

Reducing Statelessness: A New Call for India

By

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Introduction

“Moder kono basha nai, Moder kono desh nai...
Moder kono disha nai, moder kono dyash nai”¹

- Bengali Folk Song by Abbasuddin

The principal objective behind any research on statelessness in India should be to find out the communities/groups within India who are lacking nationality, rather protection of nationality, and to find out the means and methods to cover them under state protection or international protection. However, there is possibility that, this kind of research may trace communities/groups from both ways that ‘do not have the nationality of any state legally’ or ‘do not count on their state for protection’. It is noteworthy for a country like India that the second category has emerged from neighbouring states in relation to episodes of irregular migration because of sustained or systemic violation of basic human rights towards some communities/groups by their own state/ majority community. The situation actually leaves the victims virtually unprotected by the agencies of the state. This category of persons indicates that effective statelessness may no longer reflect in the relationship between the state and the person concerned. In one side there is hope that the host state will play a compassionate role and in other side there are strict law of the land which is defining the nature of nationality.

Though there are two UN conventions on statelessness, but India is not liable to abide by their terms as India has not acceded/ ratified/ adopted/ signed the conventions. The limitation of these conventions to reduce statelessness for a country like India is a writ of bit large as there is a growing number of people who are stateless *de facto*.² Their human rights are more

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vulnerable as they have left the state to which they have a formal connection and also do not get protection by the host state as doubtful citizens. The relationship between protection of these stateless persons and human rights is one of the primary issues in India. It is necessary to consider for alternative protection for these stateless persons under the two human rights covenants as the hierarchy of non-citizens in a state highlights the gap between protection and human rights. There is expansion of non-derogable rights and the concept of social, economic and cultural rights and the demand to adhere to such rights, started in the twentieth century, along with international affirmation of universality, indivisibility, interdependence and interrelatedness of human rights. All these should come together to consider the identification of specific groups/ communities whose human rights require special protection.

With regard to customary practices of international law, non *refoulement* is the principle with regard to refugees and stateless-refugees which is non-derogable in nature. Apart from that there is a significant body of international law that has elaborated the principle of nondiscrimination as a non-derogable norm that prohibits discrimination on the basis of race, ethnicity and related criteria. India's acceding of ICCPR³, ICESCR⁴, CRC⁵ and ratification of ICERD⁶ and CEDAW⁷ have widened the scope of protection from the idea of compassion to rights. This development of a body of international law which triggered the prohibition of nationality based discrimination has been further encouraged by the advocacy efforts of international organizations, non-governmental actors, and particular states. Also the recent increase in public information and advocacy has served to remind international bodies and non-governmental organizations that the persistence of statelessness is a complex matter that underlines the centrality of effective protection. There is growing pressure from international NGOs, refugee organizations, and human rights monitoring bodies to provide protection to those who do not fall under either the refugee convention or the conventions on statelessness.

There is a specific case pertaining to the *Chakmas* from CHT, East Pakistan (presently Bangladesh) where the Supreme Court had given a verdict in favour of the *Chakmas* with specific direction to process their citizenship application through the process established by law.⁸ It is mentionable here that a new public interest litigation, *Swajan & Anr. Vs. Union of India & Anr.*⁹, is pending before the Supreme Court right now urging for specific direction to confer citizenship/ refugee status to the Bangladeshi minorities staying in the State of Assam and the Court has already issued notice to the respondents Union of India and State of Assam. So it is evident that the expansion of human rights regime of stateless persons of the second category has gathered momentum in India along with the expansion of *locus standi* of foreigners staying in India.¹⁰ Now it's time to see whether Supreme Court comes out with a decision based on human rights consideration or on the ground of internal security and economic constraint of India. Countless number of deemed stateless or deemed nationals are looking forward to get Justice!

Defining Statelessness and the Indian Scenario

Citizenship has become a political weapon and treatment meted out to non-citizens is worsening as states are increasingly bestowing, denying, or retracting citizenship through various acts.¹¹ It is difficult to determine the number of stateless persons in the world as there is lack of systematic methods of collecting data and most importantly the lack of consensus on inclusion-exclusion policy.¹² Here the dilemma begins.

