

**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**

UNHCR issues these Guidelines pursuant to its mandate responsibilities to address statelessness. These responsibilities were initially limited to stateless persons who were refugees as set out in paragraph 6 (A) (II) of the UNHCR Statute and Article 1 (A) (2) of the 1951 Convention relating to the Status of Refugees. To undertake the functions foreseen by Articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness, UNHCR's mandate was expanded to cover persons falling under the terms of that Convention by General Assembly Resolutions 3274 (XXIX) of 1974 and 31/36 of 1976. The Office was entrusted with responsibilities for stateless persons generally under UNHCR Executive Committee Conclusion 78, which was endorsed by the General Assembly in Resolution 50/152 of 1995. 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.

These Guidelines result from a series of expert consultations conducted in the context of the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness and build in particular on the *Summary Conclusions of the Expert Meeting on Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children*, held in Dakar, Senegal in May 2011.

These Guidelines are intended to provide interpretative legal guidance for governments, NGOs, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff and other UN agencies involved in addressing statelessness.

I. INTRODUCTION

a) Overview

1. Article 15 of the Universal Declaration of Human Rights establishes the right of every person to a nationality. The Convention on the Rights of the Child (“CRC”) states that every child has the right to acquire a nationality. The object and purpose of the 1961 Convention on the Reduction of Statelessness (“1961 Convention”) is to prevent and reduce statelessness, thereby ensuring every individual’s right to a nationality, including every child’s right to acquire a nationality. The 1961 Convention establishes rules on acquisition, renunciation, loss and deprivation of nationality.

2. Articles 1-4 of the 1961 Convention principally concern acquisition of nationality by children. The cornerstone of efforts to prevent statelessness among children is the safeguard contained in Article 1 of the 1961 Convention. Article 1 gives a child who would otherwise be stateless the right to acquire the nationality of his or her State of birth through one of two means. A State may grant its nationality automatically, by operation of law (*ex lege*) to children born in its territory who would otherwise be stateless. Alternatively, a State may grant nationality to such individuals later upon application. The grant of nationality on application may, according to Article 1(2), be subject to one or more of four conditions as discussed in greater detail in paragraphs 36-48 of these Guidelines.

3. The 1961 Convention further includes provisions for acquisition of the mother’s nationality by descent if the child was born in the mother’s State and would otherwise be stateless (Article 1(3)), acquisition of the nationality of a parent by descent via an application procedure for individuals who do not acquire nationality of the State of birth (Article 1(4)), and on acquisition of the nationality of a parent by descent for individuals born abroad who would otherwise be stateless (Article 4). Article 2 contains a provision regulating nationality of foundlings while Article 3 establishes a rule regulating the territorial scope of the Convention. Article 12 sets out transitional provisions covering the temporal scope of Article 1. All of these provisions are discussed at greater length below.

4. As set out in Article 17 of the 1961 Convention, Contracting States are not permitted to make reservations to Articles 1-4. However, as noted above, some provisions permit Contracting States to make a choice between two or more ways to address statelessness amongst children.

5. These Guidelines are intended to assist States, UNHCR, and other actors to interpret and apply Articles 1-4 and Article 12 of the 1961 Convention.

b) General Considerations for the Interpretation of the 1961 Convention

6. Articles 1-4 of the 1961 Convention are to be interpreted in good faith and in accordance with the ordinary meaning of the terms used in the text, in their context and in light of the object and purpose of the Convention.¹ Where relevant, these Guidelines also refer to the drafting history of the treaty and similarities or differences with corresponding obligations in other, in particular more recent, treaties.

7. With respect to interpreting the plain language of the text of the Convention, it is important to acknowledge that the Convention was drafted in five official United Nations languages (Chinese, English, French, Russian and Spanish) and that all five language versions are equally authentic. There are some minor discrepancies in meaning between the different language versions but these are resolved through application of the rules of treaty interpretation and, in particular, by recourse to the meaning which best reconciles the texts, having regard to the object and purpose of the treaty.²

¹ Please see Article 31 of the Vienna Convention on the Law of Treaties, UNTS 1155, 331.

² Please see Article 33 of the Vienna Convention on the Law of Treaties, UNTS 1155, 331.

c) Impact of International human rights norms on the 1961 Convention

8. The provisions of the 1961 Convention must be read and interpreted in light of developments in international law, in particular international human rights law. Relevant instruments include the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), the 1966 International Covenant on Civil and Political Rights (“ICCPR”), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), the 1989 CRC and the 2006 Convention on the Rights of Persons with Disabilities. Regional human rights instruments, such as the 1969 American Convention on Human Rights (“American Convention”), the 1990 African Charter on the Rights and Welfare of the Child (“African Children’s Charter”), the 1997 European Convention on Nationality, the 2004 Arab Charter on Human Rights, the 2005 Covenant on the Rights of the Child in Islam, and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession are also relevant.

