Theme Paper
on
Module E
Statelessness, International Conventions and the Need for New Initiatives?

Addressing the New Frontiers of Statelessness

Sabyasachi Basu Ray Chaudhury

In the contemporary times of mixed and massive flows of people across the globe, when hundreds and thousands of people are trying to move from one country to another, from one part of the world to another, even without documents, when refugees, stateless persons, asylum-seekers and economic migrants are looking forward to 'greener pastures' elsewhere, either to find a safe haven to escape the atrocities back home, or in search of livelihood opportunities, the existing international and regional legal mechanisms ensuring security and rights to these different categories of people seem to be insufficient, ineffective, and sometimes partially redundant in an evolving phase of capitalist globalization confronting the Westphalian state system and sovereignty. In these changing times, we therefore, need to search for fresh alternatives for guaranteeing the basic rights to the stateless persons, who in most of cases, are either at the margins of municipal laws or simply beyond them. In such a scenario, the definitions of statelessness and the legal implications of those definitions need to be thoroughly revisited.

The Westphalian order came into being with the signing of the treaties of Munster and Osnabruck in 1648. This new order facilitated the system of sovereigns signing treaties with other sovereigns and devising policies to rule inside a territory. This also managed to exclude other authorities from interfering into "domestic politics". Accordingly, even today Article 2 (7) of the Charter of the United Nations (UN) states that, the UN has no authority to intervene in matters which are within the domestic jurisdiction of any State, although this principle shall not prejudice the application of enforcement measures under Chapter VII of the Charter.In other words, the Westphalian order has practically turned into a point of departure for a system of territorially organized states that still largely prevails in this latest phase of globalization generating an utterly paradoxical situation when capital and technology have become mobile, whereas the third dimension of production, labour, is still not allowed to cross the international border with 're-territorialisation' of the states. 2018 could celebrate the 370th anniversary of the Treaty of Westphalia.

Interestingly, 2018 is also the 70th anniversary of the Universal Declaration of Human Rights, and therefore, we are celebrating this through several programmes across the world. On the contrary, the Treaty of Westphalia is hardly being rejoiced by anyone, in particular, although it has been systematizing the dominant political ideas for the last four centuries. The Treaty of Westphalia installed a system of sovereign states where a single authority is supreme and sacrosanct within a set of borders. In other words, the Treaty of Westphalia foreclosed the visions of limiting sovereignty for basic human rights.

Since the rise of the nation-state in the 18th century, the right to nationality has, in practice, become integral to the enjoyment of almost all other rights. International law has traditionally allowed the States to have broad discretion to define the contours

of and delimit access to nationality. Nonetheless, recognition of the inherent link between the right to a nationality and the enjoyment of other human rights, has confirmed that nationality laws and practices must be consistent with the principles of international law. International law limits state sovereignty to regulate citizenship. This was first made clear in the early 1920s by the Permanent Court of International Justice in the early 1920s in its ruling, which said: "[t]he question of whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relevant question; it depends on the development of international relations."[1] Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws affirmed this principle:

> It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.[2]

Subsequently, in response to the mass atrocities of World War II and the refugee crisis involving millions of displaced persons throughout Europe, the international community declared its commitment to the protection of human rights while recognizing the critical role that nationality plays in ensuring individual access to the enjoyment of these rights. In this very context, Article 15 of the Universal Declaration of Human Rights guaranteed that, "[e]very one has a right to a nationality" and that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".[3] The right to nationality gained further recognition through international and regional human rights instruments in the decades after World War II.[4]

The international legal instruments, like the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC), further guarantee the right of every child to acquire a nationality and indicate the duty of states parties to undertake to respect this right as it pertains to children.[5] Moreover, a few international legal restrictions on state sovereignty over the regulation of citizenship have emerged:

(a) prohibition against racial discrimination
(b) prohibition against statelessness

---

[1] *Nationality decrees issued in Tunis and Morocco – Advisory Opinion* [1922] PCIJ 3, ¶ 24 (Oct. 4, 1922).
[2] *1930 Hague Convention on Conflict of Nationality Laws*, 179 LNTS 80; 1930 Can. T.S. No. 7

[3] Although the Declaration itself is not legally binding, international jurists argue that, it has acquired the status of customary international law

[4] For instance, Article 4 of the European Convention on Nationality states: "(a) Everyone has a right to a nationality; (b) statelessness should be avoided; (c) no one shall be arbitrarily deprived of his or her nationality." Similarly, Article 20 of the American Convention on Human Rights affirms the general right to a nationality and the prohibition against arbitrary deprivation, mentioning 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."
[5] Article 23(3) of the *ICCPR* and Articles 7(1) and 8(1) of the *CRC*

(c) prohibition on arbitrary deprivation of citizenship.

