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Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia — Part 2

SUMIT SEN*

Abstract

This article examines the situation of stateless refugees in international law, in the context of the forced population displacement of the Bihari refugees of Pakistan in Bangladesh. The partition of India and the subsequent creation of Pakistan in 1947 led to the displacement of the Biharis, and with the creation of Bangladesh in 1971, the Biharis were forced to flee a second time. However, their international legal status as refugees has seldom been recognized in international law. Part 1 of this article, comprising Sections 1 and 2, was published in the last issue of the *IJRL* (Volume 11 Number 4); it provided the background to the present problem, and showed that the Biharis' claim to Convention refugee status is well-founded, on the basis of a well-founded fear of persecution for reasons of nationality and political opinion, even and despite the succession of Bangladesh from Pakistan and the subsequent denationalization of Biharis by Pakistan which made them *de facto* stateless refugees. Part 2, comprising Sections 3 and 4, is published below; it examines the nationality entitlement of the Bihari refugees' and considers their right to return to Pakistan, their country of nationality, as a central factor in any legal solution for them, based on the right to return in international law.

3. The Right to a Nationality

Lauterpacht argued for the recognition of the right to a nationality, since nationality forms the indispensable link between the individual and international law.¹ He suggested that denationalization resulting in

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¹ Lauterpacht, H, *International Law and Human Rights*, Archon Books, USA (1968) 346-50.

statelessness would be arbitrary, and any deprivation would be incompatible with international human rights norms, especially since the right to a nationality is regarded as a fundamental human right.²

In an advisory opinion,³ the American Court of Human Rights reflected on the right to have a nationality entailing a minimum measure of legal protection in international law, and on individual protection against arbitrary deprivation of all political and civil rights tied to nationality.⁴ In confirming the inherent nature of the right to a nationality within international law, the Court observed that:

It is generally accepted today that nationality is an inherent right of all human beings ... nationality cannot today be deemed within their [States] sole jurisdiction; those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights. The classical doctrinal position ... has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the State as well as human rights issues.⁵

In balancing State sovereignty and human rights law, the Court stated that:

[I]n order to arrive at a satisfactory interpretation of the right to nationality ... it will be necessary to reconcile the principle that the conferral and regulation of nationality fall within the jurisdiction of the State, that is, they are matters to be determined by the domestic law of the State, with the further principle that international law imposes certain limits on the State's power, which limits are linked to the demands imposed by the international system for the protection of human rights.⁶

3.1 Real and effective nationality

While sections 1 and 2 have argued that the Biharis were rendered *de facto* stateless refugees as a result of denationalization, this section reviews the general principles of international law in respect of their 'real and effective nationality'. In this regard, it has been argued that States cannot plead provisions of internal law in the justification of international wrongs. The principles needed to assess this problem would include whether the manipulation of the law of nationality is part of delictual conduct,⁷ and whether the general principle of a genuine link was set aside in the conferment of nationality.

Whereas the doctrine of effective link has been recognized in

² *Ibid.*, 4–5.

³ *Re Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, 5 *HRLJ* 167 (1984).

⁴ See Chan, *The Right to a Nationality*, 5.

⁵ See *Re Amendments to the Naturalization Provisions*, above n.3, 32–3.

⁶ *Ibid.*

⁷ Brownlie, I., 'The Relations of Nationality in Public International Law', 39 *BYIL* 284, 327–8 (1963).

international legal literature,⁸ the doctrine of effective nationality was established in the *Nottebohm* case. While the internal legislation of States makes general use of residence, domicile, immigration and membership of ethnic groups associated with the territory as connecting factors, 'international law has rested on the same principles in dealing with the situations ... [as also] when certain parts of the population are outside nationality legislation'.⁹

In developing the legal policy relating to nationality, the principle of real and effective nationality applied by the Court was stated to be one of relatively close factual connection. The Court said:

International arbitrators ... have given their preference to the real and effective nationality [test], that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration ... the habitual residence of the individual is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children ... [The practices of a number of States] manifest the view of these States that ... nationality must correspond to the factual situation.

The Court ruled further that in the general context, the juridical expression of the individual's connection with the State, and therefore its nationality, 'are of a character that they demand certainty ... There must be objective tests, readily established for the existence and recognition of that status'.¹⁰ For this purpose, the Court proposed that:

According to the practice of States, to arbitral and judicial decisions and to the opinion of the writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.

While the individual exists for the State as a person bound to it by the link of citizenship, it is by no means clear that this is *the* essential legal bond sufficient to create the claim of loyalty. There seems to be a deeper connection, of 'belonging', going beyond mere citizenship and statehood. It is belonging that 'struggle(d) to create ... a search for authenticity',¹¹ which culminated in the birth of Pakistan in 1947 and was the reason for the movement of Biharis to East Pakistan. In its efforts at rehabilitation, Pakistan provided special incentives to the Bihari refugees from India,

⁸ See Weis, P., *Nationality and Statelessness in International Law*, (2nd ed., 1979), 191-2; Makarov, RDC, I (1949) 74.

⁹ Brownlie, 'Relations of Nationality', 350.

¹⁰ See Opinion of Judge Read, *Nottebohm Case*, ICJ Reports (1955), 46.

¹¹ The linkages of minorities and the 'secessionist sense of self-determination' [seems to be built essentially] 'upon a romantic or a rousseauesque approach'; Koskenniemi, M, 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 *ICLQ* 250 (1994).

the object of which was to secure protection for ethnic minorities which differed in race and language, with the possibility of living peacefully alongside the Bengali population. The approach linked the *raison d'être* of Partition to the purposive criteria of preserving and developing special characteristics of Pakistani statehood.¹²

After 1947, Biharis were integrated with 'only those non-dominant groups in a population which possess(ed) and wish(ed) to preserve stable ethnic, religious and linguistic traditions ... and ... (were) loyal to the State of which they [were] nationals'.¹³ Although always minorities in East Pakistan, Biharis remained a group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members, being nationals of Pakistan, possessed ethnic and linguistic characteristics differing from those of the rest of the population.¹⁴ Up until 1971, however, they were nationals, having a legal bond with its basis in a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties, thus emphasizing equality in fact and in law.¹⁵ Afterwards, as explained in sections 1 and 2, the majority of Biharis were denationalized by Pakistan.

Brownlie has considered whether an effective nationality can exist even in the absence of a formal status in the internal law of the State concerned.¹⁶ He argues that the judgment in the *Nottebohm* case presents the principle of effective nationality in terms of the links between the life of the *de cuius* and the population of the State in relation to the social fact of attachment, where 'the State is a concept broad enough to include not merely the territory and its inhabitants but also those of its citizens who are resident abroad but linked to it by allegiance ...'.¹⁷ He concludes that:

The effective link doctrine is an inevitable product of the process whereby nationality is placed in a proper relation to international law as a general system. There must be a system of attribution for individuals and populations on the international plane, and [especially in] the consequences of wide reliance on nationality as a reference in various parts of international law ... The logic of the judgment of *Nottebohm* in regard to the fundamental aspects of nationality is

¹² Shaw, *The Definition of Minorities*, op.cit.

¹³ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc. E/CN.4/641 Annex I, Resolution II (1950).

¹⁴ See Capotorti, F., 'Study of the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities', UN doc. E/CN.4/Sub.2/384/Rev.1 (1979).

¹⁵ Jules Deschenes defined a minority as a 'group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law': UN doc. E/CN.4/Sub.2/1985/31.

¹⁶ Brownlie, *Relations of Nationality*, 358-63.

¹⁷ Dissenting Opinion of Judge Read, above n.10. 44-5.

unimpeachable . . . [and the] evidence of practice both before and since *Nottebohm*, as well as the logical force of other principles of international law, justify the conclusion that the principle of effective nationality is a general principle of international law and should be recognized as such.¹⁸

3.2 Right of option

This section assesses the effect of territorial change in redefining the status of an individual, and discusses the question of real and effective nationality with respect to the State succession of Bangladesh in relation to the Biharis' right of option. While the rules and practice of States are based on the assumption that States administer the grant of nationality, general principles of real and effective nationality 'call for expressions of will on the part of individuals directly or indirectly . . .',¹⁹ in affirming their right of option. In this regard, the principle of effective link is considered to underlie much of the State practice on State succession.²⁰

While 'State succession' is 'employed to describe an area, or a source of problems . . . the term does not connote any principle or presumption that a transmission or succession of legal rights and duties occurs.'²¹ The succession, however, had direct consequences for potential refugees, particularly in regard to nationality. Many international lawyers are of the view that the private rights of individuals are not affected by a change of sovereignty, basing themselves on the principle of respect for acquired rights in international law, which maintains that a change of sovereignty should not touch the interests of individuals more than is necessary.²² However, when the change of sovereignty provides a certain basis for persecution and the successor State fails to comply with the minimum standards of international law and its obligation to protect its nationals, then the issue of State succession is highly relevant to the acquisition of nationality. Since the persecution of the Biharis continued despite the change of State,²³ it would be difficult to argue that persons attached to the territory of East Pakistan changed their nationality when East Pakistan became Bangladesh.²⁴

While the traditional doctrine of international law has argued for inhabitants in the successor State to accept the nationality of that State, the modern basis of nationality change must be in accord with human and political realities.²⁵ Brownlie argues that the 'evidence is overwhelmingly

¹⁸ Brownlie, *Relations of Nationality*, 364.

¹⁹ *Ibid.*, 340.

²⁰ See ILC *Yearbook*, Vol. I (1953) 319-26.

²¹ Brownlie, I., *Principles of Public International Law*, 5th ed., 1998, 650.

²² O'Connell, D. P., *State Succession in Municipal and International Law*, 2nd ed., vol. I (1970) 377-81.

²³ See Part I of this article, sections 2.1.3 and 2.1.4.

²⁴ See Jennings and Watts, eds., *Oppenheim's International Law*, vol. I, 551, 571, 656-7.

