survey-NorthMacedonia-2022.pdf>. According to Gazmend Gudaci, one of authors of the Index, the term ‘child’ in the Macedonian legislation refers to those individuals that are below the age of 18. Email from Gazmend Gudaci, on file with author, 10 September 2023.
(12) Romania	Article 5 (3) of Romania’s nationality law states ‘[...] (3) <i>Children</i> who are found in Romanian territory are regarded as Romanian citizens until proven otherwise, if none of their parents is known.’ <i>Law on Romanian Citizenship</i> no. 21/1991 <https://legislatie.just.ro/Public/DetaliiDocument/121439>. ENS Statelessness Index states ‘There is no particular age limit in the foundlings provision, therefore the applicable limit is 18 years old.’ ENS, ‘ENS Statelessness Index Survey 2022: Romania’ (2022) 20 <https://index.statelessness.eu/sites/default/files/ENS_Statelessness_Index_Survey-Romania-2022_0.pdf>. The local expert who authored the Index stated that a child is defined by the Romanian law as a person under 18, and in the absence of any other age limit specified in the nationality law, ‘child’ means a minor. Email to the author from Stefan Leonescu, Jesuit Refugee Service Romania who authored the Index (29 September 2023).

(13) Serbia	Article 13 of its nationality law states 'A <i>child</i> born or found in the territory of the Republic of Serbia (foundling/nahoče) acquires citizenship of the Republic of Serbia by birth if both his parents are unknown (...)' <i>Law on Citizenship of the Republic of Serbia 2004</i>, <https://www.paragraf.rs/propisi/zakon_o_drzavljanstvu_republike_srbije.html>. The local expert's response to the standard question on the age of foundling in the ENS Statelessness Index Survey states that 'The age limit is 18 years-old. The competent body derives this from the legal definition of a "child", i.e. person under 18 years-old' and cites 'Information derived from casework, including the decisions of the Ministry of Interior in individual cases (decision of the Ministry of Interior, 03/10 No. 204-2-248/2013 from 14 March 2013, on file with author). Letter of the Ministry of Interior sent to Praxis on 15 March 2013, 13/10 No. 204-159/13-R, on file with author.' PRS.3.b, ENS, Statelessness Index Survey 2022: Serbia (2022) 21 <https://index.statelessness.eu/sites/default/files/ENS_Statelessness_Index_Survey-Serbia-2022.pdf>.
(14) Slovenia	Article 9 of Slovenia's nationality law states 'Any child born or found in the territory of the Republic of Slovenia shall be granted citizenship of the Republic of Slovenia if his/her father and mother are unknown (...)'. <i>Citizenship of the Republic of Slovenia Act</i>, ZDRS-UPB2, 7 December 2006- <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO13>. The ENS Statelessness Index Survey states '[T]here is no age/time limit. According to the law, a case of any child under the age of 18 could be examined under the stated provision.' PRS.3.b, ENS, 'Statelessness Index Survey 2022: Slovenia' (2022) 20 <https://index.statelessness.eu/sites/default/files/ENS_Statelessness_Index_Survey-Slovenia-2022_0.pdf>. 'The law also does not stipulate an age limit (...) According to the representatives of the Ministry of Interior, a case of any child under the age of 18 could be examined under the stated provision.' ENS, 'Ending Childhood Statelessness: A Study on Slovenia' (2015) 14 <https://www.refworld.org/reference/countryrep/ens/2015/en/107958>.
(15) Turkmenistan	Article 11(1)8 of Turkmenistan's nationality law states 'A person shall be a citizen of Turkmenistan by birth in the following cases: (...) 'the parents (the single parent) of the <i>child</i> are the persons whose whereabouts and citizenship are unknown provided that the child was born in the territory of Turkmenistan.' Article 11(3) of the same law states 'The <i>child</i> resident in the territory of Turkmenistan, whose parents are unknown, <i>shall be regarded as born</i> in Turkmenistan and a citizen of Turkmenistan. (...)'. The <i>Law of 2013 on Citizenship</i>, 22 June 2013 <https://minjust.gov.tm/hukuk/merkezi/hukuk/185>. According to the email from Marin Roman (the then Statelessness Officer, UNHCR Central Asia) to the author (11 February 2022), Article 1 of the <i>Law of Turkmenistan on the guarantees of the rights of the child</i> provides that 'A child is a person under the age of 18, unless otherwise established by the law of Turkmenistan.' There are no provisions that define a child in <i>Law on Citizenship of Turkmenistan</i>, therefore, the term 'child' in its Article 11 is under the age of 18.
(16) Uzbekistan	Article 14 of Uzbekistan's nationality law states 'A <i>child</i>, who is in the territory of the Republic of Uzbekistan and both of whose parents are unknown, is a citizen of the Republic of Uzbekistan.' <i>Law on Citizenship of the Republic of Uzbekistan of 2020</i> <https://lex.uz/docs/-4761984>. According to the email from Marin Roman, the then Statelessness Officer, UNHCR Central Asia to the author (11 February 2022), the <i>Law of Uzbekistan on the Guarantees of the Rights of the Child</i> defines a child as a person up to the age of eighteen years (majority), and this applies to the term 'child' in Article 14 of the abovementioned nationality law as confirmed by an official of the competent authority.

