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Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia — Part 1

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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, which is published below, provides the background to the present problem, and shows 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, which will be published in the next issue of the *IJRL* (Volume 12 Number 1), 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.

1. Background

After the partition of India in 1947, communal violence preceded by the so-called 'Great Bihar Killing' of 30,000 Muslims in October–November,¹

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¹ Hashmi, Taj, 'The "Bihari" Minorities in Bangladesh: Victims of Nationalisms', mimeo (1996) 4.

Table 1:

Situation Report of Bihari Refugees from India in East Pakistan, 1951

<i>Districts of Bangladesh</i>	<i>Uttar Pradesh</i>	<i>Bihar</i>	<i>Punjab/Delhi</i>	<i>Total</i>
Chittagong	2,626	6,313	331	9,270
Dhaka	6,986	27,530	1,193	32,706
Mymensingh	752	2,624	42	3,418
Dinajpur	2,519	22,914	302	25,735
Bogra	332	4,285	12	4,629
Hessire	571	3,022	50	3,643
Kushtia	644	1,396	6	2,046
Pabna	650	3,078	2	3,730
Rajshahi	620	4,302	29	4,951
Rangpur	3,119	24,885	46	28,050
Total	18,819	97,349	2,002	118,170

Source: Kamaluddin, AFM, *Refugee Problems in Bangladesh*, in Kosinski, Leszek A. and K. Houdoud Elahi (ed.), *Population Redistribution and Development in South Asia*, Riedel Publishing Co, Dordrecht (1985) 224

resulted in a large scale movement of Muslims into East Bengal, the newly created province of East Pakistan. Consequently, a million refugees migrated into East Bengal in 1947.² It was estimated that 95.9 per cent of these refugees came from the eastern Indian states of Bihar, West Bengal, Assam, Orissa, Nagaland, Manipur, Tripura and Sikkim.³ Table 1 indicates that the vast majority of the Bihari refugees originated from the Indian state of Bihar.

Although Pakistan was successful in gaining her independence as a theocratic State, she had problems with the national integration of an ethnically plural society. The need for Pakistan to assimilate large numbers of refugees from India created more complexities than solutions, resulting in the 'insider-versus-outsider' syndrome, a phenomenon which exacerbated the problem of lack of acceptance and assimilation of the Bihari refugees in East Pakistan.

The culture of the Bihari refugees contributed to the definition of the ethnic boundary between them and the majority Bengali residents. In addition, when the West Pakistani feudal elite began to capture economic and political power in East Pakistan, the Biharis who shared the same language with the elite, began a covert identification with them. Their ethnicity gave them access to preferential treatment in various sectors of

² Minority Rights Group, *The Biharis in Bangladesh*, Report 11, 4th ed., (Jan. 1982), 7.

³ Chowdhury, E. Haque, 'Non-Bengali Refugees in Bangladesh: Patterns, Policies and Consequences', in Rogge, John (ed.), *Refugees: A Third World Dilemma*, Rowman & Littlefield, New Jersey, (1987), 220.

the East Pakistani economy and a relatively privileged position in terms of official patronage.⁴ In fact, Biharis acquired the nationality of Pakistan as a precondition to resettlement with priority given to the *Muhajirs*⁵ by public policy measures, especially '... in the railways, post and telegraph, armed forces, private industries, trade and commerce'.⁶ Table 2, an official document of the Government of Pakistan, testifies to the support for Biharis in the public sector, where they were given a relatively better average percentage in major occupational categories⁷ than the Bengali majority.

Table 2:
Population Distribution by Ethnicity in Industry/Occupation, 1951

<i>Sector</i>	<i>Bengalis</i>	<i>%</i>	<i>Biharis</i>	<i>%</i>
Agriculture, Forestry, Fishery	10,811,301	85.24	104,430	51.63
Mining	2,522	0.02	55	0.03
Manufacturing	481,277	3.79	17,411	8.61
Construction, Electricity, Gas, Water	136,634	1.08	7,689	3.80
Commerce	477,510	3.76	25,044	12.38
Government Services	168,340	1.33	10,775	5.33
Personal and Community Services	420,020	3.34	16,682	8.25
Total	12,683,744	100.00	202,256	100.00

Source: *Census of Pakistan*, Ministry of Home and Kashmir Affairs, Government of Pakistan (1951)⁸

⁴ Although it has argued that the Urdu-speaking educated, well-to-do and businessman preferred West Pakistan to East Pakistan as they envisaged the existing socio-economic-political conditions congenial for their future prospects. See Begum, Khurshida, 'The Stranded Pakistanis in Bangladesh and International Implications', paper, *International Workshop on Internationalization of Ethnic Conflict*, International Centre for Ethnic Studies, Kandy, Sri Lanka, 2-4 Aug. 1989, 9.

⁵ The term *Muhajir* literally translates to mean a refugee. In this case, the *Muhajir* is the Bihari refugee.

⁶ Chowdhury, 'Non-Bengali Refugees in Bangladesh', above n. 3, 223.

⁷ It has been argued that the government provided the Biharis bank credit facilities for industrial and commercial investments and nominal interest rates, licences for national and international trade, large scale estate housing and the establishment of Urdu-medium schools. Over a period, '[a]ll these had their impact (on the social and economic fabric of East Pakistan, resulting in alienation and) on the disintegration process', leading to the independence of Bangladesh. 'The government deliberately followed a policy to keep the Biharis isolated from the Bengalis'. See Begum, Khurshida, 'The Stranded Pakistanis', above n.4, 10-12.

⁸ See Chowdhury, 'Non-Bengali Refugees in Bangladesh', above n. 3, 224.

The arrival of the Biharis and the Pakistani governmental efforts at refugee rehabilitation was at first not resented by the local Bengali population. The general euphoria surrounding the creation of Pakistan resulted in positive discrimination towards the Bihari refugees. In fact, the Pakistani ruling elite portrayed the Bihari as *mujahir* with a view to making the Bengali of East Pakistan 'duty-bound to help and accept them as their own people'.⁹ Between 1947–51, a large number of Hindu landlords, businessmen, professionals and petty officials emigrated to India, and the Bengali Muslims and Biharis grabbed Hindu properties and acquired their positions at work. At this stage, the Bengali Muslims did not think of the Urdu-speaking Biharis as minorities.¹⁰

Hashmi concludes that 'the honeymoon was quite short' when, as early as March 1948, Jinnah announced in Dhaka that 'Urdu and Urdu alone shall be the State language of Pakistan' and anyone who opposed Urdu as the State language was an enemy of Pakistan.¹¹ The gradual drifting apart of East and West Pakistan between 1952 and 1971 can be summed up as a result of the '... collective megalomania of Pakistani elites, motivated by a colonial attitude' of plunder and subjugation of East Pakistan with the concentrated victimization of the Bengali and the Biharis of the lower echelons of society.¹² Despite their class and cultural differences, Biharis in East Pakistan accepted the West Pakistani ruling elite as their 'sole patrons, guides and protectors'.¹³ In contradistinction, the Pakistani elite often regarded the Bengali Muslims as 'semi Hindus, pro-Indian and disloyal to Pakistan'.¹⁴ This dysfunctional feeling amongst the West Pakistani political bureaucracy became all the more evident in the second half of the 1960s, when Pakistan began to loosen its hold on the political fabric of East Pakistan. By the late 1960s, while some Biharis

⁹ Hashmi, Taj, 'The "Bihari" Minorities in Bangladesh', above n. 1, 6.

