STATELESSNESS, HUMAN RIGHTS AND GENDER

Irregular Migrant Workers from Burma in Thailand

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The *Refugees and Human Rights* Series aims to meet the increasing need for literature which probes the nature and causes of forced migration, the modalities and procedures employed when refugees present themselves, and the manner in which the human rights of refugees are, or should be, promoted and protected.

STATELESSNESS, HUMAN RIGHTS AND GENDER

Irregular Migrant Workers from Burma in Thailand

By

Tang Lay Lee

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To

the stateless women, children and men

in our brave new world

FOREWORD

It is indeed time for a new look at the problem of statelessness. Up to now, lawyers and political scientists have tended to view 'being without a state' or having no nationality as the regrettable by-product of the otherwise generally well-ordered society of nations. In this world, each State is competent to decide who are its citizen members, and yet none is obliged to ensure that no one falls between the gaps when national laws just do not mesh.

Over the sixty years or since the founding of the United Nations, international discourse has failed to release statelessness from this traditional pattern of international law analysis. So the stateless person has come to be seen as an anomaly, someone with no definite legal status and thus of lesser 'social value'. The answer to this untidy situation was long considered to lie in providing for the status of stateless person, while adopting a raft of technical measures aimed, ever hopefully, at reducing the incidence of statelessness through the adoption of comprehensive and enlightened legislation.

Tang Lay Lee's pioneering work introduces us to a new form of statelessness, and gives us a first sense of its breadth and scope. She demonstrates how the traditional terminology of statelessness is often confusing, talking sometimes of de jure, and sometimes of de facto statelessness, but that the central conceptual issue remains that of being without protection. This in turn leads to multiple disadvantages for the new stateless, such as restrictions on freedom of movement, uncertainty and apprehension when dealing with the authorities, and the persistent threat and reality of exploitation, particularly in the labour market. Her approach to this major contemporary problem has a solid historical base, but also shows clearly the limits of the legal theoretical model when confronted with the reality of irregular migration.

It is an inescapable fact of modern life, and a consequence of an increasingly globalized economy, that many people do now and will live and work outside the country of their birth; indeed, there is a constancy in the percentage of the world's population B between 2.3% and 2.9% B which can be expected to move. It is equally a fact of life that much of that migration will be irregular, and that it will be driven by a demand for services in receiving countries which the local workforce is unable or unwilling to provide. At the same time, the shadow status of today's irregular migrants opens the way to discrimination and is as much a barrier to protection and the full enjoyment of human rights, as any formal or legal statelessness.

As Tang Lay Lee shows, this reality is well illustrated by the situation of irregular migrant workers from Burma in Thailand, and particularly in the case of women and children. The phenomenon, of course, is common to every region, especially

in countries where there is a demand for services and a tacit acceptance of migration to this end. Irregularity, discrimination and exploitation are often tolerated and welcome, because of the supposed ease with which the 'problem' can be repatriated in time of economic downturn or local unrest. Even in the 1940s, there seems to have been an inkling of the fact that the 'primarily legal problem' of stateless persons in fact hid a more complex reality, but that was not what the first generation of international treaties, such as the 1954 Convention relating to the Status of Stateless Persons, were intended to address. It is, however, a substantial challenge for the 21st Century, in which the international community seems reluctant to engage with the rights and the protection of those who are effectively disowned by their countries of origin, and yet barred also from the protection of the community in which they expend their labour.

When confronted with the evidence, States, and even most international organizations, will likely content themselves with formally accepting the existence of this new and regrettable phenomenon, while carefully avoiding doing anything practical and positive about it. For this reason alone, Tang Lay Lee's study and her account of the plight of the unprotected should be read by all whose responsibilities touch on the migrant, whether as advocates, policy makers, or legislators; these are matters of international concern and concerted efforts will be required if the rights proclaimed as universal and inalienable are indeed to be realized.

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PREFACE

This book began in 1999 simply as a thesis for my doctoral degree. It was an extension of my research on statelessness associated with refugees and state succession in the early 1990s. I was keenly aware that the international law of statelessness developed rapidly in response to historic events in the twentieth century. At the beginning of the twenty-first century, it seemed important to me to consider the new directions in which the law of statelessness may develop. The interface between statelessness and migration under international law is a largely unexplored territory. By the time I completed my thesis in early 2003, I had become convinced that this was an area of study with immense potential. Certain developments in international law since then support this view.

In the *2004 General Recommendation No 30*, the Committee on the Elimination of All Forms of Discrimination enjoined states not to discriminate against certain categories of non-citizens on the basis of immigration status.[1] This indicates that the effect of irregular immigration status on human rights protection is beginning to receive attention at the international level. In 2004, the United Nations High Commissioner for Refugees presented the final report of a global survey on statelessness.[2] As the number of stateless persons which runs into the millions continues to increase, an interest in statelessness is resurging. They represent two significant trends which appear to be separate and unrelated. But, are they? Or is there, in fact, a relationship between migration and statelessness?

This book proposes that there is a developing relationship between migration and statelessness. This proposition takes into account the current work of United Nations agencies and international non-governmental organizations on reducing statelessness and protecting stateless persons, including refugees, within the international law framework. The development of international protection for migrant workers, including irregular migrant workers, has also been taken into consideration. The

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[1] UN Doc CERD/C/64/Misc.11/rev.3, CERD Committee, *General Recommendation No 30: Discrimination Against Non-citizens*, 64th sess, 23 February-12 March 2004, Preamble [3]; [2][4].

[2] UNHCR, *Final Report Concerning the Questionnaire Pursuant to the Agenda for Protection* (March 2004). Available on UNHCR website: http://www.unhcr.ch/

efforts of these agencies and organizations are necessary so long as states hold fast to their sovereign powers over citizenship and immigration matters. The focus on statelessness caused by irregular migrant or immigration status is intended to complement their efforts.

The attention on women and children is a vital aspect of the book. I had become interested in the relation between statelessness and migration because of the plight of 'stateless' women trafficked to and detained in host countries, and 'stateless' babies born to migrant workers. Since then, I have widened the scope of my research while still retaining a special focus on women and children. This approach has enabled me to draw on the vibrant development of feminist critiques which has been invaluable in shedding light on statelessness. The focus on women and children is extremely important for another reason. It has helped to identify possible avenues for protection and remedies that have become available at domestic and international levels. In focusing on the weak, it is sometimes possible to discover their hidden strength.

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March 2005

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CHAPTER ONE

STATELESSNESS AND MIGRATION

Despite the optimism of states that statelessness would eventually disappear after the end of the Second World War, statelessness persists and takes shape in different circumstances at the beginning of the new millennium. This calls into question the effectiveness of the *1954 Convention Relating to the Status of Stateless Persons*[1] and the *1961 Convention on the Reduction of Statelessness*.[2] In fact, very few states have ratified these two Conventions. As the agency entrusted by the UN General Assembly to be responsible for them, the United Nations High Commissioner for Refugees has had a very limited role towards stateless persons, especially if they are not refugees.[3]

During the 1990s, the UNHCR focused on the issue of citizenship and statelessness in Europe with the formation of new states after the break up of the former Soviet Union, the former Yugoslavia and the former Czechoslovakia.[4] Concern had also been expressed for other protracted incidences of statelessness in Asia.[5] They include some 240,000 Biharis in camps in Bangladesh[6] and 100,000 Nepali-speaking refugees from Bhutan still in Nepal.[7] In the new European states, the UNHCR appears to have

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[1] 360 UNTS 117 (entered into force 6 June 1960). As of 5 February 2002, there are 54 state parties. ('*1954 Stateless Persons Convention*').

[2] 989 UNTS 175 (entered into force 13 December 1975). As of 5 February 2002, there are 26 state parties. ('*1961 Statelessness Convention*').

[3] See GA Res 3274 (XXIX), 10 December 1974; GA Res 31/36, 30 November 1976; and GA Res 50/152, 5 February 1996 for reasons and terms of appointment of the United Nations High Commissioner for Refugees ('UNHCR') as agency responsible for stateless persons in lieu of establishment of separate organ under the *1961 Statelessness Convention*.

[4] See UNHCR, 'Chapter 6: Statelessness and citizenship' in *The State of the World's Refugees: A Humanitarian Agenda* (1997) 5-9 <http://unhcr.ch/refworld/pub/state/97ch6.htm> (22 March 1999)

[5] Ibid 9-11.

[6] See Sumit Sen, 'Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia-Part 1' (1999) 11 *International Journal of Refugee Law* 625.

[7] Above n 4, 10-11.

been able to reduce statelessness through tempering the effects of nationality laws. The UNHCR has been less successful in Asia. The agency's efforts, however, has been restricted to the prevention of *de jure* statelessness and to the protection of *de jure* stateless refugees. The emerging phenomenon of statelessness associated with irregular migration has received little attention. The effect of the overlap between irregular migration and refugee flows on the protection of stateless persons has also been overlooked. These are the gaps that this book is concerned with.

The overarching argument is that the law of statelessness does not adequately address the legal protection of a number of groups who are stateless because of irregular migrant status. One group of *de jure* and *de facto* stateless persons consists of those who are in states not party to any or all of the international conventions that provide protection specifically to those affected by statelessness. Another group falls through the cracks between the international conventions on stateless persons, refugees and migrant workers. A third group comprises of refugees who survive as irregular migrant workers in states not party to the refugee convention. The predicament of these groups is compounded by the fact that alternative protection granted under other international human rights instruments is inadequate. Nationality and citizenship laws used to exclude stateless persons from protection. Today, migration law plays a crucial role in determining the rights accorded to non-citizens and aliens. Furthermore, women and children are among the most unprotected within these groups of *de jure and de facto* stateless persons.

1. Approach and Methods

Statelessness will be approached, in this book, from the broader perspective of protection rather than the strict legal definition of persons being without nationality. This is neither unusual nor unprecedented. Such an approach contributed to the extension of protection to *de jure stateless* persons and refugees in the last century. The broader approach also introduced the concept of *de facto* or effective statelessness. As state sovereignty over migration matters assumes greater significance at the beginning of this millennium, the protection of people who move irregularly between states will be a critical issue. First, I will identify and acknowledge the specific categories and subcategories of migrants and refugees as they are described or defined under respective international instruments. However, I will then argue that all those who move irregularly, if they are not already legally

stateless, should be considered effectively stateless because they fall outside the current regimes of human rights and diplomatic protection. I will focus on the remedies available to effectively stateless persons under the international instruments. Consequently, state policies and solutions, such as dual nationality or regional membership, and international law concepts, such as the joint responsibility of states, will not be considered as they lie beyond the scope of the analysis.

A number of international human rights instruments will be scrutinized to assess the protection afforded to stateless persons. These international instruments will be discussed in successive chapters to identify, firstly, the gaps in protection under the statelessness and refugee conventions, and secondly, the alternative protection available to emerging groups of stateless persons under the other instruments. I will also review the work of various treaty bodies, organs of the United Nations and international organizations to discern the issues, trends and principles in relation to statelessness, human rights and gender. Comments, observations, conclusions and reports of these bodies and organizations will be cited, referred to and/or discussed at relevant points in the book. Considerable benefit has also been derived from a review of the work of a number of experts in international law, migration studies and feminist critiques. I will highlight their work and their arguments, where appropriate, throughout my analysis of significant aspects of protection of stateless persons, particularly those of women and children.

To test the strengths and limits of my argument regarding protection of stateless persons, particularly those who are effectively stateless, I undertook a study of the situation of statelessness among Burmese irregular migrant workers in Thailand. This involved interviewing a number of them in 1999 and 2000 at various locations in Thailand. This work was complemented by an examination of the citizenship, nationality, immigration and other domestic laws of Burma and Thailand. Both aspects of the study were vital in verifying the relationship between citizenship and migration laws as the key factor behind emerging groups of stateless persons and gender discrimination affecting their protection.

2. TERMINOLOGY

I would like to explain a number of significant terms that will be used in the book. Some of them are already defined under international law or international instruments. Some have one or more definitions or descriptions. Where there is more than one, the other definitions and

descriptions will be highlighted at appropriate points in the discussion. The most important terms, of course, pertain to statelessness. So, a '*de jure*' or 'legally stateless person' is a person who is not considered as a national under the law of any state and a '*de facto*' or 'effectively stateless person' is a person who retains the nationality of his or her state but does not enjoy the protection of such state.[8] Unless the context indicates otherwise, 'stateless persons' refer to both legally and effectively stateless persons and likewise, 'statelessness' includes both legal and effective statelessness. The classical converse of stateless persons and statelessness also requires some explanation. The terms 'citizen', 'citizenship', 'national' and 'nationality' are used synonymously to refer to the legal status of an individual as a member of a particular state, unless indicated otherwise by the context. Accordingly, 'non-citizen' and 'non-national' indicate that such persons are not members of a state under domestic and international law. 'Alien' and 'aliens' are alternative descriptions for those excluded from such membership. A discussion of statelessness invariably includes refugees because of the historical circumstances that highlighted the characteristics stateless persons have in common with refugees. Their proximity is acknowledged in the internationally accepted definition of a refugee. A 'refugee' and a 'stateless refugee' are persons who satisfy the respective criteria under the *1951 Convention Relating to the Status of Refugees*.[9] Thus, a refugee is a person in a host state who is unable or unwilling to seek the protection of his or her state of nationality because he or she has good reasons to fear persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion. A 'stateless refugee' is a person in the host state who does not have a nationality and is unable or unwilling to return to the state of habitual residence because he or she has good reasons to fear persecution on identical grounds. This book is also concerned with another group of people who are not refugees under the *1951 Refugees Convention*. The UNHCR refers to them as 'persons of concern'. A 'person of concern' refers to a person who is assisted by the UNHCR usually in a state that is not a party to the convention on refugees and whose refugee status may or

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[8] I use the definition in art 1(1) of the *1954 Stateless Persons Convention*, above n 1, to denote de jure stateless persons. As for de facto stateless persons, I prefer the broader description in *A Study of Statelessness*, below n 12, 9 instead of the narrower one in the Final Act of the 1954 United Nations Conference on the Status of Stateless Persons, 360 UNTS 117, above n 1, Appendix.

[9] 189 UNTS 137 (entered into force 22 April 1954). As of 30 September 2002, there are 141 state parties. ('*1951 Refugees Convention*').

may not have been determined. The developing relationship between statelessness and migration requires the explanation of terms relating to migration, especially irregular migration. 'Irregular migration' refers to the movement between states of persons who leave, enter and or remain in states without proper authorization or documentation, such as passports or visas. The terms 'migrant worker', 'regular migrant worker' and 'irregular migrant worker' are taken from the respective definitions under the *1990 Convention on the Protection of the Rights of All Migrant Workers and Their Families*.[10] Briefly, a migrant worker is a person who is doing paid work in the host state, a regular migrant worker is such a person who is documented or has the papers that authorize him or her to stay and do such work in the host state, and an irregular migrant worker is a person who is also doing paid work but is undocumented or does not have such papers. The term 'global migrant' is used to describe a migrant who holds a top position either in a transnational corporation or an international financial institution.[11] The term 'liberal migrant' refers to a service worker under an international or regional free trade agreement. A 'transnational migrant' is one who moves or physically crosses borders between states, including a person who is documented or undocumented as well as a refugee.

3. LIMITATIONS

There are a number of limitations. The first limitation is the availability of information, including evidence of state practice and gender statistics of the populations of stateless persons in Thailand. The research is restricted mainly to literature in English because of my language skills and time constraints. Evidence of state practice is largely based on English translations of legislative acts and regulations. Nevertheless, the available English language materials are sufficient for the purpose of this book. In terms of content, the discussion will not explore or develop two issues. First, it will not delve into the relationship between migration law and sex

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[10] GA Res 45/158, 18 December 1990. As of 14 March 2003, there are 21 state parties. ('*1990 Migrant Workers Convention*').

[11] I have borrowed or developed the terms, global migrants, liberal migrants and transnational migrants from Sarah Collinson, 'Globalisation and the Dynamics of International Migration: Implications for the Refugee Regime' (1999) UNHCR Working Papers No 1, 7-9. See discussion in Chapter Three, 75-76.

work as it lies beyond the scope of this book. Indeed the gender implications of sex work deserve to be considered on their own. Secondly, the book will discuss international protection for those fleeing a risk of torture, disappearance or arbitrary execution insofar as it presents as an alternative remedy for emerging groups of effectively stateless persons. In terms of the case study, it must be emphasized that both *de jure* and *de facto* statelessness arise from the interface between citizenship and other domestic laws of Burma and Thailand. Whether the argument applies in other situations of irregular migrant workers would require examination of the relevant domestic laws of the states involved. The immigration laws and refugee policies of Thailand set the parameters of the distinct categories of non-citizens under discussion. It is possible, for example, that the overlapping of refugees, irregular migrant workers and *de jure* stateless ethnic minorities in Thailand may be unique. Be that as it may, the situation of stateless women, children and men in Thailand remains an important issue to understand and to try to remedy.

4. Main Issues and Arguments

There are, essentially, two parts in this book. The first part consists of four chapters, beginning with Chapter Two, and contains the main issues and arguments regarding statelessness, human rights and gender. The second part, continuing from Chapter Six, consists of two chapters and sets out the case study illustrating the issues and arguments in the first part.

In Chapter Two, I explain how state protection was extended to stateless persons in the twentieth century. Prior to that, state protection was reserved for the citizens and nationals of states under domestic and international law. Statelessness was simply the situation where a person did not have the nationality of any state. The issue of protection for stateless persons did not arise. This was because statelessness was regarded as the natural consequence of the implementation of citizenship laws or the conflict of nationality laws. Customary international law principles were concerned with limits on state sovereignty in nationality matters but did not address the issue of protection for stateless persons. At the same time, efforts to reduce statelessness arose out of a concern to avoid a conflict of nationality laws and not primarily to extend protection to stateless persons. All this changed with the massive denationalizations and expulsions in Europe during the first half of the twentieth century. Subsequently, statelessness was finally conceived of as the situation of a person not having the protection of a

state. *De jure* stateless was used to describe those who legally did not have the nationality of any state. *De facto* stateless referred to those who fled or were expelled to other states but retained their nationality yet could no longer count on their state for protection.[12]

Statelessness became associated with refugees during the time of major political upheavals in Europe. In fact the refugee phenomenon contributed to the development of the notion of *de facto* statelessness. Surrogate state protection was extended to both refugees and *de jure* stateless persons through the respective conventions adopted in the aftermath of World War Two: the *1951 Refugees Convention, the 1954 Stateless Persons Convention* and the *1961 Statelessness Convention*. A range of civil, economic and social rights normally reserved for citizens was granted to refugees and *de jure* stateless persons. *De facto* statelessness became little more than a footnote in these conventions on stateless persons and statelessness. Gender discrimination was not prohibited in these conventions. Moreover, few states in Asia and Africa are party to these statelessness conventions.

Recent concern in international law remains focused on the prevention of *de jure* statelessness. However, an impasse persists on the issue of identifying which particular state has such a responsibility under what circumstances. Meanwhile, *de jure* statelessness has surged at times simultaneously with refugees and state successions in states not party to the *1951 Refugees Convention*, the *1954 Stateless Persons Convention* or the *1961 Statelessness Convention*. New forms of *de facto* statelessness have also emerged in relation to episodes of irregular migration.[13] These new forms indicate that effective statelessness may no longer reflect, exclusively, ruptures in the relationship between the individual and the state of nationality. They suggest that the host state may be playing a decisive role. Migration law is defining the new parameters of effective statelessness. These developments raise the question of alternative protection for these groups of non-citizens.

In Chapter Three, I examine whether alternative protection is offered under the *1990 Migrant Workers Convention* as it is the other major international instrument affecting the protection of non-citizens. This is

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[12] See UN Doc E/1112 and UN Doc E/1112/Add.1 or United Nations Department of Social Affairs, *A Study of Statelessness* (1949) 9.

[13] See Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 156, 159, including nn. 4; Committee on Feminism and International Law, *Final Report on Women's Equality and Nationality in International Law*, International Law Association London Conference (2000) 5, for other groups of persons who fall within the description.

particularly relevant for those who are in states not party to the conventions on refugees and stateless persons. Economic migration captured international attention towards the end of the third quarter of the twentieth century. By which time, refugees in Asia and Africa had become prominent in the international sphere. Economic migration exploded within and between regions, generally from less developed states and regions to those more developed. However, not all migrants were welcome. Immigration policies and laws barred the entry of migrants deemed unsuitable. These migrants were characterized as economic migrants and eventually as illegal migrants or immigrants. The International Labour Organization ('*ILO*') instruments, the *1949 ILO Migration for Employment Convention (Revised) No 97*[14] and the *1975 ILO Migrant Workers Convention No 143*[15] regulate and protect regular migrant workers whereas the more recent *1990 Migrant Workers Convention* extends protection to irregular migrant workers. However this United Nations Convention specifically excludes refugees and stateless persons from protection even if they are migrant workers, regular or irregular.

International treaties use the terms, 'irregular' or 'undocumented', to indicate that the migrant workers either entered without documentary proof of permission from the host state or stayed on after the expiry of such documents. The colloquial term 'illegal' is used by governments and in the media. This reflects states' emphasis on the primacy of their powers over immigration matters in the domestic sphere. Whereas, international treaty terminology highlights the human rights of the individuals irrespective of their legal status under domestic law.

Refugees and stateless persons in state parties to the respective conventions for their protection may not be disadvantaged. However, those who fall through the cracks between these and the convention on migrant workers are another contemporary manifestation of statelessness. This could be the case of a legally stateless person who leaves the protection of a state party to the convention and enters another state illegally. Or it could be an irregular migrant worker in a state party who loses citizenship of the state of origin. Clearly, the development of mutually exclusive categories runs counter to this unfolding phenomenon. Drawing on the work of other

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[14] It replaced the *1939 Convention on Migration for Employment No 66*. As of 5 February 2002, there are 42 state parties. (entered into force on 22 January 1952).

[15] As of 5 February 2002, there are 18 state parties. (entered into force on 9 December 1978).

analysts in international law and migration studies, I suggest two reasons for this development. First, this development reflects a reassertion of state sovereignty over human rights in the current context of economic globalization. The rise of non-state actors, transnational corporations and people traffickers and smugglers, propels states to tighten territorial control. Second, this development is maintained by the paradigms of the political refugee and the economic migrant. I consider how the paradigm of the political refugee has been exploited to exclude many more from protection by characterizing them not as potential refugees but as illegal immigrants. Furthermore, the paradigm of the economic migrant appears to be reserved for transnational migrants who have been stigmatized as illegal under the domestic laws of states. The focus on illegal immigrants and irregular migrant workers has further diverted attention from the development of a hierarchy of non-citizens.[16] Global migrants and liberal migrants are at the top of this hierarchy. They enjoy a range of rights, including those pertaining to freedom of movement, which are denied to one group of contemporary stateless persons – irregular migrant workers. It is often difficult to consider the issue of protection for this group because of their illegal status under domestic law.

In Chapter Four, I consider alternative protection for the three groups of stateless persons under the two human rights covenants. The relationship between protection and human rights is a core issue. The hierarchy of non-citizens highlights a gap between protection and human rights. Essentially, unless a right is granted by the state, the duty of the state to protect does not arise. The contemporaneous development of human rights has influenced the extension of protection to non-citizens such as refugees and stateless persons since the middle of the twentieth century. However, not all states are parties to these treaties. In addition, customary international law principles of human rights, which might otherwise pertain where no treaty is applicable, are restricted to those rights concerned with the rights to life and personal liberty. There is no customary right to enter a state that is not one's own. An examination of two distinct and opposite trends further highlights the dilemma of the groups of stateless persons identified in Chapter Three. There is a developing hierarchy of human rights evinced by non-derogable rights during a public emergency and the concept of 'minimum core content' of social, economic and cultural rights. These developments

[16] The term 'non-citizens' is deployed here to highlight the apparent primacy of the domestic concept of 'citizenship' over the international one of 'national'.

indicate that distinctions may be made between citizens and aliens. At the same time, there is an international affirmation of the universality, indivisibility, interdependence and interrelatedness of human rights.[17] This affirmation is accompanied by the identification of specific groups of persons whose rights require protection. I argue that the interdependence and interrelatedness of human rights are particularly relevant to the situation of stateless persons. I also argue that distinctions between citizens and non-citizens hold adverse implications for their protection. These diametrically opposing trends raise questions regarding the application of the principle of non-discrimination under international law.

A number of facts will be highlighted by a review of the principle of non-discrimination under international law. The review focuses on relevant provisions in the major international human rights treaties and comments by the bodies set up under these treaties. For example, the prohibition against racial discrimination does not apply to distinctions between citizens and non-citizens. Also, attempts to apply the principle of non-discrimination to non-citizens, particularly those in an irregular situation, are mostly in the area of social rights. Significantly, the principle of non-discrimination does not include the freedom of movement, particularly the right to enter a state that is not one's own. Revisiting the right to freedom of movement under the respective international instruments, I suggest that the procedural rights pertaining to expulsion are, in fact, an incorporation of the international principle of state powers to expel aliens from their territory. The reports of the Special Rapporteurs on the rights of non-citizens and the freedom of movement indicate that distinctions between categories of non-citizens could translate into discrimination. I suggest that these developments mark the shift from citizenship and nationality status to immigration status as the site of struggle for equality and non-discrimination under international law. This does not mean that citizenship and nationality status are no longer important in terms of statelessness. Rather, it indicates that migration law has an increasing impact on inadequate protection for stateless persons. Furthermore, the difference in the procedural rights, pertaining to expulsion and the remedies available under different international treaties, referred to in this book do not extend to stateless persons who fall outside these treaties. Nor do they extend to those in states not party to any of these conventions.

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[17] See the *1993 Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993).

Another aspect of my argument concerns the gendered dimensions of statelessness. In Chapter Five, I consider a number of feminist critiques which assist in identifying gender discrimination in relation to statelessness. The prohibition of gender discrimination is conspicuous by its absence, particularly in the international instruments on refugees and stateless persons. While the convention on migrant workers appears to make more specific provision for women, the terms pertaining to irregular migrant women workers are less satisfactory. Nevertheless, integration of gender norms into the mainstream of United Nations mechanisms, programmes and activities attests to the impact of feminist critiques on gender discrimination in many areas of international law.[18]

Feminist critiques are infinitely relevant to statelessness. They help to uncover sources of discrimination not only pertinent to women, but also to other disempowered groups of people. Quite apart from that, children are specifically included within the analysis for two reasons. First, discrimination against women in relation to statelessness used to and continues to affect children born to them. Secondly, discrimination against women often begins when they are girls. Generally, it is important to distinguish between the rights of children and those of their parents, women and other adults to ensure their best interests are protected. However, in the case of statelessness, understanding the consequences on children will help to sharpen the analysis and also demonstrate how the rights of women and children are interrelated.

Feminist critiques of gender and culture essentialism warn against privileging the experiences of one group of women to the disadvantage of women, who are more marginalised. They suggest that a nuanced approach to statelessness among women in developing states is much more appropriate. The converse of statelessness, citizenship, has been thoroughly analysed from feminist perspectives on the public/private dichotomy. Migration, too, has been the subject of feminist critiques. However, the interface between citizenship law and migration law, particularly in the context of developing states, has received much less attention. Thus, the impact of the gender aspects of the relationship between citizenship law and migration law on statelessness will be a central focus in this chapter.

Feminist critiques concerning the public/private dichotomy assist in exploring the gendered aspects of *de jure* statelessness. They demonstrate

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[18] Office of the High Commissioner for Human Rights, United Nations Division for the Advancement of Women & United Nations Development Fund for Women, *Gender Integration into the Human Rights System* (Report of the Workshop, Geneva, 26-28 May 1999).

that the patriarchal construction of citizenship laws continues to render children born outside of marriage *de jure* stateless. Women who are cast as dependants continue to face the possibility of *de jure* statelessness upon divorce from or death of their foreign spouses. I argue that this is because the conflict of nationality laws is premised on the criterion of independence. I draw on feminist critiques of state responsibility to explore the silence over the private world of *de jure* statelessness, largely inhabited by women and children, resulting from gendered nationality laws. It is contrasted with the public domain of *de jure* statelessness, dominated by men, resulting from deprivation of nationality on grounds of race, ethnicity, religion and politics.

I find that feminist critiques of the public/private dichotomy are equally pertinent to *de facto* statelessness. A number of other feminist critiques complement the analysis. They suggest that migration law is a site for struggle for equality particularly for women of multiple identities and characteristics such as gender, race, citizenship and class. I also explore the notion that the private nature of migration law within the domestic sphere removes it from scrutiny in the public international sphere. The corollary is that the 'privatization' of irregular migrant workers divests the host state of responsibility towards them. Human rights law is unable to challenge this position, because the traditional distinction between citizens and non-citizens does not amount to discrimination. But a feminist critique of citizenship law/migration law further suggests that this version of the public/private dichotomy masks another layer of discrimination against women and children with irregular immigration status. Without protection, they are effectively stateless. Finally, I draw upon the notion of gender-based violence to explore the protection and remedies for violations against stateless persons.

The second part of the book draws upon the earlier discussions to develop the case study of a particular group of irregular migrant workers from Burma in Thailand. The case study illustrates and tests the limits of the arguments in the foregoing paragraphs. It is set out in two chapters. Chapter Six examines the interface between the citizenship, nationality, immigration and other domestic laws of Burma and Thailand. The purpose is to see how they produce *de jure* and *de facto* statelessness among these irregular migrant workers. Since the focus of this book is on legal analyses, only as much of the social, economic and political context as is necessary will be provided in this and in the following chapter. Four points of particular significance will emerge. The first concerns the discriminatory effects of the hierarchical nature of Burmese citizenship laws in producing *de jure* statelessness. The second is the implications of the progressive incorporation of illegal

immigration status into Thai nationality laws on creating *de jure* statelessness among Thai ethnic minorities and Burmese irregular migrant workers. The third notes how the immigration and labour laws of Thailand produce a hierarchy of aliens determined, overtly, by wealth, class, property, education and, less obviously, by gender, race and age. The fourth pertains to how positions in the hierarchy determine the difference in treatment and rights accorded to aliens, especially in relation to expulsion. The second section examines the interface between some aspects of domestic law and the international instruments to which both states are party.

Chapter Seven draws upon the feminist critiques in Chapter Five to consider the gendered aspects of statelessness among Burmese irregular migrant workers who overlap with Burmese persons of concern and Thai ethnic minorities. A number of points will emerge. First, women form a significant proportion particularly among irregular migrant workers and persons of concern from Burma. Second, *de jure* statelessness continues to affect children under successive citizenship and nationality laws of Burma and Thailand. Specifically, illegal immigration status masks the discrimination against the children born outside of marriage to irregular migrant women workers. The third point pertains to how the current policies of Thailand and Burma affect women and children among the merging of asylum seekers and irregular migrant workers in Thailand. I will argue that the current refugee policies of Thailand are not sufficiently informed by gender considerations. Burma's migration regulations also aggravate the vulnerability of women and children. The study concludes with a consideration of the effect of Thailand's ratification of the individual complaints procedures under the 1999 Protocol[19] to the *1979 Convention on the Elimination of All Forms of Discrimination Against Women*.[20]

As the international system evolves, new groups of stateless persons are likely to emerge. The protection of stateless persons is one of the challenges for the current international legal framework based on nation states. Individuals deserve protection not because they are citizens of particular states but simply because they are human beings. This is the reason for examining the situation of stateless women and children from Burma in Thailand. This is the essence of human rights law.

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[19] UN Doc. E/CN.6/1999/WG/L.2 (1999) (entered into force 22 December 2000). As of 9 December 2002, there are 47 state parties. ('*1999 CEDAW Protocol*')

[20] GA Res 34/180, 18 December 1979 (entered into force 3 September 1981). As of 9 December 2002, there are 170 state parties. ('*1979 CEDAW*')

CHAPTER TWO

THE INTERNATIONAL LAW OF STATELESSNESS: CONTEMPORARY ISSUES

Significant gaps in the current law on statelessness impede effective responses to the emerging phenomena of statelessness. It is true, however, that the contemporaneous development of human rights law has affected state sovereignty in nationality issues and extended protection to stateless persons. It is equally true that the principle of non-discrimination underpins international and regional instruments affecting stateless persons. However, the prohibition against gender discrimination remains noticeably weak in relation to statelessness. Furthermore, this weakness compounds the critical issue of human rights protection for emerging groups of stateless persons. Consequently, even though state sovereignty over citizenship matters is now subject to human rights limits and prohibition against discrimination, statelessness is still with us.

1. STATELESSNESS: TRADITIONAL PRINCIPLES

A stateless person is 'a person who is not considered as a national by any State under the operation of its law' according to the definition in article 1(1) of the *1954 Stateless Persons Convention*. It is the codification of a traditional concept.[1] I will use the term '*de jure* stateless' or legally stateless when referring to persons who fall within the 1954 Convention definition to differentiate them from '*de facto* stateless' or effectively persons who fall outside such definition.

A person may be *de jure* or *de facto* stateless in international law. Traditionally, *de jure* statelessness refers to the lack of legal status as a member of any state. *De facto* or effective statelessness is a more recent concept developed in response to events during the twentieth century. The lack of protection is the definitive characteristic of *de facto* statelessness of which there are various descriptions. These will be examined in subsequent

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[1] See Paul Weis, *Nationality and Statelessness in International Law* (rev 2nd ed, 1979) 161.

sections of this chapter. Statelessness *de jure* or *de facto* may affect an individual or groups of persons. An individual may be legally stateless under the nationality or citizenship law of a nation-state or rendered so by the conflict of nationality laws.[2] An individual may become stateless by renouncing the nationality possessed. A state may deprive an individual of nationality under certain circumstances thereby rendering the person legally stateless. State succession may result in statelessness *en masse*. Denationalization rendering massive numbers of people stateless may offend the international law principle of non-discrimination and where it is coupled with mass expulsion, it may also transgress territorial supremacy of the host state under international law.[3]

The following are some examples of *de jure* or legal statelessness reflecting the failure to meet requirements under specific nationality laws, the conflict of nationality laws and the legitimate exercise of denationalization powers of the state.[4] A person may be legally stateless at birth[5] or become legally stateless subsequent to birth. A person may be born outside of marriage and consequently legally stateless under the nationality laws of some states.[6] At birth, the person may be born in a country where nationality is conferred according to the law of descent or *jus sanguinis*, while the parents are nationals of a country where nationality is based on place of birth or *jus soli*. If the person has a nationality at birth, it may still be lost without acquiring the nationality of another country. For example, if the law of an individual's country provides for loss of nationality after ten years abroad, that person may become *de jure* stateless if he or she fails to acquire another nationality during or immediately after that period. A woman who marries a foreign national may lose her nationality under the law of her country and acquire the nationality of the state of her spouse only to become *de jure* stateless upon divorce from him under the law of his country.[7] A man who enters foreign civil or military service or accepts

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[2] Ibid 161-62.

[3] Ibid 125-26.

[4] Tang Lay Lee, 'Stateless Persons and the 1989 Comprehensive Plan of Action Part 1: Chinese Nationality and the Republic of China (Taiwan)' (1995) 7 *International Journal of Refugee Law* 201, 223; Tang Lay Lee, 'Refugees from Bhutan: Nationality, Statelessness and the Right to Return' (1998) 10 *International Journal of Refugee Law* 118, 138. See also Weis, ibid 115-19.

[5] UN Doc E/1112 and UN Doc E/1112/Add.1 or United Nations Department of Social Affairs, *A Study of Statelessness* (1949) 132-36 ('*A Study of Statelessness*').

[6] Ibid 134-35, including nn 15.

[7] See Catheryn Seckler-Hudson, *Statelessness with Special Reference to the United States* (first published 1934, rep 1971) 23-99 and 196-243 respectively for numerous examples of

foreign distinction, departs or sojourns abroad or is convicted of certain crimes may find himself denationalized under the domestic laws of his country.[8] His wife and children may also be denationalized together with him.[9]

People may also become legally stateless *en masse*. When one state succeeds another state in part or the whole of the same territory, nationals of the former state do not automatically become nationals of the successor state.[10] Nationality of the successor state is usually conferred by way of treaty between the former and the successor State with citizenship, birth and/or domicile used as the criteria for granting nationality.[11] However, treaties generally do not resolve existing cases of statelessness such that already legally stateless persons domiciled in territory under the successor state remain legally stateless.[12] Treaties concluded in Europe after the Second World War included a right of option for individuals affected by territorial changes.[13] Thus, individuals are entitled to choose whether they want to acquire the nationality of the state granting the right of option.

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statelessness among women resulting from marriage and statelessness among children in the early twentieth century.

[8] See Weis, above n 1, 115-16.

[9] Ibid 116.

[10] Daniel O'Connell, *State Succession in Municipal Law and International Law* (1967) vol 1, 498-501, 503; see the contrary position in 'Draft Conventions and Comments Prepared by the Research in International Law of the Harvard Law School on: The Law of Nationality' (1929) 23 *American Journal of International Law* 11, 13, draft art 18. O'Connell's position is supported by *A Study of Statelessness*, above n 5, 142. See also Jeffrey Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law' (1998) 19 *Michigan Journal of International Law* 1141, 1160-63; Ian Brownlie, 'The Relations of Nationality in Public International Law' (1963) *British Year Book of International Law* 284, 324-26, on application of the principle of effective link, including the test of domicile.

[11] See *A Study of Statelessness*, above n 5, 142-45. Art 70 of the Treaty of Saint-Germain-en-Laye with Austria of 10 September 1919; art 61 of the Treaty of Peace of Trianon with Hungary of 4 June 1920; arts 3 and 4 of the Treaty of 10 September 1919 (Kingdom of the Serbs, Croats and Slovenes); arts 3 and 4 of the Treaty of 10 September 1919 (Czechoslovakia); arts 64 and 65 of the Treaty of Saint Germain-en-Laye of 10 September 1920 (Austria); articles 56 and 57 of the Treaty of Trianon of 4 June 1920 (Hungary).

[12] Ibid 152.

[13] Ibid 151-53, for example, art 19 of the Peace Treaty of Paris on 10 February 1947, Italy granted a right of option to husband and wife separately but the father's option included all unmarried children under eighteen. The mother's option included the children only if the father were not alive. The bilateral treaty between the United Soviet Socialist Republics, and Czechoslovakia of 29 June 1945 granted a right of option for Czech citizenship to Slovak and Czech ethnic groups residing on Transcarpathian Ukraine territory before 1 January 1946 subject to agreement of the Czech authorities.

Nationals of the former state residing abroad at the time of succession may become legally stateless if they fail to obtain the nationality of the successor state, for example, by registration with the diplomatic or consular representatives of the successor state.[14] If the former state no longer exists, these people are rendered *de jure* stateless.[15] Until the mass denationalizations of the first half of the twentieth century, state succession was the primary cause of *de jure* statelessness *en masse*.[16]

The principles for acquiring nationality play a significant role in rendering individuals and groups of people legally stateless. Generally speaking, the principle of *jus sanguinis* is adopted to ensure racial and ethnic homogeneity of a state. Strict adherence to this principle results in exclusion of other racial and ethnic groups from acquiring nationality of a state with nationality laws based on this principle. However, a state is truly homogenous in terms of race and ethnicity only if nationality can be acquired where both parents are nationals of the one and the same state. But, more often than not, many states opt for the patrilineal principle whereby nationality is passed, by the father, but not the mother. This implies that racial and ethnic homogeneity is defined by the father. In reality, this is an illusion where male nationals marry foreign wives of a different race or ethnicity. Their sons will be of mixed blood, race and/or ethnicity. The patrilineal principle often entails loss of nationality by women who marry foreign husbands. These women are most at risk of becoming legally stateless. For example, the husband's state may provide different rules for acquisition of nationality by foreign wives according to their state of nationality, race or ethnicity. The women's children, who are born out of marriage, may also be rendered legally stateless.

In contrast, the principle of *jus soli* appears to be more inclusive regardless of race, ethnicity or other identity. It is highly unlikely that a child born on the territory of a state espousing the *jus soli* principle, to parents from a state with nationality laws based on the *jus sanguinis* principle, will be rendered legally stateless. On the contrary, such a child may be in the enviable position of being a dual national. Even if, only the mother were from a state espousing the principle of patrilineal *jus sanguinis* principle and

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[14] Ibid art 20 of the Peace Treaty of Paris on 10 February 1947 provided for Yugoslav-speaking Italian citizens domiciled in Italy to register with Yugoslav diplomatic or consular representative in Italy if they wished to acquire Yugoslav nationality. In the absence of such treaties, see also Weis, above n 1, 149, on explicit or implicit acceptance of the nationality of the successor state in case of partial succession.

[15] See Tang, 'Stateless Persons: Part 1', above n 4, 223; Weis, ibid 161-62; O'Connell, above n 10, 514.

[16] Ibid O'Connell, 497-518; *A Study of Statelessness*, above n 5, 142.

the father were from a third state adhering to *jus soli*, the child would still acquire the nationality of the state of birth. The possibility of individual cases of legal statelessness arises where the states involved adopt both principles in their nationality laws. Where deprivation of nationality is based on the patrilineal *jus sanguinis* principle, wives and children also lose the nationality of the state of their husbands and fathers. Where deprivation, withdrawal or refusal to grant nationality occurs on a large scale, it may be driven by a preoccupation to preserve racial homogeneity or other identity of a state. This implies that the *jus sanguinis* principle, usually of the patrilineal variety, often underpins legal statelessness *en masse*.

2. DEVELOPMENTS DURING THE TWENTIETH CENTURY

The international law on statelessness has developed through the adoption of a number of international and regional instruments during the twentieth century. The relevant international instruments are the *1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws*,[17] the *1930 Hague Protocol Relating to a Certain Case of Statelessness*,[18] the *1951 Convention Relating to the Status of Refugees*,[19] the *1967 Protocol Relating to the Status of Refugees*,[20] the *1954 Convention Relating to the Status of Stateless Persons*,[21] the *1961 Convention on the Reduction of Statelessness*,[22] the *1967 Convention on the Nationality of Married Women*,[23] the *1979 Convention on the Elimination of All Forms of Discrimination Against Women*[24] and the *1989 Convention on the Rights of the Child*.[25] The *2000*

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[17] 179 LNTS 89 (entered into force 1 July 1937). As of 5 February 2002, there were 19 state parties. ('*1930 Hague Convention on Conflict of Nationality Laws*').

[18] 179 LNTS 115 (entered into force 1 July 1937). As of 5 February 2002, there are 20 state parties. ('*1930 Hague Protocol on Statelessness*').

[19] 189 UNTS 137 (entered into force 22 April 1954). As of 30 September 2002, there are 141 state parties. ('*1951 Refugees Convention*').

[20] 606 UNTS 267 (entered into force 4 October 1967). The *1967 Refugees Protocol* lifted the restriction to events occurring before 1 January 1951 as stipulated in article 1A(2) read with article 1B(1) of the *1951 Refugees Convention*. As of 30 September 2002, there are 139 state parties. ('*1967 Refugees Protocol*').

[21] 360 UNTS 117 (entered into force 6 June 1960). As of 5 February 2002, there are 54 state parties. ('*1954 Stateless Persons Convention*').

[22] 989 UNTS 175 (entered into force 13 December 1975). As of 5 February 2002, there are 26 state parties. ('*1961 Statelessness Convention*').

[23] 309 UNTS 65 (entered into force 11 August 1958). As of 5 February 2002, there are 70 state parties.

[24] GA Res 34/180, 18 December 1979 (entered into force 3 September 1981). As of 9 December 2002, there are 170 state parties. ('*1979 CEDAW*'). Art 9.

UN Declaration on the Nationality of Natural Persons in Relation to the Succession of States[26] is also relevant. Two regional instruments affecting legal statelessness are the *1969 American Convention on Human Rights*[27] and the *1997 European Convention on Nationality*.[28]

Some landmark international and regional judicial decisions, which addressed the issue of international law obligations regarding nationality issues, arguably hold implications for statelessness under international law. International law did not impose any limits on states to avoid statelessness until the *1930 Hague Convention on Conflict of Nationality Laws* and the *1930 Hague Protocol on Statelessness*. These instruments are mainly concerned with *de jure* statelessness among children and women and, to a lesser extent, among men, and evidence the beginning of a duty to avoid legal statelessness in international law.[29] However, the mass denationalizations and expulsions that swept Europe, during the first half of the twentieth century, forced states to develop principles not only to avoid legal statelessness, but also to respond to the conditions of statelessness. The rights of those rendered stateless are set out in the *1951 Refugees Convention* and the *1967 Refugees Protocol*, and the *1954 Stateless Persons Convention*. The first two extend protection to stateless refugees and the last offers protection to stateless persons. The emerging duty to avoid legal statelessness in international law advanced another tentative step with the *1961 Statelessness Convention*. This convention seeks to avoid legal statelessness generally and, specifically, to prevent legal statelessness among children. A stateless person was finally recognized as a person before the law, within the domestic and international spheres.[30] Statelessness is no longer simply the status of being without a nationality under international law. The *1967 Convention on the Nationality of*

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[25] GA Res 44/25, 20 November 1989 (entered into force 20 September 1990). As of 9 December 2002, there are 191 state parties. ('*1989 CRC*'). Arts 7 and 8.

[26] GA Res 55/153, 12 December 2000. ('*2000 UN Declaration on Nationality*').

[27] 1144 UNTS 123, OASTS No 36 (entered into force 18 July 1978). As of 21 March 2002, there are 25 state parties.

[28] ETS No 166 (entered into force 1 March 2000). As of 21 March 2002, there are 7 state parties.

[29] See Blackman, above n 10, 1176.

[30] Art 6 of the *1948 Universal Declaration of Human Rights* ('*1948 UDHR*'), GA Res 217 A (III), 10 December 1948, provides that: 'Everyone has the right to recognition everywhere as a person before the law.' This affirmation of the legal personality of natural persons was included largely because German laws deprived Jews of legal competence, denied their capacity to possess rights and obligations and in essence denied their existence in law. It was a corollary of stripping them of German nationality. See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1999) 43-45 for background to this article.

Married Women, the *1979 CEDAW* and the *1989 CRC* also address, directly or indirectly, the prevention of legal statelessness among women and children in their provisions. At the beginning of the twenty-first century, the United Nations General Assembly on the recommendation of the International Law Commission ('ILC') adopted the *2000 UN Declaration on Nationality*. The attempt to codify principles regarding the impact of state succession on nationality issues was a response to the spate of state successions in Europe in the 1990s following the breakup of the Soviet Union, Yugoslavia and Czechoslovakia. The Declaration addresses the prevention of legal statelessness among nationals and habitual residents of the predecessor states and children born after the succession. But persons who are legally stateless before such state succession are excluded from protection under the provisions. Only two regions, America and Europe, have addressed the issue of statelessness through regional instruments. The *1969 American Convention on Human Rights* and the *1997 European Convention on Nationality* contain provisions regarding statelessness. Both address legal statelessness among children but the latter also provides against legal statelessness in cases involving deprivation of nationality and where state succession has taken place.

These international and regional instruments signify a shift away from the primacy of state sovereignty on nationality and statelessness issues. However, while international law limits on state sovereignty on nationality matters are well established, the same cannot be said for statelessness issues.

2.1. *International Law Limits on State Sovereignty in relation to Statelessness*

There were no international law principles that specifically defined state powers in relation to statelessness. This is because international law was concerned with nationality or identifying the state to which an individual is linked for the purpose of international relations. Consequently, international law principles that developed regarding nationality are the best place to begin the enquiry into state powers in relation to statelessness under international law. In taking this approach, the extent to which such principles apply to statelessness must be considered. They indicate the directions in which, the law of statelessness, have developed. International instruments in the early twentieth century articulated provisions affecting statelessness from the perspective of regulating nationality issues in international relations. In actual fact, those provisions were the first substantive content of emerging principles affecting statelessness. Only towards the close of the twentieth century would international and regional

instruments expressly adopt the principle that states have a duty to avoid legal statelessness.

The primacy of state sovereignty in citizenship matters has been subject to a caveat since 1923. In an advisory opinion in the case of *Nationality Decrees Issued in Tunis and Morocco*, the Permanent Court of International Justice ('PCIJ') upheld the proposition that nationality matters were, at the time, within the sole jurisdiction of a state, subject to the following qualification:

> The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.[31]

The PCIJ regarded state sovereignty over nationality as relative to the development of international law. The possibility that international law could, in future, impose limits on the right of states in nationality issues was left open. Even though the PCIJ did not mention statelessness, state sovereignty in relation to statelessness must necessarily be subject to the same caveat. The caveat by the PCIJ foreshadowed the day when an international law principle would emerge to prohibit mass denationalization by a state coupled with expulsion. Such denationalization amounts to a breach of its obligations to respect the territorial supremacy of other states.

The *1929 Draft Convention on Nationality* foreshadowed the type of limits international law would place on state sovereignty over nationality matters.[32] Article 2 of the Draft Convention provided that 'each State may determine by its law who are its nationals, subject to the provisions of any special treaty to which the State may be a party; but under international law the power of a State to confer its nationality is not unlimited'.[33] Note that the draft article only provided for limits on the conferral of nationality, even in relation to treaties a state may enter into. It implied that the powers of a state to withdraw nationality, including deprivation, were unfettered. Fortunately, the *1930 Hague Convention on Conflict of Nationality Laws* went further than the 1929 Draft Convention in restricting state powers in nationality matters generally instead of only in relation to the conferral of nationality.[34] The implication for potentially *de jure* stateless persons is

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[31] (1923) PCIJ, Series B, No 4, 24.

[32] Above n 10.

[33] Ibid 13.

[34] Art 1 is reproduced in the following section.

positive. International law limits imposed on state sovereignty on conferral and withdrawal of nationality would help to reduce *de jure* statelessness that may result from such exercise of state power.

Evidence of this argument can be found in the subsequent decision of the Inter-American Court of Human Rights, in 1984, elaborating on the international law limits on state sovereignty in nationality matters from the perspective of human rights. In an Advisory Opinion in the case of *Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, the Court held that:

> It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and recognition of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the State in that area and that *the manner in which States regulate matters bearing on nationality cannot today be deemed to be within their sole jurisdiction; those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights*. The classical doctrinal position, which viewed nationality as an attribute granted by the State to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the State as well as human rights issues.[35] [Emphasis added]

The Court considered Costa Rica's proposal to amend article 14.4 of its Constitution which permitted foreign women, who lose their nationality upon marrying Costa Rican nationals, to automatically acquire Costa Rican nationality. The proposed amendment provided that other women who marry Costa Rican nationals may acquire Costa Rican nationality after 2 years' marriage and residence, subject to new requirements on knowledge of Spanish language and Costa Rican history and culture. However a further amendment proposed that 'a foreigner who by marriage to a Costa Rican loses his or her nationality *and* who after two years of marriage and the same period of residence in the country indicates his or her desire to take on the nationality of the spouse' [Emphasis added]. Some members of the Special Legislative Committee had proposed this amendment in the interest of equality between spouses. The Court observed that their proposal would mean that foreigners who lose their nationality upon marrying a Costa Rican could remain legally stateless for two or more years if they are unable to

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[35] (1984) 5 Human Rights Law Journal 161, [32]-[35]. See also Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 156, 167, nn 32.

comply with any of the requirements. However, the Court concluded that that proposed amendment would not be responsible for creating *de jure* statelessness but rather the status would be engendered by the nationality laws of the foreign spouse.[36] Hence, it would not violate article 20 of the *1969 American Convention on Human Rights* on the right to a nationality. Instead, the Court unanimously held that the original proposed amendment violated article 24 on equality before the law and article 17(4) on the equality between spouses of the *1969 American Convention on Human Rights*.

I would argue that the Court in the above case failed to take into consideration that foreign men who marry Costa Rican women, do not become *de jure* stateless, temporarily or otherwise, as a result of the marriage. By upholding *de jure* equality between spouses in acquiring nationality, the Court may have provided for continuing *de facto* discrimination against foreign women who marry Costa Rican men in relation to *de jure* statelessness. It is not at all satisfactory to lay the blame for the women's legal statelessness at the door of their states. Neither is it adequate to attribute it to a 'conflict' of nationality laws. The potential *de jure* statelessness of these women is derived from the inequality between men and women on which the international framework of nationality is based. This analysis of the Court's opinion illustrates how human rights may affect state sovereignty in nationality matters. While human rights may highlight the issue of sex equality in relation to nationality, they may not adequately address the issue of equality in relation to statelessness. The issue goes beyond the mechanics of conferring and withdrawing nationality if human rights developments are to ensure the full protection of stateless persons.

The United Nations General Assembly endorsed article 1 of the *1930 Hague Convention on Conflict of Nationality Laws* in the Preamble to the *2000 UN Declaration on Nationality* '[e]mphasising that nationality is essentially governed by internal law *within the limits set by international law*'.[37] The approach of the Inter-American Court of Human Rights on limitations set by human rights also received support in the fourth paragraph of the Preamble which stated that 'in matters concerning nationality, due account should be taken both of the legitimate interests of States and *those of the individuals*'.[38]

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[36] Ibid *Naturalisation Provisions of Costa Rica Constitution*, [46].

[37] GA Res, above n 26. See also UN Doc A/54/10 and Corr 1 & 2 (1999), International Law Commission, *Report on the work of Fifty-first Session*, GAOR 54th sess, Supplement No 10, Chapter IV, Section E.2. ('ILC'). Commentary [3] on the Preamble. Emphasis added.

[38] Ibid ILC, Commentary [4] on the Preamble. Emphasis added.

In examining the major international and regional instruments concerning statelessness and stateless persons, I argue that international law limits on state sovereignty in relation to statelessness are weak. The generally low number of ratifications reflects states' reluctance to assume responsibility for stateless persons. Furthermore, the concern for *de jure* statelessness among women and children has not strengthened in the subsequent instruments and treaty provisions affecting *de jure* and *de facto* stateless persons.

2.2.1. *The 1930 Hague Convention on the Conflict of Nationality Laws*

The 1930 Hague Conference for the Codification of International Law was convened to resolve emerging issues of dual nationality and *de jure* statelessness. Most of the states represented at the Conference were European and American. The *1930 Convention on the Conflict of Nationality Laws* was one of four treaties adopted. Article 1 of this Convention spelt out the restrictions on state powers over nationality:

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

Donner argues that as a result, states do not have a duty in international law to recognize foreign national legislation if it is not consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.[39] This provision takes up the theme of an evolving international law the PCIJ evoked in 1923.[40] Article 2 provides that '[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State'. This is generally considered to be a codification of state practice. Articles 1 and 2 of the *1930 Hague Convention on Conflict of Nationality Laws* are regarded as having attained the status of customary international law.[41]

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[39] Ruth Donner, *The Regulation of Nationality in International Law* (rev 2nd ed, 1994) 29.

[40] *Nationality Decrees Issued in Tunis and Morocco*, above n 31.

[41] Ibid; Stephen Hall, 'The European Convention on Nationality and the Right to Have Rights' (1999) 24 *European Law Review* 586, 589-90; Weis, above n 1, 65. Customary international law, which binds all states, requires two elements: uniform and consistent state practice, and the opinion of states that, such practice is required by law. See article 38(b) of the Statute of the International Court of Justice, 26th June 1945, 1 UNTS xvi, on the application of international custom. See judicial opinion in *Case Concerning the Continental*

The other articles of the *1930 Hague Convention on Conflict of Nationality Laws* respond to instances of individual *de jure* statelessness resulting from a conflict of nationality laws. Article 7 provides that the issuance of expatriation permits, where the persons have renounced their nationality, should not automatically result in loss of nationality and consequent *de jure* statelessness.[42] The 1930 Hague Codification Conference has been criticized for its reluctant to go beyond problems of women's statelessness to achieve gender equality in nationality laws.[43] Articles 8 and 9 provide against *de jure* statelessness among women by reason of marriage to a foreigner. Should the woman lose her nationality upon such marriage, it has to be conditional on the woman acquiring the nationality of her husband.[44] If the woman's husband changes his nationality during the marriage and causes her to lose her nationality, it shall be conditional on her acquisition of his new nationality.[45] Articles 13, 14, 15, 16 and 17 provide against *de jure* statelessness among children. Article 13 provides that if the naturalization of the parents does not include the children, the children shall retain their existing nationality. Article 14 provides that a child whose parents are both unknown shall have the nationality of the country of birth.[46] Children born to *de jure* stateless parents may acquire the nationality of the state of birth according to its law on acquisition of nationality.[47] Article 16 provides that legitimation shall not cause a child born outside of marriage to lose the nationality of the state unless he or she acquires the nationality of another state. Article 17 contains a similar stipulation in relation to a child who is adopted.

The *1930 Hague Protocol on Statelessness* makes further provisions for the child to acquire the nationality of the mother where the father is *de jure* stateless. However, the child born outside of marriage to a legally stateless

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Shelf (1985) ICJ 29, Judgment of 3rd June, [27] regarding the elements of customary international law. See also *Military and Paramilitary Activities in and against Nicaragua* (1986) ICJ 14, [183]-[186]. See generally Michael Akehurst, *A Modern Introduction to International Law* (1987, 6th edn.) 25-34; Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000) 63-64.

[42] Weis, above n 1, 116.

[43] Committee on Feminism and International Law, *Final Report on Women's Equality and Nationality* (2000) International Law Association, 10 and 17.

[44] Art 8.

[45] Art 9.

[46] Blackman, above n 10, 1177-78 argues that articles 14 and 15 go beyond a technical conflict of laws.

[47] Art 15.

mother would still be *de jure* stateless.[48] These provisions are an attempt to protect those who may be rendered *de jure* stateless from its worst consequences.[49] The issue of whether the most vulnerable are likely to benefit from these provisions is debatable.

To this day, only nineteen states have ratified the *1930 Hague Convention on Conflict of Nationality Laws* since its adoption.[50] Similarly, only twenty-one states are party to the *1930 Hague Protocol on Statelessness*.[51] Of the two other Protocols, the *1930 Special Protocol Concerning Statelessness* has nine parties and has not entered into force.[52] Article 1 of this Protocol provides that indigent or convicted *de jure* stateless persons must in certain circumstances be accepted back into the territory of the state whose nationality they last possessed. The low number of ratifications for each these international instruments on *de jure* statelessness indicates that most states prefer to reserve their powers in relation to statelessness. The *1930 Hague Convention on the Conflict of Nationality Laws* has been criticized for the limited reforms. It also failed to address denationalization even though arbitrary deprivation of nationality had been the main cause of *de jure* statelessness in the decade preceding its adoption.[53] These issues were eventually addressed together with the protection of stateless persons by subsequent international instruments. They were preceded by and based largely on recommendations

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[48] *A Study of Statelessness*, above n 5, 155.

[49] Hall, above n 41, 590.

[50] The nineteen state parties are Australia, Belgium, Brazil, China, Cyprus, Fiji, India, Kiribati, Lesotho, Malta, Mauritius, Monaco, Netherlands, Norway, Pakistan, Poland, Swaziland, Sweden and the United Kingdom. Canada denounced the treaty on 15 May 1996. Nevertheless, international law writers of the day remarked that there was a noticeable trend towards amendment of nationality laws in line with the provisions of the 1930 Hague Conventions. See Weis, above n 1, 27-8.

[51] The twenty-one states are Australia, Brazil, Chile, China, Cyprus, El Salvador, Fiji, India, Jamaica, Kiribati, Lesotho, Malawi, Malta, Mauritius, Netherlands, Niger, Pakistan, Poland, South Africa, United Kingdom and Yugoslavia.

[52] UKTS 112 (1973). The nine parties are Australia, Belgium, Brazil, El Salvador, Fiji, India, Pakistan, South Africa and United Kingdom. The *Protocol Relating to Military Obligations in Certain Cases of Double Nationality*, 178 LNTS 227, entered into force on 25 May 1937 and has 24 parties. They are Australia, Austria, Belgium, Brazil, Colombia, Cuba, Cyprus, El Salvador, Fiji, India, Kiribati, Lesotho, Malawi, Malta, Mauritania, Mauritius, Netherlands, Niger, Nigeria, South Africa, Swaziland, Sweden, United Kingdom and United States.

[53] Hall, above n 41, 590; Blackman, above n 10, 1178. But the long-term impact of the 1930 Hague Conventions on provisions of nationality laws cannot be denied. See Weis, above note 1, 26-28.

in the historic study of statelessness made by the United Nations' Department for Social Affairs in 1949.[54]

2.2.2. *The 1949 United Nations' Study of Statelessness*

The unilateral exercise of sovereign power by some states in denationalizing and expelling large numbers of people during the first half of the 20th century revealed the threat statelessness[55] poses as an extensive phenomenon. About 2 million people were deprived of citizenship by the Russian decrees of the 1920s for political reasons. In the 1930s, Nazi Germany, Hungary and Italy denationalized the Jews on racial grounds. Germans and Hungarians were denationalized *en masse* in Czechoslovakia, Poland and the former Yugoslavia during the 1940s. Many fled or were forced to flee as refugees before or after being denationalized. There were about 30 million refugees and stateless persons in Europe after the Second World War.[56]

In 1946, the Intergovernmental Committee for Refugees focused on the causes of statelessness instead of refugees.[57] The Committee introduced two categories of stateless persons. Those deprived of nationality by their state fell into the category of '*de jure* stateless persons' and 'unprotected persons' fell into the category of '*de facto* stateless persons'.[58] In 1947, the Commission for Human Rights requested the United Nations to address 'the legal status of persons who do not enjoy the protection of any Government, in particular pending the acquisition of nationality, as regards their legal and social protection and their documentation'.[59] In 1948, the embryonic United Nations commissioned a comprehensive study on statelessness with a view to its elimination. The Economic and Social Council ('ECOSOC') requested:

> the Secretary-General, in consultation with interested commissions and specialized agencies (a) To undertake a study of the existing situation in regard to the protection of stateless persons…; (b) To undertake a study of national

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[54] *A Study of Statelessness*, above n 5.

[55] In this section, the terms 'statelessness' and 'stateless persons' include both *de jure* and *de facto* unless otherwise indicated.

[56] See Michael R. Marrus, *The Unwanted: European Refugees in the Twentieth Century* (1985) 297-98, 310; *A Study of Statelessness*, above n 5, 7-8.

[57] The Intergovernmental Committee on Refugees, *Statelessness and Some of its Causes: An Outline* (1946).

[58] Ibid.

[59] UN Doc E/600, (1947) [46].

> legislation and international agreements and conventions relevant to statelessness, and to submit recommendations to the Council as to the desirability of concluding a further convention on this subject.[60]

Thus, the first part of the resolution was concerned with the urgent issue of the protection of the huge numbers of stateless persons in Europe at the time. The second part looked forward to eliminating statelessness in the future by means of a Convention that would establish international standards beyond those in domestic legislation and international instruments of the day.

The 1949 study defined stateless persons *de jure* as 'persons who are not nationals of any State, either because at birth or subsequently, they were not given any nationality, or because during their lifetime they lost their own nationality and did not acquire a new one'.[61] Stateless persons *de facto* were described as

> persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals.[62]

The study not surprisingly included refugees. They were included on the basis that refugees who have been deprived of their nationality were legally stateless while those who no longer enjoy the protection and assistance of their national authorities despite not having been deprived of their nationality were deemed to be *de facto* stateless.[63] The study was clearly influenced by the refugee definition of earlier treaties in which refugees were characterized by a lack of protection.[64] The definitions in the 1949 study

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[60] ECOSOC Res 116 D (VI), 1 and 2 March 1948, quoted in *A Study of Statelessness*, above n 5, 3-4.

[61] Ibid *A Study of Statelessness*, 8.

[62] Ibid 9.

[63] Ibid.

[64] Note that the first response of states was to regulate the admission and movement of these Russian and Armenian refugees, many of whom had been denationalized. See LNTS Vol. XIII, No. 355, Arrangement with regard to the issue of certificates of identity to Russian refugees, signed at Geneva, 5 July 1922. See for example, LNTS Vol LXXXIX, No. 2004, Arrangement relating to the issue of identity certificates to Russian and Armenian refugees, supplementing and amending the previous arrangements dated 5 July 1922 and 31 May 1924, signed at Geneva, 12 May 1926, Resolution No 2: '*Russian.* Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality' and '*Armenian.* Any person of Armenian origin formerly a subject of

foreshadowed the crossroads for refugees and stateless persons who, in the words of Goodwin-Gill,

> [W]alked hand in hand, and after the First World War, their numbers and condition were almost coterminous. Later, their paths diverged, with refugees being identified principally by reference to the reasons for their flight, and their statelessness, if it existed, being seen as incidental to the primary cause.[65]

The compelling details of the *1949 Study of Statelessness* regarding the situation of stateless persons were matched by the means of improving the status of stateless persons to ensure their 'legal and social protection'.[66] The study outlined the protection status of stateless persons vis-à-vis nationals abroad after setting out the restrictions on their freedom of movement[67] and an account of the legal position of the stateless person in the reception country vis-à-vis foreigners with nationality.[68] The report pointed out that a stateless person without a valid passport or visa often entered another country secretly and '[led] an illegal existence, avoiding all contact with the authorities and living under the constant threat of discovery and expulsion'.[69] It also pointed out that, often, the stateless person remained in detention because the individual could not be deported after having served sentence for disobeying the expulsion order.[70] The study further noted that for a stateless person 'even if the enjoyment of human rights and of the fundamental freedoms does afford the individual certain very valuable guarantees, it does not provide him with a status in the field of civil, economic or social rights'.[71]

The emphasis on freedom of movement reflected the pre-occupation with refugees refused assistance by the diplomatic missions of their state of

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the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality'.