Based on the above review of the legislation around the world, it can be said that there is no consistent interpretation regarding the age of a foundling under Article 2 of the *1961 Convention* which can constitute ‘subsequent practice’ under Article 31(3)(b) of *VCLT* which establishes the agreement of all parties to the treaty, even in its broad sense.

According to *VCLT*, when the interpretation according to Article 31 ‘leaves the meaning ambiguous or obscure’ (or ‘leads to a result which is manifestly absurd or unreasonable’), recourse may be had to the ‘supplementary means of interpretation’ to determine the meaning (Article 32). As paragraph 9 of the Commentary to Conclusion 2(4) of the *2018 ILC Draft Conclusions on Subsequent Practice* states, ‘subsequent practice in the application of the treaty, which does not establish the agreement of all parties to the treaty (under Article 31(3)(b) of *VCLT*), but only of one or more parties, may be used as a supplementary means of interpretation’¹²⁰ under Article 32 of the *VCLT*¹²¹ which may contribute to the clarification of the meaning of a treaty.¹²²

The question arises as to how to identify, among the divergent legislation of 142 countries, the ‘subsequent practice’ to be used as a supplementary means of interpreting Article 2 of the *1961 Convention*. According to paragraph 3 of the Commentary to Conclusion 2 of the *2018 ILC Draft Conclusion on Subsequent Practice*, the rules under Article 31 and 32 *VCLT* ‘must be read together as they constitute an integrated framework for the interpretation of treaties,’ and all of the ‘primary means of interpretation’ under Article 31 *are to be taken into account* in the process of applying supplementary means of interpretation under Article 32. It would then be difficult to justify the adoption of - as a supplementary means - the most ‘common’ practice, i.e. requiring the person to be newborn or recently born, merely because of the fact that the biggest number of states adopt such limits (though 35 states, i.e. 25% out of 142).¹²³ Such an interpretation would go against the object and purpose of Article 2 of the *1961 Convention* and also the evolutionary nature of international human rights law discussed in section II.A. It is rather 26 states’ foundling provisions (18% of 142 states) covering all minors - either explicitly or according to the available legal interpretation as detailed in **Table 4**- that should be adopted as a supplementary means of interpretation. Such a conclusion is primarily drawn from the fact that the ordinary meaning of the term ‘foundling’ may encompass older children, as in Sections IV.A and IV.B above, the *1961 Convention*’s objective is to reduce statelessness, and Article 7 of the *CRC* and relevant human rights standards developed after the adoption of the *1961 Convention* call for ensuring the right to nationality for all minors.

E. Justifications to Restrict Age to Newborns/Young Children and Alternative Perspectives

The main rationale for states that have limited the scope of the term ‘foundling’ to ‘newborns’ is the assumption that if children are found in the territory while still being newborn, they are less likely to have been born abroad.¹²⁴ Nevertheless, the possibility that the child concerned was born outside the territory cannot be ruled out, particularly in regions where border controls are lax. In addition, it should be recalled that the text of Article 2 of the *1961 Convention* in itself does *not* actually exclude children who were ‘born outside the territory’ from acquiring nationality.¹²⁵ This is an outcome of the negotiations in the *travaux* process, after some states had expressed their position to prioritise the prevention of statelessness, to the effect that even if foundlings are *known* to have been *born outside the territory*, they should be granted nationality in ‘the state where they were found’ if they cannot

¹²⁰ ILC, *Draft conclusions on subsequent practice* (n 32) para (8 and) 9 of the Commentary to Conclusion 2(4), draft conclusion 4(3) and its commentary, paras 16, 23–35.