¹⁰ *Ibid.*, 5. In fact, Mujibur Rahman, later the first Prime Minister of Bangladesh, is said to have urged Bihari Muslim refugees to emigrate to East Pakistan. See Chatterjee, Basant, *Inside Bangladesh Today: An Eyewitness Account*, New Delhi (1973), 85.

¹¹ The history of disintegration of Pakistan in 1971 and the massive refugee flows from East Pakistan into India are extensively discussed in Callard, Keith, *Pakistan: A Political Study*, London (1957).

¹² Hashmi argues that the upper echelons of the Biharis in East Pakistan, as junior partners of West Pakistani business groups, believed that their existence and continued prosperity depended on the goodwill of the Pakistani ruling elite. 'Consequently they also joined the anti-East Pakistani and pro-West Pakistani stream, mobilising the half-educated or illiterate, poorer, working class sections of the Biharis against the Bengali neighbours, thus forsaking the economic and political interests of their adopted home, East Pakistan. On several occasions, Bihari mill-workers at Narayanganj, Dhaka, Khulna and Chittagong took part in anti-Bengali communal riots, whipped up their Pakistani masters in the 1950s and 1960s'. Hashmi, above n. 1, 7.

¹³ *Ibid.*, 8.

¹⁴ Ahmed, Kamruddin, *The Social History of East Pakistan*, University Press, Dhaka (1967), 124.

openly sided with the quasi-military regime of Pakistan,¹⁵ Bengali Muslims demanded independence for their province.

As a result, Pakistan disintegrated in 1971 with two simultaneous major refugee movements. The first was the escape of the estimated 10 million refugees into India in the aftermath of the brutal massacre of the Bengali population, while the second flight consisted of the minority Biharis into refugee camps within East Pakistan as a result of their persecution by the Bengalis during the liberation fervour.¹⁶

2. Assessment of Refugee Status

The existence of persecution in the country of origin forms the bases for the application of international refugee law for the determination of refugee status. The claim to Convention refugees status of the Bihari will be assessed on the basis of the definition contained in the Convention Relating to the Status of Refugees and the 1967 Protocol (CSR51).¹⁷

2.1 Analysis and application of the definition

The definition of the term refugee under the 1951 Convention/1967 Protocol applies to any person who,

... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

While the Convention illustrates the reasons for fear of persecution, the element of well-foundedness of fear in the determination of refugee status looks towards the future, rather than the past.¹⁸ Evidence of tangible harm done to a potential refugee claimant strengthens the case, tending to prove a well-founded fear and thereby endorsing the need for protection from further persecution. However, in the construction of the claim to

¹⁵ While interestingly, most of the *Muhajirs* in West Pakistan openly defied Ayub Khan and demanded more rights and opportunities. 'This indicates that, unlike the Biharis in East Pakistan, refugees from India in Karachi had leaders from within their community who did not want to compromise with the central government at the expense of their adopted home, Karachi'. See Hashmi, above n. 1, 9.

¹⁶ The first movement of 10 million refugees, when the Bengali refugees fled to India, returned in the early 1970s and have been successfully resettled. The second constitutes the Bihari refugees who fled their homes in East Pakistan because of persecution by the majority Bengali population, are presently in Bangladesh, and are still awaiting a resolution to their inordinately long crisis.

¹⁷ Since South Asia lacks domestic refugee legislation, the 1951/67 definition is used as the basic international definition.

¹⁸ Goodwin-Gill, G.S., *The Refugee in International Law*, Oxford: Clarendon Press, 2nd ed., 1996, 40.

refugee status of Biharis, evidence of 28 years needs assessment and will involve objective and subjective factors of fear, both perceived and actual persecution suffered by Biharis.

2.1.1 *Well-founded fear and persecution in East Pakistan*

In the formal determination of refugee status, assessment of a well-founded fear of persecution is usually based on the application of a fairly high level standard of proof of objective facts. In the case of the Biharis, care is required in reconstructing the bases for their claims of fear of persecution.

The parliamentary elections in December 1970¹⁹ stirred up Bengali nationalism, which translated itself throughout East Pakistan as attacks on Bihari establishments, since it was widely perceived that most Biharis supported the pro-Pakistan Muslim League. Bengali mobs carried out a reign of terror in both Dhaka and Chittagong, as well as in the peripheral districts beyond the control of the Pakistan Army, until Pakistani control was re-established in March–April 1971. For a period of three months, between December and March, the Biharis of East Pakistan were subject to systematic persecution.

Thousands of Biharis were brutally killed as a result of ethnic cleansing on the part of Bengalis. In many parts, Biharis were burnt alive or hacked to death by Bengali marauders.²⁰ When Yahya Khan postponed the promised National Assembly, Bengalis turned on Biharis as they were viewed as synonymous with and symbols of Pakistani domination. Over 300 Biharis were killed by mobs at Chittagong in early March 1971, with subsequent slaughters at Jessore, Khulna, Rangpur and Saidpur. A further slaughter in Mymensingh caused a mass movement of Biharis into the Mirpur suburb of Dhaka, still within Pakistani control.²¹

The massacre of Biharis was described by Mascarenhas:

Thousands of families of unfortunate Muslims, many of them refugees from Bihar, . . . were mercilessly wiped out. Women were raped or had their breasts torn out with specially fashioned knives. Children did not escape the horror: the lucky ones were killed with their parents; but many thousands of others must go through what life remains for them with their eyes gouged out and limbs roughly amputated. More than 20,000 bodies of the non-Bengalis have been found in the main towns as Chittagong, Khulna and Jessore. The real toll, I was told

¹⁹ The results of the parliamentary elections fuelled the dissatisfaction of the Bengali mass, when on 1 Mar. 1971, President Yahya Khan prorogued the impending parliamentary session, with the excuse of formulating an understanding between the Awami League (East Pakistan-based, majority party in Parliament) and the Pakistan People's Party (West Pakistan-based, with the second largest majority), in order to reach a consensus on the future constitution of Pakistan. See Hashmi, above n. 1, 11.

²⁰ Aziz, Qutbuddin, *Blood and Tears*, Karachi (1974).

