Evidence-Based Approaches to Peace and Conflict Studies

Volume 5

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Mai Kaneko-Iwase

Nationality of Foundlings

Avoiding Statelessness Among Children of Unknown Parents Under International Nationality Law

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Photograph of an ancient baby box, Florence, Italy

Until 1875, the 'foundling wheel' at Ospedale degli Innocenti (Foundling Hospital) in Florence, Italy had taken in abandoned children. The hospital accepted the first child in 1445.
Photo © Mai Kaneko-Iwase, 2017.

For Takeshi, Takeo and Mieko,
and in memory of my father,
Seiji Kaneko

Preface

This monograph is a fully revised and updated version of my dissertation to obtain the degree of Doctor at Faculty of Law, Maastricht University, which was successfully defended on 10 January 2020.

I have to thank so many people for having empowered me to accomplish this 'impossible' challenge—of completing my Ph.D. and this book, all while raising my little son, being a relatively supportive wife, writing during my leave, then returning to my job and working full(er) time and continuing to write, all of which pushed me to the edge. I found myself writing bits and pieces over years, during late nights and early mornings, most of my weekends and holidays.

Special thanks go first of all to my supervisor, Professor Emeritus Dr. Gerard-René de Groot. His decision to take me under his supervision was one of the luckiest things that have happened in my life. His meticulousness and wealth/depth of knowledge, combined with such a sweet personality, gave me a profound feeling of respect, honor, and gratitude. Thanks Dr. Olivier Vonk, my second supervisor, for his advice not only on the content but also on highly practical issues. I am indebted to Dr. Laura van Waas, whose fabulous training sessions I was lucky enough to participate in as part of my work, which intrigued me to get into the world of international statelessness law. Thanks Laura and other Assessment Committee members of mine for their valuable comments and advice, which definitely enhanced the quality of this book: Prof. Dr. Marta Pertegás Sender, Prof. Dr. Maarten P. Vink, and Prof. Dr. Patrick Wautelet. My heartfelt gratitude to Dr. Marieke Hopman and Dr. Mark Kawakami—such a great couple—for being my paranymphs. Having you two on board addressing my numerous worries was a real blessing.

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In more general terms, I owe a lot to the core members of the Study Group on Statelessness in Japan, starting with Attorney Sōsuke Seki, Attorney Ayane Odagawa, Attorney Fumie Azukizawa, and Prof. Dr. Osamu Arakaki for providing the fora to discuss in depth different aspects of statelessness—including my own research—which has constantly inspired, motivated, and enlightened me. Senior/peer support from Dr. Yue Fū and Dr. Hajime Akiyama kept me motivated when I felt 'alone' in the world of Ph.D. candidates.

Thanks Jade Cooper, solicitor, and Ruth Haruna Borgwardt for their copyediting assistance. I should not forget to express my gratitude to Dr. Greg Rien for listening to—for almost 4 years—my worries and sharing with me his wisdom as somebody who also wrote his dissertation while working fulltime.

While I cannot emphasize more that the views expressed herein are my personal views and not those of the UN or UNHCR, I still wish to thank some from UNHCR. The guidance from Mark Manly, Radha Govil, and Jeanette Züfle that I received as part of my work at UNHCR in the field of statelessness definitely contributed to the building of my (though relative) meticulousness. The encouragement and understanding from Melanie Khanna, Dirk Hebecker, Dr. Naoko Obi, and Toshitsuki Kawauchi that my study should also help achieve the UNHCR's objective boosted my morale. At the end of the day, I decided to write this book in the hope that it will help, if even just a tiny bit, the granting of nationality to persons of unknown parents, who are among the most vulnerable.

Last but not least, thanks to Takeshi Iwase for being an outstandingly caring father and supportive husband—not only from the 'Japanese standard' but also from the global standard. Thanks, Takeo, now 6 years old, for being my reason for living and, on top of that, for being a particularly good son. I am grateful to my parents-in-law, Toshio and Sachiko Iwase, for being exceptionally understanding and supportive in-laws. Same goes for my feminist brothers Motomu and Tsuguru.

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Without all of you, none of this was possible.

And lastly, to my scientist father Seiji Kaneko, RIP, who passed away 23 years ago today while writing his unique doctoral dissertation on 'the biological clock of the cockroach'. You should know you are still remembered in the community for your intelligence and big heart. You are the one who gave me the idea of becoming a 'Dr.' when I was just a little girl. Your spirit was always there to encourage me when I wanted to give up—not just once, but almost *every day*.

This Ph.D./book is for you.