[65] Guy Goodwin-Gill, 'The Rights of Refugees and Stateless Persons: Problems of Stateless Persons and the Need for International Measures of Protection', K.P. Saksena (ed) *Human Rights Perspective and Challenges (in 1990 and Beyond)* (1990), 389-90 (Paper presented to the World Congress on Human Rights, New Delhi, India, 10-15 December 1990).

[66] UN Doc E/600, (1947), Commission on Human Rights, [46] and *A Study of Statelessness*, above n 5, 5-6 and 32.

[67] Ibid *A Study of Statelessness*, 20-23.

[68] Ibid 23-31.

[69] Ibid 20.

[70] Ibid 21, including nn 9, which set out age, nationality, grounds of expulsion, number of sentences for violation of expulsion order and total imprisonment of 5 stateless persons. Periods of imprisonment ranged from 2 years to 9 years and 8 months while one was sentenced 12 times and another 29 times for violating expulsion orders.

[71] Ibid 19.

nationality in foreign states. But all stateless persons faced similar restrictions in trying to find their niche in a community or an area that will accept them. The study also identified the artificial divide between political rights and all other rights, civil, economic and social from the perspective of protection. The study, indirectly, pointed out the inadequacy of diplomatic protection.[72] Unless their state of nationality had bilateral agreements with the host states, their right to work in those countries was severely restricted. Even where such bilateral agreements existed, stateless persons did not benefit even if they were former nationals of a state party to the agreement. The gravity of the entire predicament of stateless persons produced wide-ranging recommendations.

The report recommended the issuance of a travel document and state undertakings 'not to expel or reconduct stateless persons who cannot legally enter another country'.[73] Other recommendations provided for civil status[74] and exemption from the principle of reciprocity.[75] In terms of economic rights, the study recommended free access to employment and exemption of stateless persons from foreign labour restrictions on the basis that they cannot be repatriated.[76] Primary education for stateless children on par with nationals and exemption from reciprocity[77] for access to higher education were also key recommendations. Other important social rights recommended were exemption from reciprocity on relief for indigent, sick

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[72] Diplomatic protection is the right of the state to protect its nationals abroad in relation to other states. See Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1928) 69-70 on the traditional understanding that diplomatic protection is construed principally in terms of civil rights which overlapped with political rights. See also *A Study of Statelessness*, above n 5, 26-28 and 32-33.

[73] Ibid *A Study of Statelessness*, 54.

[74] Ibid 53-55.

[75] Ibid 56. The concept of reciprocity in this context refers to the 'interdependence of obligations' assumed by states under international law, usually pursuant to bilateral or multilateral treaties. Put simply, it means that two or more states undertake to treat one another's nationals in a similar manner agreed to under the treaty. The phenomenon of stateless persons and refugees *en masse* highlighted the difficulties of applying this concept under certain circumstances involving human rights and humanitarian law. For the purpose of the present discussion, it is sufficient to note that the subsequent conventions on refugees and stateless persons generally provided for exemption from reciprocity as recommended by the study. For further discussion of reciprocity in relation to human rights and humanitarian law and treaties, see Rene Provost, 'Reciprocity in Human Rights and Humanitarian Law' (1994) *British Year Book of International Law* 383 and D.W. Greig, 'Reciprocity, Proportionality, and the Law of Treaties' (1994) 34 *Virginia Journal of International Law* 295.

[76] Ibid 56-57.

[77] Ibid 58.

or infirm stateless persons and social security on par with nationals for stateless persons.[78]

In response to this seminal report, the ECOSOC appointed an *Ad hoc* Committee on Refugees and Stateless Persons to draft a convention on the international status of refugees and stateless persons.[79] The ILC was also requested to prepare a study and to make recommendations on the elimination of statelessness. The urgency of the refugee problem overshadowed the broader issue of statelessness.[80] The *Ad hoc* Committee submitted, to the ECOSOC, a draft convention on refugees and a draft protocol on stateless persons.[81] These two drafts, together with a draft preamble prepared by the Economic and Social Council[82] and a draft definition of the term 'refugee' recommended by the General Assembly,[83] were presented to the 1951 United Nations Conference of Plenipotentiaries. The Conference adopted the *1951 Refugees Convention* and resolved to defer the Protocol for further study.[84] The draft protocol on stateless persons became the *1954 Stateless Persons Convention*.

2.2.3. *The 1951 Refugees Convention*

The *1951 Refugees Convention* and the *1967 Refugees Protocol* are generally regarded as responding to the issue of protection for refugees, including those who are stateless. The *1951 Refugees Convention* has 141 state parties.[85] The *1967 Refugees Protocol* has 139 state parties.[86] The Protocol removed the restrictions of the Convention by extending protection to refugees throughout the world after 1 January 1951.

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[78] Ibid 59.

[79] ECOSOC Res 248 B (IX), 8 August 1949.

[80] See Carol Batchelor, 'Stateless Person: Some Gaps in International Protection' (1995) 7 *International Journal of Refugee Law* 232, 242-45 on priority given to refugees by the Ad hoc Committee resulting in a separation of refugees from stateless persons through two draft instruments.

[81] UN Doc E/CONF.17/3 (6 August 1954) The Draft Protocol Relating to the Status of Stateless Persons: Memorandum to the Secretary-General.

[82] ECOSOC Res 319 B II (XI) 16 August 1950.

[83] GA Res 429(V), 14 December 1950, Annex.

[84] UN Doc A/1913, (15 October 1951), 1; see also UN Doc A/CONF.2/108, Section III.

[85] As of 30 September 2002. See status of ratifications at UNHCR website, http://www.unhcr.ch/. Note that in South East Asia, only two states have ratified the *1951 Refugee Convention* and the *1967 Refugee Protocol*, Cambodia ratified both on 15 October 1992 and the Philippines ratified both on 22 July 1981.

[86] As of 30 September 2002. See status of ratifications at UNHCR website, ibid.

Article 1A of the *1951 Refugees Convention* defines a refugee as a person who

> owing to a 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.[87]

The definition signals a shift from an absence of state protection in earlier treaties to persecution as a criterion.

Although refugees, *de jure* stateless or otherwise, are defined in terms of civil and political reasons for their flight, the Convention accords a wide range of rights, civil, political, economic, social and cultural, upon recognition of their new legal status in the receiving state. Most of these rights are replicated in the *1954 Stateless Persons Convention*. The two conventions adopted most of the recommendations of the 1949 study. However, *de jure* stateless refugees under the *1951 Refugees Convention* are accorded certain rights not granted to *de jure* stateless persons under the *1954 Stateless Persons Convention*. The rights granted to both will be discussed in the section on the *1954 Stateless Persons Convention*.

The *1951 Refugees Convention* contains provisions, regarding illegal entry or presence, *non-refoulement*, settlement of disputes and a supervisory body, that are absent from the *1954 Stateless Persons Convention*. Article 31 of the *1951 Refugees Convention* enjoins receiving state parties not to impose penalties on refugees who enter or are present illegally, if they have arrived directly from a territory where their life or freedom has been threatened on grounds set out in article 1, on condition that they present themselves to the authorities without delay and show good cause for their illegal entry or presence. Article 33(1) of the *1951 Refugees Convention* prohibits return to the state 'where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. Goodwin-Gill argues that '[*n*]*onrefoulement* through time is nonetheless the core element both promoting admission and protection, and simultaneously emphasizing the responsibility of nations at large to find the solutions'.[88] However, a refugee may not benefit from this prohibition where there are reasonable grounds to regard such person as a danger to the security of the

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[87] It is identical to definition in the Statute of the High Commissioner for Refugees, Annex, Chapter II, Article (ii); GA Res 428(V), 14 December 1950.

[88] Guy Goodwin-Gill, *The Refugee in International Law* (2nd ed, 1996, rep 1998) 202.

host state or community.[89] The Final Act of the 1954 United Nations Conference on the Status of Stateless Persons, at which the *1954 Stateless Persons Convention* was adopted, explicitly stated that it was not necessary to include a similar provision for stateless persons.[90]

Article 34 provides for disputes between state parties regarding interpretation or application to be referred to the International Court of Justice as a last resort. Individuals affected by such interpretation or application, have no avenues for redress under the Convention. Article 35 of the *1951 Refugees Convention* authorizes the UNHCR to monitor the application of the Convention. It has been a focal point for protection and development of principles and procedures in relation to refugees even in states that have not ratified the Convention.

2.2.4. *The 1954 Stateless Persons Convention*

The *1954 Stateless Persons Convention* has 54 state parties.[91] It is modeled on the *1951 Refugees Convention* although certain provisions have not been included. Nevertheless, it was unprecedented for stateless persons to be conferred a legal status within the framework of international law.

Article 1(1) of the *1954 Stateless Persons Convention* defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law'. The definition has been criticized as it 'precludes full realization of an effective nationality because it is a legal, technical definition which can address only technical, legal problems. Quality and attributes of citizenship are not included, even implicitly, in the definition'.[92] The Conference had debated draft definitions of *de facto* stateless persons proposed by the United Kingdom representative.[93] Unfortunately, the attempt to include *de facto* stateless persons within the definition met with much opposition. The Special Rapporteur, Roberto Cordova, had argued passionately that the circumstances of *de facto* stateless persons were frequently more tragic than those of *de jure* stateless persons.[94] He tried to

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[89] Art 33(2); See also exclusion clause in art 1F.

[90] 360 UNTS 117, Appendix.

[91] As of 5 February 2002. In South East Asia, the Philippines are the only state to have signed the Convention but have yet to ratify it. See 360 UNTS 117 at http://www.unhchr.ch/html/menu3/b/treaty3stat.html.

[92] Batchelor, above n 80, 232.

[93] See UN Doc E/CONF.17/L.11/Add.2.

[94] UN Docs E/CONF.17/4 and A/CN.4/SR.246 (1954). Roberto Cordova was the Special Rapporteur appointed by the ILC to prepare the study on the elimination or

promote support for this position by limiting the group to those who had renounced the ineffective nationality they possessed. His efforts met with partial success. The Final Act of the 1954 United Nations Conference on the Status of Stateless Persons recommended that protection be extended to *de facto* stateless persons whose reasons for renouncing the protection of the state of their nationality are recognized as valid by the host state.[95] This, of course, is a non-binding recommendation. The position of *de facto* stateless persons who have not renounced the protection of their state is, accordingly, much weaker. Ultimately, effectively stateless persons were dropped from the definition, in order to attract ratifications and to avoid reservations.[96] States were not prepared for an open-ended commitment to stateless persons.

The circumstances giving rise to the mass denationalizations and expulsions were not forgotten. Article 3 in both Conventions prohibits discriminatory application of the provisions on grounds of race, religion or country of origin. The omission of gender discrimination from the provision has been noted without comment on the implications.[97] Article 4 in both Conventions accords legally stateless persons and refugees, on par with nationals, the freedom of religion and in the religious education of their children. Article 7 of each Convention provides for exemption from reciprocity. This stipulation is significant since *de jure* stateless persons and *de jure* stateless refugees are not nationals of any state. The state of nationality of other refugees is presumed to have withdrawn protection from such nationals.

Both the *1954 Stateless Persons Convention* and the *1951 Refugees Convention* grant a number of civil, economic, social and cultural rights. Article 12 provides for the personal status of a refugee or a legally stateless person according to the law of the country of domicile or where there is no domicile, of the country of residence. Rights attached to marriage previously acquired shall be respected in accordance with the law of the receiving state.[98] Receiving state parties accord refugees and legally stateless persons

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reduction of statelessness. See UN Doc A/CN.4/64 (1953), Roberto Cordova, *Report on the Elimination or Reduction of Statelessness*.

[95] See 360 UNTS 117, Appendix.

[96] See UN Doc E/CONF./17/SR.14. The delegates were concerned that states might have conflicting views on whether a person was '*de facto*' stateless. They also wanted to avoid encouraging a person to choose statelessness to evade military service or to gain some other advantage. See also Batchelor, above n 80, 247-48.

[97] For example, see Batchelor, ibid 238 nn 26.

[98] Art 12(2) of each Convention.

rights, on par with aliens, as regards the acquisition of movable and immovable property, leases and other related contracts.[99] Artistic rights and industrial property are protected on par with nationals.[100] Refugees and legally stateless persons have the right of association, as regards non-political and non-profit making associations and trade unions, on par with foreigners in the territory of the receiving state parties.[101] They also have free access to courts of law in the receiving state parties[102] and enjoy the same treatment as nationals with regard to legal assistance.[103]

Article 17 grants refugees and legally stateless persons the same treatment as legal foreigners in the employment market and as nationals where they have entered the territory under labour recruitment programmes or immigration schemes.[104] Self-employed refugees and stateless persons enjoy the same treatment as aliens in agriculture, industry, handicrafts and commerce and in establishing commercial and industrial companies.[105] Professionals are accorded treatment no less favourable than aliens.[106] Refugees and legally stateless persons shall be treated on par with nationals in the distribution of products during rationing. They are accorded the same treatment as aliens with respect to housing,[107] but on par with nationals in elementary education (but, with aliens, with respect to higher education),[108] public relief and assistance,[109] labour legislation and social security.[110]

Articles 26 to 28 provide for freedom of movement within the territory on par with aliens, the issuance of identity papers, and travel documents subject to restrictions on grounds of national security or public order. The prohibition against expulsion, except on national security and public order grounds, in article 31 of the *1954 Stateless Persons Convention* is identical to

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[99] Art 13 of each Convention.

[100] Art 14 of each Convention.

[101] Art 15 of each Convention.

[102] Art 16(1) of each Convention.

[103] Art 16(2) of each Convention.

[104] Art 17. Note however, that art 17(2) of the *1951 Refugees Convention* accords a refugee better access to the national labour market where the person has had three years' residence in the country, whose spouse is a national of the receiving state or has one or more children possessing the nationality of the state of residence.

[105] Art 18 of each Convention.

[106] Art 19 of each Convention.

[107] Art 20 of each Convention.

[108] Art 21 of each Convention.

[109] Art 22 of each Convention.

[110] Art 23 of each Convention.

article 32 of the *1951 Refugees Convention*. Article 34 encourages expedited naturalization of refugees and legally stateless persons.

The *1948 UDHR* proclaims that everyone is free and equal in dignity and rights.[111] The *1951 Refugees Convention* and the *1954 Stateless Persons Convention* demonstrate how this may be achieved. The provisions in these two conventions place legally stateless persons and refugees favourably between nationals and other aliens. Political rights, such as the right to vote, are absent because they are reserved for nationals. Civil liberties, other than the right to freedom of religion, have also not been granted. Stateless persons and refugees are accorded economic and social rights such as access to tight national labour markets and social security that other aliens might not attain. However, the absence of provisions regarding penalties for illegal entry and presence implies that legally stateless persons who enter in contravention of domestic immigration laws are subject to penalties. In addition, the rights granted under the Convention may not be extended to them. This indicates that only those rendered legally stateless under the citizenship laws of the state party are to receive protection under the Convention. Unless the state party or state provides identity and travel documents for legally stateless persons who are habitually resident or domiciled on the territory, they will be restricted to movement within the state. This is an issue of increasing importance as international migration surges with economic globalization.

The *1951 Refugees Convention* and the *1954 Stateless Persons Convention* addressed the issue of protection for stateless persons in the 1948 ECOSOC resolution.[112] The second part of the resolution regarding the reduction or elimination of statelessness was addressed by the *1961 Statelessness Convention*.

2.2.5. *The 1961 Statelessness Convention*

The *1961 Statelessness Convention* currently has 26 state parties,[113] none of which are from South-East Asia. The process took eleven years from resolutions to drafts to adoption.[114] The protracted process and the low

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[111] Art 1.

[112] ECOSOC Res 116 D (VI), above n 60.

[113] As of 5 February 2002, the 26 countries are Armenia, Australia, Azerbaijan, Bolivia, Bosnia and Herzegovina, Canada, Chad, Costa Rica, Czech Republic, Denmark, Dominican Republic, France, Germany, Guatemala, Ireland, Israel, Kiribati, Latvia, Libyan Arab Jamahiriya, Netherlands, Niger, Norway, Slovakia, Swaziland, Sweden, Tunisia, United Kingdom, Uruguay.

[114] For a historical account of the 1961 Convention, see Batchelor, above n 80, 249-52. See also Hall, above n 41, 591-92 and UN Doc A/CONF.9/L.40/Add.6, 3.

accessions speak volumes for the sensitivity of states to any attempt to curb their powers in relation to *de jure* statelessness. The provisions also reflect the tentative commitment to reduce *de jure* statelessness.[115]

In principle, state parties are under a duty to grant nationality to persons born on their territory where they would otherwise be legally stateless.[116] However, where it is not granted at birth by operation of law,[117] the duty will only arise after birth if the applicant meets one or more of the following conditions set by the state party. First, the application must be lodged during a period beginning not later than the person's eighteenth birthday and ending not later than his or her twenty-first birthday.[118] In principle, the state party may stipulate that the application should be made between the person's eighteenth and twenty-first birthdays. The state party may also provide that the person has lived in the territory of the state for at least five years immediately before making such application or not more than ten in all.[119] The state may also stipulate that the applicant has not been convicted of national security offences nor sentenced to at least five years' imprisonment for criminal offences.[120] The last condition is that the applicant has always been legally stateless.[121]

The state also has a duty not to deprive a person of nationality where it would render him legally stateless.[122] However, the state may derogate from such duty if the person has resided abroad for not less than seven consecutive years,[123] or failed to register with the proper authorities abroad within one year of attaining majority.[124] Similarly, the state may deprive

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[115] See positive view in Paul Weis, 'The United Nations Convention on the Reduction of Statelessness, 1961' (1962) 11 *International and Comparative Law Quarterly* 1073. See also 1073-78 for a history of the Convention and 1078-80 for key issues debated at the 1959 United Nations Conference on the Elimination or Reduction of Future Statelessness.

[116] Art 1(1) provides for conferment of nationality (a) at birth to one born on the territory by operation of law or (b) upon application in accordance with the national law and provisions of art 2.

[117] Weis, above n 115, 1079-82, including nn 28 at 1080, that the provision was a compromise between *jus sanguinis* and *jus soli* states, not a compromise between *jus soli* and *jus sanguinis* principles. This means that states can choose either alternative – conferment of nationality at birth or subsequent to birth – that is more consistent with the principle underpinning their respective nationality laws.

[118] Art 1(2)(a).

[119] Art 1(2)(b).

[120] Art 1(2)(c).

[121] Art 1(2)(d).

[122] Art 8(2).

[123] Art 8(2)(a) read with art 7(4).

[124] Art 8(2)(a) read with art 7(5).

nationality where it has been obtained by misrepresentation or fraud.[125] Denationalization is also permitted where the person has rendered or renders services to another state, received or receives remuneration from another state[126] or conducts himself in a manner seriously prejudicial to the vital interests of the state.[127] The state may also deprive such person of nationality if the person has formally declared allegiance to another state or given definite evidence of his determination to repudiate his allegiance.[128] However, such deprivation shall not be permitted, unless, the person has been afforded the right to a fair hearing by a court or other independent body in accordance with law.[129]

Depriving a person or a group of persons of nationality on racial, ethnic, religious or political grounds is also prohibited.[130] This is an affirmation of the principle of non-discrimination.

The *1961 Statelessness Convention* also provides that treaty provisions regarding transfer of territory shall ensure that no person would be rendered legally stateless and, in absence of such provision, the successor state shall grant nationality to such persons on the territory who would otherwise be stateless.[131] This provision departs from tradition and imposes a clear duty on state parties to avoid statelessness in the event of state succession, particularly on the successor state with regard to the persons on the acquired territory. Unfortunately, the provision stops short and does not go further to provide for nationals of the predecessor state or their descendants resident in other states at the time of the succession. Nor does it provide for existing legally stateless persons.

The *1961 Statelessness Convention* goes further than the 1930 Hague Convention and Protocols. It advocates a positive duty to grant nationality to legally stateless persons beyond the parameters of the conflict of nationality laws.[132] Specifically, the child born outside of marriage to a legally stateless mother would benefit from the duty. The 1961 Convention has set requirements so as to achieve a balance between the individual's rights and the states' interests. Moreover, states may impose less onerous conditions. Yet a closer examination reveals that the scales are tipped in favour of the

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[125] Art 8(2)(b).

[126] Art 8(3)(a)(i).

[127] Art 8(3)(a)(ii).

[128] Art 8(3)(b).

[129] Art 8(4).

[130] Art 9.

[131] Art 10(1) and (2).

[132] Weis, above n 115, 1088, see also Hall, above n 41, 592.

state. For example, the provision that a state may delay nationality applications until the person's eighteenth birthday is rather harsh.[133] Where proficiency in the national language is a condition for application, a *de jure* stateless person lacking such proficiency because there was no access to school or education during childhood would be disadvantaged. Such a condition would ensure that few *de jure* stateless persons born in the territory of a state party would ever acquire the nationality of that state. The duty to avoid legal statelessness would arise only in extremely rare cases even for state parties of the *1961 Statelessness Convention*. The omission of gender in relation to grounds for deprivation of nationality in article 9 is also cause for concern. The fact that the 1961 Convention is silent on the remedies available to persons rendered legally stateless due to deprivation of nationality on racial, ethnic, religious or political grounds is further cause for concern. The provision in the *1961 Statelessness Convention* for a body to be set up within the framework of the United Nations falls truly short in terms of enforcing such a categorical prohibition.

Article 11 provides for 'a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority'. Such a supervisory body was never set up. Instead, the task of assisting persons with claims under the *1961 Statelessness Convention* was added to the responsibilities of the UNHCR in 1974 after the sixth instrument of ratification was deposited.[134] Article 20 empowered the Secretary-General, after receiving six ratifications to the Convention, to raise, at the General Assembly, the issue of establishing the treaty body under article 11. Article 22 of the UN Charter provides that '[t]he General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions'.[135] Consequently, article 22 read with articles 11 and 20 of the *1961 Statelessness Convention*, authorized the UN General Assembly to entrust the care of stateless

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[133] See ibid, Weis, 1081-82 that '[w]here a person has not been granted the nationality of a Contracting State jure soli, because he has failed to make the required application by the prescribed age or because he has not fulfilled the required residence conditions, the Convention provides that, if one of the parents of such a person was a national of another Contracting State at his birth, that person shall be granted the nationality of that State jure sanguinis'. This is provided in article 4. One problem would be if neither parent were the national of another Contracting State. Another is referred to on page 1082: '… a problem arises if the parents did not have the same nationality at the time of the person's birth; since no agreement could be reached as to the derivation of nationality from the father or the mother, this is left to the national law of the Contracting State concerned (Art. 4)'.

[134] See GA Res 3274 (XXIX), 10 December 1974.

[135] See Charter of the United Nations, Chapter IV, The General Assembly at United Nations Human Rights Website, http://www.unhchr.ch/html/menu3/b/ch-chp4.htm

persons to the UNHCR. The Secretary-General noted that many refugees who were already the concern of the High Commissioner were also stateless persons.[136] Another persuasive factor was that stateless persons could benefit from the High Commissioner's experience of negotiating with governments on problems of protection. The mandate was extended in 1976 by the General Assembly with the observation that no additional financial costs would be incurred by this arrangement.[137] The consequence, however, was that very little had been done to assist stateless persons or reduce statelessness until a new wave of state successions in 1990s led to renewed interest in statelessness.

2.2.6. *2000 UN Declaration on Nationality*

The ILC adopted the *1999 Draft Articles on the Nationality of Natural Persons in Relation to the Succession of States* ('*1999 Draft Articles on Nationality*')[138] after the second reading at its fifty-first session in 1999.[139] The raft of state successions in Eastern Europe in the 1990s had prompted the United Nations General Assembly to request the ILC to prepare a draft code of international law principles regarding 'state succession and its impact on the nationality of natural and legal persons'.[140] Vaclav Mikulka, the Special Rapporteur submitted three reports[141] and the Working Group submitted one[142] to the ILC and the Sixth Committee of the General Assembly. The issue of the nationality of legal persons was deferred for further study. The Special Rapporteur prepared and submitted the draft articles on nationality of natural persons at the forty-eighth session of the ILC in 1996.[143] In 1997,

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[136] Batchelor, above n 80, 254.

[137] GA 31/36, 30 November 1976. The mandate was again extended by GA Res. 50/152, 5 February 1996.

[138] See text in ILC, *Report on the work of Fifty-first Session*, above n 37, Chapter IV, Section E.

[139] Ibid [42].

[140] UN Doc A/Res/48/31 (1993).

[141] UN Doc A/CN.4/467 (1995), Vaclav Mikulka, *First Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons*, ILC, 47th sess; UN Doc A/CN.4/474 (1996), Vaclav Mikulka, *Second Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons*, ILC, 48th sess; UN Doc.A/CN.4/480 (1997), Vaclav Mikulka, *Third Report on Nationality in Relation to the Succession of States*, ILC, 49th sess.

[142] UN Doc A/CN.4/L.507 (1995), Vaclav Mikulka, *Report of the Working Group on State Succession and Its Impact on the Nationality of Natural and Legal Persons*, ILC, 47th sess.

[143] UN Doc A/CN.4/480 (1997).

the ILC provisionally adopted the draft articles[144] which were eventually adopted by the United Nations General Assembly as a declaration. The *2000 UN Declaration on Nationality* was an attempt to codify and develop international law principles regarding nationality in relation to state succession.[145] The following discussion is confined to the emphasis on the prevention of *de jure* statelessness in the *2000 UN Declaration*.

The Preamble sets the tone for the articles. It expresses a strong endorsement of human rights, the general right to a nationality, the child's right to a nationality and the general duty of states to prevent *de jure* statelessness in relation to persons whose nationality may be affected by state succession.

The articles are divided in two parts. The first part consists of nineteen general provisions. A national of the predecessor state has the right to a nationality of at least one of the states on the date of succession and a child born after the date of succession has the right to acquire the nationality of the state of birth.[146] However, article 1 fails to identify the state with the duty to grant nationality. The articles also specifically exclude existing *de jure* stateless persons from the benefit of the provisions.[147] The duty of both predecessor and successor states to prevent *de jure* statelessness is provided in article 4. There is a strict prohibition against discrimination in relation to retention or acquisition of nationality or denial of the right of option to the nationality of one of the states concerned.[148] The proscription is accompanied by a further prohibition against arbitrary decisions regarding deprivation or acquisition of nationality and a provision for procedural fairness, particularly 'effective administrative or judicial review'.[149] The prohibition against discrimination on any ground goes further than preceding instruments. Discrimination on gender grounds would be prohibited. This would be important in relation to the right of option and the principle of family unity.[150] Pursuant to article 14, *de jure* stateless persons

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[144] See text in International Law Commission, *Report on the work of Forty-ninth Session*, GAOR 52nd sess, Supplement No 10, UN Doc A/52/10 (1997), Chapter IV, Section C.

[145] See n 26, Annex, the last paragraph of the Preamble.

[146] Arts 1 and 13 respectively.

[147] Nationals of third states are also excluded from the definition of 'persons concerned' in art 2. See GA Res, above n 26, Art 2, commentary [5]-[7].

[148] Art 15.

[149] Arts 16 and 17.

[150] GA Res, above n 26, Art 11, [1] and [3] noted state practice regarding family unity in treaty provisions after the First and Second World Wars and decolonization but the Commission refrained from expressing an opinion on gender discrimination in those

who are habitual residents will remain as such. Their status will not be affected by the succession although they have a right to return to the state from which they have been forced to leave.

The second part consists of seven articles pertaining to transfer of part of a territory, unification of states, dissolution of states and separation of part or parts of the territory. Article 20 provides that where part of the territory of a state is transferred, the successor state shall confer nationality on the habitual residents in the transferred territory. The predecessor state shall withdraw its nationality from them unless otherwise indicated by their exercise of the right of option. There is no provision for those who are habitually resident in another state. Article 21 provides that, in the case where states unite, the successor state shall grant nationality to former nationals of the predecessor states, whether or not it retains the identity of one of the predecessor states or assumes a new one. Former nationals who are habitual residents in another state will also acquire the nationality of the successor state.[151]

Articles 22 and 23 provide for the event of dissolution of a state where parts of the territory form two or more successor states. In such a case, each successor state shall grant nationality to the nationals of the predecessor state habitually resident in its territory subject to their exercise of the right of option. The right of option is also granted to persons who have 'appropriate legal connection' with a 'constituent unit of the predecessor state', which has become part of that successor state. Persons habitually resident in another state born in or had their last habitual residence in the territory that has become the successor state before leaving the predecessor state or 'having any other appropriate connection with that successor state' also have the right of option.[152] Articles 24, 25 and 26 provide for the separation of part or parts of the state that form one or more successor states while the predecessor state continues to exist. A right of option is also granted to those who qualify for the nationality of the predecessor and successor states.

In principle, the right of option is an endorsement of the rights of individuals. However, the municipal legislation and mechanism of implementation are critical to safeguard this right. Otherwise, the right of option could be rendered ineffective and nugatory. For example, the predecessor or successor state could employ a criterion which is legally

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provisions. Different interpretations in various parts of the world regarding family unity were also noted in commentary on art 12 at [6]. See also above n 13, Italy.

[151] Blackman, above n 10, 1167. Note that art 21 was art 18 in the Special Rapporteur's draft before its final adoption by the UNGA.

[152] Ibid 1168-69.

justifiable that specifically excludes individuals or a minority group but which completely negates the right of option. For example, the Czech Republic stipulated that a clean criminal record was a necessary condition for the exercise of the right. The Roma inhabitants who were disproportionately affected by this stipulation were, as a consequence, excluded from Czech nationality.[153] Or, some other dispute could arise between individuals and states or between states. In either case, an effective mechanism to address and resolve the issues is extremely important.

The *2000 UN Declaration on Nationality* represents a convergence of legal principles, specifically the principle of effective nationality, the individual right to a nationality and the corresponding duty of states to prevent *de jure* statelessness, and the norm of non-discrimination.[154] Domicile or habitual residence had been used as a criterion to confer nationality in Peace Treaties after World War I.[155] Habitual residence was also used to establish the principle of genuine link in the *Nottebohm* case.[156] Unfortunately, the tests of domicile and habitual residence have not been extended to habitual residents who are already *de jure* stateless at the time of state succession. Those criteria would assist in further reducing *de jure* statelessness.

2.2.7. *Regional Instruments*

Regional initiatives on the law of statelessness reveal reduction but not elimination of statelessness as the primary concern. There are no provisions to safeguard the rights of legally stateless persons.

The *1969 American Human Rights Convention* currently has 25 state parties.[157] Article 20 of this Convention provides that every person has the right to a nationality; everyone has the right to the nationality of the state party where he was born if he does not have the right to any other

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[153] Ibid 1185-91, and nn 163 at 1188 and nn 166 at 1190.

[154] Ibid 1145.

[155] *A Study of Statelessness*, above n 5, 142-45; GA Res, above n 26, Art 19, [4].

[156] (1955) ICJ 4, 22. In deciding whether or not Liechstentein had the right to exercise diplomatic protection on behalf of Nottebohm vis-à-vis Guatemala, the International Court of Justice held that nationality is not a legal conferment but a genuine social attachment or link evidenced by factors such as 'the habitual residence of the individual…the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children etc…'

[157] See above n 27. They are Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

nationality; and that no one shall be arbitrarily deprived of nationality or the right to change it. If the person does not have the nationality of another state but has the right to that nationality, that person will not be entitled to the nationality of the state of birth if he or she chooses not to exercise such right. The proviso makes a fine but important distinction. Otherwise, the provision endorses the principle of *jus soli* such that even a person who has been rendered legally stateless by another state or has been guilty of treason will still have a nationality.[158]

The *1997 European Convention on Nationality* has 7 state parties.[159] Article 3 of the Convention is almost identical to the article 1 of the *1930 Hague Convention on Conflict of Nationality Laws*. It affirms the right of state parties to determine nationality subject to 'international conventions, customary international law and the principles of law generally recognized with regard to nationality'. Article 4 establishes four general principles on nationality. They are that everyone has the right to a nationality, legal statelessness shall be avoided, no one shall be arbitrarily deprived of his or her nationality and change of marital status shall not automatically affect the nationality of either spouse. The non-discrimination clause prohibits discrimination on grounds of sex, religion, race, colour, national or ethnic origin as well as discrimination between those who acquired nationality by birth and those who acquired it subsequently.[160] Article 6 provides that children shall acquire the nationality of the state of birth where one parent has the nationality of that state party when the child was born. Children born abroad will not acquire the nationality of the state of either or both parents unless the state party provides otherwise in its domestic law. However, given that respect for family life was one inspiration for adoption of the Convention, it is likely that state parties would facilitate the acquisition of nationality by children born abroad to their nationals.[161] On the other hand, children born to legally stateless parents, aliens or otherwise, would also be legally stateless. They may, however, apply for nationality of the state of birth after 'lawful' and habitual residence of up to five years in the territory immediately preceding the application.[162] The requirement of 'lawful' residence, however, rules out children of *de jure* stateless parents who are also illegal immigrants or migrants.

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[158] Hall, above n 41, 602.

[159] See above n 28. As of 21 March 2002, they are Austria, Hungary, Moldova, Netherlands, Portugal, Slovakia and Sweden.

[160] Art 5.

[161] Hall, above n 41, 596.

[162] Art 6(2)(b).

The state party may provide for loss or deprivation of nationality subject to the proviso that the person would not thereby be rendered *de jure* stateless.[163] However, if the person has been guilty of fraudulent conduct, false information or concealment of relevant fact when applying for nationality, the state party may proceed to exercise its powers of deprivation.[164] A state party may permit renunciation by nationals habitually resident abroad.[165] However, renunciation is not permitted whereby the person will be rendered legally stateless.[166] Lawful residence in the state of former nationality is also a condition for the recovery of such nationality. This provision is unlikely to assist one who has been rendered legally stateless as a result of fraudulent conduct in applying for nationality of another state and where he or she is likely to be habitually resident.[167]

In nationality matters related to state succession, the Convention specifically endorses the principle of avoiding *de jure* statelessness.[168] In particular, there appears to be no restriction that only nationals of the predecessor state shall be eligible for nationality in either the predecessor or successor state.[169] If this means that legally stateless persons could acquire nationality of either state upon succession, the Convention would be more progressive than the *2000 UN Declaration on Nationality*. However the absence of a dispute resolution mechanism means that it may be difficult for persons adversely affected, including stateless persons, to seek redress. Access to the European Court of Human Rights would be ideal but is not possible. It has been suggested that they could attempt to gain access to the European Court of Justice either through the preliminary reference

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[163] Art 7 permits the state to provide for loss or deprivation of nationality where the person has voluntarily acquired another nationality, served voluntarily in a foreign military service, is guilty of conduct seriously prejudicial to the state's vital interests, does not have a genuine link with the state in being habitually resident abroad, conditions laid down by domestic law no longer fulfilled during the child's minority and where a child under adoption acquires or possesses foreign nationality of one or both adopting parents.

[164] Art 7(3) read with Art 7(1)(b).

[165] Art 8(2).

[166] Art 8(1).

[167] Hall, above n 41, 601.

[168] Art 18(1) provides for respect for the principles of the rule of law, the rules concerning human rights and inter alia the principle of avoiding statelessness in nationality matters related to state succession.

[169] Art 18(2) provides that 'the granting or retention of nationality' in cases of state succession shall take into account the genuine and effective link of the person concerned with the state, the habitual residence of the person at the time of the succession, the will of the person concerned and the territorial origin of the person.

procedure or a request to the European Commission to commence proceedings against the state party concerned.[170]

The approach of the *1969 American Human Rights Convention* towards legal statelessness is much more sympathetic towards the individual than that of the *1997 European Convention on Nationality*. The introduction of 'lawful' residence, in the latter convention, even where children are involved indicates the emergence of another ground of discrimination that does not ostensibly fall within those set out in the non-discrimination clause. In this respect, the *1997 European Convention on Nationality* is even more restrictive than the *1961 Statelessness Convention*. The *1961 Statelessness Convention* stipulates a period of habitual residence without the additional requirement of lawfulness for acquisition of nationality *jus soli* where the child would otherwise be stateless.[171]

3. CONCLUSION

Statelessness is no longer a legal and technical definition but is considered as the situation of not having the protection of a state. However, the omission of *de facto* statelessness from the definition in the *1954 Stateless Persons Convention* reflects the significance states still attach to the principle of non-interference in each other's domestic affairs. Ultimately, states continue to uphold the prerogative of each state in deciding whether or not to extend protection to its nationals or citizens. As regards legally stateless persons, state parties undertake to protect the rights accorded under the 1954 Convention. Unfortunately, even though *de jure* stateless persons are granted numerous civil, economic and social rights, they are not accorded rights pertaining to illegal entry and *non-refoulement*. This implies that legally stateless persons who enter a state party illegally are not entitled to the rights granted under the Convention. Meanwhile, illegal immigration status has emerged as a bar to acquisition of nationality even though it would render children *de jure* stateless. The absence of regional instruments and the low number of ratifications to the conventions on statelessness indicate that the protection of stateless persons in South East Asia has to be sought under other international instruments. In the age of economic globalization, there is greater cause for concern because stateless women and girls also move illegally between states in search of security and a decent livelihood. At

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[170] Hall, above n 41, 601.

[171] Art 1(b) read with art 2.

times, they are trafficked to another state to work illegally in the sex, services and other industries.[172] The absence of a prohibition against gender discrimination in the conventions on statelessness takes on a greater significance in the light of these developments.

Nationality and citizenship status has been the benchmark for protection under international and domestic law. Hence, the concern for stateless persons stems from their exclusion from protection available to nationals and citizens. With the rise of immigration status as another element, the question is whether nationality and citizenship status remains as the benchmark for protection. Legal immigration status appears to be extending the boundaries of protection beyond nationality and citizenship status. Illegal immigration status seems to be creating emerging groups of stateless persons. Ultimately, immigration status is not replacing nationality and citizenship status as the converse to statelessness. More likely, immigration status is emerging to fortify nationality and citizenship status as the frontier for human rights protection. The application of the *jus sanguinis* principle to immigration status has other implications, including the possibility of discrimination on gender, race and other grounds against non-nationals and non-citizens. Such discrimination adds another dimension to statelessness and generally excludes more groups of people from protection.

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[172] See for example, Kinsey Dinan, *Owed Justice: Thai Women Trafficked into Debt Bondage in Japan* (2000) 121-23, 200-02; GAATW (Global Alliance Against Traffick in Women), *Trafficking in Women in the Asia-Pacific Region: A Regional Report* (1997) 15-16.

CHAPTER THREE

STATELESS PERSONS, REFUGEES AND IRREGULAR MIGRANT WORKERS: MERGING CATEGORIES OF UNPROTECTED PERSONS

It is generally accepted that human rights guarantees are or ought to be provided without distinction between nationals and non-nationals.[1] But the refugee, stateless persons and migrant workers conventions are evidence to the contrary. Perhaps the oversight is due to the fact that refugees and stateless persons have always been viewed from humanitarian perspectives and the rights they enjoy predate the two international covenants and other international instruments on human rights. The *1990 Convention on the Protection of the Rights of All Migrant Workers and Their Families*[2] puts that notion into proper perspective. Distinctions are made between nationals and non-nationals in relation to human rights.[3] More and more distinctions are being made to the extent that a hierarchy is emerging not just in terms of the spectrum of rights but also in relation to the people who enjoy those rights.

Immigration status and immigration categories determine the range of rights the hierarchy of non-citizens may enjoy and exercise. Some categories of immigrants share most if not all the rights accorded to citizens. The emerging hierarchy of non-citizens is overtly driven by economic imperatives. Where politics once persuaded states to accord refugees rights almost on par with nationals, economics now shape the protection extended to non-nationals according to their immigration status. Where legally stateless persons used to be excluded from protection accorded to citizens, a range of non-nationals with irregular immigration status is being confronted by this prospect. Apart from legally stateless persons, non-nationals in host states are citizens in their own countries. This implies that those with regular immigration status enjoy protection by both states. Whereas, those with

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[1] Guy Goodwin-Gill, 'International Law and Human Rights: Trends Concerning International Migrants and Refugees' (1989) 23 *International Migration Review* 526, 526.

[2] GA Res 45/158, 18 December 1990. As of 21 March 2003, there are 21 state parties. ('*1990 Migrant Workers Convention*').

[3] Goodwin-Gill, above n 1, 526.

irregular immigration status in the host state, may find themselves unprotected by both states. Just as the lack of nationality and citizenship status used to absolve states from assuming responsibility, joint or several, for legally stateless persons, irregular immigration status similarly relieves states of accountability for those migrants rendered effectively stateless. This signals that immigration status may affect the protection extended by a state to its nationals and citizens in another state. This in turn calls into question the principle of non-discrimination as it applies to rights and freedoms perceived as important but not fundamental.[4] Beyond that, irregular immigration status is eroding the fundamental principle that everyone is free and equal in dignity and rights.[5]

1. Stateless Persons, Refugees and Irregular Migrant Workers: An Overview

In 1997, the UNHCR estimated that Asia had 2.8 million people with no nationality or with uncertain nationality status, Africa had 800,000 while Europe had well over 2.5 million people rendered *de jure* or *de facto* stateless by citizenship and nationality laws of nascent states following the break up of the former Soviet Union, the former Yugoslavia and the former Czechoslovakia.[6] About 600,000 *de jure* stateless ethnic minorities in Thailand were not included in the estimates for Asia.[7] There were no statistics or breakdown according to gender or age. Since then, statistics have not been provided nor are they readily available.

At the turn of the twenty-first century, the UNHCR estimates that there are about 21.8 million 'persons of concern' to the organization world-wide, including 12 million refugees, 900,000 asylum seekers, 800,000 returned refugees, 6 million internally displaced persons, 400,000 returned internally

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[4] Ibid, 526-27.

[5] Article 1, *1948 UDHR*.

[6] UNHCR, 'Chapter 6: Statelessness and Citizenship' in *The State of the World's Refugees: A Humanitarian Agenda* (1997) 5-9. The estimates for Asia exclude Palestinians who are under the protection of another UN agency. <http://unhcr.ch/refworld/pub/state/97ch6.htm> (22 March 1999).

[7] See Chayan Vaddhanaphuti and Karan Aquino, 'Citizenship and Forest Policy in the North of Thailand' (1999) 1. (Paper presented at 7th International Thai Studies Conference, 'Thailand: A Civil Society?', Amsterdam, Netherlands, 6 July 1999), 1; Jarernwong, Suppachai, 'Citizenship and State Policy: How We Can Move Beyond The Crisis?' (1999) 5. (Paper presented at Asia-Pacific Youth Forum, 'The Crisis and Beyond: Can Youth Make a Difference?', Chiang Mai, Thailand, 22 – 28 November 1999).

displaced persons and 1.7 million others of concern.[8] The United Nations Special Rapporteur for Internally Displaced Persons estimates between 20 and 25 million internally displaced persons world wide.[9] Since the end of 2000, Asia has 44.6% refugees, Africa 30%, Europe 19.3%, North America 5.2%, Oceania 0.6% and Latin America and Caribbean 0.3%.[10] As for persons of concern to the UNHCR, Asia is host to 38.8%, Africa 27.9%, Europe 25.6%, North America 4.8%, Latin America and the Caribbean 2.6% and Oceania 0.3%.[11] About half the population of concern to UNHCR are female and about 45% are below the age of 18.[12]

The International Organization for Migration ('IOM') notes that about half the estimated 150 million migrants currently live in developing countries.[13] Women now comprise 47.5 per cent of all migrants.[14] The International Labour Organization ('ILO') estimates that about 70 to 80 million of between 120 and 130 million migrants are 'migrant workers'.[15] More recent estimates by the ILO place the number of migrants (migrant workers and their dependants) at between 80 to 97 million with 20 million across Africa, 18 million in North America, 12 million in Central America and South America, 7 million in South and South East Asia, 9 million in the Middle East and 30 million across Europe.[16] The ILO also estimates that no less than 15% of the 80 to 97 million migrants are in an irregular situation.[17] Other sources provide higher figures on irregular migrants but these are also largely 'guesstimates' with about 5 million in the United States, 3 million in Europe and 2.7 million in East and South East Asia.[18]

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[8] UNHCR Publications, 'Refugees By Numbers 2001 Edition' at UNHCR Website <http://www.unhcr.ch/> (15 August 2002).

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] IOM, *The Link between Migration and Development in the Least Developed Countries: IOM's vision and programmatic approach* (2001) 1.

[14] Ibid.

[15] UN Doc E/CN.4/2000/82 (2000), Gabriela Rodriguez Pizarro, *Migrant Workers: Human Rights*, Commission on Human Rights, 56th sess, [15].

[16] ILO, *About MIGRANT* (last updated 14 June 2002) at ILO website, http://www.ilo.org/public/english/protection/migrant/about/index.htm. (15 August 2002).

[17] Ibid.

[18] Ronald Skeldon, 'Myths and Realities of Chinese Irregular Migration' (2000) 12. (Report prepared for the IOM); see also Scalabrini Migration Centre, *Asian Migration Atlas 2000*, at the website, <http://www.scalabrini.asn.au/atlas/amatlas.htm> (15 August 2002).

1.1. *Irregular Migration: 1970s-1990s*

The phenomenon of migrant workers has evolved rapidly with economic globalization since the 1970s. The 'brain drain' from developing to developed countries has been matched by mass migration of less skilled and unskilled migrant workers. Many migrant workers used to be documented, with passports, visas and employment papers. Others were illegal or irregular.[19] Initially, irregular migrants were generally defined as those who have entered a state without authorization or worked without permission or remained after their visas had expired.[20] The term 'irregular' covers a wider range of circumstances since not everyone entered the state illegally and is consistent with the definition in the *1990 Migrant Workers Convention*.[21] I will use the term 'irregular' except where 'illegal' may be more appropriate. More recently, the meaning of irregular migration has developed to include the ways people leave their states particularly those which involve people smugglers or traffickers.[22] Both developed and developing countries had tolerated irregular migration up until the 1970s. Previously described as 'spontaneous' such migration was eventually stigmatized as 'illegal'.[23] Since then states have hardened their attitude towards irregular migration. Feminization of mass migration in various regions since the 1980s reflects the importance of women's expanded role in the world economy.[24] The proportion of female irregular migrant workers was never clear because of

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[19] The ILO Conventions on migration for employment dating back to 1939 use the term 'regular' to denote migration for employment in accordance with legal procedures agreed between states. Hence, the term 'irregular' refers to migration for employment that circumvents such procedures.

[20] Ibid, 742.

[21] Art 2 read with art 5.

[22] See Skeldon, above n 18, 23-25, where the role of the trafficker or smuggler is explained in relation to legal exit and legal entry, legal exit and illegal entry and illegal exit and illegal entry.

[23] Linda Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention' (1991) 25 *International Migration Review* 737, 744. noted that undocumented immigration in France constituted up to 80 percent of all immigration in the 1970s; H.W. Arndt, 'From State to Market' (1998) 12 *Asian Economic Journal* 331, 335 noted that unemployment in Western states was less than 2% from the 1950s to about 1970 when it shot up. This is a factor in the change in attitude towards migration in general and irregular migration in particular.

[24] See Shirley Hune, 'Migrant Women in the Context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families' (1991) 25 *International Migration Review* 800, 802.

the very nature of such migration. In the early 1990s, the ILO forecasted that illegal or irregular migration, excluding refugees would reach 25 million by 2010.[25] Women then made up about 45 percent of the migrant worker population.[26]

In the meantime, the overlapping of migrant workers with other categories of non-nationals was evolving. It largely escaped notice within such an overwhelming sweep of migration.[27] However, Bosniak noted in the early 1990s that '*de facto* refugees (persons who are not recognized as legal refugees but who are unable or unwilling to return to their countries for political, racial, religious or violence-related reasons)' fell within the term 'irregular migrants'.[28] Furthermore, the ILO Conventions on migration for employment arguably applied to refugees and stateless persons as long as they were 'regularly admitted' as migrant workers.[29] However, this view does not resonate in the *1990 Migrant Workers Convention.*

2. PROTECTION FOR MIGRANT WORKERS: INTERNATIONAL INSTRUMENTS

The relevant international instruments extending protection to migrant workers are the *1949 ILO Migration for Employment Convention (Revised) No 97*,[30] the *1975 ILO Migrant Workers Convention No 143*, the *1949 ILO Migration for Employment Recommendation (Revised) No 86*, and the *175 ILO Migrant Workers Recommendation No 151*, the *1985 Declaration on the Human Rights of Individuals who are not the Nationals of the Country in which they live*[31] and the *1990 Migrant Workers Convention*. The ILO conventions and the 1985 declaration extend protection only to migrant workers and aliens lawfully within the state, including refugees and stateless persons. The *1990 Migrant Workers Convention* extends similar protection, albeit lesser, to migrant workers and their families who are illegally within the territory. However, refugees and stateless persons are excluded from enjoying rights granted under this convention.

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[25] ILO, *Migration News Sheet*, February 1991, 3.

[26] Hune, above n 24, 802.

[27] Bosniak, above n 23, 742.

[28] Ibid.

[29] *1975 ILO Migrant Workers Convention No 143* art 11(1) and *1949 ILO Convention No. 97* art 11(1).

[30] It replaced the *1939 Convention on Migration for Employment No 66*.

[31] GA Res 40/144, 13 December 1985. ('*1985 Declaration on the Human Rights of Aliens*').

2.1. *The 1975 ILO Migrant Workers Convention No 143*

Since irregular migration was not an issue at the time, it is understandable that the *1949 Convention No 97* did not provide for irregular migrant workers. However, the *1975 ILO Convention No 143* was an express response to the upsurge in illegal migration in the 1970s.[32] Yet it did not include irregular migrant workers but retained the focus on regular migrant workers. Nevertheless, only 18 countries have ratified *Convention No 143*[33] while *Convention No 97* has 42 state parties.[34]

Other than the provision that state parties undertake to 'respect the basic human rights of all migrant workers',[35] *Convention No 143* does not make specific provisions for the protection of migrant workers who continue to be undocumented or in an irregular situation. The twin objectives of the Convention are the suppression of illegal migration and employment,[36] and securing equal opportunity and treatment for legal migrant workers in the state of employment.[37] Article 3 provides for individual and collaborative efforts of state parties 'to suppress clandestine movements of migrants for employment and illegal employment of migrants' and 'against the organizers of illicit or clandestine movements of migrants for employment departing from, passing through or arriving in its territory, and against those who employ workers who have immigrated in illegal conditions'. A migrant worker is defined as 'a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant

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[32] See Preamble [8].

[33] Benin, Bosnia and Herzegovina, Burkina Faso, Cameroon, Cyprus, Guinea, Italy, Kenya, Former Yugoslav Republic of Macedonia, Norway, Portugal, San Marino, Slovenia, Sweden, Togo, Uganda, Venezuela and Yugoslavia. (entered into force on 9 December 1978).

[34] Algeria, Bahamas, Barbados, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Cameroon, Cuba, Cyprus, Dominica, Ecuador, France, Germany, Grenada, Guatemala, Guyana, Israel, Italy, Jamaica, Kenya, Former Yugoslav Republic of Macedonia, Madagascar, Malawi, Malaysia (Sabah), Mauritius, Netherlands, New Zealand, Nigeria, Norway, Portugal, Saint Lucia, Slovenia, Spain, Tanzania Zanzibar, Trinidad and Tobago, United Kingdom, Uruguay, Venezuela, Yugoslavia, Zambia. (entered into force on 22 January 1952).

[35] Art 1.

[36] Arts 2-7.

[37] Arts 10, 12-14.

worker'.[38] Protection under *Convention No 143* would, by definition, extend to a refugee or a stateless person who is also a legal migrant worker. On the other hand, irregular migrant workers are only entitled to 'equality of treatment for [themselves] and [their] family in respect of rights arising out of past employment as regards remuneration, social security and other benefits'.[39] This has been criticized as being overly restrictive.[40] Moreover, the provision has been interpreted to mean equality with legal migrant workers and not nationals in the state of employment.[41]

Curiously, the strong emphasis on state control over immigration in the Convention has failed to attract more ratification, which indicates that states are reluctant to accord even legal migrant workers equal treatment with nationals. The issue of protection for irregular migrant workers was left for consideration by other organs of the United Nations.

2.2. *The 1985 Declaration on the Human Rights of Aliens*

The United Nations General Assembly adopted the declaration on the human rights of aliens in December 1985.[42] The issue of irregular migrant workers plagued the drafting process of the *1985 Declaration on the Human Rights of Aliens*. States were divided on whether the Declaration should apply to all non-nationals or only to those who were lawfully present on the territory. Article 1 provides that 'the term 'alien' shall apply, with due regard to qualifications made in subsequent articles, to any individual who is not a national of the state in which he or she is present'. Article 2 clarifies that

> [n]othing in this Declaration shall be taken as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens.

Thus states are restricted only by their international and human rights obligations. This non-binding declaration reflects a discernible trend in the delicate balance between state sovereignty and human rights in the late

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[38] Art 11. It is identical to Art 11(1) of *ILO Convention 97* except for the inclusion of those who have already migrated.

[39] Art 9(1).

[40] See Bosniak, above n 23, 739.

[41] Goodwin-Gill, above n 1, 535 including nn 31.

[42] GA Res 40/144, 13 December 1985.

twentieth century. States more than ever intended to retain control over who enters and who stays on their territory. For some states, legal presence alone is insufficient to guarantee full protection granted under the Declaration.[43] Such protection is only guaranteed for permanent resident aliens. As regards temporary or non-immigrant aliens, states prefer to reserve their powers to curb their freedoms or to exclude them. Efforts to secure protection for the human rights of aliens equal to that of nationals continued during the drafting of the *1990 Migrant Workers Convention*.

2.3. *The 1990 Migrant Workers Convention*

The *1990 Migrant Workers Convention* was adopted by the United Nations on 18 December 1990. As of 14 March 2003, it had 21 state parties[44] and entered into force on 1 July 2003.[45] The *1990 Migrant Workers Convention* was a response to the growing phenomenon of migrant workers since the 1970s. In 1975, following the adoption of the *1975 ILO Migrant Workers Convention No 143*, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities published a report by Halima Warzazi, *Exploitation of Labour Through Illicit and Clandestine Trafficking*, regarding the human rights problems faced by illegal migrant workers.[46] In 1978, the General Assembly of the United Nations adopted a resolution calling for improvement in the conditions of migrant workers, protection for the rights of migrant workers and ratification of the *1975 ILO Convention No 143*.[47] A Report prepared by the Secretary-General later that year highlighted the problems migrant workers faced in a new culture.[48] Attention was also drawn to the particular conditions of women and

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[43] Goodwin-Gill, above n 1, 541.

[44] Before 14 March 2003, the 19 state parties were Azerbaijan, Bolivia, Bosnia and Herzegovina, Cape Verde, Colombia, Congo, Ecuador, Egypt, Ghana, Guinea, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Uganda and Uruguay. El Salvador and Guatemala acceded and ratified respectively on 14 March 2003.

[45] Art 87(1) provides for entry in force three months after the deposit of the twentieth instrument of ratification or accession. Mali acceded on 5 June 2003, bringing the total number of state parties to 22.

[46] UN Doc E/CN.4/Sub.2/L.640, (1975). Republished as UN Doc E/CN.4/Sub.2/1986/6, UN Sales No E.86.XIV.1 (1986).

[47] GAOR, UN Doc A/RES/32/120 (1978).

[48] UN Doc E/CN.5/568 (1978), *Welfare of Migrant Workers and Their Families: Progress Report of the Secretary-General*, 26 UN ESCOR Communication for Social Development.

children.[49] These developments persuaded the General Assembly to adopt a resolution in 1979 calling for an international Convention to protect the rights of all migrant workers and their family members.[50] A Preliminary Draft Convention was completed in late 1980.[51] Unlike the *1951 Refugees Convention*, it took eleven years before it was finally adopted.[52] In this respect, it resembles the *1961 Statelessness Convention* and reflects too the tension between human rights protection and state sovereignty.[53]

Article 2 of the *1990 Migrant Workers Convention* defines a migrant worker as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'. Women migrant workers are explicitly included within the definition in addition to the prohibition against discrimination on the basis of sex in article 1.[54] Article 5 differentiates between legal and illegal migrant workers on the basis that

> migrant workers and members of their families (a) are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the state of employment pursuant to the law of that State and to international agreements to which that State is a party; (b) are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

Unlike the ILO Conventions, the term 'migrant worker' no longer implies legal immigration status. A distinction is drawn between economic status and immigration status. The inclusion of the families of migrant workers is an innovation even though some provisions of the *ILO Convention No. 143* extend to the family of the migrant worker.[55] The definition does not contemplate the situation where the migrant workers are in a regular situation but some or all other members of their families are undocumented.

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[49] Ibid 12-18.

[50] GA Res 34/172, UN Doc A/34/46 (1979).

[51] GAOR, UN Doc A/36/378 (1991) Annex I.

[52] For an insider's view of the drafting process, see Juhani Lonnroth, 'The International Convention on the Rights of All Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotation' (1989) 23 *International Migration Review* 710.

[53] See Bosniak, above n 23.

[54] See Hune, above n 24, 808-09, on the significance of arts 1 and 2 in reducing the invisibility of women migrant workers as well as the eventual adoption of the terminology 'he or she' and 'his or her' throughout the Convention.

[55] Art 9 is an example.

Article 3 provides that the 'Convention shall not apply to… (d) refugees and stateless persons, unless such application is provided for in the relevant legislation of, or international instruments in force, for the State Party…'. This is a departure from the precedent set by the ILO Conventions. It also runs counter to specific provision in the *1951 Refugees Convention* and the *1954 Stateless Persons Convention* that refugees and stateless persons may enjoy rights and benefits over and above those in the respective conventions.[56] The objective may be to prevent duplication but this can only apply where the rights are identical in the relevant conventions.[57] I espouse the argument that there is no conceivable reason why refugees and stateless persons who are 'economically active' should not be accorded rights under the *1990 Migrant Workers Convention*.[58] I also argue that the inclusion of irregular migrant workers among those protected under the *1990 Migrant Workers Convention* may have influenced the exclusion of refugees and stateless persons from enjoying the rights under this Convention.

Article 1(1) of the *1990 Migrant Workers Convention* prohibits discrimination against all migrant workers and their families in terms of 'sex, race, colour, language, religion or conviction, political opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status' but only with respect to the rights granted under the Convention. State parties also undertake not to discriminate on any of these grounds in respecting and ensuring the rights of all migrant workers and members of their families within their territory or subject to their jurisdiction.[59] Part III of the Convention provides for the human rights of all migrant workers[60] and members of their families but the rights in Part IV are only conferred on regular migrant workers and members of their families.[61] Irregular migrant workers and their families have fewer rights than those who are legal. Furthermore, some provisions in the Convention overlap with provisions in general human rights instruments. Other provisions extend similar rights; yet others are new rights while a few limit

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[56] Art 5 of the respective conventions.

[57] *Report of the Open-Ended Working Group*, UN Doc A/C.3/40/6 (October 1985) [114], [122],]123] and [143] on discussion regarding extension to refugees and stateless persons and the position of the United States that it was preferable to limit the convention to avoid 'double coverage' cited in Goodwin-Gill, above n 1, 542.

[58] Goodwin-Gill, above n 1, 542 including nn 70.

[59] Art 7.

[60] Arts 8-33.

[61] Arts 36-56.

existing rights.[62] It will become clear that irregular migrant workers do not enjoy some of the new rights while some provisions may complicate if not actually frustrate their enjoyment of the rights granted to them under the Convention.

The minimum rights of migrant workers, including irregular migrant workers, in Part III in the *1990 Migrant Workers Convention* are reproductions of substantive provisions in other general human rights instruments.[63] Articles 8 to 24 set out the civil and political rights and articles 25 to 33 the economic and social rights of all migrant workers and their families. Migrant workers and their family members are free to leave any state, including their own.[64] They enjoy protection of their right to life, freedom from torture and cruel and degrading treatment, freedom from slavery and forced labour.[65] Other civil rights include freedom of thought, conscience and religion.[66] Many of these rights are subject to restrictions, including national security, public safety, order, health, morals and basic rights and freedoms of others. These rights are almost identical to provisions in the *1966 International Covenant on Civil and Political Rights* ('*1966 ICCPR*'). Migrant workers enjoy freedom of opinion and expression beyond that provided under the *1966 ICCPR*.[67] Migrant workers also have a stronger right to liberty and security of person, including freedom from individual or collective arbitrary arrest or detention.[68] Unfortunately, for irregular migrant workers, this may prove to be an illusory right where they have transgressed immigration laws.

Article 22(1) prohibits collective expulsion of all migrant workers but individual expulsion is permitted subject to procedures according to the law.[69] These provisions are significant to irregular migrant workers. Bosniak

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[62] Ibid.

[63] See James Nafziger and Barry Bartel, 'The Migrant Workers Convention: Its Place in Human Rights Law' (1991) 25 *International Migration Review* 771.

[64] Art 8(1).

[65] Arts 9, 10 and 11.

[66] Art 12.

[67] Art 13.

[68] Art 16.

[69] Art 22(2). Art 22(3) to (8) set out the following rights to be protected at each stage of the procedures for expulsion: to be informed in a language the migrant worker and his or her family members understand and to request reasons for expulsion in writing unless national security is involved before or at the time decision is communicated; to give reasons against expulsion, to review of expulsion unless national security is involved and to stay execution of expulsion pending review; to compensation for annulment of expulsion order and to re-enter host state; to reasonable opportunity to settle claims for wages and other liabilities before or after departure; to seek entry to state other than state of origin;

suggests that article 79 casts doubts on the efficacy of this provision for irregular migrant workers.[70] Article 79 preserves the right of state parties to 'establish the criteria governing admission of migrant workers and members of their families' but 'other matters related to their legal situation and treatment as migrant workers and members of their families' shall be subject to the limitations in the Convention. Kitamura argues that article 79 should be strictly interpreted as reserving the rights of state parties to 'admission' but should not be extended to powers to deport or expel in the interest of balancing rights of migrant workers and rights of states.[71] Furthermore, a distinction may be drawn between deportation and expulsion under certain municipal laws where deportation results from refusal of admission at the point of entry.[72] If so, states have reserved these powers to expel aliens specifically at the border under article 79, and under article 22 where they have evaded border controls. If article 22 and article 79 are to be considered independently, the interpretation of article 22 would be critical for irregular migrant workers who have been present on the territory for a prolonged period of time.

Regular and irregular migrant workers are to enjoy equality with nationals on a range of economic and social rights. These include rights pertaining to work conditions and pay, and participation in trade unions.[73] Other rights are access to social security, emergency medical care and children's access to public education.[74] However, irregular migrant workers do not share the rights of regular migrant workers with respect to a number of rights. These are political rights; equal access with nationals to educational institutions, vocational guidance and training, housing, social and health services, co-operatives and self-managed enterprises and cultural life; family unity and reunification; and the right of children to have instruction in their mother tongue.[75] Political participation is a new right for migrant workers. Provisions in the *1948 UDHR* on participation in government and access to

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not to bear expulsion costs but may have to pay travel costs; and expulsion order not to prejudice other rights in host state including to wages and other entitlements.

[70] Bosniak, above n 23, 756-57, 759.

[71] Yasuzo Kitamura, 'Recent Developments in Japanese Immigration Policy and the United Nations Convention on Migrant Workers' (1993) 27 *University of British Columbia Law Review* 113, 123-25.

[72] Guy Goodwin-Gill, *International Law and the Movement of Persons Between States* (1979) 201.

[73] Arts 25 and 26.

[74] Arts 27, 28 and 30.

[75] Arts 41, 43, 44 and 45(3).

public services are interpreted as excluding aliens.[76] These and other rights are reserved for regular migrant workers under Part IV of the *1990 Migrant Workers Convention*.

The enjoyment of these rights may be restricted where the migrant workers are documented but their spouses or their children are undocumented. Would the regular status of the migrant workers secure their children's right to instruction in their mother tongue or their spouses' equal access to health services? These issues arise where the conditions of entry and residence of regular migrant workers do not include members of their families. Article 44 provides that states shall take 'appropriate measures to ensure the protection of the unity of the families of migrant workers'.[77] However, it does not go so far as to impose a duty on states to grant family reunification.

Articles 1 and 2 prohibit sex discrimination. Women migrant workers are explicitly included in the definition. Apart from that, there are no provisions that directly address issues faced by women migrant workers. However, several provisions may be interpreted as extending protection to women migrant workers in relation to these issues.[78] Prohibition against torture and cruel or degrading treatment, slavery and forced labour are some examples. Other examples are effective state protection against violence, physical injury, threats and intimidation either by public officials or private individuals, groups or institutions.[79] These provisions could be interpreted so as to protect migrant women workers from sexual exploitation, physical abuse, forced prostitution and illicit trafficking.[80] Irregular migrant women workers, who are most vulnerable, would certainly benefit from such an interpretation.[81]

Another serious omission is the fact that the Convention does not address inequities arising out of the difference between work done by women and men.[82] According to Hune,

> [a] dual labour market system has developed, creating a new international division of labour between the developed and developing worlds and between men and women. Hence, while equality of treatment with nationals is a principle of the Convention, because women's work is so differentiated from

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[76] See Nafziger and Bartel, above n 64, 783 including nn 58.

[77] See Hune, above n 24, 811-12.

[78] Ibid, 809-11.

[79] Article 16.

[80] Hune, above n 24, 809.

[81] Ibid 813.

[82] Ibid 812.