¹²¹ See for example, Goodwin-Gill, ‘The Search’ (n 16) 210, and Dunlop, ‘Applying the Rule of Treaty Interpretation’ (n 16) 57.

¹²² ILC, *Draft conclusions on subsequent practice* (n 32) Conclusion 7(2).

¹²³ It should again be noted that a *larger group of states* i.e. the 47 states i.e. 33% of 142 states do not clearly specify the maximum age in their text of foundling provisions (and the actual practice is largely not known).

¹²⁴ See sec 6.7.3 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 258–260.

¹²⁵ Sec 7.3.1 of *ibid*. See also Osamu Arakaki, *Statelessness Conventions and Japanese Laws – Convergence and Divergence* (UNHCR Japan, March 2015) 71.

acquire nationality of the state where they were 'born'.¹²⁶ The Spanish¹²⁷ and Italian cases discussed in section IV.E below indeed involve children who were likely born abroad.

Further, as mentioned above, several countries limit the scope of the foundling provision to 'infants' or 'young children' who cannot explain their parents' identities or birthplaces on their own. This distinction, however, is also difficult to justify, because *older children are not necessarily able to explain their parents' identities or their birthplaces*, as demonstrated by the case at the outset of this article. Children who do not know their parents in the first place will *not* 'recall' who their parents are and where they were born as they grow up, *no matter how old* they become. Limiting the scope to 'infants' or 'young children' also involves the difficult exercise of defining their ages– should it be children under three years old, or why not five years old? Or is it under school age, i.e., six? But why not seven years of age? Or even under 10 years of age, as stipulated in some of the legislation introduced in section IV.D? The only (almost) universal definition of the word 'child' under international law is 'under 18 years of age' under Article 7 of the *CRC* (unless majority is domestically attained earlier). Differentiating the treatments on the basis of any lower age limit would lack firm justification, especially from an effectiveness point of view, of fulfilling the objective of reducing statelessness and ensuring the right to nationality of the child.

States may understandably have reservations against explicitly legislating to grant nationality to older children, particularly in their late teens, due to the risk of fraudulent cases who claim to be of unknown parents (or minors) when they are not. However, there are ways to address or minimise this risk, starting with proper credibility assessments of the claimants' assertions.¹²⁸ If the claimants' statements as to why and how their legal parents do not exist or cannot be proven are found not credible after a full and fair assessment, then they can be rejected on that basis. If the concerned minor does not raise a refugee claim, or their refugee claim has been rejected, the normal course of action by the determining body would be to contact the authorities of the purported country of origin,¹²⁹ where at least the minor's (non-)possession of a foreign nationality can be verified, if not his/her unknown parentage.¹³⁰

126 See the proposals made by Denmark and Italy concerning the term 'proof to the contrary' in Article 2 of the *1961 Convention*. To the question from the representative from the Netherlands about what would happen if it were established that 'a foundling, although of unknown parents, had been born in a country other than that in which he was found,' The Danish representative responded that: '[T]he Danish draft provision did not refer to the place of birth of foundlings. If, for example, it was established that a foundling found in Danish territory had in fact been *born in the territory of a neighbouring state*, under that draft provision the child would nevertheless be a Danish national. (emphasis added)'. United Nations, Summary Records, 5th Plenary Meeting held on 31 March 1959, A/CONF.9/SR.5, UN Conference on the Elimination or Reduction of Future Statelessness, Geneva, 1959 (31 March 1959) 2 <http://legal.un.org/docs/?path=../diplomaticconferences/1959_statelessness/docs/english/vol_2/a_conf9_sr5.pdf&lang=E>. See details in sec 6.7 'Rationale 2: Is It Justifiable to Include "presumption of birth" in the Definition of Being "found"?' and sec 7.3.1 'Discovery of Birth Abroad Pre Facto [And Post Facto]' of Kaneko-Iwase (n 2) 258-260; 271-284.

