

SECURING CITIZENSHIP



India's legal obligations towards
precarious citizens and stateless persons

Centre for Public Interest Law, Jindal Global Law School
September 2020



Centre for Public Interest Law
Jindal Global Law School, O.P. Jindal Global University
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precarious citizens and stateless persons**

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“I welcome the publication of *Securing Citizenship: India’s legal obligations towards precarious citizens and stateless persons*. This report raises an urgent call on India to affirm the nationality of the stateless and those at risk of statelessness, who deserve to fully and equally enjoy human rights deriving from nationality. As UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, I am pleased to support the report’s recommendations as important contributions to addressing intersectional and structural discrimination against the most vulnerable people in India, including children.”

— E. TENDAYI ACHIUME, UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance

“Securing Citizenship comprehensively distils the international and national law on citizenship and statelessness, including the right against discrimination. It captures the marginalisation of stateless persons as a minority group and suggests ways to remedy it. This report highlights how law limits power, and why it must arbitrate when power is misused by the dominant. A thoughtful and accurate portrayal for those interested in what is currently at stake in India. I hope the recommendations will prove effective to address the concerns of arbitrary deprivation of nationality of minorities in Assam.”

— JOSHUA CASTELLINO, Executive Director, Minority Rights Group International & Professor of Law, Middlesex University

“Developments related to the National Register of Citizens (NRC) are being viewed by the nationality rights and human rights communities with growing concern. There are serious concerns of mass disenfranchisement, which will strain the foundations upon which the world’s largest democracy was built. In this context, this report provides a robust and thorough analysis of citizenship and the right to nationality in India, and is an invaluable resource for advocates and scholars alike.”

— **AMAL DE CHICKERA**, Co-Director, Institute on Statelessness and Inclusion

“This is a thoroughly researched, comprehensive and insightful study of the law and policy on statelessness in India today. An extremely timely intervention, the report makes a series of important recommendations and is a must-read for students, academics, activists, lawyers, policymakers, and legislators, and all those concerned with citizenship and statelessness issues in India.”

— **MICHELLE FOSTER**, Professor and Director, Peter McMullin Centre on Statelessness, Melbourne Law School, University of Melbourne

“This comprehensive report will provide an invaluable resource for lawyers and judges in India about international and comparative law relation to the right to a nationality; and for those elsewhere on the law and jurisprudence from India. The text provides in-depth analysis of principles on nationality and statelessness, detention of stateless persons, and access to other rights. It highlights the grave concerns about the current situation, but provides tools to argue for improvement.”

— **BRONWEN MANBY**, Senior Policy Fellow, Middle East Centre, London School of Economics and Political Science



Foreword

6 A central objective of laws and legal institutions in any society is to promote rule of law, rights, and justice. Their failure to do so is of serious concern to all its members. When it disproportionately impacts the poor, marginalised and oppressed groups in society, it is a matter that demands special attention. In that instance it is the urgent duty of the legal community, among others, to ascertain if existing laws are being respected and to suggest reforms that may be needed in order to avoid troubling outcomes. This solemn responsibility is at least one important reason that law school education is considered incomplete if students do not engage with, both in classrooms and clinics, the social and legal conditions of subaltern groups in society.

One such group is that of precarious citizens and stateless persons: the former category indicates a situation of uncertainty with respect to an individual's citizenship status. The condition of these two groups is that of the most wretched of the earth. As the idea of Westphalia has come to colonise planet Earth the inalienable rights of man have come to be inextricably linked with the acquisition of nationality. To be stateless is to have, as Hannah Arendt and Giorgio Agamben have pointed out, a bare existence which represents the antithesis of a life of security and dignity. Indeed, the concepts and rights of human security and dignity are empty without securing a universal right of nationality.

Therefore, over the last century, the international community has set the goal of eliminating statelessness. Toward this end it has adopted two conventions viz., the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Besides there are several core international declarations and conventions on human rights with provisions that guarantee a right to nationality. Article 15 of the Universal Declaration of Human Rights (UDHR) states that 'everyone has the right to a nationality' and perhaps more significantly that 'no one shall be arbitrarily deprived of his

nationality nor denied the right to change his nationality'. These norms have acquired the status of customary international law. Article 24 (3) of the International Covenant on Civil and Political Rights (ICCPR) states that 'every child has the right to acquire a nationality'. This right is reaffirmed in Article 7 of the Convention on the Rights of the Child (CRC). Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) mandates that State Parties 'eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin...to nationality'. Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires that States Parties 'shall grant women equal rights with men to acquire, change or retain their nationality' and 'shall grant women equal rights with men with respect to the nationality of their children'. Article 18 of the Convention on the Rights of Persons with Disabilities (CRPD) inter alia notes that persons with disability 'have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability'. Finally, Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) requires that 'each child of a migrant worker shall have the right to a ... nationality'.

But despite international efforts the problem of statelessness has not gone away. Indeed, it has made a comeback on the international agenda. The publication, *The World's Stateless: Deprivation of Nationality* (2020), brought out by the Institute on Statelessness and Inclusion, estimates that at least 15 million people live today without a nationality. Among these are stateless groups in South Asia that include the Rohingya in Myanmar and Bihari refugees in Bangladesh.

In the instance of India it notes the threat of 'mass disenfranchisement' as a result of the National Register for

Citizens (NRC) process. The present report titled *Securing Citizenship: India's legal obligations towards precarious citizens and stateless persons*, however, goes beyond and considers the existential and legal condition of both precarious citizens and stateless persons in India. It is produced by students of Jindal Global Law School, India in collaboration with students of University Catholique de Lille, France. The report undertakes rigorous legal analysis of the subject without entering the domain of politics. It examines in detail the rights available to precarious citizens and stateless persons under the Constitution of India and international conventions to which India is a party. More specifically, the report looks at the evolving national and international jurisprudence of Indian courts, the courts of other nations, and international tribunals in the light of India's international legal obligations.

The report makes some crucial recommendations that include urging India to become a party to the two conventions on statelessness. It also calls for the adoption of an explicit policy on the question of statelessness addressing key questions such as how the problem of statelessness is to be addressed, what are the measures, if any, already in place, and the policy on granting nationality to children born on the territory of India. In this regard, the report underlines the need for identifying an alternative policy to detention in the case of both precarious citizens and stateless persons. In fact the report goes on to explore human rights compliant alternatives. It also stresses the need for the government to grant as an interim measure formal recognition to stateless persons and issuing them identity certificates.

It deserves mention here that there are ongoing efforts in many parts of the world to address the problem of statelessness. For instance, at least six States have amended their laws to grant nationality to children born in their territory who would otherwise be stateless – Armenia, Cuba, Estonia, Iceland,

Luxembourg and Tajikistan. The World's Stateless also refers to numerous declarations on the problem of statelessness including the Abidjan Declaration on the Eradication of Statelessness covering West Africa, the Declaration of the International Conference of the Great Lakes Region on the Eradication of Statelessness, the N'Djamena Initiative on the Eradication of Statelessness covering Central Africa, the Arab Declaration on Legal Identity and Belonging covering members of the League of Arab States, and the Brazil Declaration which devotes a chapter to ending statelessness in the Americas.

The present report must be commended in this backdrop for its effort to raise awareness about the grave problems encountered by precarious citizens and stateless persons. It is an important and timely effort to flag relevant legal issues as law and legal institutions are an important site of struggle for democratic rights. Even as concern grows that judicial institutions are not as alert to the violation of democratic rights as in the past, the resort to them is still a significant remedy in the hands of those threatened with or deprived of the right to nationality. Not everyone may agree with every bit of the analysis offered on a wide range of legal issues and questions. But it bears reiteration that what the report does effectively is to consider all pertinent policy and legal aspects concerning the status of precarious citizens and stateless persons, including issues relating to detention. To that end, this report renders a signal service making cogent recommendations. I earnestly hope this report will be read, disseminated and debated.

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Abbreviations

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ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACTHPR	African Court on Human and Peoples' Rights
ACHR	American Convention on Human Rights
BPL	Below Poverty Line
CESCR	Committee for Economic, Social, and Cultural Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CNMW	Convention on the Nationality of Married Women
CRPD	Convention on the Rights of Persons with Disabilities
CRC	Convention on the Rights of the Child
CJEU	Court of Justice of the European Union
ERT	Equal Rights Trust
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FT	Foreigners Tribunals
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

CRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDC	International Detention Coalition
LTV	Long-term Visa
MEA	Ministry of External Affairs
NHRC	National Human Rights Commission
NRC	National Register of Citizens
OHCHR	Office of the United Nations High Commissioner for Human Rights
PCIJ	Permanent Court of Justice
PDS	Public Distribution System
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UDHR	Universal Declaration of Human Rights

Executive Summary

22

Citizenship is fundamental to realise the full extent of human rights. Stateless persons suffer from a lack of access to their rights since they are not citizens of any state. Precarious citizens – whose nationality status is in a limbo – stand at the risk of statelessness and erosion of rights. This report aims to comment on and review existing law and policy on statelessness in India. It is divided into three chapters – Status, Detention and Socio-Economic Rights. Each chapter provides a framework of law and policy by examining Indian law, international law and global best practices that India should follow to fulfil its obligations towards precarious citizens in Assam and stateless persons in Indian territory. Each chapter concludes with recommendations to strengthen the existing law and policy.

THE FIRST CHAPTER of this report employs international and Indian jurisprudence to discuss the legal status of precarious citizens in Assam and stateless individuals in India. It is divided into three sections. The first two sections address the issue of the legal status of the two groups, respectively, while the third section summarises the arguments and the key recommendations made throughout the chapter. The first section argues that there exists a right to nationality for every individual and that an individual who has a ‘genuine link’ to India must have Indian nationality. This obligation upon the Indian state has been qualified by elaborating upon the right of an individual not to be arbitrarily deprived of their Indian nationality. This section further develops another ancillary obligation upon the Indian state to prevent statelessness within its territory. It argues that precarious citizens in Assam are Indian citizens facing arbitrary deprivation of nationality and their Indian citizenship must be automatically affirmed. The section ends with a special focus on the right to nationality of children. The second section stresses the need for

the recognition of a legal status for stateless persons in India. The section concludes by elucidating the core obligation on the Indian state to grant nationality to stateless individuals within its territory using the arguments made in the first section itself. Among other key recommendations made throughout this chapter, it is argued that India should first sign and ratify the two statelessness conventions and the CRMW.

THE SECOND CHAPTER concerns the protection of civil and political liberties of individuals who have been deprived of their citizenship. The rampant reliance on detention for deportation in India poses a grave threat to the life and liberty of individuals. In view of the same, it extends a four-pronged argument. Firstly, the chapter argues that arbitrary detention of precarious citizens and stateless persons is prohibited since deportation does not serve as a legitimate purpose for them and is disproportionate. Despite this prohibition, there is evidence to show that precarious citizens in Assam are being indefinitely detained. This section further argues for the prohibition of indefinite detention as it is inherently arbitrary. Secondly, there are numerous alternatives to detention available in situations requiring determination of nationality of precarious persons where the state often argues that detention is warranted. These principles must be cautiously resorted to while ensuring that they never become alternative forms of detention. They are endorsed by international law, various national best practices and by the jurisprudence of the Supreme Court of India, and are in line with the principle of minimum intervention. Thirdly, detention for deportation cannot be devoid of procedural and substantive rights which are generally available to all incarcerated persons. These rights involve, among others, the right to legal aid, the right to review, the right to information and notice, and the right to release.

Lastly, children constitute a vulnerable group among existing detainees. India is not only a signatory to international human right treaties which protect children from incarceration but also has a statutory framework in place to promote the best interests of a child. Therefore, India is under an obligation to recognise their special needs and impose a blanket ban on the detention of children.

THE THIRD CHAPTER focuses on the undeniable effect of precarious citizenship and statelessness on socio-economic rights. Given the precarious position of the individuals who have been left off the NRC and that of stateless persons, both international and domestic legal frameworks provide stipulations for how these communities should be protected. India must ensure that minimum core obligations are met despite the reality of citizens themselves facing numerous obstacles in accessing these rights. Indian courts have historically affirmed the same despite arguments of the state's financial restraints. Despite India's lack of comprehensive refugee and statelessness policy, its practice with analogous communities like the Tibetans and UNHCR-registered refugees sheds light on the range of basic socio-economic rights that the state can and must extend to all vulnerable communities, irrespective of their citizenship status. These rights include access to documentation, healthcare, food and nutrition, shelter, housing and sanitation, education and employment, and a particular obligation to protect children as per robust international and Indian law.

In light of these aforementioned obligations, this report makes numerous recommendations including compliance with international legal instruments, strengthening of state apparatuses, and the direct involvement of civil society actors. These measures shall address the prevention and reduction of statelessness as the ultimate and necessary law and policy goal. In the immediate context, the framework of each chapter and the recommendations shall contribute to the cause of terminating the everyday erosion of rights of precarious citizens in Assam and stateless persons in Indian territory.