²⁵ Brownlie, *Principles*, 657.

in support of the view that the population follows the change of sovereignty',²⁶ given that the social fact of attachment of the predecessor State and that of the inhabitants of the successor State were of no legal consequence. While O'Connell holds that there is no automatic change of nationality with territorial change,²⁷ Crawford, in reconciling the Brownlie and O'Connell views, argues that in the absence of provisions to the contrary, persons habitually resident in the territory of the new State acquire the nationality of that State. Graupner also denies the existence of any automatic change, arguing that some form of submission, explicit or tacit, is required before nationality is acquired.²⁸

In support of this last-mentioned position, it may be said that there is no rule in international law under which the nationals of the predecessor State acquire the nationality of the successor State, although States in general have conferred nationality on former nationals of the predecessor State.²⁹ With regard to the Biharis, it may be argued as a matter of international law, that Pakistan as the predecessor State is under an obligation *vis-à-vis* Bangladesh, the successor State, to withdraw its nationality if and when the Biharis acquire the nationality of Bangladesh. However, since the displacement of the Biharis was not voluntary and the Biharis retained their Pakistani nationality, they did not qualify for Bangladeshi nationality, and hence, denationalization by Pakistan violated international law.

Crawford considers that, in the absence of provisions to the contrary, persons habitually resident in the territory of the new State acquire the nationality of the State. Since provisions in the New Delhi Agreement provide for the option for 'non-Bengalis' to return, it can be argued that in the light of explicit treaty provisions, Biharis would *not* automatically acquire the nationality of Bangladesh. Brownlie does not address the legality of population transfer, but instead provides instances of the 'voluntary exercise of rights of option'.³⁰ Having stated that 'the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality', he corroborates the right of option as a 'later and additional procedure (in treaties) . . . [O]nly if and when the choice is made, does the nationality of the successor State terminate'.³¹ While compulsory naturalization has often been associated with territorial change,³² '[u]pon occasion, however, these harsh doctrines

²⁶ Brownlie, 'Relations of Nationality', 320.

²⁷ O'Connell, *State Succession*, vol. I, 503.

²⁸ Graupner, 'Nationality and State Succession — General Principles of the Effect of Territorial Changes on Individuals in International Law', *Transactions of the Grotius Society* (1946) 87–120.

²⁹ See Weis, *Nationality and Statelessness*, 143–4.

³⁰ Brownlie, 'Relations of Nationality', 326.

³¹ *Ibid.*, 320. Drawing on Brownlie, since Biharis had cast their choice, they cannot be deemed to have acquired the nationality of Bangladesh.

³² Mann, F., 'The Effects of Changes of Sovereignty upon Nationality', 5 *MLR* 218 (1942); Weis, *Nationality and Statelessness*, 139–64.

are modified in deference to human rights and self-determination . . . [S]tate practice seeks to allow individual inhabitants of the ceded territory an option on nationality, including the retention of the original nationality'.³³

The existence of the right of option to be enjoyed by all persons affected by territorial changes has been argued by others. In a draft convention, the Harvard Law Research Group, discussed the possibility of the inhabitants of the transferred territory repudiating the nationality of the acquiring State, 'in accordance with the law of the successor State'.³⁴ However, the most noteworthy exploration of this topic was presented by Kunz,³⁵ who discussed the 'older right of option', that is, the right of the individual to emigrate from the transferred territory (option of emigration) and thereby implicitly repudiating the nationality of the successor State, compared with the 'modern right of option', namely, the right to make a declaration of refusal to acquire the nationality of the successor State (option of nationality).³⁶

Although treaty practice with regard to the right of option is not universal, it is nonetheless widespread. Westlake³⁷ and Fauchille³⁸ have shown 'that a right of option has been accorded in a great number of treaties concluded in Europe and America', with the practice reaching its climax after the First World War.³⁹ Reaffirming Kunz, Weis considered the right of option as 'international law in development', which nevertheless cannot be presumed in the absence of treaty provisions.⁴⁰

The right of option was further emphasized as a rule of international law by Lord McNair, who stated that 'it is becoming increasingly common to give such nationals an option . . . to leave the territory and retain their nationality'.⁴¹ In this regard, the Biharis, as traditional minorities⁴² of

³³ See Jennings and Watts, *Oppenheim's International Law*, Gettys, 'The Effect of Changes of Sovereignty on Nationality', 21 *AJIL* 268-71 (1927); McDougal, Lasswell, Chen, 'Nationality and Human Rights: The Protection of the Individual in External Arenas', in *Human Rights and World Public Order*, Yale University Press, New Haven and London (1980) 861-958 at 885.

³⁴ Art. 18(1), (2). See Inter-American Juridical Committee, *Report and Draft Convention on the Nationality and Status of Stateless Persons*, Department of Law, Pan-American Union, Washington (1952).

³⁵ See, among others, Kunz, J., 'L'option de nationalité', *RCADI*, I (1930) 109; 'Nationality and Option Clauses in the Italian Peace Treaty', 41 *AJIL* 622 (1947).

³⁶ In the latter case, the successor State may demand the removal of the optant from its territory. While removal is not an essential part of the right of option, it may be a condition for the exercise of the right of option, and will usually be the consequence of an exercise of the right. Kunz, 'L'option de nationalité', above n.35, 134.

³⁷ Westlake, *International Law*, vol. I, 71.

³⁸ Fauchille, *Traité de Droit International Public*, vol. 1, 858-76.

³⁹ Weis, *Nationality and Statelessness*, 161.

⁴⁰ Weis argues that 'it cannot be concluded, from widespread but not universal treaty practice, that there exists a rule of international law imposing a duty on the States concerned in a transfer of territory to grant to the inhabitants of the transferred territory a right of option to decline (or acquire) the nationality of that State': *ibid.*, 163.

⁴¹ McNair, *International Law Opinions*, vol. 2, 24.

⁴² For effective protection of minorities, see 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities': UNGA res.47/135 (1992).

Pakistan and now *de facto* stateless refugees, can be seen to have exercised the older right of option (option of emigration) and thereby implicitly to have repudiated the nationality of the successor State soon after the independence of Bangladesh in 1971. However, awaiting their return to Pakistan, they exercised their modern right of option (option of nationality), in making a declaration of refusal to acquire the nationality of Bangladesh. Their right of option,⁴³ building on their right to self-determination, has been ignored by Pakistan.

The rights of minorities and the issue of self-determination are two sides of the same coin.⁴⁴ While issues of ethnic diversity and diverging political interests within Pakistan led to self-determination for Bengalis, the real function of the principles of human rights should allow all 'peoples' to have the right of self-determination.⁴⁵ By virtue of that right, evidenced by the established norm of the right of option in international law, the Biharis wished to exercise their rights to have recognition of their status as Pakistanis. Interestingly, just before the independence of Bangladesh, 'the principle [became] a legally binding right, ...'⁴⁶ and was followed by another international legal declaration.⁴⁷ That the Bihari refugees' demonstrated 'quality of endurance' in the retention of their nationality as an issue of self-determination,⁴⁸ reaffirms their right of option, as exercised in 1971.

Self-determination has operated within the framework of the principle of territorial integrity to prevent a rule authorizing secession from an independent State,⁴⁹ thus reaffirming a 'significant presumption'⁵⁰ against the operation of self-determination. While self-determination as a legal right applies only to a recognized non-self-governing territorial situation, an assessment of Chapter XI of the UN Charter shows an impetus for the development of self-determination with a real possibility of implementation where the territorial aspect is vital.

⁴³ Also see Mikulka, Vaclav, 'Legal Problems Arising from the Dissolution of States in Relations to the Refugee Phenomenon', in Vera Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers, The Hague/Boston/London (1996), 39.

⁴⁴ Thornberry, Patrick, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments', 38 *ICLQ* 867 (1989).

⁴⁵ UNGA res. 2200A(XXI) (1966).

⁴⁶ Shaw, M., 'The Definition of Minorities in International Law', in Dinstein, Y. & Tabory, M., eds., *Protection of Minorities and Human Rights*, Dordrecht, 1992, 1, 17.

⁴⁷ 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', 1970.

⁴⁸ Thornberry, 'Self-Determination, Minorities, Human Rights', above n.44.

⁴⁹ The 'domestication of national self-determination' in James Mayall's writing, *Nationalism and International Society*, provides an interesting and different point of view. Koskenniemi observes that limiting national self-determination to decolonization has 'always seemed somehow arbitrary': Koskenniemi, M., 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 *ICLQ* 241, 242 (1994).

⁵⁰ Shaw, 'Definition of Minorities', above n.46, 17.

While the UN has built a consensus on self-determination of colonial people,⁵¹ articles 1(2) and 55 of the Charter approach the principle while using the terms State, nation and peoples, where peoples refer to groups of human beings who may, or may not, comprise a State or nation.⁵² Although the Commission on Human Rights has failed to reach a conclusion, there is support for the term to be restricted to the inhabitants of a particular State or colony.⁵³

Though the territorial conception of self-determination within the reality of mixed populations, with their differing cultures, languages and religions, weighs heavily towards taking political demarcations as they stand,⁵⁴ the situation for the Biharis is different. The Bihari community had not integrated with the majority population of East Pakistan. Although their community identity was substantially preserved, they wanted voluntary repatriation only when the political demarcations of Pakistan were irrevocably altered. Possessing 'ethnic (and) linguistic characteristics differing from those of the rest of the population',⁵⁵ and intending to maintain their specificity and preserve their identity from the majority of the population, the effort of the Bihari refugees' 'collective will to survive'⁵⁶ has been a question of fact, and not in the law as selectively applied by Pakistan.⁵⁷ Thus, within international practice, the right to self-determination of Biharis, evidenced through their right of option, is not a departure from international standards, but simply a reaffirmation of the human rights of a national minority group and their collective will to survive in the face of well-founded fear of persecution.⁵⁸

The assumption that self-determination authorizes secession by groups is incorrect. Self-determination is rather, as the Committee for Human Rights has made clear in its examination of States' reports under article 40 ICCPR66, concerned with the accountability of governments, participation, and real choice for the peoples in matters of political and

⁵¹ UNGA res. 1541(XV) requires '(p)rima facie ... obligation ... to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it'.

⁵² Thornberry, 'Self Determination, Minorities, Human Rights', above n.44.

⁵³ Shaw, 'Definition of Minorities', above n.46, 17.