Impact of the “best interests of the child” principle on the 1961 Convention

9. Of paramount importance in determining the scope of the 1961 Convention obligations to prevent statelessness among children is the CRC. All (except two) United Nations Member States are party to the CRC. All Contracting States to the 1961 Convention are also party to the CRC. Articles 1-4 of the 1961 Convention must therefore be interpreted in light of the provisions of the CRC.³

10. Several provisions of the CRC are important tools for interpreting Articles 1-4 of the 1961 Convention. Article 7 of the CRC sets out that every child has the right to acquire a nationality. The drafters of the CRC saw a clear link between this right and the 1961 Convention and therefore specified in Article 7(2) of the CRC that “States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.” Article 8 of the CRC provides that every child has the right to preserve his or her identity, including nationality. Article 2 of the CRC is a general non-discrimination clause which applies to all substantive rights enshrined in the CRC, including Articles 7 and 8. It explicitly provides for protection against discrimination on the basis of the status of the child’s parents or guardians. Article 3 of the CRC sets out a general principle and also applies in conjunction with Articles 7 and 8, requiring that all actions concerning children, including in the area of nationality, must be undertaken with the *best interests of the child* as a primary consideration.⁴

11. It follows from Articles 3 and 7 of the CRC that a child must not be left stateless for an extended period of time: a child must acquire a nationality at birth or as soon as possible after birth. The obligations imposed on States by the CRC are not only directed to the State of birth of a child, but to all countries with which a child has a relevant link, such as through parentage or residence. In the context of State succession, predecessor and successor States may also have obligations.

12. States party to the CRC that are also parties to the American Convention or the African Children’s Charter have a clear obligation to grant nationality automatically at birth to children born in their territory who would otherwise be stateless.⁵

³ Please see Article 31(3)(c) of the Vienna Convention on the Law of Treaties, UNTS 1155, 331.

⁴ Article 3(1) of the CRC reads: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

⁵ Article 20(2) of the American Convention states that “[e]very person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.” Article 6(4) of the African Children’s Charter sets out that “States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.”

Impact of gender equality norms on provisions of the 1961 Convention

13. The principle of gender equality enshrined in the ICCPR and CEDAW must be taken into account when interpreting the 1961 Convention. In particular, Article 9(2) of the CEDAW provides that women shall enjoy equal rights with men with respect to conferral of nationality on their children.

14. At the time of adoption of the 1961 Convention, prior to the adoption of the ICCPR (1966) and CEDAW (1979), many nationality laws discriminated on the basis of gender. The 1961 Convention acknowledges that statelessness can arise from conflicts of laws in cases of children born to parents of mixed nationalities, whether in or out of wedlock, on account of provisions in nationality laws that limit the right of women to transmit nationality. Article 1(3) of the 1961 Convention therefore establishes a safeguard requiring States to grant nationality to children who would otherwise be stateless and are born in their territory to mothers who are nationals. These children must acquire the nationality of their State of birth by operation of law immediately at birth.

15. Today, almost all Contracting States to the 1961 Convention have introduced gender equality in their nationality laws as prescribed by the ICCPR and CEDAW. The safeguard contained in Article 1(3) of the 1961 Convention, however, remains relevant in States where women are still treated less favourably than men in their ability to transmit nationality to their children. Although Article 1(3) of the 1961 Convention only addresses conferral of nationality by mothers, in light of the principle of equality set out in the ICCPR and CEDAW as well as other human rights treaties, children born in the territory of a Contracting State to fathers who are nationals are also to immediately acquire the nationality of that State at birth by operation of law, if otherwise they would be stateless.⁶

II. WHEN WOULD AN INDIVIDUAL “OTHERWISE BE STATELESS” UNDER THE 1961 CONVENTION?

a) Definition of “Stateless” under the 1961 Convention

16. Articles 1 and 4 of the 1961 Convention require States to grant their nationality to individuals who would otherwise be stateless. The 1961 Convention, however, does not define the term “stateless”. Rather, Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (“1954 Convention”) establishes the international definition of a “stateless person” as a person “who is not considered as a national by any State under the operation of its law”.⁷ This definition, according to the International Law Commission, is now part of customary international law. It is relevant for determining the scope of application of the term “would otherwise be stateless” under the 1961 Convention.⁸

17. The exclusion provisions set out in Article 1(2)⁹ of the 1954 Convention limit the scope of the obligations of States under that Convention. They are not relevant, however, for

⁶ This is relevant for those States which do not allow conferral of nationality by men to their children when born out of wedlock. Please see also the decision of the European Court of Human Rights of 11 October 2011 in the case of *Genovese v. Malta*, Application No. 53124/09.

⁷ For further details on the interpretation of Article 1(1) of the 1954 Convention please see UNHCR, *Guidelines on the Definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (“Definition Guidelines”)*, available at: <http://www.unhcr.org/refworld/docid/4f4371b82.html> and UNHCR, *Guidelines on Procedures for Determining whether a Person is Stateless (“Procedures Guidelines”)*, available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html>

⁸ Please see International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, 49, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.