²¹ Minority Rights Group, *The Biharis in Bangladesh*, London (1982) 8–9.

everywhere in East Bengal, may have been as high as 100,000; for thousands of non-Bengalis have vanished without a trace.²²

The persecution of the Biharis was reported widely in the contemporary press. Reports from the time indicated that when Chittagong was still governed by the Awami League and its allies, Bengali workers, resentful of the relative prosperity of the Biharis, killed them in large numbers, while in Khulna, by May 1971, thousands of Biharis were 'tied to frames specially set up to hold prisoners for decapitation'.²³ It was further reported that hundreds of Biharis died in the north-western town of Dinajpur.²⁴ Other media reports substantiated the claim that Biharis were killed by Bengalis in different parts of East Pakistan.²⁵

A government document estimated the death toll of Biharis to be 15,000,²⁶ although eyewitness accounts put the figure at 50,000. Other eyewitnesses reported that violent mobs, led by armed Awami League stormtroopers, 'invaded' Bihari settlements in Raufabad, Halishahar, Dotala, Kalurghat, Hamzabad and Pahartali. The East Bengal Regimental Centre²⁷ served as the 'principal human abattoir'.²⁸

Commenting on Pakistani politics, Ziring stated that Mujibur Rahman's call to strike on 1 March 1971 'was also taken as [a] call to arms and a bloody campaign of murder, arson and looting . . . [where the] Bihari community was the target . . . and many of them were butchered in wild orgies that [Rahman and his party] seemed unable or unwilling to prevent . . . The massacre of the non-Bengalis also continued unabated, causing the initial flight to India of tens of thousands'.²⁹

The discrimination of the State against the Bihari minority is further evidenced in the attitude of Bengali military officers. Major Zia-ur-Rahman³⁰ is stated to have remarked in 1971, that '[t]hose who speak

²² Mascarenhas, Anthony, *The Rape of Bangladesh*, Delhi (1971). These figures are corroborated by another report, which stated 'the brutal massacre of thousands of non-Bengalis . . . (where) 20,000 bodies have been found . . . in Bengal's main towns but the final count could top 100,000': *The Sunday Times*, London, 2 May 1971.

²³ Browne, Malcolm, *New York Times*, 10 May 1971.

²⁴ *The Times*, London, 6 Apr. 1971. A memorandum by Diwan Wirasat Hussain of the East Pakistan Refugee Association delivered to the British Parliamentary Delegation on 20 Jun. 1971 estimated that out of 50,000 Muslim refugees, that is, Biharis, barely 150 survived in Mar.-Apr. 1971, before the arrival of the Pakistani troops. See Aziz, Qutbuddin, above n. 20, 121.

²⁵ Aziz, Qutbuddin, above n. 20, 183, where it was stated, 'I am an eyewitness of how Bihari businessmen and their family members were gunned down and how 700 Biharis were kept in jail and later killed by Bengalis at Sirajganj town in April 1971, prior to the arrival of the Pakistani army'.

²⁶ *East Pakistan Crisis*, White Paper, Government of Pakistan, Aug. 1971.

²⁷ Operational headquarters of the Bengali troops.

²⁸ Aziz, Qutbuddin, above n. 20, 48.

²⁹ Ziring, Lawrence, *Bangladesh from Mujib to Ershad: an Interpretive Study*, University Press, Dhaka (1992) 64-5.

³⁰ A military officer, later Lieutenant-General and President of Bangladesh till 1981.

Urdu (Biharis) are also our enemies because they support the Pakistani army. We will crush them'.³¹

2.1.2 Political opinion

Bihari political opinion has its basis in their cultural origin. As a result of a shared linguistic heritage, Biharis tended to associate themselves with West Pakistan. Besides, when the Urdu-speaking West Pakistani captured economic and political power in East Pakistan, the Biharis shared their political gain, as evidenced by Table 2. The governmental policy of favouritism and insulation of the Bihari community from the Bengali majority led the Bihari to cast their fate with the West Pakistani political elite. The majority of them had voted for the Muslim League and Jamati-Islami in the elections.³² At the same time, when the Awami League began to grow as an influential political party, they found their counterparts in West Pakistan a hindrance to their prosperity. Their resulting exclusive and limited policies failed to recognize and profit from Bihari class consciousness.³³

The Bengali political elite in East Pakistan used the Urdu-only language issue to denounce the suppressive attitude of the authorities in West Pakistan. While this stance inspired the majority in East Pakistan, it aggravated the alienation of the Biharis, making them lean towards the West Pakistanis. The Bengalis, initially sympathetic towards the oppressed Biharis, gradually became suspicious of their exclusive attitudes and political activities.³⁴

It is understood that political opinion, within the substantive framework of limitations posed by human rights, is any opinion on any matter in which the machinery of State, government or policy may be engaged.³⁵ The political opinion of the Bihari community resulted in systematic persecution by the majority-led government and its entities. The political agenda of the Bihari community exposed them to the reality of persecution. It has been argued that although political opinions may or may not be expressed, they may be interpreted as attributive features for the determination of refugee status. This is true for the Biharis who may not have overtly expressed their political will but nonetheless suffered repressive measures and systematic persecution. Their fear of persecution

³¹ The systematic massacre of the Biharis was complete when in 28 March 1971 Zia-ur-Rahman ordered his troops to shoot the male Biharis prisoners in Chittagong, and allowed his troops to outrage the modesty of the female prisoners. See Mascarhenas, Anthony, *Bangladesh: A Legacy of Blood*, London (1986) 118–9, 122.

³² Begum, Khurshida, above n. 4, 13.

³³ Umar, Badruddin, *Juddhattar Bangladesh (Bangladesh after the War)*, Muktohdara, Dhaka (1982) 26.

³⁴ Begum, Khurshida, above n. 4, 17.

³⁵ *Canada v. Ward*, 2 SCR 689 (1993).

is therefore well-founded and can be clearly evidenced.³⁶ Moreover, the subjective aspect of political opinion of the Bihari community does not essentially follow from the objective political actions of anyone or some of them. Therefore, the general political opinion of the majority stems more from covert rather than overt expressions of opinion through political action. The continuous deprivation of *de jure* nationality by Pakistan needs to be assessed as central to the persecution of Biharis and the basis for their political opinions and beliefs.

2.1.3 *Persecution in Bangladesh*

The persecution which had commenced in the country of origin, carried on in Bangladesh. This section will illustrate the continuation of fear and persecution, in order to implicate the country of origin because of its failure to provide protection to its nationals.

In exploring the cause-effect factor, Goodwin-Gill suggests that 'Cause and effect are yet more indirect where the government of the country of origin cannot be immediately implicated' and he cites the example of refugees who 'fled mob violence or the activities of so-called death squads'.³⁷ Following Goodwin-Gill's logic, the Biharis may be viewed as refugees escaping organized violence. What needs to be proved is that the provincial government in East Pakistan was directly implicated and responsible for organizing and orchestrating the persecution, eventually leading to the flight of the Biharis and hence their claim to refugee status. Even after the independence of Bangladesh, the new government of Mujibur Rahman failed to stop the violence against the minority community of Biharis.