⁵⁴ Thornberry, 'Self Determination, Minorities, Human Rights' above n.44.

⁵⁵ Capotorti, above n.14.

⁵⁶ Deschenes, above n.15.

⁵⁷ This contradicts established norms of international law. See *Greco-Bulgarian Communities case*, PCIJ Ser. B, No. 17, 1930, 32.

⁵⁸ Further, the rule of non-discrimination and equality in law should move towards equality in fact, where the continued existence of the minority group is not placed in jeopardy, by practice of non-return of nationals, as is evidenced for the Bihari *de facto* stateless refugees. See Thornberry, 'Self-Determination, Minorities, Human Rights', above n.44.

economic policy.⁵⁹ Further, their right to option, as an attribute of the principle of self-determination, has been reaffirmed in recent international legal practice. The Arbitration Commission of the International Conference on the Former Yugoslavia considered using the right of option, wherein an 'individual may choose to belong to whatever ethnic, religious or language community he or she wishes'.⁶⁰ For the Bihari community, this right of option was offered by Pakistan and Bangladesh through the ICRC, and needs to be respected by Pakistan as an international obligation.

Traditionally, international law has provided minorities with little recourse as regards self-determination; greater adherence to the basic rules of human rights law is therefore required.⁶¹ The Bihari refugees' right to self-determination, ascribable in their right of option, is well-founded in international law.⁶²

3.3 Recognition of legal personality

In arguing for the *de jure* right to a nationality of the Bihari *de facto* stateless refugees, and drawing on their established right of option in international law, this section analyses their juridical personality, that is, the right to recognition as a person before the law.⁶³ 'It is one of the individual's rights of existence'; recognition of legal personality is a necessary prerequisite to

⁵⁹ Higgins, Rosalyn, 'Minority Rights: Discrepancies and Divergencies Between the International Covenant and the Council of Europe System', in *Liber Amicorum for Henry Schermers*, Dordrecht, 1994, 193, 197. However, Thornberry has stated that the Committee's comment is neither optimistic or illuminating. States do not find much use for article 1 'internally.' But the Comment incorporates a view about self-determination 'underlying' human rights: 'The right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights.' The application of internal self-determination is to be gauged with reference to human rights, and not to ideologies beyond it. Violations of self-determination are violations of human rights. Thornberry, 'Self-Determination, Minorities and Human Rights', above n.44, 883.

⁶⁰ Opinion No.2, 11 Jan. 1992, 31 *ILM* (1992) 1498.

⁶¹ Here Koskenniemi observes '(t)he discourse of self-determination contains little that is self-evident or on which everyone can agree . . . [W]e international lawyers have only ourselves to blame for the legal force presently enjoyed by claims of national self-determination. We owe it those *whose lives have been devastated by the ongoing xenophobic hysteria* to examine what is involved in contagious nature and whether a meaningful legal sense can be extracted out of the available propaganda': Martti Koskenniemi, 'National Self-Determination Today', above n.49, 244 (emphasis added).

⁶² See Crawford, J., *The Creation of States in International Law*, (1979); International Commission of Jurists, *The Events in East Pakistan 1971* (1972); Report of Independent Commission on International Humanitarian Issues, *Indigenous Peoples: A Quest for Justice* (1987). Thornberry laments that the endorsement of minority rights is 'more limited' than art. 27 ICCPR66: 'The different minorities are narrowed down to "national" minorities, implying a limitation of scope; there is no consideration of a "right to identity", only to equality before law.' On the other hand, Cassese points to Principle VIII, which includes '... the principle of equal rights and self-determination of peoples, all peoples *always* have the right, *in full freedom*, to determine, *when and as they wish*, their internal and external political status, without external political interference, and to pursue as they wish their political, economic, social and cultural development': *Self-Determination of Peoples*, Cambridge, 1995.

⁶³ Art. 16 ICCPR66.

all other rights of the individual and consequently constitutes a non-derogable right.⁶⁴

Article 16 ICCPR66 endows the individual with the 'capacity to be a person before the law', and must be distinguished from the 'capacity to act, to establish rights and duties by way of one's conduct'. Since the Biharis have been subjected to denationalization by Pakistan, leading to their present status as *de facto* stateless refugees, the recognition of their legal personality requires attention. Article 16, corresponding to article 6 UDHR48, indicates that recognition of legal personality must be accompanied by the grant of private rights. The inconsistencies in the *travaux préparatoires*, regarding the 'capacity to be a person before the law' and 'capacity to act', were settled by the Third Committee of the General Assembly, which conclusively provided that article 16 related to the capacity to be a person before the law and did not cover the capacity to act.⁶⁵

While the practical significance of article 16 has been questioned, the 'recognition of legal personality' helps provide a systematic interpretation of all other human rights provisions. Although *de jure* persons possess *ex definitione* legal personality, Bihari refugees lack the usual attributes of nationality due to their denationalization by Pakistan. Article 16 provides the international legal basis in respect of the rights to a nationality, of option to choose and their right to return.

4. Right to Return in International Law

The existence of the right to return, and the corresponding duty to admit by the concerned State, are beyond dispute as principles of international law.⁶⁶ The right to return of Biharis will be approached from the perspective of international law, drawing on the Biharis' right to a nationality, the international legal norms relating to the right of option and recognition of their legal personality. While not implying the political feasibility of repatriation, the past practice of Pakistan between 1971–1999 will be mentioned to illustrate its policy.

Since the right to return has been recognized in numerous human rights provisions, constitutions and jurisprudence of countries, in resolutions of

⁶⁴ Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel Publisher, Kehl/Strasbourg/Arlington (1993) 282.

⁶⁵ See UN doc. A/C.3/SR.1014, 7 Nov. 1960.

⁶⁶ See *Van Duyn v. Home Office*, 1 CMLR (1975) 18, where the European Court of Justice stated that as 'a principle of international law ... a State is precluded from refusing to its own nationals the right of entry or residence'.

the UN⁶⁷ and the wide operational experience of the UNHCR,⁶⁸ it has been argued that the right exists in customary international law, although 'its precise contents (are) difficult to define'.⁶⁹ The right to return to one's own country is provided *expressis verbis* in article 9 UDHR48, which prohibits 'arbitrary arrest, detention or exile', and in article 13(2) UDHR48, providing that '[e]veryone . . . the right to leave any country, including his own, and to return to his country'.⁷⁰ This human rights dimension is important for refugees, since repatriation is premised upon their right to return to their own country in conditions of security.⁷¹ In the context, the 'prohibition of exile' merits restatement, since the exile of nationals is arguably prohibited under general international law.⁷²

The right to return is incorporated as an 'absolute entitlement'⁷³ in article 12(4) ICCPR66, where the term 'his own country' suggests the bond between the claimant and the State to which he or she is claiming to return. The meaning of 'to enter' is wider in scope than the term 'return', since the former applies to persons who have been born abroad, thus allowing these persons to enter their country for the first time.⁷⁴ In fact, the *travaux préparatoires* of ICCPR66 support this interpretation.⁷⁵ Interestingly, the debate within the UN Commission on Human Rights and General Assembly on the adoption of article 12(4) ICCPR66 refers to three distinct groups: (a) nationals/citizens of a country living or who have lived in the country; (b) nationals/citizens born outside the country and who have never lived therein, (c) permanent residents or others who have a legal right to residence within a country and but are not nationals thereof. A change in the formulation of the article, from the right to 'return' to one's country, to the right to 'enter' one's country, was made to include the group under (b), and proposals to clarify the reference to 'one's country' by referring instead to the 'country of which one is a

⁶⁷ See, among others, Mubanga-Chipoya, 'Draft Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own and to Return to His Country': UN doc. E/CN.4/Sub.2/1988/35/Add.1.

⁶⁸ The right to return is implicit in UNHCR's promotion of voluntary repatriation as the most desirable solution to the problems of refugees.

⁶⁹ Lawand, Kathleen, 'The Right to Return of Palestinians in International Law', 8 *IJRL* 544 (1996).

⁷⁰ See UN doc. A/Res/217(III), 10 Dec. 1948.

⁷¹ Goodwin-Gill, G. S., 'The Right to Leave, the Right to Return and the Question of a Right to Remain', in Gowlland-Debbas, *The Problem of Refugees*, above n.43, 101.

⁷² Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel Publisher, Kehl/Strasbourg/Arlington (1993) 218.

⁷³ Goodwin-Gill, 'The Right to Leave', above n.71.

⁷⁴ de Rouw, A. C. J., 'Some Aspects of the Right to Leave and to Return with Special Reference to Dutch Law and Practice', XII *Neth. YBIL* 50 (1981).

⁷⁵ Bossuyt, M., *Guide to the 'Travaux Préparatoires' of the International Covenant of Civil and Political Rights*, Martinus Nijhoff, Dordrecht (1987) 261.

national' were rejected on the grounds that they would exclude the category under (c).⁷⁶

Within this understanding, the categorization of the various sections of the Bihari population would inevitably fall under all three categories. First, as citizens of Pakistan before denationalization, they can be termed 'nationals . . . who have lived in the country'. The second category leads from the first category, those who are the legitimate offspring of nationals of Pakistan prior to the said date, and therefore are entitled to the nationality of their parents, although they 'have never lived therein'.

Hannum has contended that the strongest support for the view that article 12(4) refers to 'nationals or citizens' is the Ingles study,⁷⁷ which refers to 'the right of a national to return', rather than to 'enter' his country,⁷⁸ and that '(n)o one shall be arbitrarily deprived of his nationality or forced to renounce his nationality as a means of divesting him of the right to return to his country'.⁷⁹ In this regard, the process of denationalization by Pakistan continues to violate the international norm that '(n)o one shall be arbitrarily deprived of his nationality or forced to renounce his nationality as a means of divesting him of the right to return to his country', since by a process of arbitrary and selective acceptance into its new (erstwhile West Pakistan) territory, the vast majority of the Bihari community became stateless refugees.⁸⁰

Weis was of the view that only nationals are included within the meaning of article 12(4), although he added that the article 'include(s) the State whose nationality the person possessed and of which he has been arbitrarily deprived'.⁸¹ Using this paradigm, it can be argued that the Biharis were nationals of Pakistan since 1947, and that the deprivation of the right to a nationality after twenty-five years constitutes an arbitrary deprivation of human rights by Pakistan.