⁹ Article 1(2) of the 1954 Convention states that the Convention shall not apply:

- (i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;
- (ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;
- (iii) To persons with respect to whom there are serious reasons for considering that:
 - (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

determining the applicability of the 1961 Convention to particular individuals.¹⁰ Rather than excluding specific categories of individuals who are viewed as undeserving or not requiring protection against statelessness, the 1961 Convention adopts a different approach. It allows Contracting States to apply certain exhaustively listed exceptions to individuals to whom they would otherwise be obliged to grant nationality.¹¹

b) Focus on the Situation of the Child

18. The term “would otherwise be stateless,” means that the child would be stateless unless a Contracting State with which he or she has a link through birth in the territory or birth to a national of that State grants that child its nationality. To determine whether a child would otherwise be stateless requires determining whether the child has acquired the nationality of another State, either from his or her parents (*jus sanguinis* principle) or from the State on whose territory he or she was born (*jus soli* principle). Children are always stateless when their parents are stateless and if they are born in a country which does not grant nationality on the basis of birth in the territory. Yet, children can also be stateless if born in a State which does not apply the *jus soli* principle and if one or both parents possess a nationality but neither can confer it upon their children. The test is whether a *child* is stateless because he or she acquires neither the nationality of his or her parents nor that of the State of his or her birth; it is not an inquiry into whether a child’s parents are stateless. Restricting the application of Article 1 of the 1961 Convention to children of stateless parents is insufficient in light of the different ways in which a child may be rendered stateless and contrary to the terms of those provisions.

c) Determination of the Non-Possession of any Foreign Nationality

19. A Contracting State must accept that a person is not a national of a particular State if the authorities of that State refuse to recognize that person as a national. A State can refuse to recognize a person as a national either by explicitly stating that he or she is not a national or by failing to respond to inquiries to confirm an individual as a national.¹² A Contracting State to the 1961 Convention cannot avoid the obligations to grant its nationality to a person who would otherwise be stateless under Articles 1 and 4 based on its own interpretation of another State’s nationality laws where this conflicts with the interpretation applied by the State concerned.

20. In most legal systems, a claimant bears the initial responsibility of substantiating his or her claim. Because of the difficulties that often arise when determining whether an individual has acquired a nationality, the burden of proof must be shared between the claimant and the authorities of the Contracting State to obtain evidence and to establish the facts as to whether an individual would otherwise be stateless. The claimant and his or her parents/guardians have the responsibility to cooperate and to provide all documentation and information reasonably available to them while the relevant authority is required to obtain and present all relevant evidence reasonably available to it.

21. There is no universal standard for assessing evidence of whether a child would otherwise be stateless. The consequence of an incorrect finding that a child possesses a nationality would be to leave him or her stateless. Therefore, decision makers need to take into account Articles 3 and 7 of the CRC and adopt an appropriate standard of proof, for example that it is established to a “reasonable degree” that an individual would be stateless unless he or she acquires the nationality of the State concerned. Requiring a higher standard of proof would undermine the object and purpose of the 1961 Convention. Special procedural considerations to address the acute challenges faced by children, especially unaccompanied children, in

(b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

(c) They have been guilty of acts contrary to the purposes and principles of the United Nations.

¹⁰ The same applies for reservations in respect of the personal scope made by some State Parties to the 1954 Convention.

¹¹ These conditions will be addressed below in paragraphs 36-48.

¹² Please see further the *Definition Guidelines* at paragraphs 16 and 34.

communicating basic facts with respect to their nationality are to be respected.¹³ All relevant evidence needs to be assessed, including the statement of the applicant and/or his parents or guardians, legislation of the concerned State(s) (i.e. the State(s) of nationality of the parents), information on application of the nationality legislation in practice, the birth certificate of the individual, identity documents of the parents, responses from diplomatic missions of other States and oral testimony, including statements of third witnesses and experts.

d) Classification of Children as of “Undetermined Nationality”

22. Some States make findings that a child is of “undetermined nationality”.¹⁴ When this occurs, States need to determine whether a child would otherwise be stateless as soon as possible so as not to prolong a child’s status of undetermined nationality. For the application of Articles 1 and 4 of the 1961 Convention, it is appropriate that such a period not exceed five years.¹⁵ While designated as being of undetermined nationality, these children are to enjoy human rights (such as health and education) on equal terms as children who are citizens.

23. If a Contracting State has opted to grant its nationality automatically at birth to children who would otherwise be stateless, they are to treat children of undetermined nationality as possessing the nationality of the State of birth unless and until the possession of another nationality is proven.

e) Possibility to Acquire the Nationality of a Parent by Registration

24. Responsibility to grant nationality to children who would otherwise be stateless is not engaged where a child is born in a State’s territory and is stateless, but could acquire a nationality by registration with the State of nationality of a parent, or a similar procedure such as declaration or exercise of a right of option.¹⁶

25. It is acceptable for Contracting States not to grant nationality to children in these circumstances only if the child concerned can acquire the nationality of a parent immediately after birth and the State of nationality of the parent does not have any discretion to refuse the grant of nationality. States that do not grant nationality in such circumstances are recommended to assist parents in initiating the relevant procedure with the authorities of their State or States of nationality.

26. Moreover, the State is to grant nationality if a child’s parents are unable or have good reasons for not registering their child with the State of their own nationality. This needs to be determined depending on whether an individual could reasonably be expected to take action to acquire the nationality in the circumstances of their particular case.¹⁷

f) Special Position of Refugee Children

27. Some children are born to refugee¹⁸ parents who are themselves stateless or cannot acquire the nationality of their parents owing to restrictions on transmission of nationality to

¹³ Please see further the *Procedures Guidelines* at paragraph 66, which advises that “[a]dditional procedural and evidentiary safeguards for child [statelessness] claimants include priority processing of their claims, provision of appropriately trained legal representatives, interviewers and interpreters, as well as the assumption of a greater share of the burden of proof by the State.”