> men's, there is no protection from the inequity between wages for men and women or from their occupational segregation.[83]

Other inequities include the difficulties women face in exercising the right to join unions and the right to social security because many work out of their homes, in private homes or generally in situations where records are not kept.[84]

Regular women migrant workers are better off than both women and men who are irregular migrant workers. Undocumented migrant workers, women and men alike, are equally disadvantaged in relation to the rights to unionise and to social security. But inequity in wages is aggravated in the case of women migrant workers who are undocumented. Illegal immigration status results in another significant distinction between women. The wives of irregular migrant workers do not indirectly enjoy the right of family reunification granted to those in a regular situation. Their children would, similarly, be denied the right to family reunification. The *1990 Migrant Workers Convention* addresses some aspects of the situation concerning children of irregular migrant workers who are with their parents in the state of employment. Children of irregular migrant workers shall enjoy equal rights with nationals to education, including public pre-school education notwithstanding the illegal immigrant status of either their parents or their own.[85] The Convention also endorses the child's right to a nationality but, like the *1966 ICCPR*, it fails to identify the state with the duty to grant such nationality.[86]

Article 77 of the *1990 Migrant Workers Convention* provides a procedure for individual complaints. A state may

> declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party.[87]

The Committee shall consider communications other than those deemed inadmissible because they are anonymous, an abuse of the right of submission or incompatible with the provisions of the Convention; and after ascertaining that there is no duplication of international proceedings;

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[83] Ibid.
[84] Ibid.
[85] Art 30(1) and (2).
[86] Art 29.
[87] Art 77(1).

and after all domestic remedies have been exhausted.[88] However, none of the current state parties has made the necessary declaration.

3. STATELESS PERSONS, REFUGEES AND MIGRANT WORKERS: DEFINITIONS AND CHARACTERISTICS

The characterization of stateless persons, refugees and migrant workers in the definitions of the respective international conventions raises questions as to why refugees and stateless persons are excluded from the benefit of the *1990 Migrant Workers Convention*. Article 5 in both the 1954 and 1951 Conventions provides that legally stateless persons and refugees may enjoy other rights and benefits accorded to them by the state party. This has to be read with the proviso in article 3 of the *1990 Migrant Workers Convention*. Together, they indicate that state parties have the prerogative to maintain stateless persons and refugees, regular migrant workers and irregular migrant workers as mutually exclusive categories subject to any limits that may be placed by international instruments.

Stateless persons are excluded from protection under the *1990 Migrant Workers Convention* even if they are migrant workers at the same time. They are *de jure* or legally stateless as opposed to *de facto* or effectively stateless. Unlike refugees and irregular migrants, *de jure* stateless persons are not characterized by their relationship with either the state of origin or the state of employment. *De jure* stateless persons who are also refugees would be the exception in being characterized in relation to the country of their former habitual residence. *De jure* stateless persons could leave the state of former habitual residence to enter another state in search of paid work as migrant workers, legally or illegally. Conversely, irregular migrant workers in a state of employment could become *de jure* stateless persons if they lose their nationality because of prolonged absence from the state of nationality. In either case, their status as *de jure* stateless persons would result in their exclusion from protection under the *1990 Migrant Workers Convention*. The problem, then, is that *de jure* stateless persons not lawfully on the territory on the state of employment would also not be entitled to protection under the *1954 Stateless Persons Convention*. A *de jure* stateless regular migrant worker who is excluded from protection under the *1990 Migrant Workers Convention* would still be protected under the *1954 Stateless Persons Convention* in the state

[88] Art 77(2), (3)(a) and (3)(b) respectively.

of employment by virtue of not having a nationality. But *de jure* stateless irregular migrant workers run the risk of being completely unprotected.

A range of *de facto* stateless persons, defined by the lack of protection in relation to their state of nationality has emerged since the adoption of the *1954 Stateless Persons Convention*.[89] Strictly speaking, there is no reason why *de facto* stateless migrant workers would be denied protection. However, if there are doubts regarding their nationality, they could be treated as *de jure* stateless and thus denied protection under the *1990 Migrant Workers Convention*.[90] It is unlikely that a regular migrant worker would be *de facto* stateless because the administrative procedures and immigration regulations would have ascertained the migrant worker's nationality before admission to the state of employment. Not so with irregular migrant workers who may have no identity or travel documents to establish their nationality. *De facto* stateless irregular migrant workers may also fall through the cracks between the statelessness and migrant worker conventions.

Refugees are defined by the reasons for their flight from their state of origin. Legally stateless refugees are a sub-category of refugees.[91] Migrant workers are defined by their immigration status in the foreign state under the *1990 Migrant Workers Convention*. The legal definition of a migrant worker, including irregular migrant worker, does not encompass the reasons for departure from the state of origin. This means that migrant workers, legal or illegal, documented or undocumented, regular or irregular, could be fleeing poverty, family conflicts, civil war, ethnic fighting, violations of their

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[89] See Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 156, 173-74; Sumit Sen, 'Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia-Part 2' (2000) 12 *International Journal of Refugee Law* 41; Sumit Sen, 'Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia-Part 1' (1999) 11 *International Journal of Refugee Law* 625; Tang Lay Lee, 'Stateless Persons and the 1989 Comprehensive Plan of Action Part 1: Chinese Nationality and the Republic of China (Taiwan)' (1995) 7 *International Journal of Refugee Law* 201; Tang Lay Lee, 'Stateless Persons, Stateless Refugees and the 1989 Comprehensive Plan of Action Part 2: Chinese Nationality and the People's Republic of China' (1995) 7 *International Journal of Refugee Law* 481.

[90] Of course the person could also be treated as *de facto* stateless. See Carol Batchelor, 'Stateless Person: Some Gaps in International Protection' (1995) 7 *International Journal of Refugee Law* 232, 252 for quotation of Paul Weis' argument at the 1961 United Nations Conference on the Elimination or Reduction of Future Statelessness that '[t]he borderline between what is commonly called *de jure* statelessness and *de facto* statelessness is sometimes difficult to draw, but the latter term is in common use and has acquired a meaning'. But where the person does not possess any or any proper identification papers, a dispute could arise between the state of employment and that which the person claims to be from.

[91] Guy Goodwin-Gill, 'Refugees – Challenges to Protection' (2001) 35 *International Migration Review* 130, 130.

economic and social rights, or simply seeking a better life in a more developed country. Their reason or reasons for leaving the state of origin does or do not make any difference to their immigration status. The possibility that some of them might have fled the state of origin as a result of fear of persecution also cannot be excluded.

The problems created by the gap between the definitions of migrant worker and refugee was acknowledged by Gabriela Rodriguez Pizarro, the United Nations Special Rapporteur on the Human Rights of Migrant Workers in her Report to the Human Rights Commission in 2000.[92] The Rapporteur was less aware of the problems created by the gap between the definitions between stateless persons and migrant workers. The Special Rapporteur noted that '[i]t is often said, by definition, many international migrants are not refugees and a large number of them are not migrant workers either. This is especially true in the case of the many migrants who are undocumented or in an irregular situation…'.[93] She went on to observe that

> [i]n the light of the political, social, economic and environmental situation of many countries, it is increasingly difficult, if not impossible, to make a clear distinction between migrants who leave their countries because of political persecution, conflicts, environmental degradation or a combination of these reasons and those who do so in search of conditions of survival or well-being that do not exist in their places of origin.[94]

She identified

> a gap in international human rights jurisprudence in this area. The virtually universal system of protection for refugees means that violations of their civil and political rights can be recognized and remedied, especially when they pose such a risk to persons' lives and security that they are forced to flee their country. However, there is no such recognition of violations of economic, social and cultural rights, which can also be serious enough to force people to flee their places of origin.[95]

Her observation highlights the phenomenon of those who flee violations of economic, social and cultural rights. They are, in fact, an emerging class of *de facto* stateless persons. Rather surprisingly, the Special Rapporteur has expressed her support for the distinction between migrant workers and

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92 Above n 15.

93 Ibid [28].

94 Ibid [30].

95 Ibid [31].

refugees and stateless persons.[96] The divergence from the precedent set by the ILO Conventions reinforces the exclusiveness of the *1990 Migrant Workers Convention*. It also contributes to other gaps in protection for those who straddle the categories.

4. Stateless Persons, Refugees and Migrant Workers: Mutually Exclusive Categories

Several points emerge from a comparison of the similarities and differences between the rights under the stateless persons, refugees and migrant workers conventions. There is some overlap in the rights conferred. There is no duplication such as to justify the exclusion of *de jure* stateless persons and refugees from enjoyment of the rights under the *1990 Migrant Workers Convention*.

De jure stateless persons who are unlawfully present on the state are legally excluded under all the conventions. *De jure* stateless persons would lose any rights granted to them under the *1954 Stateless Persons Convention* by the state they are in, if they move to another state. This is the consequence whether they move with or without the authorization of the state party. If they enter another state lawfully that state may grant similar rights to them if it were a party to the 1954 Convention. But if the state does not confer such rights, the regular *de jure* stateless migrant worker would be unprotected because of the exclusion proviso in the *1990 Migrant Workers Convention*. In that case, there would be no difference whether a *de jure* stateless person moves with or without authorization. On the other hand, irregular migrant workers may legally enjoy certain rights under the *1990 Migrant Workers Convention*. But their vulnerability to deportation or expulsion may effectively prevent them from exercising the rights granted under the *1990 Migrant Workers Convention*. That would virtually render them as unprotected as *de jure* stateless persons who have moved regularly or irregularly. In practice, it might not be possible to differentiate between irregular *de jure* stateless persons and irregular migrant workers since both are likely to be undocumented. Irregular migrant workers being *de facto* unprotected could be regarded as *de facto* stateless.

The justification for maintaining mutually exclusive categories because rights could be duplicated cannot be substantiated. In fact by maintaining mutually exclusive categories, states legally and effectively deprive *de jure*

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[96] Ibid [42].

stateless persons and irregular migrant workers of rights conferred under the respective conventions and leave them totally unprotected. Even though the position of refugees has become less favourable vis-à-vis regular migrant workers, the legal status of both categories secures the enjoyment of the other rights under the respective Conventions. But equally there is no apparent justification for excluding refugees from enjoying rights under the *1990 Migrant Workers Convention*. Any duplication of rights could easily be resolved by including express provisions as to which convention should then apply instead of a blanket exclusion clause.[97] In circumstances where refugees are compelled to leave the camps to which they are restricted and survive as irregular migrant workers, they may be doubly disadvantaged. Besides losing the protection afforded refugees, the exclusion would deprive them of rights granted to irregular migrant workers. If this should eventuate, refugees would revert to being effectively stateless and *de facto* bereft of protection.

The consequences of mutually exclusive categories create concern over the protection afforded to non-nationals where people are legally excluded by the definitions or *de facto* excluded by restrictions on the exercise of their rights. What is the justification for creating such mutually exclusive categories and how has or have the basis or bases of such justification changed over time? How may the development of mutually exclusive categories be reconciled with the merging or overlapping of refugees, irregular migrant workers and stateless persons? Two factors play decisive roles in the hardening of legal categories vis-à-vis the merging of these categories in reality. One is the struggle of states to retain territorial control in the presence or emergence of other rivals for supremacy in the international sphere. The other is the dichotomy between the paradigm of the political refugee and the paradigm of the economic migrant.

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[97] See Theodor Meron, 'Norm Making and Supervision in International Human Rights: Reflections on Institutional Order' (1982) 76 *American Journal of International Law* 754, 759-60 where he argues that '[p]roblems of overlap or conflict of norms can be avoided, or at least reduced, through appropriate drafting techniques…. Recent clauses designed to avoid conflicts have not been uniform. Some aim at saving only the more advantageous provisions of other instruments. Thus the saving clause of the Convention on the Elimination of All Forms of Discrimination against Women (Discrimination against Women Convention) provides that nothing in it shall affect any provisions in any other international agreement 'that are more conducive to the achievement of equality between men and women".

4.1. *Human Rights and State Territorial Control*

Human rights are said to place limits on state sovereignty over nationality matters. It is equally true that state sovereignty determines the range of rights conferred on different categories of people. Two aspects of state sovereignty are involved here, personal sovereignty and territorial sovereignty. State sovereignty over nationality matters, subject only to international law limits, causes *de jure* statelessness. State territorial sovereignty involves the power to deny entry and to expel aliens. It is also subject to limits imposed by international law, including the *1951 Refugees Convention* and other international, regional or bilateral agreements regulating movement between states for employment or other purposes.[98] Bosniak has observed that irregular migration 'is intelligible only by reference to both the rule of state territorial sovereignty and the limitations of sovereignty in fact'.[99] Movement between states that is unauthorized either by the state of origin or the state of employment or both is irregular.

Both the *1954 Stateless Persons Convention* and the *1990 Migrant Workers Convention* reflect the limits state sovereignty places on human rights even though they are separated by almost forty years. The omission of provisions regarding illegal entry or presence in the *1954 Stateless Persons Convention* passed unnoticed but the reservation of state powers in relation to admission and expulsion in the *1990 Migrant Workers Convention* were immediately identified as an impediment to exercise of the rights of irregular migrant workers. Both *de jure* stateless persons and irregular migrant workers fell outside the international legal framework founded on state sovereignty. If *de jure* stateless persons were granted the same rights as nationals, states would be undermining their own authority to single out individuals they regard as suitable to their purpose of constructing state identity. If irregular migrant workers were granted the same rights as nationals or even regular migrant workers, states would be undermining their authority to control labour supply and demand for the state economy.

Significantly, states did not grant irregular migrant workers political rights to participate in local government.[100] But if *de jure* stateless persons lawfully

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[98] *Musgrove v Chung Teeong Toy* (1891) AC 272; *Nishimura Eiku v United States* 142 U.S. 651 (1892); *Nottebohm* (1955) ICJ 4, per Judge Read, dissenting at 46. See generally Goodwin-Gill, above n 72, for law on admission or entry and expulsion in relation to nationals and aliens, and 21-23, for limits on state competence relating to expulsion derived from custom, treaty or general principles of law, and for traditional view, see 203.

[99] Bosniak, above n 23, 742.

[100] *1990 Migrant Workers Convention* art 42.

on the territory were not excluded from rights granted under the *1990 Migrant Workers Convention*, it would similarly undermine the state's authority to select those deemed to be suitable as members of the state. The same argument applies to Convention refugees. However, the commitment to uphold human rights standards compelled states to grant some basic rights to *de jure* stateless persons and irregular migrant workers. By reserving state powers on admission and expulsion, states gave with one hand and took away with the other. The grant of limited rights to *de jure* stateless persons and irregular migrant workers implies the exercise of sovereign powers over persons is no longer based on a reciprocal relationship between individuals and state. Such grant has been influenced by the concept of the inherent dignity of the human person. However, considerations of territorial sovereignty regarded as critical to the survival of the state would determine the ability to exercise the rights granted.

Ultimately, the movement of *de jure* stateless persons and irregular migrant workers between states without authorization from states would undermine the principle of state territorial sovereignty. Irregular migration poses a threat to state territorial sovereignty. The treatment of irregular migrant workers and *de jure* stateless persons in their state of origin is not a factor in determining their rights in the state of employment. Recalcitrant states are no longer the only unpredictable factor in the international framework of movement of people states have established. Non-state actors such as corporations and smugglers and traffickers affect state powers to control the movement of people within and between states. If states are perceived as losing such control, their powers to refuse entry and expel aliens would, accordingly, be eroded and the principles of international law regarding state territorial sovereignty imperiled.

Analysts perceive a shift in power from states to the market in the globalization of capitalism. Collinson identifies the transnational companies and international financial institutions as the new actors in the international forum exercising control through the market.[101] Their power and responsibilities transcend territorial frameworks. This form of control challenges state territorial control over citizens and aliens. Saskia Sassen argues that globalisation involves the substitution of new international legal regimes, the World Trade Organization and the International Monetary Fund for traditional sovereignty and exclusive territorial control.[102] I argue

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[101] Sarah Collinson, 'Globalisation and the Dynamics of International Migration: Implications for the Refugee Regime' (1999) UNHCR Working Papers No 1, 3-4.

[102] Saskia Sassen, 'Towards a Feminist Analytics of the Global Economy' (1996) 4 *Indiana Journal of Global Legal Studies* 7.

that it is important to distinguish between the players. Transnational companies drive home the point that market control may be more important than territorial control. States are not unaware of the economic imperative to enable them to retain territorial control. The creation of the World Trade Organization is an important step towards retaining economic power to enhance collective sovereign control through a global institution. Transnational companies and international financial institutions share the reins of global market control. I also argue that states must continue to exercise territorial control. Otherwise, they will lose the battle for global market control. Migration control is one manifestation of state territorial control. It enables states to retain territorial control over who may enter to participate in the labour market dominated by the transnational companies.

The entry of people smugglers and traffickers has turned irregular migration into an incredibly lucrative industry.[103] They have circumvented and destabilized the international migration regime based on travel documents authorized by states. States are preoccupied with maintaining territorial sovereignty. If states were perceived as having lost control over their respective territories, it would seriously undermine their authority to govern.[104] Ultimately the challenge to state sovereignty does not emanate from irregular migrants despite their increasing numbers. Other than corporations, the challenge is coming from amorphous non-state actors: smugglers and traffickers who specialize in breaking the monopoly states have over travel documents.[105] Trafficking is not new. However, it has returned with a vengeance since the abolition of the African slave trade of the early nineteenth century.[106]

Consequently, the assertion of state territorial control is one main factor in the development of mutually exclusive categories of refugees, *de jure* stateless persons and irregular migrant workers. Such assertion determines the rights granted to each category of aliens. It also limits the exercise and

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[103] See Skeldon, above n 18, 21 where it was estimated that international trafficking of people generated between US$5 billion and US$7 billion in 1995.

[104] Gerassimos Fourlanos, *Sovereignty and the Ingress of Aliens: With Special Focus on Family Unity and Refugee Law* (1986) 50, 57.

[105] John Torpey, *Surveillance, Citizen and the State* (2000) 2-5.

[106] Anuska Derks, *Combating Trafficking in South East Asia: A Review of Policy and Programme Responses* (2000) 8-15. (Paper prepared for the IOM) See historical account of trafficking traditionally linked with women and girls sold into prostitution, the 'White Slave Trade' in European and American women and modern developments since the 1980s in trafficking of women and girls who remain the most vulnerable even though it is no longer confined to women and girls today.

enjoyment of such rights especially of *de jure* stateless persons and irregular migrant workers.

4.2. *Paradigms and Categories: Political Refugee and Economic Migrant*

The paradigms of the political refugee and the economic migrant are not simply separate categories but are juxtaposed in a dichotomous and contrasting relationship. This remains true even though the paradigms have shifted. In fact, the shifting of the paradigms helps to reinforce *de jure* stateless persons, refugees and irregular migrant workers as mutually exclusive categories. Refugee discourse has focused on the reasons for the flight. These are defined as issues concerning civil and political rights. Hence, civil, economic and social rights conferred on refugees and *de jure* stateless persons by the respective Conventions have previously been overshadowed by such refugee discourse. Attention is now being paid to the civil, economic and social rights granted to refugees because they are being curtailed by host states.[107]

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[107] See for example, Savitri Taylor, 'Protection or Prevention? A Closer Look at the Temporary Safe Haven Visa Class' (2000) 23 *University of New South Wales Law Journal* 75, on the introduction of temporary protection visas in Australia for refugees from Kosovo, East Timor and Ambon in 1999 and 2000. The criteria for the grant of the temporary protection visas do not accord recognition that such visa holders are Convention refugees with all the rights under the 1951 Convention, and the possibility of permanent settlement in Australia. Since then, new classes of temporary protection visas have been introduced in Australia that are likely to make it more difficult for temporary protection visa holders to achieve refugee status. See Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 *American Journal of International Law* 661. Apart from affecting the right to apply for refugee status, the newer temporary protection visa classes also affect the social, economic and cultural rights of more recent refugees. See the Australian Government's Department of Immigration and Multicultural and Indigenous Affairs website, http://www.immi.gov.au/facts/64protection.htm, 4 where it is stated that temporary protection visa holders have no rights to 'bring their families into Australia, return to Australia if they leave, access the generous settlement services provided to refugees who enter Australia lawfully; or access the mainstream social welfare system to obtain pensions and *Newstart* allowance'. (15 January 2003). See also Morten Kjaerum, 'Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?' (2002) 24 *Human Rights Quarterly* 513, 520-24 on similar trends in Europe, specifically the downgrading of entitlements of refugees in order to avoid becoming more attractive asylum seekers in states such as Great Britain and Denmark. Kjaerum points out that the temporary protection schemes for Bosnian refugees (similar to the Australian scheme for Kosovars) led to a shift in the debate at the national level in different European states to 'entitlements rather than on the temporary nature of the stay itself'.

The paradigm of the political refugee is based on grounds for achieving refugee status under the *1951 Refugees Convention*. The grounds reflect the circumstances and experiences of refugees in Europe before, during and after the two world wars. It is significant that the refugee definition in the *1969 OAU Convention* includes forced flight from 'external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his or her country of origin'.[108] Inspired by the example of the Organization for African Unity, the *1984 Latin American Cartegena Declaration* also extends protection to those who flee from 'generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other events which have seriously disturbed public order'.[109] Western states had successfully argued for persecution under the *1951 Refugees Convention* to be defined in relation to civil and political status during the early days of the Cold War. This strengthened their position against the Soviet bloc.[110] The Eurocentric focus was partially removed by the adoption of the *1967 Refugees Protocol*. The subsequent attempt to codify a right to territorial asylum failed. This is because states at the 1977 Conference on Territorial Asylum had agreed to extend refugee status to persons at risk of 'foreign occupation or domination'.[111] These attempts to broaden the refugee definition, particularly by making explicit the relationship between human rights and refugees failed. Thus, efforts to broaden the refugee definition have so far been unsuccessful. Since then, the application of human rights law to refugee cases and situations has developed, particularly in Europe.[112] Generally though, the application of

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[108] *1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa* art 1(2). Adopted by Assembly of Heads of State and Government at 6th Ord Sess, Addis Ababa, 10 September 1969. (entered into force 20 June 1974) See text in UNHCR, *Basic International Legal Documents on Refugees*, 125.

[109] *Cartagena Declaration on Refugees* adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held in Cartagena on 19-22 November 1984, Conclusion No. 3. See text in UNHCR, ibid, 142.

[110] James Hathaway, *The Law of Refugee Status* (1991) 6-8.

[111] James Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 *Journal of Refugee Studies* 113, 123 and 128.

[112] See Richard Plender and Nuale Mole, 'Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 81, for a meticulous review of cases in the UK and other European states where provisions of international and European regional instruments were applied to cases involving the rights of asylum seekers and refugees to enter, to *non-refoulement* and freedom from detention the right to family life and the right to an effective remedy.

human rights law serves to emphasize the political nature of asylum and refugee status but not to broaden the refugee definition. There is also some concern that the application of the Convention on Torture could lead to a narrower interpretation of the right to *non-refoulement*.[113]

The paradigm of the political refugee has strengthened despite the subsequent appearance of some cracks. In principle, those who flee economic hardship *per se* do not qualify as refugees. However, analysts argue that those who suffer serious economic deprivation as a result of one of the discriminatory grounds in the refugee definition may qualify as refugees.[114] Thus, people with mixed reasons such as fear of persecution as defined under the 1951 Refugee Convention and a desire to improve their economic position in a more prosperous country may also be eligible for refugee status.[115]

An attempt to maintain the political paradigm was made through the efforts of Western states to exclude the new wave of asylum seekers from refugee status.[116] In the 1980s, many asylum seekers came from Africa, which has a broader refugee definition and Asia, which has no regional refugee instrument. Asylum seekers used to be accorded treatment different from other migrants because they were considered as potential refugees. Only after they have failed in their claim were they downgraded to the status of illegal immigrants. The efforts to eliminate economic migrants posing as genuine refugees led to the treatment of asylum seekers as potential illegal immigrants.[117] However, when such asylum seekers succeed in their claim to refugee status, it means that states have treated genuine refugees as economic migrants and illegal immigrants. The distinctions have been blurred also because asylum seekers turn to people smugglers. This was common during the 1980s when Vietnamese refugees made illegal

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[113] Morten Kjaerum, above n 107, 535 warns that: 'The importance of the [European Court on Human Rights] and the [Committee on Torture] in relation to establishing a jurisprudence in relation to the risk of torture may create an understanding that running a risk of torture is a condition under Article 1A of the 1951 Refugee Convention. This could lead to a situation whereby the likelihood of being granted asylum would be smaller than before if the applicant has not been tortured or if (s)he cannot substantiate that there are grounds to believe that (s)he will risk being tortured upon his or her arrival in the home country. Consequently, the human rights approach may end up narrowing the interpretation of the 1951 Convention'.

[114] Hathaway, above n 110, 118.

[115] See *Guillermo Lautaro Diaz Fuentes* (1974) 9 I.A.C. 323 and *Abeba Teklehaimanot v. Immigration Appeal Board*, Federal Court of Appeal Decision A-730-79, 8 September 1980.

[116] Selina Goulbourne (ed), *Law and Migration* (1998) xii.

[117] Ibid.

departures by land and by sea by paying people smugglers.[118] Nevertheless, they were received as refugees in the countries of first asylum in East and South East Asia and subsequently resettled in Western states. Since then, states have begun to doubt the veracity of refugee claims of asylum seekers who pay people smugglers for passage to developed states.[119] The trafficking in refugees is a new development resulting from European refugee policies.[120] Ironically, asylum states have also taken some 'political' aspects out of the paradigm through the application of domestic laws on 'national security' and 'terrorism' while maintaining the standard of the political refugee.[121] Instead of appraising the signs that the political paradigm was no longer relevant, states have blurred the distinctions between the paradigms. States' interest in the reconsideration of refugee law was not based on restrictions leading to the erosion of refugee rights but on the protection of states' rights to exclude aliens.[122] The refugee definition remains locked in a mutated paradigm amidst a changed international context of greater mobility and the challenge of a more holistic approach to human rights.

By way of contrast, the paradigm of the economic migrant is not based solely on the definition of paid work in the state of employment in the *1990 Migrant Workers Convention*. The definition in the *1990 Migrant Workers Convention* codified only the part of the paradigm pertaining to their status in the state of employment. The economic paradigm developed from migration theories, which established that migrant workers move to the state of employment often for reasons related to both the state of origin and the state of employment. Unemployment in the state of origin and better job prospects in the receiving state was one early theory.[123] Subsequent

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[118] Bruce Grant, *The Boat People* (1979); C. Benoit, 'Vietnam's Boat People' in D.W. P. Elliot (ed), *The Third Indo-China Conflict* (1981) 142.

[119] Kjaerum, above n 107, 516-17 notes that refugee protection issues have been neglected as states increase their focus on trafficking in refugees. The priority on blanket border control against irregular migration, he argues, leads to 'presumptive *refoulement*'. See a similar development in Australia with the adoption of the Border Protection (Validation and Enforcement Powers) Act of 2001 which validates action taken in relation to 433 Afghan, Iraqi and other asylum seekers rescued by the Norwegian freighter, the MV *Tampa*, from the Indian Ocean. It also confers new powers of interdiction, justified on the basis of combating people trafficking. See Penelope Mathew, above n 107, 673-74, for an analysis of the Act from the perspective of the 1951 Refugee Convention, particularly the aim of article 31 concerning illegal entry by refugees.

[120] Ibid Kjaerum, 517.

[121] Prakash Shah, 'Taking the 'Political' Out of Asylum: The Legal Containment of Refugee' Political Activisim' in Nicholson and Twomey, above n 112, 119, 120.

[122] Hathaway, above n 111, 115.

[123] Everett Lee, 'A Theory of Migration' (1966) 3 *Demography* 47.

migration theories analyzed the role of migrants within the international economic system in serving the developed state that host them.[124] Still other theories focusing on female migrants highlighted household strategies, family and personal networks to explain the patterns of migration.[125] These and other theories were invaluable in arguing for the protection of migrant workers.[126] Early migration theory ignored borders and immigration control.[127] The neglect of borders probably reflected an established dichotomy between the state, the public arena, and the economic sector, the private domain. Theories developed over the past three decades took into account the significance of borders or immigration control.[128]

The paradigm of the economic migrant evolved with the increasing prominence of borders. In fact, immigration control contributed to the development and maintenance of a hierarchy among migrants largely credited to economic globalization and the dominance of the market. Three categories of migrants were identified at the turn of the twenty-first century – global migrants, liberal migrants and transnational migrants.[129] Global migrants refer to highly skilled managerial and business personnel of transnational corporations and international financial institutions.[130] Liberal migrants refer to service workers under international and regional free trade agreements such as the General Agreement on Tariffs and Trade ('GATT'), North American Free Trade Agreement ('NAFTA') and European Union ('EU').[131] Transnational migrants include both documented and undocumented workers and refugees.[132] The hierarchy reduces the paradigm of the economic migrant to only one group of migrants. Everyone in the hierarchy is credited with moving within and between states for economic reasons. But that is where the similarity ends. Global migrants move with supersonic ease, usually by air and literally transcend borders while liberal

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[124] R. Cohen, *The New Helots, Migrants in the International Division of Labour* (1987); C.W. Stahl, 'South-North Migration in the Asia-Pacific Region' ((1991) 29 *International Migration* 163.

[125] Monica Boyd, 'Family and Personal Networks in International Migration: Recent Developments and New Agendas' (1989) 23 *International Migration Review* 638.

[126] See for example, Joan Fitzpatrick & Katrina Kelly, 'Gendered Aspects of Migration Law and the Female Migrant' (1998) 22 *Hastings International & Comparative Law Review* 47.

[127] Aristide Zolberg, 'The Next Waves: Migration Theory for a Changing World' (1989) 23 *International Migration Review* 403, 405.

[128] Ibid.

[129] Sarah Collinson, above n 101, 7-9.

[130] Ibid 7.

[131] Ibid 8.

[132] Ibid 8-9.

migrants cross borders within specific regions generally freely. Transnational migrants, on the other hand, are characterized by increasing restrictions on their movement between and within states.

Borders do matter to migrants. Whether they open for entry or close depends very much on the relationship of the migrants with the economy of the state, the region or the world. Even though the state controls ingress and egress of migrants, the state is also influenced by their economic status, role and value. Hence, the paradigm of the economic migrant has further degraded with rising border and immigration control. The paradigm is reserved for transnational migrants whose inferior economic status, role and value justify their exclusion from the state. Subsequently their illegal or irregular immigration status becomes synonymous with their inferior economic status, role and value. The economic migrant has been transformed into the illegal migrant. Whoever is illegal especially those who have to circumvent border and immigration control is an economic migrant. Subsequently, the paradigm shifted to accommodate refugees who cross borders as migrant workers in Africa and Asia where states have not signed the principal refugee instruments.[133]

Transnational migrants, Collinson argues, 'could not look to a *global* actor but instead must look to the protection, and therefore some degree of membership of the territorial state and/or sub-national political entity'.[134] The problem is whether the protection for refugees will be assured once the principal refugee instruments have been ratified by the states in question. The blurring of the paradigms from the European experience is not an encouraging sign.[135] The classical paradigm of the economic migrant has been used to cast doubts on refugee claims. These developments suggest that the truncated version of the paradigm of the economic migrant sustains the paradigm of the political refugee. The *1990 Migrant Workers Convention* may become another surrogate for those who fall outside the *1951 Refugees Convention*. The other, of course, is the *1954 Stateless Persons Convention*.

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[133] Ibid 14.

[134] Ibid 9.

[135] See Jacqueline Bhabha, 'Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights' (2002) 15 *Harvard Human Rights Journal* 155; Jean-Yves Carlier, 'The Geneva Refugee Definition and the "Theory of the Three Scales' in Nicholson and Twomey, above n 112, 37, 40; Jerzy Sztucki, 'Who is a Refugee? The Convention Definition: Universal or Obsolete?' in Nicholson and Twomey, above n 112, 68-72.

5. CONCLUSION

The question is whether alternative protection under the principal international instruments on migrant workers exists for *de jure* and *de facto* stateless persons in states that have not ratified the international conventions on refugees and statelessness. Unfortunately, the *1990 Migrant Workers Convention* specifically excludes *de jure* stateless persons and refugees. There is a codification of mutually exclusive categories of *de jure* stateless persons, refugees and irregular migrant workers. This codification signifies the tightening of state territorial control. Irregular *de jure* stateless persons, *de jure* stateless irregular migrant workers and *de facto* stateless persons, that is, refugees who survive as irregular migrant workers, fall through the cracks between the conventions on statelessness, refugees and migrant workers. It may not be easy to differentiate between these emerging groups of stateless persons in practice. Refugee advocates and human rights groups may try to do so in order to secure protection for refugees forced to be irregular migrant workers. The problem with the strategy is that it implicitly endorses the political refugee/economic migrant dichotomy and the primacy of civil and political rights over economic, social and cultural rights. It may be more appropriate to develop a new approach to protection for effectively stateless persons those whose rights, civil, cultural, economic, political and/or social are violated.

Irregular immigration status characterizes these emerging groups of stateless persons. Statelessness is no longer confined to those who do not have nationality or citizenship status and those who have renounced the protection of the state of their nationality. Prevention of statelessness is no longer a matter of limiting state sovereignty over nationality and citizenship matters. Protection of stateless persons under international law can no longer be left to the refugee and stateless persons conventions. State sovereignty over migration issues is behind this development. The struggle for equality by marginalized groups of nationals and citizens is now matched by the struggle for non-discrimination by these groups of non-nationals rendered effectively stateless by irregular immigration status. They face an uphill task in the quest for protection of their rights from states because of their association with people trafficking. Trafficking casts a different complexion on irregular immigration status. Illegal immigration is practically synonymous with trafficking. State efforts to eradicate trafficking are regarded as a legitimate response. Trafficking may be a perfect camouflage for state failure to extend protection. Protection for the rights of these

emerging groups of stateless persons accords with the principle of non-discrimination under international law. The issue is how to hold states accountable for violations of their human rights.

CHAPTER FOUR

STATELESS PERSONS, REFUGEES AND IRREGULAR MIGRANT WORKERS: PROTECTION AND HUMAN RIGHTS

The hierarchy of people in a state includes nationals and citizens, a range of legal aliens and emerging groups of *de jure* and *de facto* stateless persons. The category into which a person falls determines the range of rights conferred and to be enjoyed. Three issues arise from that premise. Protection is the first issue. Absence of protection characterizes those who are *de jure* stateless as well as those are who are *de facto* stateless. Conversely, protection is seldom an issue, in law if not in fact, for nationals or citizens and legal migrants, particularly global migrants and liberal migrants. State protection is not only determined by citizenship and nationality laws but also by migration law. Diplomatic protection is traditionally determined by citizenship and nationality status. The parameters of diplomatic protection means that the emerging groups of effectively stateless persons may not always receive the protection they need from their own states. One question arising from this is whether state sovereignty over immigration matters takes precedence over the right of states to protect their citizens abroad. The second issue concerns the relationship between protection and rights. The advent of human rights has led to the assumption that protection follows human rights or that human rights includes protection. But the discussion in the previous chapter has demonstrated that this is not so. Possession of rights in law does not necessarily mean that a person can in fact exercise or enjoy all or any of those rights. If one is unable to exercise rights conferred under a convention, it indicates that protection is incomplete, at the very least. Or, that the protection offered or available is not consonant with the rights granted. Today, not only do nationals and citizens have a whole range of rights, states have a duty to protect those rights within the state. But it is not entirely certain that states have a similar duty to protect the rights of non-citizens, particularly those who are stateless. Nor is it clear that states have a duty to protect the rights of citizens abroad, especially economic, social and cultural rights. The deeper issue is whether and to what extent the advent of human rights has transformed the concept of protection under

international law. Essentially, it is concerned with the relationships between individuals and states, both their own and others. The third issue is whether the incomplete protection under the criteria-based conventions or the absence of protection outside them can be made good by reference to the rights-based human rights instruments that are of general application. This is debatable because these instruments were adopted some forty or fifty years ago when the dichotomy between civil and political rights, and economic, social and cultural rights developed. Furthermore, equality and non-discrimination were very much defined and confined within the parameters of nationality and citizenship. The rise of state powers over immigration matters in the decades since their adoption, signals the importance of moving beyond those notions of equality and non-discrimination, in order to afford complete protection to emerging groups of stateless persons.

1. THE PRINCIPLE OF PROTECTION

The concept of protection predates the concept of human rights. The traditional European concept of protection developed during the feudal system and the monarchical system. Protection was the correlation of allegiance.[1] Duties and territoriality characterized the system of allegiances involving the king, noblemen and freemen.[2] Subsequently, notions of rights developed against the millstones of duty and obligation imposed by feudal lords and nobles but also by the church, the monarch and other powerful political, economic, social and religious institutions.[3] These notions of rights eventually transformed the notion of protection from being the duty of the lord arising from the duty of allegiance to the right of the subject to protection under the law. Consequently, even though citizenship and nationality, which developed from subjecthood were similarly based on allegiance, the notion of rights became an integral feature of the relationship between the individual and the state.

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[1] Edwin Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (1928) 6.

[2] Ibid; Richard Plender, *International Migration Law* (1988) 12.

[3] Ben Saul, 'In the Shadow of Human Rights: Human Rights, Obligations, and Responsibilities' (2001) 32 *Columbia Human Rights Law Review* 565, 608. See also 607-16 for a brief account of the rise of rights against oppressive obligations in the section entitled 'Historical Abuse of the Notion of Obligation'.

Western judicial opinions and legal writers concurred that citizenship or nationality was a reciprocal relationship that involved protection and allegiance, and rights and duties. For example, the US Supreme Court held that '[c]itizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other'.[4] The duty of protection of a state arose when a duty of allegiance was manifested by a subject but not by an alien.[5] In another case, the Mixed Claims Commission between Great Britain and Mexico declared that '[t]he fundamental basis of man's nationality is his membership of an independent political community. This legal relationship involves rights and corresponding duties upon both – on the part of the citizen no less than on the part of the State'.[6] However, the state's duty of protection was traditionally limited to civil liberties and political rights enjoyed by its citizens within the domestic sphere.[7]

Diplomatic protection or the protection of citizens abroad also developed from feudalistic notions of protection.[8] Unlike state protection, the international customary law principle of diplomatic protection is the right of the state, not of the individual.[9] This is because traditionally, individuals do not possess rights under international law.[10] Only subjects have rights and states used to be regarded as the only subjects of international law while nationals were traditionally considered the objects.[11]

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[4] *Luria v The United States* (1913) U.S. 9, 22.

[5] See Glanville Williams, 'The Correlation of Allegiance and Protection' (1948) 1 *Cambridge Law Journal* 54, 56-57.

[6] *Lynch Claim* (UN Reports, Vol. V. p. 17; Annual Digest. 1929-30, Case No. 134) before the Mixed Claims Commission between Great Britain and Mexico quoted in Paul Weis, *Nationality and Statelessness in International Law* (rev 2nd ed, 1979), 30.

[7] Paul Weis, 'Statelessness as a Legal-Political Problem' in Paul Weis and Rudolf Graupner, *The Problem of Statelessness* (1944) 4.

[8] Borchard, above n 1, 38-40.

[9] Ibid 6. See opinion of the Permanent International Court of Justice in the case of *Mavrommatis Palestine Concessions* (1924) PCIJ, Series A, No 2, 12; *Panevezys-Saldutiskis Railway* (1939) PCIJ, Series A/B, No 76, 16). See also *Reparations* (1949) ICJ Reports 174 for Opinion that international organizations may exercise the right of diplomatic protection on behalf of its agent.

[10] Borchard, above n 1, 33-34.

[11] The development of human rights law has postulated that individuals may be subjects of international law. Lauterpacht advanced this argument as early as 1950. Subsequently, it was argued that refugees have become subjects of international law. See H. Lauterpacht, *International Law and Human Rights* (1950) 27; Weis, above n 6, 32; F.E. Krenz,

Protection of rights of citizens abroad was also construed principally as the protection of their civil rights, which overlapped with political rights.[12] The right of diplomatic protection is exercised by the state on behalf of its national in respect of an injury and/or a denial of justice in another state.[13] The national does not have a right to diplomatic protection unless it is provided under the municipal law of his or her state.[14] In 1997, the ILC Working Group on Diplomatic Protection suggested further discussion on 'whether diplomatic protection may be exercised at the discretion of a State, or whether there is a right of a national to diplomatic protection'.[15]

Thus, the principles of state protection under domestic law and diplomatic protection under international law were well established at the turn of the twentieth century. The phenomenon of mass denationalization and expulsion, stateless persons and refugees in the first half of the twentieth century challenged these established principles. The phenomenon of massive numbers of *de jure* and *de facto* stateless persons, including refugees, gave birth to the concept of international protection or surrogate protection of individuals by other states and other agencies. International protection was no longer equated with diplomatic protection. Protection by the state was no longer determined by possession of nationality and citizenship status.

Manley O. Hudson, the first Special Rapporteur on Nationality and Statelessness, described *de jure* stateless persons as *de jure* unprotected persons and *de facto* stateless persons were *de facto* unprotected persons.[16] He further described stateless refugees as *de jure* unprotected persons and those who are not stateless as *de facto* unprotected persons.[17] Paul Weis described *de jure* stateless persons and refugees as *de jure* unprotected and *de facto* unprotected respectively.[18] The 1949 United Nations' *Study of Statelessness*

'The Refugee as a Subject of International Law' (1966) 15 *International and Comparative Law Quarterly* 90. See also Theo van Boven, 'Human Rights and Rights of Peoples' (1995) 6 *European Journal of International Law* 476, 476.

[12] Borchard, above n 1, 69-70.

[13] See *Mavrommatis Palestine Concessions* and *Panevezys-Saldutiskis Railway*, above n 9.

[14] Weis, above n 6, 34.

[15] UN Doc A/52/10 (1997), ILC, *Report on the work of Forty-ninth Session*, GAOR 52nd sess, Supplement No 10, Chapter VIII [185].

[16] UN Doc A/CN.4/50 (21 Feb. 1952), Manley O. Hudson, *Report on Nationality, Including Statelessness*, ILC, 4th sess, 40-41.

[17] Ibid.

[18] Weis, above n 6, 164 including nn 18, and 44.

provides ample evidence that they were referring to the absence of diplomatic and state protection.

The circumstances of those times affected both the concept of protection and the concept of rights. Human rights replaced and include civil and political rights. However, uncertainty reigned over the definition of protection of refugees because it was never defined in the *1951 Refugees Convention*. One analyst recently argued that it is restricted to diplomatic protection.[19] Protection of stateless persons is similarly undefined despite the constant references to 'protection'. Is 'protection' of refugees and stateless persons different from human rights 'protection'? The replacement of state or internal protection by the term 'persecution' created uncertainty. Recent judicial opinions have clarified that absence of state protection is implied in the term 'persecution' in the refugee definition under article 1 of the Convention.[20] Absence of state and diplomatic protection characterizes both refugees and stateless persons.

However, protection is unclear from another perspective. Is it the right or the duty of the state? Furthermore, is it the right or duty of the host state or of the state of origin? The current parameters, set by the concepts of human rights protection and diplomatic protection, are clear. Grahl-Madsen has argued that states of origin, that are in breach of the duty to admit their nationals, lose the right to protect such citizens. This applies where their nationals have become refugees in other states.[21] Instead the duty lies with the host states under international human rights law. Human rights law extends the duty of state protection to aliens on the territory. Human rights protection is an extension of state protection. Thus far, human rights law has not transformed the right of the state to protect citizens abroad into the duty of the state. Furthermore, the duty of the host state to protect aliens only arises under international instruments and customary international law. Host states are not required to protect all the rights of aliens under either international instruments or customary international law. For example, customary international law does not impose a duty on states to protect aliens against discrimination on grounds of irregular immigration status.

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[19] See Antonio Fortin, 'The Meaning of 'Protection' in the Refugee Definition' (2001) 12 *International Journal of Refugee Law* 548. See the contrary view in Guy S. Goodwin-Gill, 'The Language of Protection' (1989) 1 *International Journal of Refugee Law* 6; Guy S. Goodwin-Gill, 'Refugees: Challenges to Protection' (2001) 35 *International Migration Review* 130.

[20] See *Horvath v Secretary of State for the Home Department* (2001) 1 AC 489; (2000) 2 WLR 379; *Adan v Secretary of State for the Home Department* (1999) 1 AC 305.

[21] Atle Grahl-Madsen, 'Protection of Refugees by Their Country of Origin' (1986) 11 *Yale Journal of International Law* 362, 395.

However, even if states were obliged to protect the rights of irregular migrant workers because discrimination on the basis of immigration status is prohibited, this duty is inconsistent with states' right to expel non-nationals under international law and to deport them under domestic immigration laws. Hence those who fall outside the conventions on stateless persons, refugees and migrant workers may be inadequately protected in the host state. The current parameters of diplomatic protection under international law also imply that the state of nationality or origin is unlikely to extend protection in the host state. This gap between diplomatic protection and human rights protection also creates a predicament for those who fall through the cracks between the conventions on stateless persons, refugees and migrant workers.

2. INTERNATIONAL HUMAN RIGHTS LAW: CURRENT TRENDS

The *1948 UDHR* is the principal rights-based international instrument of our times. Even though it is not legally binding, the *1948 UDHR* has immense moral and authoritative force in declaring protection for everyone, children, women and men, within the territories and jurisdiction of members of the United Nations. The other significant rights-based international instruments are the *1966 International Covenant on Civil and Political Rights*,[22] the *1966 ICCPR Optional Protocol*[23] and the *1966 International Covenant on Economic, Social and Cultural Rights*.[24] The two covenants, which are legally binding on state parties, grant state protection for the full spectrum of rights of citizens and non-citizens within the borders of state parties. However, certain rights are reserved for citizens and other rights only apply to those who are lawfully within the territory. Two other conventions are also relevant to the discussion on the protection of non-citizens, especially those who are stateless. They are the *1965 Convention on the Elimination of All Forms of Racial Discrimination*[25] and the *1984 Convention*

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[22] GA Res 2200 A (XXI), 16 December 1966. (entered into force 23 March 1976). As of 9 December 2002, there are 149 state parties. ('*1966 ICCPR*').

[23] Ibid. (entered into force 23 March 1976). As of 9 December 2002, there are 104 state parties.

[24] Ibid. (entered into force 3 January 1976). As of 9 December 2002, there are 146 state parties. ('*1966 ICESCR*').

[25] GA Res 2106 (XX), 21 December 1965. (entered into force 4 January 1969). As of 9 December 2002, there are 165 state parties. ('*1965 CERD*').

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[26] The *1965 CERD* prohibits racial discrimination among citizens and specifically provide that distinctions between citizens and non-citizens on the basis of race and ethnicity do not amount to discrimination. The *1984 Torture Convention* prohibits torture of any person and specifically that of asylum seekers and refugees. Hence both conventions are pertinent to the discussion on distinctions between citizens and non-citizens. The views and decisions of the respective treaty bodies and Special Rapporteurs on issues pertaining to the difference between citizens and non-citizens and categories of non-citizens will shed light on protection available to the categories of stateless persons identified in the previous chapter.

The *1993 Vienna Declaration and Programme of Action*[27] gave fresh impetus and direction to human rights protection for a range of vulnerable groups of people. It was adopted by the World Conference on Human Rights on 25 June 1993. The *1993 Vienna Declaration* affirmed the universality, indivisibility, interdependence and interrelatedness of human rights.[28] 171 states and the international human rights community were represented, including more than 800 non-governmental organizations, treaty bodies, national institutions as well as academics.[29] This reflects the rise of non-state actors, particularly non-governmental organizations in the development of international law. Some argue that this was a formal consensus masking a deep and enduring disagreement over the proper status of economic, social and cultural rights.[30]

The *1948 UDHR* included economic, social and cultural rights.[31] However, these were generally regarded as new rights whereas civil and political rights were 'traditional' rights in Western states.[32] A dichotomy

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[26] GA Res 39/46, 10 December 1984. (entered into force 26 June 1987). As of 9 December 2002, there are 132 state parties. ('*1984 Torture Convention*').

[27] UN Doc A/CONF.157/23, 12 July 1993. It was endorsed by the Forty-eighth Session of the General Assembly pursuant to GA Res 48/121, 1993. ('*1993 Vienna Declaration*').

[28] Ibid.

[29] See <http://www.unhchr.ch/html/menu5/wchr.htm> (25 August 2002).

[30] Henry Steiner and Philip Alston (eds), *International Human Rights in Context: Law, Politics, Morals* (1996) 256.

[31] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1999); Ashild Samnoy, 'The Origins of the Universal Declaration of Human Rights' in Gudmundur Alfredsson and Asbjorn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 3.

[32] Steiner and Alston, above n 30, 256. See also Martti Koskenniemi, 'The Preamble of the UDHR' in Alfredsson & Eide, ibid 27, 36.

developed between civil and political rights and economic, social and cultural rights during the Cold War that followed.[33] It widened with the adoption of two separate covenants in 1966 – the *1966 ICCPR* and the *1966 ICESCR*. Human rights became a weapon in the ideological warfare between East and West. Western states asserted that civil and political rights were essential for the achievement of human development. Developing countries argued that economic and social rights should be the priority. Also, they were entitled to development cooperation because colonialism and neo-colonialism constituted gross violations of international law.[34] Economic, social and cultural rights were subsumed under the right to development within this debate.[35] This transformed the notion of development from one that is purely economic to human development and resulted in the integration of human rights with human development.[36] After the Cold War, some Asian states extended the denunciation of human rights. They argued that the Western concept of individual civil and political rights was opposed to 'Asian' values and philosophies that place priority on obligations towards the family, community and nation.[37] They alleged that the West used human rights as an instrument of economic competition in the post-Cold War era of globalization.[38]

In the meantime, progress in women's rights was closely followed by developments in children's rights. Since the adoption of the *1979 Convention on the Elimination of All Forms of Discrimination Against Women*[39] the focus had shifted from their status and equality with men to their rights as women and as human beings. Their lack of access to development focused attention on

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[33] Samnoy, above n 31, 11; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1994) 4-12.

[34] Steiner and Alston, above n 30, 1113.

[35] Georges Abi-Saab, 'The Legal Formulation of A Right to Development' in The Academy of International Law, *The Legal Formulation of A Right to Development* (1980) 159, 163 quoted in Steiner and Alston, ibid 1114.

[36] See Asbjorn Eide, 'Article 28' in Alfredsson and Eide, above n 31, 597, 614-20. See also Amartya Sen, *Development as Freedom* (2001); Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) 23 *Human Rights Quarterly* 1062, 1085-88 and 1091.

[37] See Yash Ghai, 'Human Rights and Governance: The Asian Debate' (1994) 15 *Australian Year Book of International Law* 1 for a critique of the self-serving aims of authoritarian Asian governments in promoting 'Asian values'. See contrary view in Bilahari Kausikan, 'Asia's Different Standard' (1993) 92 *Foreign Policy* 24.

[38] Ibid, Kausikan.

[39] GA Res 34/180, 18 December 1979. (entered into force 3 September 1981). As of 9 December 2002, there are 170 state parties. ('*1979 CEDAW*').

the fact that they were disproportionately disadvantaged in relation to economic, social and cultural rights.[40] The adoption of the *1989 Convention on the Rights of the Child*[41] also focused attention on the millions of children deprived of opportunity to grow and develop to their fullest potential. The *1989 CRC* greatly influenced the reconceptualization of development.[42] It had equally significant consequence on the importance of economic, social and cultural rights. These were some of the more significant developments that led to the affirmation in the *1993 Vienna Declaration*.

These developments in human rights law crystallize the principle of non-discrimination in international law. These treaties complement customary international law principles on human rights in protecting citizens and non-citizens in state parties. Customary international principles concerning human rights continue to develop. For example, considerable debate persists regarding the status of the principle of *non-refoulement* as customary international law and/or *jus cogens*.[43] Currently, there are only a small number of customary international law principles on human rights. Indeed, only those regarded as most essential have achieved the status of *jus cogens* or peremptory norms of general international law.[44] The *jus cogens* norms such as prohibition of genocide, slavery, murder and disappearances, torture, prolonged arbitrary detention and systematic racial discrimination are framed in negative terms instead of as positive expressions.[45] Sex discrimination is absent from the generally accepted enumeration of *jus*

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[40] Eide, above n 36, 627.

[41] GA Res 44/25, 20 November 1989. (entered into force 2 September 1990). As of 9 December, there are 191 state parties. ('*1989 CRC*').

[42] Ibid 615. See also Shelley Wright, 'Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions' (1992) 12 *Australian Yearbook of International Law* 241; Christine Chinkin & Shelley Wright, 'The Hunger Trap: Women, Food and Self-Determination' (1993) 14 *Michigan Journal of International Law* 262.

[43] Guy Goodwin-Gill, *The Refugee in International Law* (2nd ed 1996, rep 1998) 202, 134-37, 170-71; Jean Allain, 'The jus cogens nature of non-refoulement' (2002) 13 *International Journal of Refugee Law* 533; Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion* (2001) (prepared for the UNHCR).

[44] 1155 UNTS 331, *1969 Vienna Convention on the Law of Treaties* art 53 states that 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

[45] See for example, American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) [702] 'Customary International Law of Human Rights'.

cogens.[46] The absence of customary law principles pertaining to other human rights indicates that the protection for *de jure* and *de facto* stateless persons turns on provisions in the international human rights treaties to which host states are party.

2.1. *The 1993 Vienna Declaration*

The *1993 Vienna Declaration* is not a legal document with binding force but a statement of political consensus on universal aspirations.[47] Yet, it has been the impetus for major concrete actions for the promotion and protection of human rights at the international level. The appointment of the High Commissioner for Human Rights and the Special Rapporteur on Violence Against Women, the *1993 Declaration on the Elimination of Violence Against Women*,[48] the *1999 CEDAW Protocol* and the integration of women's human rights into the UN human rights programme are some of the significant outcomes of the Declaration and Programme for Action.[49] It reaffirmed:

> the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.[50]

The Declaration addressed a whole range of issues that had emerged since the *1948 UDHR*. For example, it affirmed the right to development 'as a universal and inalienable right and an integral part of fundamental human rights' and further cautioned that 'the lack of development may not be invoked to justify the abridgement of internationally recognized human rights'.[51]

It was significant that the Declaration identified a number of vulnerable groups and focused on specific measures to ensure adequate protection for

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[46] Hilary Charlesworth and Christine Chinkin, 'The Gender of Jus Cogens' (1993) 15 *Human Rights Quarterly* 63, 70.

[47] Donna Sullivan, 'Women's Human Rights and the 1993 World Conference on Human Rights' (1994) 88 *American Journal of International Law* 152, 152 especially in relation to violence against women. See also Steiner & Alston, above n 30.

[48] GA Res 48/104, 20 December 1993, UN Doc A/RES/48/104, 23 February 1994.

[49] See respective relevant recommendations in UN Doc A/CONF.157/23, 12 July 1993, Part II, [18], [40], [38], [40] and [37].

[50] Ibid, Part I [1].

[51] Ibid [10].

their rights. These groups included women,[52] minorities,[53] indigenous people,[54] children,[55] persons with disabilities,[56] refugees,[57] migrant workers[58] and prisoners[59]. 'The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights'.[60] It affirmed '[t]he full and equal participation of women in political, civil, economic, social and cultural life' at all levels and the eradication of sex discrimination as priority objectives of the international community. Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, was condemned as being incompatible with the dignity and worth of the human person and had to be eliminated.[61] 'In all actions concerning children, non-discrimination and the best interest of the child should be primary considerations and the views of the child given due weight'.[62] National and international mechanisms and programmes were to strengthen defence and protection of economically and sexually exploited children, refugee and displaced children and children in detention.[63] The Declaration also reaffirmed that 'everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one's own country'.[64] Migrant workers were included among the vulnerable groups.[65]

The identification of refugees and migrant workers as vulnerable groups is significant. They overlap with some, if not all, the other vulnerable groups such as women, children, minorities and prisoners. The omission of stateless persons is curious since the Declaration was made as the spate of state successions in Europe was in progress even if protracted statelessness in

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52 Ibid Part I [18] and Part II [36]-[44].

53 Ibid, Part I [19] and Part II [25]-[27].

54 Ibid Part I [20] and Part II [28]-[32].

55 Ibid Part I [21] and Part II [45]-[53].

56 Ibid Part I [22] and Part II [63]-[65].

57 Ibid Part I [23].

58 Ibid Part I [24] and Part II [33]-[35].

59 Ibid Part II [54]-[61].

60 Id Part I [18].

61 Ibid.

62 Id Part I [21].

63 Ibid [21].

64 Ibid [23].

65 Ibid [24].

parts of Asia and Africa attracted hardly any international concern. Stateless persons would also overlap with women, children, minorities and prisoners. There are two plausible reasons for their omission. One is the possibility that stateless persons are fewer in numbers and more disparate and unorganized unlike the other vulnerable groups which have local, national, regional and even international structures, agencies advocating their diverse causes. The other is that states remain extremely sensitive on issues of sovereignty so that the characterization of stateless persons as minorities within or of the state focuses attention on protection of their human rights instead of on the state as the direct, or indirect, cause of their statelessness.[66]

2.2. *Human Rights: Hierarchy v. Universality, Indivisibility, Interdependence and Interrelatedness*

Article 4 of the *1966 ICCPR* is regarded as evidence of the emerging hierarchy in human rights.[67] By identifying certain rights as non-derogable under exceptional circumstances, the article implies that some rights are more important than other rights. Article 4(1) provides that a state party may take measures which derogate from its obligations under the Covenant during a public emergency which threatens the life of the nation 'provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin'. Notwithstanding article 4(1), such measures may not derogate from certain rights set out in Article 4(2). The non-derogable rights are: the right to life, freedom from torture and cruel and degrading treatment, freedom from slavery, freedom from imprisonment for debts, freedom from retrospective prosecution, the right to recognition as a person before the law and freedom of thought, conscience and religion.[68]

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[66] UN Doc EPAU/2001/09 (July 2001), Magnus Engstrom & Naoko Obi, *Evaluation of UNCHR's Role and Activities in Relation to Statelessness*, UNHCR, Evaluation and Policy Analysis Unit, 3 [7].

[67] Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights' (2001) 12 *European Journal of International Law* 917; Theodor Meron, 'On A Hierarchy of International Human Rights' (1986) 80 *American Journal of International Law* 1; *Barcelona Traction* case (1970) ICJ 4. See also article 103 of the UN Charter.

[68] Compare with the American Law Institute, above n 45. See also ibid, Theodor Meron, 13-17.

Before considering the implications, it is instructive to observe how article 4 ranks human rights. Firstly, a non-derogable right such as the freedom from torture may not be curtailed even if the measure does not discriminate or target any person on the basis of the prohibited grounds in article 4(1). Secondly, the measures taken by a state party during a public emergency may derogate from 'lesser' rights not set out in article 4(2). Thirdly, the measures taken to curtail, for example, the freedom of speech must be applied across the board and cannot discriminate against or target any person or group on the prohibited grounds.

On the face of article 4, the rights in these articles apply to all individuals within the territory and subject to the jurisdiction of the state party. However, race, colour, sex, language, religion and social origin are singled out as the prohibited discriminatory grounds. Thus, the prohibition against discrimination is narrower than the non-discrimination provisions in articles 2 and article 26 of the *1966 ICCPR*. In addition to the grounds in article 4(2), articles 2 and 26 also prohibit discrimination on the basis of political or other opinion, social origin, property, birth or other status. It is argued that the differentiation between derogable and non-derogable rights under the Covenant, together with the prohibited grounds of discrimination in article 4, effectively endorses distinctions between citizens and aliens within the state party.

The omission of 'national origin' from article 4 has been interpreted as indicating that a state may discriminate against non-nationals in a public emergency.[69] In other words, the state may derogate from 'lesser' rights of non-nationals including the freedom of residence or procedural rights of expulsion. Whether this view is correct depends on the definition of the term. The term 'national origin' is open to two interpretations. According to some analysts, the *travaux preparatoires* indicate that the term implies nationality in the sense of citizenship in article 2 of the *1966 ICCPR*.[70] It is pertinent to note that the drafters of the *1948 UDHR* indicated that 'national origin' in article 2 should not be interpreted as citizenship but ought to be linked to race and colour.[71] This difference in definition is

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[69] UN Doc E/CN.4/Sub.2/2001/20 (6 June 2001), David Weissbrodt, *The Rights of Non-Citizens: Preliminary Report*, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 53rd sess, [37].

[70] Ibid; Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Preparatoires and Case-Law of the International Monitoring Organs* (1998) 643-46.

[71] Morsink, above n 31, 102-04.

unsatisfactory in view of the fact that the article in the Covenant is identical to that in the Universal Declaration preceding it.

In 2001, the Human Rights Committee clarified the scope of article 4 in *General Comment No 29*.[72] The Human Rights Committee noted that there are elements of the right of non-discrimination that cannot be derogated from even though they have not been included in article 4. They include articles 2, 3, 14(1), 23(4), 24(1), 25 and 26.[73] Unfortunately, the Committee does not specifically mention that a state may not discriminate against non-citizens during a public emergency or set the parameters for such discrimination.

The development of 'minimum core content' in economic, social and cultural rights is another aspect of the hierarchy of human rights.[74] For example, the failure to provide primary education to a significant number of children could amount to a breach of the state's obligations unless it can demonstrate that every effort had been made to use all resources at its disposal to provide such education. There are three issues arising from the notion of 'minimum core content'. First, definitions of minimum obligations are required. The Committee on Economic, Social and Cultural Rights has articulated some of these, such as the right to food, education and housing, in subsequent *General Comments*.[75] Secondly, the term 'any significant number' is vague. Thirdly, the reference to 'individuals' invites questions as to the inclusion of non-nationals. It is not clear that a state would be in breach of its minimum obligations with respect to any right where the majority of those affected are non-nationals who are in a regular situation, let alone those who are in an irregular situation.

This emerging hierarchy highlights the significance of universal, indivisible, interdependent and interrelated rights. The affirmation in the

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[72] UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001).

[73] Ibid [8]. Art 2 is the general provision on non-discrimination, art 3 provides for gender equality, art 14(1) provides for equality before the courts, art 23(4) provides for equal rights between spouses and protection for children when a marriage has been dissolved, art 24(1) provides protection for the child by the family, society and the state free from discrimination, art 25 provides for equality in citizen participation in public affairs and art 26 provides for equality before the law.

[74] UN Doc HRI/GEN/1/Rev.5 (26 April 2001), Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of State Party Obligations*, 5th sess, 1990, 18 [10]; Green, above n 36, 1072.

[75] Ibid, Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing*, 6th sess, 1991, 22; *General Comment No 7: The Right to Adequate Housing: Forced Evictions*, 16th sess, 1997, 49; *General Comment No 12: The Right to Adequate Food*, 20th sess, 1999, 66; *General Comment No. 13: The Right to Education*, 21st sess, 1999, 74; and *General Comment No 14: The Right to the Highest Attainable Standard of Health*, 22nd sess, 2000, 90 .

1993 Vienna Declaration was reiterated in recent resolutions of the General Assembly regarding follow-up to the Declaration.[76] These concepts are not defined in the Declaration but there are many examples of their application, new and old. For example, Green argues that: 'the right to health encompasses a right to access to safe drinking water, as does the right to food. Access to safe drinking water in the home and school are also aspects of the right to housing and the right to education, respectively'.[77] Labour rights provide traditional examples of the interrelation and interdependence of human rights. The Human Rights Committee has also raised questions on the relation between the freedom of religion and freedoms of expression, assembly and association.[78] However, the concept of interrelated and interdependent rights has evolved largely within the parameters of citizenship.

These notions of universality, indivisibility, the interdependence and interrelatedness of human rights are real and increasingly urgent issues for certain categories of non-citizens, non-nationals and aliens. They suggest that it is time to review the principle of non-discrimination to see whether there is a need to go beyond the established grounds of discrimination in this era of economic globalization and continuing political conflict.

3. The Principle of Non-Discrimination and Distinctions Between Citizens and Non-Citizens

Distinctions between citizens and non-citizens or nationals and aliens are explicitly or implicitly made in the *1966 ICCPR*, *1966 ICESCR* and the *1965 CERD*. The *1966 ICESCR* expressly applies to 'everyone' including non-citizens. However, it is not clear that state parties are under a duty to respect, protect and fulfill[79] the economic, social and cultural rights of non-citizens and aliens on par with citizens and nationals. The *1965 CERD* provides that the prohibition against racial discrimination shall not apply to

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[76] See UN Doc A/RES/52/148 (9 March 1998) Preamble [7]; UN Doc A/RES/53/166 (25 February 1999) Preamble [4].

[77] Green, above n 36, 1068.

[78] See UN Doc. A/47/40, Human Rights Committee, *Mongolia*, 146 [577].