Majority of the content of this book was written based on the information available as of the end of January 2019 (and the web links were rechecked on 4 August 2019) unless the updates in 2020 are noted.

Tokyo, Japan — Mai Kaneko-Iwase
25 December 2020

Executive Summary

The number of 'foundlings' around the world is possibly on the increase due to irregular migration, trafficking, armed conflicts, displacement, destruction of civil documentation systems, and disease pandemics among others.

Article 2 of the 1961 Convention on the Reduction of Statelessness (hereinafter the 1961 Convention) is a provision that leads to the acquisition of nationality by a 'foundling' 'found' in a member territory, to prevent her or his statelessness. Out of 193 UN member States, of which 75 (as of end December 2020) are parties to the 1961 Convention, at least 139 States or approximately 72 per cent have domestic provisions granting nationality to persons of unknown parents born or found in the territory. However, the wording of such 'foundling provisions' and their implementation differ significantly between States.

This book examines and proposes an appropriate definition for, and interpretation of, 'foundlings' 'found' in States' territories and 'proof to the contrary'—contained in article 2—as well as some key aspects of procedural standards such as the applicable burden and standard of proof in assessing unknown parentage—which have been largely unexplored in the scholarship to date. This is done mainly by: referring to the object and purpose of the 1961 Convention; the preparatory work and documents interpreting the Convention; complementary international human rights law standards including the best interests of the child under the 1989 Convention on the Rights of the Child (CRC); as well as by conducting a review of the text of relevant national legislation in all 193 UN member States and its actual implementation for a number of States including those that are not State parties to the 1961 Convention.

An examination of the preparatory work of the 1961 Convention and the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Law as well as, the wording of different UN language versions and of domestic foundling provisions, have confirmed that the term 'foundling' under article 2 of the 1961 Convention essentially refers to a child of unknown parents whose birthplace is either known or unknown.

The research has further found that in many States the most typical cases that benefit from foundling provisions are babies found abandoned in public places, or left in baby hatches or boxes operated by public or private organizations. In a number of countries, babies surrendered through a form of 'anonymous birth' where the

biological mother is factually known but not legally known make up the majority of the cases who acquire nationality based on the foundling provision. In several States, the foundling provision is interpreted to cover many other categories of persons, including babies left behind at a hospital by the birth mother after delivery, children who are entrusted to/informally adopted by unrelated adults, orphans, lost children, and persons who have lost their memory. In many cases, fragments of information regarding their parent(s)' identities do exist, which however cannot be firmly established. In at least one of the countries, persons whose parent(s) go missing after registering their birth with invalid identity information have been confirmed nationality.

It was also found that being of 'unknown parentage' essentially means being of 'legally unknown parents', which means specifically that the person's legal parents do not exist, including where such existence of legal parents cannot be proven. This is because for one to acquire nationality under nationality law, legal parentage rather than factual parentage matters. Naturally, having 'legally unknown parents' includes instances where the parents are factually unknown.

The book also found that under some States' practice or legislation some children of unknown parentage who are otherwise stateless who are not necessarily recognized as 'foundlings' are granted nationality through other avenues including: by relaxing the requirements for late birth registration; on the basis of adoption by nationals; by being hosted at a child custody institution within the territory; or via recognition as stateless persons and facilitating their naturalization under the 1954 Convention relating to the Status of Stateless Persons. The existence of other avenues appears to reduce the need to interpret the foundling provision in the 1961 Convention in an 'inclusive' manner in such countries.

The book reveals that *being found* on the territory of a State is a *condition* (rather than being part of the definition of a 'foundling') that gives rise to the obligation of that State to grant nationality to the person found, and includes the situation where the person's birth within the territory is indeed established. One does not have to be literally 'abandoned' but she or he can be orphaned, lost, or informally adopted and later spontaneously approach or come into contact with the authorities.

Being 'found' should be broadly defined as 'having been seen in the territory by a person other than one's parents', or something to that effect. Notably, some States have previously applied their foundling provision in a full and inclusive manner, such as by confirming nationality for persons of unknown parents who have voluntarily approached the authorities at a much older age, in their 40–60s. In such cases, their presence in the territory in their childhood was established by evidence such as their own statements, school records, or testimony by non-State third persons such as neighbors.