The Inter-American Court of Human Rights has later indicated prohibitions in the realm of nationality law. It says that, although the determination of who is a national of a particular state continues to fall within the ambit of state sovereignty, *states' discretion must be limited by international human rights that exist to protect individuals against arbitrary state actions* (emphasis mine). According to this Court, the states are particularly *limited in their discretion to grant nationality by their obligations to guarantee equal protection before the law and to prevent, avoid, and reduce statelessness* (emphasis mine).[6]

State sovereignty over nationality is quite clearly restrained by the prohibition against racial and ethnic discrimination. The principle against racial discrimination is integral to all international and regional human rights instruments, representing a rule of customary international law.[7]

However, in the contemporary world, the new forces of globalization are providing fresh challenges for international and domestic governance. As a consequence, the State has been required to cede sovereignty on certain issues, mainly economic, and to relinquish many business decisions to transnational business corporations. But, this has not led to free mobility of people – be they economic migrants, refugees, asylum-seekers or stateless population. The instance of the Rohingya, dubbed as 'the most persecuted minority' by the UN, may be a pointer to the fact that how international legal principles remain far from adequate to guarantee the stateless population around the world "the right to have rights" facing the sovereign forces of the State.

Differential Treatment

India, though a member of the Executive Committee of the UNHCR, has neither ratified the 1951 UN Convention on Refugees nor its 1967 Protocol. Being one of the major recipients of refugees in South Asia, India has been treating the refugees in a differential manner. In 1996, the National Human Rights Commission (NHRC) of India filed a Public Interest Litigation (PIL) in the Supreme Court to enforce the basic

[6] *Dilcia Yean and VioletaBosico v. Dominican Republic*, Int. Am. Ct. H.R. Case No. 12.189 (Sept. 8, 2005)

[7] The prohibition on racial and ethnic discrimination is enshrined in the following provisions of international and regional human rights instruments: Article 1(3) of the *United Nations Charter* (the purpose of the Charter is to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction to race, sex, language or religion."); Article 55(c) of the *United Nations Charter* (committing the United Nations to promote non-discrimination); Articles 2 and 7 of the *Universal Declaration of Human Rights*; Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR); Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*; Article 14 of the *European Convention of Human Rights* (ECHR); Articles 1 and 2 of *Protocol No. 12 to the ECHR*; Article 21 of the *European Charter of Fundamental Freedoms*; Chapter 1, Article 2 of the *African Charter on Human and Peoples' Rights*; and Articles 1(1) and 24 of the *American Convention on Human Rights*. Please also see *Restatement (Third) The Foreign Relations Law of the United States*, § 702 (1987) ("Customary International Law of Human Rights: A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . systematic racial discrimination); *R. v. Immigration Officer at Prague Airport*, UKHL 55, ¶ 46 (2004) ("The great theme which runs through subsequent human rights instruments, national, regional and international, is the legal right of equality with the correlative right of non-discrimination on the grounds of race. . . It is true that in the world, as we know it, departures from this norm are only too many. But the international community has signed up to it. The moral norm has ripened into a rule of customary international law. It is binding on all states."

human rights of the Chakmas, who were displaced during the construction of the Kaptai dam over the Karnaphuli river in the then East Pakistan (now Bangladesh) in 1964, some of whom crossed the international border and were resettled by the Government of India in Arunachal Pradesh (then North Easter Frontier Agency or NEFA).After three decades of their stay in Arunachal Pradesh, in 1996, the All Arunachal Pradesh Students' Union (AAPSU) asked them to quit the state as they were foreigners. The Government of Arunachal Pradesh also considered them 'foreigners' and, therefore, not entitled to any right whatsoever.

The Supreme Court observed that, the notices to the Chakmas to quit the state amounted to a violation of Article 21 of the Indian Constitution, and that no person can be deprived of his/her right to life and liberty except according to the due process of law. Therefore, it was the duty of the state government to protect the Chakmas from such threats to their lives and liberty, as well to bring to book those, who had threatened to violate these rights. It was further held that, by not forwarding the Chakmas' citizenship applications to the concerned department within the Union government, their constitutional and statutory right to be considered for citizenship was being denied to them. This decision of the Supreme Court was crucial in consideration of the legal future of the Chakma refugees or stateless persons.