¹⁴ This term is used here as an umbrella expression for the classification of the nationality status as “unknown”, “undetermined” or “under investigation”. The term also covers cases where States do not classify a person as “stateless”, but rather use a specific term based on their domestic law.

¹⁵ Five years is the maximum period of residence, which may be required under Article 1(2)(b) of the 1961 Convention where a State has an application procedure in place, please see below at paragraph 40.

¹⁶ This issue was addressed during the drafting of the 1961 Convention. The representative of Switzerland stated: “The fathers of such children often deliberately caused them to become stateless [...] a procedure which his country could not tolerate”. Please see *Summary Record of the 9th Plenary Meeting of the United Nations Conference on the Elimination or Reduction of Future Statelessness*, A/CONF.9/SR.9 (15-4-1959), p. 2.

¹⁷ This would be relevant, for example, where a parent or parents cannot be reasonably expected to register their children on account of their refugee status.

¹⁸ The same would apply to persons eligible for complementary protection, for example, who fall within the European Union’s subsidiary protection regime set out in *Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection*

children born abroad. Where the nationality of the parents can be acquired through a registration or other procedure, this will be impossible owing to the very nature of refugee status which precludes refugee parents from contacting their consular authorities. In such circumstances where the child of a refugee would otherwise be stateless, the safeguard in Article 1 will apply. Depending on the approach adopted by the Contracting State of birth, the child either acquires the nationality of the State automatically at birth or at a later time through an application procedure.

28. The situation is different for children born to refugees who automatically acquire the parents' nationality at birth. Such children have often been viewed as *de facto* stateless persons.¹⁹ The Final Act of the 1961 Convention contains a non-binding recommendation that *de facto* stateless persons should as far as possible be treated as stateless persons. States are therefore encouraged to offer the possibility to acquire the nationality of the State of birth in the manner foreseen under Article 1(1) of the 1961 Convention. However, where the child of a refugee has acquired the nationality of the State of origin of the parents at birth, it is not desirable for host countries to provide for an automatic grant of nationality under Article 1(1) of the 1961 Convention at birth, especially in cases where dual nationality is not allowed in one or both States. Rather, States are advised that refugee children and their parents be given the possibility to decide for themselves, whether or not these children acquire the nationality of the State of birth, taking into account any plans they may have for future durable solutions (e.g. voluntary repatriation to the State of origin).

III. GRANT OF NATIONALITY TO CHILDREN BORN IN THE TERRITORY OF A CONTRACTING STATE WHO WOULD OTHERWISE BE STATELESS (1961 CONVENTION ARTICLES 1(1) – 1(2))

a) Relation of Articles 1 and 4

29. The 1961 Convention and relevant universal and regional human rights norms do not dictate the basic rules according to which nationality *must* be granted or withdrawn by States. In particular, the 1961 Convention does not require States to adopt a pure *jus soli*²⁰ regime whereby States grant nationality to all children born in their territory. Similarly, it does not require adoption of the principle of *jus sanguinis*, or citizenship by descent.

30. Rather, the 1961 Convention requires that in instances where an individual would otherwise be stateless, the Contracting State in which the child is born grants its nationality to prevent statelessness (Article 1). In the event that a child is born to a national of a Contracting State in the territory of a non-Contracting State, a subsidiary obligation comes into play and the State of nationality of the parents must grant its nationality if the child would otherwise be stateless (Article 4). As a result, the 1961 Convention addresses conflicts of nationality laws through an approach that draws on the principles of both *jus soli* and *jus sanguinis*.

31. The nationality laws of States which grant nationality to all children born in the territory will always be compliant with Article 1 of the Convention. Put differently, a regime of unrestricted *jus soli* renders Article 1 of the Convention irrelevant with respect to children born in the territory of that State. Similarly, States which grant nationality by descent to all children born to their nationals abroad will always be compliant with Articles 1(4) and 4 of the Convention (described in detail below at paragraphs 49-52). Where some restrictions apply to *jus soli* transmission of nationality, such as residence requirements, these need to be assessed on the basis of Article 1(2) (please see below at paragraph 36). The same applies to limitations on *jus sanguinis* transmission with respect to the conditions allowed for under Article 4(2).

granted, which enters into force on 21 December 2013 and supersedes *Council Directive 2004/83/EC of 29 April 2004*.

¹⁹ Please see on this term paragraph 8 of *Definition Guidelines* with reference to the *Expert Meeting on the Concept of Stateless Persons under International Law (Summary Conclusions)*, 2010.

²⁰ *Jus soli* means literally right of the soil; a person acquires the nationality of his or her State of birth.

b) Options for Granting Nationality to Comply with 1961 Convention Obligations

32. Article 1 of the 1961 Convention provides Contracting States with two alternative options for granting nationality to children who would otherwise be stateless born in their territory. States can either provide for automatic acquisition of nationality upon birth pursuant to Article 1(1)(a), or for acquisition of nationality upon application pursuant to Article 1(1)(b).²¹ Article 1(1)(b) of the 1961 Convention also allows Contracting States that opt to grant nationality upon application pursuant to Article 1(1)(b) to provide for the automatic grant of nationality to children born in their territory who would otherwise be stateless at an age determined by domestic law.

