

Module D

Statelessness in South Asia

(Concept note, suggested readings, and assignments)

Concept Note

Statelessness is the quality of being, in some way, without a state. In fact it means without a nationality, or at least without the protection that nationality should offer. Nationality is the legal bond between a state and an individual. It is a bond of membership that is acquired or lost according to rules set by the state. Once held, nationality or membership of a state – brings with it both rights and responsibilities for the state and for the individual. As the world has been divided into state systems not to be a member of any one of them is a serious concern. While membership of a state is the norm statelessness continues to be widespread and has not escaped the interest of the international community. Within the realm of public international law, rules have evolved in response to the problem of statelessness.

According to the International Law Commission, the definition of stateless persons contained in Article 1 (1) of the 1954 Convention relating to the Status of Stateless Persons now forms part of customary international law. The Article defines 'stateless persons' as those who are not recognized as nationals by any state under the operation of its law. They therefore have no nationality or citizenship and are unprotected by national legislation and left in the arc of vulnerability. The International Law Commission has observed that the definition of a stateless person contained in Article 1(1) is now part of customary international law. 1954 Convention relating to the status of Stateless Persons and 1961 Convention on the Reduction of Statelessness exclusively deal with the issue of statelessness. These two legal instruments explain statelessness mainly in two ways *de jure* and *de facto*. A stateless person as defined by the 1954 convention is generally equated with the term *de jure* statelessness. Besides, the Convention also refers to the category of *de facto* stateless persons - who remain outside the country of their nationality and hence are unable, or, for valid reasons, unwilling to avail themselves of the protection of that country. 'Protection' in this context refers to the right to diplomatic protection exercisable 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 her return to the State of nationality. Again, Article 15 of the Universal Declaration of Human Rights lays down: "Everyone has a nationality. No One shall be arbitrarily deprived of his nationality or the right to change his nationality". It implies first of all that one cannot have the option of remaining stateless and secondly, deprivation of nationality or denial of the right to nationality is possible provided it is not 'arbitrary'. International Law empowers the state to determine by the operation of law who are its citizens. The operation of law must be in accordance with the principles established by International Law. The stateless are those who do not have any nationality and not having nationality may be the outcome of the way a state determines its nationality. One acquires one's nationality insofar as a 'genuine and effective link' is established through any combination of birth, descent and residency within the state.

In this context, it is to be kept in mind that nationality and citizenship are two words most commonly used to describe the same phenomenon – the legal bond of membership between an individual and a State. Nationality can only be conferred or confirmed by states and states are responsible for protecting the fundamental rights of everybody on their territory including those of stateless persons. It makes one thing clear that for all activities relating to statelessness, the states are indispensable actors.

Statelessness most commonly affects refugees although not all refugees are stateless, and not all stateless men, women and children may be able to qualify as refugees. Refugee status entails

the extra requirements that the refugee be outside his or her country of nationality (or country of habitual domicile if stateless), and is deserving of asylum based upon a well-founded fear of persecution for categorized reasons which make it unwilling or unable to avail itself of the protection of that country. According to the 1951 Convention relating to the Status of Refugees or the extended definitions in relevant regional instruments and under UNHCR's international protection mandate refugees may also, and frequently do, fall within Article 1(1) of 1954 convention. If a stateless person is simultaneously a refugee, he or she should be protected according to the higher standard which in most circumstances will be international refugee law, not least due to the protection from *refoulement* in Article 33 of the 1951 Convention.

Statelessness can have a severe impact on the lives of the individuals concerned as well as on the internal – and international – affairs of States. This is in part due to the role that nationality, as membership, plays in the formation of people's identities and the connection that they feel to the place where they live and the people around them. To be rejected by every State is to be enveloped by a debilitating "sense of worthlessness". The possible consequences of statelessness are profound and touch on all aspects of life. It may not be possible for them to work legally, to purchase property or to open a bank account. Stateless people may be easy prey for exploitation as cheap labour. They are often not permitted to attend school or university, may be prohibited from getting married with a persons from other communities and may not be able to register births and deaths. Stateless people can neither vote nor access the national justice system.

What causes statelessness?

The experts argue that there is one common root cause for statelessness that is '**discrimination**'. The UNHCR has observed the following things to analyze the causes of statelessness in general:

- ***It influences the way problems of statelessness are identified.*** Understanding that discrimination against a certain group often underlies a statelessness situation facilitates the identification of categories of people that are often exposed to a heightened risk of statelessness. Frequent grounds for discrimination are gender, ethnicity, religion or language.
- ***It influences the way prevention and reduction of statelessness and protection of stateless persons is addressed.*** To effectively tackle the causes of statelessness (i.e. to develop *prevention* or *reduction* strategies), not only must the "sovereign, political, legal, technical or administrative directives or oversights" be dealt with, but also the underlying discrimination, because the latter feeds the former. Similarly, addressing protection issues also requires overcoming discriminatory attitudes towards the group as a precondition of a truly successful and durable solution.
- ***It demonstrates the fundamental importance of addressing statelessness.*** The discrimination that has culminated in statelessness may also fuel (further) persecution, displacement, insecurity and conflict, as will be discussed in the section on the consequences of statelessness. Statelessness can thus be a useful indicator of a broader issue that needs our attention. (UNHCR Expert Meeting on *The Concept of Stateless Persons under International Law*, 2010, <http://www.unhcr.org/4cb2fe326.html>)