Historically state has the right to determine or define who is a citizen of that state.¹³ A person who is rendered a non-national by the citizenship laws, his status is that of a *de jure* stateless¹⁴ and 'it is a purely legal description; the characteristics and value of a particular person's nationality as it is realized in his particular home state is irrelevant to the definition'¹⁵. The 1954 Convention in Article 1 defines stateless as a person, 'who is not considered as a national by any State under the operation of its law'¹⁶. This *de jure* situation is also recognized by the 1961 Convention on the Reduction of Statelessness.¹⁷ It is believed by many legal scholars that the concept of statelessness should encompass more than *de jure* statelessness. The conventional definition is too narrow and limited as this does not cover those persons who have a nationality technically but not fruitfully or cannot prove their nationality on the basis of evidence.¹⁸ The prior statement should be well understood with the following statement:

The definition of statelessness outlined in the 1954 Convention precludes full realization of an effective nationality because it is a technical, legal definition which can address only technical, legal problems. Quality and attributes of citizenship are not included, even implicitly, in the definition. Human rights principles relating to citizenship are not delineated, despite the inspiration of the Conventions themselves by article 15 of the Universal Declaration of Human Rights. The definition is not one of quality, simply one of fact.¹⁹

The same author further clarifies her opinion as follows:

The definition of a *de jure* stateless person was chosen in order to exclude the question of whether the person has faced persecution, as there are conflicts of legal issues which might result in statelessness without any willful act of neglect, discrimination, or violation on the part of the State. *De facto* statelessness, on the other hand, was presumed to be the result of an act on the part of the individual, such as fleeing from the country of nationality because of persecution by the State. The drafters of the 1954 and 1961 Conventions felt that all those who faced persecution, and who did not have an effective nationality, would be considered refugees and would receive assistance from the international community under the terms of the 1951 [Geneva] Convention relating to the Status of Refugees. Quite intentionally, then, the drafters of the 1954 Convention relating to the Status of Stateless Persons adopted a strictly legal definition of stateless persons.²⁰

From this point it may be argued that persons without effective nationality should be treated as stateless.²¹ These persons may have a legal bond with a country but no longer be able to utilize it or enjoy the benefits for various socio-political reasons or cannot prove it with sufficient evidence.²² In this regard the definition of statelessness should be broadened to include *de*

facto statelessness.²³ Categorically there are three groups who may be considered as *de facto* stateless²⁴:

- i. Persons who do not enjoy the rights attached to their nationality;
- ii. Persons who are unable to establish their nationality, or who are of undetermined nationality;
- iii. Persons who, in the context of State succession, are attributed the nationality of a State other than the State of their habitual residence.

In this context a definition of *de facto* stateless adopted by the Council of Europe's Group of Specialists on Nationality may be considered as timely with regard to the expansion of statelessness regime²⁵:

persons [who] do possess a certain nationality, but where either the state involved refuses to give the rights related to it, or the persons involved cannot be reasonably asked to make use of that nationality, yet it has to be underlined, that it is up to the states to determine what *de facto* statelessness is and thus which persons are to be covered.

The Inter-American Court on Human Rights in the Case of the Yean and Bosico Children v. The Dominican Republic²⁶ held that:

States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of a nationality, when an individual does not qualify to receive this under the State's laws, owing to arbitrary deprivation or the granting of a nationality that, in actual fact, is not effective.

As the primary responsibility of States includes, prevention and reduction of statelessness²⁷, India should attempt to identify effectively stateless persons and find ways to reduce it. In India it is a fact that we will find people without effective nationality due to the effects of partition, decolonization, internal politics. Security issues in India, negative legislative intent, civil war in Sri Lanka and Bhutan, Indo-China relationship, etc. coupled with the lack of measures in Indian citizenship law to deal with this grave situation, worsens the situation. At the same time India is not bound by the terms of any of the Conventions relating to Statelessness as India has not acceded/ ratified/ adopted/ signed those. However, India is a party to various other international instruments which makes India liable to protect the stateless population in India.