Similarly, a judgment by the Delhi High Court in 2011 in *Namgyal Dolkar v. Government of India* case generated new hopes among those who were facing questions relating to nationality and statelessness in India. Namgyal Dolkar was born in 1986 in Himachal Pradesh, India whose parents were both Tibetan refugees. In 2005, she had obtained an identity certificate under the Passports Act of India after submitting a formal application for the same. Later on, while trying to submit an application for an Indian passport, she was refused by the Regional Passport Office, and the reason cited was that, her parents were Tibetan. The passport authorities invoked Section 6(2) of the Passports Act, whereby a passport application can be rejected if the applicant is not a citizen of India as Namgyal Dolkar had identified herself as a 'Tibetan national'. The Delhi High Court observed that, the concept of a 'national' is not recognized or defined under the Citizenship Act. Therefore, the Namgyal Dolkar's identification of herself as a 'Tibetan national' in her application for granting of an identity certificate is of no legal consequence under the Citizenship Act. The Court further observed that, Namgyal is an Indian citizen by birth, under Section 3(1)(a) of the Citizenship Act, and her statement cannot be treated as a renunciation of Indian citizenship. This renunciation could only occur, as envisaged under Section 8 of the Citizenship Act. Moreover, according to Delhi High Court, Section 9 of the Citizenship Act made it clear that Namgyal Dolkar's citizenship was not terminated either. The Court mentioned that, there is no need for an Indian citizen, who is a citizen 'by birth' (*jus soli*) under Section 3 of Citizenship Act, to apply for citizenship of India. Therefore, the passport authorities were citing unfair and erroneous grounds. The Court directed the Regional Passport Office to process Namgyal Dolkar's application for her passport. This judgment of the Delhi High Court was quite significant in the sense that, there is no legal framework in India till date to deal with the refugees or stateless persons.

On October 4, 2018, seven Rohingya men - Mohammad Jalal, Mokbul Khan, Jalaluddin, Mohammad Younus, Sabbir Ahamed, Rahimuddin and Mohammad Salam, who were arrested in 2012 for entering India without documents, were deported to

Myanmar. The deportation took within a few hours after the Supreme Court of India refused to intervene in a plea to allow these Rohingyas to remain in India. These men ultimately were taken to the border town of Moreh in Manipur, where they were handed over to the Border Guard Forces of Myanmar. These seven men were arrested for illegal entry into India in 2012 after they were caught by the police in the Shilchori-Nagatila region of Assam. They were detained under the Foreigners Act, and served a sentence of three months for the 'crime' of entering India without valid documents. But after they completed this sentence, they were incarcerated for six years at the detention centre in Silchar Central Jail. This would probably be just the beginning of a large-scale deportation process that perhaps would target to push back all 40,000 Rohingya refugees living across India.

These are people who had fled from Myanmar on account of serious violations of human rights and fear of persecution. Therefore, the question remains about the rationale of their deportation when there was no arrangement for repatriation of the refugees between India and Myanmar, and when no prior assessment was made on how far the current political and human rights situation in Myanmar had been improved. Even the UNHCR had been denied access to assess these men's claim to international refugee protection. UNHCR's official statement also raised concern that, these men did not have access to lawyers from state legal services so that they could have their asylum claims assessed in India.

Moreover, while hearing a petition filed in 2017 challenging such deportation plan, a Bench of the Supreme Court of India headed by the former Chief Justice Deepak Mishra clearly mentioned that, although the problem of Rohingya refugees is of “great magnitude”, there is a need to strike a balance between human rights of the refugees and national security concerns. This petition is still pending in the Supreme Court of India. But, one has to remember that more than a year ago, the Government of India announced its plan to deport “all illegal immigrants”, including approximately 40,000 Rohingya refugees estimated to be living across India. In August 2017, the Ministry of Home Affairs, Government of India issued an order in a letter sent to each of the state governments, to “identify and deport all illegal immigrants”, including the Rohingya refugees. The Ministry of Home Affairs as well as leaders of the ruling party in India insisted that, there were links between the illegal migrants and threat to national security as they were understood to be more vulnerable to potential recruitment by terrorist organizations. Even, of late, the Government of India has asked the states to identify members of the Rohingya refugee community, record their biometric details and report them to the Union Government. To quote Rajnath Singh, Home Minister of India: "Advisories have been issued to states. They need to identify the Rohingyas, take their biometrics and send us a report".

Similar attitudes are visible elsewhere in India, even in the non-government circles. Jammu's Chamber of Commerce and Industry last year threatened to launch an "identify and kill movement" against the settlers, which it claimed, pushed the government into taking the issue of Rohingya more seriously. Rakesh Gupta, the President of the Jammu Chamber said that, there was nothing new in taking the law into one's hands if "someone becomes a threat to our security, to the nation's security, and the security forces don't tackle them."Incidentally, the unquiet, insurgency-prone Himalayan state of Jammu and Kashmir, which is adjacent to Pakistan, has the biggest

population of Rohingya in the country with around 7,000 people scattered in various makeshift settlements, largely in the Jammu region.

On the other hand, even a section of Indian media, the Rohingyas were accused of trafficking in drugs and humans, apart from being involved in terrorist and anti-national activities. It is, therefore, not surprising that, the Rohingyas are considered to a "a problem", as they are " radicalized Islamist extremists", who need to be dealt with ruthlessly, or are simply "economic migrants" that India cannot afford to help. New Delhi also mentioned last year that, it shared Myanmar's concern about "extremist violence" by the Rohingya militants. The Ministry of Home Affairs, Government of India also informed the country's Supreme Court that, it had reports from the country's security agencies and "other authentic sources" indicating linkages of some of the unauthorized Rohingya immigrants with "Pakistan-based terror organizations and similar organizations operating in other countries."