Introduction

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“To be without a nationality or not to be a citizen of any country at all is to stand naked in the world of international affairs. It is to be alone as a person, without protection against the aggression of the states, an unequal battle which the individual is bound to lose.”¹

—JOHANNES MORSINK

¹ Johannes Morsink, *Universal Declaration of Human Rights: Origins, Intent and Drafting* (University of Pennsylvania Press 1999).

CRISIS OF CITIZENSHIP

The world is witnessing a crisis of citizenship. Security of citizenship was meant to be a settled debate. But there has been a resurfacing of statelessness and other instances of loss of citizenship across the world.² States in some cases have resorted to revocation of citizenship. They have also taken measures that dilute the security of citizenship status.³ India is no exception. Particularly over the last few years, the Indian state has proposed or implemented policy measures that have a bearing on the citizenship of many of its residents. The country also has numerous communities that are stateless. Yet it does not have a legally informed policy on the issue. This context demands a clear statement on the content of the Indian state's legal obligations under international law vis-à-vis citizenship both towards its own citizens and the individuals who are stateless.

The foundation of these obligations is **Article 15** of the **Universal Declaration of Human Rights** ('UDHR') that proclaims every individual's right to a nationality. The right mandates that individuals shall not be deprived of their nationality nor denied the right to change nationality. It recognises the fundamental character of political belonging. It is – in Hannah Arendt's oft-quoted and iconic characterisation – the right to have rights. As Arendt had pointed out, membership in political communities is indispensable for respecting and preserving human dignity and agency. Individuals without protected political membership are bound to be rendered voiceless and seriously vulnerable to violence. International law has appreciated this over the last many decades. The first international convention on statelessness

2 Guy S Goodwin-Gill, 'Statelessness is back (not that it ever went away...)' (*EJIL: Talk!*, 12 September 2019) <<https://www.ejiltalk.org/statelessness-is-back-not-that-it-ever-went-away/>> accessed 24 May 2020. See also Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28(4) *International Journal of Refugee Law* 564.

3 See Open Society Justice Initiative, 'Unmaking Americans' <<https://www.justiceinitiative.org/publications/unmaking-americans>> accessed 16 May 2020; Émilien Fargues and Elke Winter, 'Conditional membership: what revocation does to citizenship' (2019) 23(4) *Citizenship Studies* 295; Laura van Waas, 'Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (T.M.C. Asser Press 2016).

was the **Convention relating to the Status of Stateless Persons** (**'1954 Convention'**). It sought to 'regulate and improve the status of stateless persons' by guaranteeing a minimum set of rights such as the right to identity, travel documents, education, housing, and employment, among others.⁴ It also established the right against expulsion. **The Convention on the Reduction of Statelessness** (**'1961 Convention'**) developed this framework with the aim to prevent and reduce statelessness over time.⁵ It aimed to ensure the right of every person to a nationality.

Hansa Mehta, the Indian representative at the UDHR drafting sessions, termed Article 15 as 'the fundamental right'.⁶ The Indian Constitution – a document deeply engrained in human rights and liberties – mandates respect for international law.⁷ Despite this, the Indian state has not adequately appreciated the right to nationality, and the broader discourse of international law on citizenship. India is not a signatory to the two statelessness conventions and has not actively participated in transnational efforts to combat statelessness.⁸ There is no domestic legal framework on the issue. Indian law bundles all non-nationals in the category of 'foreigners'. This is detrimental to protecting the rights of different categories of people like refugees and the stateless. This does not fully appreciate the needs and rights of different classes of people who are subsumed within a single category. Moreover, the contemporary debates on citizenship – that may end up having a bearing on the status of millions of

4 Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (1954 Convention), Preamble.

5 Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (1961 Convention).

6 Morsink (n 1) 81.

7 Constitution of India 1950, art 51.

8 Several civil society organisations and activists along with the UNHCR are leading efforts to combat statelessness. The UNHCR, as the UN mandate holder, is running the #IBelong campaign and the Global Action Plan to End Statelessness by 2024. Several states, international and regional organisations, and civil society organisations pledged concrete measures to combat statelessness in the High-Level Segment on Statelessness. India did not participate in the summit. See UNHCR 'Every person has the right to say #IBelong' (UNHCR) <<https://www.unhcr.org/ibelong/>> accessed 24 July 2020; UNHCR 'Global Action Plan to End Statelessness 2014-2024' <<https://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html>> accessed 24 July 2020; UNHCR 'Results of the High-Level Segment on Statelessness' (UNHCR) <<https://www.unhcr.org/ibelong/results-of-the-high-level-segment-on-statelessness/>> accessed 24 July 2020.

people – have rarely reflected the country’s obligations under international law. This is a severe limitation. International law is relevant to these debates as it brings clarity on norm and policy. It is a window to the wisdom that the global community has accumulated across time and space. It brings to focus what rule of law demands of India.

FRAMING

Securing Citizenship seeks to highlight India’s obligations under international law in relation to citizenship. The report notes the country’s obligations towards two different categories of persons. The first category is that of stateless persons in the territory of India. Under the 1954 Convention, stateless persons are those who are ‘not considered as a national by any State under the operation of its law’.⁹ This definition has gained the status of customary international law. The second category – that the report calls ‘precarious citizens’ – are those Indian nationals who face the threat of arbitrary deprivation of nationality. Their condition is vulnerable and their citizenship insecure since they are facing the risk of statelessness. Precariousness indicates that their situation is marked by uncertainty, danger and contingency.¹⁰ This precariousness may be the result of the legally instituted citizenship determination procedures that are not fully transparent or respect due process. These procedures may either fail to properly appreciate evidence of nationality, or place unduly burdensome evidentiary requirements. Precarious citizens consequently face threat of detention, deportation and erosion of their fundamental rights.

9 1954 Convention art 1.

10 M. Mohsin Alam Bhat, ‘Twilight Citizenship’ (2020) 729 Seminar <https://www.india-seminar.com/2020/729/729_m_mohsin_alam_bhat.htm> accessed 5 August 2020.

We need to appreciate the condition of both these categories of persons to give a full account of the crisis of citizenship in India and the pertinence of international legal norms. India has grappled with concerns over citizenship and migration since the founding experience of the Partition in 1947.¹¹ The tumultuous history of dealing with refugees and migrants has also added to the debate on citizenship. The situation of Estate Tamils in Sri Lanka is one of the first instances of mass statelessness in the region. Over 900,000 persons were rendered stateless when Sri Lanka became independent.¹² Around 300,000 ‘Biharis’ (or ‘stranded Pakistanis’) found themselves stateless when neither Pakistan nor Bangladesh granted them citizenship after the birth of Bangladesh in 1971.¹³ Myanmar has systematically deprived between 1 - 1.5 million Rohingya of nationality since the 1982 citizenship law came into force.¹⁴ India has long dealt with statelessness as these communities along with the Tibetans make a large percentage of asylum seekers in India who seek protection as stateless persons [see box].¹⁵

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- 11 See Niraja Gopal Jayal, *Citizenship and Its Discontents* (HUP 2013) and Anupama Roy, *Mapping Citizenship in India* (OUP 2010).
 - 12 Gerrard Khan, ‘Citizenship and Statelessness in South Asia’ (2001) Working Paper No. 47 <<https://www.refworld.org/pdffd/4ff565992.pdf>> accessed 7 August 2020. The Estate Tamils were granted Sri Lankan citizenship in 2003. The report endorses this state practice as elaborated in the Status chapter. See Chetani Priyanga Wijetunga, ‘Feature: Sri Lanka makes citizens out of stateless tea pickers’ (UNHCR, 7 October 2004) <<https://www.unhcr.org/news/latest/2004/10/416564cd4/feature-sri-lanka-makes-citizens-stateless-tea-pickers.html>> accessed 7 August 2020.
 - 13 Khalid Hussain, ‘The end of Bihari statelessness’ (2009) 32 Forced Migration Review <<https://www.fmrreview.org/sites/fmr/files/FMRdownloads/en/statelessness/hussain.pdf>> accessed 11 August 2020. In 2008, a Dhaka Court recognised the right to Bangladeshi nationality for a big portion of ‘Biharis’. See Minority Rights Group International, ‘Biharis’ (July 2018) <<https://minorityrights.org/minorities/biharis/>> accessed 11 August 2020.
 - 14 See UNHCR ‘Global Report 2019’ (2019) 4, 69, 113 <https://reporting.unhcr.org/sites/default/files/gr2019/pdf/GR2019_English_Full_lowres.pdf> accessed 5 August 2020; Institute on Statelessness and Inclusion, ‘Statelessness in Numbers: 2020’ (2020) <https://files.institutesi.org/ISI_statistics_analysis_2020.pdf> accessed 3 September 2020.
 - 15 See UNHCR ‘Factsheet India’ (UNHCR, January 2020) <<https://reporting.unhcr.org/sites/default/files/UNHCR%20India%20factsheet%20-%20January%202020.pdf>> accessed 14 July 2020; UNHCR ‘Global Trends: Forced Displacement in 2019’ (2020) 73, 76 <<https://www.unhcr.org/5ee200e37.pdf>> accessed 11 July 2020; Ministry of Home Affairs, Government of India, ‘Annual Report 2018-19’ 244-245 <https://www.mha.gov.in/sites/default/files/AnnualReport_English_01102019.pdf> accessed 17 July 2020; Tibet Justice Centre, ‘Tibet’s Stateless Nationals III: The Status of Tibetan Refugees in India’ (2016) 99 <<https://www.bu.edu/law/files/2016/09/Tibets-Stateless-Nationals-II-FINAL-report.pdf>> accessed 12 March 2020. See also Julia Meredith Hess, ‘Statelessness and the State: Tibetans, Citizenship, and Nationalist Activism in a Transnational World’ (2006) 44(1) International Migration 79.

Refugee and stateless populations in India

As of January 2020, the government of India was providing protection and assistance to 108,005 refugees from Tibet and 95,230 from Sri Lanka. UNHCR India had 40,859 refugees and asylum seekers registered including refugees from Myanmar (21,049), Afghanistan (16,333) and 3,477 refugees from Iran, Iraq, Somalia, and other countries of origin.

- Although often called refugees, the majority of Tibetans in India do not enjoy refugee status (or any other legal status) and remain stateless.
- The MHA Annual Report 2018–19 remarks that many Sri Lankan refugees in India are stateless. However, it does not provide any data on these stateless individuals or any other stateless population in India.
- UNHCR clarified in 2019 that for the first time, Rohingyas refugees would also be counted as stateless persons and reported that there were 17,730 stateless persons of Rohingya ethnicity in India at the end of 2019.

** A large number of refugees (including stateless refugees), asylum seekers and stateless persons in India remain unregistered with the Government of India or UNHCR India. Unofficial estimates put the total number in hundreds of thousands.*

The problem of precarious citizenship has emerged, at least in a sustained manner, more recently. Its locus has been the eastern state of Assam, which has witnessed a decades-long conflict on the question of Bengali migrants [\[see box\]](#).

Brief history of citizenship conflict in Assam

The eastern Indian state of Assam has witnessed decades-long contestation and conflict over migration. This contestation aggravated in the 1970s, when local Assamese communities expressed grave concerns about what they perceived to be a large-scale influx of refugees during the 1971 Bangladesh war. They feared that this would reduce the local population to a minority. This process saw growing unrest in the region.

In 1985, the Indian state came to an understanding with the local groups under the Assam Accord. The Accord promised legal protection for Assamese cultural and political interests. The Indian state amended India's citizenship laws to provide a route to naturalisation to refugees who had entered the state before 25th March 1971. It committed to detect and deport those who came after this date.

Continued →

The Indian state has since created distinct mechanisms to identify who it believes to be foreigners illegally residing in Assam. In 1997, the Election Commission of India marked thousands of persons as doubtful voters, abrogating their participation in the democratic process. It remains unclear how the commission came to identify voters. At present, there are around 120,000 doubtful voters in Assam. The state has also constituted a special police force tasked with identifying foreigners.

In 1983, the Indian state had constituted tribunals under the Illegal Migrants (Determination by Tribunal) Act to determine the citizenship status of suspected foreigners in Assam. The Indian Supreme Court in 2005 held the legislation as unconstitutional in *Sonowal v. Union of India*. The Court noted that the IMDT Act was ineffective since it had far too many safeguards in favour of defendants. It held that citizenship determination must be delegated to the Foreigners Tribunals that are quasi-judicial bodies constituted by the Executive under the Foreigners Act 1946. This Act places the burden of proof on the suspected foreigners and permits the tribunal members to determine their own procedures that may be in variance with ordinary courts.

Over the last 15 years, the state has referred all doubtful voter and police reference cases to these tribunals. Over 117,000 persons have been declared foreigners by these tribunals. At present, 100 tribunals are in operation, and the government has announced the creation of 200 more.