Although only a few Biharis had joined the East Pakistan Civil Armed Forces (EPCAF), forces raised by the Pakistani authorities as *Razakars* and *Al-Shams*, the mass murder of the Bihari refugees by Bengali nationalists continued unabated. Biharis were 'taken blind-folded in broad daylight to be executed by locally organised firing squads, on flimsy charges of collaboration with the Pakistanis and [the] killing of Bengalis during the Liberation War'.³⁸ Several thousand Biharis were arrested as alleged collaborators, taken to prison and disappeared. The largely chauvinistic press of the period fuelled a genocide that was perpetrated on a large number of Biharis families who had not committed any political crime. Government speeches castigating troublemakers and lawless elements were soon interpreted by extremist nationalists to suggest that all the Biharis were collectively guilty. In fact, the complicity of the authorities in the gruesome extermination of Biharis refugees in Bangladesh is amply

³⁶ See Goodwin-Gill, *Refugee*, 49.

³⁷ *Ibid.*, 71-2.

³⁸ Hashmi, above n. 1, 19.

evidenced by the actions of a guerrilla leader³⁹ who killed several Biharis in a Dhaka stadium, 'an act which was seen widely on television and in the world's press, but for which he has never been tried'.⁴⁰

As long as the Indian Army remained in Bangladesh, they protected the Biharis in the refugee camps.⁴¹ But with the departure of the Indian Army with most of the West Pakistani civilian and Prisoners-of-War, the persecution of the Biharis turned into a generalized massacre. Instead of being a safe haven, these camps became the target of attack. Intermittently, water and power were cut, but the Biharis refugees were terrified to move in search of food or work. Visits to some refugee camps in 1973 led to the following observation:

Perhaps no other class of people in the world today (are) as ruined, economically and socially, as smitten and smashed up as the community of the former Indian refugees in Bangladesh who are known here by the general term Bihari ... Today in Bangladesh, to be a Bihari is the worst crime ... Thousands have been discharged from service on the ground of 'long absence without leave'. But their salaries and funds have not yet been paid ... Many persons rejoined duty on the strength of 'clearance chits' given by Awami League MPs. But they did not return; even their bodies remained untraced.⁴²

While the killings continued with government connivance or local initiative, many of the Biharis houses were occupied by Awami League sympathizers. In order to legitimize their illegal occupation, properties were decorated with League banners, and the majority of Biharis were forced to sign documents to facilitate the transfer of ownership of houses, shops and factories.⁴³

The absence of State security in all Bihari camps resulted in assaults, looting, rapes, evictions, kidnappings and killings. Most of the attacks were perpetrated by members of the *Mukti Bahini* aimed at providing extra-judicial justice. Bearing the label of a 'collaborator' was heavy for the Biharis, because it meant imprisonment without proof of their having collaborated with the Pakistan authorities in the killings of Bengalis. It meant systematic harassment at the hands of the police, often leading to widespread torture.⁴⁴ It needs to be recalled that Mujibur Rahman had pledged the safety and security of the Biharis as his personal responsibility.⁴⁵ Even though food rations were reported inadequate,⁴⁶ and further reports

³⁹ 'Tiger' Kader Siddiqui was granted general amnesty for his political crimes by Mujibur Rahman.

⁴⁰ Minority Rights Group, above n. 21, 9.

⁴¹ Report, Friends of Bangladesh Conciliation Mission, London (27 April–23 May 1972) 7.

⁴² Chatterjee, Basant, above n. 10, 102–13.

⁴³ See Report, Friends of Bangladesh Conciliation Mission, above n. 41, 11. This has been further corroborated in the interviews conducted in the Bihari camps.

⁴⁴ *Ibid.*, 8–12.

⁴⁵ *The Times*, 11 May 1972.

⁴⁶ *The Times*, 2 May 1972.

Table 3:
Situation Report of Bihari Refugee Camps in Bangladesh, 1972

<i>Districts of Bangladesh</i>	<i>Number of Biharis</i>
Dhaka — Outskirts	278,500
Dhaka — Mirpur	150,000
Dhaka — Mohammadpur	95,000
Dhaka — Adamjee	16,000
Dhaka — Isphani	3,000
Dhaka — Murapara	9,500
Saidpur	275,000
Rangpur	7,000
Chittagong	60,000
Khulna	60,000
Ishurdi	30,000
Bogra	14,000
Rajshahi	4,500
Mymensingh	3,100
Comilla	1,200
Sylhet	1,000
Jessore	700
Dinajpur	180
Total	1,008,680

Source: Compiled from statistics provided in MRG, *The Biharis in Bangladesh*, Report 11, 4th ed., London (1982)

of the government preventing ICRC access to Bihari camps,⁴⁷ the fear of renewed persecution forced Biharis to leave their homes, which were taken over by Bengalis at the point of a gun.⁴⁸ This organized persecution resulted in a near total loss of the property of the Bihari refugees, and by the middle of 1972 they were completely domiciled in various camps.⁴⁹ See Table 3.

2.1.4 Acquisition of property for reasons of race, nationality and membership of a particular social group

The orchestrated persecution against the Biharis continued because of reasons of race, nationality and membership of a particular social group. Persecution of the Biharis continued because of their ethnic origin and

⁴⁷ *The Daily Telegraph*, 14 Mar. 1972.

⁴⁸ *The Observer*, 16 Apr. 1972.

⁴⁹ Ben Whitaker wrote, the '... psychological despair (is) developing in the Bihari ghettos (read refugee camps) ... the Biharis do not have the courage to venture outside (the camps), even to contact the authorities'. See *The Observer*, 14 May 1972.

their insistence on retaining their Pakistani nationality, thus constituting persecution for reasons of race and nationality. However, the persecution of the Biharis was aggravated due to their membership of a particular social group.

While the *travaux préparatoires* of the 1951 Convention do little to explain social group as a category, paragraph 78 of the UNHCR *Handbook* provides the following:

Membership of a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the government or because the political outlook . . . is . . . an obstacle to the Government's policies.

Continued persecution led to the abandonment of Bihari properties. In order to escape, Biharis were coerced into the refugee camps or left Bangladesh altogether. As a result of shared values, background, ethnic and linguistic origins and 'political outlook', the Biharis were targeted by government forces and their properties confiscated. In order to make arrangements for the administration and management of such properties, Bangladesh promulgated the Acting President's Order I of 1972, followed by the Bangladesh Abandoned Property (Control, Management and Disposal) Order 1972.⁵⁰ The order provided for the acquisition and control of properties of certain persons who were either (a) not present in Bangladesh, or (b) who [had] ceased to occupy or manage their properties, or (c) who [were] *alien enemies*. It was concluded that such property would include any property owned by any person who [was] a citizen of a State which was at war with or engaged in military operations against Bangladesh.⁵¹ Since Biharis were citizens of Pakistan, the law allowed for the acquisition by the State of their properties.