More recently a confidential letter addressed to the Divisional Security Commissioners of Indian Railways in Madurai, Thiruvananthapuram and Palakkad has alerted about a mass movement of the Rohingyas from India's northeast to Kerala through several long-distance trains. The letter, signed by P Sethu Madhavan from the office of the Principal Chief Security Commissioner of the RPF said: "All Rohingyas are travelling in groups along with their families. Officers and staff under your control may be sensitized about their movement. If they are found in trains, they may be handed over to the police having jurisdiction for further action. Action taken report may be sent to this office at the earliest for the perusal of ..." The letter also listed fourteen trains connecting India's east and/or northeast with Kerala as potential trains to carry suspected Rohingyas. It is interesting to note that, many of these trains run on the migrant corridor, which witnesses mass movement of labourers from states like Assam, West Bengal, Odisha and Bihar to the southern state in search of work.

As it is, the issue of cross-border undocumented migration from Bangladesh to India has been a sensitive issue in Indian politics, particularly during the poll seasons. It is not surprising therefore that, Amit Shah, the President of the ruling party, and country's Home Minister while addressing an election rally in Madhya Pradesh, said that, all illegal immigrants were "like termites eating into the nation's security." He assured his audience that: "Elect us back next year and the BJP will not allow a single one of them to stay in this country." Therefore, panic has spread among the Rohingya refugees, who fled to India directly from Myanmar, or though Bangladesh. Even most of the Rohingyas, earlier taking shelter in the Baruipur region of the district of South 24 Parganas of West Bengal (the state that was perceived to be "slightly friendly" to the Rohingyas) have "disappeared" from the region, probably in view of growing panic of the Rohingyas of being deported to Myanmar. After all, the present government in India has taken a very unsympathetic position on the issue making it clear that the Rohingyas cannot be given refugee status in the country on account of perceived threats to the country's national security, and they may be deported to Myanmar *en masse*.

India's Home Minister Rajnath Singh on October 12, 2018 said during an event of the National Human Rights Commission of India that, action against "illegal immigrants" should not be seen from the prism of human rights. He also mentioned in this context, the deportation of the seven Rohingyas. Subsequently, a senior official of the Ministry of Home Affairs, Government of India said that, the principle of *non-*

refoulement that basically relates to human rights was applicable to those who seek asylum, and one needs to remember that no Rohingya has so far sought it.

In this emerging scenario of securitization of the Rohingya refugees and other migrants, particularly from Bangladesh, and in view of the growing erasure of concern for human rights, the core issue concerning the Rohingyas remained marginalized in the context of the deportation of these seven Rohingyas to Myanmar. Therefore, these seven men have not been officially termed by either India or Myanmar as "citizens" of Myanmar, but the "residents" of the latter. After all, the citizenship issue is at the core of the entire Rohingya issue. It is clear from the Supreme Court of India observation, which quoted the affidavit of the Ministry of Home Affairs, Government of India in defending the deportation of the seven Rohingyas indicating that, "they have been identified as residents of Myanmar."

Old Questions, New Contexts

When India deported seven Rohingyas back to Myanmar in October 2018, it raised certain fresh issues on India's stand regarding the refugee/stateless/migrant with its legal, ideological and diplomatic upshots. As such, the deportation clearly amounts to a violation of the principle of *non-refoulement* or the principle of prohibition against forcible return to a state where a person fears persecution, which is a customary principle of international law that is binding in nature for all countries, irrespective of whether or not the 1951 Refugee Convention or its 1967 protocol had been signed and/or ratified by the country concerned. Moreover, there is hardly any provision in the Indian immigration rules under which a stateless person may apply for leave to enter or remain in the country.

We need to recall that, the Rohingyas are often referred to as world's most persecuted minority, having settled for generations in Myanmar's restive Rakhine state. Since August 25, 2017, large-scale migration of this community to nearby Bangladesh and also to India began in view of a heavy army crackdown in Myanmar on the Rohingyas in the name of rooting out terrorist elements. This decision of the Government of India contradicted India's long tradition of providing shelter to those fleeing from their own countries for serious human rights violations - be it from Tibet, Bangladesh or Sri Lanka.

Consequently, Aakar Patel of Amnesty India said: "... decision by the Supreme Court marks a dark day for human rights in India." He rightly pointed out that: "This decision negates India's proud tradition of providing refuge to those fleeing serious human rights violations. It endangers the most persecuted population in the world and is bereft of any empathy." And, so far as the Rohingya refugees in India are concerned, they were predetermined to be "illegal immigrants", and therefore, were to be deported (including those, who are registered with the United Nations High Commission for Refugees) despite facing heavy criticism both within and outside the country for blatantly ignoring the plight of those, who had fled from "well-founded fear of persecution", and who as such were "refugees", and not illegal immigrants. Official statements were also made indicating clearly that for Rohingya refugees this plan would be executed even against those. India's Home Minister Rajnath Singh categorically stated that: the advisories had been issued to states to identify the Rohingyas, take their biometrics and send the Union government a report. He

promised that, the Union government would initiate action through diplomatic channels with Myanmar and get it resolved. It is interesting to note that, in the pending case before the Supreme Court of India about the *en masse* deportation of Rohingyas, the Government of India has already identified them as a threat to the country's national security. A senior official of the Ministry of Home Affairs, Government of India further said that, the principle of *non-refoulement* was applicable to only those who seek asylum, and that no Rohingya has so far sought it.