4.1 One's own country

The relationship of the Bihari community with the State of Pakistan should be located within the expansive interpretation of 'one's own country',⁸² the State with which the individual has an identifiable

⁷⁶ Hannum, Hurst, *The Right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster (1987) 56.

⁷⁷ Ingles was the Special Rapporteur for the United Nations 'Study of Discrimination in Respect of the Right of Everyone to Leave any Country, including his own, and to Return to his Country': UN doc. E/CN.4/Sub.2/220/Rev.1 (1963).

⁷⁸ However, art. 12(4) ICCPR66 clearly stipulates that '(n)o one shall be arbitrarily deprived of the right to enter his country'.

⁷⁹ Hannum, *The Right to Leave*, above n.76, 57.

⁸⁰ For a discussion on the individual and collective aspects of the right to return, see Lawand, Kathleen, 'The Right to Return of Palestinians in International Law', 8 *IJRL* 541-3 (1996).

⁸¹ Weis, *Nationality and Statelessness*, 65.

⁸² For a comparative and contextual understanding of 'one's own country', see Lawand, above n.80, 548-50.

connection. In this regard, it is appropriate to restate the landmark decision of the ICJ in the *Nottebohm* case,⁸³ where the substance of Nottebohm's links with the State of Liechtenstein was assessed. Applying the determinative criteria of 'tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future' used by the Court to assess linkages in the *Nottebohm* case to the Biharis refugees, it is clear that the Biharis succeed in qualifying on all counts for the links to Pakistani nationality.

The broad interpretation advanced at the Uppsala Colloquium suggested that the language 'his own country' was purposely chosen to avoid accepting formal governmental determinations of nationality as the final arbiter of whether there existed a right to return.⁸⁴ The decision of the International Court of Justice in *Nottebohm* further illustrated that a 'person's "country" is that to which he is connected by a reasonable combination of . . . race, religion, ancestry, birth and prolonged domicile'.⁸⁵ Though right to return is limited to nationals, the *travaux préparatoires* appear to confirm that this distinction does not extend to aliens or stateless persons who have a strong attachment to a State that they view as their 'own country'.⁸⁶ It can be argued that article 12(4) ICCPR66 is applicable to refugees, since they would want to return as soon as conditions in the country of origin improved. This article also seeks to prevent individuals being denied their right to return to their country of origin.

The term 'own country' thus implies a bond between the claimant and the State, and is premised on the right to a nationality. As argued earlier, nationality does not rest exclusively within the reserved domain of domestic jurisdiction of States, but is based on the social fact of attachment. Since customary international law imposes certain duties on States, these principles have consequences for refugees. While '[t]he State of origin may choose to ignore the link of nationality and to "write off" those who have fled . . . this potentially involves a breach of obligation to the State of refuge, and . . . to the international community'.⁸⁷

4.2 Genuine effective link and admission

Although nationals of Pakistan, the Biharis are subject to the lack of the usual attributes of nationality, including effective protection. The absence

⁸³ *Nottebohm* case, ICJ Reports (1955).

⁸⁴ See Vasak, K. & Liskofsky, S., eds., *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19-21 June 1972*, American Jewish Committee, New York (1976).

⁸⁵ Muzzavi, *Comment on the Middle East*, in Vasak & Liskofsky, *The Right to Leave and to Return*, above n.84, 343.

⁸⁶ See Bossuyt, above n.75, 261; Nowak, *UN Covenant*, above n.72, 219.

⁸⁷ Goodwin-Gill, G. S., 'Voluntary Repatriation — Legal and Policy Issues', in Loescher, G. and Monahan, L., *Refugees and International Relations*, OUP, Oxford (1989) 261.

of effective protection requires assessment of the genuine effective link.⁸⁸ The crucial question of link may determine effective nationality, and in that the Biharis have demonstrated the fact of attachment, complete with interests and sentiments. Pakistan, in fulfilling its responsibilities as a nation-State ought to recognize the norms of international law set out in the *Nottebohm* case by granting effective nationality and rights to the Biharis refugees.

Bihari refugees renounced their homes in 1947, in order to make East Pakistan their country of nationality and residence. Bangladesh was not the country to which they had freely migrated or chosen. Before the birth of Bangladesh, they stood for the integrity of Pakistan, were Pakistani nationals, and until today have not renounced their Pakistani nationality.⁸⁹ Immediately following Pakistan's defeat in 1971, with the threat of a Bengali backlash, the Biharis asked the Indian Army for asylum. This request was rejected by the Government of India.⁹⁰ Repatriation negotiations began with the ICRC census of Biharis in refugee camps.⁹¹ At the same time, Bangladesh Prime Minister Mujibur Rahman was interested in exchanging the Bengalis in Pakistan for the Biharis in Bangladesh. He solicited the services of the UN to arrange for the repatriation.⁹² However, the Pakistani repatriation formula was highly politicized and intended to leave out the bulk of the Biharis refugees.

Whereas Bangladesh was prepared to receive all the 128,000 Bengalis registered for repatriation, Pakistan agreed to the return of only 58,000 military personnel, former civil servants and members of divided families and 25,000 hardship cases, totalling 83,000. By the conclusion of the UNHCR repatriation operation in June 1974, 108,750 Biharis had returned to their country of former habitual residence,⁹³ although the ICRC registered 539,639.⁹⁴ However, a revised account stated that 534,792 had applied for repatriation and 118,866 came within the

⁸⁸ In the *Nottebohm* case, the Court expressed its view that, on the basis of the practice of States, judicial decisions and the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with reciprocal rights and duties.

⁸⁹ In their opinion, the Biharis refugees' right of self-determination is evidenced in the fact that the basic principle of their being Pakistanis is not negotiable. This was reiterated in interviews conducted in 1996-97. The non-negotiability of their nationality is evidenced in their continuous state of refugeehood.

⁹⁰ Sunanda Datta-Ray stated that hundreds of Biharis had fled to Nepal, where they were visited by Tom Jamieson, the representative of UNHCR in India. See *The Observer*, 12 Mar. 1972.

⁹¹ Minority Rights Group, *The Biharis in Bangladesh*, Report 11, 4th ed., (Jan. 1982), 16.

⁹² *The Observer*, 12 Mar. 1972.

⁹³ Compiled from reliable press reports, Table 5 lists 160,000 Biharis refugees repatriated in 1973-74. However, the figure of 108,750 was mentioned in the MRG report. See Minority Rights Group, above n.91, 16-17.

⁹⁴ Proceeding Report, *International Conference to Consider the Plight of the Non-Bengalis in Bangladesh Who Opt to go to Pakistan*, International Council of Voluntary Agencies, Geneva (13-14 December 1982), 3-4.

designated categories. Having included the 41,860 returnees from other countries, a total of 163,072 Biharis returned,⁹⁵ although the majority, 371,720, still remained in the camps.

The first phase of repatriation was suspended in June 1974, with the exhaustion of funds at the disposal of the UNHCR. At this point, some 112,000 were repatriated, and in early 1976, Bangladesh requested that the repatriation process be resumed. In response to individual appeals by the two governments, Saudi Arabia offered a C-130 transport plane, and Qatar and Kuwait contributed \$500,000 and \$50,000 respectively. The UNHCR chartered nineteen flights and in August 1977, Pakistan agreed to take 25,000 refugees in the hardship category; however, these were the remaining refugees from 1974, and did not include any new hardship cases.⁹⁶

Only 9,872 were repatriated before funds ran out again in 1979. Since then, Bangladesh has raised the matter with Pakistan,⁹⁷ and as a result, and through a UNHCR initiative, 7,000 persons were cleared for repatriation.⁹⁸ However, by April 1982, Pakistan had only cleared a total of 4,800, comprising 750 families.⁹⁹ The cost of the repatriation was estimated at \$2 million, of which UNHCR contributed \$400,000 from funds collected in the past.¹⁰⁰

Although Pakistan's President Zia-ul Haq thought his country had fulfilled its obligations under the Tripartite Agreement of 1974, he appears genuinely to have desired a solution to the humanitarian problem of people who had suffered for no other reason than their loyalty to Pakistan.¹⁰¹ In fact, at no stage in senior government discussions was it claimed that Pakistan had fulfilled her obligations under the 1973 and 1974 agreements.¹⁰² As President Zia stated, the Government of Pakistan would accept Bihari refugees if sufficient financial resources were raised for their transfer and rehabilitation.¹⁰³

The high point of the proposed repatriation was the trust agreement, signed in August 1985, between Pakistan and *Rabita Al-Alam Al-Islami*,¹⁰⁴

⁹⁵ Minority Rights Group, above n.91, 30.

⁹⁶ Proceeding Report, *International Conference*, above n.94, Annexure IV.

⁹⁷ The issue was raised during the visit of Mr Riaz Piracha, Foreign Secretary of Pakistan, to Dhaka in 1980.

⁹⁸ By October 1981, Bangladesh had cleared 7,800 names (1,143 families) that had been incorporated in the 'Green Book', that is, the list cleared in 1974.

⁹⁹ The remaining were not cleared on grounds of impersonation and lack of supporting documents. See Proceeding Report, *International Conference*, above n.94, Annexure IV.

¹⁰⁰ Ibid.

¹⁰¹ Ennals, David, Proceeding Report, *International Conference*, above n.94, 2-4; Correspondence of Ennals to Niaz Niak, Foreign Secretary, Government of Pakistan, 11 Apr. 1983.

¹⁰² Ennals and Husain, *Stranded Pakistanis Resettlement Project*, Mission Report (15 Nov.-14 Dec. 1983), 5.

¹⁰³ Ibid.