According to the above order, Pakistani nationals could not recover or release their properties, since the law provided no statutory provisions in this regard. In addition, the term 'alien friends' was employed to counter the provision that did not allow Pakistanis to recover properties by filing suits under section 83 of the Civil Procedure Code, while in fact there was no bar on 'alien friends' filing suit under section 83. The procedural law disguised and took away provisions by employing confusing terminology. In reality, however, 'alien friends' were technically treated as 'alien enemies', in spite of provisions in law which entitled resident non-citizens to enjoy the protection of the law and be treated in accordance with the law.

Armed with the legal right to administer, manage and dispose of the 'abandoned' properties, the Presidential Order was an executive decree ostensibly to protect the properties to be acquired illegally. However, the

⁵⁰ Also referred to as Presidential Order 16 of 1972.

⁵¹ *Ibid.*, s. 2(1)(i).

Acting President's Order I allowed the government to take over industrial and commercial concerns whose owners, directors and managers 'were not available',⁵² further empowering governmental officials 'to operate bank accounts of the owners, directors and managers'.⁵³

This first step in the acquisition of properties of Bihari refugees was further cemented by the President's Order 16. The vaguely defined 'abandoned' property referred to in the Order was sought to be disposed through government appointed administrators,⁵⁴ in the persons of Deputy Commissioners and Sub-Divisional Magistrates.⁵⁵ In respect of the said Order, many bona fide citizens of the country living within Bangladesh were classified 'alien enemies', and their properties were expropriated. In defending the rights of some citizens, Ahmed stated that the Presidential Order 16 gave 'the government extraordinary powers with regard to properties not only of Pakistanis (including the majority Biharis) but also of its own citizens'.⁵⁶ Also, section 15(2) of the Order provided that a person might revoke the categorization of the property as abandoned, within three months of the date of the commencement of the Order. Ahmed dismissed the applicability of this provision on the ground that the right of *citizens* to complain was taken away as the Rules came much later than three months after the date of commencement. However, while citizens were having to make their cases against unfair and putatively illegal statutory provisions, Bihari refugees in the camps could seek no legal recourse whatsoever.⁵⁷

The principle of vested or acquired rights supports the principle that a change of sovereignty should not affect the private rights of individuals. The acquired rights principle was qualified by O'Connell, who stated that 'the principle of respect for acquired rights in international law is no more than a principle and change of sovereignty should not touch

⁵² See s. 2(1), Bangladesh (Taking Over of Control and Management of Industrial and Commercial Concerns) Order, 1972, also referred as Acting President's Order I, 1972, in Rakshit, M.K., *The Law of Abandoned Properties in Bangladesh*, SR Rakshit Publisher, Chittagong (1994) 18–19.

⁵³ *Ibid.*, s. 2(2).

⁵⁴ Hashmi, above n. 1, 22.

⁵⁵ The first reference to these officials is stated in s. 7(1) of the Bangladesh (Taking Over of Control and Management of Industrial and Commercial Concerns) Order, 1972. See Rakshit, above n. 52, 25–6.

⁵⁶ Ahmed, Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman*, Dhaka (1991) 16–19. See text of the Order in Rakshit, above n. 52, 23–44.

⁵⁷ As an example, the case of Mr Murad Ali Qureshi deems attention. Qureshi was employed by the Central India Customs and Excise Department in Calcutta. In 1947 he opted for Pakistan and was transferred to East Pakistan. In 1971, while he was the Assistant Director, Customs Intelligence and Investigation, his house in Chittagong was declared abandoned and allotted to a Bengali. The assets were forcibly removed and he was forced to go on unpaid leave. His failure at judicial recourse in Bangladesh led him successfully to seek repatriation to Pakistan. Correspondence of (a) Abdul Hamid Ghazi, First Secretary, National Affairs, Overseas Pakistanis and Prisons Division, Government of Pakistan, FS/OP/7503, 25 Feb. 1975, (b) ICRC Delegation in Pakistan, 10 Mar. 1975, (c) Anne Marie Testut, ICRC Delegate, Bangladesh, Case No.B/14661, 2 Apr. 1975.

the interests of individuals more than is necessary'. He further stated that the alteration and cancellation of acquired rights by successor States must comply with the minimum standards of international law.⁵⁸ It is now amply evident that the Bangladeshi confiscation and illegal acquisition of the properties of Biharis has fallen well short of accepted international legal norms and procedures.

As an interim measure, Bangladesh adopted the Presidential Order 149 in 1972 which allowed for the temporary provision of citizenship.⁵⁹ This Order was part of Bangladesh's adoption of the so called 'zero option' solution,⁶⁰ whereby Rahman offered the Biharis Bangladeshi citizenship. Refusing to submit to the new sovereign through the acquisition of a new nationality, the Bihari community declined. This was the backdrop to the large scale persecution of the Bihari community by loyalists of the Mukti Bahini, as a result of the post-independent 'Bengalisation' of Bangladesh by Rahman.⁶¹

According to section 2 of the Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972 which required the surrender of any abandoned property in possession of any person, the Biharis had to surrender their properties, since they were technically citizens of Pakistan, and according to the definition of abandoned properties were still 'citizen(s) of a State after the 25th day of March, 1971 ... at war ... against Bangladesh'.⁶² Even the properties of the Biharis who had *not* opted for repatriation to Pakistan were taken over by the advantaged political elite. Leaders of the ruling party⁶³ and officers under patronage took full advantage of the government order to deprive the Biharis of

⁵⁸ See O'Connell, D.P., *International Law*, 2nd ed., 1970, 377-81, 388-9; *State Succession*, 2nd ed., chs. 6, 10.

⁵⁹ The citizenship laws were in force as under the Bangladesh Citizenship (Temporary Provisions) Rules in 1978. See Rakshit, above n. 52, 140.

⁶⁰ The 'zero option' solution was adopted, in general, by States that consist of a majority of their own ethno-national group, under which citizenship is granted to all people living in the republic either at the time of independence or at the moment the new nationality or citizenship law was passed. This conception has been discussed, among others, in Henckaerts, Jean-Marie, *Mass Expulsion in Modern International Law and Practice*, Martinus Nijhoff Publishers, The Hague/Boston/London (1995) 92.

⁶¹ See *The Economist*, 13 May 1972. Further, it was argued by Sunanda Datta-Ray, '[a]ssimilation (of Biharis) with the aggressively Bengali culture of Bangladesh — Bengali has been declared the language for schools, courts and Government offices — is out of question. Even Indians from West Bengal wince at the militancy of Bengali chauvinism in the East (ie Bangladesh)'. See *The Observer*, 12 Mar. 1972.