The general comment under International Covenant on Civil and Political Rights on the issues of position of aliens upholds that the rights guaranteed under this covenant should guarantee without distinction to aliens and citizens.²⁸ The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant.²⁹ Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy are denied to them or are subject to limitations that cannot always be justified under the Covenant.³⁰

The drafters of the Convention on the Elimination of All Forms of Discrimination Against Women were preoccupied with ensuring that women attain equality with men with regard to their own nationality and that of their children.³¹ It is assumed that if women do not receive equal treatment with men, then that amounts to discrimination and again women may face discrimination for which they may not find adequate redress.³²

The Convention on the Rights of the Child states, that the child shall have the right to acquire a nationality, while State Parties have to implement these rights according to their national law and obligations under relevant international instruments to prevent the child from becoming stateless.³³ This convention further provides that State Parties undertake to respect the right of the child to preserve his or her nationality as recognized by law without 'unlawful interference', and declares that State Parties shall provide assistance and protection to a child 'legally deprived' of, in this case, nationality, for its speedy restoration.³⁴

Parliamentary Discussions and Judicial Pronouncements Related to Citizenship in India

The issue of granting citizenship of India to the various effectively stateless persons has stormed the both houses of the Indian Parliament. On various occasions the Members of the Parliament have asked specific questions about the process of granting Indian citizenship to the *Chakma* and *Hajongs*, Pakistani and Bangladeshi migrants in various Indian states. There has been a continuous discussion starting from 1993 to present day where the Members of the Parliament actually showed interest in reducing statelessness in India. However, there has been no discussion on the definitional aspect, and by and large it is derived from the discussion that the Members of the Parliament are considering any group who are present in India without an effective nationality as stateless as they are continuously insisting the government to grant citizenship, expedite the citizenship granting process, propose a new bill, delegated powers etc. The following paragraphs will be addressing these parliamentary proceedings in a nutshell.

Nyodek Yonggam, MP, had asked the Minister of Home Affairs the process through which citizenship was being granted to *Chakma* refugees settled in various parts of India.³⁵ The Minister of State for Home Affairs replied that *Chakma* refugees who were residing in Arunachal Pradesh and who had arrived in India before 25 March 1971, were under consideration for the granting of citizenship by the Ministry. However, *Chakma* refugees living in other parts of India had not been considered for citizenship granting.

Drupad Borgohain, MP, had asked the Minister of Home Affairs about the latest decision of the Ministry to grant Indian citizenship to *Chakmas* and *Hajongs* who migrated from Bangladesh to Arunachal Pradesh and whether there would be any bill to come before the parliament on this issue.³⁶ The Minister of State for Home Affairs replied that the granting of citizenship was under consideration but there was no such proposal to introduce a bill in the parliament regarding this issue.

Further, A. Vijayaraghavan, MP, had asked the Minister of Home Affairs if the Ministry had received any representation to grant Indian citizenship to Pakistani citizens settled in Malappuram district of Kerala during the time of independence and whether there was any attempt in denying Ration Cards by the District Magistrate in 2003 to family members of these persons who are citizens of India by birth.³⁷ The Minister of State had replied that the Ministry did not receive any such representation. If they would apply for Indian citizenship, proper action would be taken by the Central Government as per the Indian Citizenship Act, 1955 and Citizenship Rules, 1956. However, no such information on denying ration cards was available at that time and the Minister of State assured that the information would be collected and laid down in the table of Rajya Sabha. Mr. Vijayaraghavan, another member of parliament, in 2005 had asked the Minister of Home Affairs, whether the Ministry extended time frame of the delegated powers of the District Magistrates of Gujarat and Rajasthan to grant Indian citizenship to persons who came from Pakistan, and the State wise number of persons who were granted Indian citizenship in the last year.³⁸ The Minister of State replied that the Ministry extended the time frame of this delegated power by one year and the number of Indian citizenship granted in the last one year to migrants from Pakistan in Gujarat and Rajasthan were 1,469 and 11,298 respectively.

The Minister of State for Home Affairs in 2013 while discussing the resolution and answering the questions related to formulation of an action plan to rehabilitate persons displaced from Pakistan finally requested the members to withdraw the resolution. He said the following³⁹:

The Minister of State in the Ministry of Home Affairs (Shri Mullappally Ramachandran):

...A very important issue has been raised by Shri Meghwal relating to the rehabilitation of displaced Hindu families presently coming from Pakistan. It is worthwhile to mention that in order to solve the massive problem of mass influx of displaced persons from the erstwhile West Pakistan -- as a result of partition in 1947 and to rehabilitate them -- the Government of India, during 1950's, had taken a series of measures by enacting a series of Acts. As the major works of claims, compensation and also rehabilitation, more or less, had been completed by 1970, the Central Government repealed all these Acts in 2005. At present, we do not have any Act in this connection because this august House has repealed all these Acts...