127 While *not* in the context of a foundling provision, it is notable that the judgment by the Spanish Court of Appeal of Gipuzkoa in May 2022 (appeal no. 2209/2022) <https://caselaw.statelessness.eu/sites/default/files/decisions/SAP_SS_203_2022.pdf> confirmed Spanish nationality of a child under the Civil Code 17(1)(c)(c) (granting nationality to children *born in Spain* of parents unable to transmit any nationality) who was born *abroad* i.e. in Morocco. The child's mother contacted the Cameroonian and Moroccan embassies in Spain but never succeeded in registering her birth nor having her Cameroonian nor Moroccan nationality recognized. The Court recognized the child was stateless and confirmed her acquisition of Spanish nationality by adopting a broad (*extensiva*) application of Article 17(1)(c) to ensure the right to nationality under art 7 of *CRC* and the best interests of the child. If the logic of this judgement were to be followed, there would be little difficulty recognizing the Spanish nationality under Article 17(1)(d) of a minor of unknown parents born abroad but found in Spain.

128 Refer to paras 101–7 ((9) Credibility issues) of the *UNHCR Handbook on the Protection of Stateless Persons* (2014) by analogy.

129 Paras 66, 79–82 and 96–99 of the *UNHCR Handbook* (2014).

130 See more on 7.3.1.3 'The Contemporary Relevance of the Drafters' Intention Allowing Foundlings Born Abroad to Acquire Nationality,' especially sec 7.3.13 *Link with Unaccompanied Children* and sec 7.6.1.2 and 8.3.8 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 305-309 and 345-348.

Legislating a legal provision to withdraw the nationality granted based on foundling provisions upon discovering that the claimants do possess a foreign nationality may be a reasonable measure that States may take when explicitly extending their foundling provisions to all minors of unknown parentage. This, however, needs to be accompanied by appropriate procedural safeguards - including a limitation period - to avoid arbitrary deprivation of nationality.¹³¹ Further, while it is the norm (as actually practised in many States) that foundlings acquire nationality retroactively at birth, States may also consider granting nationality at the time the child was found.¹³² This is, however, given that being 'found' is properly defined as having been seen in the territory by a person other than one's parents (i.e. not necessarily by the authorities), including to prevent undue hardships that might otherwise arise, e.g. if the period of residence within the territory before acquisition of nationality is to be considered as irregular and so on.¹³³

F. UNHCR Guidelines and International Human Rights Law Standards

UNHCR Guidelines No. 4 notes in para 57 that while some state parties apply their foundling provisions only to very young children, most states apply it to children of an *older age*, including in some cases up to the *age of majority*, and recommends at para 58 that:

[a]t a minimum (...) (Note: Article 2) is to apply to all young children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth. This flows from the object and purpose of the 1961 Convention and also from the right of every child to acquire a nationality. A contrary interpretation would leave some children stateless. (emphasis added)

This guidance is echoed by regional instruments related to the prevention of statelessness. *Principle 9 of the Council of Europe Recommendation CM/Rec (2009)13* recommends states to 'treat children found abandoned on their territory with no known parentage, *as far as possible*, as foundlings with respect to the acquisition of nationality' (emphasis added). Its *Explanatory Memorandum* at para 24 states that, while limiting the application of Article 6(1)(b), i.e. a foundling provision of the 1997 *European Convention on Nationality*, to abandoned newborn babies is still in line with its obligation, 'this restriction *leaves a gap* with regard to the *avoidance of statelessness*'. It further notes in para 25¹³⁴ that '[a] state could decide to extend the provision on foundlings to *all minors* found abandoned on their territory, as some states already do'.

Paragraph 96 of a 2014 *General Comment*¹³⁵ of the African Committee of Experts on Article 6 of the ACRWC echoes the UNHCR Guidelines 4 para 57, commending 'States that have adopted laws providing for nationality to be conferred under such provisions to *much older children*.' Further, Article 5(2) of the African Union's 2024 Protocol states that 'A State Party shall also attribute nationality, in accordance with its national law, to a *child* found in its territory of unknown parents (...)'.¹³⁶

131 See details on nationality withdrawal in sec 7.6 'Post Facto Withdrawal of Nationality.' See also guidance to avoid arbitrary deprivation of nationality in UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness* (2020).