The *de facto* stateless Rohingya refugees have been facing similar situations in almost all the countries wherever they have been seeking refuge, after being excluded from their traditional homeland. This is only one classic example to indicate the inadequacies of international law. The Rohingyas and others elsewhere in millions are living "outside normal legal protection" and without the "elementary rights". Non-recognition of Rohingya in India or in any other country as stateless means deportation, as it has already been noticed, to their country of origin (in this case, Myanmar) that refuses to recognize them as citizens, and where they are likely to be punished.

The international legal principles are quite inadequate in offering solution to refugees and stateless as international law still operates in terms of reciprocal agreements and treaties between sovereign states. In reality, the right to have rights can primarily be obtained through citizenship guaranteed by the nation-states, and for the time being, there is no sphere, which is above the nations, does exist. Therefore, even after 70 years of the Universal Declaration of Human Rights (UDHR), nationality and citizenship continue to be fundamental elements of human security as they tend to provide people with a sense of belonging and identity. As citizenship provides the legal basis for the exercise of most of the human rights, the persons without a nationality are, in reality, denied the basic human rights, which the citizens take for granted. These basic rights include among others, access to schools and medical care, ownership of property, marriage and foundation of a family and enjoyment of legal protection.

Refugees and Stateless

Historically, refugees and stateless persons are closely interlinked. Both have received protection and assistance from international refugee organisations. Refugees were there almost since the advent of the modern nation-state. But, after the Second World War, the needs of refugees appeared to be dominant in a Euro-centric world. When the 1951 Refugee Convention was drafted, a protocol relating the status of stateless persons, attached to the draft convention, was postponed for consideration at a later date. International Conventions on Statelessness were adopted in 1954 and 1961, but as the international community did not pay much attention to statelessness at that time, few countries became parties to these treaties. The UNHCR was entrusted with certain responsibilities with regard to the stateless persons, but for many years, the organisation devoted little time, resources and efforts to address the issue of statelessness.

With increasing numbers of stateless people around the world and the implications this might have for national and regional security, the international community needs to revisit international instruments that deal with issues relating to nationality and citizenship. The end of the Cold War led to a profound change in

international relations and forced the issue of statelessness onto the agenda of the international community. These changes included the disintegration of several states, the rise of ethnic consciousness in many parts of the world, and the fear of large-scale population movements involving stateless persons. This prompted UNHCR and other humanitarian organisations to address the issue of statelessness in a more urgent and systematic manner, by trying to avert situations that can lead to statelessness, protecting stateless persons and trying to find adequate solutions to their problems. Ultimately, however, the problems of statelessness and disputed nationality can only be effectively addressed by states themselves in a Westphalian order. A brief perusal of some of the major international legal instruments indicates that there is no dearth of laws ensuring the basic rights. But, these rights still elude the stateless and refugees. Being stateless means having no nationality, and having no nationality means having no documents to prove one's own identity.

Two primary universal instruments on statelessness are the 1954 Convention relating to the Status of Stateless Persons and the 1961Convention on the Reduction of Statelessness. Article 1 of the 1954 Convention relating to the Status of Stateless Persons defines a stateless person as a person not considered a national (or citizen) under the law of any state. In addition to providing a definition of statelessness, the Convention seeks to improve the status of stateless persons and helps ensure that stateless persons enjoy fundamental rights and freedoms without discrimination. It regulates, *inter alia*, the legal rights of stateless persons, their access to work and welfare and urges states to facilitate their assimilation and naturalisation.

Despite the absence of a strong non-discrimination clause, the 1954 Convention contains a number of important provisions that require treatment of stateless persons to be at least as favourable as that accorded to nationals. Those provisions apply in respect to freedom of religion, artistic rights and industrial property, access to courts, rationing, elementary public education, public relief and assistance, labour legislation and social security (subject to state discretion in the case of non-contribution benefits). However, aside from those enumerated rights, the central point of departure for the 1954 Convention is Article 7(1) which stipulates that, except where the Convention contains more favourable provisions, States "shall accord to stateless persons the same treatment as is accorded to aliens generally." Moreover, many of the provisions of the 1954 Convention, including those that confer no better treatment than that afforded to aliens generally, explicitly require that the individual is lawfully staying in the territory of the state.[8]This problem is further compounded because states differ in approach as to what constitutes "lawful stay" and may for example require the individual to be granted a residence permit before they are considered "lawfully staying".[9]