¹⁰⁴ A charitable organization, translated as World Muslim Congress. Henceforth referred to as *Rabita*.

wherein Pakistan agreed to resettle the Bihari refugees on humanitarian grounds by providing land, water, sewage, power supply and sewage connections, provided that the entire cost of transport, construction of houses and resettlement, estimated at \$300 million, was borne by overseas funds.¹⁰⁵ A willingness to accept and resettle 250,000 refugees, enabling the closure of camps in Bangladesh, is an illustration of Pakistani practice to include all the refugees within the said categories as per the 1974 Agreement. The 'total commitment' for return of her nationals was cemented in a letter from President Zia¹⁰⁶ and the Government of Pakistan GOP.¹⁰⁷ Further, a Pakistani request for this proposed repatriation received a supportive response from the UNHCR.¹⁰⁸

The resettlement plans included the construction of 36,000 houses spread over 80 sites costing about \$278 million,¹⁰⁹ with approximately \$30 million for community services and \$10 million for transportation.¹¹⁰ While the Trust members were waiting for responses from Pakistan, the latter was waiting for a costed-timed project from the *Rabita*. Though \$250 million was available, the view was that Pakistan should share the remaining cost.¹¹¹ At this stage, UNHCR was unable to contribute financially to the process.¹¹²

Lending national significance to the issue, a private member's resolution adopted by Senate¹¹³ recommended to the GOP that the refugees be repatriated at an early date. As the blueprint for the repatriation was being drawn up, it was emphasized that the refugees would not be repatriated camp-to-camp, but rehabilitated. In this regard, the location for resettlement would be determined by the GOP.¹¹⁴

Despite all the provisions made for an orderly departure programme and the availability of funds, the GOP did not respond. This lack of

¹⁰⁵ See Trust Deed, Section B.

¹⁰⁶ See Ennals, David, Speech, 6th Annual Conference of SPGRC, Dhaka, 21 Apr. 1985. Further, President Zia set up a joint committee of four representatives of GOP and four appointed by *Rabita* to oversee the repatriation plans. See *Arabia* (Aug. 1985) 26.

¹⁰⁷ Pakistan Finance Minister, Mahbubul Haq stated to the Pakistan National Assembly in June 1985 that '... Pakistan was ready to receive the additional Biharis'. See *Arabia* (Aug. 1985) 24. It was reiterated by the Foreign Affairs Minister, Zian Noorani as well. *The Pakistan Times*, 9 Feb. 1986.

¹⁰⁸ *Ibid.*

¹⁰⁹ Correspondence of Georg Popper and NA Farooki (Austrian Building Consultants) to Prime Minister of Pakistan, NAF/kud 2114/85, 22 May 1985.

¹¹⁰ Correspondence of David Ennals to Mohammed Khan Junejo, Prime Minister of Pakistan, 26 Jul. 1985.

¹¹¹ Ennals, 'Reports of Meetings', Jeddah, 28-29 Jun. 1985. However, figures of \$200 million (*Dawn*, 3 Jan. 1986) and \$278 million (*The Bangladesh Times*, 29 Dec. 1985 and *Daily Jung*, 23 Jan. 1986) were reported to have been made available from generous donors or pledged by bank guarantees. Also see *Impact International*, 14-27 Aug. 1987.

¹¹² Poul Hartling, High Commissioner, UNHCR had stated that the demands on their services was enormous, and since he was not getting adequate funds for urgent work, he could not contemplate taking any new projects. *Ibid.*, 6.

¹¹³ Upper House, Parliament of Pakistan.

¹¹⁴ *Daily Jung*, 23 Jan. 1986.

response inevitably 'cast doubts on the sincerity of statements by (both) President Zia' and the GOP.¹¹⁵ While *Rabita* wanted some positive indication from the Pakistan PM's office, Pakistan wanted the Trust to enter into an agreement with *Rabita* in order that negotiations with the GOP could continue with *Rabita*.¹¹⁶ It began to emerge that '*Rabita* [would] not be able to fulfil the commitment entered into with the President in March 1984, unless the funds raised through the International Resettlement Trust [were] made available and the Trust itself, [would be] unable to fulfil (its) commitment except with the co-operation of *Rabita* in the light of the *attitude* of the Government of Pakistan'.¹¹⁷

This non-policy response of the GOP needs to be politically assessed. There was no evidence that the government seriously considered the resolutions passed by the Senate, nor did it inform the latter of the reasons for the non-implementation of its resolutions.¹¹⁸ The details of the movement from Pakistani authorities remained unclear,¹¹⁹ but soon enough the GOP decided to deal with this matter *solely* through the *Rabita*. The lack of interest in the GOP was further illustrated by the fact that all international agencies willing to assist in the resettlement scheme were advised to establish contact directly with the *Rabita*,¹²⁰ and at a time when UNHCR was providing both financial and logistical support to 3 million Afghan refugees in Pakistan. The re-routing of all involvement with the international agencies for the repatriation clearly indicated the indifference of the GOP.

While the GOP always insisted on overseas funds for the repatriation process,¹²¹ in the absence of *Rabita* funds, the International Resettlement Trust had \$278 million made available over a three-year period. These funds were made known to *Rabita* and the GOP several times in 1985, but for reasons never explained, neither body was prepared to enter into negotiations and this large sum of money, enough to build the required 36,000 dwellings, was ignored.¹²²

¹¹⁵ Correspondence of Ennals to Nasim Khan, 17 Apr. 1986.

¹¹⁶ Minutes, Meeting of David Ennals with Ambassador of Pakistan in London, 1 May 1986.

¹¹⁷ Correspondence of David Ennals with Abdullah Omar Naseef (Secretary-General, *Rabita*), 18 Jun. 1986; emphasis supplied.

¹¹⁸ Although Agriculture Minister Sartaj Aziz assured the Senate for the rehabilitation of the Bihari refugees, GOP policy remained unclear even to Pakistani Parliament. *Dawn*, 14 Jul. 1988.

¹¹⁹ See Ennals, 'Statement', SPGRC, Dhaka, 27 Jul. 1986.

¹²⁰ A statement, 'Transfer of Non-Bengalis', was read by the Pakistani Ambassador in London to David Ennals, which was a reply to Ennals' letter of 27 Apr. 1987 to Prime Minister Mohammad Khan Junejo, 31 Jul. 1987.

¹²¹ This was reiterated by the Prime Minister Muhammad Khan Junejo who stated '... the only problem, which I feel, is to collect the funds and tell us (GOP) the funds are here. We would like to have small colonies ... hospitals, community centres, mosques ... be developed'. Interview of PM Junejo by Syed Hasan Mutahar, Editor, *The Muslim World League Journal*, reproduced in Conference Proceedings, International Council for Repatriation of Pakistanis from Bangladesh, New York, 2-3 April 1988; emphasis added.

¹²² See Statement by Lord Ennals, House of Lords, London, Sept. 1987.

However, some members of the GOP have accepted the right of return of Bihari refugees.¹²³ Other political members argued that having the Government of Bangladesh (GOB) ask the GOP to repatriate her nationals¹²⁴ is 'most humiliating, [and] . . . considering we have played host to 3 million Afghan refugees, why is the Government dragging its feet and not committing itself to bringing these Pakistanis back to their country? There is no excuse for this inordinate delay as even funds are available to the tune of \$270 million . . .'¹²⁵ Pakistan, having acknowledged its moral and legal responsibilities for the Biharis repatriation, has refused to do anything about it.¹²⁶

In defence of the Biharis' right of return, while the Pakistan Law Minister is reported to have stated, 'It is their legal right that Biharis be brought to Pakistan. To deny them would amount to negation of the ideology on which Pakistan was formed',¹²⁷ former Pakistan Prime Minister Benazir Bhutto has traditionally opposed the return of Biharis,¹²⁸ stating that 'the issue of stranded Biharis is a complicated one'.¹²⁹ It is believed that she suggested to GOB that the Bihari refugees be permanently resettled in Bangladesh, describing the Bihari issue as 'politically potent'.¹³⁰ Observers believe that she feared the Biharis, if repatriated, would end up in Karachi and other areas,¹³¹ exacerbating the ongoing conflict with the Sindhi community.¹³² However, the Bihari refugees themselves never

¹²³ Foreign Affairs Minister Zia Noorani stated, 'Stranded Pakistanis in Bangladesh are true Pakistanis and they have every right to come to Pakistan'. *The Pakistan Times*, 25 Apr. 1988.

¹²⁴ See *Dawn*, 25 Mar. 1988. Further, Senator Mahzar Ali had stated, '... the repatriation of these people (Biharis) is the duty of the government and people of Pakistan and this should have been settled a long time ago'. *Times of India*, 22 Aug. 1989.

¹²⁵ Zia Ispahani is quoted in *Star*, 28 Mar. 1988.

¹²⁶ Syed Akbar in *The Muslim*, 25 Apr. 1988.

¹²⁷ Statement of Mian Mahmood Ali Qusuri, March 1982. See Proceeding Report, *International Conference*, above n.94, Annexure VII.

¹²⁸ Seemingly, she was following the party politics (PPP) and state policy of her father, Zulfikar Bhutto. The latter had introduced the restrictive entry regulations for Bihari refugees in the early seventies. The 'present government' of Benazir Bhutto 'was absolutely ignorant about their (Biharis) coming to Pakistan'. *The Pakistan Times*, 5 Feb. 1989.

¹²⁹ The semantics are interesting; Bhutto refers to Bihari refugees as 'stranded Biharis', and not 'stranded Pakistanis', thereby completely eliminating the refugees' link of nationality. See *Far Eastern Economic Review*, 19 Oct. 1989.

¹³⁰ *Ibid.*

¹³¹ However, it has been argued, that the earlier Bihari refugees settled in Punjab had not migrated to the Sindh provinces. See *The News*, 7 Oct. 1991.