[79] Committee on Social and Economic Rights, above n 75, *General Comment No 4: The Right To Adequate Housing*, [8]; *General Comment No 13: The Right To Education*, [6].

distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens'.[80]

International jurisprudence on equality and discrimination is well known and widely accepted.[81] The first principle is that there must be equality in fact and not just in law.[82] This means that the law could be discriminatory where its application results in unequal enjoyment of the rights conferred. The second principle is that equality in fact may require different treatment.[83] The third principle is that discrimination includes covert discrimination and not just overt discrimination. Covert discrimination takes place where the application of other criteria of differentiation leads, in fact, to discrimination.[84] The fourth principle is that different treatment resulting from relevant differences must meet the criterion of justice or reasonableness.[85] Goodwin-Gill summarized three propositions on discrimination from Judge Tanaka's judgement in the *South West Africa Case*[86] and the European Court of Human Rights in the *Belgian Linguistics Case*[87] as follows: 'Differential treatment is not unlawful (1) if the distinction is made in pursuit of a legitimate aim; (2) if the distinction does not lack an 'objective' justification; (3) provided that a reasonable proportionality exists between the means employed and the aims sought to be realized'.[88] These propositions emphasize intent and proportionality behind the distinctions made. But equality in fact and not just in law would require that the distinction does not have the effect of discrimination. These early judicial opinions resonate with definitions in international instruments that intent and effect are important elements in discrimination. Bayefesky argues that

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[80] Art 1(1). See also UN Doc HRI/GEN/1/Rev.5 (26 April 2001), Committee on the Elimination of Racial Discrimination, *General Recommendation XI on non-citizens*, 42nd sess, 1993, 182[1] and *General Recommendation XIV on article 1, paragraph 1, of the Convention*, 42nd sess, 183 [1]-[3].

[81] Guy Goodwin-Gill, *International Law and the Movement of Persons Between States* (1978) 75-82.

[82] *German Settlers in Poland* (1923) PCIJ, Series B, No. 6, 24.

[83] *Minority Schools in Albania* (1935) PCIJ, Series A/B, No. 64.

[84] Goodwin-Gill, above n 81, 77, including cases at nn 2.

[85] Dissenting Opinion of Judge Tanaka in *South West Africa Case* (1966) ICJ Reports 6, 305-06, 313.

[86] Ibid.

[87] (1968) ECHR, 23 July 1968.

[88] Goodwin-Gill, above n 81, 78.

discrimination does not require intention but could be established on the effects of the distinction.[89]

Article 2(1) of the *1966 ICCPR* prohibits discrimination, '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'. Article 26 provides that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. It goes further to 'prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground' in the same terms as article 2(1).

The Human Rights Committee explained the difference between these two provisions in the following manner:

> While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.[90]

The Human Rights Committee clarified that article 26 does not require the state to enact legislation but when such legislation is adopted in exercise of sovereign power, it must comply with article 26.[91] The Committee has also noted that nationality falls within the term 'or other status' in article 26.[92] Furthermore, that the prohibited grounds of discrimination in article 26 and

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[89] Anne F. Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law' (1990) 11 *Human Rights Law Journal* 1.

[90] UN Doc HRI/GEN/1/Rev.5 (26 April 2001), Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, 1989, [10].

[91] *Broeks v Netherlands* (172/84), UN Doc CCPR/C/29/D/172/1984, 9 April 1987 [12.1]-[13]. See also *Zwaan-de Vries v Netherlands* (182/84), UN Doc CCPR/29/D/172/1984, 9 April 1987; *Danning v Netherlands* (180/84), UN Doc CCPR/C/29/D/172/1984, 9 April 1987.

[92] *Gueye et al v France* (196/85) UN Doc CCPR/C/35/D/196/1985, 6 April 1989.

article 2(1) are identical but that discrimination is not defined in either.[93] Consequently, the Human Rights Committee adopted the definitions in article 1 of the *1965 CERD* and article 1 of the *1979 CEDAW*:

> While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[94] [Emphasis added]

General Comment No 15 states that: 'in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness'.[95] However, paragraph 2 clarifies that article 25 (right to participate in government) which applies only to citizens, and article 13 (expulsion) which applies only to aliens, are exceptions to the general rule. The fundamental rights of aliens in paragraph 7 are substantially the same as those set out in the *1990 Migrant Workers Convention* that applies to all migrant workers. *General Comment No 15* paved the way for the inclusion of civil and political rights in the *1990 Migrant Workers Convention* with the exception of the provisions regarding expulsion of aliens.

Article 2(2) of the *1966 ICESCR* provides that state parties guarantee that the rights granted would be exercised 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Article 2(3) exempts developing countries from this rule by providing that they may 'determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals'. However, that provision does not permit discrimination between nationals of different countries, only between nationals of the State party and non-nationals.[96] The exemption applies only to economic rights such as the right to work and the right to equal pay for equal work, but not to cultural or social rights. But does it apply to rights at the interface of economic and social rights, such as the right to social security? Article 9 clearly provides that the State party recognizes the right of everyone to social security, including social insurance. This is a major

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[93] *General Comment No 18*, above n 90, [6].

[94] Ibid [7].

[95] UN Doc HRI/GEN/1/Rev.5 (26 April 2001), Human Rights Committee, *General Comment No 15: The Position of Aliens under the Covenant*, 27th sess, 1986, 127 [1].

[96] Weissbrodt, above n 69, [58].

concern of the workers, workers' organizations, trade unions and the International Labour Organization ('ILO') today. The ILO focused on social security for all in its 2001 conference, including migrant workers and people – many of who are women – in the informal economy.[97] While noting the differences between developed and developing states, the ILO also analysed the relationship between social security, employment and development policies. It was of the view that most states, including middle-income developing states, were in the position to provide some minimum level of social security.[98] The *1990 Migrant Workers Convention* expressly provides for unemployment benefits for regular migrant workers.[99] I submit that developing states should not be permitted to derogate from its obligations to secure the right of all migrant workers to social security. This is because such derogation would contradict the principle of the interdependence and interrelatedness of human rights. If at all, the discretion should be exercised narrowly as the exemption applies only to economic rights.

In *General Comment No 13* on education, the Committee on Economic, Social and Cultural Rights states that, 'the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status'.[100] This is an unequivocal statement that discrimination on the basis of *de jure* stateless, irregular or illegal immigration status offends the principle of non-discrimination. With respect to adequate housing, the Committee also implies that such discrimination is similarly proscribed. *General Comment No 4* provides that individuals and families are entitled to adequate housing 'regardless of age, economic status, group or other affiliation or status and other such factors'.[101] *General Comment No 14* prohibits any discrimination in access to health care

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97 ILO, *Social Security: A New Consensus*, 2001, 2 [5] and 13.

98 Ibid, 39.

99 Article 27 on social security for both regular and irregular migrant workers; article 54(b) on unemployment benefits for regular migrant workers. See also the ILO Conventions, *1952 ILO Social Security (Minimum Standards) Convention No 102* on minimum standards of social security for all workers ordinarily resident in the state party, *1962 Equality of Treatment (Social Security) Convention No 118* on social security for non-nationals, *1982 ILO Maintenance of Social Security Rights Convention No 157* on social security for migrant workers and *1988 ILO Employment Promotion and Protection Against Unemployment Convention No 168* on unemployment protection for migrant workers.

100 *General Comment No 13*, above n 75, [34].

101 *General Comment No 4*, above n 75, [23].

> on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental ability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has *the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.*[102] [Emphasis added]

The Committee addresses the right of some of those without legal status in paragraph 34 of *General Comment No.14*:

> In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs.

These General Comments demonstrate that the principle of non-discrimination in article 2(1) of the *1948 UDHR* has developed with changing circumstances. The principle of non-discrimination was extended to the deprivation of nationality on the grounds of race after the mass denationalizations of early twentieth century.[103] It sought to curb abuse of state powers over citizens and nationals. Such abuse had reached extreme proportions during the Nazi rule in Germany.[104] The extension of the prohibition to discrimination on property and birth status highlighted that the right to education, suffrage or other rights should not be affected by social or economic privileges.[105] The term 'national origin' was included to indicate nationality in the sense of racial or ethnic origin.[106] Ideological preferences of the time influenced the discriminatory grounds articulated but also left the door open for other grounds that might emerge in the term, 'other status'. At the time, the scope of the principle was also restricted to discriminatory practices in relation to citizens. The treatment of aliens was considered as being the primary responsibility of their state of nationality. Hence, differential treatment of aliens was not regarded as discriminatory.

Would a *de jure* stateless irregular migrant worker in a state party be able to challenge legislation that prohibits acquisition of nationality *jus soli* by children born on the territory to illegal aliens pursuant to article 24(3) read with article 26 of the *1966 ICCPR*? Article 24(3) provides that 'every child

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[102] *General Comment No 14*, above n 75, [18] and [34].

[103] Weis, above n 6, 125. See also American Law Institute, above n 45 and Ineta Ziemele & Gunnar G. Schram, 'Article 15' in Alfredsson and Eide, above n 31, 297, 308.

[104] Morsink, above n 31, 102-03.

[105] Ibid, 113-16.

[106] Morsink, above n 71.

has the right to acquire a nationality'. It is generally accepted that a state party does not have a corresponding duty to grant nationality *jus soli* under article 24(3). However, where the domestic laws of a state party provide for acquisition of nationality *jus soli*, it is arguable that such a right should be granted without any discrimination as to immigration status in accordance with article 26. Even then, unless the *de jure* stateless irregular migrant worker is a child who was born on the territory of the state party, it is unlikely that he or she will be able to challenge the prohibition. Otherwise, it is his or her child or children born on its territory who may be able to challenge such legislation that prevents acquisition of nationality *jus soli*. This is because the prohibition against discrimination is restricted to the right in question. The right in this case belongs to the child and not the parent or parents. Furthermore, other rights of the child affected, as a consequence of the discriminatory effect of the domestic legislation on this particular right, are not taken into account. For example, the *de jure* stateless child of a *de jure* stateless irregular migrant worker would not be able to sustain a claim for the right to higher education due to the prohibition against acquisition of nationality *jus soli*. It is my view that such an interpretation of article 26 does not accord with the principle of interdependence or interrelatedness of rights. Take another example, would an irregular *de jure* stateless person in a state party to both Covenants be able to challenge 'arbitrary' detention under article 9 of the *1966 ICCPR*, because deportation or expulsion is not possible, as an infringement of the right to work and to an adequate standard of living pursuant to articles 6 and 11 of the *1966 ICESCR*? The principle that human rights are interdependent and interrelated raises serious questions regarding the implications arising from the division into two covenants. They highlight nuances in the interpretations of the principle of discrimination and the differences in remedies and enforcement procedures. The inclusion of irregular migrant status as a discriminatory ground in relation to the right to education is an exception. It is driven by the ascendancy of the rights of the child in recent decades.

In 2001, David Weissbrodt, the Special Rapporteur on the Rights of Non-Citizens, noted that increasing distinctions are being made between different categories of non-citizens, particularly by 'supranational political or economic unions, such as the European Union and the North American Free Trade Agreement (NAFTA)'.[107] Furthermore, that 'aliens tend to be of a minority race, discrimination against aliens has some of the underlying

[107] Weissbrodt, above n 69, [161].

tendencies as racism, and there is a substantial relationship between discrimination on the basis of race and discrimination against aliens'.[108] He recommended that

> [a]ny approach to combating discrimination against non-citizens should take into account several critical factors including different categories of non-citizens (e.g. permanent residents, temporary residents, undocumented aliens, etc.) regarding different categories of rights (e.g. political rights, civil rights, right to education, social security, other economic rights, etc.) in countries of different level of development and offering differing rationales for such distinctions (e.g. issues of national reciprocity).[109]

While 'it is clear that all persons, regardless of citizenship status, enjoy the most fundamental human rights such as the right to life, the right to be free from torture, and the right to be free from arbitrary detention',[110] it is less clear 'how various categories of non-citizen status affects other rights such as the right to social security, the right to employment and the right to higher education'.[111] For some categories of non-citizens, not only is the right to be free from arbitrary detention uncertain, the right to an adequate standard of living or to basic education is beyond reach.

The emerging discrimination between categories of non-citizens is at variance with the principle of non-discrimination that each state would protect the rights to be enjoyed by citizens and non-citizens. The issue has been phrased in terms of discrimination between categories of non-citizens largely because minorities overlap with the categories of non-citizens, who are not enjoying the rights and freedoms guaranteed. According to article 1(1) of the *1965 CERD*, distinctions between citizens and non-citizens on the basis of race and ethnicity are not discriminatory. However, it is unclear whether certain categories of non-citizens are not enjoying the rights granted to all because of racial or other discrimination or a combination of discriminatory grounds. It is my view that the creation of different categories of non-citizens has the effect, if not the intent, of nullifying, impairing the recognition, enjoyment or the exercise of the rights and freedoms for asylum seekers, illegal immigrants and those without legal status. Instead of using the citizen as the comparator, one or more categories of non-citizens serve as the standard by which discrimination is being assessed. The express extension of certain social rights to these

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[108] Ibid [200].
[109] Ibid [204].
[110] Ibid [205].
[111] Ibid [206].

categories of non-citizens is a significant move to protect those who are most vulnerable in accordance with the principles of the covenant. It signals the awareness that the absence of legal status could nullify or impair the recognition, enjoyment or the exercise of their rights and freedoms.

Immigration status has an important function vis-à-vis citizenship and nationality. States retain the prerogative to select potential citizens through the creation of categories of non-citizens. Those who qualify as permanent residents often do so on the basis of their higher economic or social status or both. Hence, immigration status has emerged as a discriminatory ground where the traditional grounds of discrimination intersect. Race is rarely an overt factor in determining immigration status these days. Class or property status is implied in the Special Rapporteur's observation regarding categories of non-citizens ranging from permanent residents to undocumented aliens.[112]

Immigration procedures serve as a selection process and immigration status determines the range of rights that certain categories of non-citizens enjoy in the receiving state. Undocumented aliens who are citizens of another state have the right to return to their own country. To what extent is their enjoyment of the rights in the receiving state affected by the fact the right to freedom of movement between states does not encompass the right to enter another state not one's own? The absence of this right does not, legally speaking, affect their enjoyment of all the other civil, economic and social rights. It does highlight the interrelation between freedom of movement and all other rights. What are the implications for those who are stateless, *de jure* and *de facto*, in addition to being in an irregular situation, whose freedom of movement is even more restricted because the right to return to one's country remains as much an issue, in fact as it does in law?

4. Freedom of Movement

The relevant provisions concerning freedom of movement between states are articles 13 and 14 and 9 of the *1948 UDHR*, articles 12 and 13 of the *1966 ICCPR* and article 3 of the *1984 Torture Convention*. The right to seek and to enjoy asylum in article 14 is missing from the *1966 ICCPR*. Instead, article 13 of the ICCPR codifies state powers to expel aliens under international law in the form of providing procedural rights to aliens

[112] Ibid.

lawfully on territory who are at risk of expulsion. This provision is original and has no precursor in the *1948 UDHR*.

Article 13(2) of the *1948 UDHR* provides that everyone has the right to leave any country, including his own, and to return to his country. The right to leave in article 12(2) of the *1966 ICCPR* is qualified by article 12(3) which provides for restrictions 'provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'. In essence, article 12(4) on the freedom from arbitrary deprivation of the right to enter one's own country echoes the provision in the *1948 UDHR*. These restrictions appear in relation to several other rights and the need for definitions of these restrictions has been reiterated.[113] Arguably, one aspect of the right to freedom of movement should be the right to enter any country. While departure from any state is regarded as a right, entry to states other than one's own is viewed as a privilege granted by the receiving state. This flows from the established international law principle that the duty of the state to admit its nationals is a corollary of the right of the state to expel aliens.[114] Consequently, there is no right to enter any country other than one's own under international law. Instead, the international principle of territorial sovereignty holds sway as states determine who may enter or remain on their territory or within their jurisdiction under their domestic laws, subject to international limits.

In 1988, the Human Rights Commission requested the second Special Rapporteur on the Freedom of Movement, C.L.C. Mubanga-Chipoya, to consider these issues:

> the possibility to enter other countries, without discrimination or hindrance, especially of the right to employment, taking into account the need to avoid the phenomenon of the brain drain from developing countries and the question of recompensing those countries for the loss incurred, and to study in particular the extent of restrictions permissible under article 12, paragraph 3 of the International Covenant on Civil and Political Rights.[115]

The Special Rapporteur reported that

> [t]he right to leave is directly dependent on the ability or possibility to enter another country. Indeed, for them to be effective, both these aspects of the freedom of movement should be addressed and settled at one and the same

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[113] UN Doc E/CN.4/Sub.2/1997/22 (29 July 1997), Volodymyr Boutkevitch, *Freedom of Movement: Working Paper*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 49th sess, [42].

[114] Weis, above n 6; Goodwin-Gill, above n 81, 136-37.

[115] Boutkevitch, above n 113, [47].

> time. States should be encouraged to take international and regional measures and to reduce the necessity for entry visas on temporary visits. All forms of discrimination in this respect should be eliminated.[116]

States rejected draft definitions of the restrictions prepared by the second Special Rapporteur.[117] The issue was dropped from the agenda of the Commission for about ten years.

In 1997, the right to enter another country was raised once again. The third Special Rapporteur, Mr Volodymyr Boutkevitch on the Freedom of Movement,[118] concurred with his predecessor's observation.[119] He went on to say that his predecessor's appeal with regard to migrant workers, the 'brain drain', family reunification and refugees, had become even more pertinent.[120] The third Special Rapporteur also observed that circumstances had changed radically since the first study carried out by the first Special Rapporteur, Jose Ingles.[121] In the 1960s, 'departure' and 'return' were the main issue as far as the exercise of the right of freedom of movement was concerned.[122] The restrictive migration practices of the Communist bloc have been jettisoned with the switch to building democratic societies in the 1990s. 'In circumstances in which freedom of movement is guaranteed by law but economic crisis, interethnic conflict and civil war prevail, the central problem is no longer 'departure' and 'return' but 'entry' and 'non-return'.[123] Boutkevitch went so far as to suggest that

> [t]he violations of human rights and freedoms in connection with the exercise of the right to enter a foreign country are so numerous that it has become a matter of urgency to adopt an optional protocol to the International Covenant on Civil and Political Rights concerning the right of entry.[124]

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[116] UN Doc E/CN.4/Sub.2/1988/35, C.L.C. Mubanga-Chipoya, *The Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country*, [524], [525], [526].

[117] Boutkevitch, above n 113.

[118] He was appointed by the Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1996 pursuant to UN Doc Decision 1996/109.

[119] Boutkevitch, above n 113, [43].

[120] Ibid [43].

[121] UN Doc E/CN.4/Sub.2/220; Jose Ingles, *Draft Principles on Freedom and Non-Discrimination in respect of the Right of Everyone to Leave Any Country, including His Own and to Return to His Country*, adopted by UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 2B(XV), UN Doc E/CN.41846 (1963), 40.

[122] Boutkevitch, above n 113, [28].

[123] Ibid.

[124] Id [54].

4.1 *The Right To Enter A State That Is Not One's Own?*

The third Special Rapporteur had accurately noted the effect of historical events and circumstances, political, social, economic and otherwise on the right to freedom of movement. In fact article 13 in the *1948 UDHR* was affected by the Cold War that was just developing. The right to leave any country was an exception to the international law principle of state sovereignty over immigration matters under its domestic jurisdiction. The international law principle regarding territorial sovereignty preserved state powers over entry and expulsion of aliens. It did not extend to voluntary departure from the territory. The rise of immigration control as a prerogative of the state effectively restricted such voluntary departure, save in accordance with domestic law. Hence, an early draft of article 13(1) provided that 'the right to emigration and expatriation shall not be denied'.[125] The First Session of the Drafting Committee adopted a single draft article, which combined the draft on freedom of movement within the state with this draft on emigration and expatriation. The adoption was accompanied by a note stating that 'the right to leave a country was correlated with the right to enter another one and that the Commission hoped that 'these corollaries [would] be treated as a matter of international concern and that members of the United Nations cooperate in providing such facilities".[126] Four decades on, the right to enter any country has emerged as the urgent issue because its omission has contributed to the violation of other rights of non-citizens and aliens, including migrant workers, stateless persons and refugees.

Article 14 is an innovation in the sphere of civil and political rights. Despite the solemn affirmation of a right to seek and to enjoy asylum, its efficacy was plainly in doubt even in the view of the Drafting Committee.[127] Its weakness contrasts with the collective strength of the articles in the *1951 Refugees Convention* regarding penalties for illegal entry and presence, expulsion and *refoulement*. The *1951 Refugees Convention* does not grant a right to asylum. However, these articles seem to be an attempt to compensate for the failure of the *1948 UDHR* to grant the right to asylum and not just the right to seek and to enjoy asylum in other countries. In 1989, the UNHCR observed that

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[125] Morsink, above n 31, 73.

[126] Ibid.

[127] Ibid.

> [f]or a refugee to enjoy and exercise fundamental rights and freedoms, admission, somewhere, is required as the first step. This suggests that the appropriate interpretation of provisions in the 1951 Convention dealing with *non-refoulement*, non-expulsion and non-penalization for illegal entry, is that the asylum seeker is to be admitted.[128]

A number of Conclusions of the Executive Committee of the UNHCR refers to the relationship between the article 33(1) of the *1951 Refugees Convention* and article 14 of the *1948 UDHR*. In 1979, the Executive Committee noted that:

> [i]t is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.[129]

In 1988, the Executive Committee noted that, 'like other asylum seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin'.[130]

The Sub-Commission on Human Rights urged all states

> to respect the principle of *non-refoulement* within their obligations under the Convention relating to the Status of Refugees and the Protocol thereto and other human rights instruments and to safeguard and give effect to the right of everyone to seek and enjoy in other countries asylum from persecution…[131]

More recently, the United Nations General Assembly reaffirmed that

> as set out in article 14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution, and calls upon all states to refrain from taking measures that jeopardize the institution of asylum, particularly by returning or expelling refugees or asylum seekers contrary to international standards.[132]

These conclusions and resolutions demonstrate that article 33(1) of the *1951 Refugees Convention* sustains the right to asylum in article 14 of the *1948 UDHR*.

The primary purpose of Article 31 of the *1951 Refugees Convention* is to prevent the imposition of penalties. The intention, most definitely, was not to permit states to send unrecognized refugees or asylum seekers

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[128] UN Doc A/AC.96/728 (2 August 1989), UNHCR, *Note on International Protection*, Executive Committee of the High Commissioner Programme, 40th sess, [10].

[129] *Conclusion No 15 (XXX), 1979*, [c].

[130] *Conclusion No 53 (XXXIX), 1988*, [1].

[131] Sub-Commission on Human Rights Res 2000/20, 18 August 2000, [1].

[132] GA Res A/RES/55/74, 12 February 2001, [6]; see also GA Res A/RES/53/125, 12 February 1999, [5]; GA Res A/RES/52/103, 9 February 1998, [5].

elsewhere.[133] This is also relevant to the right to seek asylum under article 14 of the *1948 UDHR*. If states are prohibited from penalizing refugees for illegal entry or presence, is it possible to imply a negative duty on states not to obstruct refugees in exercising the right to seek asylum under article 14 of the UDHR in the receiving states? Such an interpretation is sustainable because it is the prerogative of the state to regulate immigration including the imposition of penalties for violation of such laws and regulations. If a state undertakes not to impose such penalties, it amounts to a derogation from state powers with respect to the entry of refugees. Unfortunately, even if this interpretation were accepted, it would only apply where states have ratified the *1951 Refugees Convention*.

The right to leave was a comprehensive rejoinder to the restrictive emigration practices of the Communist states. The right to seek asylum was an incomplete response to the experience of refugees in the decades preceding the *1948 UDHR*. The reasons for this situation can be found in the drafting process of articles 13 and 14 of the *1948 UDHR*. Morsink notes that

> [t]he right to leave is hollow without the right to enter. The right to ask for and be given asylum is therefore a necessary corollary of the right to leave one's own country. This problem is different from the rights to emigrate and to immigrate, rights that…were replaced by an exclusive focus on the problems of refugees seeking asylum from persecution.[134]

Yet the draft article giving refugees the right 'to seek and be granted in other countries asylum from persecution' met opposition led by the United Kingdom representative who won the day. A compromise was reached in the present form of article 14.[135] In the words of Kjaerum, '[t]he outcome was that the granting of asylum was upheld as a unilateral act by the protecting State and as a prerogative of State sovereignty. The lessons learned from the Holocaust were lost'.[136]

Further restrictions on the freedom of movement follow in the *1966 ICCPR*. The substantive right to freedom from arbitrary exile[137] in article 9

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[133] Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 *American Journal of International Law* 661, 668; Lauterpacht and Bethlehem, above n 43, [93].

[134] Morsink, above n 31, 75.

[135] See Morten Kjaerum, 'Article 14' in Alfredsson and Eide, above n 31, 279, 282-83.

[136] Ibid, 283.

[137] Johanna Niemi-Kiesilainen, 'Article 9' in Alfredsson and Eide, above n 31, 209, 215-16 notes that the absence of the prohibition of exile of nationals in later human rights instruments may be explained by its having become a rule of customary international law.

of the *1948 UDHR* disappeared and the procedural right to freedom from expulsion appeared in article 13 of the *1966 ICCPR*. Although it is couched as a right, article 13 effectively institutionalizes state power to expel aliens under international law. Moreover, only aliens lawfully on the territory have the right to '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'. *General Comment No 15* of the Human Rights Committee made the following clarifications. First,

> illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular are not covered by its provisions. However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13.[138]

Secondly, that

> its purpose is clearly to prevent arbitrary expulsions…and hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions… An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one.[139]

The *1990 Migrant Workers Convention* has adopted these clarifications and extended these procedural rights to irregular migrant workers under article 22.

Freedom of movement is a burning issue for *de jure* and *de facto* stateless persons who fall outside the respective stateless persons, refugee and migrant worker conventions. The provisions under the *1966 ICCPR* indicate that they receive less protection than those who fall within those criteria-based conventions in the recognition, enjoyment and exercise of the right to freedom of movement. There is ample evidence of the affirmation of the principle of non-discrimination with respect to other rights. Nevertheless, those who fall outside the criteria-based conventions often find the exercise of such rights impeded by, not by their subjective fear but the reality of arrest, detention and expulsion.

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[138] *General Comment No 15*, above n 95, [9]. Erick Mose, 'Article 8' in Alfredsson and Eide, ibid 187, 200 notes that article 2(3) of the 1966 ICCPR on remedies would apply to a right to a remedy against expulsion in article 13.

[139] Ibid, *General Comment No 15*, [10].

5. HUMAN RIGHTS PROTECTION PROCEDURES AND MECHANISMS

Part IV of the *1966 ICCPR* sets up the Human Rights Committee to supervise the reporting mechanism on the implementation of the rights under the Covenant by each state party.[140] The Human Rights Committee is also empowered by the Optional Protocol to the *1966 ICCPR* to consider complaints from individuals of violations of human rights by a state party. The *1966 ICCPR Optional Protocol* was adopted under the same resolution as the Covenant.[141] As declared in the Preamble, it provides for a complaints procedure by individuals 'claiming to be victims of violations of any of the rights set forth in the Covenant'. Therefore an individual may pursue a remedy for alleged violation of article 13 against a state party to the Optional Protocol[142] after having exhausted all domestic remedies, where applicable, in writing to the Human Rights Committee.[143]

Part IV of the *1966 ICESCR* sets out the reporting procedures for states on the measures adopted and the progress made in achieving the rights under the covenant.[144] The standards are weaker than those set in the *1966 ICCPR* reporting procedures. The basic reporting procedures are similar in that state parties are required to submit regular reports on the measures and adopted and progress made in achieving observance of the rights. However, the *1966 ICESCR* did not establish an additional mechanism comparable to that under article 41 of the *1966 ICCPR* where a state party may submit communications to the Human Rights Committee to the effect that another state party is not fulfilling its obligations under the Covenant. There is also no provision for submissions or complaints by individuals who claim violation of any right under the covenant for economic, social and cultural rights.

One issue that has arisen from the different mechanisms in place is whether the individual complaint procedure under the *1966 ICCPR Protocol* may be used in relation to violations of rights under the *1966 ICESCR* or other human rights treaties.[145] According to the Human Rights Committee,

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[140] Arts 28-45.

[141] GA Res 2200 A (XXI), 16 December 1966. (entered into force 23 March 1976). As of 9 December 2002, there are 104 state parties.

[142] Art 1.

[143] Art 2.

[144] Arts 16-25.

[145] See generally Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2000) 66-73; McGoldrick, above n 33, 182-87.

article 5(2)(a) of the *1966 Optional Protocol*[146] only precludes the admissibility of complaints under the Protocol that are being considered at the same time[147] by an international body that is of similar standing as the Committee.[148] This also applies even where the complaint was previously considered inadmissible[149] by or was withdrawn before that other body.[150]

The Human Rights Committee has also indicated that the 'same matter' has 'to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body' and not where other individuals had brought their own claims before that body that may appear to arise from the same event.[151] Furthermore, the Human Rights Committee is of the view that the *1966 ICCPR* 'would still apply even if a particular subject matter is referred to or covered in other international instruments' including the *1965 CERD*, the *1979 CEDAW* and the *1966 ICESCR*.[152] For example, where a complaint relates to national legislation concerning rights other than those in the *1966 ICCPR*, such as the right to social security, the Human Rights Committee would examine the complaint pursuant to article 26 of the *1966 ICCPR*.[153] However, the Human Rights Committee appears to be more cautious in finding violations of article 26 when they involve distinctions pertaining to economic, social and cultural rights.[154] Furthermore, unless the complaint may be brought pursuant to article 26, it is uncertain that the Human Rights Committee would be able to examine it.

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[146] Art 5(2)(a) provides that: 'The Committee shall not consider any communication from an individual unless it has ascertained that: (a) the same matter is not being examined under another procedure of international investigation or settlement'.

[147] See for example, *L.E.S.K. v The Netherlands* (381/89), UN Doc CCPR/C/45/D/381/1989, 12 August 1992.

[148] They include the Committee Against Torture and other international human rights treaty bodies as well as regional human rights treaty bodies such as the European Court on Human Rights.

[149] *Thomas v Jamaica* (321/88), UN Doc CCPR/C/49/D/321/1988, 19 October 1993, [5.1].

[150] *Wright v Jamaica* (349/89), UN Doc CCPR/C/45/D/349/1989, 27 August 1992; *Antonaccio v Uruguay* (63/79) UN Doc CCPR/C/14/D/63/1979, 28 October 1981.

[151] *Fanali v Italy* (75/80), UN Doc CCPR/C/18/D/75/1980, 31 March 1983, [7.2]; *Blom v Sweden* (191/85), UN Doc CCPR/C/32/D/191/1985, 4 April 1988; *Sanchez Lopez v Spain* (777/97), CCPR/C/67/D/1997, 25 November 1999.

[152] *Broeks v Netherlands*, above n 91, [12.1] – [12.5].

[153] Above n 91.

[154] *Sprenger v The Netherlands* (395/90), UN Doc CCPR/C/44/D/395/1990, 8 April 1992; *Oulajin and Kaiss v The Netherlands* (406, 426/90), UN Doc CCPR/C/46/D/406/1990, 23 October 1992.

Therefore, a person without legal status, such as a *de jure* stateless irregular migrant worker could file a complaint with the Committee claiming violations of the right to health due to 'the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health'.[155] However, the *1966 ICCPR Optional Protocol* may not be used in relation to violations of rights under the *1966 ICESCR* that have not been the subject of national legislation. Hence, the idea of a similar individual complaints procedure for economic, social and cultural rights has been mooted and is being considered at the Commission on Human Rights.[156]

Where the Article 77 individual complaints procedure applies, an irregular migrant worker may seek redress in a state party for violations of article 22 under the *1990 Migrant Workers Convention*. However, where the state party accused of violating such rights has not recognized the competence of the Committee, the issue of alternative remedies arises. Where that state party has also ratified the *1966 ICCPR* and the *1966 Protocol*, such possibility could exist for the irregular migrant worker concerned.

Article 5(2) of the *1966 ICCPR* prohibits 'restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party…pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent'. It raises the possibility that the state party may not refuse to extend procedural rights under article 13 to irregular migrant workers. However, such an interpretation seems unlikely. Firstly, the term 'fundamental' appears to make a distinction between rights that are more important with those that are less. The emerging hierarchy of rights would indicate that article 13 rights are not fundamental. Secondly, the prohibition concerns rights and not the category of persons accorded such rights.

The inconsistency between procedural rights under article 13 of the *1966 ICCPR* and article 22 of the *1990 Migrant Workers Convention* raises another issue regarding national legislation of a state party. Article 22 sets out a whole range of procedural rights in the event of individual expulsion of a migrant worker including the rights to be informed of the reasons for expulsion, to appeal against or apply for review of the expulsion order, to compensation should the order be subsequently annulled, to return to the

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[155] *General Comment No 14*, above n 75, [50].

[156] See UN Doc E/CN.4/1997/105 (18 December 1996), Secretary-General, *Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Commission on Human Rights, 53rd sess, Annex.

host state and, notwithstanding the expulsion order, to be able to enjoy and exercise all other rights in the host state such as that to wages and other entitlements. Where the state party has not amended national legislation to implement its obligations under article 22 of the *1990 Migrant Workers Convention*, can an irregular migrant worker seek redress for violation of article 22 rights pursuant to article 26 of the *1966 ICCPR*? The principles set out by the Human Rights Committee restrict the application of article 26 to the application and interpretation of national legislation.[157] Consequently, an irregular migrant worker would be denied the benefit of article 22 in a state party to the *1990 Migrant Workers Convention*, the *1966 ICCPR* and the *1966 ICCPR Protocol*. It follows that an irregular *de jure* stateless person or others affected by various forms of *de jure* or *de facto* statelessness would be unable to pursue remedies for violations of procedural rights under either Convention.

Provisions of the *1984 Torture Convention* have been invoked in certain cases to prevent *refoulement* of asylum seekers.[158] Article 1(1) defines torture as intentionally inflicting severe physical or mental pain or suffering by a public official. The purpose of such torture must be to obtain information or a confession, to punish, to intimidate or for any other discriminatory reason. Article 3(1) prohibits a state from expelling, returning or extraditing a person to another state 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Article 3(2) provides that 'the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights'.[159] This could be an important safeguard for irregular migrant workers in a state party to the *1966 ICCPR* and the *1984 Torture Convention* but not the *1951 Refugees Convention*. Where refugees are unable to establish

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[157] *General Comment No 15*, above n 95, [9]; See also the case of *Maroufidou v Sweden* (58/79), UN Doc CCPR/C/12/D/58/1979, 8 April 1981.

[158] *Balabou Mutumbo v Switzerland*, Communication No. 13/1993; *Kisoki v Switzerland*, Communication No. 41/1996.

[159] See the decision of the Committee on Torture in *Balabou Mutombo v. Switzerland*, ibid, 27 April 1994, [3] where the Committee set out the principles to be applied in relation to a violation of article 3. Since the aim of the determination is to establish 'whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return', the existence of a consistent pattern of gross, flagrant or mass violations of human rights is insufficient to establish the claim under article 3 unless there are additional grounds to indicate the element of personal risk. 'Similarly, the absence of such a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances'.

their status in such a state and must survive as irregular migrant workers, article 3 of the *1984 Convention on Torture* offers alternative protection. But even if procedural rights were to be extended to irregular migrant workers, the issue for refugees who merge with irregular migrant workers is whether they provide sufficient protection against *refoulement*.

6. Conclusion

There is a gap between human rights protection and diplomatic protection. Those unable to assert a right to the protection of the state of origin or nationality are most vulnerable in the host state. Their exercise of the rights granted by the host state is subject to international law principles concerning state powers over entry and exit. The affirmation of universality, indivisibility, interdependence and interrelatedness of human rights in the *1993 Vienna Declaration* is critical for non-citizens. The emerging hierarchy of rights reveals that distinctions are maintained between citizens and non-citizens. Since distinctions between citizens and non-citizens are regarded as legitimate, the focus has shifted to distinctions between different categories of non-citizens. At the same time, social rights such as the right to basic education and the right to health in the *1966 ICESCR* have been extended to those without legal status.

Illegal immigration status has emerged as a discriminatory ground, which intersects with traditional grounds of discrimination. The absence of the right to enter a state other than one's own is critical to *de jure* stateless irregular migrant workers and irregular *de jure* stateless persons. The absence of the right to seek asylum means that refugees who survive as irregular migrant workers are vulnerable to both expulsion and *refoulement*. Others who are either *de jure* or *de facto* stateless are also liable to expulsion without even procedural rights if they are also in an irregular situation at the same time. The *1966 ICCPR Optional Protocol* is an avenue through which remedy for violation of other rights, including those under the *1966 ICESCR*. The possibility of seeking remedy for violation of procedural rights in relation to expulsion does not extend to those who are stateless, *de jure* or *de facto*, and in an irregular situation. This indicates that the situation of stateless women and children with irregular immigration status requires further consideration.

While nationality and citizenship laws are restricting the parameters for protection of the most important civil and political rights, migration law seems to be limiting them to some of most basic economic, social and cultural rights. These developments are symptomatic of the limits of human

rights protection and diplomatic protection. In the current human rights protection regime, the host state bears total responsibility for protecting the full spectrum of human rights for everyone on its territory or within its jurisdiction. States of nationality or origin are absolved from any responsibility because diplomatic protection does not oblige them to extend protection to their citizens abroad and is traditionally restricted to civil and political rights. If states are prepared to assume joint responsibility for protecting human rights regardless of both sets of parameters, distinctions between citizens and non-citizens will be less problematic. Even the issue of children, women and men with illegal immigration status, can be resolved.

CHAPTER FIVE

GENDER DISCRIMINATION AND STATELESSNESS

Feminist critiques have identified many discriminatory aspects of law, domestic and international, based on sex and gender. The exclusion of women from full citizenship in Western societies has been revealed, despite increasing civil equality, in the construction of policies and structures affecting economic and social rights. However, the casting of women as the alien 'other' to the citizen has resulted in neglect of statelessness as the other alien space. Feminist critiques of citizenship assume legal or formal citizenship as the norm for women. The experience of women who are stateless disappears from sight and statelessness appears as a gender-neutral phenomenon. Statelessness becomes subsumed under the category of non-citizens in the citizen/non-citizen dichotomy, and the similarities and differences between statelessness and other forms of non-citizenship rendered insignificant. Feminist critiques are primarily Western and European, even those by feminists of colour. The absence of feminist critiques on statelessness could also be due to the fact that current forms of statelessness are mainly in Asia and Africa. This suggests that feminist critiques may not always extend to the experiences of women on the margin who do not fit into the issues defined as women's issues. It also suggests that issues may be defined according to the number of women affected.

There are some feminist critiques of the relationship between citizenship law and migration law. These have important implications for migrant women and children in general. However, the relationship between citizenship, irregular immigration status and statelessness has specific implications for the protection of women and children among irregular migrant workers. Migration law may disguise gender discrimination in acquisition of citizenship through the criteria for those migrants who will be eligible for formal citizenship. The question is how migration law masks gender discrimination in effective statelessness by legitimizing the denial of protection to those with irregular immigration status.

Feminist perspectives have also influenced the interpretation and application of the *1979 CEDAW* to various issues affecting women. In the current context, it is pertinent to explore the directions suggested by feminist critiques in which the *1979 CEDAW*, the *1989 CRC* and the 1999

Optional Protocol[1] to the *1979 CEDAW* may be able to provide alternative protection for women and children among the contemporary groups of stateless persons.

1. Feminist Critiques and Gender Discrimination

The prohibition against gender discrimination is taken for granted today. Yet, early feminist struggles for equality between women and men foundered. Differential treatment for women used to be justified on the grounds that women were different from men and consequently did not amount to discrimination. MacKinnon was among the feminist analysts who critiqued the sameness/difference model of equality.[2] Feminist critiques of the public/private dichotomy extended to the international legal framework, *jus cogens* and state responsibility.[3] The protection of gender-related persecution in refugee law also developed from feminist critiques on the public/private dichotomy, rape and violence against women under municipal law.[4]

The continual extension of feminist critiques of the public/private distinction to more and more areas of international law is necessary. International law, developed from Western standards of civilization,

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[1] UN Doc. E/CN.6/1999/WG/L.2 (1999). The Optional Protocol was adopted by the forty-third session of the United Nations Commission on the Status of Women (CSW) on 12 March 1999, and by the United Nations General Assembly on 6 October 1999. (entered into force 22 December 2000). As of 9 December 2002, there are 47 state parties. ('*1999 CEDAW Protocol*').

[2] Catharine MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 *Yale Law Journal* 1281.

[3] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613; Hilary Charlesworth and Christine Chinkin, 'The Gender of *Jus Cogens*' (1993) 15 *Human Rights Quarterly* 63; Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *European Journal of International Law* 387.

[4] See guidelines adopted by states on gender-related claims in Immigration and Refugee Board (Canada), *Guidelines for Women Refugee Claimants Fearing Gender-Related Persecution* (1996); Immigration and Naturalization Service (U.S.), *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (1995); Department of Immigration and Multicultural Affairs (Australia), Refugee and Humanitarian Visa Applicants: *Guidelines on Gender Issues for Decision-Makers* (1996); Immigration Appellate Authority (U.K.), *Asylum Gender Guidelines* (2000); Dutch Immigration and Naturalization Service (IND), Work Instruction no. 148: Women in the Asylum Procedure (1997). See also Deborah Anker, 'Boundaries in the Field of Human Rights: Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133.

including legal norms, structures and institutions, were imposed on colonies and non-European states.[5] Western notions of the public/private distinction were part and parcel of the standards that evolved as international law.

African American feminists have been at the forefront of the critique of gender essentialism in the domestic sphere. Harris warns against the tendency to essentialize women's experiences thereby privileging one female experience and marginalizing all others.[6] Harris objects to '[t]he notion that there is a monolithic "women's experience" that can be described independent of other facets of experience like race, class, and sexual orientation'.[7] She suggests that

> [t]he result of essentialism is to reduce the lives of people who experience multiple forms of oppression to additional problems: "racism + sexism = straight black women's experience," or "racism + sexism + homophobia = black lesbian experience."[8]

In her view 'feminist essentialism paves the way for unconscious racism'.[9] Crenshaw argues the feminist theory of intersectionality of race and gender from the experiences of African American women at the workplace and in confronting rape and sexual harassment.[10]

From a non-Western perspective, Mohanty argues essentialism assumes that 'women have a coherent group identity within different cultures…prior to their entry into social relations'.[11] Furthermore, such generalizations are hegemonic in that they represent the problems of privileged women, who are often (though not exclusively) white, Western, middle-class and heterosexual women.[12]

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[5] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law' (1999) 40 *Harvard International Law Journal* 1; Gerrit W. Gong, *The Standard of 'Civilisation' in International Society* (1984).

[6] Angela Harris, 'Race and Essentialism in Feminist Legal Theory' in Richard Delgado (ed), *Critical Race Theory: The Cutting Edge* (1995) 253.

[7] Ibid 255.

[8] Ibid.

[9] Ibid.

[10] Kimberle Williams Crenshaw, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139; Kimberle Williams Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour' in Kimberle Crenshaw et al (eds), *Critical Race Theory: The Key Writings That Formed the Movement* (1995) 357.

[11] Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' in Chandra Talpade Mohanty et al (eds), *Third World Women and the Politics of Feminism* (1991) 51, 70.

[12] Ibid.

> Gender essentialism refers to the fixing of certain attributes to women. These attributes may be natural, biological, or psychological, or may refer to activities and procedures that are not necessarily dictated by biology. These essential attributes are considered to be shared by all women and hence are universal. Essentialism thus refers to the existence of fixed characteristics, given attributes, and ahistorical functions that limit the possibilities of change and thus social reorganization.[13]

Kapur also argues that '[f]ocusing on the commonality of women's experiences places the analysis on a slippery slope where it can slide into the essentialist and prioritizing category of gender; it can blunt rather than sharpen our analysis of oppression'.[14] She notes that it is important to 'consider the way in which legal systems have been shaped by social, economic, or historical forces, such as colonialism, enslavement of non-white populations (including both men and women), or the role of the Christian Church' as well as how class, cultural, religious and racial differences between women are all collapsed under the category of gender through women's common experiences.[15] Gender essentialism represents the problems of privileged women as the norm thereby effacing those experienced by women on the margin, not only within the domestic sphere but also in the international arena. The reality, however, is, that women 'come to the law not just as women, but as Black women, and/or Latina women, and/or Muslim women, negotiating with the dominant and stable discourses on race, ethnicity, culture, sexuality, and/or family'.[16]

Feminist critiques of citizenship are germane to the analysis of gender discrimination in citizenship and nationality laws. The move towards gender equality in citizenship and nationality laws in many states has been indirectly, if not directly, influenced by feminist critiques of patriarchy and the public/private distinction.[17] However, these critiques have remained primarily within the parameters of citizenship, despite theories that regard citizenship as membership of a community rather than as a legal status.[18] Such theories extend the scope of citizenship to admit more people,

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[13] Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Journal* 1, 3-4.

[14] Ibid 9.

[15] Ibid.

[16] Ibid 8.

[17] See generally, Lisa Stratton, 'The Right to Have Rights: Gender Discrimination in Nationality Laws' (1992) 77 *Minnesota Law Review* 195.

[18] Kim Rubenstein, 'Citizenship in Australia: Unscrambling Its Meaning' (1995) 20 *Melbourne University Law Review* 503.

including women to the enjoyment of rights and responsibilities vis-à-vis the state.[19] They challenge the definition of citizenship as a legal status and have contributed towards the blurring of distinctions between citizens and migrants.

However, these theories do not deal directly with the citizen/non-citizen distinction or the national/stateless person dichotomy. I suggest that feminist critiques can unveil the gender inequities of statelessness under international law. Feminist critiques can be applied to international legal principles on nationality, including the principles of the conflict of nationality laws and family unity to explain the ongoing gender discrimination against stateless women and children.

1.1. *Public/Private Dichotomy and De Jure Statelessness*

Western feminist critiques of the public/private dichotomy expose how the traditional doctrine renders women unequal with men. The division between public domain of political affairs and the private world of non-political affairs is

> largely a product of classical western liberal thought in which, *inter alia*, John Locke sought to deny the legitimacy of the divine right of kings without challenging patriarchal familial structure. To dispute the analogy employed by royalty between their authority over society and the father's authority, Locke argued that the two spheres were separate and distinct. Whereas patriarchal authority was deemed to be divine, political power was deemed to emanate from the governed. The consequences for women are fundamental and profound.[20]

Women are relegated to the home, from policy-making political and other public institutions that determine the nature and quality of community life.[21]

Feminist theorists such as Carole Patemam apply the critique of the public/private dichotomy to citizenship to demonstrate the invisibility of

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[19] See Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994) contrast with Louise Ackers, 'Women, Citizenship and the European Community Law: The Gender Implications of the Free Movement Provisions', (1994) 4 *The Journal of Social Welfare and Family Law* 391; Daiva Stasiulis and Abigail Bakan, 'Negotiating Citizenship: The case of foreign domestic workers in Canada' (1997) 57 *Feminist Review* 112.

[20] Gayle Binion, 'Human Rights: A Feminist Perspective' (1995) 17 *Human Rights Quarterly* 509, 515-16.

[21] Ibid 516.

women as citizens.[22] The public/private dichotomy does not only separate the private world of women from the public world of men. It also structures a hierarchy of inequality where women are inferior to men, invisible in political life, expendable in the economic marketplace and subordinate within the family and cultural domain. The public/private dichotomy that developed within Western societies has been replicated in the international sphere. Feminist analysts argue that the operation of the public/private dichotomy in international law is partly responsible for the marginalization of women's rights and gender-specific issues in the international human rights sphere.[23] Binion suggests that '[o]vercoming the international institutionalization of the public-private dichotomy is one of feminism's greatest hurdles in creating an *inclusionary* approach to human rights and in incorporating the diverse everyday life experiences of women into its models'.[24] This is absolutely true as male characteristics and experiences are often the unspoken standards and reference points on any human rights issue.

Pateman's critique of the public/private dichotomy deals with the creation of civil society from social contract theory.[25] She develops her critique from the division of civil society into two worlds where the public life is implicitly conceptualized as the sphere of men. She argues that, historically, the separation occurred with the development of capitalism and its specific form of sexual as well as class division of labour, 'wives were pushed into a few low-status areas of employment or kept out of economic life altogether, relegated to their 'natural' dependent place in the private, familial sphere'.[26] The subordination of wives continues well into the late 20th century 'just because they are dependent on their husbands for subsistence'.[27] Another feature of the separation of the two worlds is ownership. Men 'own the property in their persons and capacities over which they alone have right of jurisdiction; they are self-governing'.[28] On the

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[22] For example, Carole Pateman, 'The Patriarchal Welfare State' in Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (1989) 179, 185-86.

[23] Kapur, above n 13, 3; Hilary Charlesworth, 'Worlds Apart: Public/Private Distinctions in International Law' in Margaret Thornton (ed), *Public & Private: Feminist Legal Debates* (1995) 203.

[24] Binion, above n 20, 516.

[25] Carole Pateman, 'The Fraternal Social Contract' in Pateman, above n 22, 33, 33-34.

[26] Carole Pateman, 'Feminist Critiques of the Public/Private Dichotomy' in Pateman, above n 22, 118, 123.

[27] Ibid.

[28] Id 10.

other hand, women's lack of ownership was illustrated very clearly in the common law doctrine of coverture. In the mid-nineteenth century when a woman married she ceased to have an independent existence. She disappeared from juridical and civil view under the 'cover' of or ownership of her husband, who gained 'conjugal rights', i.e. right of sexual access to her body whether or not she was willing.[29] Because men could 'sell' their labour capacity, they were independent. The notion of independence eventually defines citizenship.

Pateman's analyses explain the gendered aspects of general principles of citizenship and nationality laws that originated in western societies. I suggest that the fraternity also institutionalized the fraternal social contract through citizenship and nationality laws. Fraternity and patriarchy are evident in the construction of citizenship and nationality laws.

Citizenship and nationality laws presupposed the existence of the dual spheres of civil society and marriage laws. Originally, the principle of *jus sanguinis* crystallized the fraternal and patriarchal imperative of citizenship. The acquisition of citizenship was based on having a father or a husband who was a citizen. This privileged the man and identified him as being part of the fraternal social pact.[30] If citizenship could be acquired by having a mother or a wife who was a citizen, it would destabilize the social order men had established to regulate relations among themselves and govern their households. The *jus sanguinis* principle as originally conceived was male gendered. The father or husband was the public face of the fraternal pact of citizenship. The citizenship of the subordinate daughter or wife whose place was in the private domain of the family was acquired and/or maintained through the mediation of first her father and then her husband. The male gendered *jus sanguinis* principle ensured that the son subordinated as a child would eventually take his place among the men, demonstrating his independence and equality with them as a citizen.[31] Thus the construction of citizenship and nationality laws reflected the hierarchy of inequality derived from the traditional public/private dichotomy.

This is where I would draw on and develop from Pateman's thesis that '[p]atriarchalism has two dimensions: the paternal (father/son) and masculine (husband/wife)'.[32] The position of the daughter who did not become a wife entailed consequences under citizenship and nationality laws.

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[29] Ibid 12.

[30] Pateman, above n 25, 37, 41, 43.

[31] Pateman, above n 22, 185-86.

[32] Pateman, above n 25, 37.

The incorporation of marriage as a legal institution and of the modern order of conjugal or sexual right[33] in citizenship and nationality laws led to children born outside the boundaries of legal marriage being rendered legally stateless at birth. According to the doctrine of coverture, the girl or woman who had no ownership of her body would also have no ownership over the child born to her. Such ownership belonged to the man who had the right to choose whether he would exercise the right of ownership over the child. Even where the principle adopted was *jus soli* or a mixture of both principles, acquisition of nationality by registration or naturalization often revealed the gender bias of citizenship and nationality laws. The male gender of the eligibility criteria for registration or naturalization belied the apparent gender neutrality of such laws. Citizenship by registration or naturalization perpetuated the fraternal social pact.

However, citizenship and nationality laws also demonstrate that the fraternal social pact is not cast in stone, but is able to accommodate challenges to its basic premises. The extension of the *jus sanguinis* principle to the female bloodline, where the father of the child born outside the boundaries of marriage is unknown, is an example of its flexibility and durability. The basic premise remains intact, the father of such a child although unknown is part of the fraternity of men. Legitimation, or recognition by a man, who may or may not be the natural father of the child, as a criterion for the grant of citizenship, preserves the patriarchal facet of the fraternal pact. This is consistent with Pateman's argument that individuals without blood ties can be part of the fraternity by virtue of their common bond as men.[34] Citizenship and nationality laws are constructed to preserve the fraternal pact especially when anomalies emerge as its consequence.

It is important to understand how legal systems have been shaped by various forces such as colonialism so as to avoid gender essentialism.[35] I suggest that this is the case with citizenship and nationality laws. Citizenship and nationality laws, which originated in western societies, are replicated all over the world. Sometimes they are modified to suit local or cultural specificities. Sometimes, they foreshadow the changes in domestic family and marriage laws to meet Western standards of civilization. Hence Pateman's critique is important in understanding the origin of and the bases on which citizenship and nationality laws, in non-Western states, are

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[33] Ibid 43.

[34] Ibid.

[35] Kapur, above n 13, 9.

constructed. Granted, that Pateman's critique of the fraternal social contract is located within the state and stops at its frontiers. This is precisely because her critique is based on women's experience within the context of Western states.[36] Nevertheless, elements of her critique are relevant in other situations even though essentialising women's experiences should be avoided.[37] For example, the replication of citizenship and nationality laws demonstrate another dimension to the fraternal social pact.

Citizenship and nationality laws reflect that the fraternal social pact is not one single pact but numerous intersecting pacts made by different groups of individuals whose common identity is male. The citizen/alien distinction symbolizes the intersection of the fraternal social pacts where the individual is citizen and alien at the same time depending on which fraternal social pact he is a part of. Citizenship and nationality laws provide for exit from one fraternal social pact and entry to become part of another fraternal social pact through registration and naturalization procedures. The procedures for exit and entry are set by the respective fraternal social pact concerned and vary, but the variations also preserve the patriarchal origin of the fraternal social pact. Providing for equal rights for women and men to acquire citizenship by naturalization does not destroy its patriarchal origins. Only setting naturalization criteria based solely on women's experience can do that. This analysis illustrates the indestructibility of the patriarchal origins and is not meant to advocate the substitution of matriarchy and sorority for patriarchy and fraternity.

The patriarchal construction of some citizenship and nationality laws continues to engender *de jure* statelessness of children born outside of marriage. For example, Kuwait expressly provides that only children whose fathers are nationals acquire Kuwaiti nationality.[38] The *1985 Bhutan Citizenship Act* provides for acquisition of citizenship at birth only if both parents are Bhutanese citizens.[39] It amended provisions in earlier nationality laws that provided for acquisition of Bhutanese nationality where the father was a national.[40] It has also been pointed out that the patriarchal construction of nationality laws could potentially affect children of single

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[36] Binion, above n 20, 512.

[37] Mohanty, above n 11, 70.

[38] See reservation by Kuwait at UNHCHR website, http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm (9 May 2000).

[39] See Tang Lay Lee, 'Refugees from Bhutan: Nationality, Statelessness and the Right to Return' (1998) 10 *International Journal of Refugee Law* 118, 138, 143-44.

[40] Ibid 143, nn 92.

mothers and lesbian couples in the twenty-first century.[41] A matriarchal construction would not produce *de jure* stateless children at birth because of the presumption that the natural mother is conclusively determined at birth. By the same token, the citizenship or nationality laws of a state provide for the inclusion of children *de jure* stateless at birth because the unknown father is presumed to be a part of the fraternal social pact.

But what happens in the context of multiple fraternal social pacts? Under some circumstances, the presumption still applies by permitting the child to acquire the mother's nationality where the father's identity is unknown or *de jure* stateless or to acquire the nationality of the state of birth where both parents are unknown or *de jure* stateless. The operation of this presumption is evidenced by the fact that children born outside of marriage to *de jure* stateless women cannot acquire the nationality of the state of birth. For example, article 1(1) of the *1929 Nationality Law of the Republic of China (Taiwan)* provides that a child wherever born to a male national acquires the nationality of the state. But the child only acquires the mother's nationality if the father is unknown or *de jure* stateless.[42] A *de jure* stateless father is still part of the fraternal social pact but a *de jure* stateless mother is totally excluded.

But there are exceptions to the general presumption such as where the race or other identity of the fraternal social pact of the father has to be preserved. The legitimacy of the child then becomes an obstacle to the acquisition of the natural father's nationality where the mother is a foreign national. Article 2(1) of the *1950 Nationality Act of Japan* provides for Japanese nationality at birth where the father is a national.[43] Thus,

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[41] Committee on Feminism and International Law, *Final Report on Women's Equality and Nationality in International Law*, International Law Association London Conference (2000) 19, including nn 82.

[42] According to Taiwan Headlines, 'Stateless mother sues government' Tuesday, 3 April, 2001 a 32 year-old woman, daughter of a *Kuomintang* loyalist born and raised in Burma and trafficked to Taiwan in the early 1990s could not prove her status as a stateless person in support of her application for Taiwanese citizenship for her two daughters born out of marriage in 1996. The problem in this case is two-fold. First she has to prove that she has Taiwanese nationality and secondly that the father is unknown or *de jure* stateless. Even if she could prove that the father of her daughters is unknown or *de jure* stateless, they cannot acquire Taiwanese nationality because she is *de jure* stateless. The newspaper article claims that '[t]here are hundreds of stateless ethnic Chinese living in Taiwan without identity papers, including many from Thailand, Myanmar (Burma), and Indonesia'.

[43] This is the dilemma facing children born outside marriage to non-Japanese mothers and Japanese fathers. According to the Alternative Report to the Fourth Periodic Report of Japan on the International Covenant on Civil and Political Rights, Chapter 8, Section 2, 3, there were 79 *de jure* stateless children under the age of four in Japan in 1988

citizenship and nationality laws institutionalize another feature of the fraternal social pacts generally overlooked, because of the concern with the exclusion of women from full citizenship. The fraternal social pacts, individually and collectively, produce *de jure* stateless persons as differentiated from aliens who are citizens of other states.

Another concern here is with how and why women, as opposed to men, continue to be rendered legally stateless. Historically, the patriarchal construction of women and children as dependants of their husbands and fathers[44] meant that they could be rendered legally stateless along with their spouses who are deprived of nationality under domestic nationality law.[45] The women were presumed not to be independent or to be capable of being independent or want to be independent from their husbands. Even if they did not agree with what their husbands had said or done to warrant their denationalization, they were not given an opportunity to differ. In the context of multiple nationality laws, foreign wives of citizens could also be rendered legally stateless upon divorce or death of their spouses if they were unable to retain their husband's nationality or to reacquire their former nationality.[46] The fact that the children could retain the father's nationality upon the parents' divorce or the death of the father reflected the operation of the male gendered *jus sanguinis* principle, which preserved the fraternal social pact. Death or divorce, which ended the conjugal right of the husband, also signaled the end of the man's ownership of the woman. The woman was clearly the 'other' who did not belong after being disowned. The retention of the husband's nationality was a privilege, not a right. The resumption of the father's nationality often mirrored the uncertain prospect of return to the father's household. Some nationality laws used to provide for the woman's loss of nationality and property rights upon marriage.[47] Hence, citizenship and nationality provisions that produced *de jure* statelessness among women were consistent with the elements of independence and ownership in Pateman's critique of patriarchy.

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and this number increased to 933 by the end of 1997. See Japan's Ministry of Justice website, http://www.nichibenren.or.jp/hrsympo/jrt/chap8.htm (30 March 2000).

[44] Pateman, above n 26, 123.

[45] See Catheryn Seckler-Hudson, *Statelessness with Special Reference to the United States* (first published 1934, rep 1971) 23-99 for numerous examples of *de jure* statelessness among women resulting from marriage; Paul Weis, *Nationality and Statelessness in International Law* (rev 2nd ed, 1979) 116.

[46] Ibid.

[47] See for example, Richard W. Flournoy, Jr. and Manley O. Hudson (eds), *A Collection of Nationality Law of Various Countries as Contained in Constitutions, Statutes and Treaties* (1929) 326, Haiti Decree of 9 September 1845 and 4, Afghanistan Civil Code of 1921 s 93.

Nowadays, nationality laws may provide for retention or loss of a woman's nationality upon marriage. Reservations to article 9(1) of the *1979 CEDAW* serve as evidence that some aspects of patriarchy persist.[48] France, Iraq, Singapore, Turkey and the United Kingdom currently maintain such reservations.[49] However, other states such as Kenya, Monaco and Venezuela retain discriminatory nationality laws although they have not entered reservations.[50] For example, where they are silent on or set conditions[51] for the reacquisition of nationality upon divorce from or death of the foreign spouse, the woman may be cast out into the cold.[52] In other nationality laws, there are provisions prohibiting the reacquisition of nationality[53] that could also render women *de jure* stateless upon the death of or divorce from the foreign husband. Such situations are said to arise, in gender-neutral terms, from the 'conflict of nationality laws'. But, in fact, the 'conflict of nationality laws' is male gendered, being premised on the criterion of independence. The dependent daughter who becomes the dependent wife of another man cannot reclaim her father's nationality by claiming to be his dependent daughter once again. In other words, the conflict of nationality laws represents a conflict of interests between different men, as individuals and as groups. If the principle were not male gendered or premised on independence, men, who acquire their wives' citizenship by registration or naturalization, should also lose such citizenship upon divorce or death of their spouse.

The independent/dependent dichotomy that excludes women with formal citizenship from full citizenship also operates to render women legally stateless. However, this does not mean that legally stateless women and women excluded from full citizenship share exactly the same experiences. Such a suggestion would amount to gender essentialism, because it implies that having legal citizenship does not make any difference to women, since what matters is equal citizenship with men. Nevertheless, there is a parallel between the citizen/woman opposition and the

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[48] See Committee on Feminism and International Law, above n 41, 8.

[49] See explicit or implicit reservations or interpretative declarations at UNHCHR Website, above n 38.

[50] Committee on Feminism and International Law, above n 41, 8.

[51] See discussion on section 23 of the *1965 Nationality Act* of Thailand in Chapter Six.

[52] See Committee on Feminism and International Law, above n 41, 17. The report cited the example of women who have lost their Canadian nationality on marriage to a non-Canadian. They could be refused certain health care benefits when they return to Canada later in life to be cared for, usually by a daughter. See also nn 76 on the same page.

[53] See discussion on sections 15(a), 34 and 41 of the *1982 Burma Citizenship Law* in Chapter Six.

citizen/stateless dichotomy. It explains the silence over legal statelessness, particularly the part that is inhabited and experienced by women, that makes it a private space as opposed to the public life of citizenship.

1.2 *International Law/Domestic Law Dichotomy and De Jure Statelessness*

The international law/domestic law dichotomy mirrors the public/private distinction. Within each state,

> [t]he public/private divide refers not only to the distinction between the world of finance, education, government and the professions and that of the domestic sphere, but also to the scope of legal regulation and the distinction between those areas of life into which the law should and should not intrude. The public sphere refers principally to the area in which relations between the individual and the State are played out, an area in which legal regulation is viewed as appropriate. There is also a further layer of relations occurring within the public sphere which concern arrangements between private individuals and in which State intervention is more restricted. For instance, in the realm of employment, the State, while expected to intervene to a certain extent by passing legislation on, for example, health and safety and unfair dismissal, is not expected to fetter the pursuit of individual satisfaction by limiting employers' choice and employees' choice. Beyond this public realm lies the domestic sphere, the site of the family, reproduction and sexuality which has traditionally appeared to be beyond the scope of legal regulation. [54]

These layers of relations are reflected in the international context. As Wright has pointed out, the non-interference of the public government in the private affairs of the family is paralleled by the non-interference in the internal matters of a state under international law.[55] International law also comprises of two aspects. The public aspect of international law refers to the area in which relations between the state (i.e. individual) and the international system (i.e. the state) admit legal regulation. Political affairs and economic relations between states fall within this area. Another aspect of international law deals with relations between non-state actors. Private international law regulates contractual and other relationships between individuals and corporations from different states. The area in which international law normally does not intrude is that which is regarded as

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[54] Jo Bridgeman and Susan Millns (eds), *Feminist Perspectives on Law: Law's Engagement With the Female Body* (1998) 24.

[55] Shelley Wright, 'Economic Rights, Social Justice and the State: A Feminist Reappraisal' in Dorinda Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (1993) 117, 128-29.

internal to a particular state. This would include all areas, public and private, within the domestic realm of the state. Hence, citizenship questions used to be regarded as matters solely within the domestic jurisdiction of each state. Within the national space, they fall within the public domain because they are concerned with the relationship between the individual and the state. States have accepted international law limits on their powers over nationality matters. Such limits include developments in human rights. However, these developments are not free from gender discrimination.[56]

1.3 *State Responsibility and De Jure Statelessness*

Gender discrimination that results from patriarchy underpinning nationality laws will continue. The public/private distinction absolves the international society of states from responsibility towards the individuals affected by the exercise of state powers in nationality matters by individual states. The public/private distinction also operates to divest the state concerned from accountability for the individuals rendered *de jure* stateless because of the principle of the 'conflict of nationality laws'. The notion that the individuals are rendered *de jure* stateless not through the act or omission of one state but of two states removes the issue from the private domain of either state and deposits it neatly on the public international podium. The concept of state responsibility is concerned with the accountability of a particular state in international law.[57] The concept of joint responsibility where more than one state has contributed to the creation of *de jure* statelessness is not considered at all. This is one aspect of state responsibility that is seldom reviewed.

The public/private distinction is central to the concept of state responsibility in domestic and international law.[58] Romany argues that the

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[56] Charlesworth and Chinkin, above n 3, 70.