The 1954 Convention defines a stateless person as one "who is not considered as a national by any state under the operation of its law". Therefore, the 1954 Convention requires states to guarantee provisions of the Convention to *de jure* stateless persons, a

[8]Several articles of the 1954 Convention, including Article 15 (Right of Association), Article 17 (Employment), Article 21 (Housing), Article 23 (Public Relief), Article 24 (Social Security), Article 26 (Freedom of Movement), Article 28 (Travel Documents), Article 30(1) (Non-Expulsion) are significant in this context.
[9]See Carol Batchelor, "The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation", *Refuge*, Vol. 22, No. 2 (2005).This review of EU state practice by her indicates that, "the majority of countries in the EU do not anticipate an automatic right to residence based on recognition as a stateless person."

group defined in a narrow, strictly legal manner, which usually does not accommodate persons who have become *de facto* stateless as a result of not enjoying the core minimum state protection linked with nationality. Indeed, it has been argued that this technical definition ignores the power of states to politically manipulate citizenship in both law and practice. States are encouraged, but not obliged, by virtue of a recommendation of the Final Act, to extend the Convention provisions to *de facto* stateless persons wherever possible. In sum, despite containing important provisions to regularise the status of stateless persons and ensure basic rights, the 1954 Convention has significant weaknesses. Many of the protections apply only to stateless persons who are considered to be lawfully staying in a particular country; many provisions require no more preferential treatment to be extended to stateless persons than to "aliens" generally and, fundamentally, it does not contain a comprehensive non-discrimination provision. Perhaps most importantly, it categorises the stateless into two groups, (*de jure* and *de facto* stateless) and affords protection only to one, thus creating a hierarchy within statelessness, further complicating the (in)equality puzzle.

Regardless of whether a state is party to the 1954 Convention, the right to non-discrimination would require a procedure that enables states to respond to the specific needs of stateless persons in a timely manner. The first step would be a formal recognition procedure for stateless persons. This draws upon a basic and vital principle of equality and non-discrimination law, or that equal treatment is not equivalent to identical treatment.[10]To realise full and effective equality, it would be necessary to treat people differently according to their different circumstances, to assert their equal worth, and to enhance their capabilities to participate in society as equals.[11]This understanding of equality may be applied by states when responding to statelessness, in order to ensure that their particular vulnerabilities are taken into account when dealing with them and resolving the problems specific to them.

The 1954 Convention indicates two types of statelessness: *de jure* and *de facto*. The Convention requires state parties to extend protection to *de jure* stateless persons, defined as those who are "not considered as a national by any state under the operation of its law". Only in the non-binding Final Act does the 1954 Convention encourage states to extend Convention provisions to *de facto* stateless persons. Although the Final Act does not provide a definition of the latter, the UNHCR has defined a *de facto* stateless person as one who is "unable to demonstrate that he/she is *de jure* stateless, yet he/she has no effective nationality and does not enjoy national protection".[12] The fact remains that, while there are clear cases of *de jure* statelessness, most cases fall in a grey area of *de facto* statelessness. The consequence is that, many persons who are genuinely in need of protection as they are in effect stateless, but cannot provide legal proof that they have no nationality. Therefore, they are simply

[10]In *Thlimmenos v. Greece*, application no. 34369/97, judgment of 6 April 2000, where the European Court of Human Rights observed that, "[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." cited in Katherine Perks and Amal de Chickera, " The Silent Stateless and the Unhearing World: Can Equality Compel Us to Listen?", *The Equal Rights Review*, Vol. Three (2009), p. 48

[11]*Declaration of Principles on Equality,* The Equal Rights Trust, 2008, Principle 2: Equal Treatment

[12]UNHCR Inter-Parliamentary Union, *Nationality and Statelessness: A Handbook for Parliamentarians*, Geneva, 2005, p.11.

excluded from the purview of 1954 Convention. The provisions of the 1954 Convention seem to be insufficient in responding to the questions like: "(1) how to identify its beneficiaries and (2) how to interpret the meaning of "stateless person". The definition, after all, provides a negative concept and difficult to prove and define.[13]One of the most contested questions of the drafting process of the 1954 Convention dealt with whether the *de facto* category should also be included in the Convention.[14] To avoid confusion, the drafters decided against it.[15] The members of the drafting committee were also perhaps apprehensive of a decline of the number of signatories to the Convention, and therefore, could have avoided the inclusion of *de facto* statelessness in the definition.[16]