¹³² The history of non-assimilation of the *Muhajirs* and Sindhis have resulted in sectarian violence between the two communities since 1947. Sindhi political parties have always protested against the repatriation. *The Times of Karachi*, 11 Oct. 1992. In fact, certain Sindhi leaders have termed their community as 'true Pakistanis'. *Dawn*, 6 Dec. 1990. Viewed against this political background, Bhutto admitted in a press conference in Kuala Lumpur that it was difficult for Pakistan to take Biharis back, pointing to the ethnic opposition of the Sindhi community. See *Weekly Holiday*, May 1990. However, her party colleague Malik Qasim (PPP) attacked her policy, stating that if Biharis were allowed to live in Punjab, it would not hurt the PPP policy in using the Sindh card, 'because it suits the PPP to go on pleasing the extremist [g]roups in Sindh'. *The Star*, 29 Dec. 1990.

wished to settle in Sindh.¹³³ Playing her Sindh card, Bhutto indefinitely put off the repatriation,¹³⁴ thereby lending support to Sindhi factions.¹³⁵ On humanitarian and moral grounds, Bhutto had stated that if she held the PM's office, the grant of the right to be citizens of Pakistan to Bihari refugees would be among her first acts. Upon achieving office, she did not grant citizenship rights either to the refugees in Bangladesh or to the 100,000 Biharis who have returned to Pakistan illegally since 1977.¹³⁶ Her government tolerated the presence of the Biharis but did not grant them citizenship, thereby protracting their status as stateless refugees.

However, Bhutto's political opponent, Nawaz Sharif, traditionally supported a policy to accept the Bihari refugees,¹³⁷ and this issue was on his election manifesto.¹³⁸ He allayed the fears of the Sindhi community by a categorical assurance that the Bihari refugees would be rehabilitated and officially domiciled in Punjab with the issue of identity cards.¹³⁹ As an interim measure, a consignment of 111,000 stitched clothes were sent to Bangladesh.¹⁴⁰

On assuming office as Prime Minister, Sharif held talks with Ershad on the issue of repatriation.¹⁴¹ He maintained that work had begun and 'results would come out soon'.¹⁴² The GOP reconstituted the board members of the Trust, with Sharif as chairman,¹⁴³ and Punjab was ready to accommodate all the Bihari refugees,¹⁴⁴ with adequate employment opportunities.¹⁴⁵ Wyne undertook a pilot project and had 3,000 houses

¹³³ *The News*, 23 Aug. 1991.

¹³⁴ *Dawn*, 24 Dec. 1990.

¹³⁵ *The Nation*, 4 Jan. 1991.

¹³⁶ Mirza, Loraine in *Muslim*, 27 Apr. 1990. In fact, the co-ordinator of PPP Policy Planning Group, Syed Tariq Sohail stated that the repatriation was 'undeniable moral obligation', and present Bhutto policy 'is a deviation from the 1988 manifesto, which says in para 40.2 "All Pakistanis living abroad by choice or compulsion will be allowed or helped to come back to the country".' *Daily News*, 29 Dec. 1990; emphasis provided.

¹³⁷ Nawaz Sharif was earlier the Chief Minister of Punjab and was Prime Minister until his overthrow in a military coup in 1999.

¹³⁸ The parties of Sharif (IJI) and Altaf Hussain (MQM) had agreed upon a political alliance in Sept. 1989 by which it stated that as soon as IJI came to power, passports would be issued to all stranded Pakistanis (ie Biharis) and their repatriation would be finalized at the earliest. *Dawn*, 17 Dec. 1990.

¹³⁹ *Daily News*, 16 Dec. 1990.

¹⁴⁰ In 1989, when Sharif was Punjab Chief Minister. *The Star*, 1 Jan. 1991.

¹⁴¹ *Dawn*, 26 Nov. 1990.

¹⁴² *Daily News*, 12 Dec. 1990.

¹⁴³ *The Muslim World*, vol. 29 no. 8, 24 Aug. 1991. The Trustees which could not meet during the regime of Bhutto (*Dawn*, 23 Aug. 1991), was reconstituted with three committees, (a) Committee for Preparation of Rehabilitation Plan, (b) Planning and Logistics Committee and (c) Fund Raising Committee. See correspondence of Khurshid Anwar (Pakistan High Commission, London) to David Ennals, No. Pol. 2(4)/80, 29 Apr. 1992. Sharif directed the Cabinet Division and Minister of State and Frontier Region to co-ordinate the early repatriation of Bihari refugees. *Dawn*, 22 Mar. 1992.

¹⁴⁴ Punjab Chief Minister, Ghulam Haider Wyne, was quoted to be 'fully prepared to welcome them'. *Daily News*, 12 May 1991.

¹⁴⁵ *The Star*, 25 May 1991.

built to accommodate the first batch, and the Islamic Development Bank promised to extend assistance for the health and educational needs of the returning refugees.¹⁴⁶ In this endeavour, the Pakistan High Commission completed the registration of more than 200,000 refugees and provided them with identity cards.¹⁴⁷ The Punjab government allocated 1,035 acres of land over 32 districts, for the construction of 45,000 houses,¹⁴⁸ and in order to block their movement into Sindh, the refugees were to be allotted non-transferable houses.¹⁴⁹ In addition to provincial initiatives, the GOP had decided to match all external contributions, and the Government of Saudi Arabia had agreed to provide air transport to all the refugees.¹⁵⁰

As a first step, 20,000 refugees comprising 3,000 families were to return.¹⁵¹ The GOP indicated that some logistical and practical problems had delayed the repatriation,¹⁵² but the arrival of 325 Bihari refugees began the repatriation process. After the first batch, however, the process halted. Efforts to expedite the repatriation were undertaken with reported measures of the proposed completion of the housing units at Mian Channu by July 1993.¹⁵³ But by April 1993, Sharif was removed from power and Bhutto was reinstated as Prime Minister.¹⁵⁴ Although her government decided to honour the previous government's commitment to repatriate,¹⁵⁵ the repatriation process suffered a complete setback.¹⁵⁶

The interests of political parties and negative press gained from inter-ethnic riots in Pakistan have effectively blocked the repatriation process in over two and a half decades. With every political upsurge and turmoil, there has been a perceptible change in State policy, leaving the Bihari refugees in an orbit of statelessness and uncertainty. When Sharif returned to power, he once again offered to settle the Biharis in Punjab,¹⁵⁷ he held talks with Bangladesh Prime Minister Hasina on the question of return,¹⁵⁸ but no GOP policy paper ever emerged.

¹⁴⁶ *Business Recorder*, 31 Dec. 1992.

¹⁴⁷ Though different from the those issued in Pakistan. *The News International*, 3 Jan. 1993.

¹⁴⁸ *The Leader*, 3 Jan. 1993.

¹⁴⁹ *The News International*, 3 Jan. 1993.

¹⁵⁰ Correspondence of Ennals to Sardaz Aziz, Finance Minister of Pakistan, 6 Jul. 1992.

¹⁵¹ *The News*, 8 Sept. 1992.

¹⁵² *The Morning Sun*, 31 Dec. 1992.

¹⁵³ Correspondence of Khalid Saleem (Additional Foreign Secretary, Pakistan) to Ennals, No.1271-AS(AP)/93, 20 Apr. 1993.

¹⁵⁴ *The Morning Sun*, 21 Apr. 1993.

¹⁵⁵ The Foreign Minister of Pakistan had conveyed to his Bangladeshi counterpart at the SAARC Council Meeting on 5 Dec. 1993. See Ennals, 'Report', 23 Mar. 1994.

¹⁵⁶ *Daily Star*, 9 May 1993. The 'go-slow' attitude of GOP has since led it to refrain from defining a timetable for repatriation. *Dawn*, 20 Dec. 1994.

¹⁵⁷ *Dawn*, 1 Jan. 1991.

¹⁵⁸ *The Asian Age*, 17 Jan. 1998.

Table 4:
Estimated Figures of Repatriation, 1972–1999

<i>Year</i>	<i>Number of Biharis Repatriated</i>
1973–74	163,072
1979	9,872
1982	4,800
10 January 1993	325
Total	178,069

Sources: *The News*, 8 September 1992; *The Guardian*, 11 January 1993; MRG, op.cit., 30; Proceeding Report, *International Conference*, op.cit., Annexure IV

The repatriation figures over the last 28 years well illustrate the law of diminishing returns.¹⁵⁹ So far, an estimated 178,069 Bihari refugees have returned to their country of former habitual residence. The majority of Bihari refugees¹⁶⁰ are still waiting to return, but Pakistan has yet to assure the Bihari refugees and the international community of its plans for the resolution of this protracted crisis. In 1996, the Foreign Secretary was reported to have stated, '[b]oth Bangladesh and Pakistan have recognized this repatriation as a *humanitarian* issue and agreed to solve it expeditiously ... I don't want to set a time limit'.¹⁶¹ Yet by evading its obligations, Pakistan is violating international law, the norms of human dignity and acceptable international behaviour, despite its membership of the Executive Committee of the UNHCR.

The Government of Pakistan has granted 1.5 million Afghan refugees freedom of movement and enterprise. It claims the presence of the Afghan refugees has adversely affected its economy, because of limited resources in the social sector. 'It (has been) indeed a complex situation but Pakistan has been meeting its humanitarian obligations forced on her by circumstances not of its own creation'.¹⁶² However, where the Bihari refugees are concerned, the present *impasse* is Pakistan's 'own creation'. Its practice has contravened principles it has acknowledged

¹⁵⁹ This terminology is borrowed from international finance law, where returns on investments portray a continuously diminishing trend.

¹⁶⁰ See Table 6.

¹⁶¹ Najmuddin Sheikh, Foreign Secretary, GOP, emphasis supplied. See 'Refugees to Return', *The Asian Age*, London, 19 Aug. 1996.

¹⁶² This can be interpreted as an official Government of Pakistan statement, since D. J. Khan was Secretary, States and Frontier Regions Division, Islamic Republic of Pakistan. See Khan, Dil Jan, 'The Magnitude and Complexity of Contemporary Refugee Problems in Asian-African Region: Humanitarian and Legal Responses', in AALCC-UNHCR Workshop, *International Refugee and Humanitarian Law*, 24–26 Oct. 1991, New Delhi (1991) 70.

as applicable to the international community, and which have been specifically addressed within the Asian and African contexts; these include, *inter alia*, '(a) refugee shall have the right to return if he so chooses to the State of which he is a national or to the country of his nationality and in this event it shall be the duty of such State or Country to receive him'.¹⁶³ There are already precedents in Pakistani practice for the return of nationals,¹⁶⁴ so that allowing the Bihari refugees to return would only reaffirm its practice, and produce neither a precedent or a burden of any sort.¹⁶⁵

The 1972 Pakistani government of President Bhutto expressed concern at the plight of the Biharis.¹⁶⁶ However, the acceptance of a return procedure has demonstrated the systematic violation of the right to return of the Bihari refugees.¹⁶⁷ In effect, the repatriation process has been manipulated to interfere with the international legal right of Bihari refugees to return to Pakistan.¹⁶⁸

4.3 Integration in the country of asylum

To argue that Bangladesh is responsible under the 1951 Convention/1967 Protocol relating to the Status of Refugees does not stand. Although the Convention '... contains a laundry list of particular rights to which refugees are entitled',¹⁶⁹ as a matter of law it does

¹⁶³ Art IV, 'Principles Concerning Treatment of Refugees', Asian-African Legal Consultative Committee, 1966: UNHCR, *Collection of International Instruments Concerning Refugees*, 2nd ed., Geneva, 1990, 201.