I would like to state that the Central Government has been very sensitive to the issues faced by the Pakistan nationals who migrated to India at various point of time. For instance, it has been decided that the cases of the Pakistan nationals who entered India prior to 31.12.2004 would be processed on a case to case basis, and if an applicant files an Affidavit before the authority prescribed under Rule 38 of the Citizenship Rules, 2009, that is, the Collector, District Magistrate and Deputy-Commissioner, it may be accepted in lieu of the Renunciation Certificate. The State Governments and UTs concerned have been duly requested to deal with these matters as per instructions given by the Ministry of Home Affairs. In fact, the Ministry has also stipulated a Standard Operating Procedure for dealing with foreign nationals who claim to be refugees.

Madam, another important issue has been raised, that is, delegation of power to the District Collectors in the States of Gujarat and Rajasthan for grant of Indian Citizenship to Pakistan nationals. This is a very important issue which has been raised by some Members. The powers to grant Indian Citizenship to nationals of Pakistan belonging to minority Hindu community were delegated to the Collectors of Kutch, Patan, Banaskantha, Ahmedabad of Gujarat and Barmer and Jaisalmer of Rajasthan in 2004 for one year to grant citizenship to Pak nationals of minority community staying in the border districts of Rajasthan and Gujarat as a special case. This delegation was extended up to 2007 on year to year basis. Such powers were not delegated to any other State. Sufficient time was given to these two States to decide such pending cases...

The provisions of applying for Indian Citizenship continue to be available as per provisions of Citizenship Act of 1955. Normally, the Central Government takes about four months in processing cases and issuing acceptance letter in consultation with security agencies. In order to make the procedure simpler, faster and transparent, the Home Ministry has decided to introduce what is called online submission of application for grant of citizenship with effect from 1.12.2001.

I would like to reiterate that the Government of India is very sensitive to the issue related to the welfare of all foreign nationals in India including Hindu Pak nationals who deserve support and attention subject to the laws of the land and policies of the Indian Government...

It is clear from the abovementioned questions by the Members of the Parliament and the answers of the Ministry of Home Affairs that the parliamentarians of India and also the Government of India are not concerned about the two conventions of statelessness and precisely they have clubbed these two categories. They have never tried to refer to these two conventions anywhere during these proceedings.⁴⁰

India is not a party to the stateless conventions, however this does not mean that India is under no obligation to protect. The principle of non *refoulement* has been accepted as a principle of customary international law. This goes on to add that the other principles regarding refugees enumerated in various international law instruments have to be taken into consideration. This leads to the international law and municipal law debate. Thus stands out a question- Why would a nation respect international principles and policies unless they have been incorporated in the municipal laws of that nation? The Supreme Court of India deserves a laud in this regard. The way Supreme Court of India has interpreted the Constitution in its decisions to highlight the duty of the state to accord refugee protection is phenomenal.

In its two major decisions the Supreme Court had referred to Article 14 of the Universal Declaration of Human Rights and Article 13 of the International Covenant on Civil and Political Rights to uphold the obligation of refugee protection.⁴¹ The first instance was the case of *Khudiram Chakma v. State of Arunachal Pradesh*⁴², where the Supreme Court of India had referred to the Universal Declaration of Human Rights in the context of refugees in India in the following words:

Article 14 of the Universal Declaration of Human Rights, which speaks of the right to enjoy asylum, has to be interpreted in the light of the instrument as a

whole, and must be taken to mean something. It implies that although an asylum seeker has no right to be granted admission to a foreign State, equally a State which has granted him asylum must not later return him to the country whence he came. Moreover, the Article carries considerable moral authority and embodies legal prerequisite of regional declarations and instruments.⁴³

The pro refugee protection approach was further reflected in the case of *National Human Rights Commission v. State of Arunachal Pradesh*⁴⁴. The Supreme Court of India held that *Chakma* refugees who had come from Bangladesh due to persecution should not be forcibly sent back to Bangladesh as they might be killed or tortured or discriminated, and in result of this they would be deprived of their right to life under Article 21⁴⁵ of the Constitution of India. The Supreme Court in the same case made a number of observations relating to the protection of *Chakma* refugees in India:

We are a country governed by Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to the procedure established by law. Thus the State is bound to protect the life and personal liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons...to threaten the chakmas to leave the State, failing which they would be forced to do so...the State government must act impartially and carry out its legal obligations to safeguard the life, health and well being of chakmas residing in the state without being inhibited by local politics. Besides, by refusing to forward their applications, the chakmas are denied rights, constitutional and statutory, to be considered for being registered citizens of India.⁴⁶

A subtle derivation from the above trend would stand to claim that the obligation to protect refugees or particularly the stateless persons is paramount. The importance of Article 21 of the Constitution can be well inferred from the decisions rendered by the Supreme Court. Article 21 is a non-derogable right. It would be therefore not incorrect to claim that the term “reducing statelessness” with regard to the groups who are staying in India for a long period or for generations have been fully incorporated into Indian Law via Article 21 of the Constitution of India.