132 See sec 5.8.2 and sec 8.3.5 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 224, 341-343.

133 See sec III.H of this paper and sec 6.5 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 253.

134 Council of Europe: Committee of Ministers, Recommendation CM/Rec(2009)13, Principle 9; para 24 of the explanatory memorandum of the Committee of Ministers to member states on the nationality of children (9 May 2009) <<https://www.refworld.org/legal/resolution/coeministers/2009/en/79185>>. Note that these recommendations are being updated to adopt furthermore inclusive approach. Gérard-René de Groot/Council of Europe, 'Feasibility study on a non-binding legal instrument regarding stateless children's access to nationality', <<https://rm.coe.int/prems-016225-gbr-2017-publication-study-children-access-nationality-we/1680b4634f>> footnote 9 cites Kaneko-Iwase, *Nationality of Foundlings* (n2).

135 African Committee of Experts on the Rights and Welfare of the Child, General Comment No 2. on Article 6 of the ACRWC, *The Right to a Name, Registration at Birth, and to Acquire a Nationality* (2014) <<http://www.refworld.org/docid/54db21734.html>>.

136 Its draft *Explanatory Memorandum* (2018) used to echo the African Expert Committee General Comments (2014) but the new version of the *Explanatory Memorandum* has not been published.

All the referenced commentaries from UNHCR, the European Council and the African Committee of Experts above indicate that it is ideal that the maximum age to be considered a foundling is *higher than* that of young children or infants. Furthermore, the UN Committee on the Rights of the Child, while not articulating on the right to nationality including of foundlings, has expressed concern that '*children between 15 and 18 years tend to be provided much lower levels of protection*' in spite of the fact that the *CRC* grants the *same rights* to all children up to the age of 18, and calls on states to guarantee the rights under the Convention on an 'equal' basis as those under 15.¹³⁷

G. Precedents Involving Children Above the Age of 'Young Child' When Found

There are a small number of publicly available legal precedents known to the author where a child was found in the territory when above the age of infancy or 'young child' in common usage (above six to seven years old) and was confirmed as a national based on the relevant foundling provisions. One of them is from Spain, introduced at the outset of this article, whose foundling provision explicitly used the term 'minor' (of undetermined filiation).¹³⁸ Most of the foundling-related decisions by the General Directorate of Registries and Notaries (DGRN), the Spanish competent authority, relate to those found as young children. This 2005 case,¹³⁹ however, involved an undocumented female child claiming to be 11 years of age, who was found by the police of Catalonia engaged in begging on the streets in Barcelona along with the self-claimed father. The self-claimed parents were purportedly from Bosnia and Herzegovina and of Romanian nationality, but their identities were not established. They also stated the girl was born in Rome, which was not proven either.

According to the decision, the relevant Child Care Directorate declared the minor to be in a situation of abandonment and arranged for the child to be hosted in a public reception centre, which subsequently produced a multidisciplinary report showing that the alleged parents did not prove their parentage over the girl. In confirming the child's Spanish nationality, DGRN recalled that:

[T]his conclusion is supported and confirmed by other *superior principles* of our legal system relevant in the case, such as the primacy of the *child's interest* (...) and the *right of every child* to registration of their birth and a *nationality* resulting from Article 7 (of *CRC*) (emphasis added).'

In 2006, a child in a similar case was confirmed as a Spanish national by DGRN under the foundling provision, this time involving a male child, approximately eight years of age, of unknown parentage. The alleged parents were 'apparently of Romanian nationality' but proved neither their own identity nor parentage over the child. The child was of unknown birthplace (possibly born abroad, i.e. in Italy, as mentioned in paragraph 1 of the decision), but his first known place of stay was in Spain.¹⁴⁰

137 Joint General Comment No 4 of CMW and No 23 of the CRC (2017), CMW/C/GC/4-CRC/C/GC/23.

138 Article 17(1)(d) of the Spanish *Civil Code* states: 'The following persons are Spanish nationals of origin: (...). d) Those born in Spain whose parentage is not determined. To these effects, minors [*los menores de edad*] whose first known place of stay is Spanish territory are presumed to have been born in the Spanish territory.' (author translation) *Código Civil* <[https://www.boe.es/eli/es/rd/1889/07/24/\(1\)/con](https://www.boe.es/eli/es/rd/1889/07/24/(1)/con)>.

139 The DGRN resolution June 2005 (n 2).

140 Res. DGRN 2a de 3 de julio de 2006 (BOE, núm. 218, 12-IX-2006) 15896 <http://www.migrarconderechos.es/jurisprudenciaMastertable/jurisprudencia/Res_DGRN_03_07_2006>. Author thanks Professor Aurelia Álvarez Rodríguez and Professor Nacho Hernández Moreno for guiding her to the decision.