33. A Contracting State may apply a combination of these alternatives for acquisition of its nationality by providing different modes of acquisition based on the level of attachment of an individual to that State. For example, a Contracting State might provide for automatic acquisition of its nationality by children born in their territory who would otherwise be stateless whose parents are permanent or legal residents in the State, whereas it might require an application procedure for those whose parents are not legal residents. Any distinction in treatment of different groups, however, must serve a legitimate purpose, cannot be based on discriminatory grounds and must be reasonable and proportionate.

c) Acquisition of Nationality at Birth or as Soon as Possible after Birth

34. The rules for preventing statelessness contained in Articles 1(1) and 1(2) of the 1961 Convention must be read in light of later human rights treaties, which recognize every child's right to acquire a nationality. Specifically, when read with Article 1 of the 1961 Convention, the right of every child to acquire a nationality (Article 7 of the CRC) and the principle of the best interests of the child (Article 3 of the CRC) require that States grant nationality to children born in their territory who would otherwise be stateless either (i) automatically at birth or (ii) upon application shortly after birth. Thus, if the State imposes conditions for an application as allowed for under Article 1(2) of the 1961 Convention, this must not have the effect of leaving the child stateless for a considerable period of time.

35. There are also regional treaties which give rise to a stricter standard for a number of States. Article 20 of the American Convention and Article 6 of the African Children's Charter establish that children are to acquire the nationality of the State in which they are born automatically at birth if they would otherwise be stateless.²²

d) Permissible Conditions for the Acquisition of Nationality upon Application (1961 Convention, Article 1(2))

36. Where Contracting States opt to grant nationality upon application pursuant to Article 1(1)(b) of the 1961 Convention, it is permissible for them to do so subject to the fulfilment of one or more of four conditions. Permissible conditions are set out in the exhaustive list in Article 1(2) of the 1961 Convention. These are:

- a fixed period for lodging an application immediately following the age of majority (Article 1(2)(a));
- habitual residence in the Contracting State for a fixed period, not exceeding five years immediately preceding an application nor ten years in all (Article 1(2)(b));
- restrictions on criminal history (Article 1(2)(c)); and
- the condition that an individual has always been stateless (Article 1(2)(d)).²³

Imposition of any other conditions would violate the terms of the 1961 Convention.²³

37. The use of the mandatory "shall" ("nationality *shall* be granted..."), indicates that a Contracting State must grant its nationality to children born in its territory who would otherwise be stateless where the conditions set out in Article 1(2) and incorporated in its application

²¹ Compare with the similar approach in Article 4 of the 1961 Convention. Please see further paragraph 51.

²² Please see paragraph 12 above.

²³ Similar lists of exhaustive conditions for the application procedures of Article 1(4) and Article 4(1) are given in Article 1(5) and Article 4(2) respectively. Please see a comparative table of those grounds for rejection of an application in the Annex to these Guidelines.

procedure are met. The exhaustive nature of the list of possible requirements means that States cannot establish conditions for the grant of nationality additional to those stipulated in the Convention.²⁴ As a result, it is not consistent with Article 1(2) to require that the parents of the individual concerned possess a specific type of residence in the State.²⁵ Similarly, providing for a discretionary naturalization procedure for children who would otherwise be stateless is not permissible under the 1961 Convention. A State may nevertheless choose not to apply any of the permitted conditions and simply grant nationality upon submission of an application.

Application within a prescribed period at the end of childhood (1961 Convention, Article 1(2)(a))

38. Pursuant to international human rights obligations,²⁶ Contracting States that opt to grant nationality upon application pursuant to Article 1(1)(b) of the 1961 Convention, are to accept such applications from children who would otherwise be stateless born in their territory as soon as possible after their birth and during childhood.²⁷

39. Where Contracting States set deadlines to receive applications at a later time from individuals born in their territory who would otherwise be stateless, they need to accept applications lodged at a time beginning not later than the age of 18 and ending not earlier than the age of 21 in accordance with Article 1(2)(a) of the 1961 Convention. This provision ensures that these individuals have a window of at least three years after majority within which to lodge their applications.²⁸

Habitual residence (1961 Convention, Article 1(2)(b))

40. States may stipulate that an individual who would otherwise be stateless born in its territory fulfils a period of “habitual residence” in the territory of the State of birth in order to acquire that State’s nationality. This period is not to exceed five years immediately preceding an application nor ten years in all. In light of the standards established under the CRC, these periods are lengthy. States which apply an application procedure and require a certain period of habitual residence are encouraged to provide for a period as short as possible.²⁹

41. The term “habitual residence” is found in a number of international instruments³⁰ and is to be understood as stable, factual residence.³¹ It does not imply a legal or formal residence requirement. The 1961 Convention does not permit Contracting States to make an application for the acquisition of nationality by individuals who would otherwise be stateless conditional upon *lawful* residence.

²⁴ This also applies for the application procedures of Article 1(4) and Article 4.

²⁵ In this context the scope of the non-discrimination provision set out in Article 2 of the CRC is relevant, specifically paragraph 2: “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the *basis of the status*, activities, expressed opinions, or beliefs of the *child’s parents, legal guardians, or family members*” (emphasis added).

²⁶ Please refer to paragraphs 34 and 35 above.

²⁷ This also applies for the application procedure of Article 4.