Carol A. Batchelor is of the opinion that, the lack of an effective nationality causes a particular problem for those individuals who are outside their State of origin and cannot obtain assistance or documents to return. She argues that a person who is unable to obtain an effective nationality due to administrative obstacles should fairly be considered *de facto* stateless.[17] She even argues that, although Article 1(1) of the 1954 Convention refers to *de jure* stateless persons, the resolutions attached to the 1961 Convention on the Reduction of Statelessness and the Final Act of the 1954 Convention recommend that persons who are de facto stateless should as much as possible be treated as *de jure* stateless to enable the acquisition of an effective nationality and that States ought to implement it.[18] On the other hand, Laura van Waas is apprehensive that, cases of ineffective nationality are often confused with cases of *de facto* statelessness cases. She rather points out that, the question of whether these individuals are *de jure* or *de facto* stateless is somewhat irrelevant. In the end, the challenge is to identify them as stateless through appropriate procedures and well-defined rules of evidence.[19]

---

[13]For a detailed and comprehensive discussion on this issue, please see Laura van Waas, " The UN Statelessness Conventions" in Alice Edwards and Laura van Waas, *Nationality Matters: Statelessness under International Law*, Cambridge University Press, Cambridge, 2014, pp. 64-87

[14]See UN Doc E/CONF.17/L.6 in N. Robinson, Convention Relating to the Status of Stateless Persons. Its History and Interpretation. A Commentary, World Jewish Congress 1955, Institute of Jewish Affairs, reprinted by the Division of International Protection of UNHCR, 1997, 3, 7; United Nations General Assembly (UNGA), Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Stateless Persons, Summary Records (13–23 Sep. 1954), UN Doc E/CONF.17/SR. 1–15, SR. 2; SR.11–15; SR. 11, 5–8; SR.13, 5–16, cited in Katia Bianchini, "The "Stateless Person" Definition in Selected EU Member States: Variations of Interpretation and Application", *Refugee Survey Quarterly*, Volume 36, 2017, p. 87

[15]D. Weissbrodt & C. Collins, "The Human Rights of Stateless Persons", *Human Rights Quarterly*, 28(1), 2006, pp. 245-243

[16]For details, please see Carol A. Batchelor, "Stateless Persons: Some Gaps in International Protection", *International Journal of Refugee Law*, 7(2), 1995, pp. 232-248

[17]For details, please see Carol A. Batchelor, "Statelessness and the Problem of Resolving Nationality Status", *International Journal of Refugee Law*, 10(1–2), 1998

[18]Paragraph 3 of the 1954 Convention's Final Act recommends that, the benefits of the Convention should be extended to individuals who States consider to have had valid reasons for renouncing the protection of their State of nationality. The Final Act of the 1961 Convention, does not mention *de facto* statelessness, but rather it recommends that, such persons benefit from the provisions in the 1961 Convention so as to obtain an effective nationality. Final Act of the United Nations Conference on the Status of Stateless Persons, 360–9 UNTS 118, 6 Jun. 1960

[19]Cited in Katia Bianchini, "The "Stateless Person" Definition in Selected EU Member States: Variations of Interpretation and Application", *Refugee Survey Quarterly*, Volume 36, 2017, p. 88

Other international instruments dealing with the right to nationality include, *inter alia*, Article 15 of the UDHR (Universal Declaration of Human Rights), which stipulates the right to a nationality, and the right not to be arbitrarily deprived of nationality. Article 5 of CERD (International Convention on the Elimination of All Forms of Racial Discrimination), signed in 1965, seeks to "prohibit and to eliminate racial discrimination in all its forms and to guarantee the right to everyone, without distinction as to race, colour, or nationality or ethnic origin, to equality before the law". International legal instruments dealing specifically with the right to a nationality with regard to women and children also include the Convention on the Nationality of Married Women (1957), Article 9 of the CEDAW (Convention on the Elimination of all Forms of Discrimination Against Women) (Article 9) and Articles 7 and 8 of the CRC (Convention on the Rights of the Child). The instruments concerning women seek to ensure that they enjoy equal rights to acquire, change or retain nationality, while those covering children deal mainly with the right of children to be registered and to acquire a nationality from birth. At the regional level, the European Convention on Nationality (1997) embodies principles and rules applying to all aspects of nationality. The Convention on the Avoidance of Statelessness in relation to State Succession (2006) establishes more detailed rules to be applied by states with a view to preventing, or at least reducing to the extent possible, cases of statelessness arising from state succession.

However, like the situation of IDPs (Internally Displaced Persons), till date there is no specific international institution dealing with the problem of statelessness, or supervising the 1954 and 1961 Conventions relating to statelessness. The UNHCR was provisionally assigned to assume the responsibilities referred to in Article 11 indicating 'of a body to which a person claiming benefit of this convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority' in order to fill this gap with the entry into force of the Convention on the Reduction of Statelessness in 1975. However, no mention was made of UNHCR's competence regarding the Convention relating to the Status of Stateless Persons. The UNHCR was not given wider responsibilities relating to statelessness.