However, with regard to illegal migration from Bangladesh, the Supreme Court had declared the Illegal Migrants (Determination by Tribunal) Act, 1983 unconstitutional in the decision given in *Sarbananda Sonowal v. Union of India*⁴⁷. The Act was enacted by the Indian government, partly to prevent a witch-hunt against illegal migrants, but also with the professed aim of making the detection and deportation of illegal migrants easier. This Act resulted in the establishment of tribunals to determine whether or not a person is an illegal migrant. This was specifically and exclusively applicable to foreigners in Assam, while foreigners in the rest of India covered under the provisions of the 1946 Foreigners Act.⁴⁸ While the Foreigners Act specifically provides that the onus of proving citizenship status rests on the person accused of being a non-citizen⁴⁹, whereas the 1983 Act contained no such provision, and in effect, its provisions accorded greater protection to anyone accused of being a foreigner in placing the burden of proof on the prosecution to establish that

he or she is not a citizen of India. In this case, the petitioner, a former president of the Assamese Students Union, stated that the 1983 Act was unconstitutional as it discriminated against a class of citizens of India, making it impossible for citizens resident in Assam to secure the detection and deportation of foreigners from India. The petitioner claimed that the Act had actually ended up protecting illegal migrants. The Court declared the Act unconstitutional on the ground that it violated article 355 of the Indian Constitution.⁵⁰ This judgment has a very long standing effect in determining the issue of granting citizenship in India where in one side there is threat to security and in another side there is a possibility of social integration.

Conclusion

It is noteworthy that stateless persons have not been historically distinguished from refugees; however they are now of different categories where refugees are identified and stateless persons are mostly unidentified.⁵¹ For a country like India statelessness emerges mainly for the following reasons rigidity of Indian citizenship laws, administrative obstacles by Indian authorities and neighbouring countries, laws that revoke citizenship in some of the neighbouring countries, arbitrary and discriminatory denial of citizenship in India in case of children, State withdrawal of Citizenship in some of the neighbouring countries, laws affecting women rights of nationality and subsequent rights, transnational migration, etc. This is the time for India to deal with this situation of effective statelessness or in a new future likely after fifty years the number will grow in such huge that the government machinery will not be able to deal with their demands may be for new independent country for each and every groups. Though in this present world political scenario it will not be favourable to adopt any of the conventions of statelessness by the Indian government as there is a growing concern over the third world approaches to international law, precisely public international law.⁵²

So the most important possibility to deal with statelessness in India would be to deal with human rights approach as humanism and compassion have been India's ageless heritage and is a fundamental duty under Article 51⁵³ of the Indian Constitution. The recent judgments⁵⁴ of the Delhi High Court and Karnataka High Court dealing with citizenship rights of *Tibetan* children who were born in India from 1950 to 1987 can now exercise their right to vote, have excelled the opportunity for other groups present in India to make their way towards Indian citizenship!

Notes

In case of India there is no legal distinction between nationality and citizenship. So these terms will be used interchangeably in this paper.

¹ This Bengali folk song may be translated as "we have no residence, we have no village; we have no direction, we have no country". This song with its excellent lyrics and music portrayed the misery and sorrow of every person who became homeless,

rather refugee, during the dawn of independence of India. Even today this song has relevance with regard to misery and sorrow of refugee and stateless persons staying in India. The song is available at <http://www.youtube.com/watch?v=LrwYo5-DLpI>.

² On *de facto* statelessness see for example, Section II.A. of United Nations High Commissioner for Refugees, *Expert Meeting on the Concept of Stateless Persons under International Law (Summary Conclusions)*, 2010 (hereinafter referred to as the “Prato Conclusions”):

“1. *De facto* statelessness has traditionally been linked to the notion of effective nationality and some participants were of the view that a person’s nationality could be ineffective inside as well as outside of his or her country of nationality. Accordingly, a person could be *de facto* stateless even if inside his or her country of nationality. However, there was broad support from other participants for the approach set out in the discussion paper prepared for the meeting which defines a *de facto* stateless person on the basis of one the principal functions of nationality in international law, the provision of protection by a State to its nationals abroad.