Observers have consistently complained about the integrity and veracity of the citizenship determination procedures instituted by the state, especially Foreigners Tribunals (‘FTs’) and the border police.¹⁶ In 2015, the Supreme Court of India initiated a citizenship enumeration called the National Register of Citizens (‘NRC’) in the eastern state of Assam. All the residents of the state were expected to submit documentary proof of their citizenship. When the NRC authorities came out with the final list in 2019, they had excluded over 1.9 million (1,906,657) residents of the state.¹⁷ The excluded persons have a right to file appeals in FTs, failing which they stare at uncertainty of citizenship status. Numerous high-ranking Indian government officials have proposed the implementation of an NRC at a national level.¹⁸

These two categories of persons – precarious citizens and the stateless – are doubtlessly distinct. However, they share the condition of insecure status and rights owing to their citizenship. The stateless do not enjoy the security of citizenship at all. The citizenship for precarious citizens is insecure and hence, they are in many ways on the verge of statelessness. Citizenship, as recent scholarship has noted, is like a slippery slope.¹⁹ ‘Lucky holders of hard citizenship rights’ are at the top. Towards the bottom are a number of persons with varying degrees of uncertainty: the stateless, refugees, asylum seekers, the migrants deemed illegal by the state, and precarious citizens. Appreciating their shared vulnerability on the slippery slope allows us to cross-fertilise lessons and best approaches for the benefit of securing citizenship.

16 Amnesty International, ‘Designed to Exclude: How India’s Courts are Allowing Foreigners Tribunals to Render People Stateless in Assam’ (2019) 37-39 <<https://amnesty.org.in/wp-content/uploads/2019/11/Assam-Foreigners-Tribunals-Report-1.pdf>> accessed 23 April 2020; Ipsita Chakravarty, ‘Declaring foreigners: How Assam’s border police and tribunals form a secretive system of justice’ (*Scroll.in*, 19 August 2018) <<https://scroll.in/article/890134/declaring-foreigners-how-assams-border-police-and-tribunals-form-a-secretive-system-of-justice>> accessed 27 July 2020.

17 Express Web Desk, ‘Assam NRC Final List 2019: Over 19 lakh excluded, 3.11 crore included in list’ *The Indian Express* (31 August 2019) <<https://indianexpress.com/article/india/assam-nrc-final-list-2019-published-19-lakh-left-out-5953202>> accessed 12 August 2020.

18 Rohan Venkataramakrishnan, ‘Who is linking Citizenship Act to NRC? Here are five times Amit Shah did so’ (*Scroll.in*, 20 December 2019) <<https://scroll.in/article/947436/who-is-linking-citizenship-act-to-nrc-here-are-five-times-amitshah-did-so>> accessed 21 June 2020.

19 Rhoda E. Howard-Hassmann and Margaret Walton-Roberts, *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015).

Securing Citizenship seeks to interpret the international human rights framework as applicable to India, and links it to the complementary duties under India's Constitution. The report highlights the deviations of Indian state's policies from these standards. It underlines how these policies may be amended in the light of law and best practices across the globe. The report argues that the country is legally bound to prevent and reduce statelessness. This obligation mandates that India affirm the citizenship of precarious citizens being subjected to citizenship deprivation procedures. It also argues that India cannot detain precarious citizens and stateless persons, and must ensure the full gamut of socio-economic rights is available to stateless persons in the Indian territory. The report is first and foremost a tool available to state actors and civil society to improve the condition of stateless persons and those facing statelessness. The report has been written to raise awareness within the Indian society regarding the international law aspects of citizenship. It has condensed relevant norms, case law and recommendations in favour of the inclusion of such issues to the discourse in India. It speaks to judges and legal practitioners in India by providing international and Indian precedents on the various rights available to stateless persons and persons at the risk of statelessness. It also addresses the larger audience of transnational legal scholars and practitioners by interpreting international legal norms in the complex context of contemporary India.

STRUCTURE

38 The report is divided into three chapters, viz. status, detention and socio-economic rights. THE FIRST CHAPTER discusses the status of precarious citizens in Assam and stateless persons in the Indian territory. It highlights the legal requirement to recognise their right to nationality and the ways in which it shall be implemented. It highlights the duty of the state to prevent and reduce statelessness. It argues that precarious citizens cannot be subjected to arbitrary citizenship deprivation procedures and threatened with statelessness. The chapter also specifically focuses on the state obligation to prevent statelessness among children.

Detention of precarious citizens and the stateless is one of the most urgent issues. Yet the legal norms governing this remain the least developed in the area. THE SECOND CHAPTER on detention covers the prohibition of arbitrary detention of precarious citizens and stateless persons. In the light of ongoing detention of precarious citizens in Assam, the chapter elaborates the underlying prohibition of indefinite detention along with the applicable procedural rights and remedies. It highlights the paramount obligation to ensure the rights of child detainees. It also suggests alternatives to detention for stateless persons in India.

THE THIRD CHAPTER focuses on the legal norms related to the protection of basic rights such as the right to health, food and nutrition, housing, education and employment of stateless individuals and precarious citizens. It further develops the applicable norms regarding children's social, economic and cultural rights given the higher protection of rights available to them. It strongly suggests better access to documentation since it is fundamental to access these rights.

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New Delhi

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CHAPTER I

STATUS

SECURING CITIZENSHIP

This chapter addresses the legal status of stateless individuals and precarious citizens in India. It extensively delves into the right to nationality and draws attention to the stakes and consequences of loss of nationality status on individual rights. It situates Indian laws and procedures relating to nationality and statelessness within the norms and frameworks of international law. By doing so, the chapter highlights the gaps in Indian practice and advocates for greater protections for persons on the brink of statelessness. The first section of this chapter lays out two intertwined standards in international law – the right to nationality for every individual, and the duty on states to prevent and reduce statelessness. These two standards, when combined with India's human rights obligations, affirm that under international law, every individual has a right to nationality and States are prohibited from arbitrarily depriving individuals of this foundational right. Moreover, all those individuals who have a genuine connection to India can only enforce this right through India. This argument is particularly relevant but not limited to persons excluded from the NRC in Assam, whose citizenship status is on the slippery slope towards statelessness. It further places a special emphasis on the right to nationality for children. The second section asserts the need for legal recognition of all stateless persons in Indian territory. Recognition of legal status should operate as the first step towards the eventual naturalisation of stateless persons, drawing from international best practices towards the prevention and reduction of statelessness. The chapter ends with recommendations to harmonise India's citizenship laws with the prevailing international law norms and customs relating to statelessness.

ARTICLE 15 OF THE UDHR

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

I. The Right to Nationality

A. THE RIGHT TO NATIONALITY FOR EVERY INDIVIDUAL

43

SECTION I.A.1

A.1 Right to nationality and the 'genuine link' test

The right to nationality is embodied under **Article 15** of the **UDHR** which clearly states that everyone has the right to nationality and that 'no one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality'.²⁰ The UDHR, including Article 15 has achieved the status of customary international law and is binding on all States.²¹ The right of every individual to have nationality is guaranteed by a multitude of international legal instruments.²² This recognition of nationality also extends to the 'change, retention...[and] acquisition' of nationality.²³ Thus, under treaty and customary international law, every individual has a right to nationality. It follows that stateless persons in India and precarious citizens in Assam also have a determinate right to nationality.

20 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 15.

21 *Anudo Ochieng Anudo v United Republic of Tanzania* App no 012/ 2015 (ACtHPR, 22 March 2018) [76].

22 Such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR) (Article 24 (3)), the Convention on the Rights of the Child (CRC), the Convention on the Nationality of Married Women (CNMW), the Convention on the Rights of Persons with Disabilities (CRPD) (Article 18) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW), among others.

23 Such as Article 9 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). See Ruma Mandal and Amanda Gray, 'Out of the Shadows: The Treatment of Statelessness under International Law' (Briefing Paper, International Law Programme, October 2014) Chatham House, The Royal Institute of International Affairs <https://www.chathamhouse.org/sites/default/files/field/field_document/20141029StatelessnessMandalGray.pdf> accessed 10 March 2020.

In *Liechtenstein v Guatemala* ('*Nottebohm*'), while adjudicating between the contesting nationality claims of Friedrich Nottebohm, the International Court of Justice ('ICJ') defined nationality as:

*...a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual... is in fact more closely connected with the population of the State conferring nationality than with that of any other State.*²⁴

To determine the effective nationality of Mr. Nottebohm, the Court elaborated on 'genuine link' as a necessary, supplementary test of a person's nationality in international law. Here, it was for both the states to contest whether Mr. Nottebohm was genuinely connected to Liechtenstein. The Court included a non-exhaustive list of broad factors to help ascertain this genuine link – 'the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc'.²⁵ The Court clarified that it is still each country's sovereign prerogative to devise their own rules for granting its nationality. These rules reflect the juridical expression of the close connection of the individual with that particular State, rather than any other State.

To operationalise the genuine link test, it is inferred that states must recognise the individuals who fulfil these factors in *Nottebohm* and grant them nationality. The absence of such a connection with any other nation further cements the individual's claim to nationality (as in *Nottebohm*), which is tied to the international law obligation to not cause statelessness [↘].

see Section I.B (Chapter I),
pg 66

²⁴ *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ 23.

²⁵ *ibid* 22.

The precarious citizens in Assam have a genuine link to India through their long-term habitual residence, extensive family ties, participation in public life, and their attachment to India. The absence of a genuine link with any other nation, including Bangladesh (their alleged country of nationality) strengthens their genuine link to India. It also must be noted that many precarious citizens have children and grandchildren who were born and raised in India. Stateless individuals in India also have a genuine link in cases where the elements mentioned above are present.

International human rights law over the years has provided another test to determine the connection of nationality between an individual and their country. **Article 12(4)** of the **International Covenant on Civil and Political Rights** ('ICCPR') prohibits any state from arbitrarily depriving a person the right to enter his own country. In *Warsame*, the Human Rights Committee had the opportunity to interpret the phrase 'own country'.²⁶ This test is based on a sociological account of membership. It operates within the human rights paradigm, where individual rights flow from personhood and not from their status. The Committee considered the presence of Warsame's family in Canada, the language he speaks, the long duration of his stay in Canada as well as the lack of any effective ties with any other country (here, Somalia). The test in *Warsame* supplements the nationality centric genuine link test and informs the interpretation of statelessness in international law. It is especially relevant in situation where states misinterpret and refuse to recognise the genuine link of individuals to their country. Subsequently, in *Nystrom*, the Committee held that Australia was 'his own country' on grounds similar to those in *Warsame*.²⁷ The Committee clarified that the applicants shall not be stripped of the nationality of their own country and expelled to a third country since it would violate their human rights.

²⁶ *Jama Warsame v Canada* Comm no CCPR/C/102/D/1959/2010 (UN Human Rights Committee, 1 September 2011).

²⁷ *Nystrom v Australia* Comm no 1557/2007 (UN Human Rights Committee, 1 September 2011).

ARTICLE 12 OF THE ICCPR

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are 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 recognised in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

The central rationale in both cases was that the affected individual was indeed living in ‘his own country’. By referring to General Comment 27, the Committee delved into Article 12 which entitles everyone to return to their own country. The term ‘own country’ is broader than the term ‘country of nationality’ as understood in *Nottebohm*. It indicates that there exist ‘factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality’.²⁸ Factors such as long-term residence, family relations, and intentions to remain along with the absence of similar ties to another country, establish that it is the individual’s own country even when they are not recognised as citizens of that country. As per **General Comment 27**, this broader concept applies to nationals of a country who have been arbitrarily deprived of their nationality and stateless persons arbitrarily blocked from acquiring the nationality of the country of their residence.²⁹ These two situations refer to the communities which are central to this report, viz. Indian nationals in Assam who are facing arbitrary deprivation of nationality, and stateless persons in India, respectively. While India filed a reservation against Article 12, stating that it would apply this provision in conformity with **Article 19** of the **Indian Constitution** (‘Constitution’), these principles will still have a bearing on precarious citizens in Assam, all of whom are Indian nationals facing arbitrary deprivation of nationality [↗]. Hence, the Indian reservation does not affect their right to reside in their ‘own country’.

see Section I.A.3 (Chapter I),
pg 50

International human rights law has elucidated and expanded the genuine link test by grounding it in expansive interpretations of international treaty provisions. *Nottebohm*, among its several shortcomings, applied the genuine link assessment to negate the only formal nationality Mr. Nottebohm had. The risks of basing an individual’s claim to nationality of a

²⁸ *Jama Warsame v Canada* (n 26) 17.