Meanwhile, the recent times have witnessed a steep rise in the number of stateless persons and a growing securitisation of these stateless people. This has probably led the UNHCR's Executive Committee and the UN General Assembly to adopt and endorse the 'Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons' (Resolution 50/152). In addition, UNHCR was requested to 'actively promote accession' to the 1954 and 1961 Conventions on statelessness, 'as well as to provide relevant technical and advisory services pertaining to the preparation and implementation of national legislation'.

To this end, the UNHCR has taken a number of practical steps to strengthen its efforts with regard to stateless persons. It has appointed a legal expert on the problem of statelessness, and has actively assisted governments in the preparation and implementation of nationality legislation while encouraging them to accede to the 1954 and 1961 statelessness Conventions. A key provision of the 1961 Convention categorically states not to create statelessness through the deprivation of nationality. Article 8(1) of the Convention mentions that, a "Contracting State *shall not* deprive a person of his nationality if such deprivation would render him stateless." In addition, the UNHCR has also strengthened its working relationship with a number of

organisations involved in this issue such as the Office of the United Nations High Commissioner for Human Rights (OHCHR), Council of Europe andthe Organization for Security and Co-operation in Europe (OSCE).

In 2014, the UN launched a global campaign to end statelessness by 2024. At the same time, the crises of the Rohingya from Myanmar and displacement from Syria started unfolding. Populist responses to globalisation and migration, as well as securitisation and digitisation have probably placed greater pressure on citizenship policy and making the task of promoting fair, inclusive and non-discriminatory rules and practices ever more difficult. The post-colonial societies have been facing new demarcation of boundaries that had ignored the natural and historical frontiers at the time of de-colonisation. The fresh geopolitical calculations of the postcolonial states have attached less importance to different communities inhabiting a territorial area, may be for centuries, and have begun emphasising the importance of the territory itself (may be stacked with different natural resources), its integrity and 'national security'. Under these circumstances, Hannah Arendt's observation, in an earlier generation, seems to be quite relevant: "[T]he moment human beings lacked their own government . . . no authority was left to protect them and no institution was willing to guarantee them... [what was] supposedly inalienable". After all, modern international law still grants states the right to set citizenship rules, and to revoke citizenship.[20]This power still allows states to divest their citizens of citizenship, or "denationalize" them, despite the work of the international community to eliminate statelessness.

New Horizons

In an emerging anti-immigrant and xenophobic world, *jus sanguinis* theory of citizenship is becoming more popular, where citizenship is limited to those with an ethnic or racial tie to the country concerned. Such laws usually grant citizenship to the foreign-born children of non-resident nationals, also create statelessness amongst children born to members of minority groups and refugees. The USA under President Donald Trump is now contemplating to change the US citizenship from a *jus soli* system to a *jus sanguinis* one. This would have the obvious and intended effect of stripping the 'outsiders', who are not 'real Americans' of their citizenship and its connected rights. The history of the world is witness to application of *jus sanguinis* principle of citizenship, and the production of large stateless populations. It would probably not be an exaggeration to say that, if states had defined citizenship solely on a *jus soli* principle of citizenship, then statelessness would have been a lesser problem. At least, all the children born to the stateless people would have been citizens of the state of their birth.

So far as the Rohingyas in India are concerned, the gap in the international protection regime is apparent as India's attitude towards the refugees is ambiguous or entirely absent. Restrictive trends in refugee determination procedures mean that more and more people (presently Rohingyas) are refused refugee protection, who cannot return home because they fear persecution and concerned about their safety. This trend highlights the heightened necessities for a well-built framework of

[20]U.N. High Commissioner for Refugees, Div. of Int'l Prot., *UNHCR Action to Address Statelessness: A Strategy Note*, 22 INT'L J. REFUGEE L. 297, 299 (2010) (explaining the international legal framework regarding the loss and acquisition of nationality)

protection for *de facto* stateless persons, who do not strictly fit the refugee criteria and yet cannot return home, and others who, while not at risk if returned, cannot return home for legal reasons.

The world has been witnessing mixed and massive flows of people since the 1990s. Since then, it has become quite difficult to make a clear distinction between refugees and asylum-seekers, normally protected by international refugee law, and the economic migrants, who usually does not enjoy that level of protection. In other words, the earlier categorisations of the people on the move are becoming blurred, and sometimes irrelevant, in dealing with the evolving situations worldwide. Therefore, the risk of confusion between security, economic, political considerations, and humanitarian concerns is becoming more complex in character. The States or governments would focus usually on frameworks and procedures to "disaggregate and manage mixed migration",[21] whereas rights-based approach must address basic human needs beyond such considerations. Therefore, in order to address the basic needs of the people on the move, on the one hand, we need to look beyond the international refugee law *per se*, and must take into consideration of the international human rights law and international humanitarian law and other international and regional legal frameworks. On the other, we require to address the Westphalian order and the question of state sovereignty from an absolutely fresh perspective.

[21]Thomas Linde, "Mixed Migration: A Humanitarian Counterpoint", *Refugee Survey Quarterly*, Vol. 30, No. 1, 2011, p. 89