2. The definition is as follows: *de facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality”. Available at <http://www.unhcr.org/refworld/pdfid/4ca1ae002.pdf>.

³ International Covenant on Civil and Political Rights, 1966. India acceded to the convention on 10 April, 1979.

⁴ International Covenant on Economic, Social and Cultural Rights, 1966. India acceded to the convention on 10 April, 1979.

⁵ Convention on the Rights of the Child, 1989. India acceded the convention on 11 December 1992.

⁶ International Convention on the Elimination of All Forms of Racial Discrimination, 1965. India ratifies the convention on 03 December, 1968 with reservations.

⁷ Convention on the Elimination of All Forms of Discrimination against Women, 1979. India signed the convention on 30 July 1980 and ratified it on 9 July 1993 with reservations.

⁸ *National Human Rights Commission vs. State of Arunachal Pradesh*, 1996 AIR 1234.

⁹ W.P.(C)No.243/2012, pending before the Supreme Court of India

¹⁰ *Chairman, Railway Board & Ors. vs. Chandrima Das & Ors.*, 2000 AIR 988

¹¹ Goldston, James A. 2006. “Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens”, *Ethics & International Affairs*, 20, pp.321- 322.

¹² UNHCR estimates there to be at least 12 million people around the world. See <http://www.unhcr.org/pages/49c3646c155.html>.

¹³ The International Court of Justice held in the *Nottebohm Case* that “. . . it is for every sovereign state to settle by its own legislation the rules relating to the acquisition of its nationality.” *Nottebohm (Liechtenstein v. Guatemala)*, Judgment, 1955 I.C.J. 4, at 20 (Apr. 6, 1955).

¹⁴ Article 1(1) of the 1954 Convention sets out the definition of a stateless person as: *For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.*

¹⁵Weissbrodt, David and Collins, Clay. 2006. "The Human Rights of Stateless Persons", *Human Rights Quarterly*, 28(1), p. 245, 251. "While there may be complex legal issues involved in determining whether or not an event has occurred by operation of law, national courts have means of resolving such questions", see Batchelor, Carol A.1995. "Stateless Persons: Some Gaps in International Protection", *International Journal for Refugee Law*, 7, p. 232.

¹⁶Convention relating to the Status of Stateless Persons, *adopted 28 July 1951*, G.A. Res. 429 (V), 360 U.N.T.S. 117 (*entered into force 6 June 1960*)

¹⁷Massey, Hugh.2010. " UNHCR and De Facto Statelessness", Legal and Protection Policy Research Series, <http://www.refworld.org/pdfid/4bbf387d2.pdf>, last accessed March 2, 2014. Also see, UNHCR.2010. " UNHCR Action to Address Statelessness - A Strategy Note", UNHCR Division of International Protection, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4b9e0c3d2>, last accessed February 2, 2014. Also note that UNHCR's responsibilities for stateless persons began with refugees who are stateless under paragraph 6(A) (11) of its Statute and article 1(A) (2) of the 1951 Convention relating to the Status of Refugees, both of which refer to stateless persons who meet the criteria of the refugee definition. UNHCR's mandate responsibilities concerning statelessness were expanded following the adoption of the 1954 Convention relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness. General Assembly resolutions 3274 (XXIV) and 31136 designated UNHCR as the body mandated to examine the cases of persons who claim the benefit of the 1961 Convention and to assist such persons in presenting their claims to the appropriate national authorities.

¹⁸David and Clay, 2006.

¹⁹Carol, 1995.

²⁰Carol, 1995. Despite the reluctance of the drafters of the 1954 Convention to acknowledge *de facto* statelessness, the Final Act of the 1961 Convention recommends that " persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality." *United Nations Conference on the Elimination or Reduction of Future Statelessness, 30.Aug. 1961*, Final Act, 91 23, U.N. Doc. A/Conf./9/14 (1961).

²¹David and Clay, 2006.

²²Ibid.

²³ However, UNHCR's mandate on *de facto* stateless persons is:

"The extent to which *de facto* stateless persons who do not fall within its refugee mandate qualify for the Office's protection and assistance is largely determined by UNHCR's mandate to prevent statelessness. It was noted that unresolved situations of *de facto* statelessness, in particular over two or more generations, may lead to *de jure* statelessness." Op Cit 2, at p. 8.