¹⁶⁴ Pakistan had sent a high powered delegation to resolve the issue of Pakistanis stranded in Libya. Further, GOP had evacuated 42,000 Pakistanis during the Gulf War by chartering 42 planes and 2 ships. A similar British practice is evidenced in the case of Ugandan Asians, to whom the British government granted admission because of their British nationality.

¹⁶⁵ The Chairman of National Advisory Council of Pakistan, Khaja Muhammad Safdar stated, 'It is a heinous crime to oppose the repatriation of Biharis to Pakistan. 250,000 cannot be a burden on 90 million people of Pakistan'. See Proceeding Report, *International Conference*, above n.94, Annexure V. Further, and as an example, repatriated refugees have successfully transformed barren land to form the Orangi Township in Karachi, entirely on self help, and not even resorting to aid from the Karachi Development Authority. See *The News*, 7 Oct. 1991.

¹⁶⁶ *The Economist*, 13 May 1972.

¹⁶⁷ Official statements like '[i]t is, however, not justified to expect Pakistan to continue to receive refugees' are indicative of a practice of the denial of nationality to her citizens. See Acting Permanent Representative, Pakistan Permanent Mission, Geneva, Tariq Altaf's letter to Executive Director of ICVA, Anthony Kozlowski, No.H(26)/82, 9 Dec. 1982 in Proceeding Report, *International Conference*, above n.94, Annexure V.

¹⁶⁸ Bihari refugees claim that because of the actions of the Pakistan Army in 1971, they were persecuted and are being continuously victimized. They wonder as to why they '... cease to be citizens of Pakistan. What happened to our right to repatriation? What happened to our right to return to our homeland?' The obvious confusion in mixing issues of the legal right of Bihari refugees to return and the repatriation process is amply evident in Pakistani practice in the last 28 years. Author interviews, 1996-1997.

¹⁶⁹ Lillich, Richard, *The Human Rights of Aliens in Contemporary International Law*, Manchester University Press, Manchester (1984) 65.

not require the State hosting the refugees to integrate them completely into the social, political, economic and legislative fabric. Bihari refugees feel that they are the forgotten factor from the events of 1971.¹⁷⁰ Although some have been assimilated, this has been primarily due to personal resolution, and not as a result of initiatives on the part of the GOB over the last 28 years.

Although the citizenship order provided for integration,¹⁷¹ continued persecution rendered it impossible.¹⁷² A more recent 'cessation' clause was included whereby, 'a person shall not qualify to be a citizen of Bangladesh if he owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign State'.¹⁷³ Since Bihari refugees have retained their Pakistani nationality, they are thus 'foreigners' in Bangladesh. Moreover, the Bangladeshi political elite believe that in the context of 'psychopolitical settlement', total repatriation to Pakistan is the solution to the problem.¹⁷⁴ The GOB hopes for the successful repatriation of the camp inmates,¹⁷⁵ and instances of the grant of citizenship by the courts are not conclusive evidence of the recognition of human rights,¹⁷⁶ but based on previous domicile.¹⁷⁷

Over the years, the physical security of Biharis has improved although their situation is still serious.¹⁷⁸ Generations live together without proper nutrition, education or training. Since medical facilities are poor, there is a high incidence of disease and illness. Housing comprises rows of dingy and dark huts wrapped in bedsheets, blankets and hessian cloth, measuring 8 feet by 6 feet. Each dwelling accommodates an entire extended family. Social lives are completely

¹⁷⁰ Resolution, SPGRC, 2 October 1990.

¹⁷¹ See art.2, Bangladesh Citizenship (Temporary Provisions) Order, 1972.

¹⁷² See sections 2.1.1 and 2.1.3.

¹⁷³ Art. 2B, Bangladesh Citizenship (Temporary Provisions) Amendment Ordinance 1978 (Ordinance No. VII of 1978).

¹⁷⁴ Bangladeshis consider the Biharis to '... remain among the people as some aggrieved social parasites (sic) vulnerable to any subversive activities against the solidarity, integrity, social, cultural and economic well-being of the nation'. See Khurshida Begum, *Weekly Holiday*, May 1990.

¹⁷⁵ The temporary haven and the future repatriation of Bihari refugees are initiatives emphasized by GOB. Interview with Farooq Sobhan, Foreign Secretary, GOB, Jan. 1996. More recently, see Bangladesh PM Hasina's comments in *The Asian Age*, 17 Jan. 1998.

¹⁷⁶ Judges have reinforced orthodox views, where 'nationality can neither be acquired nor retained except with will of the State'. See *Superintendent and Rememberer of Legal Affairs, Government of East Pakistan v. Amalendu Paul*, PLD 1960 Dacca 329.

¹⁷⁷ Judges came to the finding that 'respondent was domiciled in Bangladesh since 1951 and that he did nothing except filing an application for option to Pakistan but never left Bangladesh ... The Respondent is a citizen of Bangladesh', Appellate Division, unreported judgment by the Chief Justice of Bangladesh. See Malik, Shahdeen, *Overview*, in UNHCR, *Regional Consultation on Refugee and Migratory Movements in South Asia*, New Delhi, 14–15 Nov. 1996, 33; emphasis added.

¹⁷⁸ Comments of Mr Finucane (Concern). See Proceeding Report, *International Conference*, above n.94, 2.

ruined where couples, their parents and children, are huddled together. Toilets and baths are scarce and are located at the perimeters of the camps, and water sources sport long queues. The refugees complain of persistent mismanagement regarding the control and distribution of wheat, corrupt officials who, despite cases against them in the courts, are allowed to function as usual; the lack of hygienic conditions and the general inability of the Ministry of Relief and Rehabilitation to repair damaged camp dwellings.¹⁷⁹

Though Bangladesh is yet to ratify the 1951 Convention, it allows most Bihari refugees to earn their living as rickshaw drivers, street cleaners, porters and petty shopkeepers.¹⁸⁰ Since Bangladesh does not consider them citizens, all avenues in official and semi-official institutions, including schools are closed to them. There is no chance of getting back their shops, houses, factories and other properties taken over by the Bangladeshis. The Bangladesh government made some efforts at restitution, but quickly refrained once the political implications were clear.¹⁸¹

The GOB's attitude has been one of toleration, though governmental efforts on behalf of the Biharis have been minimal. It claims to spend \$4 million annually in providing assistance¹⁸² and food rations,¹⁸³ even though children born since the enumeration in 1974 do not receive any support because they are not listed.¹⁸⁴ Attacks on camps¹⁸⁵ and threats of evictions¹⁸⁶ persist, and the general population still views the refugees with suspicion.¹⁸⁷

¹⁷⁹ Minutes, Extra-Ordinary Meeting, SPGRC, Saidpur, 31 Jan. 1986, and reiterated by interviews/observations during 1996-98.

¹⁸⁰ On conducting interviews in the refugee camps, I was told that several Biharis had graduate or post-graduate qualifications. They had worked in banks, government or private sector companies. But due to the present situation, they were forced to work in jobs much below their social standing. In this regard, Bangladesh has made little effort in implementing provisions of art.19, i.e. the Liberal Professions clause. Moreover, most of the refugees are exploited and are paid much less than the acceptable salaries.

¹⁸¹ Author interviews, 1996-98.

¹⁸² Proceeding Report, *International Conference*, above n.94, Annexure IV.

¹⁸³ About 3 kgs. of wheat per person per month. See Imtiazuddin, M. and A. Husain, *An Eye-Witness Report on 'Stranded Pakistanis' in Bangladesh*, Committee for Stranded Pakistanis in Bangladesh, USA, 30 Mar. 1982.

¹⁸⁴ Salauddin, M., *Citizens of Utopia*, Impact International, 25 Jul.-7 Aug. 1980.

¹⁸⁵ *Arabia* (Aug. 1985) 23; Report, SPGRC, 12 Sept. 1993.

¹⁸⁶ See SPGRC/786/Rep/Eviction/CTG/88, 11 May 1988. GOB sent a one-man Enquiry Committee to investigate the police firing and eviction of Bihari refugees from their place of residence. See SPGRC/786/Rep/Meet/88, 29 Jul. 1988; *Minutes of Meeting*, International Alert's Working Party on Biharis, 20 Oct. 1988. However, demolition and eviction has continued. See correspondence of Nasim Khan (SPGRC) to David Ennals, 30 Oct. 1993; SPGRC/Press Conference/94, 11 Aug. 1994.

¹⁸⁷ This has been corroborated by interviews. See Resolution, SPGRC, 2 Oct. 1990.

Table 5:
Situation Report of Bihari Refugees in Bangladesh, 1982

<i>Districts of Bangladesh</i>	<i>Number of Camps</i>	<i>Number of Biharis</i>
Dhaka including Narayanganj	29	95,095
Chittagong	7	29,958
Khulna	6	36,462
Rangpur	18	19,128
Rajshahi	10	4,520
Bogra	4	3,412
Jessore	4	2,985
Pabna	1	16,208
Mymensingh	1	3,757
Jamalpur	1	455
Total	81	211,980

Source: *Stranded Pakistanis in Bangladesh*, Ministry of Relief and Rehabilitation, Government of Bangladesh (1982)

Although figures for 1972 estimate the number of Bihari refugees in camps at one million,¹⁸⁸ by 1982, the number had dwindled by four-fifths, according to Bangladesh government figures. If these are reliable, then Biharis have left the relative security, but extreme hardship, of essentially unaided camps. Some may have made their way to Pakistan,¹⁸⁹ travelling illegally through India, while a substantial number were likely forced to seek work in different regions of Bangladesh, where unassisted domicile is a difficult but necessary proposition.¹⁹⁰ According to Table 6, over 250,000 Bihari refugees remain in camps.