A more recent notable case is from Italy, whose foundling provision itself does not provide for an explicit age. Italy's foundling provision, i.e. Article 1(2) of its nationality law of 91/1992, uses the term '*il figlio*', which refers to a family relation, i.e. 'son or daughter' (of unknown parents), and is not linked to a particular age.¹⁴¹ The decision of an Italian Court of Napoli in March 2022¹⁴² confirmed the Italian nationality, based on the foundling provision, of a male who had been recognised as a stateless person under the *1954 Convention* in 2018 by the Court of Rome.¹⁴³ He had supposedly arrived in Italy as an unaccompanied minor, and was allegedly born in the former Yugoslavia in 1990 and was a trafficking victim. He was found alone and without identity documents by the Italian authorities and was considered to be approximately 12 years old when found in 2002.¹⁴⁴ The preceding 2018 Court of Rome judgment contains the plaintiff's account (which the Napoli Court effectively affirms in general terms) that, having been abandoned at a very young age, the plaintiff is unable to remember anything about his origins, and that after arriving in Italy, he subsequently lived in a Roma people's camp (presumably with a self-claimed father who was not legally one) where he was engaged in begging and was abused until he managed to escape and ask for help from the Italian authorities. After being recognised in 2018 as a stateless person by the Court of Rome, the plaintiff subsequently applied for confirmation of Italian nationality at birth under the Italian foundling provision but was rejected by the relevant Civil Registrar. During the Napoli court proceedings, the Department for Civil Liberties and Immigration Ministry of Interior (Moi), the competent authority on nationality matters, defended its position by submitting its opinion, stating that Article 1(2) referred only to the case of a newborn or a child not yet capable of speaking, found on the territory, without the possibility of tracing back to his or her country of origin.¹⁴⁵ The judge disagreed with the argument, referring to the fact that the Court of Rome had already ascertained the child's statelessness, and that the foundling provision only stipulated (to grant nationality to children of unknown parents) in the absence of proof of their possession of any other citizenship.¹⁴⁶ The Moi did not appeal the first-instance court decision, and the decision became final.¹⁴⁷

What transpires through these decisions is the states' and courts' will to ensure, through their domestic foundling provisions, the right to nationality of all minors under Article 7 of the CRC.¹⁴⁸

141 Author thanks Attorney Paolo Farci and Enrico Guida for guiding her through the Italian nationality law including the meaning of terms.

142 Court of Naples, XIII Civil Section, Decision of 2 March 2022.

143 Ordinary Court of Rome, the First Civil Section Judgment No. 16519/2018 of 14 August 2018. (Original: Sentenza n. 16519/2018 pubbl. 14/08/2018, Il Tribunale ordinario di Roma Prima Sezione Civile). The author wishes to thank Attorney Paola Ferrannini for providing the judgment to the author.

144 The Court of Rome judgment contains the plaintiff's account that he had arrived in Italy at around eight years of age, having subsequently lived in the Roma people's camp. Nonetheless his presence since eight years of age apparently had not been substantiated; with the judgement stating, 'at least from the age of 12'.

145 This position and rationale by the Ministry of Interior is explained in detail in sec 6.7.1., chap 6 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 255-256.

146 The Italian nationality law article 1(1)(b) states

'The following shall be citizens by birth: [...] (b) (A son or daughter) who was born in the territory of the Republic both of whose parents are unknown [...].' Article 1(2) states 'A son or daughter (*figlio*) found in the territory of the Republic whose parents are unknown shall be considered citizens by birth in the absence of proof of their possession of any other citizenship.' *Legge n. 91, 5 febbraio 1992, Nuove norme sulla cittadinanza* <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1992-02-05;91!vig=2019-11-09>>.

147 The author is informed that MOI has subsequently adopted a new position that the Italy's foundling provision is not only applicable to newborns, but to children up to 18 years old in general. Email responses from Enrico Guida, UNHCR Italy, dated 28 September and 18 October 2023 to the author's inquiry, on file with the author.