[57] Article 3 of the *1996 Draft Articles on State Responsibility* provides that: 'There is an internationally wrongful act of a State when: (a) Conduct consisting of an action or omission is attributable to the State under international law; and (b) That conduct constitutes a breach of an international obligation of the State'. See James Crawford, *First Report on State Responsibility*, ILC, 50th sess, UN Doc A/CN.4/490 (24 April 1998); UN Doc A/CN.4/490/Add.1 (1 May 1998); UN Doc.A/CN.4/490/Add.2 (5 May 1998); UN Doc A/CN.4/490/Add.3 (11 May 1998); UN Doc A/CN.4/490/Add.4 (26 May 1998); UN Doc A/CN.4/490/Add.5 (22 July 1998); and UN Doc A/CN.4/490/Add.6 (24 July 1998).

[58] Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal* 87; Rebecca Cook, 'State Responsibility for Violation of Women's Human Rights' (1994) 7 *Harvard Human Rights Journal* 125.

construction of 'civil and political rights as belonging to public life' in international human rights discourse allows states to neglect protection of the 'infringement of those rights in the private sphere of familial relationships'.[59] Thus, the state is not held 'accountable for the state's systematic failure to institute the necessary political and legal protections to ensure the basic rights of life, integrity, and dignity of women'.[60] Essentially, the state is not responsible for the private acts of non-state actors or individuals in the privacy of their home. However, she argues that in fact

> the state is in complicity with private actors who infringe upon the human rights of women. The state's complicity is established by demonstrating how the systematic failure to prevent and punish 'private' acts of violence creates a parallel state with its own system of justice.[61]

Chinkin extends the feminist critique of the public/private distinction to the concept of state responsibility in the international sphere. She observes that the notion that the state is only responsible for certain internationally wrongful acts and omissions and not for others flows from a variety of distinctions between the public and the private worlds.[62] She argues that

> [a]lthough the Draft Articles do not espouse the language of public/private, this distinction brings into the law of state responsibility the reserved domain from international intrusion. The residual domestic jurisdiction has been greatly reduced by human rights law which itself adds another layer of public/private opposition through its traditional applicability only to the relations between the state and individuals, through the acts of public officials. Human rights discourse thus largely exclude abuses committed by private actors. Doctrines of sovereign immunity also categorize governmental acts. The retention of immunity from suit within the domestic courts of another state for governmental acts (*jure imperii*) asserts the international quality of those acts, while its denial for private or commercial acts (*jure gestionis*) locates them within the national, domestic arena.[63]

The primary concern is with the impunity from prosecution and responsibility non-state or private actors derive from the application of the public/private distinction. This concept of state responsibility privileges men. Their analyses demonstrate that the human rights framework is not free from gender discrimination because the public/private distinction remains entrenched in the concepts and norms of international law.

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[59] Ibid Romany, 87.

[60] Ibid 87.

[61] Ibid 88.

[62] Chinkin, above n 3, 389.

[63] Ibid.

There is another facet of the traditional concept of state responsibility which affects *de jure* statelessness. The public/private distinction institutionalized subordination of women by men with respect to *de jure* statelessness. This underscores its private and invisible character vis-à-vis citizenship. Acquisition and deprivation of nationality are issues of civil and political rights affected by the exercise of state power in the public life. However, the private character of *de jure* statelessness means that the state cannot be held accountable for those who are excluded from the public world of citizenship. The very concept of state responsibility admits no accountability towards such individuals domestically. This is not only because human rights law traditionally applies 'only to the relations between the state and individuals, through the acts of public officials'.[64] It is also because '[h]uman rights law legitimates international scrutiny of a state's treatment of its own nationals, a matter from which international law historically was precluded by the doctrine of nonintervention'.[65] As Romany has pointed out, where the area is defined as private, the state does not interfere and does not admit responsibility. The private character of *de jure* statelessness is brought into sharper relief in the public international sphere.

As Chinkin has pointed out, the international sphere is fraught by many sets of dichotomies that separate those whose rights are violated and those who are responsible for the violations. The distinctions, between authorized and unauthorized use of state powers, and between state powers and state responsibility within the domestic sphere, mean that the state can divest responsibility for persons rendered *de jure* stateless by its exercise of state power. The division between the public international sphere and the private domestic space also prevents states from being held accountable for persons rendered *de jure* stateless, by nationality principles and standards states develop, to regulate their relations with one another. *De jure* statelessness resulting in accordance with private domestic law exculpates states and their officials from responsibility towards such individuals. Hence, women and children who are rendered legally stateless as a result of gendered nationality laws fall outside the scope of state responsibility. The attempts to reduce and eliminate *de jure* statelessness among women and children demonstrate that states consider that they are not responsible for legally stateless persons. State responsibility for *de jure* statelessness would only arise where it assumes a public character.

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[64] Ibid.

[65] Cook, above n 58, 137.

Chinkin argues that diplomatic protection of aliens led to the development of state responsibility, including the principle that differentiates between '*ultra vires* acts of officials for which there is responsibility because of their apparent authority, and the private acts of individuals who just happen to be officials for which there is no responsibility'.[66] This development justifies the continued exclusion of family/private life from domestic legal intervention and international accountability.[67] What about state responsibility for *intra vires* acts of officials? First of all, the Draft Articles on State Responsibility[68] do not preclude state responsibility for internationally wrongful acts towards natural persons.[69] However, the act must be wrongful under international law.[70] The fact that internal law deems the act as lawful does not validate the act.[71] The wrongful act may be a breach of an international customary or convention obligation.[72] State responsibility arises for a wrongful act committed by an organ of the state exercising 'constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character'.[73] Therefore, in principle, state responsibility arises in relation to both *intra vires* and *ultra vires* acts of officials committed in their official capacity, which result in an internationally wrongful act.

De jure statelessness assumes a public character where it results from denationalization on discriminatory grounds of race, ethnicity, religion and politics. This raises the issue of state responsibility under international law. Denationalization on such grounds is specifically prohibited under the *1961 Statelessness Convention.*[74] It is wrongful and *ultra vires* and the state party is to be held accountable for such act or acts. The main exception permitted by the *1961 Statelessness Convention* is deprivation on grounds of treason, i.e. national security, which is political in nature. Deprivation of nationality on

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[66] Chinkin, above 3, 393.

[67] Ibid.

[68] For text of draft articles, see ILC, *Report on the Work of Forty-eighth Session*, 1996, GAOR, UN Doc A/51/10 (1996) Supplement No. 10, Chapter III, Section D, Draft Articles on State Responsibility, 125.

[69] Ibid 125, art 1: 'Every internationally wrongful act of a State entails the international responsibility of that State'. See UN Doc A/CN.4/490/Add.4 (26 May 1998), [123]-[129].

[70] Ibid, 126, art 4.

[71] Ibid, 126, art 4.

[72] Ibid, 130, art 17(1).

[73] Ibid, 126, art 6.

[74] Article 9.

this ground is regarded as *intra vires* state powers and does not amount to a wrongful act. However, the public character of the political acts legitimating the exercise of state powers is such that the state may be held accountable for consequent *de jure* statelessness where there is an abuse of state powers.[75] To ensure that the state has not acted *ultra vires* its powers, aggrieved individuals are to be accorded the right to a fair hearing.[76]

Conversely, *de jure* statelessness of a private character, resulting from male gendered nationality laws does not give rise to state responsibility because the non-acquisition, loss or deprivation of nationality is deemed *intra vires* state powers. The legislative organ of the state has not committed an internationally wrongful act for which the state is responsible. Hence, deprivation of nationality on the ground of sex or gender is not prohibited under the *1961 Statelessness Convention.*

Refugee status on the basis of fear of persecution for race, religion, nationality, particular social group and political opinion adds another layer to the public/private dichotomy. It reinforces the distinction between statelessness in the public international sphere and statelessness in the private national space. Refugees are stateless because of the absence of state and diplomatic protection. The additional fact that they have moved from the state of origin to another state propels them from the private national space into the public international sphere. Thus, refugees represent the public character of statelessness in the international sphere, resulting from the *ultra vires* exercise of state powers.

The private character of statelessness within the national space is further emphasized through the distinction between *de jure* stateless refugees and *de jure* stateless persons. *De jure* stateless refugees who are in the public international sphere are distinguished from *de jure* stateless persons in the private national sphere. This is achieved through the limits placed on state responsibility under the respective international instruments. For example, *de jure* stateless refugees are exempt from penalties for illegal entry or presence in receiving state. *De jure* stateless persons are subject to the immigration laws of the state they seek to enter. Perceived abuse of state powers by the state of origin elicits remedial action by the receiving state. Ordinary exercise of state powers by the state of origin absolves the receiving state from surrogate accountability.

The receiving state is not regarded as being in breach of any international obligation from its use of immigration powers. These powers are within the

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[75] *1961 Statelessness Convention* art 8.

[76] Art 8(4).

domestic sphere, in relation to a private domestic issue. The characterization of *de jure* statelessness as 'private' also justifies the use of immigration laws. The result of these multiple layers of the public/private distinction is the marginalization of women and their children who are rendered legally stateless under patriarchal citizenship and nationality laws and male gendered 'conflict of nationality laws'.

1.4. *Public/Private Distinction and De Facto Statelessness*

The construction of *de facto* statelessness is similarly gendered. The refugee definition is a clear example of how male experiences and concerns form the basis of the public character of *de facto* statelessness. The grounds in the definition reflect the separation between the public and the private spheres. The grounds are concerned with activities in the public world of men whether they pertain to race, religion, nationality or political opinion. Hence activities in the private or domestic sphere were not considered as falling within the ambit of the definition. Where women experienced or feared persecution on these grounds, not in the public sphere or in the same way as men, they had great difficulty asserting their claim to refugee status. One example is where women flee violence in the home.[77] Often they had to present their claims on the ground of a particular social group.[78] Other women who transgressed cultural norms such as refusing to wear the veil, refusing to marry the husbands chosen for them or committing adultery had to assert the political nature of their private acts to come within the refugee definition.[79]

The private character of *de facto* statelessness is also based on male interests and reasons for renouncing the protection of the state of nationality. *De facto* statelessness was left out of the definition of statelessness in the *1954 Stateless Persons Convention*. Apparently, this was to prevent individuals, that is, men, from renouncing the protection of the

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[77] See *Islam v. Secretary of State for the Home Department*; *R. v Immigration Appeal Tribunal, ex parte Shah* (1999) 2 AC 629. See also Jacqueline Bhabha and Sue Shutter, *Women's Movement: Women under Immigration, Nationality and Refugee Law* (1994) 251-53.

[78] See Committee on Feminism and International Law, *Preliminary Report on Women and Migration*, International Law Association: New Delhi Conference (2002) 9-11.

[79] Ibid, Bhabha and Shutter, above n 77, 248-51. See also Susan Musarrat Akram, 'Orientalism Revisited in Asylum and Refugee Claims' (2000) 12 *International Journal of Refugee Law* 7 who argues that such claims should be asserted as fear of persecution on the ground of political opinion or religion instead of as gender-based persecution which perpetuates the Orientalist stereotype.

state of nationality to avoid military service or for reasons of personal convenience. The possibility that women might find themselves in circumstances of *de facto* statelessness was never considered. Let alone the fact that they might have very different experiences from men who are *de facto* stateless.

Pateman's critique of the public/private dichotomy in relation to the contemporary concept of citizenship is applicable to the effective statelessness of irregular women migrant workers in the current context where the marketplace occupies a shifting space between the public world of government and the private domain of family life. It is an instructive starting point because western models of citizenship and development have been replicated in most, if not all states, and internationalized. Pateman argues that independence is the criterion for citizenship of the public world. It has male attributes and abilities such as the capacity to bear arms, to own property and to self-govern.[80] In contemporary society, independence is defined by employment. This prevents women from becoming full citizens in Western societies where men are regarded as the breadwinners visible in the public/market sphere. Women are regarded as dependants invisible in the private space at home – like children and elderly persons – even though more and more women enter the marketplace and more and more women are heads of households. Because women's place is, traditionally, in the home, the assumption is that their entry into the marketplace is to supplement the family income. While men are entitled to a family wage because they are the main breadwinners, women are not. This analysis provides a compelling explanation for low and lower wages for women workers usually in low and lower-skilled jobs. The independent men/dependent women critique also explains why women in Western societies receive lower unemployment and other social security benefits than men in the patriarchal welfare state.[81] These critiques in the latter half of the twentieth century indicate a shift from the nineteenth century feminist struggles for equality with men primarily in the area of civil and political rights, symbolized by the right to vote, to issues of economic and social rights.

Achieving the right to vote did not automatically translate into equality in all areas of life as women in western societies discovered. The development of capitalism was in full swing and norms and structures were developing to protect workingmen as opposed to the entrepreneurial class. Pateman's

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[80] Pateman, above n 22, 185-86.

[81] Ibid.

insightful critique of the 'fraternal social contract'[82] explains the exclusion of women and other 'dependants' from social protection in the form of the 'patriarchal welfare state' in western societies. The fraternal social contract developed to preserve equality among men with the development of the economic sector and economic barons but did not dismantle the public/private dichotomy. Instead, the economic sector occupies a shifting space, sometimes it is private and at other times it is public. Generally, it is understood as being private as opposed to the public world of political affairs and government. But in terms of the traditional concept of public/private, it actually opens up another public space in the form of the marketplace. This ambivalence masks the discrimination against women in the economic sector because the public world of government also does not 'interfere' in private contractual arrangements.[83] The regulation of the economic sector by the public sector extended to proscribe discriminatory practices against women workers only gradually through painstaking challenges by feminists on specific issues, policies and pieces of legislation within the municipal sphere. The significant difference between the public world of political affairs and the ambivalent domain of economic matters is the participation of women in the marketplace. The public political world could happily function to the exclusion of women but the imperative of the marketplace necessitates the ever-increasing participation of women to reduce variable production labour costs.

With the globalization of the marketplace, migrant women, particularly irregular women migrant workers, have moved into the lowest ranks of industries. This is happening in developed as well as in developing states. In effect, they replace many but not all women citizens of the host states in the lowest paid, least valued jobs, including domestic work, often in abject working conditions. Male migrant workers, including irregular male migrant workers also move in to replace male citizens in the dirty, difficult and dangerous jobs. Pateman's critique of the fraternal social pact partially explains why these migrant workers, male and female, particularly those who are irregular, are excluded from social protection. The fraternal social contract was developed to preserve equality among male citizens of the state. The notion of the fraternal social contract helped to bridge the gap between different classes of men through social protection for working men. Race was and remains a significant criterion for such membership.

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[82] Ibid.

[83] Chinkin, above n 3, 392, including nn 35.

Men from another fraternal social pact were also excluded unless they could meet the criteria for membership of the fraternal social pact in the host state.

1.5. *Racial Hierarchy and De Facto Statelessness*

Critical race theories supplement the application of the critique to *de facto* statelessness among irregular migrant women workers. For example, Ikemoto's critique of racial hierarchies and racial positioning in relation to Korean Americans in the United States is pertinent to the exclusion of irregular migrant workers, women and men, from social protection in a range of host states.[84] Her critique complements Pateman's analysis of the fraternal social pact. It highlights the reality of race embedded in classical social contract theories.

The 'dominant white society' in Ikemoto's critique is the fraternal social pact in Pateman's analysis.[85] The general thrust of her argument regarding a dominant society within each individual state is unassailable whether in a multi-racial or multi-ethnic society or one with a racial majority. Her analysis reveals the racial underpinnings of Pateman's fraternal social pact. The identification of a racial hierarchy and racial positioning within this hierarchy explains the precarious position of irregular migrant workers vis-à-vis working class citizens, which collapses gender, culture, age and ability into race and/or class.[86] Irregular migrant workers are often characterized as an economic burden or social/cultural problem, 'intruders' who want a piece of the economic pie that is reserved for citizens.[87] The conflict between the two groups is also economic so that the concept of the family or living wage does not hold for the male 'intruders' who are not part of the fraternal social pact. The wages of irregular migrant workers often do not reflect the value of the work or the contribution to the economy of host state or in the case of male workers, their role as breadwinners of the family. Both working class citizens and regular migrants have earned their place in the fraternal social pact. The former earned it through the historic struggles of the

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[84] Lisa Ikemoto, 'Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"', in Delgado, above n 6, 305.

[85] Ibid 306.

[86] Ibid.

[87] Ibid.

workers' movement and the latter through class, property and/or ability.[88] In some states, irregular migrant workers are often of a race or ethnicity different from the dominant race or ethnicity. In other states, they may be of an ethnicity or race similar to the subordinate race or ethnic group. Religion may be another differentiating factor. In some states, a racial hierarchy may not be as obvious as in other states but a class hierarchy is often visible.

The Korean Americans in Ikemoto's analysis are not representative of all regular migrants but they do represent 'yellow-skinned' migrants who are often positioned below 'white-skinned' migrants even in states where the dominant race is not white. From an international perspective, the dominant race is white in the dominant developed states. Black and brown races are dominant in some developing states. Yellow races are dominant in other developing states. The identification of this international racial hierarchy is pertinent to the positioning of migrants not only in developed states where whiteness is dominant but also in some developing states where the dominant race is not white. It reflects the racial positioning of developing states with developed states where the dominant society is white.

The nativist position of the dominant society is replaced by the universalist position of the developed states.[89] Developing states position themselves as developed, when they adopt the values of and model their laws, institutions on the developed states. To ensure that they share in the Universal Dream, their doors must be open to migrants from the developed states.[90] When developing states assert their right to development, they are claiming equality with whiteness. The doors, of developed and other developing states, must be open to their citizens. In either case, the dominant society in the developed states is supreme. To remain supreme, the dominant society in the developed states, devises a system to select suitable migrants. To achieve equality with whiteness, developing states replicate the migrant selection system. There is, admittedly, a certain degree of essentialism in this proposition. It is necessitated by the purpose of the proposition. The purpose of which is to identify migration law as a site for struggle and its role in institutionalizing discrimination that has developed over the past few decades.

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[88] Id 307-08.

[89] Ibid 309.

[90] Ibid 308, Ikemoto speaks of the American Dream.

Critical race theorists have demonstrated that race is socially constructed[91] and racial differences have previously been used to justify discrimination during colonization.[92] The reality is that race discrimination is not a thing of the past but continues to characterize international developments. Furthermore, denationalization on racial grounds is prohibited under international law. However, the site of discrimination, race, gender or otherwise, appears to have shifted from citizenship at the centre to immigration status on the periphery. As Dauvergne demonstrates in her critique of the citizenship law/migration law dichotomy, appearances of equality and independence can be very deceptive.

1.6. *Citizenship Law/Migration Law Dichotomy and De Facto Statelessness*

Dauvergne argues the citizenship law/migration law dichotomy ensures 'that the bodily preoccupations of migration law reserve for citizenship law the liberal discourse of equality and universality'.[93] She develops her critique from permanent residency statistics of Australia, to demonstrate that Australian migration law discriminates against women. She points out that 'independent' men benefit most from the economic migration programme because of their immediate dollar value to the Australian economy as well as from the humanitarian migration programme. Most women enter under the family migration programme as wives and mothers of new Australians, underscoring the construction of these women as 'dependent'.[94] Dauvergne's proposition is that 'it is migration law rather than citizenship law which forms the most significant barrier to full membership of the nation'.[95] She argues that migration law is the more significant hurdle although citizenship is equated with full membership of the nation. This notion of citizenship includes membership of a community, political participation in a community, the rights and duties of membership and a

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[91] Ian Haney Lopez, 'The Social Construction of Race', Michael Olivas, 'The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History' and Ian Haney Lopez, 'White By Law' in Delgado, above n 6, 191, 9 and 542 respectively.

[92] Ibid. See also Anghie, above n 5.

[93] Catherine Dauvergne, 'Citizenship, Migration Laws and Women: Gendering Permanent Residency Statistics' (2000) 24 *Melbourne University Law Review* 280, 282.

[94] Ibid 306.

[95] Ibid 286.

concept of equality. Once membership is established, issues of participation, rights, responsibilities and equality follow.[96]

The development of a broader notion of membership indicates that the fraternal social pact in Pateman's critique is under siege. If citizenship no longer determines participation, rights, responsibilities and equality, a new strategy has to be developed to preserve the exclusive and dominant character of the fraternal social pact. Citizenship and nationality laws cannot justify exclusion of and discrimination against those who can claim membership of community. Migration law performs this function with impunity. Dauvergne's critique does not reveal how race, class, age or other identities and characteristics interact with gender in the selection process for the two categories of migrants. Nevertheless, her argument that migration law is gendered raises the question as to whether migration law is also discriminatory on any ground or on a combination of grounds. Her critique suggests that a racial hierarchy among migrants exists, because, it is institutionalized by migration law. Migration law is a process that is far more selective than citizenship and nationality procedures. It is not subject to the same degree of scrutiny from a human rights perspective, particularly in relation to the principle of non-discrimination. The criteria set for each category of migrants to be admitted as members of a community, but not necessarily for full membership or citizenship, determines the racial hierarchy within which gender and other identities are collapsed.

Migration law effectively supports the characterization of irregular migrant workers as 'intruders', an economic burden and a social/cultural problem. Irregular women migrant workers are doubly discriminated. Implicitly, migration law creates doubt as to whether they can be regarded as members of the community. I argue that Dauvergne's critique suggests that the purpose of migration law is to deny irregular migrant workers the security attached to membership of a community without explicitly denying them participation, rights and responsibilities and equality of membership. Like citizenship law, migration law falls within the public world of government in the national space. It regulates the entry and exit of individuals into the territory of the state concerned. In the public international context, migration law is an internal matter of individual state that international law does not normally intrude. It is another example of

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[96] Ibid 283; Catherine Dauvergne, 'Beyond Justice: The Consequences of Liberalism for Immigration Law' (1997) 10 *Canadian Journal of Law and Jurisprudence* 323 and Catherine Dauvergne, 'Amorality and Humanitarianism in Immigration Law' (1999) 37 *Osgoode Hall Law Journal* 597.

how the international law/domestic law dichotomy mirrors the public/private divide.

States prefer to characterize migration law as private in order to remove it from the public scrutiny of international law. But in fact, migration law is redefining the boundaries of citizenship, a concept that is no longer wholly within the private national space. For example, illegal immigration status has been a ground for revocation and non-acquisition of nationality in Thailand. Irregular migrant children and women workers are discriminated by the barrier to acquisition of Thai nationality. A full discussion of these issues can be found in the final chapter on gendered aspects of statelessness in Thailand.

The private character of migration law divests the host state of responsibility towards irregular migrant workers in the international sphere. The effectiveness of human rights law is restrained by the concept that the state only has a duty to protect a customary or convention right. An apt description of their situation that comes to mind is *de facto* statelessness.[97] Their ambivalent membership in the host state does not secure their economic, social, cultural or other rights even if they retain nationality of another state. The fact that they are not in their state of nationality exacerbates their ambivalent situation. This is because human rights instruments define state responsibility in terms of individuals within the territory of the state party. Traditional principles of diplomatic protection also do not authorize their state of nationality to intervene on their behalf where their economic, social and cultural rights have been violated in the host state.

1.6. *Multiple Identities, Gender and De Facto Statelessness*

Irregular migrant workers, both women and girls, who are *de facto* stateless, are in a particularly difficult situation. Their experience of discrimination is not exactly the same as that experienced by women and girls who are dependants of permanent residents or regular migrant workers within the same host state. Their experience of discrimination is a consequence of their multiple identities and characteristics and cannot be reduced to gender or race or gender + race or gender + race + age.[98] In developing her critique on the intersectionality of race and gender, Kimberle Crenshaw argues that

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[97] Stasiulis and Bakan, above n 19, 132.

[98] Harris, above n 6, 255.

the 'focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination'.[99] There is a tendency to generalize the experience of women migrant workers, to the extent of privileging the experience of those who are in a regular situation over those who are irregular migrant workers.[100] Gender is identified as the primary cause of discrimination with insufficient attention being paid to illegal migrant status.[101]

Migrant status should be subject to the scrutiny once focused on citizenship to uncover the ways in which it discriminates against women and girls and prevents them from exercising their human rights. This does not imply that migrant status is identical to citizenship status. The point is that there are parallels between the citizen/stateless distinction and the regular migrant/irregular migrant status dichotomy. The marginalization of the experience of irregular migrant women and girls echoes that of *de jure* and *de facto* stateless women and girls. Discrimination is even more complex in situations where women and girls are compelled to be irregular migrant workers because they are unrecognized refugees. Human rights law has compelled the extension of rights from citizens to regular migrants. But the current paradigm of state responsibility suggests that the rights of persons affected by statelessness and irregular migrant status are seldom considered unless citizens and regular migrants are similarly affected. For example, reservations have been raised regarding the campaign on violence against women in that its focus on the victim subject reinforces culture and gender essentialism.[102]

In relation to migrant women, the focus on violence should be redirected to the specific causes in order to develop more appropriate and effective responses and solutions. Granted that discrimination is a complex phenomenon arising from multiple identities and characteristics, the elimination of specific disadvantages such as unrecognized refugee status or irregular migrant status, in reducing the incidence of discrimination, cannot be disregarded. Finally, the context in which they experience discrimination is also important. This includes the relationship between the state of origin

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[99] Crenshaw, 'Demarginalising', above n 10, 140.

[100] See Gabriela Rodriguez Pizzaro, *Discrimination Against Migrants – Migrant Women: In Search of Remedies*, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Preparatory Session, UN Doc A/CONF.189/PC.1/19, (14 March 2000) [21] compare with [34].

[101] Ibid [59]-[63].

[102] Kapur, above n 13, 2.

and the host state and the status of women and girls in the host state.[103] For example, gender discrimination may not be obvious because of the portrayal of service and sacrifice as feminine virtues in the particular culture and traditions.[104] These virtues motivate women and girls to assume responsibility for their families, children and siblings in very difficult circumstances. The exploitation and corruption of these virtues are manifested in the subordination of their security and their rights to other interests, economic, political, social or otherwise. Migrant women and girls' experience of discrimination will also be coloured by the ambivalence attached to the status of women and girls in the host state.

Women and children who inhabit this private world of effective statelessness become visible only when they display vulnerability and assert recognized rights similar to other women and children. If they are victims of violence such as rape, domestic violence, child sexual abuse, the issue of their human rights receives attention. Even then it is narrowly restricted to those rights perceived as having actually been violated. The rhetoric of the indivisibility, interdependence and interrelatedness of universal human rights does not accord with the reality they face. The experiences of *de jure* and *de facto* stateless irregular migrant women and girls have been marginalized by the multiple public/private dichotomies and hierarchies in international law and international human rights law.

2. THE *1979 CEDAW*, THE *1989 CRC* AND THE *1999 CEDAW PROTOCOL*

The *1979 CEDAW* protects women against all forms of discrimination and the protocol is the international mechanism for aggrieved women to seek redress for violations of their rights under the convention. The convention provides specifically for women to have equal rights with men on nationality issues but does not prohibit legal statelessness among women. Significantly, the convention does not differentiate between women on the basis of their citizenship or immigration status. The *1979 CRC* extends protection to all children within the territory of state parties. However, there are no special

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[103] See for example, Suwanna Satha-Anand, 'Looking to Buddhism to Turn Back Prostitution in Thailand' in Joanne Bauer and David Bell (eds), *The East Asian Challenge* (1999) 193 for her insights regarding the inferior status of women from Buddhist concepts and the legitimization of this status through law.

[104] Ibid.

provisions for girls. In particular, states are enjoined to grant nationality to children born on their territory who would otherwise be legally stateless.

The current parameters of protection for stateless women and girls are to be found in the general comments and concluding observations of the Committee on the Elimination of Discrimination against Women ('CEDAW Committee') and the Committee on the Rights of the Child ('CRC Committee'). Although not legally binding on state parties, they are eminently persuasive authority on the protection of women and children.

The CEDAW Committee, consistent with the Convention, appears to be less concerned with statelessness and more focused on gender equality in relation to nationality. Article 9(1) specifically provides that 'neither marriage to an alien nor change of nationality by the husband during marriage' shall result in statelessness among women. Nationality is presented as the ultimate answer to statelessness. In *General Recommendation No 21* on equality in marriage and family relations, the CEDAW Committee notes that

> [n]ationality is critical to full participation in society. In general, States confer nationality on those who are born in that country. Nationality can also be acquired by reason of settlement or granted for humanitarian reasons such as statelessness. Without status as nationals or citizens, women are deprived of the right to vote or to stand for public office and may be denied access to public benefits and a choice of residence.[105]

'Statelessness' is not defined in the *1979 CEDAW* or the recommendation of the CEDAW Committee. The phrase '[w]ithout status as nationals or citizens' indicates that the Committee is concerned with legal statelessness. The consequences of not having nationality or citizenship status are viewed within the national rather than the international context. As statelessness continues to evolve in this era of employment migration, it is arguable that the recommendation should be reviewed in order to take into account the experiences of irregular migrant women workers who are effectively stateless.

Concluding Observations of the CEDAW Committee consistently urge state parties to grant women equal rights with men with regard to having and changing nationality and citizenship[106] and also passing it to their

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[105] UN Doc HRI/GEN/1/Rev.5 (26 Apr 2001), Committee on the CEDAW Committee, 13th sess (4 February 1994) 222, [6].

[106] UN Doc A/55/38 (1 Feb 2000), CEDAW Committee, *Concluding Observations: India*, 22nd sess, 17 Jan-4 Feb 2000, [30]-[90], [50]; UN Doc A/55/38 (14 Jun 2000), CEDAW Committee, *Concluding Observations: Iraq*, 23rd sess, 12-30 Jun 2000, [166]-[210], [187]; UN Doc A/56/38, (2 Feb 2001), CEDAW Committee, *Concluding Observations: Maldives*, 24th sess, 15 Jan-2 Feb 2001, [114]-[146], [127]; UN Doc A/52/38/Rev.1 (12 August 1997),

spouses.[107] The avoidance of legal statelessness among women may be implied from these observations but the impression is that it is not regarded as a significant problem such as to warrant explicit mention.

The CEDAW Committee does not refer to effective statelessness. Instead, the Committee has expressed concern for and made recommendations regarding refugee and migrant women and the trafficking of women. For example, the Committee has urged one government 'to facilitate the attainment of work permits by migrant women on an equal basis with migrant men'[108] and recommended several governments to ensure the integration of migrant and refugee women into the economic and social life in or access the legal and social services of state parties or their protection against traffickers.[109] The Committee has also drawn attention to the link between trafficking, particularly for prostitution purposes and high unemployment among women in their countries that are party to the *1979 CEDAW*.[110] It is similarly concerned for the protection afforded migrant women before they leave and upon their return to Bangladesh, Indonesia, Mexico and Sri Lanka, and during the period when they are in host states

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CEDAW Committee, *Concluding Observations: Turkey*, 52nd sess, 13-31 Jan 1997, [151]-[206], [169], [174], [186].

[107] UN Doc A/52/38/Rev.1 (12 Aug 1997), CEDAW Committee, *Concluding Observations: Venezuela*, 52nd sess, 13-31 Jan 1997, [207]-[239].

[108] UN Doc A/55/38 (15 Jun 2000), CEDAW Committee, *Concluding Observations: Austria*, 23rd sess, 12-30 Jun 2000, [211]-[243], [227].

[109] Ibid; UN Doc A/53/38 (14 May 1998), CEDAW Committee, *Concluding Observations: Azerbaijan*, 53rd sess, 19 Jan-6 Feb 1998, [37]-[79], [68], [74], [75]; UN Doc A/55/38 (31 Jan 2000), CEDAW Committee, *Concluding Observations: Belarus*, 22nd sess, 17 Jan-4 Feb 2000, [334]-[378], [371], [372]; UN Doc A/52/38/Rev.1 (12 Aug 1997), CEDAW Committee, *Concluding Observations: Denmark*, 52nd sess, 13-31 Jan 1997, [248]-[274], [263]; UN Doc CEDAW/C/2002/I/CRP.3/Add.7 (30 Jan 2002), CEDAW Committee, *Concluding Observations: Estonia*, 26th sess, 14 Jan-1 Feb 2002, [31], [32]; UN Doc A/56/38 (2 Feb 2001), CEDAW Committee, *Concluding Observations: Finland* 24th sess, 15 Jan-2 Feb 2001 [279]-[311], [286], [3-4], [305]; UN Doc A/55/38, (2 Feb 2000), CEDAW Committee, *Concluding Observations: Germany*, 22nd sess, 17 Jan-4 Feb 2000, [287]-[333], [317], [318], [322], [323], [327], [328]; *Concluding Observations: India*, above n 106, [76], [77]; UN Doc A/52/38/Rev.1 (12 Aug 1997), CEDAW Committee, *Concluding Observations: Luxembourg*, 52nd sess, 7-25 July 1997, Part II, [184]-[227], [224]; UN Doc A/56/38 (31 Jul 2001), CEDAW Committee, *Concluding Observations: Netherlands*, 25th sess, 2-20 Jul 2001, [185]-[231], [205]-[207], [210]-[212]; UN Doc A/56/38 (31 Jul 2001), CEDAW Committee, *Concluding Observations: Sweden*, 25th sess, 2-20 Jul 2001, [319]-[360], [356].

[110] Ibid *Belarus*, [372]; UN Doc A/53/38 (14 May 1998), CEDAW Committee, *Concluding Observations: Bulgaria*, 53rd sess, 19 Jan-6 Feb 1998, [208]-[261], [218], [219], [256]; UN Doc A/53/38 (14 May 1998), CEDAW Committee, *Concluding Observations: Czech Republic*, 53rd sess, 19 Jan-6 Feb 1998, [167]-[207], [192], [204]; UN Doc A/55/38 (23 Jun 2000), CEDAW Committee, *Concluding Observations: Romania*, 23rd sess, 12-30 June 2000, [278]-[322], [309].

such as Singapore.[111] But the Committee has not differentiated between regular and irregular women migrant workers. Nor has the Committee requested governments to provide data disaggregated by immigration status in addition to sex in relation to migrant women other than those who have been trafficked.[112] Effective statelessness of irregular migrant women workers has yet to resonate with the Committee.

The CEDAW Committee has also focused on children's acquisition of nationality from the perspective of gender equality. Concluding Observations of the CEDAW Committee call on states to ensure that children of mixed parentage born outside or within the country can acquire nationality through their mother.[113] The Committee has also pointed out that unless dual nationality is recognized, gender discrimination exists where a woman married to a foreigner cannot transfer her nationality to her children born overseas.[114] Such *de jure* discrimination against women may translate into legal statelessness for their children if their fathers are also unable to pass on nationality to them.

In comparison, legal statelessness among children figures more prominently at the CRC Committee. Article 7(2) of the *1989 CRC* reminds state parties to take practical steps to prevent legal statelessness among children. Article 7(1) identifies immediate registration after birth and the rights from birth to a name, a nationality and to know and be cared for by the child's parents as the rights state parties should implement to prevent statelessness. In recent years, the CRC Committee has consistently urged state parties to ratify the major human rights instruments, and the

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[111] UN Doc A/52/38/Rev.1 (12 Aug 1997), CEDAW Committee, *Concluding Observations: Bangladesh*, 52nd sess, 7-25 Jul 1997, Part II [409]-[464], [439], [456]; UN Doc A/53/38 (14 May 1998), CEDAW Committee, *Concluding Observations: Indonesia*, 53rd sess, 19 Jan-6 Feb 1998, [262]-[311], [296]; UN Doc A/53/38 (14 May 1998), CEDAW Committee, *Concluding Observations: Mexico*, 53rd sess, 19 Jan-6 Feb 1998, [354]-[427], [400], [418]; UN Doc A/56/38 (31 Jul 2001), CEDAW Committee, *Concluding Observations: Singapore*, 25th sess, 2-20 Jul 2001, [54]-[96], [90], [91]; UN Doc CEDAW/C/2002/I/CRP.3/Add.5 (30 Jan 2002), CEDAW Committee, *Concluding Observations: Sri Lanka*, 26th sess, 14 Jan-1 Feb 2002, [40], [41].

[112] *Bulgaria*, above n 110, [256].

[113] UN Doc. A/56/38 (2 Feb 2001), CEDAW Committee, *Concluding Observations: Egypt*, 24th sess, 15 Jan-2 Feb 2001, [312]-[358], [330]; Doc A/56/38 (31 Jul 2001), CEDAW Committee, *Concluding Observations: Guinea*, 25th sess, 2-20 Jul 2001, UN [97]-[144], [125]; UN Doc A/55/38 (27 Jan 2000), CEDAW Committee, *Concluding Observations: Jordan*, 22nd sess, 17 Jan-4 Feb 2000, [139]-[193], [172].

[114] *Singapore*, above n 111, [54]-[96], [64], [75].

conventions on statelessness.[115] Such an integrated approach accords with the principle that human rights are indivisible and interdependent.[116]

The CRC Committee, likewise, has not defined statelessness. It has adopted a two-pronged strategy in relation to legal statelessness among children. State parties are encouraged to ensure that women nationals, married to foreign spouses, may pass on their nationality to their children.[117] The CRC Committee has occasionally been openly critical where gender discrimination has been justified on the basis that nationality laws are based on the patrilineal *jus sanguinis* principle.[118] State parties are also reminded of their obligation to grant nationality to children born on their territories who would otherwise be legally stateless,[119] including refugee children.[120] However, the CRC Committee has not taken a clear stand on refugee or immigration status as a reason for not granting nationality. The Committee explained that its concern for the legally stateless Kurds born in Syria but who had not received citizenship was not meant to suggest that anyone

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[115] See for example, UN Doc CRC/C/SR.465 (23 Sep 1998), CRC Committee, *Consideration of State Report: Japan*, [18]; UN Doc CRC/C/SR.459 (16 Sep 1998), CRC Committee, *Consideration of Initial Report: Democratic People's Republic of Korea*, 18th sess, [11]; UN Doc CRC/C/SR.488 (14 April 1999), CRC Committee, *Consideration of State Report:: Kuwait*, [3]; UN Doc CRC/C/15/Add.143 (21 Feb 2001), CRC Committee, *Concluding Observations: Liechtenstein*, [6]-[7]; UN Doc CRC/C/15/Add.84 (4 Feb 1998), CRC Committee, *Concluding Observations: Libya*, 17th sess, [32]; UN Doc CRC/C/Q/CZE/1, CRC Committee, *List of Issues: Czech Republic*, 16th sess, Pre-sess Working Group, 9-13 June 1997, [20]; UN Doc CRC/C/Q/Mya.1, CRC Committee, *List of Issues: Myanmar*, 13th sess, Pre-sess Working Group, 10-14 June 1996, [14]; UN Doc CRC/C.12/WP.3 (12 Feb 1996), CRC Committee, *List of Issues: Nepal*, art 7; UN Doc CRC/C/Q/SYR.1 (18 Oct 1996), CRC Committee, *List of Issues: Syria*, [21]; CRC Committee, *Reply to List of Issues: Republic of Korea*, (18 Jan 1995), [15].

[116] UN Doc CRC/GC/2003/5, CRC Committee, General Comment No 5: General Measures of Implementation for the Convention on the Rights of the Child (Articles 4, 42 and 44(6)), 34th sess, 19 Sep-3 Oct 2003, [17].

[117] UN Doc CRC/C/SR.277 (26 Jan 1996), CRC Committee, *Consideration of Initial Report: Republic of Korea*, 11th sess, [29], [37]; UN Doc CRC/C/15/Add.51 (13 Feb 1996), CRC Committee, *Concluding Observations: Republic of Korea*, 11th sess, [22]; UN Doc CRC/C/15/Add.157 (9 Jul 2001), CRC Committee, *Concluding Observations: Bhutan*, 27th sess, [36], [37]; UN Doc CRC/C/SR.144 (18 Apr 1994), CRC Committee, ,*Consideration of Initial Report: Jordan*, 6th sess, [27], [31], [37], [38], [47]; *Concluding Observations: Libya*, above n 115, [11].

[118] Ibid Consideration of Initial Report: Republic of Korea, [45], [49], [53].

[119] UN Doc CRC/C/15/Add.128 (28 Jun 2000), CRC Committee, *Concluding Observations: Cambodia*, 24th sess, [31], [32]; *Jordan*, above n 117, [28], [33], [39], [42]; UN Doc CRC/15/Add.146 (21 Feb 2001), CRC Committee, *Concluding Observations: Lithuania*, 26th sess, [24].

[120] UN Doc CRC/C.6/WP.6 (21 Feb 1994), CRC Committee, *List of Issues: Norway*, [18].

entering Syria has a right to Syrian citizenship.[121] But the Committee did not challenge the requirement of legal residence as a precondition to legally stateless children receiving Norwegian nationality.[122]

The Committee is also concerned for the consequential denial of rights to legally stateless Bedoon and Palestinian children who do not have the right to Kuwaiti nationality,[123] and the Roma children in a number of European states.[124] Denial of access to education, it has been noted, often prevents legally stateless children from integrating into economic and social life when they become adults.[125] These examples demonstrate that issues of gender are often submerged when legal statelessness involves sizeable numbers of children.

The CRC Committee has not adequately addressed effective statelessness of children, especially girls, with irregular migrant status. It has requested more information regarding migrant children, including those who are domestic workers in the host countries.[126] The Committee has deplored discrimination against migrant children, refugee and asylum seeking children,[127] and girls.[128] This raises the issue as to whether girl migrants, refugees and asylum seekers may be doubly discriminated. The reservation of equality to citizens under the constitutions of some state parties has led to questions regarding the protection of non-citizens, including those in an irregular situation, against discrimination pursuant to article 2 of the *1989*

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[121] UN Doc CRC/C/SR.362 (24 Jan 1997), CRC Committee, *Consideration of Initial Report: Syria*, 14th sess, [12], [17].

[122] UN Doc CRC/C/SR.150 (21 Apr 1994), CRC Committee, *Consideration of Initial Report: Norway*, 6th sess, [10].

[123] *Kuwait*, above n 115, [11]; UN Doc CRC/C/15/Add.54 (7 June 1996) CRC Committee, *Concluding Observations: Lebanon*, 12th sess, [21].

[124] UN Doc CRC/C/SR.754 (1 Mar 2002), CRC Committee, *Consideration of Initial Report: Greece*, 29th sess, [19], [20], [61], [69], [70]; UN Doc CRC/C/SR.672 (15 Jan 2001), CRC Committee, *Consideration of Initial Report: Latvia*, 26th sess, [52], [55], *Lithuania*, above n 119, [21]; *Norway*, above n 121, [19], [28], [43]; UN Doc CRC/C/15/Add.81 (27 Oct 1997), CRC Committee, *Concluding Observations: Czech Republic*, 16th sess, [15], [16], [32].

[125] UN Doc CRC/C/SR.413 (6 Oct 1997), CRC Committee, *Consideration of State Report: Czech Republic*, 16th sess, [43].

[126] UN Doc CRC/C/SR.422 (3 Feb 1998), CRC Committee, *Consideration of Initial Report: Togo*, 16th sess, [38], [40]; *Concluding Observations: Lebanon*, above n 123, [20]; *Syria*, above n 120, [53].

[127] *Norway*, above n 122, [64]; UN Doc CRC/C/15/Add.131 (28 Jun 2000), *Concluding Observations of CRC Committee: Djibouti*, 24th sess, [27] [28].

[128] *Cambodia*, above n 119, [28]; *Djibouti*, ibid, [27] [28]; UN Doc CRC/C/15/Add.96 (26 Oct 1998), CRC Committee, *Concluding Observations: Kuwait*, 19th sess, [17].

CRC.[129] The Committee is emphatic that non-discrimination under article 2 extends to children who are aliens, stateless persons, refugees or asylum-seekers such that Kurdish children in Syria should have full rights under the Convention, including access to education.[130] Arguably, the Committee should focus on girls who are in an irregular situation to appreciate the full impact of the interface between illegal migrant status and other identities and characteristics on the denial or deprivation of girl children's rights.

The adoption of the Optional Protocol to the *1979 CEDAW* in 1999[131] is a major step forward in strengthening protection for women. This holds true even though the Convention has a significant number of reservations.[132] Individuals and groups now have a channel previously not available to seek redress for violations of women's human rights.[133] Concern for children involved in exploitative labour resulted in the adoption of the *1999 ILO Convention No 182 on the Worst Forms of Child Labour*.[134] Two Optional Protocols to the *1989 CRC* have also been adopted, one on the involvement of children in armed conflict[135] and the other on the sale of children, child prostitution and child pornography.[136] Unfortunately, their issue-specific character indicates that issues affecting children that fall outside the ambit of those protocols would remain without redress internationally. The violations of the rights of children, particularly girls, because they are *de jure* or *de facto* stateless, are likely to be partially addressed.

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[129] UN Doc CRC/C/SR.508 (15 Jan 1999), CRC Committee*, Consideration of Initial Report: Austria*, 20th sess, [17]; *Cambodia*, ibid, [27].

[130] UN Doc CRC/C/SR.361 (21 Mar 1997), CRC Committee, *Consideration of the Initial Report: Syria*, 14th sess, [26].

[131] UN Doc. E/CN.6/1999/WG/L.2 (1999), above n 1.

[132] Belinda Clerk, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) 85 *American Journal of International Law* 281; Andrew Byrnes, 'Towards More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures' in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (1994) 189; Julie Minor, 'An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women' (1994) 24 *Journal of International and Comparative Law* 137.

[133] Laboni Amena Hoq, 'The Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights' (2001) 32 *Columbia Human Rights Law Review* 677, 707.

[134] The Convention was adopted on 17 June 1999 and came into force on 19 November 2000. As of 8 May 2002, there are 127 state parties.

[135] 10 July 2002, 33 state parties.

[136] 10 July 20002, 32 state parties.

Even though the *1999 CEDAW Protocol* provides for redress on all issues affecting women's rights, the issue of equality with men seems to impose certain limits on complaints women may be able to pursue internationally. For example, migrant women workers would able to seek redress through the optional protocol for equal remuneration with male migrant workers. But whether they would be able to seek equal remuneration with male citizen workers may not be so straightforward. The issue of equality becomes more complex in relation to irregular migrant women workers and *de jure* or *de facto* stateless migrant women workers. Furthermore, article 4(2)(a) of the *1999 CEDAW Protocol* also restricts the competence of the CEDAW Committee where the 'same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement'.[137]

The definition of discrimination in the *1979 CEDAW* prohibits 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, of their human rights in the political, economic, social, cultural, civil or other field'.[138] *General Comment No 19* of the CEDAW Committee on violence against women explicitly states that gender-based violence is a form of discrimination, which seriously inhibits a woman's ability to enjoy rights and freedoms equally with men.[139] The Committee also argues that the definition of discrimination in article 1 includes gender-based violence which it defines as 'violence directed against a woman because she is a woman or which affects women disproportionately. It includes physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty'.[140] To enforce the prohibition against sex and gender discrimination, article 2 of the Convention commits state parties to undertake 'all appropriate means' to eliminate discrimination against women.[141] Significantly, most of the measures relate to laws, legal and public institutions. However, article 2(e) specifically provides for 'all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'. Radhika Coomaraswamy, the Special Rapporteur on Violence Against

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[137] See discussion in previous chapter on the interpretation by the Human Rights Committee.

[138] Art 1.

[139] UN Doc. CEDAW/C/1992/L.1/Add.15 (1992).

[140] Ibid.

[141] Art 2(a), (b), (c), (d), (f) and (g).

Women, notes that this provision 'expressly covers State responsibility for violations by private actors'.[142]

3. CONCLUSION

Gender-based statelessness has the effect of impairing, if not nullifying the recognition, enjoyment and exercise by women of their human rights, civil, economic, cultural, political and social. Statelessness is used here to include both *de jure* and *de facto* statelessness. Statelessness among women has been observed in relation to refugees, illegal migration or trafficking but it is seldom more than a footnote in these issues. There is a lack of investigation into statelessness as a human right violation, or how statelessness is related to violations of other human rights of women. Instead, this aspect of their situation often disappears beneath generalizations and rhetoric such as violence against women. Women have been cast as the 'other', aliens, under international law yet stateless women, who are on the margin, seldom receive the attention they deserve. If stateless women are able to seek redress for the violation of their rights, it could also have a positive impact on the rights of men who are also invisible in the private world of statelessness.[143] The *1979 CEDAW* and the *1999 CEDAW Protocol* may be able to offer effective protection to stateless women and girls who fall outside the *1951 Refugees Convention*, the *1954 Stateless Persons Convention* and the *1990 Migrant Workers Convention*. The limitations in the *1966 ICCPR* and the *1966 ICESCR* indicate that the *1979 CEDAW* and the *1999 CEDAW Protocol* could well be the better alternative for these stateless girls and women.

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[142] UN Doc E/CN.4/1995/42, (22 November 1994), Radhika Coomaraswamy, *Preliminary Report on Violence Against Women, its Causes and Consequences*, [106].

[143] Binion, above n 20, 513.

CHAPTER SIX

BURMA AND THAILAND: INTERFACE BETWEEN DOMESTIC AND INTERNATIONAL LAW

The dominance of citizenship in domestic law impedes better analysis of the public and private faces of statelessness especially in newer states not party to the conventions on stateless persons, refugees and migrant workers. The focus on the right to a nationality has also reduced international concern with statelessness to prevention of *de jure* statelessness in international law. The prominence of Western developments in the law of statelessness has contributed to the silence over the experiences of stateless persons in Asia where statelessness continues to simmer and in Africa where it is emerging. The lack of ratifications in Asia to these criteria-based instruments implies that states in Asia are seldom held accountable for stateless persons. Some states in Asia are beginning to accept obligations under rights-based and identity-based international human rights instruments that open up possibilities where none used to exist. Burma and Thailand are examples of states associated with the current phenomena of statelessness that are party to a few of these international instruments. The study of irregular migrant workers from Burma in Thailand illustrates well some of the complexities of gender-based statelessness.

1. BURMA: CITIZENSHIP LAWS

Burma emerged from the British colonial era in the post Second World War period as an independent sovereign state on 4 January 1948. The criteria for Burmese citizenship were set out in a number of documents: the *1947 Constitution of the Socialist Republic of the Union of Burma*, the *1948 Union Citizenship (Election) Act* and the *1948 Union Citizenship Act*. *De jure* statelessness resulted from these criteria but was not significant. The *1982 Citizenship Law* significantly tightened citizenship criteria and extended *de jure* statelessness to a greater number of people.[1] It specifically repealed the *1948*

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[1] *Pyithu Hluttaw Law No 4 of 1982*. For an English translation, see *The Guardian*, Special Supplement, Sunday, 16 October 1982.

Union Citizenship (Election) Act and the *1948 Union Citizenship Act*.[2] The amended *1974 Constitution of the Socialist Republic of the Union of Burma* also contain some provisions relating to citizenship status.[3] However, a new Constitution is being drafted under the State Peace and Development Council ('SPDC').[4] The focus of the following section is on *de jure* statelessness resulting from these pieces of domestic legislation. The purpose is to demonstrate how *de jure* statelessness is likely to have increased as the citizenship laws tighten with successive amendments. The hierarchical nature of recent and current laws, based on ancestry and dates of arrival and settlement in Burma, strengthens the racial aspects of the citizenship laws. They effectively exclude those unable to provide such evidence from full citizenship or any category of citizenship. Gender discrimination will be discussed in the following chapter.

1. 1. *The 1948 Union Citizenship Act*

Citizenship, of the newly independent sovereign state of Burma, was largely defined by the *1948 Union Citizenship Act*. However, critical provisions of the *1947 Constitution* and the *1948 Union Citizenship (Election) Act* set the parameters for citizenship in post-colonial Burma. Section 11 of the *1947 Constitution* set out those who were eligible to be the first citizens of Burma. Thus, the first citizens of Burma comprised of those who could trace their ancestry within Burma before the beginnings of British colonial rule and those came from other British dominions before independence was achieved in 1948. The combined application of the principles of *jus sanguinis* and *jus soli* to determine citizenship by descent excluded non-indigenous racial groups.[5] Hence, a person who was not Arakanese, Burmese, Chin, Karen, Kayah, Mon or Shan but who had one grandparent from an ethnic group who settled in Burma after 1823 could be *de jure* stateless.[6] For

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[2] *1982 Burma Citizenship Law* s 76.

[3] Chapter XI: Fundamental Rights and Duties of Citizens, ss 145-47.

[4] The State Law and Order Restoration Council ('SLORC') imposed military rule in Burma after the coup in late 1988 and was renamed in 1998.

[5] *1948 Union Citizenship Act* s 3(1) provided that: '[f]or the purposes of section 11 of the Constitution the expression 'any of the indigenous races of Burma' shall mean the Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon or Shan race and such racial group as has settled in any territories included within the Union as their permanent home from a period anterior to 1823 A.D. (1185 B.E.)'.

[6] *1947 Constitution* s 11(i) provided that a person born to parents both who belong or belonged to any indigenous race of Burma would be a natural-born citizen. Section 11(ii)

example, a person whose father was Shan but whose mother was of mixed parentage, Shan and Chinese, would not be considered as belonging to an indigenous race. But such a person would still be a natural-born citizen as one grandparent was Shan. A person whose parents were Chinese and whose maternal grandparents settled in Burma in 1890 could be *de jure* stateless. The provision, that a person whose ancestors have settled permanently in Burma for two generations and whose parents and himself or herself were born in Burma would be deemed Burmese citizens, prevented *de jure* statelessness for many from the non-indigenous races.[7]

To avoid *de jure* statelessness, persons not from the designated indigenous races could also apply for naturalization under *1948 Union Citizenship (Election) Act* and the Constitution if they were born in the British dominions.[8] Those from Thailand, China, or Indo-China, the former French colony could be *de jure* stateless unless they already held or were able to acquire the citizenship of another state. Those who applied for naturalization must be eighteen years of age, have had five years' continuous residence in Burma before applying, be of good character and able to speak any indigenous language.[9] They must also intend to reside, enter or serve Burma or its constituent state or a religious, charitable or commercial undertaking in Burma.[10]

De jure statelessness could also result from revocation of citizenship by registration or naturalization under the *1948 Union Citizenship Act*. The grounds include obtaining such grant of citizenship by false representation, fraud or concealing material circumstances, or some act or speech revealing disloyalty to Burma.[11] The person was entitled to show cause, why the certificate should not be revoked.[12] Article 19 provided seven other grounds

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provided that a person born in Burma, with one grandparent from an indigenous race would also be a natural-born citizen.

7 *1948 Union Citizenship Act* s 4(2).

8 *Union Citizenship (Election) Act No XXVI of 1948* s 3 provided naturalization if they also resided for eight out of ten years in Burma before 1 January 1942 or 4 January 1948. Section 4 provided for minor children to be included in the application. Section 8 provided renunciation of foreign nationality by the successful applicant to renounce any other nationality or foreign citizenship.

9 Section 7 (a), (b) and (c) respectively.

10 Section 7(d).

11 *1948 Union Citizenship Act* s 18.

12 *1948 Union Citizenship Act* s 18.

for revocation.[13] The first and most important ground was trading or communicating with an enemy state or national during war. Conviction for an offence involving moral turpitude that resulted in twelve months' imprisonment or a fine of 1,000 kyats was another ground. Another significant ground was five years' continuous and voluntary residence abroad other than in an official capacity after the certificate had been granted and failing to register annually at the Burma consulate. Failure to renounce the foreign nationality within the prescribe period is the fourth ground. Public interest was an important consideration in relation to the fifth and sixth grounds. Bad character such as to prejudice the public interest at the time of such grant could result in revocation. Injury to safety, public order or interest of Burma, if the person were allowed to retain such certificate, also invited revocation.

These grounds are not dissimilar to those in citizenship laws of other states. Treason, prolonged absence from the state and dual nationality are acceptable grounds for loss or deprivation of nationality under international law. Moreover, the time limits on grounds involving criminal record, bad character and safety and public order and interest attempt to balance state interests and individual rights. The main criticism of these grounds stems from the racial underpinnings of the provisions. There is a continuum from the provisions on acquisition to deprivation of citizenship. Citizens of Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon and Shan ethnicity would not be deprived of Burmese citizenship. Descendants of relatively recent immigrant ethnic groups such as the Rohingyas, Indians and Chinese who acquired citizenship by registration or naturalization could be so deprived under the *1948 Union Citizenship Act*. Deprivation of Burmese citizenship was, therefore, racially based.

1.2. *The 1982 Citizenship Law*

The *1982 Burma Citizenship Law* made significant amendments to citizenship laws. They reflect the protracted conflicts between the Burmans, the majority ethnic group and the other ethnic groups that developed during the independence struggle against the British colonizers. The Act strengthened the *jus sanguinis* principle and established significant retrospective cut-off dates for acquisition of Burmese citizenship. The Act also institutionalized a

[13] Section 19(a), (b), (c), (d), (e), (f) and (g) respectively. The proviso prevented revocation on grounds of bad character under s 19(e) three years after the grant of the certificate and safety, public order or interest under s 19(f) five years after such grant.

hierarchy among citizens. There are 3 tiers of citizens – citizens at the top, associate citizens in the middle and naturalized citizens at the bottom.[14] For the purpose of this study, the terms 'full citizen' and 'full citizens' shall be used to differentiate the first tier of citizens from associate and naturalized citizens. 'Full citizenship' shall also be used for the same purpose vis-à-vis associate and naturalized citizenship. These categories are mutually exclusive in that one may not move from a lower category to a higher category through marriage. This applies whether an associate citizen marries a full citizen or a naturalized citizen marries a full citizen or associate citizen.[15]

At the Seventh Meeting of the Central Committee, the then Burma Socialist Programme Party Chairman, U Ne Win, explained the rationale for the citizenship hierarchy:

> We regained independence on 4 January 1948. We then find that the people in our country comprised true nationals, guests, issues from unions between nationals and guests or mixed bloods, and issues from unions between guests and guests…This became a problem after independence…We are, in reality, not in a position to drive away all those people who had come at different times for different reasons from different lands…as guests and eventually could not go back and have decided to go on living here for the rest of their lives…Such being their predicament, we accept them as citizens, say but leniency on humanitarian ground cannot be such as to endanger ourselves. We can leniently give them the right to live in this country and carry on a livelihood in the legitimate way. But we will have to leave them out in matters involving the affairs of the country and the destiny of the State. This is not because we hate them. If we were to allow them to get into positions where they can decide the destiny of the State and they were to betray us we would be in trouble. [16]

National interests and national security rationalized the exclusion of people from full citizenship because they had settled in Burma much later than the 'true nationals'. Nationals, such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine, Shan and ethnic groups that have settled permanently in the state before 1823, are full citizens.[17] However, the Council of State retains the discretion to decide 'whether any ethnic group is national or not'.[18] The SPDC has acknowledged that there are 135 races

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[14] Chapter 2, ss 3-22, full citizens; Chapter 3, ss 23-41, associate citizens; Chapter 4, ss 42-64, naturalized citizens.

[15] Sections 33 and 56 respectively.

[16] See an English translation of the speech in *The Working People's Daily*, Vol XIX, No 275, 9 October 1982.

[17] Section 3. It is an amalgamation of section 11 of the *1974 Constitution* and section 3(1) of the *1948 Union Citizenship Act* discussed in the earlier paragraphs.

[18] Section 4.

(ethnic groups) in Burma.[19] The Rohingyas who settled in Rakhine State after 1823 are not among these 'national' groups.[20] However, they are not the only ethnic group excluded.[21]

Citizens by birth are those both of whose parents are nationals.[22] There is also citizenship by descent irrespective of place of birth if both parents are citizens.[23] In all other cases of citizenship by descent, at least one parent must be a full citizen, associate citizen or a naturalized citizen.[24] The other parent must be either a full citizen, associate citizen, naturalized citizen or born of parents who are both associate citizens, or naturalized citizens or of one parent who is an associate citizen and the other a naturalized citizen.[25] Associate citizenship is not defined in the *1982 Citizenship Law*. The Central Body may determine that those who qualified for citizenship under the *1948 Union Citizenship Act* are associate citizens.[26] The term seems to refer to those whose ancestors have settled in Burma after 1823. They would not be full citizens. Naturalized citizens include those who 'entered and resided in the state prior to 4 January, 1948'.[27] Their children born within the state who have not applied for citizenship under the previous law may also apply for naturalization.[28] Applicants for naturalization wherever born must have one parent who is a full citizen and the other a foreigner, one parent an associate citizen and the other a naturalized citizen, one parent an associate citizen and the other a foreigner, both parents naturalized citizens or one parent a naturalized citizen and the other a foreigner.[29]

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[19] UN Doc CRC/C/70/Add.21, *Second National Report on the Implementation of the Convention on the Rights of the Child: Myanmar*, 1, [3]. This report is scheduled for review in May 2004.

[20] See ILO Commission of Inquiry, *Report of the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*, 51-2, [251] and [253] at ILO Website, http://ilolex.ilo.ch/ (8 May 2002).

[21] See also Zunetta Liddell, *Burma: Children's Rights and the Rule of Law*, Human Rights Watch, January 1997, Vol 9 No 1(C), 10.

[22] Section 5.

[23] Section 7(a).

[24] Section 7(b)-(f).

[25] Section 7(b)-(f).

[26] Section 23. Section 67 provides that the Central Body shall comprise the Minister of Home Affairs as the chairman, the Minister of Defence and the Minister of Foreign Affairs as members.

[27] Section 42.

[28] Section 42.

[29] Section 43.

A major consequence of the citizenship hierarchy lies in the rights attached to citizenship. Full citizens enjoy the rights prescribed under state laws.[30] The Council of State reserves the power to curtail the rights of associate and naturalized citizens.[31]

In practice, it would not be easy to distinguish between full citizenship, associate citizenship and naturalized citizenship. This is because acquisition of any tier of citizenship depends on production of evidence of birthplace and nationality of one's ancestors. Furthermore, discretion rests ultimately with the Council of State. It 'may, in the interest of the State, confer on any person citizenship or associate citizenship or naturalized citizenship' and 'revoke the citizenship or associate citizenship or naturalized citizenship of any person, except a citizen by birth'.[32] The Central Body is authorized to determine the tier of citizenship and has powers to grant, terminate or revoke associate and naturalized citizenship.[33] More people may be rendered *de jure* statelessness because of the difficulty in producing the required evidence and the unfettered discretion of the Council of State.

The *1982 Citizenship Law* established 4 January 1948 as the cut-off date for naturalization and for Burmese citizenship in general. Furthermore, one parent of the applicant has to be a full citizen, associate citizen or naturalized citizen.[34] Adopted children are now excluded even as naturalized citizens.[35] Another cut-off date for naturalization is the date on which the *1982 Citizenship Law* comes into force. Only those married to a full citizen, associate citizen or naturalized citizen and who held a Foreigner's Registration Certificate before the Act enters into force may apply for naturalization.[36] Such applicant must be aged eighteen and above, of good character and sound mind, the only husband or wife and has resided continuously for three years in Burma as the lawful wife or husband.[37] A foreigner is defined as 'a person who is not a citizen, an associate citizen or a naturalized citizen'.[38] This definition includes both the citizen of another state and one who is *de jure* stateless. In other words, *de jure* stateless persons under the previous nationality laws would remain *de jure* stateless. In

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30 Section 12(c).

31 Sections 30(c) and 53(c) respectively.

32 Section 8 (a) and (b) respectively.

33 Section 68. For composition of the Central Body, see above n 26.

34 Section 43.

35 Section 73. Contrast with *1948 Union Citizenship Act* s 12(3).

36 Section 45.

37 Section 45.

38 Section 2(e).

addition, some foreigners who acquired citizenship under the *1948 Union Citizenship Act* could be rendered *de jure* stateless. For example, if they entered Burma after the 1948 cut-off date or cannot prove that they entered and resided in Burma before the 1948 cut-off date.

The grounds for cessation and revocation of Burmese citizenship under the *1982 Citizenship Law* could extend *de jure* statelessness to a significant number of people. Citizens and associate citizens alike cease to be citizens if they leave Burma 'permanently' or acquire the citizenship or register as the citizens of another state or take out the passport or similar certificate of another state.[39] Associate citizens and naturalized citizens may have their citizenship revoked for trading or communicating with enemy states during war; trading or communicating with an organization or member of an organization hostile to the state; committing an act likely to endanger the sovereignty and security of the state or public peace and tranquility; showing disaffection or disloyalty to the state by act or speech; giving information on state secret to any person, organization or state; or committing an offence involving moral turpitude for which the person has been sentenced to one year's imprisonment or a fine of 1,000 kyats.[40] Those who obtained citizenship by false representation or concealment shall have the citizenship revoked.[41]

These cessation and revocation provisions go beyond those in the *1948 Union Citizenship Act*. Not only associate citizens, but full citizens, too, may lose Burmese citizenship if they leave Burma permanently. Legally, it applies to any person from the national races. In reality, those likely to be affected would be from the Karen, Mon, Shan or other ethnic groups who have fled to Thailand and other states to escape the continuing political and ethnic conflicts. Length of absence is no longer a ground. Volition is also no longer a requirement. The Central Body could legally terminate the citizenship if there is evidence of complete uprooting even if one were forced to leave and has been absent from Burma for less than a year. Even though there is a 'right of defence to a person against whom action is taken', the discretion ultimately lies with the Central Body to determine whether the citizen concerned has left Burma permanently.[42] Furthermore, the Central

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[39] Sections 16 and 34 respectively.

[40] Sections 35 and 58. Note that the exchange rate is 10 kyats = 1 baht in 2003.

[41] Sections 18, 36 and 59 respectively. Abetment of such offences also attracts revocation and punishment under sections 19, 37 and 60.

[42] Section 68(c).

Body is not required to give any reason for its decision on the matter,[43] which seems inconsistent with the requirement of affording a right of defence.