The author reviewed the foundling provisions of 139 States (mainly read through English originals/translations except for those in Spanish and French). In relation to the 'age' of the person to be considered a 'foundling' and thereby granted nationality—which is not specified in the 1961 Convention—the review shows that the legislation of 17 States only grants nationality to persons of unknown parents who have been *born* in the territory, and at least 36 States limit the grant

of nationality to persons who are 'new-born (or recently born)' when found. At the same time, ten States provide for the application of their foundling provisions to older children (3–15). A total of 15 States, or slightly more than 11 per cent of the 139 States with foundling provisions, either explicitly or by interpretation open up the target age to all 'minors'. Among such 15, ten States are explicitly open, either by using the term 'minor', or by using 'child' *and* defining 'child' as 'minor' (while the age of majority differs) within the same legislation. For the remaining five States among 15, relatively dependable information was available stating that the (undefined) term 'child' therein meant 'minor'. For the remaining 61 States (44 per cent) whose foundling provisions do not specify the age—using either the term 'child', 'foundling', or 'infant'—while no complementary information was readily located specifying the age of the person in question, there are indications that a number of the States (using 'child') might indeed cover all minors.

Based on these findings, and in light of the object and purpose of article 2 of the 1961 Convention and the right to nationality under article 7 of the CRC contracted by 192 UN member States, it is argued that an ideal foundling provision should cover all persons of unknown parentage found in the territory of a State before reaching the age of majority. This is because imposing various younger age limits is arbitrary under international law and goes against the best interests of the child. Many persons of unknown parentage are not able to account for the identity of their parents regardless of how old they become. The object and purpose of the foundling provision is essentially to prevent statelessness of persons of unknown parents (and often unknown birthplace) for whom there is no basis to determine (or acquire) nationality by *jus sanguinis* or *jus soli*.

The book further examines the term 'in the absence of proof to the contrary' in article 2 in the pre facto assessment for the purpose of (confirming) one's nationality acquisition based on the foundling provision. Further, it examines what constitutes the ground for the withdrawal post facto of such nationality.

As to pre facto assessment, while current State practice generally shows that evidence of birth outside the territory constitutes 'proof to the contrary' and disqualifies the person concerned from acquiring nationality based on the foundling provision, the travaux records of the 1961 Convention as well as limited statements from some administrative and judicial authorities indicate the room for an alternative interpretation. According to such an alternative interpretation, a child of unknown parentage found in the territory but born in another State could nevertheless acquire nationality of the State where found, as long as she or he is otherwise stateless. In other words, under such an alternative interpretation, having been born in another State does not constitute 'proof to the contrary' pre facto, but possession of another nationality does. This interpretation will be particularly relevant in today's climate of global migration, displacement, and human trafficking, where persons move between borders without necessarily securing evidence on their parentage.

With regard to the post facto withdrawal of nationality, the author stresses that it must not constitute arbitrary deprivation of nationality prohibited under international human rights law. For this purpose, the withdrawal of nationality must: have a clear basis in law; be the least intrusive means of achieving a legitimate purpose; and follow

a due process. The nationality withdrawal upon the discovery or establishment of foreign parentage and/or birth may only be allowed if it is proven that the person concerned has indeed acquired foreign nationality as a result. Further, after the person has lived with the nationality for a certain number of years, it should be maintained even if non-withdrawal results in multiple nationality.

The book also examined the burden and standard of proof when a dispute occurs as to the 'unknown-ness' of one's parentage at the initial determination of a person's nationality. The author concludes that, as long as the person concerned asserts unknown parentage and duly cooperates and provides all the reasonably available evidence regarding the parents' unknown-ness, States should bear both the burden of producing evidence and the burden of persuasion regarding the *existence* of a legally recognized parent. If such a burden of proof is not fulfilled, the State should affirm the unknown-ness of the parents. In relation to the standard of proof or the 'degree' of unknown-ness of parentage, it is recommended that decision-makers recognize the 'unknown-ness' when they cannot be convinced within a pre-set deadline, that one of the child's legally recognized parents is *definitively* identified to the extent that it enables the confirmation of the child's nationality acquisition by *jus sanguinis*.

Drawn from the above including the best practice around the world, the book concludes by proposing a 'model provision' that can serve as an inspiration in reflecting article 2 of the 1961 Convention into domestic law or in drafting a new regional instrument:

> A person whose **legal parentage cannot be proven** who is **found** as a **child** in the territory shall **acquire the nationality** of X [the State where found], **unless her or his possession of a foreign nationality is proven**.