⁶² S. 2(1)(i), The Bangladesh (Taking Over of Control and Management of Industrial and Commercial Concerns) Order, 1972.

⁶³ Prominent were Korban Ali, Shah Moazzem and nephew of Mujibur Rahman, Sheikh Fazlul Haq Moni. See Chatterjee, above n. 10, 102-13.

their properties, and 'the result was chaos, corruption, [looting] and plunder',⁶⁴ although Bangladeshi official sources tried to dismiss it.⁶⁵

2.2 Denationalization of Biharis by Pakistan

Pakistan helped perpetrate the persecution of the Biharis under Bangladeshi rule by the denial of their effective nationality. In this context, the presumptions and policy rules against the arbitrary deprivation of nationality merit attention. It is fairly well established in customary international law that no one shall be arbitrarily deprived of their nationality, and if necessary, the deprivation must be prescribed by law.

Wilful deprivation of nationality, in particular mass denationalization, is inconsistent with the international obligations of States. Equally, denationalization for penal or political reasons is inconsistent with the notion of the human being as a person in law.⁶⁶ Weis declared 'deprivation of nationality, leading to denationalization, to be illegal . . . (and) [i]f the deprivation is part and parcel of a breach of an international duty then the act of deprivation will be illegal'.⁶⁷ Further, deprivation on the grounds of a policy of racial inequality or persecution is contrary to international law and elementary principles of human justice. The act of denationalization may not *per se* have delictual consequences but it is probable that it would be in breach of the provisions of the 1966 International Covenant on Civil and Political Rights.⁶⁸ Further, the deprivation is not entitled to recognition by other international actors, because it disregards the doctrine of effective link, and represents an attempt to avoid the responsibilities of territorial sovereignty and statehood.

The standards of non-arbitrariness in the deprivation of nationality provide for the following: (1) deprivation of nationality prescribed by law after full legal proceedings involving review and appeal; (2) deprivation not leading to statelessness; (3) deprivation acceptable if nationality secured by fraud; or (4) deprivation as a result of the national engaging in acts posing serious threats to national security.

Within international legal norms, post-1971 Pakistan legislated categories of Biharis who would qualify for repatriation. The majority of the Biharis were excluded due to the restrictive acceptance for return

⁶⁴ Ahmed, Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman*, Dhaka (1991) 14–16.

⁶⁵ The Bangladesh High Commissioner to the United Kingdom stated, '... I have on the authority of my Government to say that no such killing has taken place anywhere in Bangladesh'. See Letter to the Editor by Syed Abdus Sultan, *The Times*, London, 12 May 1972.

⁶⁶ Weis, P., *Nationality and Statelessness in International Law*, 2nd ed., 1979, 127.

⁶⁷ *Ibid.*, 127–31. However, if the deprivation is not a part of a delictual act but merely involves denationalization of groups of citizens domiciled within the frontiers of a State, who lack any other links, then there is no delict.

⁶⁸ Cf. Brownlie, I., 'The Relations of Nationality in Public International Law', 39 *BYIL* 284, 337 (1963); art. 1(2), CSR51; art. 9, 1961 Convention on the Reduction of Statelessness.

criteria set by Pakistan. When Bangladesh emerged as an independent nation in December 1971, it was host to more than a million Bihari refugees.⁶⁹ Although government reports indicate that 600,000 Biharis accepted Bangladesh citizenship, there were 539,669 who registered with the ICRC in order to return to their country of nationality.⁷⁰ While the ICRC estimated that 60 per cent wished to go to Pakistan, Biharis themselves stated that 95 per cent wanted to go to Pakistan and 5 per cent to India.⁷¹ Since the majority had suffered widespread persecution or still perceived considerable threat, they had all chosen to leave Bangladesh for Pakistan.⁷²

The first political step in formulating categories of 'non-Bengalis' to be accepted in Pakistan began with the recognition of Bangladesh as an independent State. This was primarily because President Bhutto of Pakistan needed to negotiate the return of 93,000 POWs held captive in Bangladesh. However, he was equally anxious to see that the one million Biharis did not move to Pakistan.⁷³ Although Bhutto spoke against the proposed Bangladeshi war crimes trial of Pakistanis,⁷⁴ he was unwilling to admit any sizeable number of Bihari refugees into Pakistan.⁷⁵ Further, he was agreeable to admit some Biharis, but ruled out mass return to Pakistan.⁷⁶

Pakistan agreed by the New Delhi Agreement of 28 August 1973 to transfer a substantial number of 'non-Bengalis' in Bangladesh who had opted for repatriation to Pakistan, in exchange for Bengalis in Pakistan and the return of POWs.⁷⁷ Using the ICRC as the route for all applications for repatriation from Biharis to the Government of Pakistan,⁷⁸ the ICRC made it clear at the time that '[r]egistration with the ICRC does not give a right to repatriation. The final acceptance . . . lies with (the) Pakistan and Bangladesh governments'.⁷⁹ Pakistan began issuing clearances in

⁶⁹ See above, Table 3.

⁷⁰ *Stranded Pakistanis in Bangladesh*, Ministry of Relief and Rehabilitation, Government of the People's Republic of Bangladesh (1982) 3. However, interviews with a wide cross-section of the Bihari refugees prove that the governmental figures in relation to acceptance of Bangladeshi citizenship were grossly exaggerated.

⁷¹ Minority Rights Group, above n. 21, 13.

⁷² The persistent demand to repatriate to Pakistan made in 1972 is still held by Bihari refugees. This is corroborated by interviews conducted in 1996–97.

⁷³ *The Daily Telegraph*, 18 Feb. 1972; *The Times*, 18 May 1972.

⁷⁴ *The Observer*, 14 May 1972. However, Bangladesh did not proceed with the trials as an act of clemency. See *Bangladesh-Pakistan-India Agreement on the Repatriation of POWs and Civilian Internees*, 13 *ILM* (1974) 501, para. 15.

⁷⁵ *The Economist*, 13 May 1972.

⁷⁶ *The Guardian*, 11 May 1972.

⁷⁷ 'Bangladesh-Pakistan-India Agreement on the Repatriation of POWs and Civilian Internees', 13 *ILM* (1974) 501.

⁷⁸ See Office Memorandum by M. Aslam Tariq, No.31/78-Rep-I, Cabinet Division, Government of Pakistan, Rawalpindi, 26 Aug. 1978.