Treason is no longer defined in terms of collusion with another state under the *1982 Citizenship Law*. Collusion now casts a wider net, from trading, communicating and passing official secrets to an organization to disloyal action or speech to state. First, it indicates that the Communist Party of Burma or even the Karen National Union could be deemed to be an organization 'hostile' to the state. Secondly, the distinction between state and the incumbent regime may be blurred to the extent where the ruling government or regime is regarded as synonymous with the state. Since the term 'organization' is not defined, it could include a local, national or an international organization. Legally speaking, full citizens from the national races remain exempt from deprivation of citizenship pursuant to the new parameters of treason. However, the discretionary powers of the Central Body and the problems of providing documentary evidence of ancestry leave open the possibility that those entitled to full citizenship could be relegated to either associate or naturalized citizenship. Should this eventuate, full citizens could be arbitrarily deprived of Burmese citizenship for colluding with ethnic resistance organizations. A harsher view of civil and political participation by those deemed to be associate citizens and naturalized citizens is plain. They may no longer rely on the provisos to the grounds of bad character and safety, and public order and interest in the *1948 Union Citizenship Act*. The possibility of *de jure* statelessness has increased under the cessation and revocation provisions of the *1982 Citizenship Act*.

Apparently, many members of Burma's ethnic minorities entitled to full citizenship have no identity cards, especially those who are living in areas not under government control for long periods.[44] They are often unable to prove Burmese citizenship because of the lack of access to written records, the difficulty in traveling to government-controlled areas for registration and the reluctance of the government to register them.[45] Consequently, they cannot travel freely within Burma or vote, and their children cannot attend high school or university.[46] The inability to prove Burmese citizenship often

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[43] Section 71 provides that '[n]o reason need be given by organizations invested with authority under this Law in matters carried out under this Law'.

[44] Liddell, above n 21, 9-10.

[45] Ibid.

[46] Ibid.

leads to denial of access to a whole range of rights, including civil, economic and social.

2. MIGRATION LAWS OF BURMA

Migration within, into and out of Burma continues to be regulated by the *1947 Burma Immigration (Emergency Provisions) Act*,[47] the *1940 Registration of Foreigners Act*,[48] the *1948 Registration of Foreigners Rules*,[49] the *1949 Residents of Burma Registration Act*, the *1951 Residents of Burma Registration Rules*, the *1907 Towns Act*[50] and the *1907 Village Act*.[51] Some provisions of the *1982 Citizenship Law* are also relevant. These enactments are supplemented from time to time by orders from the SPDC.

Burmese citizens may only enter their state with a valid Union of Myanmar Passport or a certificate issued by the competent authority.[52] Those who violate this requirement shall be punished with 'six months to five years imprisonment or with a fine of a minimum of 1500 kyats or with both'.[53] Identity cards are often used in lieu of passports for internal travel and for crossing into Thailand. They are issued under the *1949 Residents of Burma Registration Act* that provides for registration of the particulars of every person residing in Burma, including name, gender, date of birth, country of origin, nationality, occupation, residence and spouse, if any.[54] The headmen of towns and villages keep these registration lists as part of their duties.[55] Foreigners are also required to register.[56] The *1982 Citizenship Law* provides that children born in Burma eligible for citizenship would be issued citizenship identity cards when they register at the age of 11.[57] The parent or guardian of those born outside Burma is required to register them

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[47] *Burma Act XXXI*, 1947.

[48] *Burma Act VII, 1940*, 28 March 1940.

[49] Entered into force: 4 January 1948.

[50] *Burma Act III*, 1907, 25 May 1907.

[51] *Burma Act IV, 1907*, 1 January 1908.

[52] *1947 Burma Immigration (Emergency Provisions) Act* s 3(2).

[53] *1947 Burma Immigration (Emergency Provisions) Act* s 13(1).

[54] Section 4.

[55] *1951 Residents of Burma Registration Rules* r 2(2) read with *1907 Towns Act* s 7(1)(h) and *1907 Village Act* s 8(1)(j).

[56] *1948 Registration of Foreigners Rules* r 6 read with *1940 Registration of Foreigners Act* s 3 and *1951 Residents of Burma Registration Rules* r 34.

[57] Section 9.

within one year of their birth.[58] Failure to register would render the parent or guardian inside or outside of Burma liable to a fine of 50 kyats per year or 1,000 kyats for five years in succession.[59] Burmese citizens who do not have valid passports or identity cards may have difficulty returning to their state if they cannot prove possession of Burmese nationality. For example, they could be treated as aliens on deportation to Burma. If the person enters with a forged citizenship, associate citizenship or naturalized citizenship card, such a person could be liable to up to 10 years' imprisonment and a fine of 50,000 kyats.[60] Recently, the SPDC has reportedly issued a new order Law 367/120-(b)(1) that Burmese citizens who depart illegally to work in Thailand face seven years' imprisonment on their return.[61]

3. THAILAND: NATIONALITY LAWS

The relevant nationality laws affecting *de jure* statelessness in Thailand are the *1913 Nationality Act*,[62] the *1952 Nationality Act*,[63] the *1953 Nationality Act*,[64] the *1957 Nationality Act*,[65] the *1960 Nationality Act*,[66] the *1965 Nationality Act*,[67] the *1972 Order No 337 of the Revolutionary Council*[68] and the *1992 Nationality Act (No 2)* and *(No 3)*.[69] The focus in this section is on the *1965 Nationality Act* which contains the legal framework for Thai nationality

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[58] Section 10.

[59] Section 11(a) and (b) respectively.

[60] *1982 Citizenship Law* ss 18, 36 and 59 respectively.

[61] Therese Caouette and Mary Pack, 'Pushing Past the Definitions: Migration from Burma to Thailand' (2002) 28, citing English translation of this order in the *New Era Magazine* (March-April 2002).

[62] *Nationality Act B.E. 2456*.

[63] *Nationality Act B.E. 2495*, 3 January B.E. 2495, Royal Gazette Vol 69, Part 10, 12 February B.E. 2495.

[64] *Nationality Act B.E. 2496*, 3 February B.E. 2496, Royal Gazette Vol 70, Part 10, 193-95.

[65] *Nationality Act B.E. 2499 (2500)*, 12 February B.E. 2500, Royal Gazette Vol 74, Part 15, 431-35.

[66] *Nationality Act B.E. 2503*, 1 February B.E. 2503, Royal Gazette Vol 77, Part 8, 5-12.

[67] *Nationality Act B.E. 2508*, 21 July B.E. 2508, 20th year of King Rama IX, Royal Gazette Vol 82, No 62 (Special Issue), 4 August B.E. 2508.

[68] Proclamation of the Revolutionary Party No 337 of 13 December B.E. 2515. ('*1972 Order No 337*')

[69] *Nationality Act (No 2) B.E. 2535*, 19 February, B.E. 2535, Government Gazette Vol 109, No 13; *Nationality Act (No 3) B.E. 2535*, 31 March B.E. 2535, Government Gazette Vol 109, No 42, 8 April B.E. 2535.

that is still in force today. The subsequent amendments build on this framework and play a critical role in excluding certain categories of people from Thai nationality.

3.1. *The 1965 Nationality Act*

The *1965 Nationality Act* repealed the nationality acts of 1952, 1953, 1957 and 1960.[70] The *1965 Nationality Act* was amended by the *1972 Order No 337* and the *1992 Nationality Acts (No 2 and No 3)*. Prior to these amendments, a child wherever born of a Thai father acquired Thai nationality.[71] A child wherever born of a Thai mother and a legally stateless or unknown father also acquired Thai nationality.[72] A child born on Thai territory acquired Thai nationality at birth.[73] Currently, those who wish to apply for naturalization must be *sui juris* under Thai law as well as the law of their state of nationality, of good behaviour, have regular occupation, five consecutive years' domicile in Thailand and knowledge of the Thai language.[74] These requirements, with the exception of good behaviour, are waived for the minor children of the applicant if they are domiciled in Thailand.[75] Requirements of domicile and language proficiency are waived if the applicant is the child or wife of a person who has been naturalized.[76] The Minister of the Interior retains wide discretionary powers to grant or refuse naturalization applications.[77]

The Minister has similar powers to revoke Thai nationality of naturalized citizens.[78] The grounds for revocation include effecting naturalization by concealing facts or making false statements; evidence of use of former nationality; commission of act prejudicial to security or interests of Thailand or insulting the nation; commission of act contrary to the public order or good moral; five years' residence abroad without domicile in Thailand; and retention of nationality of state at war with Thailand.[79] These grounds are unexceptional under international law even though some of them could

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[70] Section 2.
[71] Section 7.
[72] Ibid.
[73] Ibid.
[74] Section 10.
[75] Section 12.
[76] Section 11(2).
[77] Section 12.
[78] Section 20.
[79] Section 19(1), (2), (3), (4), (5) and (6) respectively.

result in *de jure* statelessness.[80] Arguably the most controversial ground for the denial and deprivation of Thai nationality in recent history was introduced at the beginning of the 1970s.

3.2. *The 1972 Order No 337*

The *1972 Order No 337* made radical changes to acquisition and revocation of Thai nationality under the *1965 Nationality Act*. The 'protection and preservation of national security' was invoked to justify these changes.[81] National security is a legitimate ground for nationality deprivation under international law.[82] The Order revoked the Thai nationality of persons born in Thailand 'of an alien father or an alien mother without legitimate father and at the time of birth, the father or mother' was on a special leniency residence permit, a temporary residency permit or was an illegal immigrant.[83] It also prevented children born to such aliens from acquiring Thai nationality.[84] The incorporation of immigration status of the parent concerned as a ground for revoking or not conferring nationality was unusual under international law.[85] Restricted or illegal immigration status seemed to be sufficient proof of their disloyalty.[86] The effect was plain. They could be primarily from particular racial, ethnic, religious or political minority groups. If so, the issue of racial, religious or other discrimination could be raised. The defence would certainly be that the measures extended to other aliens who entered in breach of Thai laws. The advantage of using illegal immigration status could be to deflect any accusation of discrimination.

At the core of the issue is that denationalization on the basis of restricted or illegal immigration status is not prohibited under international law. What

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[80] Section 19(1), (3), (4) and perhaps even (5).

[81] *1972 Order No 337*, Preamble.

[82] *1961 Statelessness Convention* art 8.

[83] Clause 1(1), (2) and (3) respectively.

[84] Clause 2 provides that children born in Thailand to parent on special residency permit after the Order has come into force shall not acquire Thai nationality unless the Minister of Interior considers it appropriate and orders otherwise in any specific case.

[85] This is no longer true. See section 6(2)(b) of the *1997 European Convention on Nationality*. See also section 4 of the *Australian Citizenship Amendment Act No 70 of 1986* which amended section 10 of the *1948 Australian Citizenship Act* by removing the *jus soli* principle to restrict citizenship by birth to those born of one parent who was at the time of the child's birth, an Australian citizen or a permanent resident.

[86] *1972 Order No 337*, Preamble.

the *1972 Order* did not highlight was the fact that children born to alien parents whose immigration status was not restricted or illegal would acquire Thai nationality. Hence racial or other discrimination may be submerged under illegal immigration status which, in turn, is justified by national security.

3.3. *The 1992 Nationality Act (No 2)*

The amendments introduced by the *1992 Nationality Act (No 2)* have strengthened gender equality between Thai nationals on acquisition of Thai nationality at birth.[87] However, the grounds for non-acquisition of Thai nationality under the *1972 Order No 337* have been extended. The *1992 Nationality Act (No 2)* draws the line where both parents of the children are illegal aliens, regardless of their marital status.[88] In 2001, new regulations on nationality have been approved. These amendments and regulations will be analyzed in the next chapter on gendered aspects of statelessness among Burmese irregular migrant workers in Thailand.

4. MIGRATION LAWS OF THAILAND

Provisions of the *1979 Immigration Act*,[89] the *1978 Working of Aliens Act*[90] and the *1950 Alien Registration Act*[91] control aliens, who enter, reside, work in and leave Thailand. They apply to those eligible to apply for naturalization and those who were rendered stateless by the *1972 Order No 337* and the 1992 amendments to the *1965 Nationality Act*. The Immigration Commission prescribes rules for entry of immigrants 'taking into account the income, property, academic and professional abilities and family position of such person in connection with person of Thai nationality, the condition on national security and other appropriate conditions'.[92]

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[87] Section 7(1) as amended by section 4 of the *1992 Nationality Act No 2*.

[88] *1965 Nationality Act*, s 7 bis (2).

[89] *Immigration Act, B.E. 2522* (1979) as amended by the *Immigration Act (No 2), B.E. 2523*, Government Gazette Vol 97, Part 131, Special Issue, 23 August B.E. 2523.

[90] *Working of Aliens Act, B.E. 2521*, Government Gazette Vol 95, Part 73, Special Issue, 21 July B.E. 2521.

[91] *Alien Registration Act*, B.E. 2493.

[92] *1979 Immigration Act* s 41.

Global and liberal migrants enter Thailand on work permits issued under business and investment categories.[93] A minimum of 2 million baht or US$47,600 must be brought into Thailand by general investors on one-year visa extension and work permits.[94] General investors who bring in a minimum of 10 million baht or US$238,000 may apply for two-year visa extension and work permits.[95] Executives and experts on one-year visa extension and work permits must work for companies with fully paid-up capital or working capital of not less than 30 million baht or US$714,000.[96]

Global and liberal migrants have the option to become permanent residents in Thailand. Their wealth, resources, skills and expertise are regarded as economic assets by a developing state such as Thailand. Foreign nationals who stay in Thailand for business, employment or investment purposes, foreign nationals who are experts or academics, foreign nationals supporting wives and children who are Thai citizens, foreign nationals who are dependants of husbands or fathers who are Thai citizens; foreign citizens who accompany husbands, fathers, sons and daughters who already have resident permits and retired foreign nationals with net monthly income of 30,000 baht, foreign experts with annual income of US$10,000 and former Thai nationals may apply.[97] A period of three years' residence in Thailand is required for all applicants for permanent residence.[98] However the three-year residence requirement period was waived in the case of some global migrants and their families who made huge direct and indirect investments between 1 July 1997 and 12 May 2000.[99] In principle, *de jure*

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[93] *1979 Immigration Act* s 34 (5), (6) and (7).

[94] *1979 Immigration Act* s 34(7) read with the *Investment Promotion Act of 1977*, *Petroleum Act of 1971* and *Industrial Estate Authority Act of 1979*. See 'Extension of visa and issuance of work permits in Thailand' at Thai Embassy Website, http://www.thaiembdc.org/consular/con_info/restpmit/extvisa.htm. (8 June 2001) Note that the exchange rate is 42 baht = US$1.00 in 2003.

[95] *1979 Immigration Act* s 34(6) and 'Extension of visa and issuance of work permits in Thailand', ibid.

[96] *1979 Immigration Act* s 34(14) and 'Extension of visa and issuance of work permits in Thailand', ibid.

[97] See 'How to Apply for Permanent Residence Permit' for criteria of each of these categories at Thai Embassy Website, above n 94. (10 December 2001).

[98] Ibid.

[99] Ibid. See Temsak Traisophon, 'Residence Visas to Tempt Investors' *Bangkok Post*, 19 February 1997 where it was reported that normally only 100 resident visas were issued annually to foreigners after which they would wait three years to be eligible for permanent residence. The new policy, said to be similar to immigration policies of Singapore, Australia and Canada, was aimed at reviving the Thai economy after the 1997 crisis and hoped to attract 5,000 foreigners to bring in 50 billion baht. The report added that work

stateless persons may also apply for permanent residence.[100] But other requirements may effectively prevent some of them from qualifying.

Valid passports and visas are generally required for entry into Thailand.[101] An exception is made in the case of aliens who are 'nationals of the country having common border with Thailand who cross the border for temporary stay' under any agreement between Thailand and that state.[102] Aliens without skills, academic or technical training or means of support are not permitted to enter Thailand.[103] Visas are seldom granted to unskilled aliens. Where unskilled aliens are permitted to work, they are barred from occupations reserved for Thai citizens.[104] They include aliens who enter Thailand illegally and are awaiting deportation, resident aliens or those born in Thailand but have not acquired Thai nationality under the *1972 Order No 337* or other laws and aliens whose Thai nationality have been revoked by the same Order or other laws.[105] They may only work in employment prescribed by the Minister if they receive work permits from the Director-General of the Labour Department.[106] Work permits are valid for one year from the date of issue for these categories of aliens.[107]

Investment, business and expert resident permit holders are free to reside, travel or work anywhere in Thailand. Work permit holders are restricted to the job, locality and place of work stated in the permit unless permission to transfer has been obtained from the Registrar of Working Aliens.[108] Resident aliens are already restricted to certain locality or province under the *1950 Alien Registration Act*.[109] Aliens in the said categories who

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permits were currently granted to 10,000 foreigners who invested at least 10 million baht in Thailand each year. See also Peerawat Jariyasombat, 'Only Rich Foreigners Need Apply', *Bangkok Post*, 25 June 1998 where it was reported that these special permanent resident permits were targeted at wealthy foreigners in China, Indonesia, Macau, European countries and Canada.

[100] *1979 Immigration Act* s 40 provides for an annual immigrants quota for foreign nationals and for those without nationality.

[101] *1979 Immigration Act* s 12(1).

[102] Section 13(2).

[103] Section 12(2) and (3) respectively.

[104] *1978 Working of Aliens Act* s 6 read with clause 4 of the *1979 Royal Decree Prescribing Occupations and Professions in Which Aliens Are Prohibited to Work*.

[105] *1978 Working of Aliens Act* s 12(2), (3) and (4) respectively.

[106] Section 12, [two].

[107] Section 13(2).

[108] Section 21.

[109] Section 5 provides that aliens, aged twelve and above, living in Thailand are required to have identification cards, which contain restrictions on their movement within Thailand. Section 20 further provides that the failure to have such identity cards or to

work in proscribed occupations or without work permits or both are liable for up to three month's imprisonment, a fine not exceeding five thousand baht or both.[110] To further ensure compliance by aliens on work permits regarding restrictions on their movement within Thailand, heads of household or managers of premises where they reside are required to report to the Immigration Office within 24 hours of their arrival to stay.[111] The failure to report is punishable with a maximum fine of 2,000 baht; where the offender is a hotel manager, the punishment shall be a fine of between 2,000 to 10,000 baht.[112]

As a general rule, '[a]ny alien who enters or remains in the Kingdom without permission or the permission has been terminated or revoked may be expelled from the Kingdom by the competent official'.[113] However, permanent and temporary residents are treated differently from those who have entered the country illegally. Permanent residents and others on temporary resident permits would be liable to expulsion only when conditions of their residence have been breached.[114] There is no automatic right to a hearing before expulsion for prohibited aliens.[115] Those who enter without valid passports and/or valid visas and those categories of aliens prohibited from entering Thailand on grounds of national interest, public order, good morals and public well being are denied the right to appeal expulsion orders.[116] National security, public order and good morals, and national interest, criminal records and mental or physical disability are the main grounds on which the grant of immigrant status may be revoked.[117] Permanent residents and other residential permit holders would be entitled to appeal expulsion orders.[118] Aliens prohibited from entering or who

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renew them upon expiry is punishable with a maximum fine of 500 baht per year during the period of non-compliance.

[110] *1950 Alien Registration Act* s 34.

[111] *1979 Immigration Act* s 38.

[112] *1979 Immigration Act* s 77.

[113] *1979 Immigration Act* s 54.

[114] *1979 Immigration Act* s 53.

[115] *1979 Immigration Act* s 22.

[116] *1979 Immigration Act* s 22 read with s 12 (1); s 22 read with ss 12(10) and 16 respectively.

[117] *1979 Immigration Act* s 53 read with ss 12(7), 12(8), 12(10), 43 [two], 44, 63 or 64 respectively.

[118] *1979 Immigration Act* s 22.

remain in Thailand after the expiry of permission face detention,[119] penalties[120] and expulsion.

These provisions create a hierarchy of aliens whose enjoyment and exercise of rights in Thailand are determined overtly by wealth, class, property and education. Permanent residents would be at the top of the hierarchy and illegal or irregular aliens at the bottom.

4. THAILAND: DOMESTIC REMEDIES

Thailand's municipal law on expulsion of aliens differentiates between those who have legal migrant status and those who are illegal aliens. The issue is whether there is any avenue within Thailand where prohibited aliens may seek protection or remedies for violations of their rights. For example, an irregular migrant worker may wish to challenge an expulsion order on the ground that it constitutes a breach of Thailand's obligations under an international instrument. It is important to remember that there is an obligation to exhaust all domestic remedies before seeking redress under any international mechanism. I suggest that the National Human Rights Commission of Thailand is an avenue to explore. It is established under the *1999 National Human Rights Commission Act*.[121]

The Thai National Human Rights Commission appears to have a fairly wide mandate. In the Act, human rights is defined as 'human dignity, right, liberty and equality of people which are guaranteed or protected under the Constitution of the Kingdom or under Thai laws or *under treaties which Thailand has obligations to comply*'.[122] Thailand's *1997 Constitution*[123] protects 'the human rights, liberty and equality of the people'.[124] However, such

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[119] *1979 Immigration Act* s 20 provide that aliens who are prohibited from entering may be detained for up to 48 hours from the time of arrival at the official's office; if necessary, such aliens may be detained for more than 48 hours but no more than 7 days. A Court order is required for longer periods of detention but no more than 12 days each time.

[120] *1979 Immigration Act* s 81 provides that '[a]ny alien who remains in the Kingdom without permission or the permission has been terminated or revoked shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding twenty thousand baht or to both'.

[121] *National Human Rights Commission Act, B.E. 2542*, Government Gazette Vol 116, Part 118a, 25 November B.E. 2542 (1999).

[122] Section 3. Emphasis added.

[123] *Constitution of the Kingdom of Thailand, B.E. 2540*, Government Gazette, Vol. 114, Part 55a, 11 October B.E. 2540 (1997).

[124] Section 4.

protection is not extended to aliens.[125] The Commission is empowered to receive a petition from any person whose human rights have been violated.[126] Alternatively, a representative of such person, including a private human rights organization may submit such petition.[127] The petition may be made in writing setting out the facts and circumstances that have caused the commission or omission of the acts, which violated his or her human rights.[128] The petition may also be made verbally according to regulations issued by the Commission.[129]

The Commission has a positive duty to 'examine and propose remedial measures under this Act for the commission or omission of acts which violate human rights and which is not a matter being litigated in the Court or that upon which the Court has already given final order or judgment'.[130] The Commission is empowered to require provision of facts, opinions, documentary evidence and attendance of representatives from government and state agencies as well as state enterprises; and to set out remedies.[131] Failure to comply with the Commission's summons is punishable with up to six months' imprisonment or a fine not exceeding 10,000 baht or both.[132] The Commission is also empowered to set out remedial measures such as specifying legal duties and methods of performance, time period for implementation; appropriate methods to prevent recurrence of similar human rights violation or remedial guidelines to rectify an unjust practice even though no human rights violation has been committed.[133] Unfortunately, the Commission has no power to enforce such remedies.[134] The Commission may report to the Prime Minister where the offending party has failed to implement the remedial measures or to complete such measures without justifiable reasons.[135] Only the Prime Minister may order the implementation of remedial measures within sixty days provided such

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[125] Section 5. The possibility that the *1997 Constitution* extends protection to aliens is further contradicted by the heading of Chapter III – 'Rights and Liberties of the Thai People' setting out the rights from sections 26 to 65.

[126] *1999 National Human Rights Commission Act* s 23.

[127] *1999 National Human Rights Commission Act* s 23(1).

[128] *1999 National Human Rights Commission Act* s 23(2).

[129] *1999 National Human Rights Commission Act* s 23 [2].

[130] *1999 National Human Rights Commission Act* s 22.

[131] *1999 National Human Rights Commission Act* s 32.

[132] *1999 National Human Rights Commission Act* s 34.

[133] *1999 National Human Rights Commission Act* s 28.

[134] *1999 National Human Rights Commission Act* s 30.

[135] *1999 National Human Rights Commission Act* s 30.

measures are within his powers.[136] If no such order is made, the Commission is to report to the National Assembly for directions on further proceedings and may publicise the issues where it deems such matter has public benefit.[137]

Thus a *de jure* stateless irregular migrant worker could petition the Commission for an act or omission that violates his or her human rights under any international instrument to which Thailand is party, including those which only provide for reporting or monitoring procedures. Alternatively, a non-political, non-profit human rights organization may, of its own accord, petition the Commission to investigate allegations of human rights violations affecting such a person if there is a *prima facie* case.[138] The absence of penalties for failure to implement remedial measures may prove to be a serious drawback for *de jure* stateless irregular migrant workers or irregular *de jure* stateless persons or refugees who survive as irregular migrant workers.

Despite the difficulties, there is no alternative for *de jure* and *de facto* stateless persons in Thailand whatever their immigration status, but to pursue violations of their rights within the domestic sphere. The Human Rights Commission may reject their petition. Alternatively, their petition may be accepted, investigated but remedial measures are not implemented. They are then entitled to pursue remedies under the appropriate international instrument to which Thailand is a party and which provides for procedures for remedies.

5. BURMA AND THAILAND: INTERNATIONAL INSTRUMENTS

Burma is a state party to the *1979 CEDAW*, the *1989 CRC* and the *1930 ILO Forced Labour Convention No 29*.[139] Thailand has also ratified these international instruments.[140] More recently, Thailand ratified the *1966 ICCPR* and the *1966 ICESCR*.[141] On 22 December 2000, Thailand ratified

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[136] *1999 National Human Rights Commission Act* s 30.

[137] *1999 National Human Rights Commission Act* s 31.

[138] *1999 National Human Rights Commission Act* s 24 [1].

[139] Dates of accession: 21 August 1997, 14 August 1991 and 4 March 1955 respectively.

[140] Dates of accession: 8 September 1985, 26 April 1992 and 26 February 1969 respectively.

[141] Dates of accession: 29 January 1997 and 5 December 1999 respectively.

the *1999 CEDAW Protocol*, one of a small number of state parties to do so.[142] On 16 February 2001, Thailand became one of 127 states to ratify the *1999 ILO Worst Forms of Child Labour Convention No. 182*.[143]

Currently, Thailand is not party to the *1951 Refugees Convention* and the *1967 Refugee Protocol*; the *1954 Stateless Persons Convention* and the *1961 Statelessness Convention*; the *1965 CERD*; the *1966 ICCPR Optional Protocol*; the *1984 Convention on Torture*; and the *1990 Migrant Workers Convention*. Burma also has not signed or ratified any of these international instruments. In addition, Burma is not a party to the *1966 ICCPR* and the *1966 ICESCR*.

Burma is an illustration of a state that remains largely beyond the reach of international human rights instruments. Apart from international customary law principles, it does not admit or is not by bound any international obligations with regard to stateless persons, *de jure* or *de facto*, refugees or irregular migrant workers. Where *de jure* statelessness results from Burmese citizenship laws or a 'conflict of nationality laws', Burma would not be accountable for the protection of the rights of *de jure* stateless persons because it is not a party to the *1954 Stateless Persons*, the *1966 ICCPR* and the *1966 ICESCR*. Should individuals and groups be rendered *de jure* stateless as a result of racially, politically or religiously motivated deprivation of nationality by the state, Burma would remain immune from accountability even though this is prohibited under the *1961 Statelessness Convention*. It could also be in breach of the *jus cogens* norm prohibiting racial discrimination under international law. Protection for *de facto* stateless persons who retain nominal nationality of Burma is similarly uncertain whether they remain within Burma or leave the state. Protection for the human rights of irregular migrant workers under the *1990 Migrant Workers Convention* rests primarily with the host state. Consequently it makes very little difference whether Burma were a party to the Convention. Burma would be absolved from responsibility for protecting the human rights of its nationals who become irregular migrant workers in another state. Since Burma is not a party to the *1999 CEDAW Protocol*, *de jure* and *de facto* stateless women compelled to become irregular migrant workers in Thailand, are denied recourse for violations of their rights vis-à-vis Burma.

The prognosis is mixed for *de jure* and *de facto* stateless persons where Thailand is concerned. Thailand has yet to make initial reports to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. Hence, Thailand has yet to come under scrutiny in relation

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[142] As of 9 December 2002, there are 47 state parties.

[143] As of 8 May 2002.

to the economic, social and cultural rights of *de jure* and *de facto* stateless persons whether legally or illegally on Thai territory. *De jure* and *de facto* stateless irregular migrant workers are also restricted in their pursuit for protection of their human rights by the lack of individual complaints procedures under international instruments ratified by Thailand. The only exception is the *1999 CEDAW Protocol*. That mechanism is available to women among those who are *de jure* and *de facto* stateless. Even then, reservations made by Thailand could affect their claims under the *1979 CEDAW* and their remedies under the *1999 CEDAW Protocol*.

Reservations, however, are not cast in stone nor does the absence of individual complaints procedures render protection entirely ineffective. In the following section, the reservations made by Burma and Thailand to the respective international instruments shall be analysed for the implications on the rights and remedies available to categories of *de jure* and *de facto* stateless persons concerned.

5.1. *Reservations, Protection and Remedies*

The general principle is that a state party may enter a reservation 'when signing, ratifying, accepting, approving or acceding to a treaty' so as to exclude or modify the legal effect of certain provisions on that state.[144] The exceptions to the general principle are: where the reservation is prohibited by the treaty, where the treaty provides that only specified reservations other than the reservation in question may be made or where the reservation is incompatible with the object and purpose of the treaty.[145] The prohibition against a reservation that is incompatible with the object and purpose of the treaty is an affirmation of the test laid down in the *Reservations to the Genocide Convention* Case.[146] Although this prohibition is expressly stated in the *1979 CEDAW* and the *1989 CRC*,[147] neither treaty defines how it will be determined or the consequences where the reservation is found to be incompatible with the object and purpose of the treaty.

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[144] Article 19 of the *1969 Convention on the Law of Treaties* which entered into force in 1980. The treaty is generally regarded as a codification of customary law concerning treaties.

[145] Art 19(a), (b) and (c) respectively.

[146] (1951) ICJ Reports 15 (Advisory Opinion, 28 May).

[147] Article 28(2) of the *1979 CEDAW* and Article 51(2) of the *1989 CRC* separately provides that 'A reservation incompatible with the object and purpose of the present Convention shall not be permitted'.

The numerous reservations entered to the *1966 ICCPR* led the Human Rights Committee to issue *General Comment No 24*.[148] The Human Rights Committee contends that the principles in the *1969 Vienna Convention* on state objections to reservations do not apply to human rights treaties. The principal reason being, that such treaties are concerned with individual rights and not mutual state obligations.[149] The Human Rights Committee further contends that it is the appropriate body to determine the issue of incompatibility of any reservation made.[150] The Inter-American Court of Human Rights and the European Court of Human Rights preceded the Human Rights Committee in asserting their own competence to determine compatibility of reservations to the relevant regional human rights treaties.[151]

Some states and the International Law Commission have challenged these views.[152] According to some analysts, the ensuing uncertainty over reservations to the 1966 ICCPR reveals the 'tension between the classical view of treaties creating bilateral and multilateral relations between States, which informs the customary law of reservations, and the modern view that human rights treaties essentially create bilateral relations between State Parties and individuals'.[153] The CEDAW Committee has taken the approach of encouraging states to withdraw the multitude of reservations.[154]

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[148] UN Doc HRI/GEN/1/Rev.5, (26 April 2001) 52nd sess, 1994, 150.

[149] [16]-[17].

[150] [18].

[151] See *Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (1982) 22 ILM 37, 47 (Advisory Opinion) ; *Belilos v Switzerland* (1988) 10 EHRR 466, 485-87.

[152] See generally Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2000) 604-21. Apart from objections from states such as the UK, France and the USA, the ILC has included the issue of reservations to human rights treaties in its current work on reservations. See particularly Alain Pellet, *First Report on Reservations*, UN Doc. A/CN.4/470 and Corr. 1 (1995); Alain Pellet, *Second Report on Reservations*, UN Doc A/CN.4/477 and Add. 1 (1996); UN Doc A/51/10 (1999), GAOR, 51st sess, Supp 10, [137] for draft resolution of ILC on reservations to multilateral normative treaties, including human rights treaties and UN Doc A/52/10 (2000), GAOR, 52nd sess, Supp 10, [157] on preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties; Alain Pellet, *Seventh Report on Reservations*, UN Doc A/CN.4/526 and Add 1-3 (2002), ILC, 54th sess, [48]-[55] on developments regarding reservations involving human rights treaties, one specifically at request of CEDAW Committee. See also UN Doc A/57/10, (2002), GAOR, 54th sess, Supp No 10, 24-119. For text of draft guidelines on reservations to treaties provisionally adopted so far by the Commission and text with commentaries thereto, see 49-62 and 63-119 respectively.

[153] Ibid, Joseph, Schultz and Castan, 621.

[154] See UN Doc A/CONF.157/23 (12 July 1993), *1993 Vienna Declaration*, [39].

However, the approach taken by the Human Rights Committee indicates that the issue of invalid reservations in human rights treaties is not to be lightly dismissed. The Human Rights Committee has also implicitly severed a reservation in the communication of *Kennedy v Trinidad and Tobago*.[155] Some commentators have discussed the issue, one from the angle of nonderogable rights and another from the standpoint of severability of such reservation. Clerk suggests that reservations 'purporting to derogate from the rights that are (whether by explicit provision or by implication) nonderogable are not only incompatible but also invalid or impermissible'.[156] Goodman discusses options arising from invalid reservations that are incompatible with the object and purpose of a treaty: (1) the state remains bound to the treaty except for the provision(s) to which the reservation related; (2) the invalidity of a reservation nullifies the instrument of ratification as a whole and thus the state is no longer a party to the agreement; and (3) an invalid reservation can be severed from the instrument of ratification such that the state remains bound to the treaty including the provision(s) to which the reservation related.[157] He argues that reservations to human rights treaties should be severable 'unless for a specific treaty there is evidence of a ratifying state's intent to the contrary'.[158] He also contends that 'severability should be an option for a third-party institution (e.g. a domestic court, a national human rights commission, a regional court, the International Court of Justice (ICJ), a treaty body) to invoke after having found a reservation invalid' and that 'severability should be presumed to be the optimal remedy'.[159] Goodman's argument merits consideration in view of the comments and jurisprudence of the Human Rights Committee.

When Burma ratified the *1989 CEDAW*, it lodged a reservation to article 29 on resolution of disputes. Thailand entered reservations to articles 7, 9(2), 10, 11(1)(b), 15(3), 16 and 29(1) of the *1989 CEDAW* upon ratification.[160] National security was cited as the primary rationale for these

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[155] (845/99), UN Doc CCPR/C/67/D/845/1999, 31 December 1999.

[156] Belinda Clerk, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) 85 *American Journal of International Law* 281, 320.

[157] Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96 *American Journal of International Law* 531.

[158] Ibid 531.

[159] Ibid 531-32.

[160] Article 7 provides for gender equality in political and public participation. Article 9(2) provides that state parties shall grant women equal rights with men with respect to the nationality of their children. Article 10 provides for equal rights between men and women in education. Article 11(1)(b) provides for equal rights to same employment opportunities. Article 15(3) provides that contracts and private instruments that restrict the legal capacity

reservations.[161] Subsequently, Thailand withdrew the reservations to all but articles 16 and 29(1) of the Convention, i.e. provisions regarding sex and gender equality in matters concerning marriage and family relations and dispute resolutions.[162]

Burma lodged reservations to articles 15 and 37 of the *1989 CRC* upon accession.[163] Reservations to both articles were justified on the grounds of national security or the protection of 'the supreme national interest, namely, the non-disintegration of the Union, the non-disintegration of national solidarity and the perpetuation of national sovereignty, which constitute the paramount national causes of the Union of Myanmar'.[164] Subsequently, these reservations were withdrawn on 19 October 1993. Thailand entered reservations to articles 7, 22 and 29 of the *1989 CRC*.[165] On 11 April 1997, Thailand withdrew the reservation to article 29 concerning the child's rights to education.

While both states opted to exclude international resolution of any dispute regarding its laws and policies discriminatory towards women, they remain accountable in their periodic reports to the CEDAW Committee to justify,

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of women shall be deemed null and void. Article 16 provides for equality between men and women in matters relating to marriage and family relations, including (d) the same rights and responsibilities as parents, irrespective of their marital status.

[161] See UNHCHR Website, http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm (9 May 2000).

[162] Thailand withdrew the reservations to articles 11(1)(b) and 15(3) on 25 January 1991, article 9(2) on 26 October 1992 and articles 7 and 10 on 1 August 1996.

[163] Article 15 protects the right of the child to freedom of association and peaceful assembly subject to restrictions. Article 37 protects the life, liberty and personal security of the child, specifically freedom from torture or cruel, inhuman or degrading treatment, unlawful or arbitrary deprivation of liberty; treatment that accords with humanity, human dignity and needs of child deprived of liberty, including separation from adults; the right to prompt access to legal and other assistance and the right to challenge the legality of the detention before any court or competent authority.

[164] Paragraph (2) of the reservation to article 15 and paragraph (3) of the reservation to article 37. See at UNHCHR Website, http://www.unhchr.ch/html/menu3/b/treaty15_asphtm (9 May 2000).

[165] Article 7 (1) provides for the immediate registration of the child after birth and 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 and (2) for states to implement these rights in accordance with their national laws and their obligations under the relevant international instruments, particularly where the child would otherwise be stateless. Article 22 provides for (1) protection and humanitarian assistance for children seeking refugee status or considered as refugees under international or domestic law and procedures and (2) family reunification and protection for refugee child. Article 29 provides for child's education including in culture, language and values of own country and of host state.

reform or abolish such laws and policies.[166] Thailand is more systematic and meticulous in identifying issues and appeared to work towards elimination of gender discrimination on those specific issues. For example, the withdrawal of the reservation to article 9(2) on the equal right with respect to the nationality of children was made in October 1992. The withdrawal was made after the passage of the *1992 Nationality Act (No. 2)* in February of the same year, granting Thai women equal right with Thai men to pass on Thai nationality to their children wherever born and even where the fathers are foreign nationals.[167]

Burma simply denied any gender discrimination in relation to nationality.[168] Burma also referred to the citizenship hierarchy to deny statelessness or denationalization among children.[169] Rohingya refugee women and children born in refugee camps allegedly have been refused Burmese citizenship.[170]

The one common objection to Thailand's reservations upon ratifying the *1979 CEDAW* other than the one pertaining to dispute resolution was the fact that they were incompatible with the object and purpose of the Convention.[171] However, Germany, Mexico, Sweden and the Netherlands concluded their objections by stating that they did not affect the Convention entering into force between Thailand and them. Since the *1979 CEDAW* expressly provides for states to opt out of the provision on dispute resolution,[172] the reservations by both Burma and Thailand did not raise any objections. In fact, they are among 26 states that have excluded the provision on dispute resolution.[173]

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[166] UN Doc CEDAW/C/THA/2-3, *Initial Report: Thailand*; UN Doc CEDAW/C/MMR/1 (25 June 1999), *Initial Report: Myanmar*.

[167] Thailand cited this development as evidence of increasing equality between women and men with Thai nationality. See UN Doc CRC/C/11/Add.13 (30 September 1996), CRC Committee, *Initial Report: Thailand*, [143].

[168] *Myanmar*, above n 166, 14 on article 9.

[169] UN Doc CRC/C/8/Add.9 (18 September 1995), CRC Committee, *Consideration of Report: Myanmar*, [57(b)]. The same position is adopted in the latest report.

[170] Liddell, above n 21.

[171] See Declarations and Reservations to the *1979 CEDAW* at the UNHCHR website, above n 161.

[172] Article 29(2).

[173] As of 8 August 2000, 56 states have entered reservations to various provisions of the *1979 CEDAW*.

Germany, Ireland, Portugal and Sweden made separate but similar objections to Burma's reservations to articles 15 and 37 of the *1989 CRC*.[174] Each state expressed the view that the reservations were incompatible with the object and purpose of the Convention but concluded that such objection did not preclude the Convention from entering into force between Burma and each state respectively. Ireland and Sweden objected to Thailand's reservations to articles 7, 22 and 29 of the *1989 CRC* on the grounds that they cast doubts on Thailand's commitment to the object and purpose of the Convention but added that the objection would not obstruct the entry into force of the convention between them and Thailand.[175]

The focus here is on the implications of the reservations made by Burma and Thailand and the effect of objections made by other states in relation to the protection and the remedies available to *de jure* and *de facto* stateless persons under the *1979 CEDAW* and the *1989 CRC*. Since the CRC Committee does not have the competence to receive individual communications, the issue does not arise for its consideration. However, it is open to the CEDAW Committee to consider alternative approaches to the issue. While the CEDAW Committee would prefer that states withdraw reservations especially those that are incompatible with the object and purpose of the treaty, it may not be in the position to wait until then. Now that the *1999 CEDAW Protocol* has entered into force, the CEDAW Committee may have to consider its role in relation to such reservations. The CEDAW Committee could adopt the principles in the 1969 Vienna Convention on the Law of Treaties. The Committee could decline to consider the invalidity of a reservation, where it has been accepted by all state parties. Alternatively, it could consider the approach pioneered by the Human Rights Committee and assert its own competence to determine the validity of the reservation. In the case where states have lodged objections to reservations by another state, the Committee could also adopt the approach that such objections could assist in determining the compatibility of the reservation with the object and purpose of the treaty.[176]

With respect to other types of multilateral treaties, states usually object to reservations that affect their interests and on the basis of such objection, they may pursue remedies provided under the treaties such as international tribunals. The lacuna in human rights treaties is that the individuals whose rights may be affected by the reservations lodged by the state party are not

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[174] See Declarations and Reservations to the *1989 CRC* at the UNHCHR website, above n 164.

[175] Ibid.

[176] *General Comment No 24*, above n 148, [18].

in the position to lodge objections or to pursue remedies in a similar manner. It is arguable that justice would require that the body receiving the individual complaint should have the competence to review the validity of a reservation to determine if it were incompatible with the object and purpose of the treaty where such reservation affects specific rights under the treaty and whether or not other states have made objections. The fact that such a body is competent to consider the application of the reservation does not mean that the reservation will automatically be invalid or severed. This is where the CEDAW Committee or any other treaty body, national human rights commission or other domestic court or institution, regional or international body has to assume the role of arbiter in determining the legal consequences of such objections and, thereby, balance individual rights and state interests. The introduction of the individual complaints procedures under human rights treaties indicates that such an approach could be more appropriate. It is pertinent to note that the International Court of Justice in the *Reservations to the Genocide Convention* case enunciated the customary law principles on reservations before such individual complaints procedures were pioneered.

6. CONCLUSION

Generally speaking, the interface between the respective citizenship and nationality laws of Burma and Thailand produces *de jure* statelessness. Specifically, the departure of ethnic minorities and other political dissidents from Burma and their entry to Thailand raises the issue of how their citizenship and nationality laws interface to produce *de jure* statelessness among irregular migrant workers. On this issue, the significance of illegal immigration status in preventing acquisition of Thai nationality *jus soli* has been overlooked in a recent report on laws relating to trafficking in the Mekong Sub-region.[177] The migration laws of both states and the current refugee policies of Thailand also have a significant impact on *de facto* statelessness among them. The study concludes with the gendered aspects of statelessness affecting Burmese irregular migrant workers in Thailand.

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[177] Edda Ivan-Smith, *Advocacy Paper on Comparative Laws of the Countries in the Mekong Sub-region With Respect to Trafficking in Women and Children* (2001) 81 (Paper prepared for the International Save the Children Alliance).

CHAPTER SEVEN

GENDERED ASPECTS OF STATELESSNESS AND IRREGULAR MIGRANT WORKERS FROM BURMA IN THAILAND

The concern with gender equality in citizenship and nationality laws does not always translate into prohibition against gender discrimination related to statelessness. This is often the case in states not party to conventions on stateless persons, refugees and migrant workers. For instance, the development in gender awareness and child rights in Thailand focuses attention on the right to Thai nationality particularly for children from ethnic minorities. The question is whether such development also addresses the hidden issue of children born to parents of illegal immigration status. Unfortunately, the private construction of the migration regime in Western states is accentuated in Asian states where women are rendered doubly invisible. Furthermore, while the migration regime in the West is subject to some limits, the migration regimes in Burma and Thailand are generally exempt from the scrutiny of international law. Some discriminatory aspects of the citizenship laws of both countries have been criticized. But the cumulative effects of their citizenship and migration regimes on women and children have received little attention.

1. THE HIERARCHY OF ALIENS IN THAILAND

The hierarchy of aliens in Thailand is constructed through a combination of immigration and nationality policies and laws. They create a hierarchy of aliens whose enjoyment and exercise of rights in Thailand are determined overtly by wealth, class, property and education.

Global and liberal migrants are either permanent or temporary resident permit holders. The number of permanent residents peaked at 287,105 in 1990 and gradually fell to 266,329 in 1998.[1] The majority of these

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[1] Alien Registration and Taxation Division, Police Department, Ministry of Interior (Statistical Yearbook of Thailand), Table 6: Aliens Registered in Thailand, by Nationality and Gender, 1990-1998, reproduced at Asian Research Centre on Migration ('ARCM') website, <http://www.chula.ac.th/institute/ARCM> (9 June 2001).

permanent residents are Chinese, Indian, English, Vietnamese, Japanese and USA as set out in Table A below.

Table A: Major Categories of Aliens Registered in Thailand by Nationality, 1990, 1995 and 1998[2]

	1990	1995	1998
China	250,043	229,184	219,674
India	6,107	6,105	6,210
England	5,239	5,290	5,444
Vietnam	3,428	3,163	2,929
Japan	2,534	2,578	2,639
USA	2,282	2,292	2,349

The following tables B and C provide some estimates of temporary resident permit holders in Thailand. The Thai authorities reported that as at June 2000, there were between 57,082 and 74,552 temporary work permit holders in the business and investment categories. Of the 74,552 global migrants and liberal migrants on work permits, the largest numbers were from Japan, the United States of America, China, India and the United Kingdom.

Table B: Number of Foreign Work Permit Holders in Business and Investment categories in Thailand in 2000[3]

Category	Number
Professional, technical and related workers	24,397
Administrative and managerial workers	27,599
Clerical and related workers	592
Sales workers	652
Service workers	1,384
Agriculture, animal husbandry, forestry workers, fishermen	246
Production workers, transport, equipment operators and labourers	2,212

[2] Figures are taken from Table 6, ibid.

[3] Figures are taken from Table 4: Employed Persons By Occupations, Nationals and Immigrant Workers, 1986-2001, ILO Website, using statistics from Alien Workers Registration Office, Department of Employment, Ministry of Labour and Social Welfare, http://www.ilm.cdtel.fr/english/ilmstat/table04.asp (29 August 2001).

Table C: Foreign Work Permit Holders by Citizenship in Thailand in 2000[4]

	Number	Japan	USA	China	India	UK
2000	74,552	16,071	6,548	6,520	6,506	5,752

Table D below contains the number of work permits issued to Burmese, Laotian and Cambodian irregular migrant workers in 1996, 1998 and 2001. More than 90 percent of the work permits were issued to Burmese irregular migrant workers in Thailand in 1996. In 1998, one-year work permits were issued to 89,862 irregular migrant workers. In 2001, a sudden reversal of policy saw the registration of 562,527 irregular migrant workers. Once again, almost 80 percent of the work permits were issued to irregular migrant workers from Burma while Laotian and Cambodian workers shared the balance of the work permits issued.

Table D: Number of Work Permits Issued to Burmese, Laotian and Cambodian Irregular Migrant Workers in Thailand, 1996, 1998 and 2001

	Burmese	Laotian	Cambodian	Total
1996[5]	256,492	11,594	25,566	313,942
1998[6]				89,862
2001[7]	448,988	58,411	55,128	562,527

Before the registration in 1996, an official Thai government survey in the same year recorded 733,640 irregular migrant workers in Thailand.[8] Official

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[4] Figures are taken from Table 2: Employed Persons By Sex and By Citizenship, Absolute Numbers, 1986-2001, ILO Website, ibid.

[5] Figures are taken from Ministry of Labour and Social Welfare, Table 10: Registration of Foreign Workers from Burma, Laos and Cambodia in Thailand: 1 September 1996 to 30 November 1996 at ARCM website, above n 1.

[6] Supang Chantanavich, 'Thailand's Responses to Transnational Migration during Economic Growth and Economic Downturn' (1999) 14 *Journal of Social Issues in South East Asia* 159, Table 2.

[7] Figures are taken from Committee for the Administration of Illegal Migrant Workers in Thailand, Table: Registration Results according to Industry (24 Sept – 25 Oct 2001) at the ARCM website, http://www.chula.ac.th/institute/ARCM/registration2001.html (3 July 2002).

[8] From Yongyuth Chalaemwong, *An Estimated [sic] of Undocumented Migrant Workers in Thailand* (1996) available at ARCM website, above n 1, Table 9. The estimated numbers by region are 99,176 in the south; 167,822 in the north; 14,016 in the central; 5,838 in the northeast; 83,843 in the outskirts of Bangkok, 38,875 in the east; 48,730 in the west; and 275,340 in Bangkok.

estimates of irregular migrant workers escalated to two or three million before the 2001 registration.[9] Irregular migrant workers from Burma often enter and work in Thai border towns, villages and provinces nearest to their homes, villages, towns or states in Burma. Consequently, the Shans and Karennis from Shan State and Kayah State predominate in Chiang Rai and Chiang Mai provinces in the north; the Burmans, Karens, Mons and Tavoyans move from Rangoon and Irrawaddy Divisions, Mon State, Karen State and Tenasserim to Tak province in the northwest and all the way down from Kanchanaburi to Mahachai and Ranong in the south.[10] However, many of the ethnic groups are represented in major centres such as Chiangmai in the north and Mahachai in the south.[11] They include Karen, Lahu, Lisu, Wa, Palaung, Akha and Kachin.

In the mid 1980s, about 60,000 Mons and Karens and 250,000 Burmans fled to Thailand to escape intensified Burmese military offensives against the ethnic minorities.[12] At the time, about 20,000 lived in refugee camps. In the wake of repeated offensives, the numbers mushroomed to about 120,000 during the 1990s.[13] At the end of 2000, there were 104,299 Burmese persons of concern in refugee camps.[14] The majority were Karens with a smaller number of Karennis.[15] Since 1996, about 100,000 more people, mostly Shan

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[9] *Bangkok Post*, 'Government "Failing on Illegal Immigration"', 10 November 2001; Penchan Charoensuthipan, 'PM Could Head New Agency Managing Illegal Aliens', *Bangkok Post*, 28 September 2001; Penchan Charoensuthipan, 'Registration of Alien Workers', *Bangkok Post*, 19 August 2001 and Yuwadee Tunyasiri and Penchan Charoensuthipan, 'All Alien Workers to Register by Sept 29', *Bangkok Post*, 29 August 2001.

[10] Human Rights Documentation Unit and Burmese Women's Union, *Cycle of Suffering: A Report on the Situation for Migrant Women Workers from Burma in Thailand, and Violations of Their Human Rights* (2000) 41, 49-54 ('HRDU and BWU'); Jennifer S. Thambiyah et al (eds), *Dignity Denied* (2000) 14-15; CARE Thailand/Raks Thai Foundation, *Migrant Workers and HIV/AIDS Vulnerability Study Thailand* (1999) 21, 29-30, 41.

[11] Ibid, HRDU and BWU, 50 and 54.

[12] Therese Caouette, Kritaya Archavanitkul and Hnin Hnin Pyne, *Sexuality, Reproductive Health And Violence: Experiences of Migrants from Burma in Thailand* (2000) 29-31.

[13] Human Rights Watch, 'Burmese Refugees in Thailand at Risk: Press Backgrounder' 6 May 2000 at http://www.hrw.org/press/2000/thaiback0506.html, 2. (10 April 2002).

[14] UNHCR, *Women, Children and Older Refugees: The Sex and Age Distribution of Refugee Populations With a Special Emphasis on UNHCR Policy Priorities* (19 July 2001) at UNHCR Website, http://www.unhcr.ch/, 13, Table 2: Refugee population by country of asylum, origin, sex and age, end 2000 and Table 1, page 8 for refugee population by country of asylum, sex and age, end 2000.

[15] According to a map of the camp sites and statistics provided by the Burma Border Consortium in February 1998, Karennis comprised a total of 11,903 in 4 camps (Camps 2, 3, 4 and 5) in 2 sites while Karens comprised a total of 93,321 in 16 camps including 4,378 in 2 camps on the Burma side of the border.

and other minorities from the Shan State found shelter in temporary 'settlements' at the Thai border.[16] They had fled forced relocations as the Burmese military fought with the Shan resistance.[17] These settlements are not regarded as refugee camps. Thai authorities do not regard these people as persons of concern but allege that they have fled for economic reasons.[18]

There are nine major ethnic minorities in Thailand.[19] They are the Akha, Lahu, Lisu, Yao, Hmong, Karen, Lua, Khamu and H'tin. Smaller ethnic minorities include Malabri, Palong, Tongsu, Thaluu, Chinho and Thai Yai.[20] Official estimates of Thai ethnic minorities vary significantly. The 1995 Thai Social Welfare Department Population Survey counted 853,274 ethnic minority people; the 1999 Population Registration Office Survey found 991,122 ethnic minority persons; and the 1999 Department of Local Administration Survey supported by the Miyazawa Fund arrived at the

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[16] Human Rights Watch, above n 13, 2.

[17] The Shan Human Rights Foundation, *Dispossessed: Forced Relocation and Extrajudicial Killings in Shan State* (1998) for a village by village, location by location account of the events between 1996 and 1998, a continuation of the 'Four Cuts' strategy of the SLORC developed since 1962 to deny food, funds, intelligence and recruits to resistance armies. See also Karen Human Rights Group ('KHRG'), 'Exiled at Home: Continued Forced Relocations and Displacement in Shan State' (#2000-03, 5 April 2000); KHRG, 'Killing the Shan' (#98-03, 23 May 1998); KHRG, 'Forced Relocation in Central Shan State' (#96-23, 25 June 1996). See also Subin Khuenkaew, 'Army Worried Over Influx of Shan', *Bangkok Post*, 6 February 2001 regarding forced relocations, this time of Wa people from the North to Mong Hsat in Burma near Fang and Mae Ai districts in Thailand, causing another wave of some 30,000 Shan people to cross into Thailand, with 120,000 more expected to arrive in 2001.

[18] Subin Khuenkaew, 'Thousands of Evicted Shan to Ask Thaksin for Refugee Status' *Bangkok Post*, 10 October 2001 estimated the number of Shan refugees who fled into Thailand between 1996 and 1998 at 300,000 and reported that the UNHCR had agreed to accept them to refugee camps; Subin Khuenkaew, 'Refugees in Limbo' *Bangkok Post*, 22 October 2001 cited allegation by the National Security Council Chief, Kachadpai Buruspat.

[19] Anchalee Singhanetra-Renard, 'Indo-China Subregional Highland Peoples Programme' in UNDP-Highland Peoples Programme, *Overview of Highland Minorities in Mainland Southeast Asia (4/5)* (1998) at http://www.unv.org/projects/highland/mino98d.html (13 December 2002).

[20] The 1999 Thai Population Registration Office Survey divided the highland population into three groups and included the Malabri among the major ethnic groups. See Chainarong Sretthachau and Suppachai Jarernwong, 'Citizenship, Ethnic Identity and State Policy: Thai or Non-Thai for the Hilltribe People?' (Paper presented at the 7th International Thai Studies Conference 'Thailand: Civil Society?', Amsterdam, The Netherlands, 6 July 1999) 4. However the dwindling numbers estimated at 180 of this ethnic minority led the UNDP-HPP to group them with the Palong or Padorng and the Shan or the Thai Yai.

lower figure of 747,847.[21] In 1995, Thai authorities established that 197,623 or 23.16% of 853,274 ethnic minority people possessed Thai nationality.[22] Since then the numbers of ethnic minority people holding Thai nationality continue to vary but all estimates hover between 250,000 or 300,000 in 2000.[23] This means that at least half a million ethnic minorities in Thailand are *de jure* stateless.

The hierarchy of aliens in Thailand is comprised of migrants and indigenous minorities. There are about 350,000 global and liberal migrants at the top of the hierarchy. They are courted so that Thailand, as a developing state, may realize the Universal Dream.[24] Below them are, at least, three million transnational migrants comprising regular and irregular migrant workers, persons of concern and unrecognized persons of concern. The number of irregular migrant workers currently fluctuates between two and a half million and three million. This depends on the number who transform into regular migrant workers from year to year. They are the 'intruders' who want a piece of the economic pie in Thailand. The 500,000 *de jure* stateless Thai ethnic minorities are the fall out of the national security concerns in past decades. In their place, irregular migrant workers are currently regarded as a security risk or a socio-economic burden or both.[25]

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[21] Ibid, Sretthachau and Jarernwong. The social welfare survey was part of the Master Plan for community development on environment and drug control in the highlands. The population registration survey classification estimated that Karen, Hmong, Yao, Akha (Akka), Lahu, Lisu, Lua, Tin (H'tin), Khamu and Malabri comprised 774,316 people (78.13% of total ethnic minority population), Palong (Padorng), Tongsu, Thaluu, Chinho, Thai Yai (Shan) and others comprised 59,088 people (5.96%) and ethnic Thai lowlanders comprised 157,718 people (15.91%). The local administration department is part of the Ministry of the Interior.

[22] Ibid.

[23] See Suppachai Jarernwong, 'Citizenship and State Policy: How We Can Move Beyond The Crisis?' (Paper presented at Asia-Pacific Youth Forum 'The Crisis and Beyond: Can Youth Make a Difference?', Chiang Mai, Thailand, 22 – 28 November 1999) 2 that as of 1997, 214,127 (less than 30%) out of 774,316 ethnic minorities are Thai nationals; Malee Traisawasdichai, 'Hilltribes Take Woes to Denmark', *The Nation*, 12 July 1999 reported that 30% or about 300,000 out of 834,000 hilltribes have Thai citizenship; *The Nation* 'Citizenship Rules for Hilltribes Eased', 4 May 2000 quoted the Director-General of the Local Administration Department, Parinya Nakchattree, that the department had granted Thai citizenship to 235,025 hilltribe people since 1974 and is considering the status of 100,000 more; *The Nation* 'A Sad Chapter of Uncertainty Ends for Hilltribes' 12 September 2000 reported that a 'total of 182,065 highland people in 20 provinces were registered as Thai nationals between January 2, 1975 and March 20, 1992'.

[24] See Chapter Five, 136-37, including 137, n 90.

[25] See for example, Editorial, 'Prison Breakout Shows Rising Foreign Threat', *The Nation*, 24 November 2000 alleged that the real threat is from illegal and legal workers from neighbouring countries who have found Thailand to be a place where they can earn a

Altogether, these groups add up to about three and a half million aliens with restricted or illegal immigration status.

1.1. *Women and Children*

This section briefly identifies women and children in the hierarchy of migrants. They are women and children with permanent resident status, Burmese transnational migrant women and children and persons of concern and Thai ethnic minority women and children. The focus is on Burmese irregular migrant women and children.

Table E sets out relevant figures on permanent residents in Thailand according to nationality and gender in 1990, 1992 and 1995.[26]

Table E: Aliens Registered in Thailand by Nationality and Gender, 1990, 1992 and 1995

	1990 Male	1990 Female	1992 Male	1992 Female	1995 Male	1995 Female
England	3,543	1,696	3,562	1,717	3,556	1,734
China	161,942	88,101	155,908	85,180	148,201	80,983
Vietnam	2,083	1,345	2,015	1,308	1,908	1,255
India	4,606	1,501	4,576	1,511	4,563	1,542
Japan	1,927	607	1,952	613	1,966	612
USA	1,709	573	1,714	574	1,715	577
Singapore	167	178	172	177	174	179
Canada	103	109	122	113	123	115
Burma	662	444	662	442	661	443
Cambodia	-	-	-	-	-	-
Laos	87	76	87	75	87	75

Far fewer women and girls than men and boys were registered as Thai permanent residents between 1990 and 1995. Women and girls formed about half of English permanent residents, one third each of Chinese and

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living with little, if any, disturbance from law enforcement authorities and the government has to weigh the economic benefits of foreign workers with long-term national security and the social burden the country has to bear; Editorial, 'Foreign Labour Deserves Better', *Bangkok Post*, 5 November 1999 noted that the Thai government claimed that migrant workers were a significant burden on the public health care system with 50 million baht being spent each year on treating foreign workers.

[26] Figures are taken from Table 6, above n 1.

Vietnamese permanent residents, one quarter of Indian, Japanese and USA permanent residents. There were marginally more females than males from Canada in 1990. The number of Singapore females consistently exceeded males by a tiny margin from 1992 to 1995. In 1995, there were 443 female and 661 male permanent residents from Burma, 75 female and 87 male permanent residents from Laos. No figures were available for Cambodians.

These statistics raise questions as to why more males were granted permanent resident status. The criteria for permanent residence suggest two reasons. First, women are cast as dependants for two categories of applicants. An applicant who is a foreign national with a Thai wife and children must furnish proof of his employment and income.[27] The Thai husband of a foreign wife who is applying also has to provide evidence of his employment and income.[28] The foreign wives and children of male resident permit holders may apply for permanent residence.[29] But where the wives or mothers are the holders of resident permits, the foreign husbands and children are not eligible. Second, more foreign husbands may qualify for permanent residence on the basis of ability to support Thai wives and children while fewer Thai husbands are able to prove that they can support foreign wives and children. The criteria for the other categories, business, employment and academic, also support the proposition that independence is the criterion. Such criterion privileges male foreign nationals. Hence, it would seem that the permanent residency criteria are either *de jure* or *de facto* gendered.

In 1998, 34,687 irregular migrant women workers and 55,175 irregular migrant male workers received work permits.[30] Of the 34,687 women, 34,283 were domestic workers.[31] The figures from the registration of irregular migrant workers in 2001 are even more revealing. They are set out in Table F below. It is clear that almost three-fifths of the work permits were issued to Burmese men in 2001. However, nine out of ten work permits for domestic services were issued to Burmese women. Between one-quarter and one-third of work permits were issued to women in fishing and fishing related industries, pottery, agriculture, construction, water

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[27] See 'How to Apply for Permanent Residence Permit' at Thai Embassy Website, http://www.thaiembdc.org/consular/con_info/restpmit/extvisa.htm (10 December 2001).

[28] Ibid.

[29] Ibid.

[30] Chantanavich, above n 6.

[31] Ibid.

transport, animal husbandry, rice milling and mining. Less than half of the work permits were issued to women in other industries.

Table F: Work permit registration of Burmese irregular migrant workers according to industry in Thailand (24 Sep-25 Oct 2001) [32]

	Male	Female	Total
Domestic Work	6,436 (10.7%)	53,744 (89.3%)	60,180
Agriculture	61,594 (68.3%)	28,595 (31.7%)	90,189
Mining	938 (71%)	383 (29%)	1,321
Pottery	2,248 (66.6%)	1,128 (33.4%)	3,376
Construction	28,910 (71.7%)	11,411 (28.3%)	40,321
Rice Milling	4,621 (78.3%)	1,279 (21.7%)	5,900
Animal Husbandry	17,035 (75.5%)	5,525 (24.5%)	22,560
Fishing & Seafood	50,523 (64.6%)	27,637 (35.4%)	78,160
Water Transport	7,072 (79.3%)	1,851 (20.7%)	8,923
Others (with employers)	64,535 (54.6%)	53,757 (45.4%)	118,292
Others (without employers)	11,211 (56.7%)	8,555 (43.3%)	19,766
Total Number	255,123 (56.8%)	193.865 (43.2%)	448,988

The gendered division of work permits issued is plain with respect to domestic work. It is regarded as women's work in the private domain of the family. For the other 8 industries, it is less clear. There are two possibilities. One is to say that they are male gendered. For example, male workers traditionally dominate construction and mining industries. In the fishing and related industries, fishing boat crew are also male. The other possibility is to

[32] Figures are from the Committee for the Administration of Illegal Migrant Workers in Thailand, Table: Registration Results 2001, above n 7.

say that the industries are gender neutral. Agricultural workers may be male or female. The first possibility implies that there is a gendered division of labour at play. The second indicates a gender bias in the selection process for work permits. Hence, the labour immigration criteria for regular transnational migrant workers are either *de jure* or *de facto* gendered.

Despite the paucity of reliable government statistics, non-governmental organizations suggest that women form over half of the migrant worker population.[33] That would mean over one million are women if there were two million irregular migrant workers before the 2001 registration. Or, over one and half million are women if there were three million irregular migrant women workers. If they are correct, more women than men remain in an irregular situation after work permits were issued. This was almost certainly the case in 1999 when industries dominated by women such as domestic work, restaurants and retail jobs, were excluded from the types of work open to foreign workers.[34]

Table G: Number of Work Permits Issued to Irregular Migrant Workers by Industry in 1996[35] and 2001[36] in Thailand

	Construction	Agriculture	Fishing & Related	Domestic Work	Industrial Production
1996	101,484	78,665	51,923	34,283	22,547
2001	103,124	99,578	47,756	81,045	

Table G sets out the number of work permits issued to irregular migrant workers in 1996 and 2001 in the main industries. In 1996, even though domestic work did not feature significantly in the survey, domestic workers received the fourth largest number of work permits after those in the construction, agriculture and fishing and related industries. A comparison between the 1996 and 2001 work permit figures reveals that most work permits consistently went to the agriculture and fishing industries while work permits for the construction industry slumped after the 1997 financial

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[33] Thambiyah et al, above n 10, 3; HRDU and BWU, above n 10, 17.