²⁴Massey, *supra note 14*, at iii.

²⁵ As quoted by Massey, *supra note 14*, at 30

²⁶ Judgment of 8 September, 2005, available at <http://www.refworld.org/docid/44e497d94.html>.

²⁷UN General Assembly Resolution No 61/137, adopted on 19 December, 2006, available at

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/61/137&Lang=E

²⁸General Comment No. 15, The position of aliens under the Covenant, 04 November 1986, available at

<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument>.

²⁹Article 2:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

³⁰General Comment, *supra note 24*, Para 2³¹Article 9:

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

³² Lee, Tang Lay. 1998. "Refugees from Bhutan: Nationality, Statelessness, and the Right to Return," *International Journal of Refugee Law*, 10 (1-2), pp118-155.³³ Article 7:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

³⁴Article 8:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

³⁵ Question No. 169, Proceeding 2821, Rajya Sabha, 22 December 1993.³⁶ Question No. 197, Proceeding 2127, Rajya Sabha, 11 December 2002.³⁷ Question No. 198, Proceeding 617, Rajya Sabha, 26 February 2003.

³⁸ Question No. 204, Proceeding 3634, Rajya Sabha, 27 April 2005.

³⁹ Resolution of 17 August 2012, Discussion on 13 May 2013.

⁴⁰ However, the International Law Commission observed that Article 1(1), definition of stateless, of the 1954 Convention relating to the Status of Stateless Persons can “no doubt be considered as having acquired a customary nature”. Op Cit 2, at p. 2.

⁴¹ Article 14(1) of the Universal Declaration of Human Rights states “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” Article 13 of the International Covenant of Civil and Political Rights states: ‘An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority’. The Supreme Court used these international mechanisms to hold that it is the duty of the state to protect refugees.

⁴² (1994) Supp (1) SCC 615

⁴³ Ibid

⁴⁴ (1996) 1 SCC 742

⁴⁵ Article 21: “No person shall be deprived of his life and personal liberty except according to the procedure established by law”.

⁴⁶ National Human Rights Commission, *supra* note 35

⁴⁷ (2005) 5 S.C.C.665

⁴⁸ The Foreigners Act confers wide-ranging powers to deal with all foreigners, prohibiting, regulating, or restricting their entry into India or continued presence in the country including through arrest, detention, and confinement. The Foreigners Act, No. 31 of 1946.

⁴⁹ Section 9 reads as follows:

Burden of proof - If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given there under, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person.

⁵⁰ Article 355: “It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution.”

On the broad meaning of aggression, the Court referred to the U.S. Supreme Court decision in *Chae Chan Ping*:

“To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.” *See Sonaval*, (2005) 5 S.C.C. 665, para. 57 (citing *Chae Chan Ping v. United States*, 130 U.S. 581 (1930)).

The Court also quoted Lord Denning, former Justice of the U.K. Court of Appeals: In recent times England has been invaded not by enemies nor by friends, but by those who seek England as a haven. In their own countries there is poverty, disease and no homes. In England there is social security, a national health service and guaranteed

housing all to be had for the asking without payment and without working for it. Once here, each seeks to bring his relatives to join him. So they multiply exceedingly. See *Sonawal*, (2005) 5 S.C.C. 665, para. 59.

⁵¹ Goodwin-Gill, Guy S. 1994. "The Rights of Refugees and Stateless Persons: Problems of Stateless Persons and the Need for International Measures of Protection". In *Human Rights Perspectives and Challenges*, ed K. P.Saksena. New Delhi: Lancer Books

⁵²B.S. Chimni's work in the area of third world approaches to international is well regarded.

⁵³ Article 51: Promotion of international peace and security The State shall endeavour to-

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of international disputes by arbitration.

⁵⁴ See Children of Tibetan Refugees Can Now Vote, 11 February, 2014, *The Indian Express*, <http://indianexpress.com/article/india/india-others/children-of-tibetan-refugees-can-now-vote/>, last accessed May 27, 2014. Also see, Karnataka High Court Judgment in *Tenzin L. C. Rinpoche vs. Union of India & Anr.*, WP No. 15437/2013 (GM-PASS) and Delhi High Court Judgment *Namgyal Dolkar vs. Govt. of India*, WP (C) 12179/2009.