²⁸ Furthermore, Article 1(2)(a) of the 1961 Convention provides that the person concerned shall be allowed at least one year during which to make the application without having to obtain authorization of the parent or guardian to do so. This additional rule was important at the time when most States provided that the age of majority was 21, but is now less important where the age of majority is generally 18 years of age.

²⁹ Please see paragraph 11 above. This also applies for the period of habitual residence which may be acquired under Article 1(5) and Article 4(2).

³⁰ For example, the term is also used in the treaties prepared by *The Hague Conferences on Private International Law*, the drafters of which have sought to harmonize its’ usage. The term is found also in Article 1A(2) of the 1951 Convention relating to the Status of Refugees and according to the *Travaux Préparatoires* of that treaty it refers to “the country in which [the stateless applicant] has resided and where he had suffered or fears he would suffer persecution if he returned”. UN Ad Hoc Committee on Refugees and Stateless Persons, Report of the Ad Hoc Committee on Statelessness and Related Persons (Lake Success, New York, 16 January to 16 February 1950), 17 February 1950, E/1618; E/AC.35/5, p. 39, available at: <http://www.unhcr.org/refworld/docid/40aa15374.html>.

Please see also UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 103. Please see also Article 1 of the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession and the Explanatory Report on that Convention, and Resolution (72)1 of the Council of Europe.

³¹ This also applies for the term “habitual residence” in Article 1(5) and Article 4(2) of the 1961 Convention.

42. It follows from the factual character of “habitual residence” that in cases where it is difficult to determine whether an individual is habitually resident in one or another State, for example due to a nomadic way of life, such persons are to be considered as habitual residents in both States.

43. States may establish objective criteria for individuals to prove habitual residence. Lists of types of permissible evidence, however, are never to be exhaustive.

Criminal history (1961 Convention, Article 1(2)(c))

44. As set out in Article 1(2)(c), the permissible condition that an individual who would otherwise be stateless has been neither convicted of an offence against national security nor sentenced to a term of imprisonment for five years or more on a criminal charge refers to the criminal history of the individual and not to acts by his or her parents.

45. Criminal consequences due to irregular presence on the territory of a State are never to be used to disqualify an individual who would otherwise be stateless from acquiring nationality under Article 1(2)(c).³²

46. Whether a crime can be qualified as an “offence against national security” needs to be judged against international standards and not solely on the basis of a characterization by the concerned State.³³ Similarly, criminalization of specific acts must be consistent with rights guaranteed by international human rights law (for example, freedom of expression, assembly and religion) and acts protected by such rights may not be considered “crimes” for the purposes of Article 1(2)(c).³⁴ Sentencing standards must also be consistent with international human rights law.

Has “always been stateless” (1961 Convention, Article 1(2)(d))

47. The final permissible condition in Article 1(2) of the 1961 Convention for granting citizenship through an application procedure allows States to require that an applicant has “always been stateless” (i.e. since birth). If a State does not explicitly require that a person has always been stateless, then a person born in their territory has the right to acquire that State’s nationality if, for example, he or she was born stateless, acquired a nationality but lost this nationality and is stateless at the time of the application.³⁵

48. Where a Contracting State requires that an individual has “always been stateless” to acquire nationality pursuant to an application under Article 1(2)(d), there is a presumption that the applicant has always been stateless and the burden rests with the State to prove the contrary. An applicant’s possession of evidently false or fraudulently obtained documents of another State does not negate the presumption that an individual has always been stateless.

IV. GRANT OF NATIONALITY TO INDIVIDUALS WHO WOULD OTHERWISE BE STATELESS BORN ABROAD TO NATIONALS OF CONTRACTING STATES (1961 CONVENTION, ARTICLES 1(4), 1(5) AND 4)

49. Article 1 of the 1961 Convention places primary responsibility on Contracting States in whose territory children who would otherwise be stateless are born. The Convention also sets out two subsidiary rules.

³² Please see also paragraphs 40-41 in relation to the fact that Article 1(2)(b) of the 1961 Convention only allows the State to require a period of *habitual* residence in the territory of the State of birth preceding the application and not a period of *lawful* residence. This obligation may not be circumvented by criminalising unlawful residence.

³³ This also applies for the corresponding requirement in Article 4(2). This condition of possible exclusion is in most cases of little relevance, because pursuant to international human rights obligations, nationality is to be acquired at a very young age, generally before criminal responsibility is attributable. Please see paragraph 11 above.

³⁴ Please see considerations of a similar nature in UN High Commissioner for Refugees, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, available at: <http://www.unhcr.org/refworld/docid/3f5857d24.html>.

³⁵ This also applies for the acquisition of the nationality of a parent under Article 1(5) and Article 4(2).