[34] See Thai Government Cabinet Resolution, 3 August 1999, Thai Government Official Website, http://www.pmoffice.go.th regarding issue of 86,895 one-year work permits for 37 provinces and 18 types of jobs. (3 April 2002).

[35] Figures are taken from Ministry of Labour and Social Welfare, Table 10: Registration of Foreign Workers, above n 5.

[36] Figures are taken from the Committee for the Administration of Illegal Migrant Workers in Thailand, Table: Registration Results 2001, above n 7.

crisis. Agriculture and fishing and fish related industries are critical industries of the Thai economy.

It is, therefore, not surprising that the number of work permits for those industries increased by 14.5% and 50.5% respectively, from 1996 to 2001. For domestic work, the number increased 75.5% from 1996 to 2001. Using the sex ratio of the 2001 work permit figures as a guide, it would seem that up to two-thirds of the work permits were issued to men in 1996. Only the relatively large increase in work permits for domestic work led to a marginal increase, to more than one-third for women in 2001. The inescapable conclusion is that more than half of the migrant workers from Burma who remain irregular in Thailand after the 2001 registration are women.

According to the ILO, there were about 194,180 foreign child workers in Thailand in 1996, mostly from Burma, Laos and Cambodia and working in construction, small shops, factories, agriculture, and domestic work.[37] According to some reports, the numbers of Burmese child workers have increased to between 300,000 and 350,000 by 2000.[38]

The UNHCR provides gender statistics for the Burmese persons of concern in the Karen and Karenni refugee camps in Thailand. Table H sets out the figures by age and gender at the end of 2000.

Table H: Burmese Persons of Concern in Refugee Camps in Thailand by Age and Gender, 2000[39]

	Female	Male
0-4 yrs	6,720	6,997
5-17 yrs	18,035	18,919
18-59 yrs	24,062	26,048
60+ yrs	1,728	1,804
Total	50,545	53,768

[37] Vitit Muntarbhorn, 'Children and Displacement: The Interface between Child Rights and Asia', Background paper of the Regional Consultation on Children and Displacement, organized by Thailand's National Youth Bureau, Bangkok, 26 – 28 January 2000, 12.

[38] Wassayos Ngamham, 'Illegal migrants to face new round up', *Bangkok Post*, 21 June 2000 reported that there were some 350,000 Burmese children under 13 begging in the streets; Supamart Kasem, 'Penalise factories, says Sant', *Bangkok Post*, 8 July 2000 reported the Deputy National Police Chief, Police-General Sant Sarutanon as saying that there were more than one million illegal aliens, including some 300,000 children, causing social problems for the country.

[39] Figures are taken from UNHCR, above n 14, Table 2.

Accordingly, 50,671 or 48.5% are below the age of 18 and women and girls comprise 50,545 or 48.3% of this refugee camp population. Girls and women form slightly less than half the population in each age group. However, gender, age and other statistics are not available for the Shan 'settlements' along the Shan State border in Thailand.

Age and gender statistics for the Akha, Lahu, Lisu, Yao, Hmong, Karen, Lua, Khamu, Htin, and other smaller ethnic minorities in Thailand are not easily available. The number of ethnic minority children and women without Thai nationality is equally uncertain. However, a recent health survey among the Thai ethnic minorities estimated that about 380,000 or 46.9% of the total population are young people and children below the age of 20.[40] Recent estimates place the number of children of ethnic minorities without Thai nationality at about 150,000 or less than one third of the total population of *de jure* stateless ethnic minorities in Thailand.[41] If ethnic minority women and girls form half the total ethnic minority population, they would only make up about 0.75% of the Thai population of over 60 million. Yet it is estimated that about 10% of women and girls in Thailand caught up in the sex industry are from ethnic minorities.[42]

Distinctions between these categories of migrant women in the hierarchy are not based on any one identity or characteristic or a mathematical addition.[43] Instead they are based on a multiplicity of identities and characteristics. Class, nationality, property and education seem to be definitive. For example, there are a small number of Burmese women who are permanent residents and a huge population who are irregular migrant workers. Race is still an element even though it overlaps with nationality. For example, women from the USA and England are likely to be white although some of them could also be yellow or brown or black. The hierarchy highlights the fact that the experience of any one group of migrant women does not represent those of all other groups.[44] These categories of

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[40] Bureau of Policy and Health Planning, *Hilltribe Health Survey* (1998).

[41] *The Nation*, 'Citizenship is Gift Sought on Children's Day', 9 January 2000.

[42] Teena Amrit Gill, 'Thailand: Hilltribes Still Battling Discrimination', *Inter Press Service* at http://www.ipsnews.net/wconference/note15.shtml (15 December 2002).

[43] Angela Harris, 'Race and Essentialism in Feminist Legal Theory' in Richard Delgado (ed), *Critical Race Theory: The Cutting Edge* (1995) 253, 255.

[44] Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' in Chandra Talpade Mohanty et al (eds), *Third World Women and the Politics of Feminism* (1991) 51, 70 and Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Journal* 1, 3-4.

women are treated differently and granted different rights according to whether they have been included within the broader notion of membership of a community within Thailand. Women and children with permanent resident status are mainly from developed states such as USA, England and Japan, and developing states, including China, India and Vietnam. These women have achieved such membership in Thailand beyond traditional citizenship. Some of them have entered as dependants of spouses who are global or liberal migrants. Their children also enter as dependants. Family unity, in relation to global and liberal migrants, is respected.

The invidious position of Burmese migrant women underscores the role of Thai migration law in excluding some women from membership. The independent/dependent dichotomy does not apply to them. Regular transnational migrant women workers from Burma must hold work permits in their own right. These work permits are for short periods of six months or one year. They may be renewed. If they are not, these women simply revert to being irregular migrant workers. The gendered division of labour underscores the operation of the public/private dichotomy to their disadvantage. For example, domestic work is regarded as women's work in the private domain. Low economic value is attached to such work. Hence, domestic workers' immigration status is changeable. Children of Burmese regular transnational migrant workers are not permitted to enter or remain as dependants. They are illegal in Thailand. Thus, many become irregular child workers. Family reunification as envisaged under the *1990 Migrant Workers Convention* is denied to these transnational migrant workers even whilst their immigration status is regular. Some Burmese irregular migrant women have spouses who managed to secure work permits. However, the situation of these women is as insecure as that of irregular women workers and irregular migrant child workers.

2. Burmese Citizenship Laws: Children and Women

The provisions of both the *1948 Union Citizenship Act* and the *1982 Citizenship Law* are considered in this study because the ethno-political conflict in Burma began with the birth of the Union of Burma in 1948. The citizenship laws were tightened in 1982 just before or around the time the military junta intensified offensives against the ethnic resistance groups. Refugees and irregular migrant workers who fled or left Burma in the wake of these offensives would be affected by these changes.

Patriarchy and marriage underpinned provisions of the *1948 Union Citizenship Act* on acquisition and loss of citizenship. The Act defined 'father' as the 'father of a child who is legitimate' and 'parent' 'to include an adoptive parent and the mother of an illegitimate child, provided that the adoptive parent or the mother has the lawful custody of such child or children'.[45] Therefore, a child born out of marriage in Burma could also be *de jure* stateless even though the maternal grandparents had made their permanent home in Burma and the child and the natural mother lived permanently in Burma.[46] A child born out of marriage outside Burma, of a mother who was a Burmese citizen, also did not acquire Burmese citizenship.[47] Such a child might be rendered *de jure* stateless unless the mother was able to return to Burma or acquire citizenship of the state of birth or another state. Similarly children born out of marriage in Burma could be rendered *de jure* stateless if the mother was a foreigner and the children were unable to acquire the citizenship of her state or that of any other state.[48] There were no provisions in the *1948 Union Citizenship Act* for acquisition of Burmese citizenship *jus soli* where the child born on the territory, would otherwise be *de jure* stateless. The *1982 Citizenship Law* also does not provide for such an eventuality.

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[45] Section 2.

[46] Section 4(2).

[47] Section 5(a) provided that a child born in Burma one of whose parents was a citizen acquired Burmese nationality by birth but if the father was a foreign national, the child had to renounce any other citizenship within one year of majority. Section 5(b) provided that a child born outside of Burma of a Burmese father had Burmese citizenship by birth if the child's birth was properly registered at a Burmese consulate. Section 5(c) provided that where the child was born outside of Burma to one parent who was a Burmese citizen in the service of Burma, the child had Burmese citizenship but if the father is a foreign citizen, a proviso similar to that in section 5(a) applied. Section 12(1) provided that the Burmese parent of a child, born abroad could apply for citizenship of the minor child in his or her custody on resuming domicile in Burma.

[48] Section 12(3) provided that those born in and permanently resident in Burma to foreign parents also residing permanently in Burma could apply for citizenship before 1 April 1955 or within one year after attaining majority provided that the applicants were of good character and not under any disability (i.e. being a minor, lunatic or idiot as defined in section 2 of the *1948 Union Citizenship Act*). The mother could apply for naturalization under section 7 if she was or when she reached eighteen, had 5 years' continuous residence in Burma, was of good character, was able to speak an indigenous language and intended to reside in or serve Burma or its constituent or a religious, charitable or commercial undertaking in Burma. Although there was no reason why the natural mother could not include her child or children born out of marriage in her application for naturalization, a strict reading of section 7 with section 9 could preclude such application since they referred to 'alien' and 'applicant' but not to 'parent' as defined in section 2.

Unlike the *1948 Union Citizenship Act*, the *1982 Burma Citizenship Law* is silent on children born outside the boundaries of marriage.[49] Hence, children born out of marriage to Burmese women citizens outside Burma may no longer be able to acquire Burmese citizenship even if they return home with their mothers. Even if they were to be adopted by Burmese citizens, they would not acquire Burmese citizenship. In such circumstances, they would be *de jure* stateless unless they have or are able to acquire the citizenship of the state of birth or that of another state. Even children born out of marriage within Burma, whether to women who are Burmese citizens or foreigners could be *de jure* stateless.[50]

Children could also be rendered *de jure* stateless under the provisions of the *1982 Citizenship Law* on cessation and revocation of all three tiers of citizenship.[51] It is not clear whether the children of citizens also cease to be citizens, where the citizens concerned lose their citizenship.[52] But minor children also cease to be associate citizens, where both parents who are associate citizens or the parent who hold associate citizenship, lose or loses such citizenship.[53] Similarly, where both parents who are naturalized citizens, or the parent who is a citizen loses citizenship, associate citizenship or naturalized citizenship, minor children as well as children above eighteen who have yet to take the oath of allegiance, also lose citizenship.[54]

The revocation provisions appear to gender neutral. But in fact, the political offences reflect male characteristics and concerns. Trading or communicating with enemy countries or hostile organizations or providing secret information to them, are usually activities in the 'public' world dominated by men. Granted it does not mean that women could not be involved or do not participate in such political activities, especially during the ongoing conflict in Burma. But the point is that the provisions ignore the fact that it is usually the mother who takes care of minor children. This is the case where following the father's loss of citizenship as a result of such political involvement, the children also lose their citizenship but the mother

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[49] See section 2 of the respective Acts.

[50] The definition section 2 is silent on legitimacy of children but the tenor of sections 5 and 7 on citizenship by birth indicates that it is based on the marriage of parents.

[51] See sections 16 and 34 of the *1982 Citizenship Law* on cessation of citizenship for full citizens and associate citizens; sections 35 and 58 for revocation of citizenship for associate citizens and naturalized citizens; and sections 18, 36 and 59 for revocation of citizenship for full citizens, associate citizens and naturalized citizens respectively.

[52] Section 17 provides that the citizenship of a citizen by birth shall not be revoked, except in the case of cessation of citizenship under section 16.

[53] Section 29(a) and (b).

[54] Section 51.

retains Burmese citizenship. As a citizen with rights, she has every reason to stay. However, the position of her husband and children may be untenable if they no longer have any rights in Burma. As a mother who wishes to care for her children, she may be compelled to go with her husband and/or children should they decide to leave Burma. By doing so, she may ultimately forfeit her citizenship.[55] Thus the construction of children as dependants of their fathers may result in *de facto* discrimination against their mother. This belies the facial gender equality of these revocation provisions.

Under the *1948 Union Citizenship Act*, a woman who married a foreign citizen did not lose Burmese citizenship.[56] This minimized the risk of a Burmese woman citizen being rendered stateless, upon the end of the marriage through death of or divorce from her foreign husband. Even if she had acquired the citizenship of her spouse's state by marriage, she would not lose Burmese citizenship.[57] Furthermore, women and children would not lose their Burmese citizenship, even if the Burmese citizenship of their spouses and parents were revoked.[58] However, gender equality did not extend to foreign women who married Burmese citizens. Women who acquired Burmese citizenship by marriage could lose such citizenship if they

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[55] Sections 16 and 34.

[56] Section 10. However, section 11(1) provided that a foreign woman married to a Burmese citizen could apply for Burmese citizenship after one year's continuous residence in Burma. Under section 11(2), she could be granted citizenship status provided the Minister was satisfied that she was not under a disability, of such bad character as to prejudice the public interest and if she undertook to renounce her foreign national status. Furthermore, under section 11(4), the children born before the grant of the citizenship could be included in the certificate on the joint application of the foreign women and her Burmese spouse. The foreign husband of a Burmese citizen was not eligible under this provision but had to apply for naturalization under section 7.

[57] Section 14 provided that '[a] citizen of the Union, not being under a disability, who obtaining a certificate of naturalization in a foreign State or by a voluntary or formal act other than marriage becomes naturalized in any other foreign State, shall forthwith be deemed to have ceased to be a citizen of the Union'.

[58] Section 18 provided for the revocation of a certificate of citizenship or naturalization obtained by false representation or fraud or concealment of material circumstances, or shown loyalty to Burma through act or speech. Section 19 set out additional grounds for revocation including (a) unlawfully trading with the enemy or enemy national during war, (b) being sentenced to twelve months' imprisonment or fine of one thousand kyats upon conviction for an offence involving moral turpitude within five years of grant of citizenship, (c) five years' continuous residence abroad not in the service of Burma and failing to register annually at Burmese consulate, or (d) failure to renounce citizenship of another state within prescribed period, or (e) was of such bad character, or (f) would injure the safety, public order or interest of Burma to allow such person to retain Burmese citizenship.

left Burma and resided in another state for five or more years.[59] They could be rendered *de jure* stateless unless they were able to reacquire their former nationality or to acquire another nationality.

Under the *1982 Citizenship Law*, women do not lose Burmese citizenship upon marriage with a foreigner.[60] However, the prohibition of dual citizenship means that if she acquires the nationality of her spouse upon marriage, she would lose Burmese citizenship. There is no similar provision for retention of Burmese citizenship by an associate woman citizen or a naturalized woman citizen who marries a foreigner. This implies that she may lose Burmese citizenship upon marrying a foreigner. The prohibition against dual citizenship also applies.[61] The absence of provisions for recovery of Burmese citizenship for any tier of citizenship also contributes to gender discrimination. It means that Burmese women who acquire the citizenship of their foreign husbands may be rendered *de jure* stateless if they were to lose the nationality of the spouse upon dissolution of marriage. However, it is much more critical for women who hold associate or naturalized citizenship because they may not be able to retain Burmese citizenship on marriage. Finally, women retain their Burmese citizenship upon cessation or revocation of their husbands' citizenship irrespective of the tier of citizenship. However, as previously explained, the effect of revoking the children's citizenship may result in *de facto* discrimination against their mothers. Hence, women in Burma may continue to be rendered *de jure* stateless by gender discrimination. These 1982 provisions, as a whole, may discriminate against women from ethnic minorities of Burma.

These gendered aspects of Burmese citizenship laws have far-reaching effects on irregular migrant women workers and female asylum seekers who fled or left for Thailand and other states. The 1982 citizenship cessation and revocation provisions were aimed at denationalizing male dissidents, particularly from the ethnic minorities. But children and women are directly or indirectly affected because they are cast as dependants of disloyal or anti-government male citizens. For example, the Mon, Karen and Burman people who fled to Thailand during the military offensives in the mid-1980s and who did not stay in refugee camps could be *de jure* stateless. The irregular migrant women and children who left Burma 'permanently' with their husbands and parents or on their own in the 1990s could be rendered *de jure* stateless even if they had been forced to leave. For example, in

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[59] *1948 Union Citizenship Act* s 19(c).

[60] Section 15(a).

[61] Sections 31 and 54 respectively.

October 2000, a Shan woman said that she had left Shan State ten years ago to join her husband who had fled to Thailand.[62] She had lost her Burmese identity card and her 15-year-old son also did not have one.[63] Theirs is not an unusual or an isolated incident. Shan women and children who fled the relocation sites in the Shan state since 1996 and who have become irregular migrants in Thailand, could also be affected.

The children of members of opposition groups such as the Communist Party of Burma or the Karen National Union may be rendered *de jure* stateless. For example, two Burman brothers aged 14 and 12 who were adopted by a former member of the Communist Party of Burma.[64] The adoptive father has been in the armed struggle in the jungle since 1966. Neither he nor his wife and his two sons, aged 25 and 23, possess Burmese identity cards.[65] The parents may well be full citizens being Burman, Karen or any other national race, and therefore their citizenship might not be revoked. But if the children were born in Thailand or are considered to have left Burma permanently with their parents, they could lose their citizenship by cessation or failure to acquire Burmese citizenship.[66] In another example, a Karen woman recounted that her family left Burma because they had no work; the military taxed them heavily and also forced them to provide free labour. Their 9-year-old daughter was born in Burma but their 3-year old son was born in Thailand.[67] Many other families have also fled Burma for similar reasons. In fact, the ILO has investigated and condemned forced labour in Burma.[68]

Such cases of Burmese children with uncertain citizenship are not unique. Between 1993 and 1996, the Mae Sot Hospital near the Thai-Burma border, reportedly delivered 2,202, 2,026, 2,031 and 2,077 'stateless' babies born to irregular migrant workers.[69] Other researchers found that 6,209 children were born *de jure* stateless in 17 Thai provinces to irregular migrant

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[62] Interview at Thai location on record with writer.

[63] Ibid

[64] Interview towards the end of 2000 at Thai location on record with writer.

[65] Ibid.

[66] Ibid.

[67] Interview towards the end of 2000 on record with writer.

[68] ILO Commission of Inquiry, *Report of the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)* at ILO Website, http:ilolex.ilo.ch/ (8 May 2002).

[69] See Irrawaddy, 'No Home, No Future', Vol. 5, No. 3 June 1997 at http://www.irrawaddy.org/database/1997/vol5.3/nohomenofuture.htm. (25 November 2001).

workers.[70] The Thai Ministry of Health reported in 2000 that 90% of the 8,000 children born to migrant workers were Burmese.[71]

The issue of whether someone has left Burma permanently is complicated. The possession of an identity card, especially an old one, may not be sufficient proof that a person is still a Burmese citizen. Two other factors are pertinent to the issue. One factor is the household registration records kept by village and town headmen. Where the names of persons have been removed from the registration records because they have left the village or town, the authorities can and do assume that they have left the state permanently. In June 2000, a Shan man who had fled to Thailand in the mid 1990s said that he had heard that his household registration had been cancelled after he left the township.[72] Another factor is the practice of Burmese military officials confiscating Burmese identity cards at border checkpoints.[73] Prior to 1998, Burmese citizens only had to show their identity cards.[74] Possession or retention of Burmese identity cards is important because they are proof of citizenship.

The problem is compounded by the fact that the Burmese authorities regard them as having left Burma unlawfully. [75] It was only in 1999 that the Burmese authorities have admitted that there are Burmese migrant workers in Thailand.[76] Proof of citizenship is likely to be a sticking point in disputes regarding deportations of Burmese irregular migrant workers from Thailand. According to Thai foreign ministry officials, Burmese authorities insist that names, home addresses in Burma, photos and identity cards must be

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[70] Ibid.

[71] Aphaluck Bhatiasevi, 'Illegal Alien Woes Blamed on Officials', *Bangkok Post*, 27 January 2000.

[72] Interview on record with writer.

[73] Ibid. This is corroborated by HRDU and BWU, above n 10, 46-47 that Burmese travelers into Thailand have to leave their citizenship cards and 60 kyats each in exchange for day passes at the border checkpoints. They may retrieve the identity cards when they hand back the passes on their return within the same day. See also KHRG, 'Exiled at Home' above n 17, 34, Interview No 4 where the Shan Buddhist farmer recounted his family's flight from a Hwe Mark Pun relocation site to Thailand in February 2000, "We crossed near Bang Ma village [Fang area]. Near the border we passed one Burmese gate. The Burmese soldiers took our ID cards because we told them, "We will go to Thailand in the morning and come back in the evening." But we didn't go back to collect our ID cards."

[74] Ibid.

[75] See Surichai Wun'gaeo, 'A Job Badly Done: Serious Effort Must Be Made to Put Migrant Worker Issues on a Firmer Footing and Avoid the Pitfalls of the Past and Present', *Bangkok Post*, 10 June 2001.

[76] Ibid.

submitted for verification.[77] Furthermore, Burmese nationals should have house registration documents.[78] Whereas, those from ethnic minorities would be investigated, and reports of such investigation, would be sent to Burma.[79] This indicates that irregular migrant workers from ethnic minorities are more likely to face scrutiny and rejection. The Karen Human Rights Group pointed out that the Burmese military had used the same tactic against the Muslim Rohingyas in 1992. Their identity cards were confiscated when they fled from Arakan State to Bangladesh in order to refuse them entry to Burma should the refugees later decide to return home.[80]

These gendered aspects of Burmese citizenship laws clearly discriminate against ethnic minority women and children who fled to Thailand as irregular migrant workers and persons of concern. Many of them are likely to be rendered *de jure* stateless by these bureaucratic and military practices unless they are able to acquire the citizenship of Thailand or of another state.

3. THAI NATIONALITY LAWS: CHILDREN AND WOMEN

Thai nationality law of the early 20th century reflected the public/private dichotomy, patriarchy and marital institutions prevalent in European and Western societies of the times. Women and children who were not dependants of men, the independent citizens, could be rendered *de jure* stateless.

De jure statelessness among children in Thailand has been subject to constant change in the twentieth century. The adoption of the *jus soli* principle in the *1913 Thai Nationality Act* masked the patriarchal bias of the *jus sanguinis* principle underpinning provisions on acquisition of Thai nationality at birth.[81] Thus, children born out of marriage to Thai women nationals in Thailand could acquire Thai nationality regardless of the

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[77] Bhanravee Tansubhapol, "Rangoon to Verify Status of Migrants: Wants List of Names Before Repatriation', *Bangkok Post*, 9 February 2002.

[78] Ibid.

[79] Ibid.

[80] KHRG, 'Exiled at Home', above n 17, 22-23.

[81] Section 3(1) provided that a child wherever born of a father with Thai nationality acquired Thai nationality; section 3(2) provided that a child born of a mother with Thai nationality and an unknown father acquired Thai nationality at birth; section 3(3) provided for acquisition of Thai nationality by birth on Thai territory.

nationality of the fathers. However, children born outside Thailand, to a mother with Thai nationality and a *de jure* stateless father, would be *de jure* stateless unless the child could acquire the nationality of the state of birth or that of another state.[82] *De jure* statelessness among children emerged momentarily in the mid-twentieth century reflecting the ebb and flow of migration connected to political upheavals of Thailand's neighbours struggling for independence from European colonial masters. In 1952, Thai nationality at birth was extended to children born outside of Thailand to women with Thai nationality and where the father was either unknown or *de jure* stateless.[83] That amendment effectively, albeit briefly, eliminated *de jure* statelessness among children under Thai nationality laws. This was quickly replaced by an amendment in the following year whereby a child born in Thailand could only acquire Thai nationality if the mother has Thai nationality.[84] Almost as quickly, the law was re-amended in 1957 to abolish the requirement that the mother of the child born on Thai territory had to have Thai nationality.[85] This amendment applied retroactively to cover the period from 1953 to 1956 to confer Thai nationality on children born on Thai territory.[86] As discussed in the previous chapter, the *jus soli* principle was retained in the *1965 Nationality Act*. However, the generous application of this principle was once again withdrawn in 1972. The amendments introduced restrictions that overtly targeted people with illegal or restricted immigration status.

The patriarchal construction of the *1972 Order No 337* meant that children born in Thailand, whose mother was a Thai national, would be deprived of or would not acquire nationality where the father was an illegal alien. However, children whose mother was an illegal alien but whose father was a Thai national would retain or acquire Thai nationality. Similarly, children born out of marriage in Thailand to illegal alien women would be deprived of Thai nationality and could be rendered *de jure* stateless even if their natural fathers were Thai nationals.

The *1992 Nationality Act (No 2)* provides for acquisition of Thai nationality at birth *jus sanguinis* to a child 'born of a father or a mother of Thai nationality, whether within or outside the Thai Kingdom'.[87] The

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[82] Ibid.

[83] *1952 Nationality Act* s 7(2).

[84] *1953 Nationality Act* s 7(3).

[85] Section 3.

[86] Section 3.

[87] Section 7 of the *1965 Nationality Act* as amended by section 4 of the *1992 Nationality Act (No 2).*

principle of sex equality, however, is reserved for men and women who already have Thai nationality or legal immigration status. The 1992 proviso states that:

> A person born within the Thai Kingdom of alien parents does not acquire Thai nationality if at the time of his birth, his lawful father or his father who did not marry his mother or his mother was (1) the person having been given leniency for temporary residence in the Thai Kingdom as a special case; (2) the person having been permitted to stay temporarily in the Thai Kingdom; (3) the person having entered and resided in the Thai Kingdom without permission under the law on immigration.[88]

This means that children born in Thailand whose mother is a Thai national and whose father an illegal alien could now acquire Thai nationality. Furthermore, children born out of marriage in Thailand whose mother is an illegal alien could acquire Thai nationality if their natural father is a Thai national. Children born out of marriage are also entitled to acquire Thai nationality at birth where the natural father is a Thai national.[89] However, the practical problem of proving paternity could deny them their legal right. If they are unable to acquire their mother's nationality, such children could be stateless at birth. It is the same for children born out of marriage whose mothers are *de jure* stateless. On the other hand, where the mother is a Thai national, children born out of marriage are entitled to acquire Thai nationality. Where the mother is a legal alien, the children born out of marriage are also able to acquire Thai nationality *jus soli* irrespective of the father's nationality.[90] Thus, discrimination against children of non-national women on the basis of illegal immigration status is not obvious.

Discrimination against children of women with illegal immigration status is not restricted to denial of the right to acquire Thai nationality *jus soli*. The 1992 amendments also proscribed the acquisition of Thai nationality *jus soli* where the natural father is an illegal alien. This is a perverse application of the principle of sex equality. The concepts of equality and non-discrimination are meant to be inclusive, not exclusive. From the feminist perspective, this means extension of rights previously denied or effective

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[88] Ibid, section 7 *bis* (2), Chapter Five, 167, inserted by section 5 of the *1992 Nationality Act (No 2)*.

[89] See the chart setting out the eighteen permutations on acquisition of Thai nationality at birth on the Thai Embassy website, http://www.thaiembdc.org/consular/con_info/con_inf.htm (6 August 2001).

[90] Ibid.

protection for rights granted.[91] But such extension of the proscription only serves to increase the number of children who may be rendered *de jure* stateless.[92] Even if they were able to acquire Thai nationality despite restricted or illegal immigration status, they could subsequently lose such nationality through revocation on grounds related to national security and interests.[93] Those who were born in Thailand of an alien father but not of an alien mother and those who acquired Thai nationality by naturalization could have their nationality revoked on similar grounds.[94]

De jure statelessness among women was also not a significant problem for foreign women who marry Thai nationals under early Thai nationality laws. They acquired Thai nationality by marriage.[95] Thai women could also retain Thai nationality upon marriage with foreigners.[96] However there was no provision for recovery of Thai nationality should they lose the nationality of their spouse upon death of or divorce from such spouse. Dual nationality is not prohibited under the 1965 and current Thai nationality laws but

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[91] Gayle Binion, 'Human Rights: A Feminist Perspective' (1995) 17 *Human Rights Quarterly* 509, 513.

[92] It could be an attempt to plug a perceived loophole in the *1972 Order No 337*, which only provided for non-acquisition of Thai nationality where the father is an illegal alien, or where the mother is an illegal alien in the case of a child born out of marriage. See also Committee on Feminism and International Law, *Final Report on Women's Equality and Nationality* (2000) International Law Association, 21 and 41-43, where the report commented on the case of *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 81 *International Law Reports* 139 regarding equal treatment of foreign wives and foreign husbands. The significance of this case that after the women successfully challenged the British immigration rules, the British government changed the immigration rules so that it became as hard for foreign wives to join their husbands settled in Britain as it already was for foreign husbands to join their wives. In effect, both Thailand and the United Kingdom apply the principle of equality in order to exclude and not to include certain categories or classes of non-nationals and aliens.

[93] *1965 Nationality Act* s 18.

[94] *1965 Nationality Act* ss 17(3) and 19(3) respectively. Another ground common to both categories is the commission of any act contrary to public order or good moral. Specific to those born of an alien father are five years' consecutive residence in country of his father's current or former nationality from day of becoming *sui juris* and evidence of his use of his father's nationality or of a foreign nationality or his active interest in his father's nationality or a foreign nationality. Specific to those who were naturalized are concealment of facts or making of statements false in material particular, evidence of use of former nationality, five years' residence abroad without domicile in Thailand and retention of nationality of country at war with Thailand.

[95] *1913 Nationality Act* s 3(4).

[96] *1913 Nationality Act* s 4 provided that a Thai woman who married a foreigner could renounce Thai nationality only if she acquired the nationality of her spouse.

exceptions to this principle apply under certain circumstances.[97] However, Thai women nationals who renounce Thai nationality when they marry foreigners may be rendered *de jure* stateless if they fail to recover Thai nationality after the dissolution of the marriage.[98] Alien women who acquire Thai nationality by marriage may also be rendered *de jure* stateless if their Thai nationality is revoked for, among other reasons, committing any act contrary to the public order or good morals.[99] Revocation of Thai nationality may extend to the children but not to the wives of those who acquired Thai nationality by naturalization.[100] In each of these cases, the persons deprived of Thai nationality could be rendered *de jure* stateless unless they have or can acquire the nationality of another state.

The gendered aspects of these changes in Thai nationality laws in the second half of the twentieth century have led to serious consequences for Thai ethnic minorities. Many from the ethnic minorities were not registered as Thai citizens pursuant to the 1956 Population Registration Rule because the remote regions were inaccessible.[101] The nationality amendments in the 1950s created some uncertainty regarding Thai nationality for their children. However, the retrospective application of the 1957 nationality amendment should have resolved the issue. Between 1969 and 1970, 119,591 persons in 16 provinces were registered as 'hilltribes'.[102] This was a reaction to the rise of Communism and communist activities in the highlands during the 1960s.[103] They were suspected of not being indigenous or of being disloyal to Thailand. Consequently, their children born on Thai territory were not granted Thai nationality to which they were entitled under the *1965 Nationality Act* regardless of their parents' nationality.[104] The *1972 Order No*

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[97] *1965 Nationality Act* s 14 provides that a Thai national who has acquired the nationality of his alien father or whose father is a naturalized Thai national, has to declare his intention to renounce Thai nationality within one year of reaching twenty years. The Minister has to grant such permission except where Thailand is involved in an armed conflict or war.

[98] Section 13 provides for formal renunciation by a Thai woman marrying a foreign national. Section 23 provides for recovery of Thai nationality upon dissolution of marriage on declaration in prescribed form before a competent official.

[99] Section 16(3). Other grounds are (1) the marriage was achieved by concealment of facts or making any statement false in material particular and (2) commission of any act prejudicial to the security or conflicting with the interests of the State or amounting to an insult to the nation.

[100] Section 19 [two].

[101] Sretthachau and Jarernwong, above n 20, 2-6.

[102] Ibid.

[103] Ibid.

[104] Section 7.

337 effectively prevented children born to 'hilltribes' from acquiring Thai nationality *jus soli*, The Order also revoked Thai nationality of those, including children born out of marriage, who might have acquired it under the *1965 Nationality Act*. Although the Order was prompted by the influx of refugees and immigrants from neighbouring states riven by war and conflict,[105] the Thai ethnic minorities were struck another blow. Children whose fathers or whose fathers' forebears had registered as Thai citizens in 1956 would not be affected even if their mothers had failed to do so. But those whose mothers or whose mothers' forebears had registered in 1956, would still have their Thai nationality revoked if their fathers or fathers' forebears had not done so. Hence, doubts were raised as to their immigration status and they were placed in the same category as those refugees and immigrants.[106]

Another citizenship registration exercise of the Thai ethnic minorities took place in 1992. The exercise made little difference but instead added conditions regarding residence, employment, national security and drugs. Consequently, even those, aged eighteen and over, whose parents were Thai nationals could no longer qualify for citizenship.[107] In 1996, the requirement of 5 years' residence was replaced by the ability to speak Thai.[108] The intention was to differentiate them from recent immigrants or refugees who are also ethnic minorities.[109] Instead, 'hilltribe' people with blue resident cards or white citizenship cards were arrested because they are unable to speak Thai.[110] This suggests that they were suspected of being recent immigrant or refugee ethnic minorities who had acquired (stolen, bought or otherwise) such cards. Since the ethnic minorities are restricted to the highlands and have less access to education, the language requirement was and remains a barrier to Thai citizenship. The language requirement arguably amounts to *de jure* and *de facto* discrimination against Thai ethnic minorities.

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[105] Sretthachau and Jarernwong, above n 20, 6.

[106] Ibid, 6-7 on subsequent registrations and surveys, such as where Thai nationality registration in 1974 was restricted to those born in Thailand whose parents had registered under the *1956 Population Registration Rule*; 1985-88 (the 'Singha Phu Khao' or Mountain Lion Project) to register all hilltribes; the 1990 Ministry of the Interior's Master Plan to control the environment and drugs in the highlands issued blue identity cards to those registered under the Singha Phu Khao Project which restricted their freedom of movement and did not grant them citizenship.

[107] Ibid 7.

[108] Ibid.

[109] Ibid.

[110] Ibid.

The gendered construction of successive nationality amendments and regulations rendered an unknown proportion of indigenous ethnic minorities in Thailand *de jure* stateless, growing progressively larger with each set of amendments. The inaccessibility of the highlands made the registration in 1956 less effective but the main effect was on the number of people from ethnic minorities who became Thai nationals. Ultimately, it was the patriarchal construction of the successive nationality laws that ensured the resulting *de jure* statelessness would be gender-based.

4. *DE JURE* STATELESSNESS IN THAILAND

In 1996, at least six waves of refugees and migrants from Burma were identified by the Office of Population Registration under the Department of Administration in the Ministry of the Interior of Thailand.[111] They are set out in Table I below.

Table I: Categories of Burmese Migrants in Thailand[112]

Category	Number	Status
Displaced Persons	47,735	Entered Thailand before 9 March 1976; number officially registered with Thai authorities in 1993
Illegal Migrants	130,000	Entered Thailand after 1976; number officially registered with Thai authorities
Labour Migrants	101,845	Work in border areas and residing with employers; number officially registered with Thai authorities
Asylum Seekers	91,500	Members of various ethnic groups who fled SLORC oppression in Burma; number is estimate as of Dec 1996
Burmese Students	1,355	Entered Thailand after crackdown on pro-democracy movement in Burma in 1988; number registered with the Ministry of *sic* the Interior
Displaced	7,849	Entitled to Thai citizenship

[111] Table 5: Numbers of Highlanders, Ethnic Minorities and Other Migrants in Thailand reproduced from Pornsuk Gertsawang & Kritaya Archanvanitkul, *The Condition of Highland and Ethnic Minority Groups in Thailand* (1997) on ARCM website, above n 1.

[112] Figures are taken from table 5, ibid.

persons of Tai Ethnicity from Burma		

Almost every group may be divided according to date of entry: those who entered before 9 March 1976; those who entered after 9 March 1976 but before 1988; and those who entered since then. Those who entered before 9 March 1976 or after 9 March 1976 but before 1982 could lose their Burmese citizenship under the *1948 Union Citizenship Act* of Burma after five years' residence in Thailand if they were citizens by registration or naturalization.[113] Those who entered after 1982 and considered to have left permanently could also lose their Burmese citizenship regardless of tier of citizenship.[114]

Refugees could be treated differently from irregular migrant workers. The military regime in Burma had assured Thailand that refugees would be allowed to return.[115] However, some refugees could be denied any tier of citizenship on their return should they be are unable to provide satisfactory evidence of ancestry. Refugees who were rendered *de jure* stateless by the gendered construction of the Burmese citizenship laws are likely to remain as such.

Irregular migrant children and women who are *de jure* stateless may be more vulnerable. Irregular migrant children who accompanied their parents to Thailand could be rendered *de jure* stateless if they or their parents cease to be Burmese citizens.[116] In November 1999, Burmese nationals deported from Thailand to Burma were allegedly refused entry or arrested or detained for illegal entry by the Burmese authorities.[117] Those who were born in Thailand could also be rendered *de jure* stateless, as they would not be able to acquire Thai nationality where one of their parents is an irregular migrant. If they were arrested and deported to Burma, with or without their parents,[118] they would remain *de jure* stateless and be denied any citizen rights. Irregular migrant women who accompanied their husbands to

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[113] Section 19(c).

[114] *1982 Citizenship Act* ss 16, 34 and 57.

[115] Reuters, 'Myanmar Tells Thailand It Will Allow Back Refugees', 25 November 2000. Contrast with Bhanravee Tansubhapol, above n 77.

[116] Section 16 read with section 17, section 29 read with section 34 and section 51 read with section 57 of the *1982 Citizenship Act*.

[117] See HRDU and BWU, above n 10, 89.

[118] In late 2000, one 12-year-old Mon boy told the writer he was locked in the rented house while his parents were at work. His mother explained to the writer that they were afraid that if he were arrested when they were not around, they might not be able to find out his whereabouts, where he was being detained or deported to.

Thailand could also be rendered *de jure* stateless on the ground that they had left Burma permanently. *De jure* stateless irregular migrant women and children are more vulnerable than their husbands and fathers who are also *de jure* stateless where the latter hold work permits. These migrant men are less at risk of deportation than their wives and children because of their legal immigration status.[119] However, they could be forced to leave where their wives and children are being deported.[120] Hence their legal immigration status in Thailand may not secure them against *de jure* statelessness. The only possible guarantee for them and their wives and children would be to acquire Thai nationality by naturalization.[121] Even if they were to satisfy the naturalization criteria, including regular employment and five years' continuous domicile in Thailand, the outcome of their application lies entirely within the discretion of the Minister.[122]

It is obvious that Thai immigration policy and law privilege the women and children who enter as dependants of global and liberal migrants on the basis of class. Their children are further privileged because they may acquire Thai nationality *jus soli* at birth. The discrimination against *de jure* stateless women and children is compounded by their irregular migrant status. The irregular immigration status of *de jure* stateless women and children from Burma in Thailand places them in a worse position than *de jure* stateless women and children belonging to ethnic minorities of Thailand. Their irregular immigration status not only prevents those born in Thailand from acquiring Thai nationality but also exposes them to arrest, detention and deportation.

5. *DE FACTO* STATELESSNESS IN THAILAND

A new class of *de facto* stateless persons emerged in Thailand in the late 1990s. A combination of several factors has produced this class of *de facto* stateless persons. The refugee policy of Thailand is a primary factor in the merging of refugees and irregular migrant workers from Burma. The immigration regulations of Burma render women and children most vulnerable among those in this new class of *de facto* stateless persons.

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[119] This does not always hold because migrant workers, regardless of their immigration status, were affected during the mass deportations at the end of 1999. See HRDU and BWU, above n 10, 87-88.

[120] Ibid 89.

[121] *1965 Nationality Act* s 10.

[122] Section 10 read with section 12.

Thailand's refugee policy further illustrates that the notion of gender equality is reserved for Thai nationals. Thailand's refusal to recognize refugees from the Shan State has driven an unknown number to survive as irregular migrant workers in Thailand. This is despite the willingness of the UNHCR to set up camps for these persons of concern. The majority of these refugees are Shan while the rest are from Akha, Lahu and other ethnic minorities in Burma.[123] Refugees who leave the refugee camps for work or education or other reasons also lose their status as UNHCR persons of concern.[124] If they are arrested during a crackdown on illegal migrant workers, they face deportation like all irregular migrant workers. In fact, under the new Thai refugee policy, the Provincial Admission Boards could reject the refugee claims of asylum seekers who delay reporting to refugee camps.[125] Thailand's domestic refugee procedures and criteria adopted recently are also a cause for concern.[126] The UNHCR is no longer able to provide protection or assistance to anyone in Bangkok because the Thai government considers anyone living outside the camps on the border to be an illegal immigrant.[127] In effect, the policy overrides the refugee status determination previously or currently carried by out the UNHCR. The

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[123] See The Lahu National Development Organization, 'Unsettling Moves: The Wa P in Eastern Shan State (1999-2001)', (April 2000), regarding the more recent relocation of at least 48,000 Shan, Lahu and Akha people to accommodate the arrival of 126,000 Wa from the China border. At least 4,500 of the original inhabitants have fled to other areas of the Shan State while another 4,000 have sought refuge in Thailand. However the change in Thailand's humanitarian policy towards refugees have forced them to survive as irregular migrants, joining other Shan and other ethnic groups from Burma who fled the forced relocations of 1996-1998.

[124] In late 2000, the writer met a number of Karens who left the refugee camps, including a young man who had completed 10th grade in the refugee camps and wanted to pursue his education; a woman who did not want to stay in the refugee camp to which they had been relocated against their will because her husband died there after their arrival; and a number of other women who left with their husbands and families because there was no work, nothing for them in the camps whereas they could find casual work as agricultural labourers in the surrounding farmlands near the border town of Mae Sot.

[125] See Human Rights Watch, 'Burmese Refugees Forced Back' (Press Release, 15 June 2000) at http://www.hrw.org/press/2000/06/thailand0615.htm regarding the expulsion of 116 Karen refugees on 12 June 2000 from Don Yang refugee camp in Kanchanaburi Province to Burma's Mon State because they had reported to the camp only after border-wide registrations in 1998. Many moved out, fearing forced return to Burma, leaving some forty to sixty of the rejected population in the camp. Thai army, immigration and border police and district officers simply included other asylum seekers in the camp who had not passed through the admission process and were not registered to make up the number. (10 April 2002).

[126] Human Rights Watch, above n 13.

[127] Ibid 3.

Provincial Admission Boards could reject those who fled as political dissidents because flight from immediate fighting is the principal criterion.[128] The criterion also implies that women and girls who fled or flee because of gender-related persecution, such as fear of rape or sexual slavery at the hands of Burmese military, would not qualify as refugees.

The Burmese policy, of restricting girls and young women between the ages of 16 and 25 from crossing into Thailand without a legal guardian, is discriminatory.[129] However, it has not deterred them from crossing into Thailand. Hence, women and girls continue to comprise a sizeable if not the major proportion of Burmese irregular migrant workers in Thailand. Irregular migrant workers, including those who have left the refugee camps, are at risk of arrest, detention and deportation at all times regardless of gender and age. Only women and children who are victims of trafficking receive special assistance.[130] The bleak prospect of deportation or *refoulement* and the more attractive alternative of remaining in the relative security of Thailand prompt more than one irregular migrant worker to acquire resident alien cards. There are at least fourteen types of resident alien cards[131] but the blue card of the ethnic minorities has proved the most appropriate and the

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[128] Ibid 4.

[129] UN Doc. CEDAW/C/ MMR/1 (25 June 1999), *Initial Report: Myanmar*, 10, on art 18 of the *1979 CEDAW*.

[130] See Office of the National Commission on Women's Affairs, Office of the Permanent Secretary & Office of the Prime Minister, 'Memorandum of Understanding on Common Guidelines of Practices for Agencies Concerned with Cases where Women and Children are Victims of Human Trafficking, B.E. 2542 (1999)' on Thai guidelines developed pursuant to regional conferences to combat organized trafficking of women and children in the Mekong Sub-Region. Women and children from Burma and the Thai ethnic minorities fall into 3 out of 4 groups identified as requiring special assistance.

[131] Ibid 10, nn 3: 'According to the letter of Registration Administration no. Mor Thor 0310.1/ Wor 8 (Ministry of Interior) on 31 March 2538 (1995), the 14 groups of persons, which the Ministry of Interior has compiled bio-data records and has provided identification cards in the appendix related to ethnic minority groups in Thailand, are the people who do not have Thai citizenship but live in Thailand. There are: 1. persons living on highlands (blue card) 2. former Kuo Min Tang soldiers (white card) 3. Hor-Chinese civilian refugees (yellow card) 4. independent Hor-Chinese (orange card) 5. Burmese displaced persons (pink card) 6. illegal immigrants from Burma (orange card/having permanent residence) 7. illegal immigrants from Burma (purple card/living with employer) 8. Vietnamese refugees (white card with blue rim) 9. Laos refugees (blue card) 10. Nepalese refugees (green card) 11. former Malaya-Chinese communist insurgents (green card) 12. Tai-Lue (orange card) 13. Mlabri tribe (Tong Lueng or Yellow Leaves tribe) (highlander's blue card) 14. Thai refugees from Kong Island, Cambodia (green card)'. Note that the 1999 Miyazawa Fund survey issued another card, green with red frame. See Sretthachau and Jarernwong, above n 20, 4. In late 2000, a number of Shan irregular migrants who have been in Thailand for several years, showed the writer these cards issued to them during the survey.

most sought after by many. This is partly because the *de jure* ethnic minorities in Thailand are the largest population of resident aliens. It is also partly because a large proportion of the irregular migrant workers are from ethnic groups in Burma, which are related to ethnic groups in Thailand. Different branches of the Karens who are indigenous in Burma and Thailand, are a good example.[132]

The acquisition of Thai resident alien cards by Burmese refugees and irregular workers results in an overlap with Thai ethnic minorities. Despite the penalties for selling or buying resident alien cards, the practice has not been stemmed. All holders of the fourteen or fifteen resident alien cards are subject to restrictions on their movement and place of residence and work in Thailand.[133] Nevertheless, it is better to possess resident alien cards than none at all as these cards secure some freedom of movement within a province or area in Thailand. However, the consequent merging of these three groups of aliens in Thailand poses difficulties over social control for the Thai authorities.

Thailand has developed some policies to address some of the issues created by the merging of the three groups of aliens. About 100,000 Thai ethnic minorities, descendants of displaced persons from Burma and children of Vietnamese, Kuo Min Tang Chinese and Nepalese refugees, and former Malayan Communist Party members and their families are expected to acquire Thai nationality pursuant to a Cabinet Resolution passed in August 2000.[134] However, the majority of Thai ethnic minorities would remain *de jure* stateless resident aliens. The recent registration of half a million irregular migrant workers serves a number of purposes. Economically, it has generated huge revenues for the government in the

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[132] Other ethnic groups indigenous or long settled in both states include the Akha, Lahu, Lisu, Hmong (Meo), Palong (Palaung), Tai Yai (Shan).

[133] *1950 Alien Restriction Act of Thailand* s 5.

[134] Piyanart Srivalo and Anan Paengnoy, 'Refugees' Children to Get Citizenship', *The Nation*, 30 August 2000 reported that 15,467 first generation Shan, Karen and Mon refugees who were born after 13 December 1976, 16,581 first-generation KMT Chinese refugees whose parents entered between 1963 and 1988, and 1,115 Nepalese refugees who fled during World War II were among the 100,000 eligible for Thai citizenship while their elders would have legal status but not citizenship; *The Nation*, 'A Sad Chapter', above n 23, reported that a Thai nationality subcommittee set up pursuant to a Cabinet resolution in May 1999 subsequently recommended that Thai ethnic minorities born between 10 April 1913 and 13 December 1972, and those who have been residing in Thailand for generations should be granted Thai nationality. It further recommended that those who entered before 1985 should be issued resident cards or alien certificates as the first step to apply for Thai citizenship. Compare figures with those in Table 5: Numbers of Highlanders, Ethnic Minorities and Other Migrants in Thailand, above note 111.

form of 1.7 billion baht or US$405 million.[135] Registration also means more effective social and political control since work permits carry restrictions on movement, workplace and residence. On the other hand, the Thai government's refusal to allow Shan and other ethnic minorities fleeing human rights violations in Burma to set up refugee camps is incongruent with the policy towards Karen and other earlier refugee arrivals. It may also blunt the effectiveness of the new policy to register irregular migrant workers. It is also plain that these new policies are not sufficiently informed by gender considerations.

6. Domestic and International Remedies: Gender-Based Statelessness

The CRC Committee had noted the impact of Burma's discriminatory laws. The Committee expressed concern that 'the national identity card explicitly mentions the religion and the ethnic origin of each citizen, including children'. [136] The citizenship hierarchy could have the effect that 'some categories of children and their parents might be stigmatized and/or denied certain rights'.[137] The CRC Committee recommended that the *1982 Citizenship Law*, *inter alia*, should be repealed in order to bring national legislation into conformity with the principles and provisions of the Convention on non-discrimination and citizenship.[138]

Despite Thailand's withdrawal of the reservation to article 9(2) of the 1979 CEDAW, the CEDAW Committee expressed concern for ethnic minority women and girls, 'whose rights may not be effectively protected by

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[135] Supamart Kasem and Penchan Charoensuthipan, 'Registration Makes 1.7 Billion Baht for Government Coffers', *Bangkok Post*, 26 October 2001 reported that employers in 10 types of industries were allowed to recruit foreign workers who each had to pay 3,250 baht for a 6-month work permit or 4,450 baht for a one-year work permit. Errant employers are liable to a maximum 3-year jail term and/or a 60,000 baht fine while illegal workers face 3 months in jail and a 5,000 baht fine. Employers sheltering illegal immigrants are liable to 10 years in jail and a 100,000 baht fine. See also Penchan Charoensuthipan, 'Registration of Workers', *Bangkok Post*, 17 August 2001 where it was reported that the registration fee include 1,200 baht for annual health insurance coverage, 1,000 baht in repatriation guarantee payment, 900 baht for six-month work permit and 150 baht to obtain the card.

[136] UN Doc CRC/C/15/Add.69, (24 January 1997), CRC Committee, *Concluding Observations: Myanmar*, [14].

[137] Ibid.

[138] Id [28].

national laws'.[139] The Committee recommended the introduction of legislation and other measures to protect effectively the rights of hill-tribe women and girls and welcomed proposed amendments to the Names Act and the Nationality Law.[140] The CRC Committee also recommended that Thailand withdraw the reservations to the provisions on nationality and refugee children; and encouraged Thailand to 'adopt the measures to regularize the situation of hill tribe children and provide them with documentation to guarantee their rights and facilitate their access to basic health, education and other services'.[141] Both Committees are likely to continue monitoring the situation of Thai ethnic minority women and children. However, attention should be drawn to the gender-based statelessness among irregular migrant women workers and children.

Within the domestic sphere, the Thai Human Rights Commission may examine any petition that these children have been rendered *de jure* stateless by the 1992 nationality amendments. The impact on their rights in all spheres, civil, cultural, economic, political and social, may also be considered. Arguably, the Commission has the power and the duty to sever the reservation to article 7 of the *1989 CRC* as being incompatible with the object and purpose of the Convention. Furthermore, *de jure* or *de facto* stateless children seeking refugee status or considered as refugees could petition the Human Rights Commission of Thailand for protection under article 22 of the *1989 CRC* read with article 26 of the *1966 ICCPR* against expulsion orders under the *1979 Immigration Act*.[142] The absence of an international mechanism similar to the *1999 CEDAW Protocol* for children rendered *de jure* or *de facto* stateless is a serious impediment to the recognition, enjoyment and exercise of their rights under the 1989 CRC. Since Thailand has withdrawn its reservation to article 9(2) of the *1979 CEDAW*, I suggest that any person or human rights organization may also petition the Human Rights Commission in Thailand regarding gender-based statelessness under the *1965 Nationality Act* or the effects thereof. Their

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[139] UN Doc A/54/38, (1999), CEDAW Committee, *Concluding Observations: Thailand*, [213]-[250], especially [239].

[140] Ibid [240] and [248] respectively.

[141] UN Doc CRC/C/15/Add. 97 (26 October 1998), CRC Committee, *Concluding Observations: Thailand*, [8] and [20] respectively.

[142] Article 22(1) provides for States Parties to ensure that such children should receive protection for rights not only under the CRC but also in other international instruments to which States are Parties. Hence, article 26 of the *1966 ICCPR* on equality before the law and equal protection of the law free from any discrimination may be invoked by the children concerned or human rights organizations on their behalf to challenge expulsion that effectively amounts to *refoulement*.

petitions may be rejected. Alternatively, their petitions may be accepted but they may be unable to obtain effective protection because the powers of the Commission are limited. Ultimately, women seeking protection and remedies for gender-based statelessness should and must consider the *1999 CEDAW Protocol*.

CHAPTER EIGHT

CONCLUSIONS

There is inadequate protection for *de jure* and *de facto* stateless persons associated with irregular migrant status. The protection of women and children among these *de jure* and *de facto* stateless persons is a special concern. However, the inadequacy of protection for stateless persons[1] in general prompted me to discuss the implications of statelessness more broadly before turning to focus on women and children.

As has been demonstrated, there are significant gaps in the law of statelessness. The absence of customary international principles on the protection of stateless persons implies that such protection has to be sought under international, regional or national instruments. The development of the law of statelessness has been based largely on European experiences, particularly during the first half of the twentieth century. It cannot therefore adequately address the protection of stateless persons in other regions at the beginning of the twenty-first century.

I have examined significant developments of the law of statelessness. First, it was shown how statelessness developed from being *de jure* statelessness, i.e. the condition of being without a nationality of any state, to include the concept of *de facto* statelessness. *De facto* statelessness used to describe the situation where persons who fled or were expelled to other states could no longer count on their states of origin for protection even though they retained their nationality. Since then, other forms of effective statelessness have developed. As was shown, statelessness encompasses the refugee experience. The refugee experience is but one type of *de facto* or effective statelessness. It focuses on the absence of state and diplomatic protection by the state of origin. The statelessness phenomenon also demonstrates the importance of international law and human rights limits on state sovereignty over citizenship and protection issues. Other forms of effective statelessness are possible and may be equally compelling.

Statelessness has historically been defined in relation to the states of origin or nationality. It has not been characterized with reference to the host

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[1] In this chapter, the term refers to both *de jure* and *de facto* stateless persons unless otherwise indicated.

states. State sovereignty over entry to and exit from host states has traditionally not been regarded as the cause of statelessness. However, the situation has changed. Illegal immigration status, and not lack of citizenship status, has become the gap in protection as states apply their powers over immigration matters with devastating effect.

The history of stateless persons is entwined with the rise of state immigration powers. As immigration powers increase, protection for stateless persons falters. Immigration status was an important but secondary issue for *de jure* and *de facto* stateless persons, including refugees, who fled or were driven from their own states in the first half of the twentieth century. As host states felt or became overwhelmed with the influx of stateless persons, they resorted to their immigration powers to stem the tide. As a result, stateless persons seeking refuge were treated as illegal immigrants by the host states. Therefore, their immunity from the usual immigration regime was canvassed when protection in the host state was considered for refugees and stateless persons. States were finally persuaded to accept some limits on their powers over admission and expulsion under domestic and international law. Consequently, the *1951 Refugees Convention* specifically provides that refugees would be exempt from penalties for illegal entry and presence. It is unfortunate that a right to asylum was not granted at the same time. Nevertheless, the rights pertaining to illegal entry and presence, expulsion and *non-refoulement* together have constructed the basis for refugee protection that, until recent years, has largely withstood the test of time.

Unfortunately, host states have reserved their rights over admission in the case of *de jure* stateless persons. The impact is being felt today. Those who enter their territory illegally do not enjoy rights in the event of expulsion under the *1954 Stateless Persons Convention.* Host states also retain the discretion on the extension of such rights to other groups of effectively stateless persons. At the same time, host states extend protection for a range of other rights, civil, economic and social. By necessary implication, *de jure* stateless persons illegally within the territory are not entitled to such rights or protection. Effectively stateless persons, not recognized as refugees, are similarly unprotected. Legally and effectively stateless persons, who transgress immigration laws of host states, are treated as illegal immigrants. Moreover, the reservation of state powers over entry and exit has been extended through the creation of more and more categories of migrants.

It is unfortunate that the absence of gender provisions in the conventions on stateless persons and statelessness has not provoked much interest. The preoccupation continues to lie with gender equality in

citizenship laws. Another concern is the prevention of *de jure* statelessness among children. The presumption is that developments in both aspects would eventually lead to eradication of statelessness. This may be ill-founded because gender discrimination in statelessness may involve the citizenship laws of more than one country. By allowing a state to shift the responsibility to the women's state of nationality implies that the international dimension of the principle of non-discrimination does not apply to gender equality in citizenship laws. Sovereignty of an individual state over citizenship matters may continue to render foreign women legally stateless in the name of achieving gender equality in citizenship laws. This is the reason why gender discrimination should be prohibited in the conventions on statelessness. State parties could then be persuaded to initiate discussions with other states on how to develop solutions to accommodate interests of states involved and to protect the individuals affected.

The prevention of legal statelessness among children is not as straightforward as it may seem. The *1961 Statelessness Convention* prohibits deprivation of nationality on discriminatory grounds that engender *de jure* statelessness *en masse*. Nowadays, such discriminatory denationalization is seldom overtly practiced. Instead, the provision of illegal immigration status as a bar to acquisition of nationality *jus soli* signals that *de jure* statelessness will persist. Children of illegal immigrants will be among those most affected. Article 6(2)(b) in the *1997 European Convention on Nationality* is an indication of this trend. It is entirely reasonable to enquire whether illegal immigration status is being used to conceal racial and/or other prohibited grounds of discrimination such as to cause *de jure* statelessness. The development of regional groupings and regional membership alongside citizenship may be a clue to the significance of illegal immigration status. Among other things, it justifies the withholding of citizenship and regional membership from certain categories of migrants entering from states outside the region. The issue of illegal immigration status as a bar to citizenship is still relevant even where no regional membership is involved.

Another issue is whether illegal immigration status on its own amounts to discrimination. It has been argued that 'the right of a stateless child to the nationality of the State of his birth has now formed part of customary international law'.[2] If so, it raises the issue as to whether such use of illegal immigration status amounts to a breach of customary international law. Otherwise, those children will continue to be *de jure* stateless in adulthood in

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[2] Johannes M.M. Chan, 'Nationality as a Human Right' (1991) 12 *Human Rights Law Journal* 1, 11.

the event of state successions if the *1997 Draft Articles on Nationality* are adopted. The absence of provisions for acquisition of nationality by habitual residents who are *de jure* stateless highlights their predicament. No argument, let alone one that is convincing, has been advanced for not addressing their plight at the time of state succession.

In Asia, the reluctance of states to accede to the conventions on statelessness and refugees compounds the problem of protection. It implies that stateless persons are even less adequately protected in states not party to these conventions. The concomitant issue that has been explored in this book is whether international human rights law provides alternative protection.

Unfortunately, such protection will not be available to stateless persons in state parties to the *1990 Migrant Workers Convention*. Refugees and stateless persons are excluded, because duplication, it has been argued, is a possibility. This argument is out of step with developments such as the resurgence of dual nationality which suggest that duplication in terms of rights and protection is not a problem. Instead such duplication should be regarded as an advantage. The *1990 Migrant Workers Convention* is progressive because it affords unprecedented protection to workers with illegal immigration status. Hence, it could benefit stateless persons who find that they have to enter and work in another state illegally. Regrettably, illegal immigration status will deny protection to irregular *de jure* stateless persons, *de jure* stateless irregular migrant workers and an emerging class of refugees who survive as irregular migrant workers. This implies that state sovereignty over immigration matters is not only a domestic affair but is supreme in international law. Although human rights law has extended some measure of protection to irregular migrant workers, it has not been able to completely restrain state sovereignty over immigration matters. Thus, sovereignty of the host state over immigration matters is a major cause of these emerging forms of statelessness. The exclusion of refugees and stateless persons from the *1990 Migrant Workers Convention* has effectively created mutually exclusive categories of stateless persons, refugees and migrant workers. Whether by accident or design, this development supports states in their battle with corporations and people traffickers and smugglers.

In the era of globalization, states must share economic control of the market with corporations. To do so, they must ensure that people traffickers and smugglers do not break state control over the movement of people. The more developed states and regions with a greater share of the market attract more migrants. Hence, they are the states that are more focused on people trafficking and smuggling. However, transit states are compelled to

collaborate otherwise they will find themselves inundated with victims of traffickers and smugglers. States must retain control over who enters their territory and for what purpose. If aliens enter or are present illegally, states will be justified in expelling them. Otherwise they could lose the authority to govern. This explains the need for clear distinctions between categories of people who enter. In fact, states are keen to maintain a clear distinction between political refugees and economic migrants.

In reality, people do move for a mixture of reasons. However, when their motives are in doubt, they fall into neither category. Instead, they become a new class of *de facto* stateless persons. They are usually characterized by illegal immigration status. Paradigm shifts of the political refugee produce illegal immigrants in Europe. In Asia, paradigm shifts of the economic migrant accommodate refugees who cross borders as irregular migrant workers. Domestic immigration control has structured an international hierarchy of migrants in response to the market paradigm. Global migrants transcend state borders. Illegal transnational migrants are subject to immediate expulsion. Nevertheless, host states, especially the developed states, are reluctant to ratify the *1990 Migrant Workers Convention*. This could be due in part to the fact that some of its provisions are more progressive than those of the *1966 ICCPR*.

Protection for stateless persons under the major human rights covenants is even less effective. First of all, the gap between diplomatic protection and human rights protection accentuates the predicament of stateless persons. Under international law, states do not have a duty to protect their nationals in other states. Such protection is left to the host states. States are only bound by customary international human rights norms and obliged to protect rights accorded to those who are within their territory and jurisdiction. As a matter of fact, some states are beginning to undertake protection of their nationals beyond the current paradigm of diplomatic protection.[3] This optimistic development, however, is beyond the scope of this book. The recommendation to extend traditional diplomatic protection to stateless persons legally within states is an encouraging development. However, for most stateless persons, they must rely on the *1966 ICCPR* and the *1966 ICESCR* for alternative protection.

The treaty bodies of these covenants are continually developing human rights jurisprudence with non-discrimination as the guiding principle. The

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[3] Marisa Chimprabha and Mukdawan Sakboon, 'Mystery Deaths Show Workers Need Protection', *The Nation*, 19 September 2000 on the need to change domestic laws and regulations and cooperation from host countries to protect Thais working abroad; Achara Ashayagachat, 'Plans Afoot to Protect Thais Abroad', *Bangkok Post* 12 June 2001.

grounds of non-discrimination are numerous but not exhaustive. Unfortunately, the Human Rights Committee is far more constrained than the Committee on Economic and Social Rights by the provisions of the respective covenants. Hence distinctions between citizens and non-citizens are far more scrupulously maintained under the *1966 ICCPR*. It is significant that some minimum social rights have been extended to those with illegal immigration status under the *1966 ICESCR*. It would appear that the international dimension of the principle of non-discrimination has been applied in this case. There are no provisions in this covenant that confines the application of the principle within the boundaries of citizenship. Stateless persons in a state party to both covenants may exercise economic and social rights subject to the risk of expulsion. This inconsistency between the two covenants is in fact echoed in the *1990 Migrant Workers Convention*. On this issue, the main difference between the *1966 ICCPR* and the *1990 Migrant Workers Convention* is that there is no protection for procedural rights where stateless persons are unlawfully within the territory in a state party to the covenants. Other categories of non-citizens are accorded such rights under the *1966 ICCPR*.

Distinctions between categories of non-citizens have been criticized as being potentially discriminatory. This criticism is valid because the rights a non-citizen can exercise and enjoy depend on the category and immigration status he or she falls within. Some categories of non-citizens are almost as effectively protected as citizens. Stateless persons with illegal immigration status are not. Illegal immigration status is emerging as a discriminatory ground where the traditional grounds of discrimination, such as race and gender, intersect. The crucial difference lies in the absence of the right to enter a state that is not one's own under international law. Consequently, the reservation of state powers over admission under the *1990 Migrant Workers Convention* assumes greater significance. This highlights the importance of developing international law and human rights principles to limit state powers over admission. State sovereignty over citizenship matters used to be beyond the reach of international law. But today, nationality is regarded as a human right and denationalization on race and other discriminatory grounds is prohibited under international law. A series of mass denationalizations and expulsions finally convinced states that they must act collectively to resolve the issue even if it means derogating from their absolute powers over citizenship and protection issues. For the moment, states are collaborating against people trafficking and smuggling. This development, in fact, justifies the need for more control, and not less, over

immigration matters. In other words, they are not ready for restrictions on their powers over immigration and protection issues.