²⁹ UN Human Rights Committee ‘CCPR General Comment No. 27: Article 12 (Freedom of Movement)’ (1999) UN Doc CCPR/C/21/Rev.1/Add.9.

state in their formal legal status alone are clear, as can be seen with the aforementioned situation in Assam. The expanded test ensures that the limitations of *Nottebohm* do not invalidate the rights vested in individual personhood, which form the basis of an individual's claim to effective nationality.³⁰ Thus, the right to nationality along with prevention and reduction of statelessness in international law, supplemented with international human rights law, results in a concrete obligation on the state to grant and recognise (as well as not arbitrarily deprive) nationality of individuals with a genuine link to the state.

Hence, precarious citizens in Assam have a genuine link to India and are living in their 'own country' by the virtue of their long-term residence, family relations, and intentions to remain. They also do not have any such ties to another country, specifically the alleged country of nationality – Bangladesh. The government of Bangladesh has maintained that none of its citizens are in Assam.³¹ Their right to nationality must be recognised in India and the state cannot arbitrarily deprive them of their nationality [↗]. The nationality of stateless persons residing in India shall also be recognised based on their residence and assimilation in India. It will operationalise their right to nationality as per *Nottebohm* and expansive account of nationality in international human rights law.

see Section I.A.3 (Chapter I),
pg 50

30 Audrey Macklin, 'Is It Time to Retire *Nottebohm*?' (2017) 111 AJIL Unbound 496.

31 ANI, 'No Relation To Us, Says Bangladesh On Illegal Immigration Amid Assam Row' (NDTV 1 August 2018) <<https://www.ndtv.com/india-news/no-relation-with-us-bangladesh-on-illegal-immigrants-in-assam-1893131>> accessed 21 July 2020. See also PTI, 'CAA, NRC 'internal matters' of India: Bangladesh PM' *The Economic Times* (19 January 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/caa-nrc-internal-matters-of-india-bangladesh-pm/articleshow/73374451.cms>> accessed 21 July 2020.

A.2 Right to nationality in Indian law

Where the petitioner's nationality is less than conclusive, courts consistently interpret domestic law to assert the right to nationality of the concerned parties. *Mangal Sain* is an early case from the Punjab High Court.³² The petitioner argued that he had migrated from his birthplace in present-day Pakistan to India in 1944 and had been ordinarily resident in India since then and was thus an Indian citizen under **Articles 5** and **6** of the **Constitution**. The Court interpreted 'migrate' in Article 6 broadly to hold that the petitioner's movements, ambitions, sentiments, conduct, and habits all evinced his clear intention to remain and permanently settle in India (much like the conditions of the aforementioned genuine link test), and that he was, therefore, a citizen of India. The Court was sensitive to the effect that a narrow construction of 'migrate' would – in cases like the petitioner's who possessed no other nationality – make such persons stateless.

More recently in *Prabhleen Kaur*, a young woman approached the Delhi High Court after her Indian passport renewal application was denied as her parents' nationality was considered 'doubtful'.³³ Since the petitioner was born in India after 1987, she would be an Indian citizen if either of her parents were Indian citizens at the time of her birth. The Court dismissed the Ministry of External Affairs' ('MEA') impugnation as unjust. It held that a neighbour's allegation that her parents were Afghan citizens, and some discrepancies in the birth registry at Amritsar were not sufficient evidence to dislodge the petitioner's assertion that their family had migrated to India during Partition. The Court held that the MEA could not deny a passport on a mere doubt, especially when the petitioner and both her parents had been issued passports in the past. Crucially, the Court reiterated the adverse consequences of MEA's stance – the petitioner had never set foot in Afghanistan, and clearly had no moorings to any country but India, so doubting her nationality at this stage would

³² *Mangal Sain v Shrimati Shanno Devi* AIR (1959) P&H 175 (Punjab & Haryana High Court). It was upheld by the Supreme Court in *Shanno Devi v Mangal Sain* AIR (1961) SC 58.

³³ *Prabhleen Kaur v Union of India & Anr* (2018) 253 DLT 602 (Delhi High Court).

leave her stateless. The Court used two instruments to bolster its argument – **Article 15** of the **UDHR** and **Section 8** of the **Foreigners Act, 1946**. Both taken in combination clearly established that doubting the petitioner’s nationality at such a stage was manifestly unjust, and that she could be ascribed only Indian nationality.

A.3 Right against arbitrary deprivation of nationality

All individuals have a right against arbitrary deprivation of nationality. This right is an important safeguard especially in situations where the deprivation of nationality leads to statelessness. **Article 15(2)** of the **UDHR** prohibits arbitrary deprivation of nationality. It is interesting to note that at the time of the drafting of the UDHR, India and UK played an instrumental role in the introduction of this right into the draft Article 15.³⁴ The UN General Assembly has also termed this right as one of the ‘fundamental principles of international law’.³⁵

It is crucial to understand what ‘arbitrary’ and ‘deprivation of nationality’ mean in this context. It has been established by the Human Rights Committee that the ‘notion of “arbitrariness” must not be equated with “against the law” but be interpreted more broadly to include such elements as inappropriateness and injustice’.³⁶ This broad interpretation includes human rights protections which ensure that even ‘lawful’ interference must be in accordance with provisions, aims and objectives of the law and must also be reasonable.³⁷ Deprivation of nationality, on the other hand ‘refers to any loss, withdrawal or denial of nationality

34 *Shamima Begum v Special Immigration Appeals Division* [2020] EWCA Civ 918. See ‘Skeleton Argument of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Combating Terrorism’ (Intervenor in the case) <https://www.ohchr.org/Documents/Issues/Terrorism/SR/2020_05_29_FINAL_Begum_Intervention.pdf> accessed 21 July 2020.

35 UNGA Res 50/152 (9 February 1996) UN Doc A/RES/50/152. See also Institute on Statelessness and Inclusion, ‘Draft Commentary to the Principles on Deprivation of Nationality as a National Security Measure’ (2020) <https://files.institutesi.org/PRINCIPLES_Draft_Commentary.pdf?mc_cid=8f33a5dc1c&mc_eid=570b60c7a9> accessed 19 July 2020.

36 *A v Australia* Comm no 560/1993 (UN Human Rights Committee, 30 April 1997).

37 UN Human Rights Committee ‘CCPR General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)’ (1988), para 4 <<https://www.refworld.org/docid/453883f922.html>> accessed 20 July 2020.

that was not voluntarily requested by the individual'.³⁸ This covers loss of nationality as a consequence of operation of the law, acts by the administrative authorities, and also informal acts where authorities ceased to consider a person as a national.³⁹

The Assam NRC excluded people who allegedly could not adequately 'prove' their citizenship. The government has represented the NRC as a citizenship determination process whereby it is merely undertaking a sovereign exercise by singling out non-citizens from citizens.⁴⁰ However, along with the FTs, the NRC in Assam is causing a serious threat of citizenship deprivation. The NRC process lacked sufficient safeguards and placed additional burdens on certain communities [↘]. Similarly, there is ample evidence showing that the working of FTs infringes several due process rights [↘]. These processes have put millions of citizens in Assam in a precarious position. If not ceased immediately, these processes together have a potential of arbitrarily depriving individuals of their Indian nationality, thereby leaving them at the brink of statelessness.

see Section I.A.3.3 (Chapter I),
pg 60

see Sections I.A.3.1 and I.A.3.2
(Chapter I), pg 52, pg 56

This section looks at these citizenship deprivation processes in Assam, i.e. the NRC and the FT mechanisms. It explores the procedural and substantive aspects of the right against arbitrary deprivation of nationality with reference to India's treaty obligations and customary international law on statelessness. The procedural aspects of the right, i.e. due process requirements, and procedural standards in international law on nationality are discussed here. This section also delves into the substantive elements of the right, i.e. racial and ethnic discrimination, and the duty to avoid statelessness.

38 Institute on Statelessness and Inclusion, 'Principles on Deprivation of Nationality as a National Security Measure' (2020) art 2.2.1 <<https://files.institutesi.org/PRINCIPLES.pdf>> accessed 7 April 2020.

39 *ibid* art 2.2.2. Art 2.2.2: 'Deprivation of nationality also covers situations where there is no formal act by a State but where the practice of its competent authorities clearly shows that they have ceased to consider a person as a national, including where authorities persistently refuse to issue or renew documents, or in cases of confiscation of identity documents and/or expulsion from the territory coupled with a statement by authorities that a person is not considered a national'.

40 Samanwaya Rautray, 'NRC must to identify non-citizens: Govt to SC' *The Economic Times* (17 March 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/nrc-must-to-identify-non-citizens-govt-to-sc/articleshow/74680527.cms>> accessed 23 July 2020.

A.3.1 Due process protections

Any state action which deprives an individual of their citizenship is subject to certain standards of scrutiny. These standards have been laid out in various international human rights law instruments and complimented with domestic jurisprudence. The real effects of deprivation of nationality upon an individual must be weighed against the state's intention behind the action. If the state deprives someone of nationality, it must follow a fair and clear process, allowing the concerned persons to defend themselves against the state's actions.

Thus, procedural safeguards are non-derogable in any process leading to deprivation of nationality. **Article 10** of the **UDHR** and **Article 14** of the **ICCPR**, which guarantee equality before law and the right to a fair trial, lay down the principles of natural justice that must undergird all legal procedures that impact individuals' fundamental rights. While Article 14 refers to due process in the context of criminal trials, the severity and irreversibility of citizenship deprivation necessitate that the same due process obligations apply to any state action relating to deprivation of nationality.⁴¹ Therefore, individuals must receive notice of the charges against them and the intent to deprive nationality in a language that they can understand; they must have enough time to seek legal counsel of their choice and prepare materials in their defence; and they must have the right to remain in the country and participate in their legal proceedings, inclusive of all avenues of appeal. The hearings must take place before a 'competent, independent, and impartial tribunal established by law'.⁴² The **Indian Constitution** also contains provisions which guarantee due process. **Article 14** guarantees equality before the law, while **Article 21** secures the right to life and liberty for all persons, which includes procedural due

41 UN Human Rights Committee, 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial' (2007) UN Doc CCPR/C/GC/32, para 15.

42 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(1).

process. **Articles 20 and 22** reiterate principles of natural justice when laying down criminal procedural rights.

Both the FT and the NRC processes in Assam shall be examined for procedural guarantees. FTs are quasi-judicial authorities created by the Central Government under the **Foreigners (Tribunals) Order, 1964**, in exercise of its powers under Section 3 of the Foreigners Act.⁴³ They are the forums where accused individuals must prove their Indian nationality. There are two mechanisms through which cases are referred to FTs. First, through the Assam Border Police, which is empowered to serve notice to suspected foreigners. Secondly, the Election Commission of India in 1997 conducted a large scale revision of electoral rolls and labelled several thousands of persons as ‘doubtful’ voters, whose cases are adjudicated before FTs as well. Two **Foreigners (Tribunals) Amendment Orders**, passed in **2013** and **2019**, further expanded the powers of FTs, including the power to detain persons and grant bail.

The NRC exercise in Assam followed the **Citizenship Act, 1955** and the **Citizenship Rules, 2003**.⁴⁴ It demanded two sets of documents from every individual: the first set to identify a legacy person with whom the applicant claims descent, and the second to establish linkage between the applicant and the legacy person.⁴⁵ Decades of poor recordkeeping and irregular digitisation coupled with poverty and illiteracy led to a large number of exclusions from the NRC, despite many of these applicants knowing no home other than Assam. Those excluded can eventually file their appeals before FTs as well.

Neither the Foreigners Act nor the three subsequent orders lay down a clear, consistent, comprehensive, and pre-determined procedure applicable to FTs. These tribunals instead

43 The Foreigners Act, 1946 empowers the Central Government to regulate the entry and presence of foreigners in Indian territory.

44 The Citizenship Act, 1955, s. 6A; The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003, rule 4A and Schedule.

45 Government of Assam, ‘What are the admissible documents?’ <<http://nrcassam.nic.in/admin-documents.html>> accessed 1 July 2020.