148 It should be noted that there are more precedents where persons of unknown parents came to the attention of the authorities only as adults (including as elderlies), who were still confirmed nationals under foundling provisions. They were determined to have been already 'found' by third persons other than authorities when they were (young) children. See e.g. DGRN Resolution in Spain. Res. DGRN de 9 de agosto de 1993 (188) (BIMJ, núm. 1685, 1993, pp. 4645-8; RAJ, 1993, núm. 6899). Further, in a number of family court adjudications in Japan (whose relevant nationality law provision requires 'birth in the territory'), the plaintiff had their 'birth in the territory' presumed by circumstantial evidence (with no documentary evidence) as found in several family court adjudications. Such as *Kagetsu* Vol 28, No 1, p 84 [31 January 1975 (Showa 50 nen)] (*Oita* Family Court *Bungotakada* Branch). See sec 6.4 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 249.

H. Conclusions of Section IV: Age Limit - Below the Age of Majority

This section examined the maximum age of children that should be covered by the term 'foundling'. Article 2 of the *1961 Convention* does not specify an age, and the *travaux préparatoires* are largely silent but consistently use the neutral term 'child', leaving some room for minors to be included in the foundling concept. It was acknowledged that definitions of a 'foundling' in non-legal dictionaries carry connotations of a newborn or young child. However, the 'ordinary meaning' of a term under Article 31 (1) of the *VCLT* is not to be restricted to its dictionary definition¹⁴⁹ nor determined in the abstract, but must be interpreted in light of the context, object and purpose of the treaty.¹⁵⁰ Indeed, there were a couple of nationality laws valid *at the time of drafting* the *1961 Convention* whose foundling provisions were applicable to minors of unknown parents.¹⁵¹ As per the CRC Committee's guidance, the rights enshrined in Article 7(1) of the *CRC* are rights of *all* children who have not attained the age of majority, and it is never in the best interests of the child to be rendered stateless. As detailed in **Table 4**, the comparative analysis revealed that the foundling provisions of 10 states (7% of 142 states) explicitly cover all minors, and that the provisions of at least 16 states (11%) encompass all minors according to their available legal interpretation, making a total of 26 states (more than 18%). The actual legal precedents in which children of unknown parents who were found only when around ages 11 and 12, respectively, in Spain and in Italy (likely to have been born abroad) were confirmed nationals under their respective foundling provisions are exemplary. This is because children who do not know their parents in the first place (e.g. because they were informally adopted or trafficked) *will not 'recall' who their parents are*, no matter how old they become - whether 10, 15, or even 70 years old. Restricting foundlings' age to 'newborns' or 'infants' by heavily relying on the non-law dictionary foundling definition, or to certain younger children 'who cannot explain the identity of parents/birthplace' lacks firm justifications and may be considered arbitrary in light of the objective of the *1961 Convention* and the evolutive nature of international human rights law. It is therefore recommended that all persons of unknown parents under the age of majority be covered by the term 'foundling'.

IV. CONCLUSIONS

This article, having asserted that the grant of nationality to foundlings is a customary international law norm, examined the definition of the term 'foundling' in Article 2 of the *1961 Convention*, with the aim of making a recommendation on the maximum age of the child when found in a territory to qualify as a foundling. It adopted an evolutionary and teleological approach to treaty interpretation in light of the object and purpose of the *1961 Convention*, taking into consideration the best state practice and developments in (regional) human rights law, including those related to the *CRC*.

This article first clarified that the term 'foundling' in fact means 'a child of unknown parents'. This was drawn from the analysis of the evolution from Article 14 of the *1930 Convention* to Article 2 of the *1961 Convention*, the comparative analysis of the texts of 142 nationality laws that contain foundling provisions (among 193 UN member States) and their actual applications in some states. It also clarified that 'unknown parentage' essentially means being of 'legally unknown parents,' i.e. either there exists no legally recognised parent for the person concerned, or a legal parent(s) is supposed to exist, but such existence cannot be proven.

149 Gardiner, *Treaty Interpretation* (n 15) 181.

150 ILC, *Draft Articles on the Law of Treaties* (n 111).

151 See section IV.A.

Accordingly, in the formulation of the wording of future international/regional treaties or nationality laws, it is recommended to adopt the term ‘child (minor) of unknown parents’ or ‘child (minor) whose legal parentage cannot be proven’ (found in the territory) since the term ‘foundling’ as well as its equivalents in other UN official languages are vague, misleading and prone to restrictive interpretation.¹⁵²