⁷⁹ As quoted from the application receipt retained by Mr Shakoor, Ref No MD-10461, Geneva Camp, Mohammedpur, Dhaka.

favour of those 'non-Bengalis' who were either (i) domiciled in former West Pakistan, (ii) were employees of the Central Government and their families or (iii) were members of divided families, irrespective of their original domicile. Pakistan reiterated that all those who fell under the first three categories would be received by Pakistan without any limit as to members.⁸⁰ In respect of persons whose applications had been rejected, Pakistan agreed, upon request, to provide reasons why any particular case was rejected. Any aggrieved applicant could, at any time, seek a review of his application provided he was able to supply new facts to support his contention that he qualified in one of the three categories. The claims of such persons would not be time bound. In the event of a review, it was decided that Pakistan and Bangladesh would resolve it by mutual consultation.⁸¹

However, in practice, denationalization through non-adherence to the established categories was effected since the majority remain. The review of rejected applicants in the light of the reinterpretation of the definitions of 'central government employees and divided families' merit fresh legal assessment.

First, all railway employees should have been included within the first category, since the service tenure and conditions of these employees remained the same. Not to accept railway employees as central government staff was a violation by Pakistan of its own category. Secondly, it can be argued that the category of divided family applied by Pakistan was unilaterally determined and was more restrictive than that identified by ICRC in their letter requesting options regarding repatriation. It is estimated that 75 per cent of Bihari families were separated because of the restrictive application of the definition on divided families, since grand-parents, parents, unmarried siblings were not considered as part of the same family for the issuance of clearance documents.⁸² Bangladesh has asserted the need for the acceptance of a broader and Islamic definition of the family, since the present definition is too narrow and restrictive, based as it is on the western concept of the family.⁸³ This argument upholds family reunification as one of the fundamental provisions of refugee law and central to the most appropriate durable solution, repatriation.

Thirdly, it had been agreed between Pakistan and Bangladesh that the antecedents of the persons who returned to Pakistan as hardship cases would

⁸⁰ *Bangladesh-Pakistan-India Agreement*, above n. 77, para. 12.

⁸¹ *Ibid.*

⁸² This was further emphasized by Nasim Khan. See 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 Dec. 1982), Annexures III.

⁸³ The term family was defined to include *only* the husband, wife and children under 18. See Proceeding Report, *International Conference*, above n. 82, Annexures IV; Salahuddin, M, *Citizens of Utopia*, Impact International, 25 July-7 August 1980.

be examined. If it were to be established that they fell within the other two categories, then additional hardship cases would be included. At the outset, the definitional and numeric limits of the hardship cases caused a legal anomaly, since an explanation is required as to why Pakistan limited the number to 25,000. In reality, the hardship cases included Biharis who were within the other two categories, and were not victims of war, orphans or disabled persons.⁸⁴ Over the years since, Pakistan has failed to give a breakdown of the number of persons who were listed under all categories, as well as the vacancies in the hardship category.

The denationalization of Biharis by Pakistan is an abuse of human rights under international law through denial of their duty to admit nationals, thereby imposing a burden on the State of residence.

2.3 International status of Biharis as *de facto* stateless refugees

The denationalization of Biharis by Pakistan effectively rendered them stateless refugees. While objective proof to support the claim of Biharis as convention refugees was earlier provided beyond reasonable doubt, this section will consider their eligibility as *de facto* stateless refugees, in accordance with article 1A(2) CSR51.

The issue of statelessness received preliminary attention in 1947 when the Commission on Human Rights requested the UN to give consideration to the legal status of persons who did not enjoy the protection of any government, in particular pending the acquisition of nationality, as regards their legal and social protection. In response, the Secretary-General, on a request by the Economic and Social Council, undertook a study⁸⁵ in consultation with the International Refugee Organisation (IRO), on refugees who were *de jure* or *de facto* stateless. The study divided the legal analysis into issues of status, and of the elimination of statelessness in relation to refugees.⁸⁶ The international codification of elimination and reduction was taken up by the International Law Commission.

In response to the Secretary-General's report, the Economic and Social Council appointed an *Ad hoc* Committee for both refugees and stateless persons; the position of stateless persons was said to be the same as that of refugees, as both were lacking the protection and assistance of a State.⁸⁷ A combination of factors, including the impending liquidation of the IRO

⁸⁴ Proceeding Report, *International Conference*, above n. 82, 5.

⁸⁵ *A Study on Statelessness*, UN doc. E/1113 and Add.1(1949).

⁸⁶ Batchelor, Carol, 'Stateless Persons: Some Gaps in International Protection', 7 *IJRL* 241 (1995). It has been argued that this division was in fact implicit in the ECOSOC res, 116D(VI), 1–2 Mar. 1948, which requested the Secretary-General (a) to undertake a study of the existing situation in relation to the protection of stateless persons and (b) to undertake a study of national legislation and international agreements and conventions relevant to statelessness. It is clearly evidenced that (a) dealt with the status of refugees and (b) with the elimination and reduction.

⁸⁷ Batchelor, *Stateless Persons*, above n. 86, 243.

and the need for a new organization, led the *Ad hoc* Committee to observe, In view of the urgency of the refugee problem and the responsibility of the United Nations in this field, the Committee decided to address itself to the problem of refugees, whether stateless or not . . .⁸⁸

For reasons of time, lack of authority, the creation of an independent instrument, and the fact that the Convention relating to the Status of Stateless Persons was not in place, although the ILC seemed in favour of it, the ILC rejected the suggestion of the Special Rapporteur that *de facto* stateless persons should be assimilated with *de jure* stateless persons,⁸⁹ so as to receive the status of protected persons and the right to naturalization should they renounce their ineffective nationality. In fact, persons who are *de jure* nationals of a State, but who are without its effective protection, can be categorized as *de facto* stateless refugees, when statelessness is the result of persecution in the State of origin.⁹⁰ It can be concluded that Hudson's *de facto* unprotected persons are, in reality, *de facto* stateless refugees.

More importantly in this connection, article 1A(2) enumerates four requisites for a person to be regarded as a refugee under the Convention; he or she (1) must have a well-founded fear of persecution; (2) the persecution in question must be based on his or her race, religion, nationality, membership of a particular social group or political opinion; (3) he or she must be outside his country of nationality, or if a stateless person, outside his or her country of former habitual residence; and (4) must be unable or, owing to fear of persecution, unwilling to avail himself or herself of the protection of the country of nationality. Alternatively, if he is a stateless person, he must be unable or unwilling to return to his country of former habitual residence.⁹¹

This article distinguishes refugees with a nationality and refugees without a nationality. For the former, supported by sub-clause 5, the

⁸⁸ *Report of the Ad hoc Committee on Statelessness and Related Problems*, UN doc. E/1618 and Corr.1, 17 Feb. 1950 at 120.

⁸⁹ *Report of the International Law Commission*, A/CN.4/88 (1954) 8. The Special Rapporteur Manley Hudson had commented that '[p]urely formal solutions . . . might reduce the number of stateless persons but not the number of unprotected persons. This might lead to a shifting from statelessness *de jure* to statelessness *de facto*'. He further had stated that the 'so-called stateless persons *de facto* are nationals of a State who are outside its territory and devoid of its protection; and to call this group *de facto* unprotected persons, in distinction to *de jure* unprotected persons ie stateless persons'. See Hudson, Manley, *Report on Nationality, Including Statelessness*, International Law Commission, UN doc. A/CN.4/50 (21 Feb. 1952) 49.