Causes and Context of Statelessness in South Asia

Normally statelessness emerges from succession of states or territorial reorganizations. But it also emerges from persecution of minorities and state's majoritarian bias, which lead the states at time to expel citizens or inhabitants. This condition reinforced by the protracted refusal of the involved states to take them back creates a condition, which may lead at times to loss of their

nationality and citizenship. Also, states of South Asia being what in academic circles are called 'kin states' represent social and ethnic continuities across the borders and the cases selected here illustrate both these albeit overlapping sources of statelessness in contemporary South Asia. The experts have identified three salient facts while analyzing the causes of statelessness in South Asia.

- Very few contiguous South Asian states have entirely normalized relations with each other, usually on account of disputes concerning borders and cross-border movements, or histories of unwelcome intervention in each others' affairs. The inherent and massive heterogeneity of South Asian states has frequently given rise to militant resistance – often with a secessionist agenda – to the exercise of central power and the project of national consolidation. These resistances have usually obtained support and legitimacy from the governments or societies of neighbouring states. As threats to the project of national consolidation have accumulated over the past decades – because of interstate conflict, border and territorial disputes, insurgencies, illegal migration, increasing competition for resources and unfavourable demographic drift – the resistance has intensified, and so has the tension of regional relations. It would not be incorrect to say that an atmosphere of suspicion lies over South Asia. Suspicion has driven South Asian states to progressively tighten the strings on who may claim membership goods, thus creating growing pockets of statelessness at their cultural and geographical margins. Examining the changes that have been introduced to citizenship laws of South Asian states provides a clear narrative of how this tightening of strings has proceeded: largely by restricting the acquisition of citizenship by right in favour of granting citizenship at the government's discretion.
- The second salient aspect of South Asian statelessness is its production as a result of political turmoil. In almost every case, such turmoil has manifested post-colonial South Asia's attempt to mould itself into culturally unique nation-states by favouring dominant national claims to cast out a minority; or, the attempt of a disgruntled minority to secede from the dominant majority to create their own uniform homeland. The two largest cleavages in independent South Asia occurred for precisely these reasons – the Partition of India in 1947 and the secession of Bangladesh in 1971. It follows, then, that these nation-building experiments created the ideal conditions for inducing statelessness.
- The third aspect of statelessness in South Asia is as a product of economic migration between states. Borders in South Asia, in the pre-colonial, colonial and post-colonial periods, have been unregulated or unsuccessfully regulated, engendering traditions of seasonal migration but also permanent minority settlements. Migrant populations are of all different vintage: Nepali migrants from as early as the seventeenth century in Bhutan, Tamil labourers from the nineteenth century in Sri Lanka, and continuing flows of Bangladeshi Muslims in India. Since the advent of independent nation-states, however, majority leaders have argued for the disenfranchisement of such groups, which appear to have closer ties to the national identity of a neighbouring state than to the identity of the state of their residence. The political centres have demanded the migrants' 'repatriation,' which has been refused by the neighbour state on account of resources constraints and political concerns of its own, leaving the group stateless. (***Protecting the Forgotten and Excluded Statelessness in South Asia***, Raghu Amay Karnad, Rajeev Dhavan, Bhairav Acharya, <http://y4e.in/pdf/wc/Refugees%20and%20Displacement/Statelessness%20in%20South%20Asia.pdf>)

Against this backdrop this module seeks to find answers of the following questions in the light of our experience in South Asia. Participants are requested to make their presentations touching on any of these questions or any of their combination with reference to various cases of statelessness in the region.

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- How certain groups and communities are rendered stateless? While successor states in South Asia remain far from being ethnically homogeneous, are minorities living within them more vulnerable to statelessness than others?
- Does protracted refugeehood eventually result in statelessness? Is the distinction between refugeehood and statelessness increasingly wearing thin?
- Is it possible to put in place an early warning system for addressing and if possible pre-empting the problem of statelessness?
- Is the existing legal regime adequate in dealing with the problem of statelessness? What has been the experience with case laws in different countries of South Asia?
- Can judicial activism as evident in some of the countries particularly in recent years serve as an effective guarantee?
- Does the varied nature of our experience in South Asia call for changes in the existing municipal and international laws? Does this underline the necessity of framing a regional law relating to the stateless in South Asia?
- Do policymakers need to think beyond legal terms? Why does mere judicial activism prove ineffective?
- Does all this call for activating and strengthening the civil society institutions? But how does one make the first move towards melting the ice of xenophobia against the outsiders who remain in the host country as the stateless?