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see Section I.A.3.2 (Chapter I),
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have the power to regulate their own procedures. In practice, they are rife with procedural inequities.⁴⁶ The burden of proving Indian citizenship rests with the individual, not the state. Many FTs disregard oral testimony which is crucial for proving the existence of family relationships in the absence of paperwork.⁴⁷ They place an excessive emphasis on documentary evidence and proof thereof [↘].⁴⁸ Slight inconsistencies and clerical errors in documents are used by FT members to designate individuals as foreigners.⁴⁹ The grounds of appeal are restricted: appellate courts have repeatedly held that they cannot interfere with questions of fact.⁵⁰ Additionally, more than 50% of orders by FTs are made *ex parte*, without hearing the accused person and their defence.⁵¹ Legal aid is also not guaranteed to all affected

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- 46 See Talha Abdul Rahman, 'Identifying the 'Outsider': An Assessment of Foreigner Tribunals in the Indian State of Assam' (2020) 2(1) *Statelessness & Citizenship Review* 130-136; Amnesty International, 'Designed to Exclude: How India's Courts are Allowing Foreigners Tribunals to Render People Stateless in Assam' (2019) 30 - 57; <<https://amnesty.org.in/wp-content/uploads/2019/11/Assam-Foreigners-Tribunals-Report-1.pdf>> accessed 23 April 2020; Human Rights Law Network, 'Statelessness and Marginalisation in Assam: Report of the Public Hearing on the Citizenship Amendment Bill and the National Register of Citizens' (2019) 80-86 <<https://hrln.org/uploads/2019/06/Report-of-Public-Hearing-on-NRC-and-CAB.pdf>> accessed 20 August 2020; Citizens Against Hate, 'Making Foreigner: Report on NRC updation in Assam and the risk of mass statelessness' (2018) 15 <<http://citizensagainsthate.org/wp-content/uploads/2019/06/Making-Foreigner.pdf>> accessed 30 July 2020.
- 47 *Nur Begum v Union of India and Ors.* (2020) W.P. (C) 1900/2019 (Gauhati High Court); *Sahera Khatun v Union of India and Ors.* (2020) W.P. (C) 7482/2019 (Gauhati High Court). See also Rohini Mohan, 'Inside India's Sham Trials That Could Strip Millions of Citizenship' (*VICE News*, 29 July 2019) <https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship> accessed 1 July 2020.
- 48 Section 50 of the Indian Evidence Act, 1872 recognizes the oral opinion of a persons who have 'special knowledge', by virtue of being family members or otherwise, of a relationship between two persons. Sections 61 - 65 of the Indian Evidence Act govern the proof of documentary evidence. See Tora Agarwala, 'Gauhati High Court rejects Assam woman's eight documents, mother's testimony' *The Indian Express* (26 February 2020) <<https://indianexpress.com/article/north-east-india/assam/gauhati-high-court-rejects-assam-womans-8-documents-mothers-testimony-6286923/>> accessed 2 August 2020.
- 49 Amnesty International, 'Designed to Exclude' (n 46) 37- 39; Ipsita Chakravarty, 'Declaring foreigners: How Assam's border police and tribunals form a secretive system of justice' (*Scroll.in*, 19 August 2018) <<https://scroll.in/article/890134/declaring-foreigners-how-assams-border-police-and-tribunals-form-a-secretive-system-of-justice>> accessed 27 July 2020.
- 50 *State of Assam v Moslem Mandal and Ors.* (2013) 3 Gau LR 402 (Gauhati High Court). See also Talha Abdul Rahman, 'Identifying the 'Outsider' (n 46) 136.
- 51 *Unstarred Question No. 3558 Answered on 10 December 2019* <<http://164.100.24.220/loksabhaquestions/annex/172/AU3558.pdf>> accessed 15 July 2020; *Unstarred Question No. 3804 Answered on 16 July 2019* <<http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=4102&lno=17>> accessed 15 July 2020; *Unstarred Question No. 1724 Answered on 2 July 2019* <<http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=1909&lno=17>> accessed 15 July 2020.

individuals.⁵² Despite FTs being empowered to summon persons and compel the production of documents, the emphasis is on speed and expedience rather than due process. Such procedural perils are manifestly arbitrary and discriminatory, and clearly contravene the standards laid down in **Article 14** of the **ICCPR**.

The aforementioned laws do not state the minimum qualifications necessary to helm FTs and ensure their impartial and competent functioning. A matter as grave and foundational as citizenship should require that the adjudicators have the necessary judicial training, experience, and expertise to impartially and fairly determine an individual's citizenship status. Indeed, in other arenas of the Indian judicial system, including various other tribunals, there exist clear and specific guidelines for appointment of tribunal members, based on necessary qualifications and experience to accurately and objectively decide upon the questions of law. On the other hand, the sole criteria for appointment as FT members is that they have 'judicial experience' as the Government may see fit.⁵³ This vague, imprecise guideline has led to great variations in the terms of eligibility. In 2019, the Gauhati HC opened applications for FT members to retired members of the judicial service, the civil service, and to advocates above the age of 35 years with at least seven years of practice.⁵⁴ Additionally, reports state that the assessment and extension of FT members' tenures is contingent on the nature of orders passed – especially on the number of 'foreigners' declared.⁵⁵ Based on these facts, FTs fall short of

52 Human Rights Law Network, 'Statelessness and Marginalisation in Assam: Report of the Public Hearing on the Citizenship Amendment Bill and the National Register of Citizens' (n 46). The Assam Government has offered free legal aid to those who've been excluded from the NRC: PTI, 'People in Assam excluded from final citizens list to get free legal aid' *NDTV* (27 August 2019) <<https://www.ndtv.com/guwahati-news/assam-people-excluded-from-final-citizens-list-to-get-free-legal-aid-2091071>> accessed 16 July 2020.

53 Foreigners (Tribunals) Order, 1964 (India), s. 2(2).

54 Gauhati High Court Advertisement <<http://ghconline.gov.in/Recruitment/Notification-10-06-2019.pdf>> accessed 12 July 2020.

55 Arunabh Saikia, "'The highest wicket-taker': Assam's tribunals are competing to declare people foreigners' (*Scroll.in*, 19 June 2019) <<https://scroll.in/article/927025/the-highest-wicket-taker-assams-tribunals-are-competing-to-declare-people-foreigners>> accessed 16 July 2020; Fatima Khan, 'Job in Assam Foreigners Tribunal depends on conviction rate, says civil rights group report' (*The Print*, 19 September 2019) <<https://theprint.in/india/job-in-assam-foreigners-tribunal-depends-on-conviction-rate-says-civil-rights-group-report/294030/>> accessed 16 July 2020.

being competent and independent bodies deciding individuals' citizenship status.

Persons excluded from the NRC must be considered Indian citizens until all avenues of appeals are exhausted. However, as they must file their appeals before FTs, they face the very real risk of deprivation of nationality, because of the arbitrary functioning of FTs as explained above. It is clear that the NRC and FT process in Assam lack any due process safeguards. They unlawfully and arbitrarily threaten to deprive persons of their Indian nationality.

A.3.2 Procedural standards in international law on nationality

Even if the due process requirements are fulfilled, deprivation of nationality will be 'arbitrary' if it does not have a legitimate purpose.⁵⁶ It will also be 'arbitrary' if it fails to either respect the interrelated international legal standard of proportionality or if it is not in accordance with the law.⁵⁷ This section elaborates upon these three prerequisites. It is important to note that all of these pre-conditions need to be satisfied, and failure to do so on any one count renders the entire deprivation procedure unlawful.

Firstly, a deprivation process must serve a legitimate purpose that is consistent with international law, which necessarily includes international human rights law. **Article 8 of the Draft Articles on the Expulsion of Aliens** explicitly mandates that deprivation of nationality in order to convert nationals into aliens and for the sole purpose of expelling them would not qualify as a legitimate purpose.⁵⁸ Precarious citizens in Assam are being detained under the pretext of deportation to their alleged country of nationality i.e. Bangladesh [↗]. They are facing a threat of deprivation of Indian nationality to facilitate their

56 *Shamima Begum* (n 34). See 'Skeleton Argument of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Combating Terrorism' (n 34).

57 *ibid.*

58 UNGA 'Report of the International Law Commission: Sixty-sixth session' (5 May-6 June and 7 July-8 August 2014) UN Doc A/69/10, 32.

deportation.⁵⁹ Therefore, the deprivation exercise in Assam is arbitrary and unlawful.

Secondly, the nationality deprivation exercise must satisfy the international law principle of proportionality. This principle is paramount in all cases of deprivation of nationality.⁶⁰ It requires the State in question ‘to carry out an individual assessment to determine, *inter alia*, that the immediate and long-term impact of deprivation of nationality on the rights of the individual, their family, and on society is proportionate to the legitimate purpose being pursued’.⁶¹ The state must also make sure that the deprivation of nationality is the ‘least intrusive means of achieving the stated legitimate purpose’.⁶² The Supreme Court of India has asserted the proportionality principle in assessing state actions that infringe fundamental rights.⁶³ Furthermore, prohibitions against arbitrary restrictions on individuals’ liberty and rights are found in **Articles 9 and 13** of the **UDHR**, and **Article 12** of the **ICCPR**. Indian citizenship law adds another balancing factor that no deprivation shall occur if it is not conducive to ‘public good’ [↗].⁶⁴

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The precarious citizens in Assam are Indian nationals who do not have any other proven nationality. The citizenship deprivation processes are fundamentally disproportionate since they will put them at the risk of statelessness. The precarious citizens are also facing a threat to their rights to legal personhood, dignity, and privacy, owing to their present state of limbo. They are being detained and separated from their children, partners

59 Home and Political Department, Government of Assam, *Foreigners’ Issue* (White Paper, 2012) <<https://cjp.org.in/wp-content/uploads/2018/10/White-Paper-On-Foreigners-Issue-20-10-2012.pdf>> accessed 24 May 2020. See also Ministry of Home Affairs, *Lok Sabha Unstarred Question No. 1680* (2019) <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2019-pdfs/ls-02072019/1680.pdf>> accessed 20 August 2020.

60 Institute on Statelessness and Inclusion, ‘Draft Commentary to the Principles on Deprivation of Nationality’ (n 35) 58.

61 *ibid.*

62 *ibid.*

63 *K S Puttaswamy v Union of India* (2017) 10 SCC 1 (Right to Privacy case); *Modern Dental College and Research Centre & Ors v State of M.P. & Ors* (2016) Civil Appeal No. 4060 of 2009 (Supreme Court of India).

64 The Citizenship Act 1955, s 10(3).

and extended families.⁶⁵ Some have even died in detention.⁶⁶ If the processes of deprivation of nationality are allowed to conclude, these rights will be nullified for these individuals. Such a consequence will be disproportionate and completely fail to meet the requisite international law standards.

It is useful to look at European Court of Human Rights ('ECtHR') decisions which illustrate the link between right to nationality and the right to private life, where the Court used the principle of proportionality to balance the interest of States against the infringement of the applicants' rights. In *Hoti*, the ECtHR dealt with a case of refusal of the Croatian authorities to recognise the applicant as one of its citizens, acknowledging the fact that he was stateless.⁶⁷ The Court reiterated its argument that 'measures restricting the right to reside in a country may, in certain cases, entail a violation of Article 8 of the Convention if they create disproportionate repercussions on the private or family life, or both, of the individuals concerned'.⁶⁸ It directed Croatia to ensure the applicant's stability of residence through a legal status. Likewise, the ECtHR held in *Kuric* that the prolonged refusal of the Slovenian authorities to comprehensively regulate the applicants' situation resulting from their erasure from administrative registers and data interfered with the exercise of

65 Ravik Bhattacharya, 'In Kolkata, 85-year-old, his 6 children await "foreigner" son's release from detention' *The Indian Express* (20 February 2020) <<https://indianexpress.com/article/cities/kolkata/in-kolkata-85-year-old-his-6-children-await-foreigner-sons-release-from-detention-6267109/>> accessed 19 July 2020; Tora Agarwala and Abhishek Saha, 'Final NRC: "I don't know what to do...will anyone give me a job?"' *The Indian Express* (1 September 2019) <<https://indianexpress.com/article/north-east-india/assam/i-dont-know-what-to-do-will-anyone-give-me-a-job-assam-nrc-final-list-published-5955020/>> accessed 19 July 2020; Arunabh Saikia, 'A newborn died in a detention centre in Assam. His mother was later found not to be a foreigner' *Scroll.in*, 28 August 2019) <<https://scroll.in/article/935337/detention-in-assam-a-baby-and-old-man-died-despite-their-families-having-proof-of-citizenship>> accessed 10 July 2020; National Human Rights Commission, 'Report on NHRC Mission to Assam's Detention Centres from 22 to 24 January, 2018' (2018) 3 <<https://cjp.org.in/wp-content/uploads/2018/11/NHRC-Report-Assam-Detention-Centres-26-3-2018-1.pdf>> accessed 27 May 2020.

66 Abhishek Saha, '60-year-old woman lodged in Assam detention camp dies, toll rises to 30' *The Indian Express* (7 April 2020) <<https://indianexpress.com/article/north-east-india/assam/woman-lodged-in-assam-detention-camp-dies-6351177/>> accessed 19 July 2020; Arunabh Saikia, 'In Assam, a sick man was not spared detention and a healthy man did not survive it' *Scroll.in*, 29 August 2019), <<https://scroll.in/article/935457/in-assam-a-sick-man-was-not-sparged-detention-and-a-healthy-man-did-not-survive-it>> accessed 10 July 2020.

67 *Case of Hoti v Croatia* App no 63311/14 (ECtHR, 26 April 2018).