Children born in a Contracting State to parents who are parents of another Contracting State who miss the age limit to apply for nationality or cannot meet the habitual residence requirement in the State of birth

50. The first subsidiary rule is found in Article 1(4) of the 1961 Convention and applies where a child who would otherwise be stateless is born in a Contracting State to parents of another Contracting State but does not acquire the nationality of the State of birth automatically and either misses the age limit to apply for nationality or cannot meet the habitual residence requirement in the State of birth. In such cases, responsibility falls to the Contracting State of the parents to grant its nationality to the child (or children) of its nationals. In these limited circumstances where Contracting States must grant nationality to children born abroad in another Contracting State to one of their nationals, States may require that an individual lodge an application and meet certain criteria set out in Article 1(5) of the 1961 Convention that are similar to those set out in Article 1(2) of the 1961 Convention.³⁶

Children of a national of a Contracting State who would otherwise be stateless, born in a non-Contracting State

51. The second subsidiary rule applies where children of a national of a Contracting State who would otherwise be stateless are born in a non-Contracting State. This rule is set out in Article 4 of the 1961 Convention and requires the Contracting State of the parents to grant its nationality to the child (or children) of its nationals born abroad. Article 4 gives Contracting States the option of either granting their nationality to children of their nationals born abroad automatically at birth or requiring an application subject to the exhaustive conditions listed in Article 4(2). These conditions are again similar to those set out in Article 1(2) of the 1961 Convention, with some distinctions.³⁷

52. Like Article 1, Article 4 of the 1961 Convention must be read in light of developments in international human rights law, in particular the right of every child to acquire a nationality, as set out in Article 7 of the CRC and the principle of the best interests of the child contained in Article 3 of the same Convention. As a result, Contracting States to the 1961 Convention are required to provide for automatic acquisition of their nationality at birth by a child who would otherwise be stateless and is born abroad to a national or, for States which have an application procedure, to grant nationality shortly after birth.³⁸

V. OTHER OBLIGATIONS IN ARTICLES 1 AND 4 OF THE 1961 CONVENTION

a) Appropriate Information

53. Contracting States that opt for an application procedure are obliged to provide detailed information to parents of children who would otherwise be stateless about the possibility of acquiring the nationality, how to apply and about the conditions which must to be fulfilled.

54. Information on how to apply needs to be provided to concerned individuals whose children born in the territory of a Contracting State would otherwise be stateless or of undetermined nationality. A general information campaign is not sufficient.

b) Fees

Where Contracting States grant nationality to individuals who would otherwise be stateless upon application, they are encouraged to accept such applications free of charge.³⁹ Indirect costs, such as for authentication of documents, must not constitute an obstacle for individuals to make an application under Articles 1 and 4 of the 1961 Convention.

³⁶ There are significant differences between paragraphs 2 and 5 of Article 1, however. Please see the comparative table regarding the grounds for rejection of an application in the Annex.

³⁷ Please see the comparative table regarding the grounds for rejection of an application in the Annex.

³⁸ Please see paragraph 11 above.

³⁹ The exhaustive lists of requirements allowed by Article 1(2), Article 1(4) and (5) and Article 4(2) of the 1961 Convention do not mention the payment of a fee.

c) Importance of Birth Registration

55. In the legislation of most States, nationality is acquired at birth automatically by virtue of descent from a national or birth in the territory of the State. As a result, the rules set out in the 1961 Convention operate regardless of whether a child's birth is registered. Nonetheless, registration of the birth provides proof of descent and of place of birth and therefore underpins implementation of the 1961 Convention and related human rights norms. Article 7 of the CRC specifically requires the registration of the birth of *all* children and applies irrespective of the nationality, statelessness or residence status of the parents.

d) Implementation of Treaty Obligations in National Law

56. Contracting States are encouraged to formulate their nationality regulations in a way that makes clear the procedures by which they are implementing their obligations under Articles 1- to 4 of the 1961 Convention and incorporate all relevant due process guarantees. This also applies for countries in which, according to their Constitutions or legal systems, international treaties are directly applicable.

VI. FOUNDLINGS

57. Article 2 of the 1961 Convention establishes that children found abandoned in the territory of a Contracting State (foundlings) acquire the nationality of that State. The Convention does not define an age at which a child may be considered a foundling. The words for 'foundling' used in each of the five authentic texts of the Convention (English, French, Spanish, Russian and Chinese) reveal some differences in the ordinary meaning of these terms, in particular with regard to the age of the children covered by this provision. State practice reveals a broad range of ages within which this provision is applied. Several Contracting States limit grant of nationality to foundlings who are very young (12 months or younger) while most Contracting States apply their rules in favour of children up to an older age, including in some cases up to the age of majority.

58. At a minimum, the safeguard for Contracting States to grant nationality to foundlings 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.

59. 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.

60. Nationality acquired by foundlings pursuant to Article 2 of the 1961 Convention may only be lost if it is proven that the child concerned possesses another State's nationality.⁴⁰

61. A child born in the territory of a Contracting State without having a parent, who is legally recognised as such (e.g. because the child is born out of wedlock and the woman who gave birth to the child is legally not recognized as the mother), is also to be treated as a foundling and immediately to acquire the nationality of the State of birth.⁴¹

⁴⁰ Please compare to Article 7(1)(f) of the European Convention on Nationality: if later the child's parents or the place of birth are discovered, and the child derives citizenship from (one of) these parents or acquired citizenship on account of his place of birth, the citizenship acquired pursuant to the foundling provision may be lost. However, according to Article 7(3) of the European Convention on Nationality, discovery of information on the parents may never cause statelessness.

⁴¹ The same applies for legal systems which have retained requirements that mothers must recognise children born out of wedlock in order to establish a family relationship.