While not included in the above 'model provision' itself, it is essential that the assessment and confirmation of whether the person has acquired nationality under the above provision is done within a reasonable time. Reasonable time can be, for example, 6 months extendable to 1 year, after the declaration is made to the competent authority for the purpose of such nationality confirmation. Further, the withdrawal of nationality previously confirmed under a foundling provision, if envisaged, should be clearly regulated either within the same provision or by a separate provision, so as to avoid arbitrary nationality deprivation. As stated above, such provision should at least provide that, in case of discovery or establishment of foreign parentage and/or birth, nationality cannot be withdrawn unless the State concerned proves—within a limitation period—that the person possesses a foreign nationality. Further, the decision to withdraw, including when not resulting in statelessness, must be subject to individual proportionality assessment including best interests determination when involving children, as well as procedural safeguards such as the right to a fair hearing and effective remedy. This limitation period should be the maximum of 10 years from the date the State took an action to confirm her or his nationality, ideally with even a shorter deadline in light of the best interests of the child. The withdrawal should desirably have non-retroactive effect.

The model foundling provision and other interpretative guidance contained in this book should help ensure a full and inclusive application of article 2 of the 1961

Convention and equivalent national provisions in accordance with their object and purpose as well as the best interests of the child under the CRC. They should prove particularly useful in cases involving States under the effects of armed conflicts; or where documentation of civil and nationality status is not yet systematic; or where migration, displacement, and trafficking is widespread.

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Note: This book was written by the author purely in her personal capacity. The views expressed herein are those of the author and do not reflect the views of the UN or UNHCR.

Abbreviations

1930 Convention	Convention on Certain Questions relating to the Conflict of Nationality Law
1951 Convention	Convention on the Status of Refugees
1954 Convention	Convention on the Status of Stateless Persons
1961 Convention	Convention on the Reduction of Statelessness
AAO	Administrative Appeals Office (US)
ACHPR	African Commission on Human and Peoples' Rights
ANUSCA	Associazione Nazionale Ufficiali di Stato Civile e d'Anagrafe [National Association of Civil Registrar Officials] (Italy)
ART	Assisted reproductive technology
AU	African Union
BIA	Board of Immigration Appeals (USA)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union (European Court of Justice)
CMW	UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DGRN	General Directorate of Registries and Notaries (Spain)
DHS	Department of Homeland Security (USA)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)

ECN	European Convention on Nationality
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
ENS	European Network on Statelessness
ETS	European Treaty Series
EUDO Citizenship	European Union Observatory on Democracy on Citizenship (now GLOBALCIT)
ExCom	UNHCR Executive Committee of the High Commissioner's Programme
FCA	Federal Court of Australia
GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
GLOBALCIT	Global Citizenship Observatory (formerly EUDO)
HCCH Study (March 2014)	HCCH, 'A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangement' (March 2014)
HCCH	Hague Conference on Private International Law
IACrtHR	Inter-American Court of Human Rights
IAO	Immigration and Asylum Office (Hungary)
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IJ	Immigration Judge (USA)
ILC	International Law Commission
ILEC Guidelines (2015)	ILEC Guidelines on Involuntary Loss of European Citizenship (2015)
ILEC	Involuntary Loss of European Citizenship Research Project
INA	Immigration and Nationality Act (US)
INS	Immigration and Naturalization Services (US)
IOM	International Organisation for Migration
IPU	Inter-Parliamentary Union
ISI	Institute on Statelessness and Inclusion
Kagetsu	Katei saiban geppō [Family court monthly report] (Japan)
LNTS	League of Nations Treaty Series
MENA	Middle East and North Africa
Minshū	Saikō saibansho minji hanrei shū [Supreme Court collection of civil cases, Japan]
NADRA	National Database and Registration Authority (Pakistan)
OAU	Organisation of African Unity

OFPRA	Office Français de Protection des Réfugiés et Apatrides (France)
RSD	Refugee Status Determination
SDG	Sustainable Development Goals
Tunis Conclusions (2014)	UNHCR, 'Summary Conclusions: Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality' (March 2014)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR Guidelines 4 (2012)	UNHCR, 'Guidelines on Statelessness No 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness' (21 December 2012)
UNHCR Guidelines 5 (2020)	UNHCR, 'Guidelines on Statelessness No 5: Loss and Deprivation of Nationality under Articles 5–9 of the 1961 Convention on the Reduction of Statelessness' (May 2020)
UNHCR Handbook (2014)	UNHCR Handbook on Protection of Stateless Persons (30 June 2014)
UNHCR	UN High Commissioner for Refugees
UNICEF	UN Children's Fund
UNTS	UN Treaty Series
USCIS	Citizenship and Immigration Services (USA)
VCLT	Vienna Convention on the Law of Treaties of 1969