Until such time, alternative protection is available for stateless women and children with illegal immigration status under the *1979 CEDAW* and the *1989 CRC*. The *1999 CEDAW Protocol* is an avenue for such *de jure* and *de facto* stateless women. However, the provisions in both the *1989 CEDAW* and the *1989 CRC* are aimed at preventing *de jure* statelessness. Protection for stateless women and children associated with illegal immigration status requires a better understanding of how citizenship and migration laws construct statelessness. Thus, feminist critiques of the public/private dichotomy have been very helpful in highlighting the private space of statelessness and the public life of citizenship instituted by citizenship laws. The patriarchal construction of citizenship laws, unfortunately, persists in some states. Children born outside marriage continue to be rendered *de jure* stateless. Women still face *de jure* statelessness after divorce from or death of their foreign spouses because they are cast as dependent. This is because the conflict of nationality laws is premised on the notion of independence that remains associated with men. The state is only responsible for the public world of *de jure* statelessness dominated by men. Deprivation of nationality on grounds of race, ethnicity, religion and politics invites state responsibility under customary international law or the *1961 Statelessness Convention*. Where *de jure* statelessness results from non-acquisition or loss of nationality, the state is not responsible for those rendered stateless. Where the construction of such provisions continues to be gendered, women and children are not protected. This is the private world of *de jure* statelessness in states that are not party to the *1954 Stateless Persons Convention*.

The construction of citizenship laws is no longer the sole or most important cause of gender discrimination with respect to statelessness. Migration law contributes significantly to this aspect of the emerging phenomena of statelessness. Firstly, it secures citizenship law from scrutiny for discriminatory intent and effect under international law and human rights law. Secondly, it escapes similar scrutiny because it is considered a 'private' matter within the domestic jurisdiction of the state under 'public' international law. These layers of dichotomies construct the gendered dimensions of the hierarchy of migrants overtly characterized by wealth, class and race. Migration law selects those migrants deemed suitable to be members of the community in the host state. Ultimately, some of them are likely to acquire citizenship and may even enjoy dual nationality as a result. Women and children are often cast as dependants of these male migrants who have the requisite wealth, qualifications and skills. This development

indicates that the market may be driving states to abrogate sovereignty over citizenship as another means of acquiring or enhancing economic control.

The market may also be driving states to shed responsibility for irregular migrants. Migration law performs this task with impunity. Illegal immigration status denies irregular migrant workers of rights and participation without explicitly denying them membership of community in the host state. The economic costs of hosting irregular migrant workers are regularly paraded while their contribution to the economy is seldom acknowledged, let alone officially quantified. Since protection by their states of nationality is often beyond their reach, irregular migrant workers are effectively stateless. It is arguable that the effect, if not the intent, of immigration criteria that favour migrants with wealth, skills and qualifications, may be to render others without these attributes illegal in the host states. As a further consequence, gendered dimensions of irregular migrant status may lie hidden beneath overt racial, ethnic, nationality or even class discrimination against irregular migrant workers. To uncover these dimensions may require a review of the current paradigms of gender discrimination under international law – violence against women and trafficking of women and children. Efforts in these two areas should also be made to identify the discriminatory effects of immigration laws and the specific consequences of irregular migrant status on women and children. Irregular migrant women and girls have a more complex experience of discrimination than those with regular migrant status. Consequently, it is important to subject migrant status to the same scrutiny once focused on citizenship to identify how it prevents women and girls from exercising their rights as migrant workers.

The study of Burmese irregular migrant workers in Thailand is an instructive example of the increasing role of migration law in producing statelessness. Successive citizenship and nationality laws of Burma and Thailand produce *de jure* statelessness among Burmese irregular migrant workers in Thailand. The hierarchical construction of current Burmese citizenship laws discriminates against the ethnic minorities. Since the early 1970s, Thailand has used illegal immigration status to revoke or prevent the acquisition of Thai nationality *jus soli*. This has caused *de jure* statelessness among Thai ethnic minorities. Even though there may be good reason to critique the exercise as being racially discriminatory under international law, no hue and cry ensued at the time. This highlights the problem of the avenues available to those rendered legally stateless to seek redress for the breach of a customary international law principle. The interface between this incorporation of illegal immigration status into Thai nationality laws,

and Burmese citizenship laws also produces *de jure* statelessness among irregular migrant workers from Burma. Irregular migrant workers from Burma are rendered *de facto* stateless by the interface between the immigration, labour and other domestic laws of Burma and Thailand. Departing or remaining illegally outside Burma deprives them of protection in Thailand. At the same time, they are unable to obtain assistance from the Burmese embassy.[4] Illegal departure or presence outside Burma results in penalties upon return. Burmese irregular migrant workers are treated differently from and accorded fewer rights than others in the hierarchy of aliens. They are particularly vulnerable to expulsion and do not have any procedural rights on expulsion.

Women and children form a significant proportion among Burmese irregular migrant workers and persons of concern in Thailand. The patriarchal construction of successive nationality laws in Thailand engenders *de jure* statelessness among children of Burmese irregular migrant workers. The gendered construction of Thai labour immigration policies causes more Burmese women and children to remain in an irregular situation. Current Thai policies on refugees exclude women and girls from claims based on gender-related persecution. Shan ethnic minority women and girls are most affected as the Thai authorities have refused to recognize the Shans as persons of concern.

Stateless persons are not effectively protected in Thailand. The focus on their illegal immigration status under domestic law detracts from the issue of their protection under international law. However, the nascent Human Rights Commission of Thailand is a domestic avenue for stateless children and women from Burma through which to seek protection. Thailand is considering ratification of the *1951 Refugees Convention*.[5] Should that eventuate, unrecognized persons of concern may no longer need to survive as irregular migrant workers. Until then, stateless women can and should pursue claims for violations of their rights under the *1999 CEDAW Protocol*. Their efforts may eventually have a positive impact on protection for stateless men.

This book has focused on the domestic and international remedies available to stateless persons whose rights have been violated. Another area for further research and discussion concerns the concept of joint

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[4] See Human Rights Documentation Unit and Burmese Women's Union, *Cycle of Suffering: A Report on the Situation for Migrant Women Workers from Burma in Thailand, and Violations of Their Human Rights* (2000) 22.

[5] Achara Ashayagachat, 'UN Convention on Refugees: Thailand Wants to See Document Modified', *Bangkok Post*, 27 March 2002.

responsibility of states. The study of Burmese irregular migrant workers highlights the accountability of Burma as the state of origin for these stateless persons. As a host state, Thailand seems to bear an inordinate burden. The issue of joint responsibility is not an easy one to resolve. The distinctive character of effective statelessness in Thailand, where irregular migrant workers and persons of concern from Burma overlap with Thai ethnic minorities, has to be taken into account. It would require the active support of the UNHCR and other UN agencies or even a special international body to ensure the effective protection of this emerging group of effectively stateless persons.

This study has been a contribution towards a broader appreciation of statelessness. The experiences of marginalized people who move from a developing state to more prosperous developing state are seldom viewed from such a perspective. The complexity of their experiences underscores the need for effective protection for stateless persons. As human rights law continues to develop, their protection shall be certain, their life more secure and their dignity truly respected.

APPENDICES

APPENDIX I

NATIONALITY ACT[1]
B.E. 2508
(1965 Nationality Act)

BHUMIBOL ADULYADEJ, REX.
Given on the 21st day of July, B.E. 2508:
Being the 20th Year of the Present Reign.

His Majesty King Bhumibol Adulyadej has been graciously pleased to proclaim that:

Whereas it is expedient to revise the law on nationality,

Be it, therefore, enacted by the King, by and with the advice and consent of the Constituent Assembly in the capacity of the Nationality Assembly, as follows:

Section 1. This Act shall be called the "Nationality Act, B.E. 2508".

Section 2.[2] This Act shall come into force on and from the day following the date of its publication in the Government Gazette.

Section 3. The following shall be repealed:
(1) The Nationality Act, B.E. 2495;
(2) The Nationality Act (No. 2), B.E. 2496;
(3) The Nationality Act (No. 3), B.E. 2499;
(4) The Nationality Act (No. 4), B.E. 2503.

Section 4. In this Act:
"Alien" means a person who does not have Thai nationality;
"Competent official" means the person appointed by the Minister for the execution of this Act;

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[1] Reproduced with permission from A. Peter Mutharika, *The Regulation of Statelessness under International Law and National Law*, Oceana Publications, Inc, New York, 1989, Release 89-1, Issued June 1989. This Act has been amended by the *1972 Order No 337* and the *1992 Nationality Acts (No 2)* and *(3)*.

[2] Published in the Government Gazette Vol 82 No62 (Special Issue) dated August 4, 2058 (1965).

"Minister" means the Minister who takes charge and control of the execution of this Act.

Section 5. The acquisition of Thai nationality under Section 9 or 12, the loss of Thai nationality under Chapter 2 or the recovery of Thai nationality under Chapter 3 shall be effective upon its publication in the Government Gazette and the effect shall be personal.

Section 6. The Minister of Interior shall take charge and control of the execution of this Act and shall have the power to appoint competent officials and to issue Ministerial Regulations fixing fees not exceeding the rates annexed to this Act, and to exempt any person as he thinks fit from fees for the following:

(1) Application for naturalization;
(2) Certificate of naturalization;
(3) Application for recovery of Thai nationality.

Such Ministerial Regulations shall come into force upon their publication in the Government Gazette.

CHAPTER 1

Acquisition of Thai Nationality

Section 7. The following persons acquire Thai nationality by birth:

(1) A person born of a father of Thai nationality, whether born in or outside the Kingdom of Thailand;

(2) A person born outside the Kingdom of Thailand of a mother of Thai nationality but whose lawful father is unknown or is of no nationality;

(3) A person born in the Kingdom of Thailand.

Section 8. A person born in the Kingdom of Thailand of alien parents does not acquire Thai nationality, if at the time of his birth, one of his parents was

(1) Head of a diplomatic mission or a member thereof;
(2) Head of a consular mission or a member thereof;
(3) An officer or expert of an international organization;
(4) A member of a family either as a relative under patronage or servant, who came from abroad to reside with the person in (1), (2) or (3).

Section 9. An alien woman who has married a person of Thai nationality shall, if she desires to acquire Thai nationality, file an application with the competent official according to the form and in the manner prescribed in the Ministerial Regulations.

The granting or refusal of permission for acquisition of Thai nationality shall be at the discretion of the Minister.

Section 10. An alien who possesses the following qualifications may apply for naturalization:

(1) Becoming *sui juris* in accordance with Thai law and the law under which he is of nationality;

(2) Being of good behaviour;

(3) Having regular occupation;

(4) Having a domicile in the Kingdom of Thailand consecutively for not less than five years until the day of filing the application for naturalization;

(5) Having knowledge of Thai language as prescribed in the Ministerial Regulations.

Section 11. The provisions of Section 10(4) and (5) shall not apply if the applicant for naturalization as a Thai:

(1) Has rendered distinguished service to Thailand or has performed meritorious act to the benefit of official service, which is deemed appropriate by the Minister;

(2) Is a child or wife of a person who has been naturalized as a Thai or has recovered Thai nationality; or

(3) Is one who used to be of Thai nationality.

Section 12. Whoever being desirous to apply for naturalization as a Thai shall file an application with the competent official according to the form and in the manner prescribed in the Ministerial Regulations.

If the applicant for naturalization under the first paragraph has children of not *sui juris* under Thai law who have a domicile in Thailand, he may concurrently apply for naturalization of his children, in which case such children shall be exempted from possessing the qualifications under Section 10(1), (3), (4) and (5).

The granting or refusal of permission for naturalization shall be at the discretion of the Minister. In case the Minister deems appropriate to grant permission, he shall submit the matter to the King for Royal Assent. Upon the Royal Assent, the applicant shall make an affirmation of loyalty to Thailand.

A naturalized Thai is entitled to apply for a certificate of naturalization.

CHAPTER 2

Loss of Thai Nationality

Section 13. A woman of Thai nationality who marries an alien and may acquire the nationality of her husband according to the law on nationality of her husband shall, if she desires to renounce Thai nationality, declare her intention to the competent official according to the form and in the manner prescribed in the Ministerial Regulations.

Section 14. A person who is of Thai nationality by reason of his birth in the Kingdom of Thailand while his father was an alien and may acquire the nationality of his father according to the law on nationality of his father, or a person who acquires Thai nationality under the second paragraph of section 12 paragraph shall, if he desires to renounce Thai nationality, declare his intention to the competent official within one year from the day on which he attains the age of twenty years, according to the form and in the manner as prescribed in the Ministerial Regulations.

If, after having considered the said intention, the Minister is of opinion that there is good ground for believing that such person may really acquire the nationality of his father or other nationality, he shall grant permission, except in case where Thailand is being engaged in arms conflict or is in state of war, he may issue an order denying any renunciation of Thai nationality.

Section 15. A person who is of Thai nationality by reason of his birth in the Kingdom of Thailand while his father was an alien and may acquire the nationality of his father, or a person who acquires Thai nationality under the second paragraph of Section 12, but fails to declare his intention within the period as fixed in Section 14, or a person who is of both Thai nationality and other nationality, or is of Thai nationality by naturalization, shall, if he

desires to renounce Thai nationality, file an application with the competent official according to the form and in the manner prescribed in the Ministerial Regulations.

The granting or refusal of permission for renunciation of Thai nationality shall be at the discretion of the Minister.

Section 16. An alien woman who has acquired Thai nationality by marriage, may have her Thai nationality revoked if it appears that:

(1) The marriage was effected by concealment of facts or assertion of a falsehood in an essential matter;

(2) She commits any act prejudicial to the security or conflicting with the interests of the State, or amounting to the disgrace to the nation;

(3) She commits any act contrary to the public order or good moral.

Section 17. A person who has Thai nationality by reason of his birth in the Kingdom of Thailand of an alien father may have his Thai nationality revoked if it appears that:

(1) He has resided in a foreign country, of which his father is of or used to be of nationality, consecutively for more than five years as from the day of his becoming *sui juris*;

(2) There is evidence to show that he makes use of the nationality of his father or of a other nationality, or that he is adherent to the nationality of his father or to other nationality;

(3) He commits any act prejudicial to the security or conflicting with the interests of the State, or amounting to the disgrace to the nation;

(4) He commits any act contrary to the public order or good moral.

The Minister in the event of (1) or (2), and the Court and upon a request of the public prosecutor in the event of (3) or (4), shall order the revocation of Thai nationality.

Section 18. Under appropriate circumstances in view of the security or interests of the State, the Minister is empowered to revoke Thai nationality from any person who is of Thai nationality by reason of his birth in the Kingdom of Thailand of an alien father, or of an alien mother but whose lawful father is unknown, if it appears that:

(1) one of this parents has been given leniency for temporary residence in the Kingdom of Thailand as a special case;

(2) one of his parents has been permitted to stay temporarily in the Kingdom of Thailand;

(3) one of his parents has entered and resided in the Kingdom of Thailand without permission under the law on immigration.

Section 19. The Minister is empowered to revoke Thai nationality from a person who has acquired Thai nationality by naturalization if it appears that:

(1) The naturalization was effected by concealment of facts or assertion of a falsehood in an essential matter;

(2) There is evidence that he still uses his former nationality;

(3) He commits any act prejudicial to the security or conflicting with the interests of the State, or amounting to the disgrace to the nation;

(4) He commits any act contrary to the public order or good moral;

(5) He has resided abroad without having a domicile in Thailand for more than five years;

(6) He still retains the nationality of the country at war with Thailand.

The revocation of Thai nationality under this Section may extend to children of a person whose Thai nationality is revoked in case such children are not *sui juris* and acquire Thai nationality under the second paragraph of Section 12, and the Minister shall, after having issued an order for revocation of Thai nationality, submit the matter to the King for information.

Section 20. There shall be a Committee consisting of the Under-Secretary of State for Interior as chairman, a representative of the Ministry of Foreign Affairs, the Director-General of the Department of Administrative Affairs, the Director-General of the Police Department and the Director-General of the Public Prosecution Department as members, which shall have the duty of considering the revocation of Thai nationality under Sections 16, 17(1) or (2), 18 or 19.

If circumstances are such that any person from whom Thai nationality may be revoked, the competent official shall submit the matter to the Committee for consideration. After consideration, the Committee shall refer its opinion to the Minister for direction.

Section 21. A person of Thai nationality who is of Thai nationality by reason of his birth in the Kingdom of Thailand of an alien father shall lose

Thai nationality if he obtains an alien identification card according to the law on registration of aliens.

Section 22. A person of Thai nationality who becomes alien by naturalization, or who renounces Thai nationality or from whom Thai nationality is revoked, shall lose Thai nationality.

CHAPTER 3

Recovery of Thai Nationality

Section 23. A woman of Thai nationality who has renounced Thai nationality in case of marriage with an alien under Section 13 may, if the marriage has been dissolved by any reason whatsoever, be entitled to apply for recovery of Thai nationality.

In applying for recovery of Thai nationality, a declaration of intention shall be made to the competent official according to the form and in the manner prescribed in the Ministerial Regulations.

Section 24. A person of Thai nationality who has concurrently lost Thai nationality along with one of his parents at the time when he was not *sui juris* shall, if he desires to recover Thai nationality, file an application with the competent official according to the form and the in the manner prescribed in the Ministerial Regulations within two years from the day of his becoming *sui juris* under Thai law and the law under which he has nationality.

The granting or refusal of permission for recovery of Thai nationality shall be at the discretion of the Minister.

Countersigned by:
Field Marshall Thanom Kittikachorn
Prime Minister

Rates of Fees

(1)	Application for naturalization	5,000 baht, each
(2)	Application for naturalization for a child of not *sui juris* of the applicant,	2,500 baht, each
(3)	Certificate of naturalization	500 baht, each
(4)	Substitute of the certificate of Naturalization	500 baht, each
(5)	Application for recovery of Thai Nationality	1,000 baht, each
(6)	Other applications	5 baht, each

APPENDIX II

(Unofficial Translation[1])

ANNOUNCEMENT OF THE REVOLUTIONARY PARTY NO 337

(The Nationality of the Person Born in the Kingdom of Thailand)

Whereas the Revolutionary Party considers that persons born in the Kingdom of Thailand of alien father or mother who enters into the Kingdom of Thailand not in compliance with the laws on immigration, or of alien father or mother who is permitted to enter the Kingdom on temporary basis or on a specific case, and although these persons are of Thai nationality, they possess no loyalty to Thailand. It is therefore deemed appropriate, for the protection and preservation of nationality security, that these persons shall no longer have or acquire Thai nationality, the Chairman of the Revolutionary Party hereby issues an order, as follows:

Clause 1. The Thai nationality shall be revoked of person born in the Kingdom of Thailand of an alien father or an alien mother without legitimate father and at the time of birth, the father or mother is

(1) a person who was granted leniency to reside in the Kingdom of Thailand on a specific case;

(2) a person who was permitted to stay in the Kingdom of Thailand on a temporary basis; or

(3) a person staying in the Kingdom of Thailand without due permission in accordance with laws on immigration.

The Thai nationality is so revoked unless the Minister of Interior considers it appropriate and orders otherwise in any specific case.

Clause 2. Persons under Clause 1 who was born in the Kingdom of Thailand after this Announcement has been in force shall not acquire Thai nationality unless the Minister of Interior considers it appropriate and orders otherwise in any specific case.

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[1] Reproduced with permission from A. Peter Mutharika, *The Regulation of Statelessness under International Law and National Law*, Oceana Publications, Inc, New York, 1989, Release 89-1, Issued June 1989.

Clause 3. All other laws, rules and regulations in so far as they are already provided in or are in conflict with or are at variance to this Announcement shall be superseded by this Announcement.

Clause 4. The Minister of Interior shall take charge and control of the execution of this Announcement.

Clause 5. This Announcement of the Revolutionary Party shall come into force on the day following the date of its publication in the Government Gazette.

Given on the 13th December B.E. 2515
Field Marshal Thanom Kitikachorn
Chairman of the Revolutionary Party

APPENDIX III

(Official Translation[1])

IMMIGRATION ACT, B.E. 2522 (1979)[2]

BHUMIBOL ADULYADEJ, REX.,
Given on the 24th day of February B.E. 2522;
Being the 34th Year of the Present Reign.

His Majesty King Bhumibol Adulyadej is graciously pleased to proclaim that:

Whereas it is expedient to revise the law on immigration;

Be it, therefore, enacted by the King, by and with the advice and consent of the National Legislative Assembly acting as the National Assembly as follows:

Section 1. This Act is called the 'Immigration Act, B.E. 2522'.

Section 2. This Act shall come into force after ninety days from the date of its publication in the Government Gazette.[3]

Section 3. The followings shall be repealed:
(1) Immigration Act, B.E. 2493;
(2) Immigration Act (No.2), B.E. 2497.

All other laws, by-laws and regulations in so far as they are already provided herein, or are contrary to or inconsistent with, the provision of this Act, shall be replaced by this Act.

Section 4. In this Act,
"alien" means a natural person who is not of Thai nationality;

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[1] Foreign Law Division, Office of the Juridical Council. Reproduced with permission from A. Peter Mutharika, *The Regulation of Statelessness under International Law and National Law*, Oceana Publications, Inc, New York, 1989, Release 89-1, Issued June 1989.

[2] As amended by the Immigration Act (No 2) B.E. 2523 (1980), and published in the Government Gazette Vol 97, Part 131, Special Issue, dated 23rd August B.E. 2523 (1980).

[3] Published in the Government Gazette Vol 96, Part 28, Special Issue, dated 1st March B.E. 2522 (1979).

"conveyance" means a vehicle or beast of burden or any other means of transport which is capable of taking a person from one place to another;

"conveyance owner" includes the owner's agent, hirer, hirer's agent, person who has possession of conveyance or his agent, as the case may be;

"master of conveyance" means the master of the vessel or the person responsible for controlling conveyance;

"crew" means a person whose duty or work is within the conveyance and shall, for the purpose of this Act, include the master of the conveyance who operates it without crew;

"passenger" means any person who travels on a conveyance in any case and excludes the master of conveyance and its crew;

"entrant" means an alien who is admitted into the Kingdom;

"immigration medical officer" means a medical officer appointed by the Director-General for the execution of this Act;

"house owner" means a person who is the head of the household in the capacity of owner or lessee or in any other capacity in accordance with the law on registration of inhabitants;

"dwelling place" means a place used for dwelling, i.e., a house, shed, boat, or floating house and includes the compound used for dwelling whether enclosed or not under the Penal Code;

"hotel" means any kind of place established for the purpose of providing temporary accommodation for remuneration for travelers or persons seeking temporary accommodation under the law on hotels;

"hotel manager" means a person who is in charge of or manages a hotel under the law on hotels;

"Commission" means the Immigration Commisssion;

"competent official" means an official appointed by the Minister for the execution of this Act;

"Director-General" means the Director-General of the Police Department;

"Minister" means the Minister having charge and control of the execution of this Act.

Section 5. The Minister of Interior shall have charge and control of the execution of this Act and shall have the power to appoint competent officials and issue Ministerial Regulations prescribing fees, charges and other costs not exceeding the rates specified in the Schedule attached hereto, and prescribing other matters for the execution of this Act.

Such Ministerial Regulations shall come into force upon their publication in the Government Gazette.

CHAPTER I

Immigration Commission

Section 6. There shall be established an Immigration Commission consisting of the Under-Secretary of State for Interior as Chairman, Under-Secretary of State for Foreign Affairs, Director-General of the Police Department, Director-General of the Labour Department, Director-General of the Department of Public Prosecution, Secretary-General of the Board of Investment, Secretary-General of the National Security Council, Director of the Tourist Organization of Thailand as members, and the Commander of the Immigration Division as member and secretary.

Section 7. The Commission shall have the following powers and duties:

(1) to revoke the permission for an alien to remain in the Kingdom as a nonimmigrant under section 36 paragraph one;

(2) to consider an appeal filed under section 36 paragraph two;

(3) to admit an alien into the Kingdom as an immigrant under section 41 paragraph one;

(4) to prescribe rules on qualifications of an alien who may apply for admission into the Kingdom as an immigrant, conditions concerning national security and other conditions under section 41 paragraph two;

(5) to prescribe rules on the application of a nonimmigrant to acquire immigrant status under section 41 paragraph four;

(6) to admit an alien into the Kingdom as an immigrant under section 43 paragraph one and to prescribe the rules on financial status of such alien under section 43 paragraph two;

(7) to permit an alien who has already been admitted into the Kingdom as a nonimmigrant to acquire immigrant status and to permit and prescribe conditions for such permission to an alien who has already applied for an immigrant status to remain in the Kingdom for the time being under section 45 paragraph one and paragraph two;

(8) to suspend the grant of immigrant status under section 47 paragraph three;

(9) to permit a resident alien to remain the Kingdom as such under section 51 paragraph one;

(10) to consider the revocation of the grant of immigrant status under section 53;

(11) to give advice, recommendation and opinion to the Minister in prescribing regulations on the execution of duties by the competent officials at the immigration stations or other officials for the maintenance of the national security, or in the issue of the Ministerial Regulations under this Act;

(12) to consider and give opinion on matters concerning immigration as entrusted by the Council of Ministers or by the Minister.

Section 8. In carrying out the duties of the Commission under this Act, the member and secretary shall submit the matters which are within the scope of powers and duties of the Commission to the Chairman or, in the case where the Chairman is absent or is unable to carry out his duty, to the member so designated by the Commission without delay; and the Chairman or the designated member shall convene a meeting according to the urgency of the matter in accordance with the rules prescribed by the Commission.

At a meeting, if the Chairman does not attend or is absent from the meeting, the meeting shall elect a member to preside over the meeting.

At a meeting, the presence of not less than one-half of the total number of members shall be required to constitute a quorum.

The decision of the meeting shall be by majority votes. Each member shall have one vote; in case of an equality of votes, the person presiding over the meeting shall have additional vote as a casting vote.

Section 9. The Commission may appoint a sub-committee or delegate power to a competent official to carry out any work entrusted thereto.

The provisions of section 8 shall apply *mutatis mutandis* to the meeting of the sub-committee.

Section 10. In the performance of duties under this Act, the Commission shall have the power to issue a summons to any person to give

facts or deliver documents relating to the matter within the scope of its power and duties.

CHAPTER II

Entry into and Department from the Kingdom

Section 11. Persons entering or leaving the Kingdom shall pass through the authorized routes, immigration stations, ports, stations, or localities and during such time as to be prescribed by the Minister in the Government Gazette.

Section 12. No alien under any of the following descriptions shall be admitted into the Kingdom:

(1) not having a genuine and valid passport or traveling document or if he has, no visa has been issued by the Thai embassy or consulate abroad or the Ministry of Foreign Affairs, except in special cases where certain categories of aliens are exempted from requirement of visa.

The issue of visa and exemption from requirement of visa shall be in accordance with the rules, procedure and conditions as prescribed in the Ministerial Regulations;[4]

(2) not having means of support appropriate for his admission into the Kingdom;

(3) entering in order to become a labourer or to take up an employment for manual work without using academic or technical training, or to take up any other employment in violation of the law on the working of aliens;

(4) being a person of unsound mind or afflicted with any one of the diseases as prescribed in the Ministerial Regulations;

(5) not having been inoculated against small-pox, nor vaccinated nor complied with any medical treatment for the prevention of contagious diseases prescribed by law, and refusing to allow an immigration medical officer to carry out the treatment;

(6) having been imprisoned by the judgment of a Thai Court or a lawful order or the judgment of a foreign Court except for petty offence or offence committed through negligence or offence which has been exempted by the Ministerial Regulations;

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[4] As amended by the Immigration Act (No 2) B.E. 2523 (1980).

(7) there is a cause to believe that he may cause danger to society or cause an act endangering the public peace and safety or the national security, or being a person to whom a warrant of arrest has been issued by a foreign government;

(8) there is cause to believe that the purpose of his entry into Thailand is for prostitution, the procurement of women or young persons, narcotics trading, smuggling, or other activities which are contrary to the public order or good morals;

(9) not possessing any money or being unable to furnish security prescribed by the Minister under section 14;

(10) being refused admission into the Kingdom by the Minister under section 16;

(11) having been deported by the Thai or foreign government, or having his resident status in the Kingdom or abroad cancelled, or having been expelled from the Kingdom by the competent official at the expense of the Thai Government, unless the Minister has granted exemption as a special case.

The immigration medical officer shall be required to diagnose the illness, physical and mental condition as well as to perform any medical treatment for the prevention of contagious diseases.

Section 13. The following aliens shall be granted exemption from requirement of passport or traveling document:

(1) master and crew of a vehicle, vessel or aircraft which only stops at a port, station, or locality within the Kingdom and then departs.

For the purpose of controlling such persons, a competent official may issue a permit as evidence in the form prescribed in the Ministerial Regulation.

(2) nationals of the country having common border with Thailand who cross the border for temporary stay in compliance with the Agreement between the Government of Thailand and the Government of that country;

(3) transit rail passengers holding one way through ticket and passing through the territory of Thailand with the destination outside the Kingdom under the Agreement between the Government of Thailand and the Government of such country, as well as master and crew of the train.

(4) The Minister shall have the power to require any alien who is admitted into the Kingdom to possess cash or furnish security, to grant exemption therefrom under any condition; provided that such requirement shall be published in the Government Gazette.

The requirement under paragraph one shall not apply to children under the age of twelve.

Section 15. Aliens who have been admitted into the Kingdom and remains in the following capacity shall be granted exemption from complying with the duties of aliens as prescribed in this Act except compliance or prohibitions under section 11, section 12(1), (4) and (5), and section 18 paragraph two:

(1) Members of diplomatic corps sent by a foreign government to perform duties in the Kingdom, or those who travel through the Kingdom in order to perform duties in another country;

(2) Consular officers or employees sent by a foreign government to perform duties in the Kingdom, or those who travel through the Kingdom in order to perform duties in another country;

(3) a person sent by a foreign government, with the consent of the Thai Government to perform duties or mission in the Kingdom;

(4) a person who performs duties or mission for the Thai Government in the Kingdom under the agreement concluded between the Thai Government and foreign government;

(5) Head of the office of international organization or agency whose operations in Thailand are protected by law or approved by the Thai Government, and officials or experts or other persons who have been appointed or entrusted by such organization or agency to perform duties or mission in the Kingdom on its behalf or one behalf of the Thai Government and such international organization or agency;

(6) spouses or children who are dependants of and part of the family of the persons specified in (1), (2), (3), (4), or (5);

(7) personal servants who come from abroad to carry on their normal occupation at the residence of the persons in (1) or persons who have been accorded privileges and immunity equivalent to those of members of the diplomatic corps under the agreement concluded between the Thai Government and foreign government or international organization or agency.

Cases under (1), (2), (6) or (7) shall be in accordance with the international obligations and the principle of reciprocity.

The competent official shall have the power to interrogate and ask for evidence in the investigation of the person being admitted into the

Kingdom as to whether such person is entitled to the exemption under this section.

Section 16. In the case where the Minister finds the circumstances to be such that, in the national interest or for the reason of public order and good morals, and public well-being, an alien or certain categories of aliens should not be admitted into the Kingdom, the Minister shall have the power to refuse admission of such alien or categories of aliens.

Section 17. In a special case, the Minister, with the approval of the Council of Ministers, may admit any alien or category of aliens into the Kingdom under any condition or may waive any provision of this Act in any case.

Section 18. The competent official shall have the power to search any person entering or departing from the Kingdom.

For this purpose, the person entering or departing from the Kingdom shall submit particulars in the form as prescribed in the Ministerial Regulation and shall have passed inspection of the competent official at the immigration station on such route.

Section 19. In examining whether an alien is under any prohibition to enter the Kingdom, the competent official may require the alien to reside at an appropriate place upon assurance that such alien shall present himself to the competent official to acknowledge the order on the date and at the time and place as specified by the competent official, and if considered expedient, the competent official may require such alien to provide surety or surety with security, or may detain him at an appropriate place for the purpose of carrying out the provision of this Act.

For the purpose of the provision in paragraph one, if there is a cause for the competent official to believe that the statement given by a person may be beneficial to the case in doubt, he shall have the power to issue a summons to such person to take an oath or make an affirmation and give statement.

If there is a cause to suspect that an alien entered the Kingdom for the purpose specified in section 12(8) or is involved therewith, or any woman or young person entered the Kingdom for such purpose, the

competent official may admit him into the Kingdom temporarily under the conditions that he shall be required to present himself to, and answer the questions of, the competent official, or the police at the local police station of the locality where he stays, during the period specified by the competent official; provided that during the interval between each specified period for presenting himself and answering questions shall not be less than seven days.

Section 20. In detaining an alien under section 19, the competent official shall have the power to detain such alien for only such period as warranted by circumstances, which shall not be longer than forty-eight hours from the time the detainee arrives at the office of the competent official. In case of necessity, the detention period may be extended but shall not exceed seven days altogether and the competent official shall record the reason for such extension as evidence.

In the case where it is necessary to detain an alien for a longer period than that specified in paragraph one, the competent official shall apply to the Court for an extension of detention and the Court may, as deemed necessary, authorize the extension thereof, which shall not exceed twelve days each time, however if the Court deems it expedient, the Court may grant provisional release of such alien on bail with or without security.

Section 21. All the costs incurred in the detention of an alien under section 19 and section 20 shall be at the expense of the owner or master of conveyance which brought him to the Kingdom. In the case where the owner or master of conveyance cannot be found or the entry was effected without any conveyance, such costs shall be at the expense of the alien himself.

Section 22. In the case where the competent official has found that the alien who is under any prohibition specified in section 12 entered the Kingdom, the competent official shall have the power to issue a written order to such alien to leave the Kingdom. If the alien is dissatisfied with the order, he may appeal to the Minister, with the exception of the case under section 12(1) or (10) for which an appeal is prohibited. The order of the Minister shall be final. If the Minister does not issue any order within seven days from the date of the appeal, he shall be deemed to have given the order that such alien is not prohibited to enter the Kingdom under section 12.

An appeal shall be filed with the competent official within forty-eight hours from the time of acknowledging the order of the competent official and shall be made in the form and subject to payment of fees as prescribed in the Ministerial Regulation.

After the alien has field an appeal, the competent official shall delay the expulsion of such alien from the Kingdom until the Minister has issued an order to that effect.

Pending the implementation of the order of the competent official or the order of the Minister, as the case may be, section 19 paragraph one shall apply *mutatis mutandis*, but section 20 shall not apply.

CHAPTER III

Conveyances

Section 23. The owner or master of conveyance shall take the conveyance into or out of the Kingdom through the authorized routes, immigration station, port, station or locality and at such time as prescribed by the Minister in the Government Gazette.

Section 24. The competent official shall have the power to inspect conveyance entering or departing from the Kingdom, or vehicles suspected of transporting passengers into or out of the Kingdom, except in the case where such conveyances are used in the services of the Thai Government or of a foreign government for which the permission of the Thai Government has been obtained.

Section 25. The owner or master of conveyance entering or departing from the Kingdom shall notify the competent official, within the prescribed time, of the date and time of entry or departure from the port, station or locality, in the form as prescribed in the Ministerial Regulation, at the immigration office supervising such port, station or locality.

In the case where the owner or master of conveyance is unable to comply with the requirement in paragraph one, he shall promptly notify the competent official in person at the nearest immigration office.

In giving notice under this section, the Minister may, if he considers it expedient, waive due compliance or impose conditions for the compliance by any conveyance.

Section 26. The owner or master of conveyance entering or departing from the Kingdom shall submit particulars in the form as prescribed in the Ministerial Regulation and the conveyance shall have been inspected by the competent official at such place and under such conditions as prescribed by the Director-General.

In the case where it is necessary for the inspection to be conducted at the place other than that prescribed by the Director-General, prior permission of the Director-General or the person entrusted by the Director-General must be obtained.

Section 27. For the purpose of the inspection, the owner or master of conveyance entering or departing from the Kingdom shall have the following duties:

(1) to ensure that the passengers or the crew may not leave the conveyance or the place approved by the competent official until the permission is given by the competent official, except in the case where the master and crew of conveyance is the same person. In such case, such person may leave the conveyance for the purpose of notifying the competent official in accordance with section 25 as the master of conveyance;

If the passengers or the crew resist or cause any disturbance, section 29 paragraph two shall apply *mutatis mutandis*. All costs incurred in the execution of the provision of this paragraph shall be at the expense of the owner or master of this conveyance.

(2) to furnish the passenger manifest, crew list including the master of conveyance in the form prescribed in the Ministerial Regulation to the competent official within such time as prescribed by the Director-General or the competent official;

(3) to provide facilities to the competent official in the execution of duties under this Act.

The provision of this section shall, in so far as the in-coming and out-going passengers are concerned only, apply to the owner or master of conveyance coming from or going to the common border of the Kingdom and a foreign country, and transporting passengers coming into the

Kingdom or going to the border area with the intention of departing from the Kingdom.

Section 28. While being in the Kingdom, if there is an addition or reduction in the number, or a change of crew who entered the Kingdom or is to depart from the Kingdom, or any member of the crew is not going to depart from the Kingdom, the conveyance owner or, in the case the conveyance owner is not in the Kingdom, the master of conveyance shall notify the competent official of that fact in the form as prescribed in the Ministerial Regulation.

In the case where a member of the crew who is an alien is not going to depart from the Kingdom as stated in paragraph one, the owner or master of conveyance, as the case may be, shall deliver him to the competent official without delay.

If a member of the crew in paragraph two resists or obstructs the execution of duty specified in this section by the owner or master of conveyance, as the case may be, section 29 paragraph two shall apply *mutatis mutandis*, and all costs incurred in the execution of duty specified in this paragraph shall be at the expense of the owner or the master of conveyance.

Section 29. Upon finding that an alien who is under any prohibition to enter the Kingdom or there is a cause to suspect that the alien is under any prohibition to enter the Kingdom, the competent official shall have the power to order the owner or master of conveyance to detain such alien on board or to commit such alien to any place so as to enable the competent official to detain him for investigation or to send such alien out of the Kingdom.

In the case where the alien in paragraph one resists or causes any disturbance, the owner or master of conveyance or his agent may request the administrative official or police officer to detain or arrest such alien. If prompt assistance of the administrative official or police officer is not available, he shall have the power to arrest such alien and deliver him to the custody of the administrative official or police officer who shall commit him to the competent official for proceedings under this Act.

The cost incurred in the execution of this section shall be at the expense of the owner or master of conveyance.

Section 30. In the case where there is a cause to suspect that there has been a violation of this Act, the competent official shall have the power to order the owner or master of conveyance to stop the conveyance or to bring the conveyance to any place as may be necessary for inspection.

The order under paragraph one may be given by using recognisable signal or other means.

Section 31. From the time of arrival of conveyance at the Kingdom until the competent official has completed the inspection, no person, not being an official in charge with the duty in connection with the conveyance, shall board such conveyance nor bring other conveyance alongside it, nor enter an area or place reserved for the purpose of inspection unless permission is obtained from the competent official.

The owner or master of conveyance shall not allow nor fail to prevent the act under paragraph one.

Section 32. During or after the inspection by the competent official of the departing conveyance which is still in the Kingdom, no person, not being an official in charge with the duty in connection with the conveyance, shall board the conveyance nor bring other conveyance alongside it during the inspection by the competent official unless permission is obtained from competent official.

The provision of paragraph one shall apply to the area or place reserved for the inspection while departing passengers have not boarded the conveyance.

The owner or master of conveyance shall not allow nor fail to prevent the act under this section.

Section 33. In the case where the competent official has, without his fault, to carry out the inspection of the conveyance beyond the official working hours, or at any place other than that designated by the Director-General under section 26 paragraph one, or has to leave his office to take charge of a conveyance, or has to delay the inspection of the conveyance, the owner or master of conveyance shall be required to pay the charges and other costs as prescribed in the Ministerial Regulation.

CHAPTER IV

Nonimmigrant

Section 34. A nonimmigrant may enter the Kingdom for the following purposes:

(1) performance of diplomatic or consular duties;
(2) performance of official duty;
(3) tourism;
(4) sports;
(5) business;
(6) investment which has been approved by the Ministries, Sub-Ministries and Departments concerned;
(7) investment or other activities in connection with investment under the law on the promotion of investment;
(8) travelling through the Kingdom in transit;
(9) being master or crew of conveyance arriving at the port, station, or any locality in the Kingdom;
(10) education or training;
(11) performance of mass media duty;
(12) religious propagation with the approval of the Ministries, Sub-Ministries, and the Departments concerned;
(13) scientific research or training in a research or education institution in the Kingdom;
(14) performance of skilled work or being an expert;
(15) other purposes as prescribed in the Ministerial Regulation.

Section 35. The Director-General or the competent official entrusted by the Director-General may impose any condition on the admission into the Kingdom of a nonimmigrant under section 34.

The period of admission into the Kingdom shall be as follows:

(1) not longer than thirty days for cases under section 34(4), (8) and (9);
(2) not longer than ninety days for cases under section 34(3);
(3) not longer than one year for cases under section 34(5), (10), (11), (12), (13), (14) and (15);

(4) not longer than two years for cases under section 34(6);
(5) any period considered necessary for cases under section 34(1) and (2);
(6) any period considered reasonable by the Board of Investment for cases under section 34(7).

In the event where it is necessary for an alien to remain in the Kingdom for period longer than those specified in (1), (2), (3) and (4), the Director-General may, at his discretion, grant an extension of not longer than one year each time and shall submit a report with reasons to the Commission within seven days from the date of extension.

In applying for each extension, the alien shall submit an application in the form and pay the fees as prescribed in the Ministerial Regulation. Pending the decision, such alien shall be allowed to remain in the Kingdom.

Section 36. If there is a circumstance warranting the revocation of the permission for an alien to remain in the Kingdom as a non-immigrant, the Director-General or the Commission shall have the power to revoke such permission notwithstanding it was granted by the Director-General or person entrusted by the Director-General.

In the case where the Director-General issues an order revoking the permission, such alien may appeal to the Commission and the decision of the Commission shall be final; in the case where the order revoking the permission was issued by the Commission such order shall be final.

The appeal against the order of the Director-General under paragraph two shall be filed with the competent official within forty-eight hours from the time he acknowledges the order of the Director-General and shall be in the form and subject to payment as prescribed in the Ministerial Regulation.

The revocation of permission under paragraph one shall be made in writing and delivered to the alien. In the case where the delivery cannot be made, the competent official shall affix it to the place of residence of the alien as declared by him to the competent official, and after forty-eight hours, the alien shall be deemed to have acknowledged the order thereafter.

Section 37. A nonimmigrant shall comply with the following conditions:

(1) not to engage in any occupation or take up any employment unless a permission is obtained from the Director-General or the competent official entrusted by the Director-General. If the law on working of aliens provides otherwise, a permission under such law must also be obtained;

(2) to reside at the place declared to the competent official. In the case where he is unable to reside at such place with good cause, he shall notify the competent official of the change of address within twenty-four hours from the time of taking up new residence;

(3) to notify the police officer at the local police station within twenty-four hours from the time he takes up residence. In the case of a change of residence which is in a different locality, the alien shall also notify the police officer at the local police station of the new locality of the residence within twenty-four hours from the time he takes up residence;

(4) to notify the police officer at the local police station within forty-eight hours from the time of his arrival, if he travels to another Changwat and stays there for longer than twenty-four hours;

(5) if such alien remains in the Kingdom for longer than ninety days, he shall notify the competent official at the Immigration Division of his residence in writing when the period of ninety days is coming to an end, and every ninety days thereafter. If there is an immigration officer at the locality, he may notify the competent official at such immigration office.

The Director-General may prescribe any condition for waiving the provisions in (3) and (4) for cases under section 34.

The notice under this section may be given in person or in writing to the competent official in accordance with the rules as prescribed by the Director-General.

Section 38. Any house owner, owner or occupier of a dwelling place, or a hotel manager, who accepts a nonimmigrant as resident shall notify the competent official at the local immigration office within twenty-four hours as from the time an alien takes up residence. If there is no immigration office in the locality, he shall notify the police officer at the local police station.

If the house, dwelling place or hotel is in Bangkok Metropolis, the notice shall be given to the competent official at the Immigration Division.

The notice under paragraph one and paragraph two shall be given in accordance with the rules as prescribed by the Director-General.

Section 39. A nonimmigrant status of an alien who departs from the Kingdom shall be deemed to have been terminated; but if the alien, prior to his departure, has obtained permission for re-entry from the competent official and upon his re-entry, he is not under any prohibition under section 12, he shall be permitted to remain in the Kingdom for the remaining period of his previous admission.

In applying for permission for re-entry, the alien shall submit an application in the form and pay the fees at the rate and in compliance with the rules as prescribed in the Ministerial Regulation.

CHAPTER V

Immigrants

Section 40. Subject to section 42, section 43 and section 51, the Minister, with the approval of the Council of Ministers, shall have the power to announce in the Government Gazette the annual immigrants quota not more than one hundred for nationals of one country and fifty for persons without nationality.

For the purpose of prescribing the immigrants quota, all colonies of one country or each self-governing territory shall be considered as one country.

Section 41. No alien shall be admitted into the Kingdom as an immigrant unless permission is obtained from the Commission with the approval of the Minister; that is, subject to the quota as prescribed by the Minister under section 40 and the receipt of certificate of residence under section 47.

In order to ensure that the admission into the Kingdom of aliens as immigrants will be of maximum benefit to the country, the Commission shall prescribe rules on the qualifications of aliens applying for immigrant status taking into account the income, property, academic and professional abilities and family position of such alien in connection with persons of Thai

nationality, the condition on national security and other appropriate conditions as the Commission deems appropriate, to be used as guidelines in considering applications of aliens for immigrant status.

An alien may apply for the admission into the Kingdom as an immigrant prior to his arrival in the Kingdom or subsequent to his admission into the Kingdom as a nonimmigrant.

For the purpose of this Act, the Commission shall have the power to prescribe rules permitting an alien who has already been admitted into the Kingdom as a nonimmigrant under section 34 to apply for immigrant status.

An alien who has obtained immigrant status prior to his arrival in the Kingdom shall be admitted as an immigrant upon his arrival at the Kingdom and shall have submitted particulars and passed the inspection of the competent official under section 18 paragraph two, and shall not be a person under any prohibition under section 12 and section 44, and shall have received the certificate of residence under section 47. Pending the issue of the certificate of residence, such alien may remain in the Kingdom.

Section 42. The following persons are excluded from the immigrants quota announced by the Minister under section 40:

(1) an immigrant who re-enters the Kingdom under section 48 or section 51;

(2) a woman of Thai nationality by birth who has renounced her Thai nationality when she married an alien;

(3) a child who is not *sui juris* of a woman of Thai nationality by birth notwithstanding she has renounced her Thai nationality in case her marriage to an alien;

(4) a child under one year old of alien parents born at the time the mother was not in the Kingdom, but the parent had obtained an endorsement of re-entry permission under section 48, and accompanying a parent who returns to the Kingdom within the time permitted.

Section 43. An alien who brings not less than ten million Baht of foreign currencies into the Kingdom for the purpose of investment and the Commission is of the opinion that there is no violation of any provision of this Act, the Commission may, with the approval of the Minister, admit such alien as an immigrant in addition to the immigrants quota announced

by the Minister under section 40; provided that the number admitted each year shall not exceed five per cent of the quota.

For the purpose of checking foreign currencies brought in for investment purposes, the immigrant under paragraph one shall provide evidence of his financial standing in accordance with the rules as prescribed by the Commission, for the period of not less than two years but not more than five years as the Commission may deem appropriate.

Section 44. No alien shall be admitted as an immigrant if it appears that:

(1) he had been imprisoned by a judgment of a Thai Court of lawful order, or a judgment of a foreign Court except for petty offences or offences committed through negligence or offences exempted by the Ministerial Regulation;

(2) he is unable to earn his living as the result of physical or mental infirmity or being afflicted with a disease as specified in the Ministerial Regulation.

The provision in (2) shall not apply to an alien who is the father, mother, husband, wife, or child of a person whose domicile is in the Kingdom and who is able to support each other.

Section 45. A nonimmigrant who wishes to acquire immigrant status shall submit an application in the form prescribed in the Ministerial Regulation at the immigration office of the locality where he resides; in the case where there is no immigration office in that locality, the submission shall be made at the nearest immigration office. After having considered that the immigrants quota as announced by the Minister under section 40 or the number under section 43, as the case may be, is still available, or that such alien is an eligible person under section 42 and is not under any prohibition under section 44, the Commission may, with the approval of the Minister, grant him immigrant status. As for the alien who has submitted an application for immigrant status, if the period he is permitted to remain in the Kingdom as an nonimmigrant is due to expire while his application is being considered, he may submit an application at the same immigration office requesting to remain in the Kingdom until his application is decided. In such case, the Commission shall have the power to grant such permission, subject to any condition which may be imposed by the Commission or the competent official entrusted by the Commission.

The application under paragraph one is subject to the payment of fees prescribed in the Ministerial Regulation.

Section 46. Pending the issue of a certificate of residence under section 41 or pending the consideration of the Commission or competent official entrusted by the Commission under section 45 paragraph two, if such alien departs from the Kingdom, the permission to remain in the Kingdom under section 41 paragraph five or section 45 paragraph two shall be deemed to have been terminated unless he has obtained a re-entry permission from the competent official prior to the departure, and his re-entry was made during the period permitted by the competent official. In such case, such alien shall be permitted to remain in the Kingdom for the duration as specified.

Section 47. An alien who has been granted immigrant status shall apply to the Director-General or the competent official entrusted by the Director-General for a certificate of residence within thirty days from the date of receiving a written notice of the grant thereof from the competent official.

In case of an immigrant being under twelve years of age, the person exercising parental power or the guardian shall apply for a certificate of residence in such alien's name. In such case, the Director-General or the competent official entrusted by the Director-General may issue a separate certificate of residence or include it in the certificate of residence issued to the person exercising parental power or the guardian.

If no application for a certificate of residence is submitted within the period specified in paragraph one, the Commission may suspend the grant of immigrant status. In such case, the permission to remain in the Kingdom under section 41 paragraph five or section 45 paragraph two shall be terminated.

The applicant for a certificate of residence shall be required to pay the fees at the rate and in compliance with the rules as prescribed in the Ministerial Regulation.

Section 48. A certificate of residence shall be valid for an indefinite period but shall be invalidated upon his departure from the Kingdom unless, prior to his departure, the holder has obtained from the competent

official an endorsement of re-entry permission under section 50. In such case, if such alien re-enters the Kingdom within one year from the date of the prohibition under section 12 or section 44, such certificate of residence shall continue to be valid.

The provision of section 12 in so far as (1) in respect of the issue of visa for passport or traveling document is concerned and (2), (3) and (4) shall not apply to cases under paragraph one.

Section 49. The holder or possessor of the certificate of residence which is invalidated under section 48 shall return it to the competent official.

The possessor of the certificate of residence belonging to a deceased alien shall return it to the competent official.

Section 50. A lawfully resident alien intending to depart from and then return to the Kingdom shall comply with the following:

(1) bring the certificate of residence to the competent official for endorsement of re-entry permission in accordance with the procedure as prescribed in the Ministerial Regulation;

(2) in the case where the alien has no certificate of residence because he has been resident before the enactment of the provisions requiring him to apply therefor, he shall apply to the competent official for a certificate of residence and comply with the procedure in (1);

(3) in the case where there is no available space in the certificate of residence for endorsement under (1), the holder thereof shall apply for a new certificate of residence under section 52.

The endorsement of re-entry permission shall be valid for one year as from the date thereof which shall be good for several trips within such period.

The application for endorsement of re-entry permission and the application for the issue of a certificate of residence under (2) shall be subject to payment of fees as prescribed in the Ministerial Regulation.

Section 51. If an alien who, having been resident but having no endorsement of re-entry permission or having such endorsement, failed to re-enter the Kingdom within the period specified under section 48, wishes

to be admitted as a resident alien, he shall submit an application in accordance with the procedure as prescribed in the Ministerial Regulation. If the Commission, after due consideration, is of the opinion that such alien has good reasons and excuses and is not under any prohibition under section 12 and section 44, it may admit him as a resident alien, with the approval of the Minister, but he shall be required to apply for a new certificate of residence. Pending the grant of permission, the provision of section 45 paragraph two shall apply *mutatis mutandis*.

The provision of section 12 in so far as (1) in respect of the issue of visa for passport or travelling document is concerned and (2), (3) and (9) shall not apply to cases under paragraph one.

The applicant for a new certificate of residence shall be required to pay the fees at the rate and in accordance with the rules as prescribed in the Ministerial Regulation.

Section 52. In the case where documents issued under this Act are lost or damaged and the owner wishes to have substitute, or in the case of applying for a new certificate of residence under section 50(3), the competent official shall, after inquiries have been conducted to his satisfaction, issue a substitute or a new certificate or residence to the applicant who shall be required to pay the fees as prescribed in the Ministerial Regulation.

CHAPTER VI

Expulsion of Aliens from the Kingdom

Section 53. If it subsequently appears that a resident alien is a person of suspicious character under section 12(7) or (8) or is a person under section 12(10), or has failed to comply with the regulations prescribed by the Commission under section 43 paragraph two, or is under any prohibition under section 44, or has been sentenced under section 63 or section 64, the Director-General shall report the matter to the Commission which, if it is of the opinion that the grant of immigrant status should be revoked, may submit its opinion to the Minister for an order to be issued accordingly.

Section 54. Any alien who enters or remains in the Kingdom without permission or the permission has been terminated or revoked may be expelled from the Kingdom by the competent official.

If in the case where an inquiry is required for the expulsion under paragraph one, section 19 and section 20 shall apply *mutatis mutandis*.

In the case where an expulsion order of an alien has been issued, the competent official shall, while awaiting the departure, have the power to permit such alien to reside at any place; provided that such alien presents himself to the competent official at the specified date, time and place, with surety or both surety and security, or the competent official may detain such alien at any place for any period which he may deem necessary.

The provision of this section shall not apply to aliens who have been residents in the Kingdom prior to the date the Immigration Act, B.E.2480 comes into force.

Section 55. In the expulsion of an alien from the Kingdom under this Act, the competent official may send him in any conveyance or by any route as he may deem appropriate.

The costs of sending an alien out of the Kingdom shall be at the expense of the owner of master of conveyance which brought such alien into the Kingdom. In the case where such owner or master of conveyance cannot be found, the offender under section 63 or section 64 shall be liable to the costs and the competent official shall have the power to require that the entire costs of sending an alien out of the Kingdom be paid out by any one of the offenders or all offenders jointly at his option. If such alien requests to leave the Kingdom in other conveyance or by other routes at his own expense, the competent official may grant him such request.

Section 56. In the case where the requirement of visa is exempted under section 12(1) and the alien has produced to the competent official the ticket or any other travelling document of the owner or master of conveyance or other evidence of any person as surety for his departure from the Kingdom in compliance with the conditions set forth in the Ministerial Regulation, the competent official shall have the power to order, with or without any conditions, the owner, master of conveyance or issuer of such

ticket, documents, or evidence, as the case may be, not to cancel, recall, or make any substantial change in such ticket, document or evidence.

The order under paragraph one shall be affixed to or endorsed on such ticket, document or evidence; if any cancellation, recall or substantial change in such ticket, document or evidence is made thereafter without the consent of the competent official and it is contrary to the order of the competent official, it may not be used as evidence against the competent official. The competent official shall have the power to order the owner, master of conveyance or issuer of ticket, document or evidence, as the case may be, to perform his original obligations specified in such ticket, document or evidence for the purpose of sending the alien out of the Kingdom.

CHAPTER VII

Miscellaneous

Section 57. For the purpose of this Act, any person who claims to be person of Thai nationality but has insufficient evidence to substantiate his claim to the competent official shall be presumed to be an alien until his Thai nationality is proven.

The proof under paragraph one shall be submitted to the competent official in the form and subject to payment of fees as prescribed in the Ministerial Regulation. If such person is dissatisfied with the order of the competent official, he may submit a motion to the Court for consideration.

Upon receipt of such motion, the Court shall notify the public prosecutor of it and the public prosecutor has the right of objection.

Section 58. Any alien without evidence of lawful admission into the Kingdom under section 12(1) or a certificate of residence under this Act or certificate of registration under the law on alien registration, shall be presumed to enter the Kingdom in violation of this Act.

Section 59. The Director-General or the competent official entrusted by the Director-General shall have the power to arrest or suppress the offenders under this Act; for this purpose he shall have the power to issue

summons, warrants of arrest or search, or to arrest, search or detain and shall have the power to make inquiry in respect of the offence under this Act as if he were an inquiry official under the Criminal Procedure Code.

Section 60. If the Minister deems it appropriate to grant exemption from any kind of fees as prescribed in this Act in respect of any locality, he shall have the power to do so by having the exemption published in the Government Gazette.

CHAPTER VIII

Penalties

Section 61. Any person who fails to comply with a summons issued under section 10 shall be liable to a fine not exceeding five thousand Baht.

Section 62. Any person who fails to comply with section 11 or section 18 paragraph two shall be liable to imprisonment for a term not exceeding two years and to a fine not exceeding twenty thousand Baht.

If the offender under paragraph one is of Thai nationality, he shall be liable to a fine not exceeding two thousand Baht.

Section 63. Any person who brings or takes an alien into the Kingdom or commits any act which constitutes the aid, assistance or provision of facilities to an alien to enter the Kingdom in violation of this Act shall be liable to imprisonment for a term not exceeding ten years and to a fine not exceeding one hundred thousand Baht.

Any owner or master of conveyance who, having failed to comply with section 23 and having on board an alien who entered the Kingdom in violation of this Act, shall be presumed to have committed the offence under paragraph one, unless he can prove that he was not aware that there was an alien on board even though reasonable care has been taken.

Section 64. Any person who, knowing that an alien entered the Kingdom in violation of this Act, provides him with shelter, hiding place, or any assistance to enable him to escape an arrest, shall be liable to

imprisonment for a term not exceeding five year and to a fine not exceeding fifty thousand Baht.

Any person who provides shelter for an alien who entered the Kingdom in violation of this Act shall be presumed to have the knowledge that such alien entered the Kingdom in violation of this Act unless he can prove that he was not aware of it even though reasonable care has been taken.

If the offence under paragraph one is committed in order to assist the father, mother, children, husband or wife of the offender, the Court has the discretion not to punish him.

Section 65. The owner or master of conveyance who fails to comply with section 23 shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand Baht or to both.

Section 66. The owner or master of conveyance who fails to comply with section 25, section 26 paragraph one, or section 27(2), shall be liable to imprisonment for a term not exceeding two months or to a fine not exceeding ten thousand Baht or to both.

Section 67. The owner or master of conveyance who fails to comply with section 27(1) paragraph one or does not provide reasonable facilities to the competent official under section 27(3) shall be liable to a fine not exceeding twenty thousand Baht.

Section 68. The owner or master of conveyance who fails to comply with section 28 paragraph two shall be liable to a fine not exceeding ten thousand Baht.

Section 69. The owner or master of conveyance who fails to comply with section 28 paragraph two shall be liable to a fine not exceeding ten thousand Baht for each member of the crew whom he fails to deliver to the competent official.

Section 70. The owner or master of conveyance who entered the Kingdom with aliens who are under any prohibition under section 12(1) on board as passengers shall be liable to a fine not exceeding twenty thousand Baht for each of such aliens.

Section 71. The owner or master of conveyance who fails to comply with the order of the competent official under section 29 paragraph one shall be liable to imprisonment for a term not exceeding five years and to a fine not exceeding fifty thousand Baht.

If such non-compliance with the order of the competent official enables an alien to escape, the owner or master of conveyance shall be liable to imprisonment to imprisonment for a term not exceeding ten years and to a fine not exceeding one hundred thousand Baht.

Section 72. An alien who escapes from the conveyance, or escapes enroute to the place where the owner or master of conveyance was ordered by the competent official to detain or deliver under section 29, or escapes while being detained under the authority of the competent official under this Act, shall be liable to imprisonment for a term not exceeding two years or to fine not exceeding twenty thousand Baht or to both.

Section 73. The owner or master of conveyance who fails to comply with the order of the competent official under section 30 shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand Baht or to both.

Section 74. Any person who violates section 31 or section 32 shall be liable to a fine not exceeding ten thousand Baht.

Section 75. Any alien who fails to comply with section 37(1) shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand Baht or to both.

Section 76. Any alien who fails to comply with section 37(2), (3), (4) or (5) shall be liable to a fine not exceeding five thousand Baht and a fine of two hundred Baht per day until compliance therewith.

Section 77. Any person who fails to comply with section 38 shall be liable to a fine not exceeding two thousand Baht but, if the offender is a hotel manager, he shall be liable to a fine from two thousand Baht to ten thousand Baht.

Section 78. Any person who fails to comply with section 49 shall be liable to a fine not exceeding one thousand Baht.

Section 79. The owner, master of conveyance or issuer of ticket, document or evidence, who fails to comply with the order of the competent official under section 56 shall be liable to imprisonment for a term not exceeding six months or to a fine of five hundred Baht per day until such alien departs from the Kingdom, but the total fine shall not exceed fifty thousand Baht or to both.

Section 80. Any person who destroys or defaces the order of the competent official under section 56 paragraph two with intent to prevent the owner, master of conveyance or issuer of ticket, document or evidence from knowing such order shall be liable to a fine not exceeding five thousand Baht.

Section 81. Any alien who remains in the Kingdom without permission or the permission has been terminated or revoked shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding twenty thousand Baht or to both.

Section 82. Any alien who fails to comply with, violates or refuses to acknowledge the order issued for him by the Minister, the Commission, the Director-General or the competent official entrusted by the Commission under this Act shall be liable to a fine not exceeding five thousand Baht.

If the order under paragraph one is an expulsion order, such alien shall be liable to imprisonment for a term not exceeding two years and to a fine not exceeding twenty thousand Baht.

Section 83. In the case where the offender who is liable to punishment under this Act is a juristic person, the managing director, manager or representative of such juristic person shall also be liable to such punishment unless he can prove that he has taken no part in the commission of the offence by such juristic person.

Section 84. There shall be a settlement committee consisting of the Director-General of the Police Department or representative, Director-General of the Public Prosecution Department or representative, and the Commander of the Immigration Division or representative as members with

the power to settle all offences under this Act except the offences under section 62 paragraph one, section 63, section 64, section 71 and section 82 paragraph two. For this purpose, the committee may delegate the power to settle offences to any inquiry official or competent official under the rules or conditions as it may deem appropriate.

Where the offender has paid the fine as fixed, the case shall be regarded as settled under the Criminal Procedure Code.

Transitory Provisions

Section 85. An alien who has been admitted into the Kingdom as a nonimmigrant on the date this Act comes into force shall be deemed to have been admitted under this Act; provided that he is entitled to such rights and benefits as appeared in the evidence of admission.

Section 86. An alien who has been admitted into the Kingdom as a nonimmigrant and has remained in the Kingdom for a period exceeding ninety days on the date this Act comes into force shall give first notice to the competent official under section 37(5) within seven days from the date this Act comes into force.

Section 87. The house owner, owner or occupier of a dwelling place or manager of the hotel who provides accommodation to an alien admitted into the Kingdom on the date this Act comes into force shall notify the competent official under section 38 within thirty days from the date this Act comes into force.

Section 88. A certificate of residence issued under the law on immigration prior to the date this Act comes into force shall be deemed the certificate of residence issued under this Act.

Section 89. The endorsement of re-entry permission made by the competent official in the certification of residence prior to the date this Act comes into force shall be deemed the endorsement of re-entry permission under this Act.

Section 90. An alien who is under a detention order pending departure from the Kingdom on the date this Act comes into force shall be deemed an alien under a detention order pending departure from the Kingdom under this Act.

Section 91. All applications submitted by aliens for consideration before and on the date this Act comes into force shall be deemed applications submitted under this Act.

Section 92. All Ministerial Regulations, regulations, rules, orders or resolutions of the Immigration Commission established under the Immigration Act, B.E. 2493 as amended by the Immigration Act (No. 2), B.E. 2497 which are in force prior to the date this Act comes into force shall continue to be in force in so far as they are not contrary to or inconsistent with the provisions of this Act until they are replaced by the Ministerial Regulations, regulations, rules, orders or resolutions of the Commission under this Act.

Countersigned by:

S. Hotrakitya
Deputy Prime Minister

Certified correct translation

(Signed)

(Taksapol Chiemwichitra)
Office of the Juridical Council

Rates of Fees, Charges and Other Costs

Fees[5]

(1)	Visa issued under section 12(1)	not exceeding	500 Baht each
(2)	Appeal under section 22	not exceeding	500 Baht each person
(3)	Application to remain in the Kingdom under section 35	not exceeding	500 Baht each person
(4)	Appeal under section 36	not exceeding	500 Baht each person
(5)	Application for re-entry into the Kingdom under section 39	not exceeding	500 Baht each person /each trip
(6)	Application for immigrant status under section 45	not exceeding	2,000 Baht each person
(7)	Certificate of residence under section 47 or 51	not exceeding	50,000 Baht each
	In the case where the applicant for a certificate of residence is a spouse or child who is not *sui juris* of a resident alien or of a person of Thai nationality	not exceeding	25,000 Baht each
(8)	Endorsement of re-entry permission under section 50(1)	not exceeding	500 Baht each person

[5] As amended by the Immigration Act (No. 2), B.E. 2523 (1980).

(9)	Certificate of residence under section 50(2)	not exceeding	5,000 Baht each
(10)	Documents issued under section 52	not exceeding	500 Baht each
(11)	Application to prove nationality under section 57	not exceeding	200 Baht each person

Charges and Other Costs

(1)	Overtime inspection of conveyance without passenger,	not exceeding	200 Baht each time
	with passenger, an additional charge of	not exceeding	10 Baht per person
(2)	Inspection of each conveyance at the place other than that prescribed by the Director-General under section 26 paragraph one	not exceeding	200 Baht each day
(3)	Inspection of each conveyance at the place other than that prescribed by the Director-General under section 26 paragraph one	not exceeding	200 Baht each day
(4)	Taking charge of each conveyance outside office	not exceeding	200 Baht each day /each conveyance

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Professor Anne F. Bayefsky

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