Some relevant cases of Statelessness in South Asia

- Chakmas living in Arunachal Pradesh, India
- The inhabitants of the Chhitmahals (Indian enclaves in Bangladesh/ Bangladeshi enclaves in India)
- Lhotshampas in Bhutan
- The displaced Hindus from Pakistan living in India
- Tamils in Sri Lanka and Sri Lankan Tamils in India
- Biharis in Bangladesh
- Rohingyas in Myanmar

Suggested Readings (CRG publications in bold)

1. Deepak K. Singh, *Stateless in South Asia: The Chakmas Between Bangladesh and India*, Sage Publications, New Delhi, 2011.
2. **“Uprooted Twice: Refugees from the Chittagong Hill Tracts”**, Sabyasachi Basu Ray Chaudhury, in Ranabir Samaddar (ed.), *Refugee & The State*, Sage: New Delhi, 2003.
3. **Subir Bhaumik, Meghna Guhathakurta, and Sabyasachi Basu Ray Chaudhury, *Living on the Edge – Essays on the Chittagong Hill Tracts*, Manohar publications, New Delhi, 1997.**

Web-based references

A. Selected articles from REFUGEE WATCH, a South Asian journal Published by CRG

1. Muhammad Tajuddin, Biharis in Bangladesh Cessation, Liberation and the Problem of Statelessness, *Refugee Watch* Issue No. 4, December 1998.
2. Protection of Refugees, Migrants, Internally and Stateless Persons

[Below we reproduce the recommendations of the Kathmandu Consultation (November 21 -22, 1996) on a regional protocol for the protection of refugees, migrants, internally displaced and stateless persons - Ed.], *Refugee Watch Issue No. 1*, January 1998

3. Paula Banerjee, "Women, Trafficking and Statelessness in South Asia" , *Refugee Watch*, 27, June 2006.
4. Anuradha Bhasin Jamwal , "Homeless and Divided in Jammu & Kashmir", *Refugee Watch*, Issue No. 23, December , 2004.
5. Aung Phyro and Tapan Bose, "Refugee Receiving Countries in South Asia: An Overview", *Refugee Watch*, Issue No. 2, April 1998.
6. "Sri Lankan Tamil Refugees in India" - *A Correspondent*, Issue No. 2, April 1998.

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B. Selected references from Policies and Practices (CRG publications)

1. Pascale McLean, *Incomplete Citizenship, Statelessness and Human Trafficking : A Preliminary Analysis of the Current Situation in West Bengal, India*, Policies and Practices 38. 2011.

*** To access and download the above articles please visit our website www.mcrg.ac.in**

C. Selected reference from the research report by CRG

1. Executive summary of the project entitled *State of Being stateless: A Case Study of Chakmas in Arunachal Pradesh*,

Additional references

2. Raghu Amay Karnad, Rajeev Dhavan, Bhairav Acharya,,"Protecting the Forgotten and Excluded Statelessness in South Asia",
http://y4e.in/pdf/wc/Refugees%20and%20Displacement/Statelessness%20in%20South%20Asia.pdf)
3. UNHCR Expert Meeting on *The Concept of Stateless Persons under International Law*, 2010, *http://www.unhcr.org/4cb2fe326.html*)
4. Christer Lænkholm, Resettlement for Bhutanese refugees, *Forced Migration Review*, 28.
5. Michael Hutt, The Bhutanese Refugees: Between Verification, Repatriation and Royal Realpolitik, *Peace and Democracy in South Asia*, Volume 1, Number 1, January 2005.
6. Willem van Schendel, "Stateless in South Asia: The Making of the India-Bangladesh Enclaves", *The Journal of Asian Studies*, Vol. 61, No. 1 (Feb., 2002), pp. 115-147.
7. *Special Protocol Concerning Statelessness*, *The American Journal of International Law*, Vol. 24, No. 3, Supplement: Official Documents (Jul., 1930), pp. 211-21.
8. CAROL A. BATCHELOR, "Statelessness and the Problem of Resolving Nationality Status", *International Journal of Refugee Law* Vol. 10 No. ½, 1998.
9. 1954 Convention Relating to the status of Stateless Persons,
http://www.unhcr.org/3bbb25729.html

Assignments

Participants opted for this module D should submit a research report/article (within 4000 - 5000 words with end notes or foot notes on any one of the following themes:

- 1. Discuss with reference to a case study how the distinction between a Refugee and a Stateless Person is increasingly getting blurred.**
- 2. Discuss the 1954 Convention on Statelessness. Frame a Model Regional Law in order to address the problem of Statelessness in South Asia against the background of international legal regimes.**
- 3. Suggest with reference to a case study a roadmap for civil society activism in order to address the problem of Statelessness.**
- 4. Do you think that the Stateless should have a right to citizenship in the host country? Please enunciate your view on global responsibility relating to statelessness.**