VII. APPLICATION OF SAFEGUARDS TO CHILDREN BORN ON A SHIP OR IN AN AIRCRAFT

62. Article 3 of the 1961 Convention serves to clarify the scope of application of provisions of the 1961 Convention, in particular with respect to Article 1, 2 and 4. It provides that children born on a ship or in an aircraft, respectively flagged or registered in a Contracting State, are deemed to have been born in the territory of that State. The extension of the territory of a Contracting State to children born on a “ship” as prescribed in Article 3 of the 1961 Convention is to be interpreted as referring to all vessels registered in that Contracting State irrespective of whether the ship involved is destined for transport on the high seas. Consequently, smaller ships which are in practice used for transport of persons from one State to another could also qualify as “ships” under this provision. “Ships” used on international lakes and rivers also qualify. However, an essential condition in all cases is that the “ship” is registered in a Contracting State.⁴²

63. It follows from the ordinary meaning of the terms used in Article 3 that the extension of the territory of a Contracting State to ships flying the flag of that State and to aircraft registered in that State also applies when ships are within the territorial waters or a harbour of another State or to aircraft at an airport of another State.

VIII. TRANSITIONAL PROVISIONS

64. Article 12 of the 1961 Convention provides that if a State opts to grant its nationality automatically to children born in its territory who would otherwise be stateless, this obligation only applies to children born in the territory of that State *after the entry* into force of the 1961 Convention for that State.

65. On the other hand, if a Contracting State opts to grant its nationality to individuals who would otherwise be stateless upon application in accordance with the provisions of Article 1(1) and 1(2), the rules also apply to children born before the entry into force for the State involved. This is also the case for the application procedures foreseen in Article 1(4) and (5), and in Article 4. This transitory rule is intended to avoid a situation in which States opt to impose conditions for acquisition of nationality by application under Articles 1 and 4, and thereby avoid any grant of nationality to individuals covered by those provisions until many years after they become bound by the treaty.⁴³ In those States, persons born before the entry into force therefore also enjoy the benefits of the Convention. Consequently, if a State acceded to the 1961 Convention on 1 January 2012 and opted for acquisition of nationality by operation of law under Articles 1 and 4, this rule would only apply to children born on or after the date the Convention entered into force with regard to that State. However, if the State opted for an application procedure, Article 12 would require allowing the receipt of applications by stateless persons born before the entry into force of the Convention with respect to that State.

66. States that opt for automatic acquisition are encouraged to provide for a transitory application procedure for stateless children born before the entry into force of the Convention.

⁴² UN Convention on the Law of the Sea, Article 91 prescribes: “Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag”. This obligation affects ships on the high seas, but rules also exist in many States on the registration of ships which are destined for transport on (international) rivers and lakes.

⁴³ Please see *United Nations Conference on the Elimination or Reduction of Future Statelessness, Geneva, 1959 and New York, 1961. Summary Record of the 6th Meeting of Committee of the Whole, A/CONF.9/C.1/SR.6 (6-4-1959)*, p. 7 and *Summary Record of the 13th Meeting of Committee of the Whole, A/CONF.9/C.1/SR.13 (10-4-1959)*, p. 9.

ANNEX

COMPARATIVE OVERVIEW OF PROVISIONS IN ARTICLES 1 AND 4 OF THE 1961 CONVENTION WITH EMPHASIS ON PERMISSABLE CONDITIONS FOR APPLICATIONS FOR NATIONALITY

(Differences between the conditions allowed by each provision are indicated in bold)

Article 1 (2)	Article 1 (4) and (5)	Article 4 (2)
<i>Obligation falls on a Contracting State in which a child who would otherwise be stateless is born</i>	<i>Obligation falls on a Contracting State of which a child's parent is a national</i>	<i>Obligation falls on a Contracting State of which a child's parent is a national</i>
<i>Child born in the territory of that Contracting State</i>	<i>Child born in the territory of another Contracting State whose nationality the child has not acquired</i>	<i>Child born in the territory of another non-Contracting State</i>
<i>Nationality status of the parent immaterial so long as the child born in the territory of the Contracting State would otherwise be stateless (and has not acquired the nationality of his/her parents)</i>	<i>Child born to a parent of a Contracting State that is not the State of birth of the child</i>	<i>Child born to a parent of a Contracting State</i>
<i>a) application lodged during a period, beginning not later than at the age of eighteen years and ending not earlier than at the age of twenty-one years. Period must include at least one year during which applicant does not need to obtain legal authorization to apply</i>	<i>a) application lodged before the applicant reaches an age, being not less than twenty-three years</i>	<i>a) application lodged before the applicant reaches an age, being not less than twenty-three years</i>
<i>b) habitual residence for a period not exceeding five years immediately preceding the lodging of the application nor ten years in all</i>	<i>b) habitual residence for a period immediately preceding the lodging of the application, not exceeding three years</i>	<i>b) habitual residence for a period immediately preceding the lodging of the application, not exceeding three years</i>
<i>c) no sentence because of an offence against national security or sentence to imprisonment for a term of five years or more on a criminal charge</i>	<i>N.B. if application in State of birth was rejected because of criminal record, Article 1 (4) does not apply</i>	<i>c) no sentence because of an offence against national security</i>
<i>d) applicant has always been stateless</i>	<i>c) applicant has always been stateless</i>	<i>d) applicant has always been stateless</i>