¹⁸⁸ See Table 3.

¹⁸⁹ Bihari refugee families are said to have paid huge bribes in order to obtain exit permits. See *The Times*, 18 May 1972. As an example, refugees who made their way through India, were detained by GOP at the Khokhrapar border. See *Dawn*, 24 Apr. 1988.

¹⁹⁰ This is further corroborated in the official Bangladesh position where a survey had indicated 413,525 Bihari refugees in Bangladesh, of which 211,000 were in camps, a number close to Table 4 estimation. See A. A. Khan, Proceeding Report, *International Conference*, above n.94, 4; *The Guardian*, 7 Jul. 1987.

Table 6:
Situation Estimates of Bihari Refugees in 1996–97

<i>Names/Locations of Refugee Camps</i>	<i>Number of Families</i>	<i>Number of Refugees</i>
Mohammedpur & Dhaka City	4,863	33,174
Adamjee Nagar	1,071	7,216
Narayanganj	132	895
Mirpur Section X	1,206	8,739
Mirpur Section XI	3,578	24,695
Mirpur Section XII (Moorapara Camp)	550	3,712
Mirpur Section XII (Kurmitola Camp)	506	3,166
Mirpur Section XII (Block C & D)	720	5,126
Mymensingh	318	2,227
Rangpur	936	8,526
Saidpur	912	38,045
Dinajpur	256	1,916
Bogra	503	3,757
Ishurdi	1,157	7,591
Rajshahi	453	3,470
Khalispur	2,406	14,769
Khulna	602	3,966
Jessore	442	3,336
Chittagong (S B Nagar)	1,467	8,904
Chittagong (Hali Shahar)	706	4,494
Chittagong (Firoz Shah Colony)	375	2,395
Chittagong (Raufabad Colony)	380	2,403
Gilatalla	326	1,934
Total	39,779	258,028

Source: *Survey Report of ICRC, SPGRC, Geneva Camp, Mohammedpur, Dhaka*

4.4 Role of the UNHCR

The role of the UNHCR derives from the Statute of the Office and the duties ascribed to the Office of the High Commissioner by the General Assembly.¹⁹¹ Since international protection is premised on durable solutions, the first of which is repatriation,¹⁹² the Biharis' right to return justifies the direct involvement of the UNHCR. Since any further integration of Bihari refugees in Bangladesh is an unacceptable

¹⁹¹ UNGA res. 408(V), 14 Dec. 1950.

¹⁹² UNHCR, *The State of the World's Refugees: 1993*, Penguin Books (1993) 141.

proposition, to both the refugees and their host State, the role of the UNHCR lies in the provision of protection through the facilitation and promotion of repatriation.¹⁹³

UNHCR is also the agency concerned with the reduction and elimination of statelessness, within the context of its protection role.¹⁹⁴ In fact, at the 1961 Conference on the Reduction of Statelessness, UNHCR stated that it had 'always been the endeavour of the Office of the UNHCR to assist refugees in acquiring a nationality, as one of the means of ceasing to be a refugee'.¹⁹⁵ Moreover, while neither the 1951 Convention nor the *travaux préparatoires* say much about the source of persecution feared by the refugee,¹⁹⁶ article 1C(5) and (6) establish an exception which can be interpreted to support the continuation of refugee status. In the sense of these provisions, the right to refugee status for Biharis is supported as a consequence of 'compelling reasons arising out of previous persecution',¹⁹⁷ and thus justifies the continuing application of UNHCR's protection mandate.

The nature and extent of UNHCR's institutional responsibilities are relative to their duty to provide international protection during voluntary return. Any assessment of changed circumstances 'involves subjective elements of appreciation, in a continuum where the fact of repatriation may be the sufficient *and* necessary condition, bringing the situation or status of refugee to an end . . . contributing to . . . stability and to national reconciliation'.¹⁹⁸

UNHCR extended its good offices for the implementation of an agreement in the mid-seventies,¹⁹⁹ and the High Commissioner continued thereafter to be willing to provide assistance at the request of the two governments.²⁰⁰ While UNHCR ought in principle to reclassify Biharis as refugees, rather than as those in a 'refugee-like situation',²⁰¹ the status of Biharis as *de facto* stateless refugees still merits the intervention of UNHCR. The legal position of the Bihari refugees brings them within

¹⁹³ See discussion in Goodwin-Gill, *Refugee*, 273.

¹⁹⁴ UNHCR was requested to continue to act as the art. 11 implementing agency of the 1961 Stateless Convention: UNGA res.31/36, 30 Nov. 1976; Batchelor, Carol, 'Stateless Persons: Some Gaps in International Protection', 7 *IJRL* 241, 252, 256 (1995); Weis, P., UN doc A/CONF.9/SR.23, 11 Oct. 1961.

¹⁹⁵ UN doc. A/AC.96/INF.5, 26 Oct. 1961.

¹⁹⁶ Goodwin-Gill, *Refugee*, 71.

¹⁹⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979, para. 136.

¹⁹⁸ Goodwin-Gill, *Refugee*, 270-1.

¹⁹⁹ J. Cuénod (UNHCR), Proceeding Report, *International Conference*, above n.94, 3.

²⁰⁰ David Ennals, Proceeding Report, *International Conference*, above n.94, 3.

²⁰¹ Cuénod, above n. 201. The traditional 'difficulty' in classification, as stated by Hugh Hudson (UNHCR), can be argued to give way to new interpretations, since the Bihari refugees fall within the contemporary understanding of international protection. See Hudson in 'Report of Meeting', International Alert Committee on Biharis, 2 May 1990.

UNHCR's mandate, and that office needs to impress upon Pakistan the need to realize its responsibility to repatriate them.²⁰²

First, UNHCR needs to conduct a proper census of refugees, to be followed by the issue of Pakistani passports. This would enable the Pakistani authorities to have a precise idea of the resources required for the repatriation and rehabilitation.²⁰³ Although the appeal for funds is crucial, it is possible for UNHCR to raise funds for the repatriation programme, once a request from the GOP is received.²⁰⁴ More recently, UNHCR has accepted the need for a wider and pro-active role, and has acknowledged 'a vacuum in the region regarding the status of resident non-nationals. The tendency is to avoid taking responsibility for persons whose citizenship is unclear. In accordance with its mandate, UNHCR should continue to play a catalytic role in the region to promote measures to reduce statelessness.'²⁰⁵

4.5 Return *ex debito justitiae*

The right to return has an international dimension, where the State's obligation to admit its nationals is the correlative to the other States' right of expulsion. Moreover, as an incident of nationality, the State's obligation for the protection of its nationals abroad is matched by its duty to receive those nationals who are not allowed to remain in other States.²⁰⁶

The right to return of Bihari refugees needs assessment within the 'primary' rule of international law which forbids the abusive exercise of rights of control over the movement of people,²⁰⁷ rights which would be violated if certain limits are exceeded in the course of the exercise, or if they are exercised with the intention of harming others.²⁰⁸ The practice of Pakistan has harmed the Bihari community where the inability of refugees to return home has being accentuated by the arbitrary deprivation

²⁰² In this regard, it had been unnecessary for a non-political body like UNHCR to point out that 'Pakistan had already accepted over 2.5 million Afghan refugees and would find it difficult to provide resettlement assistance to the non-Bengalis (ie Biharis) from Bangladesh'. Statement of Mr Cuénod (UNHCR), Proceeding Report, *International Conference*, above n.94, 5.

²⁰³ The physical resources of the Bihari refugees can be effectively put into use. Although the priority might be the elderly and disabled, it might be useful to move young families first, so that they have established homes for the extended families. Further, services of refugees trained as administrators, teachers, community and building workers could be harnessed in resettlement activities.

²⁰⁴ UNHCR has been the principal focal point for UN operations and the expertise of the Office would be useful.

²⁰⁵ UNHCR, 'Strategy in Asia: Towards the New Millennium', Geneva, March 1999.

²⁰⁶ Goodwin-Gill, G. S., 'The Right to Leave, the Right to Return and the Question of a Right to Remain', in Gowlland-Debbas, V., ed., *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers, The Hague/Boston/London (1996), 100.

²⁰⁷ Ago, Roberto, 'Second Report on State Responsibility': UN doc. A/CN.4/233, in *YBILC II* (1970) 191-3.

²⁰⁸ Goodwin-Gill, above n.207, 99.

of their nationality.²⁰⁹ In this regard, a 'view is widely held . . . that a State may not unilaterally shirk its duty of admission by depriving its national of his nationality . . . [and] . . . this duty remains in force, at least in so far as the individual concerned did not acquire another nationality'.²¹⁰ As Grahl-Madsen declared:

if a person has a nationality at the time when he becomes a refugee, he is to be considered a person having a nationality for the purpose of Article 1A(2). It follows that the country of which he was the national at the relevant date is the 'country of his nationality' in the sense of the said provision, and that it remains as such irrespective of whether he eventually loses his nationality . . . irrespective of any subsequent factual residence.²¹¹

In summary, the right to return is guaranteed without restrictions to all nationals, including *de facto* stateless refugees.²¹² Since most Bihari refugees have not acquired another nationality, it may be concluded that Pakistan is depriving her *de jure* nationals their right to return in international law, a right which is regarded as *ex debito justitiae*.²¹³

²⁰⁹ See Report of the *Ad Hoc* Committee: UN doc. E/1618, 39.

²¹⁰ Van Panhuys, H. F., *The Role of Nationality in International Law* (1959) 57.

²¹¹ Grahl-Madsen, A., *The Status of Refugees in International Law*, vol. I (1966) 162.

²¹² Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel Publisher, Kehl/Strasbourg/Arlington (1993) 221.

²¹³ As a matter of right.