The article then examined the maximum age of children that should be covered by foundling provisions and recommended that *all persons* of unknown parents found *under the age of majority* be covered. Article 2 of the *1961 Convention* does not provide for any age limit, with the *travaux* record largely silent but consistently using the neutral term ‘child’, leaving some room for minors to be included in the foundling concept. It was acknowledged that definitions of a ‘foundling’ in non-legal dictionaries carry connotations of a newborn or young child. However, the ‘ordinary meaning’ of a term under Article 31 (1) of the *VCLT* must be interpreted in light of the context, object and purpose of the treaty.¹⁵³ Indeed, there were a couple of accessible nationality laws valid *at the time of drafting* the *1961 Convention* whose foundling provisions were applicable to minors of unknown parents.¹⁵⁴ The nationality rights enshrined in Article 7(1) of the *CRC* are rights of *all* children who have not attained the age of majority,¹⁵⁵ and it is never in the best interests of the child to be rendered stateless. As detailed in **Table 4**, the comparative analysis revealed that foundling provisions of 10 states (7% of 142 states) explicitly cover all minors, and that the provisions of at least 16 states (11%) encompass all minors according to their available legal interpretation, making a total of 26 states (more than 18% of 142 states). There also exist exemplary legal precedents in which children of unknown parents who were found only at ages 11 and 12, respectively, in Spain and Italy (both of whom are likely to have been born abroad) were confirmed as nationals under their respective foundling provisions.

As discussed in Section IV.E, the main rationale for states not opening up their foundling provisions to all minors and instead adopting an age limit of ‘newborns’ is to reduce the possibility that the claimants have been born abroad. However, the text of Article 2 of the *1961 Convention* does not actually exclude foreign-born foundlings. Some states in the *travaux* process acknowledged that such foundlings should still be granted nationality where found, if they would otherwise remain stateless.¹⁵⁶ Further, while some states limit the foundling age to ‘young children who cannot explain the identity of their parents/birthplace’, children who do not know their parents (e.g. because they were informally adopted or trafficked) *will not ‘recall’ who their parents are*, no matter how old they become - whether 10, 15, or even 70 years old. Concerns regarding fraudulent claims can be addressed or minimised by measures such as proper credibility assessment. Restricting foundlings’ age to ‘newborns’, ‘infants’, or certain younger ages, such as 10 or 14 years old, would thus lack firm justifications and may be considered arbitrary in light of the objective of the *1961 Convention*, the *CRC* and the evolutive nature of international human rights law.

¹⁵² In reflecting this into domestic legislation, the ‘model foundling provision’ advanced in the author’s book serves a useful reference: ‘A person whose **legal parentage cannot be proven** who is **found as a child** (or under the age of majority) in the territory shall acquire the nationality of X [the State where found], unless her or his **possession of a foreign nationality** is proven.’ Detailed commentary is available in chapter 8 of Kaneko-Iwase, *Nationality of Foundlings* (n 2) 333-349.

¹⁵³ ILC, *Draft Articles on the Law of Treaties* (n 111).

¹⁵⁴ Peru and Israel. See section IV.A. (n 112 and n 113).

¹⁵⁵ Joint General Comment No 4 of CMW and No 23 of the *CRC* (2017) (n 46).

¹⁵⁶ See the proposals made by Denmark and Italy concerning the term ‘proof to the contrary’ in article 2 of the *1961 Convention* (n 128).

A harmonised interpretation of the term 'foundling' contributes to legal certainty and strengthens the integrity and legitimacy of the *1961 Convention* and the international human rights protection system in general. Defining a foundling as any minor of unknown parents not only closes the recurrent gaps where many persons of unknown parentage can only be discovered late, when no longer 'newborn' or 'young children' due to informal adoption, trafficking, displacement, conflict or document loss,¹⁵⁷ but also leads to a more structured approach to domestic adjudication and international responsibility sharing.

¹⁵⁷ On how the lack of functioning civil registration and loss of documents due to displacement and armed conflict can lead to statelessness in general, see for example Amit Sen and Zahra Albarazi, 'Efforts to prevent statelessness amongst children displaced by conflict in the Middle East and North Africa' in Laura van Waas and Melanie Khanna (eds), *Solving Statelessness* (Wolf Legal Publishers 2017) 412-422.

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For any clarifications, please contact the author. The author welcomes any updates on nationality laws and relevant legal precedents.

Annex (separate document): Mai Kaneko-Iwase, Table of Legislation on the Nationality of Foundlings of 193 UN Member States (Last partially updated on 20 Feb 2026)