⁹⁰ This argument is further corroborated by Goodwin-Gill, who states 'Refugee status . . . might appear determinable in the light of the situation prevailing in the country of origin as the "country of former habitual residence"'.² He dismisses Hathaway by stating in a footnote that '[t]here is no historical, textual or commonsensical basis for the view that because a stateless person is not "returnable" to his or her country of former habitual residence, so he or she is not in danger of being *refouled* and therefore not a refugee': see Goodwin-Gill, *Refugee*, 42.

⁹¹ Stenberg, Gunnell, *Non-Expulsion and Non-Refoulement*, Iustus Forlag, Uppsala (1990) 60.

relevant criterion is that they are unable or unwilling to avail themselves of the protection of their State of nationality, while the latter are unable or unwilling to return to their State of former residence.⁹² Alongside the inability to return to their State of former residence, stateless refugees need to demonstrate a well-founded fear of persecution as a result of the deprivation of nationality as the principle reason in support of their claim to refugee status.

Though stateless persons and refugees are not identical,⁹³ both refugees and *de facto* stateless persons suffer from the lack of national protection.⁹⁴ After having fled East Pakistan as a result of persecution, Biharis were subjected to denationalization. Although having been deprived of *de jure* nationality, the formal link with Pakistan remains, a link which commenced after the partition of India in 1947, when the religious community of Bihari Muslims emigrated to the Eastern province of Pakistan. The Biharis' move to Pakistan was a direct result of their intention to make Pakistan their country of habitual residence. As formerly observed and corroborated by Table 2, in the years between 1947 and 1971, the Bihari community became well-established in Pakistan in small scale industry, trade and commerce. Since then, and for all purposes under international law, Pakistan constitutes their country of 'former habitual residence'.

While denationalization in the presence of this link provides a 'compelling testimony of denial of protection' by the country of origin,⁹⁵ Goodwin-Gill emphasizes that 'the expulsion of an unwanted minority could not justifiably be predicated upon the municipal act of deprivation of citizenship',⁹⁶ since the grant of nationality is no longer the exclusive prerogative of States. Hence, the denial of protection due to denationalization strengthens the Biharis' claim for refugee status.⁹⁷ Soon after statehood, Bangladesh was

⁹² Goodwin-Gill, *Refugee*, 41.

⁹³ Goodwin-Gill, *Refugee*, 42. He had earlier noted: 'Stateless persons have not been historically distinguished. Refugees and stateless persons [w]alked hand in hand, and after the First World War, their numbers and condition were almost coterminous . . . their paths diverged, with refugees being identified by reference to the reasons of flight, and their statelessness, if it existed, (was) seen as incidental to the primary cause', Goodwin-Gill, G.S., 'The Rights of Refugees and Stateless Persons: Problems of Stateless Persons and the Need for International Measures of Protection', in Saksena, K.P., ed., *Human Rights Perspectives and Challenges (in 1990 and Beyond)*, Lancer Books, New Delhi (1994) 389-90.

⁹⁴ Batchelor, *Stateless Persons*, above n. 86, 239.

⁹⁵ Goodwin-Gill, *Refugee*, 42.

⁹⁶ *Ibid.* Also Fisher Williams, J., 'Denationalization', 8 *BYIL* (1927) 45.

⁹⁷ Art. 27 ICCPR66 provides that '[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'. The Bihari can be termed as a national minority of Pakistan, based on their ethnic origin and difference. With regard to refugee status, and drawing on art. 27, the persecution by Pakistan of her national minority (that is, Biharis) occurred by the denial to the minority's right to return to their country of habitual residence. It is obvious that the State practice of the denial of nationality and the resultant persecution, would qualify the Biharis for refugee status on reasons, apart from others, of nationality. See Grahl-Madsen, A., *The Status of Refugees in International Law*, vol.1, (1966) 218-9.

hostile to the Biharis because of their alleged political opinions and cultural, linguistic and ethnic affiliations with Pakistan.⁹⁸ Viewed as patriotic Pakistan nationals by the Bangladeshis, the Biharis were victims of persecution in Bangladesh and were not allowed to return to Pakistan their country of habitual residence. Therefore, it is argued that the Biharis qualify as both refugees under the 1951 Convention and *de facto* stateless refugees as they are 'unable . . . to return to their State of former residence',⁹⁹ as a result of their denationalization by Pakistan.¹⁰⁰

If persons became stateless for political reasons, they should be treated as refugees.¹⁰¹ The obviousness of this logic was clarified by the Convention Relating to the Status of Stateless Persons of 28 September 1954 which sought a definition that did not overlap with the *de facto* stateless of the CSR51. The assumption was that *de facto* stateless persons are refugees,¹⁰² and contracting States might object to acceptance of obligations on behalf of both *de facto* and *de jure* stateless persons.¹⁰³

The inability of a national to gain protection can range from a 'conscious, premeditated denial of protection to factual inability on the part of the country of nationality to accord it. The reasons for the inability are . . . immaterial, but refusal to accord protection may be an indication of a threat to protection'.¹⁰⁴ The general failure of Pakistan to accord protection to Biharis between December 1970 and December 1971 evidences denial of protection for over a year and the process of denationalization over the last 28 years, upholds arguments in support of their status as *de facto* stateless refugees in international law.

⁹⁸ Linguistic minorities have been studied, among others, in Capotorti, F., *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UN doc. E/CN.4/Sub.2/384/Rev.1 (1978); *Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*: UN doc. E/CN.4/1994/72 (13 Dec. 1993).

⁹⁹ Goodwin-Gill, *Refugee*, 41. In addition, the *travaux préparatoires* of the 1951 Convention provide further evidence in favour of the Biharis as *de facto* stateless refugees. The *Ad Hoc* Committee agreed that 'unable', hence the inability, referred to stateless refugees who possessed a nationality but are refused passports or other protection by their governments. See Report of the *Ad Hoc* Committee, UN doc. E/1618 at 39.

¹⁰⁰ It has been argued that persecution for reasons of nationality is also understood to include persecution because of lack of nationality, resulting in statelessness. See Grahl-Madsen, *Status of Refugees*, 219.

¹⁰¹ However, if they renounced their nationality for personal convenience, they would not be entitled to special protection. See UN doc. E/CONF.17/SR.10, 11.

¹⁰² Brownlie proposes that '... large numbers of refugees may retain a *de jure* nationality for which they have no use and so are referred to as "de facto stateless".' See Brownlie, Ian, *Principles of Public International Law*, (5th ed., 1999) 560.

¹⁰³ Batchelor, *Stateless Persons*, above n. 86, 248.

¹⁰⁴ Stenberg, *Non-Expulsion and Non-Refoulement*, above n. 91, 76.