68 *ibid.* See also *Maslov v Austria* App no 1638/03 (ECtHR, 23 June 2008).

the applicants' rights with respect to their private and family life.⁶⁹

Consequently, individuals' private and family life, as well as the fact that they had established their residence in the country for decades, weighs higher on the proportionality scale if the question of citizenship deprivation ever arises. In other words, these factors would make citizenship deprivation an arbitrary and unlawful exercise. These factors are clearly applicable in the case of precarious citizens in Assam, who have a genuine link to India [↗], and strengthen the conclusion that they are at the risk of arbitrary deprivation of nationality.

Thirdly, citizenship deprivation process must always be in accordance with the law. This is possible only when it is true to its letter and object, has a clear and clearly articulated legal basis for such a measure, and is predictable.⁷⁰ Despite the Supreme Court of India confirming that the principle of *res judicata* applies to FT decisions,⁷¹ there are several ground reports of individuals who had been declared as Indians by FTs being served notice and having their citizenship questioned once again.⁷² This translates to a situation where, in practice, the citizenship deprivation exercise in Assam lacks finality and fails to protect individuals from multiple litigation arising from the same cause. The Supreme Court repeatedly revised the list of documents that individuals could file in order to establish their citizenship.⁷³ The burden is upon the precarious citizens to prove their Indian

⁶⁹ *Kuric and others v Slovenia* App no 26828/06 (ECtHR, 26 June 2012).

⁷⁰ *Shamima Begum v Special Immigration Appeals Division* (n 34). See 'Skeleton Argument of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Combating Terrorism' (n 34). See also Institute on Statelessness and Inclusion, 'Draft Commentary to the Principles on Deprivation of Nationality' (n 35) 52.

⁷¹ *Abdul Kuddus v Union of India and Ors* (2019) 6 SCC 604.

⁷² Amnesty International, 'Designed to Exclude' (n 46) 44 - 45; Sagar, 'Case Closed: How Assam's Foreigners Tribunals, aided by the High Court, function like kangaroo courts and persecute its minorities' (*Caravan Magazine*, 6 November 2019) <<https://caravanmagazine.in/law/assam-foreigners-tribunals-function-like-kangaroo-courts-persecute-minorities>> accessed 30 July 2020; Sagar, 'A case of double incrimination reveals the chimera of fair trials in Foreigners Tribunals' (*Caravan Magazine*, 25 November 2019) <<https://caravanmagazine.in/law/foreigner-tribunal-assam-nrc-jalal-seikh-double-jeopardy>> accessed 31 July 2020.

⁷³ Mohsin Alam Bhat, 'On the NRC, Even the Supreme Court is Helpless' *The Wire* (7 January 2019) <<https://thewire.in/law/nrc-supreme-court-crisis>> accessed 23 July 2020.

citizenship, as reiterated by the Gauhati High Court in *Nur Begum* and *Sahera Khatun*.⁷⁴ The threshold for meeting this burden of proof is often very high, as demonstrated in a recent case where 15 official documents produced by a precarious citizen were not enough to discharge the burden.⁷⁵ Hence, the ongoing citizenship deprivation process in Assam lacks finality and is extremely unpredictable. This is against the international law principle of legality. It makes this deprivation process arbitrary and therefore in violation of international law.

A.3.3 Law against racial and ethnic discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination ('**ICERD**') obligates states to ensure the non-discriminatory enjoyment of every person's right to nationality.⁷⁶ This obligation on the states applies with regard to all citizenship deprivation exercises, irrespective of whether such an exercise leads to the creation of statelessness or not.⁷⁷ Additionally, **Article 9** of the **1961 Convention** prohibits the deprivation of nationality on racial, ethnic, religious or political grounds, regardless of whether such deprivation would lead to statelessness or not.

The prohibition of ethnic and racial discrimination can be found within **Article 2** of the **UDHR**, **Article 26** of the **ICCPR** and

74 *Nur Begum v Union of India* (n 48) and *Sahera Khatun v Union of India* (n 47).

75 *Jabeda Begum v Union of India* (2020) WP(C) 7451/2019 (Gauhati High Court).

76 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 5(d)(iii). See also UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXX on Discrimination against Non-Citizens' (2002) <<https://www.refworld.org/docid/45139e084.html>> accessed 20 July 2020.

77 OHCHR 'The UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance's Amicus Brief before the Dutch Immigration and Naturalisation Service' (23 October 2018) <https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/DutchImmigration_Amicus.pdf> accessed 20 July 2020.

in most international and regional human rights instruments.⁷⁸ This principle is a prominent rule of customary international law which has achieved the status of an *erga omnes* obligation.⁷⁹ It is a violation of international law if any state derogates from such obligations, even during times of emergency.⁸⁰ India's Constitution also guarantees equality to every person before the law and 'equal protection of all laws' within Indian territory.⁸¹ This prohibition limits the state's discretion in deprivation of nationality matters, as any deprivation rooted in ethnic or racial discrimination would constitute arbitrary deprivation of nationality.⁸² Discrimination based on the national origin of a person has been found to form a part of this prohibitive principle of racial discrimination.⁸³

The Bengali community in Assam, especially the Bengali Muslim minority, have historically been portrayed as 'foreigners' and 'illegal migrants' in the state.⁸⁴ In 1997, the Election Commission of India arbitrarily labelled more than 350,000 persons – many of whom were of Bengali origin – as 'doubtful' citizens.⁸⁵ The Commission did so without any transparent process.⁸⁶ This deprived them of their right of political

78 See Article 2 of the UDHR: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty'; Article 26 of the ICCPR: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. See also Article 2(2) of ICESCR, Article 14 of ECHR, Article 2 of African Charter on Human and Peoples' Rights and Article 24 of ACHR.

79 Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27(3) *Refugee Survey Quarterly* 93.

80 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1964] ICJ.

81 Constitution of India 1950, art 14.

82 Adjami and Harrington, 'The Scope and Content of Article 15' (n 79) 93.

83 *ibid.*

84 Human Rights Law Network, 'Statelessness and Marginalisation in Assam: Report of the Public Hearing on the Citizenship Amendment Bill and the National Register of Citizens' (n 46).

85 Human Rights Watch, 'Shoot the traitors' Discrimination Against Muslims under India's New Citizenship Policy' (9 April 2020) <<https://www.hrw.org/report/2020/04/09/shoot-traitors/discrimination-against-muslims-under-indias-new-citizenship-policy>> accessed 20 April 2020.

86 Human Rights Law Network, 'Statelessness and Marginalisation in Assam: Report of the Public Hearing on the Citizenship Amendment Bill and the National Register of Citizens' (n 46).

participation and their entitlements to social protection as citizens of India. In 2014, the NRC divided the people in Assam into two formally undefined categories, viz. ‘original’ and ‘non-original’ inhabitants, with Bengali and Nepali speaking minorities largely making up the latter category.⁸⁷ The NRC authorities used different criteria to verify the claims made by ‘original’ and ‘non-original’ inhabitants. ‘Original’ inhabitants were subjected to a less strict and vigorous process while deciding claims of their inclusion in the NRC, while ‘non-original’ inhabitants were arbitrarily subjected to stricter scrutiny.⁸⁸ Now, the FTs in Assam will decide on appeals of individuals excluded from the NRC along with the cases of ‘doubtful’ citizens. It has been found that the members of the FTs are pressured by authorities to declare more people, especially those who are Bengali and Muslim, as foreigners.⁸⁹

Hence, the citizenship deprivation processes in Assam are plainly discriminatory and push their victims down on the slippery slope of citizenship. This is barred by the **ICERD** and customary international law, and in turn, absolutely prohibits the Indian state. In conclusion, the arbitrary citizenship deprivation exercises in Assam – the NRC and FT mechanisms – violate international law.

87 See Human Rights Watch, “Shoot the traitors” Discrimination Against Muslims under India’s New Citizenship Policy’ (n 85).

88 Amnesty International India, ‘125 Civil Society Organisations condemn the exclusion of 1.9 million people from the Assam NRC’ *Amnesty International India* (6 September 2019) <<https://amnesty.org.in/news-update/amnesty-india-joint-statement-to-condemn-the-exclusion-of-1-9-million-people-from-the-assam-nrc/>> accessed 20 July 2020; Arunabh Saikia, ‘How many times will NRC test your Indian citizenship? Depends on which community you belong to’ (*Scroll.in*, 25 July 2019) <<https://scroll.in/article/931646/how-many-times-will-nrc-test-your-indian-citizenship-depends-on-which-community-you-belong-to>> accessed 30 July 2020.

89 Human Rights Watch, “Shoot the traitors” Discrimination Against Muslims under India’s New Citizenship Policy’ (n 85). See also Amnesty International, ‘Designed to Exclude’ (n 46).

A.3.4 The duty to avoid and reduce statelessness

In addition to the several components mentioned above, failure of states to prevent and reduce statelessness within their territory also makes a citizenship deprivation exercise ‘arbitrary’.⁹⁰ The cumulative effect of various individual rights enshrined in international human rights law, when combined with other articles and conventions relating to statelessness, establish the duty of states to prevent and reduce statelessness.

[↘]

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If the current citizenship deprivation exercise of NRC and FTs in Assam is not halted, precarious citizens in Assam will be rendered stateless. This is because, as mentioned earlier, the state with which they have a genuine link with, i.e. India, would deprive them of its nationality, and their alleged state of nationality i.e. Bangladesh has consistently maintained that none of its nationals are illegally residing in India.⁹¹ Thus, the NRC and FT mechanisms are also arbitrary since if not halted, they would arbitrary deprive Indians nationals of their nationality and would create a stateless population in India, which is a grave violation of international law.

⁹⁰ Mirna Adjami and Julia Harrington, ‘The Scope and Content of Article 15’ (n 79) 93. See also Section B of this chapter.

⁹¹ Shoaib Daniyal, ‘Bangladesh government expresses concerns over Assam’s NRC process for the first time’ (*Scroll.in*, 18 July 2019) <<https://scroll.in/latest/930979/bangladesh-government-expresses-concerns-over-assams-nrc-process-for-first-time>> accessed 13 July 2020.

A.4 CONCLUSION AND RECOMMENDATIONS

Every individual has the right to a nationality. This right along with other human rights standards cements the obligation to grant and recognise nationality of individuals with a genuine link to the state. The fact that the individual has a genuine link to that state and not to any other state translates into an obligation on the former state. Hence, India is obligated under international law to grant nationality to persons who have a genuine link to India and to no other state. In addition, this obligation is informed by the right against arbitrary deprivation of nationality. This right has been argued in the light of due process protections, procedural standards in international law on nationality, law against racial and ethnic discrimination, and the duty to avoid and reduce statelessness. Violations of these legal standards in Assam is causing a threat of arbitrary deprivation of nationality.

The right to nationality with the duty to prevent and reduce statelessness establishes that persons at the risk of arbitrary deprivation of nationality must have their citizenship affirmed. The arbitrary deprivation process must be immediately halted and overhauled as per international law and Indian law. Recommendations in this regard, include:

- India must affirm the nationality of precarious citizens in Assam immediately through a non-discretionary, non-bureaucratic process to avoid any discrimination or exclusion.
- Precarious citizens must not be excluded from the set of socio-economic rights and protections (from the right to adequate nutrition, health, education and the ability to seek employment) granted by the Indian state to Indian citizens [\[↗\]](#).
- In citizenship determination cases where the individual maintains that they are nationals of India by producing official documents confirming the same, their burden of proof must

be considered *prima facie* satisfied.⁹² A strict burden of proof must then lie on the state to prove the contrary i.e. that they are not nationals of India, since the means to verify such a claim lie exclusively with the state.⁹³ Such a shared burden of proof mechanism endorsed by the African Court of Human and Peoples' Rights ('ACtHR') must be followed in relation to the precarious citizens in Assam as well.⁹⁴

- People excluded from the NRC are citizens of India and shall be treated accordingly until all their appeals are exhausted. Treating them as foreigners violates their right to nationality.
- The State should organise training of judges, lawyers, NRC officials, and FT members on substantive aspects of India's international law obligations on nationality and statelessness.
- The State must also provide accessible materials (leaflets, field actions) to ensure that people facing arbitrary deprivation of nationality know their rights and the procedural aspects of Indian law in this regard.

92 *Anudo Ochieng Anudo* (n 21) [80]. See also *Robert John Penessis v United Republic of Tanzania* App no 013/2015 (ACtHPR, 28 November, 2019) [90] - [96].

93 *Anudo Ochieng Anudo* (n 21) [80]. See also *Robert John Penessis* (n 92) [90] - [96].

94 *ibid.*

B. THE STATE'S DUTY TO PREVENT AND REDUCE STATELESSNESS

66

SECTION I.B.1

B.1 Prevention and reduction of statelessness in international law

The duty of a state to prevent and reduce statelessness is linked to the right to nationality of every individual and the right to not be arbitrarily deprived of nationality. Discretion in laws relating to migration, immigration, and nationality are often justified as functions of national sovereignty. However, the fact that the state's sovereignty in regulating nationality is not absolute and is dependent on the development of international relations was made clear as early as 1923 by the Permanent Court of Justice.⁹⁵ After this decision, the **1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws** and the **Protocol relating to a Certain Case of Statelessness** together codified the international rules on abolition of statelessness. Since these developments, and particularly with **Article 15** of the **UDHR** in 1948, the development of international human rights law has significantly clarified the boundaries within which state sovereignty in citizenship matters must be exercised.⁹⁶

The **1954 Convention** was adopted to establish that the fundamental rights of stateless persons need to be protected. The **1961 Convention** was further adopted to propose a framework through which statelessness could be reduced and prevented. The 1961 Convention simply reaffirmed the existing international custom of a state's duty to prevent and reduce statelessness and set out rules for its implementation.⁹⁷ This duty has been reaffirmed and integrated through several other

95 *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PCIJ Rep Series B No 4.

96 Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15' (n 79) 93.

97 Council of Europe, 'Explanatory Report to the European Convention on Nationality' (6 November 1997) ETS No.166.

international and regional legal instruments.⁹⁸ There are compelling arguments to suggest that the obligation to prevent and reduce statelessness is part of customary international law and hence, it applies to India despite it not being party to the two conventions.⁹⁹ It is important to note that even though the 1961 Convention allows for the deprivation of nationality in very specific and limited cases, international human rights law has evidently superseded these limits of the Convention by reiterating that any such restrictions must be seen as an exception to the principle of equality, and consequently, ‘must be construed so as to avoid undermining the basic prohibition of discrimination’.¹⁰⁰

Regional courts across the world have intervened and reiterated the state’s duty to prevent and reduce statelessness, even in the absence of direct provisions on statelessness. In *Anudo Ochieng Anudo*, the Tanzanian-born applicant was abruptly stripped of his Tanzanian passport and citizenship, detained, and escorted to the Kenyan border. Upon Kenya’s refusal to admit him, he became confined to the ‘no man’s land’ between the two nations. The ACtHR – while acknowledging that there is no general right to nationality listed in the ICCPR, nor in the African Charter on Human and Peoples’ Rights – utilised the customary international status of the **UDHR** and **Article 15** thereof to place a limit on Tanzania’s sovereign power in nationality matters. Despite Tanzania being a non-signatory to the **1954** and **1961 Conventions**, the Court held that Tanzania had ‘failed to take the necessary measures to prevent the applicant from being in a situation of statelessness’ and thus, the applicant’s deprivation of

98 International legal instruments include the UDHR (Article 15), ICCPR (Article 24), the 1954 Convention, the 1961 Convention, CEDAW (Article 9), ICERD (Article 5), the CRC (Article 7), and CNMW. Regional legal instruments like the American Convention on Human Rights (ACHR) (Article 20) and the African Charter on the Rights and Welfare of the Child (ACRWC) (Article 6) also emphasize this duty of states.

99 Council of Europe, ‘Explanatory Report to the European Convention on Nationality’ (n 97). See also UNHCR, ‘Submission by the Office of the United Nations High Commissioner for Refugees in Case of *Kuric and Others v Slovenia* (No 26828/06)’ (8 June 2011) <<https://www.refworld.org/pdfid/4df9cd8c2.pdf>> accessed 12 April 2020.

100 UN Committee on the Elimination of Racial Discrimination ‘General Recommendation XXX on Discrimination against Non-Citizens’ (2002) 2 <<https://www.refworld.org/docid/45139e084.html>> accessed 20 July 2020.

nationality was arbitrary.¹⁰¹ In *Robert John Penessis*, the ACtHR once again affirmed its commitment to the protection of the right to nationality under Article 15 of the UDHR.¹⁰² It went a step further to hold that the arbitrary deprivation of an individual's nationality is not only inconsistent with a state's duty to avoid statelessness, but also with the individual's right to human dignity.¹⁰³

In Europe, although the European Convention on Human Rights ('ECHR') does not refer to an explicit right to nationality, it finds mention in the case law and Conventions as promulgated by the Council of Europe. These Conventions¹⁰⁴ deepen the existing legal framework aiming to avoid statelessness and facilitate the access to nationality by explicitly setting out the obligation of States to avoid statelessness. Further, they recall the right of every individual to have a nationality and emphasize upon the ruling that rules on nationality may not be discriminatory.¹⁰⁵ However, these specific Conventions are less ratified than general ones among the 47 member States of the Council of Europe.

The ECtHR has stepped in and played a decisive role by filling the legal gaps in the ECHR and imposing key obligations on the states. In several cases such as *Genovese*,¹⁰⁶ *Mennesson*¹⁰⁷ and *Francis Labassee*¹⁰⁸, the ECtHR intervened to prevent State practice that led to statelessness. While the Court did not explicitly mention an obligation for States to prevent and reduce statelessness nor a right to nationality as such, it ruled that

101 *Anudo Ochieng Anudo* (n 21) [76] - [80], [102].

102 *Robert John Penessis* (n 92) [103].

103 *Robert John Penessis* (n 92) [87] - [88].

104 See European Convention on Nationality, and Convention on the Avoidance of Statelessness in relation to State Succession.

105 European Convention on Nationality art 4(a), 4(b) and 5. Art 4(a): 'everyone has the right to a nationality', Art 4(b): 'statelessness shall be avoided', Art 5 - 'The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin'.

106 *Genovese v Malta* App no 53124/09 (ECtHR, 11 October 2011).

107 *Mennesson v France* App No 65192/11 (ECtHR, 26 June 2014).

108 *Labassee v France* App No 65941/11 (ECtHR, 26 June 2014).

nationality is a constitutive part of the social identity of the applicant that must be protected. In *Genovese*, the ECtHR held that a State's nationality law shall not discriminate on the ground of birth. Therefore, a child born out of wedlock shall have equal access to nationality. The Court justified its reasoning by relying on the importance of nationality for individuals alongside the precariousness and tremendous uncertainty of their situation when it is not recognised. Accordingly, in *Mennesson* and *Labassee*, the Court balanced the effect of the uncertainty of nationality and the importance of an individual's identity as part of the right to private life. It then ruled that indeterminacy on the possibility of grant of nationality could affect applicants' own identity, and so states shall grant nationality to its applicants. The indirect recognition and promotion of the right to nationality and the State's duty to avoid statelessness highlight the importance of guaranteeing such rights, as well as the courts' duty to intervene and support the existing customary international law on the matter.

B.2 Duty to prevent and reduce statelessness in Indian law

Indian courts are cognizant of the lacunae in domestic laws on issues of statelessness. Therefore, they have interpreted existing statutes liberally and holistically to minimise statelessness when questions of uncertain nationality have arisen.

In the case of *Gangadhar Yeshwant Bhandare*, the appellant alleged that the respondent was not an Indian citizen.¹⁰⁹ The respondent had a curious case of having retained his Portuguese nationality after the liberation of Portuguese territories in India for the purpose of completing a secret Indian mission. The Indian government had provided the option to people born in those territories to choose either nationality by making a declaration and surrendering the foreign passport, as their choice may require. The respondent retained his Portuguese nationality by a declaration, but surrendered that passport a year after the

¹⁰⁹ *Gangadhar Yeshwant Bhandare v Erasmo De Jesus Sequeira* AIR (1975) SC 972.

stipulated date. It was found that his actions were not voluntary, as the secret mission included him renouncing his Portuguese nationality and obtaining an Indian one. Hence, it was held that the respondent was an Indian citizen and that to hold him not to be one at this stage would render him stateless, since he had already renounced his Portuguese nationality.

In *Jan Balaz*, the Gujarat High Court was asked to decide whether children born in India to an Indian surrogate with German nationals as their surrogate parents would be eligible for Indian citizenship by birth.¹¹⁰ In this case too, the Court interpreted the Citizenship Act progressively to hold that the children had a right to Indian citizenship via their surrogate mother, who was an Indian national, and directed the Government to issue Indian passports to them. The Court was aware of existent German laws that do not recognise surrogacy, which would have then denied German citizenship by birth to the children, rendering them stateless.

In *Ramesh Chennamaneni*, the petitioner was challenging the cancellation of his citizenship by an enquiry committee constituted under **Section 15** of the **Citizenship Act**.¹¹¹ The petitioner was an Indian citizen by birth who had migrated to Germany and acquired German nationality (thus giving up his Indian citizenship) before moving back to India after several years. He had subsequently applied for Indian citizenship by registration, a precondition for which was continuous residency in India for 12 months prior to the application. While his citizenship application was successful, one of the respondents contended that the petitioner had concealed material facts about the continuous residency requirement, as he had travelled to Germany and back several times in those 12 months. The Telangana High Court remarked that even though the petitioner's travel to Germany would constitute a wrong declaration for the purposes of his application, this would not perforce result in the

¹¹⁰ *Jan Balaz v Anand Municipality and 6 Ors* AIR (2010) Guj 21 (Gujarat High Court).

¹¹¹ *Ramesh Chennamaneni v Union of India* (2019) SCC OnLine TS 2100 (Telangana High Court).

SECTION 10, THE CITIZENSHIP ACT, 1955

10. Deprivation of citizenship. (1) A citizen of India who is such by naturalisation or by virtue only of clause (c) of article 5 of the Constitution or by registration otherwise than under clause (b)(ii) of article 6 of the Constitution or clause (a) of sub-section (1) of section 5 of this Act, shall cease to be a citizen of India, if he is deprived of that citizenship by an order of the Central Government under this section.

(3) The Central Government shall not deprive a person of citizenship under this section unless it is satisfied that it is not conducive to the public good that person should continue to be a citizen of India.

deprivation of his Indian citizenship under **Section 10** of the Act. The Court held that the statute contained several implied limits upon the State's power to deprive citizenship. The first is that the authority must satisfy that the 'continuation of citizenship of that person is "not conducive to the public good"'.¹¹² Secondly, this deprivation must be preceded by a fair administrative hearing in consonance with the principles of natural justice, which was also denied to the petitioner. Since 'public good' has not been defined in any statute anywhere, the Court used this opportunity to compare this Act with analogous nationality statutes in common law jurisdictions and arrive at common juridical principles underlying all of them. The Court then explicitly read the avoidance of statelessness as an additional implied curtailment on the government under Section 10 of the Act. It held that although statelessness is not explicitly mentioned in the statute and though India is not a signatory to the statelessness conventions, the status of these treaties and widespread international state practice clarify the scope of the sovereign prerogative. Although the Court does not explicitly recognise the emerging customary international law obligation on the states to prevent and reduce statelessness [↗] here, it seems to be suggesting exactly that. Hence, the threshold for deprivation of nationality for 'public good' is very high, and it is even higher when such deprivation would result in statelessness for the individual. Since deprivation would render the petitioner stateless in this scenario, the committee's decision was set aside.

These cases demonstrate the Indian judiciary's efforts to prevent and reduce statelessness by liberally interpreting citizenship laws and recognising international law obligations.

¹¹² *ibid.*

B.3 CONCLUSION AND RECOMMENDATIONS

Any action undertaken by the state which deliberately or inadvertently renders its nationals stateless is a violation of their rights assured by emerging customary international law and municipal law. Hence, there is a core negative obligation on India to not render people stateless. This obligation has been clarified in the domestic context by several Indian judicial decisions as well. Recommendations in this regard, include:

- India should accede to the **1954** and the **1961 Statelessness Conventions**.
- India should adopt a national legislation consistent with international law on statelessness.
- Modules on international law and India's obligations should be incorporated into judicial education and training programs for judges and FT members.
- Keeping the scale of disenfranchisement and the lack of supranational policy in mind, civil society organizations must further highlight the consequences of people being deprived of citizenship in legal and policy terms when discussing the impact of the NRC and similar exercises in India.

C. EVERY CHILD’S RIGHT TO A NATIONALITY

The arguments and sub-arguments made thus far apply to all individuals. Children, however, deserve special attention and accordingly enjoy additional rights and safeguards. The African Committee of Experts on the Rights and Welfare of the Child (‘ACERWC’) rightly observed the following in this regard:

Statelessness is particularly devastating to children in the realisation of their socio-economic rights such as access to health care, and access to education. In sum, being stateless as a child is generally antithesis to the best interests of children.¹¹³

The current Indian citizenship framework does not provide for nationality to children born within the territory of India who would otherwise be stateless. Prior to the 1986 amendment of the Citizenship Act, every child born within Indian territory was conferred Indian citizenship at the time of birth (with two rarely applicable conditions that exist even today under section 3(2) of the Act). The 1986 amendment imposed an additional requirement that either of the child’s parents must be Indian citizens in order to be eligible for Indian citizenship by birth (*‘jus soli’*). To further restrict the *jus soli* principle, the 2003 amendment added yet another condition that neither parent must be an ‘illegal migrant’. Accordingly, the present law is not only in contravention of several international legal instruments signed and ratified by India, but also in contravention of customary international law in this regard.

¹¹³ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v Government of Kenya* Comm no 002/Com/002/2009 (ACERWC, 22 March 2011).

C.1 India's international law obligations to prevent and reduce statelessness among children

India has signed and ratified the **CRC**, **ICCPR**, Convention on the Elimination of All Forms of Discrimination Against Women (**'CEDAW'**) and Convention on the Rights of Persons with Disabilities (**'CRPD'**). These four international legal instruments clearly shed light upon the right to nationality of a child, the prevention and reduction of statelessness among children, the right to a name of a child, and the right of immediate birth registration. **Article 7(1)** of the **CRC** and **Article 24** of the **ICCPR** encompass the right of every child to acquire a nationality, the right to a name, and the right to an immediate birth registration. **Article 18(2)** of the **CRPD** enumerates the three aforementioned rights for disabled children. However, **Article 7(2)** of the **CRC** goes further to mandate the following – 'State parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless'.¹¹⁴ Finally, **Article 9 (2)** of **CEDAW** asserts that there are equal rights for men and women with respect to passing nationality on to their children.

It is important to note that India did not make any reservations to the specified articles of these four international legal instruments. Hence, they have binding force in law and must be adopted by the Indian state within its domestic citizenship law framework.

Emerging customary international law also places an important obligation upon India to prevent and reduce statelessness of children and to grant nationality to stateless children born in its territory. Several international and regional treaties, apart from those listed above, mandate the right to nationality of a child and the prevention and reduction of

¹¹⁴ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 7(2).

statelessness in children.¹¹⁵ The obligation to grant nationality to all children born within a state's territory who would otherwise be stateless is included in the legislation of over 100 States.¹¹⁶ Hence, under customary international law, all states have the duty to automatically grant citizenship to stateless children born in their territory and to prevent and reduce statelessness among children.

This obligation comes with two exceptions. The first exception is when the state has a 'non-burdensome, non-discretionary' nationality application process.¹¹⁷ It is appropriate here to consider Sri Lanka's approach to reduce statelessness among Hill Tamils within the territory [see box].¹¹⁸ The Sri Lankan government found that the only non-cumbersome procedure to grant nationality to most stateless Hill Tamils within its territory was an automatic grant of citizenship.¹¹⁹ Hence, the first exception that calls for a non-burdensome and non-discretionary nationality application process does not absolve the state of its duty under international law. The second exception is a case where the state of birth can 'definitively secure de jure nationality for the child from another state'.¹²⁰ The second exception is highly discouraged as this might render a child stateless for the interim period until their nationality is secured.

115 International legal instruments that mandate the aforementioned principles are the 1954 Convention, 1961 Convention (Articles 1, 2 and 4), and the CRMW (Article 29). Regional treaties that specifically mandate this are ACRWC (Article 6) and ACHR (Article 20).

116 Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (OUP 2019) ch 3, 12.

117 William Thomas Worster, 'The Obligation to Grant Nationality to Stateless Children under Customary International Law' (2019) 27(3) *Michigan State International Law Review* <<https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1257&context=ilr>> accessed 11 March 2020.

118 UNHCR, 'Good Practices Paper: Action I – Resolving Existing Major Situations of Statelessness' (2015) <<https://www.refworld.org/pdfid/54e75a244.pdf>> accessed 3 April 2020.

119 Grant of Citizenship to Persons of Indian Origin, 2003 (Sri Lanka).

120 William Thomas Worster, 'The Obligation to Grant Nationality to Stateless Children under Customary International Law' (n 117).

Sri Lanka's Approach to Reducing Statelessness

Sri Lanka had enacted laws in 1986 and again in 1998 to resolve the statelessness situation among the Hill Tamils within its territory by conferring citizenship to the stateless persons. However, this was unsuccessful due to the complex and cumbersome procedures under the two legislations. The state decided to enact another law in 2003 that sought to automatically grant citizenship to these individuals. The 2003 law also had a provision for some other Hill Tamils who would have been left otherwise stateless to obtain Sri Lankan nationality through simple self-declarations.

C.2 Indian law on prevention and reduction of statelessness among children

Indian citizenship law is yet to be modified to reflect the treaty and customary law obligations on the nationality rights of children. The 2003 Citizenship Amendment Act denies Indian citizenship by birth to children born in India after 2004 if one parent is deemed an 'illegal migrant' even if the other parent is Indian. In the context of the Assam NRC, this effectively meant that children born after 2004 – and with either parent designated 'doubtful voter' / 'declared foreigner' / 'pending in FTs' – were excluded from the NRC, a status confirmed by the Supreme Court itself.¹²¹

¹²¹ *Assam Public Works v Union of India and Ors* (2019) 9 SCC 70.

While there is no explicit mention of a ‘right to a name’ and the right to be ‘registered immediately after birth’ in the Constitution,¹²² life and personal liberty under **Article 21** are inalienable rights that are inseparable from human dignity. Dignity needs to be seen as a status concept, that is related to ‘the formal legal standing or perhaps, more informally, the moral presence’ that a person has in a society and in their interactions with others.¹²³

In *Children of Nubian Descent*, the Committee held that there is a strong and direct link between birth registration and nationality, and that every child must have a nationality at birth.¹²⁴ In this case, the practice of Kenya of not allowing birth certificates to be a proof of citizenship and of allowing children in Kenya to acquire Kenyan nationality only after 18 years of age was held to be a violation of **Article 6** of the **African Charter on the Rights and Welfare of the Child** (‘ACRWC’) that stipulates the right to a name and the right to be immediately registered at birth.

While it may be argued that the lack of birth registration on its own does not usually place a person at the risk of statelessness, possession of a birth certificate actually helps in establishing an entitlement to nationality.¹²⁵ Birth registrations of children born in India are mandated and governed by the **Registration of Births and Deaths Act, 1969**. This Act gives power to every state to frame its own rules in order to implement its provisions, which makes the procedures, requisites and other technicalities non-uniform and inconsistent.¹²⁶ These procedural inconsistencies create the potential for leaving out registrations. Furthermore, the Act does not provide guidance about the nationality and marital status of a child’s parent, and their effect,

122 As under several international instruments such as the ACHR (Article 18) and the CRC (Article 7), ICCPR (Article 24), Migrants Workers Convention (Article 29), ACRWC (Article 6), among others.

123 Jeremy Waldron, ‘How Law Protects Dignity’ (2012) 71(1) *The Cambridge Law Journal* 200.

124 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya)* (n 113).

125 UNHCR ‘Good Practices Paper: Action 7 – Ensuring birth registration for the prevention of statelessness’ (2017) <<https://www.refworld.org/docid/5a0ac8f94.htm>> accessed 4 April 2020.

126 Registration of Births and Deaths Act 1969, s 30.

if any, on the birth registration of that child. This leaves room for arbitrary refusals of birth registrations of certain children. Hence, these gaps in the Indian birth registration system are a huge impediment which prevent India from achieving **Sustainable Development Goal ('SDG') 16.9** that focuses on 'legal identity for all' by 2030.¹²⁷ The condition of statelessness leaves a person without a recognised juridical personality which is a clear violation of human dignity. This is because a lack of legal personality absolutely denies 'an individual's condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals'.¹²⁸ Hence, an inefficient birth registration system violates Article 21 since it fails to guarantee legal personhood and human dignity.

Despite the Parliament and the Executive's insufficient action on this front, it must be noted that the Indian judiciary has taken some positive steps to prevent and reduce statelessness among children, thereby respecting India's international law obligations. In the case of *Jan Balaz*, as mentioned in the earlier section, the Indian judiciary liberally interpreted the nationality of children born to surrogate parents so that they were not left stateless.

127 Sustainable Development Solutions Network, 'Target 16.9 by 2030 provide legal identity for all including free birth registrations' <<https://indicators.report/targets/16-9/>> accessed 21 May 2020.

128 *Case of Girls Yean and Bosico v Dominican Republic* Inter-American Court of Human Rights Series C no 156 (8 September 2005).

C.3 CONCLUSION AND RECOMMENDATIONS

There is a core obligation on the Indian state under international law and domestic law to not create statelessness among children and to grant citizenship to those children who would otherwise be rendered stateless. Furthermore, India is obligated to ensure that all children born in Indian territory are registered at birth. Recommendations in this regard, include:

- India should provide an automatic path to citizenship to all the children born in India who would otherwise be rendered stateless. The 1986 and the 2003 amendments to the Citizenship Act must be done away with, keeping the **pre-1986 amendment** *jus soli* principle intact. Good practices in this regard include:
 - The 2010 amendment to the **Nationality Law of Guinea-Bissau** provides – ‘A Guinean citizen is... anyone who is born in the territory and who does not possess another nationality’.¹²⁹
 - The **Bulgarian Citizenship Act** after recent amendments states that a ‘Bulgarian citizen by place of birth is every person born within the territory of the Republic of Bulgaria who has not acquired another citizenship by origin’.¹³⁰
 - By the new comprehensive **Nationality Act** adopted in 2003, **Finland** stipulated that all children born in Finland who would otherwise be stateless would automatically acquire Finnish nationality at birth.¹³¹
 - The **French Civil Code** provides for the acquisition of nationality of a child born in France who would otherwise be stateless.¹³² It is important to note that the courts in the country

¹²⁹ UNHCR ‘Good Practices in Nationality Laws for the Prevention and Reduction of Statelessness - Handbook for Parliamentarians’ (2018) 22-23 <<https://www.refworld.org/docid/5be41d524.html>> accessed 11 May 2020.

¹³⁰ Bulgarian Citizenship Act 1999, art 10.

¹³¹ Nationality Act 2003 (Finland), s 9.

¹³² UNHCR, ‘Good Practices Paper: Action 2 - Ensuring that no child is born stateless’ (2017) 8-9 <<https://www.refworld.org/docid/58cfab014.html>> accessed 3 August 2020.

play a vital role in confirming the French nationality of an individual on a factual basis, including a case where the child would otherwise be rendered stateless.¹³³

- India should implement constitutional standards similar to Malaysia. According to the **Constitution of Malaysia**, any person born on the territory of the state who is not born a citizen of any country i.e. who is otherwise born stateless is a citizen of Malaysia.¹³⁴
- The birth registration system in India should be made more efficient by eliminating the gaps mentioned in Section I.C.2 of this chapter, to prevent and reduce statelessness among children [↗]. Good practices to ensure that all children are registered at birth irrespective of their parents' legal status include:
 - In December 2019, **Kazakhstan** amended its **Code on Marriage and Family** to ensure that all children born in the country are registered at birth and that all children, irrespective of the legal status of their parents, are issued birth certificates.
 - **Thailand's** reform of its **Civil Registration Act** in 2008 made it clear that all children born in the territory can be registered when born, regardless of their parents' nationality and legal status.
 - **Uzbekistan** has run a nationwide campaign since 2017 for universal birth registration. The campaign included identifying and registering all cases of unregistered births, including for children born to undocumented parents.

see Section III.A and III.B
(Chapter III), pg 216 , pg 217

¹³³ *ibid.*

¹³⁴ Constitution of Malaysia 1957, pt I, sch 2, art 14(1)(a).

II. Legal Recognition of Statelessness in India

A. RECOGNITION OF STATUS

Statelessness poses a moral and normative challenge to the legitimacy of the international state system. In simpler terms, since the world is comprehensively divided between nation states, then every person should be able to claim citizenship and its attendant rights somewhere¹³⁵ Yet, thousands of people around the world face barriers in claiming citizenship rights in any nation because of several aggravating factors.

There are several stateless groups in India who either arrived or were born in India as stateless persons, such as the Tibetans and the Rohingyas. This section pertains to these stateless persons in Indian territory whose citizenship was not deprived as a result of any action of the Indian state. They have no avenues of return to their country of nationality as a result of their statelessness i.e. their state does not accept them as nationals. Thus, they are prohibited from exercising their right to return.¹³⁶ In this situation, they cannot be deported and continue to reside in India as subjects of a legal framework which does not formally recognise their status.

A close reading of the Indian domestic law framework governing the status of non-citizens reveals that the definitional categories determining the legal status of an individual are inadequate for

¹³⁵ Matthew Gibney, 'Statelessness and Citizenship in Ethical and Political Perspective' in Alice Edwards and Laura van Waas eds., *Nationality and Statelessness under International Law* (CUP 2014) ch 2, 45.

¹³⁶ Article 13(2) UDHR.

guaranteeing the rights of stateless persons.¹³⁷ The use of the terms ‘illegal migrant’, ‘foreigner’, and ‘citizen’, as distinct and oppositional categories, operates on the implicit assumption that the person whose status is to be ascertained must be in possession of at least one nationality, even if that nationality is not Indian. None of these terms can be used interchangeably for a stateless person; the Acts simply do not define or acknowledge the phenomenon of statelessness.

International law on the right to nationality of every individual along with the obligation on the state to prevent and reduce statelessness commands states to naturalise all stateless persons in their territory.¹³⁸ This has been elaborated above in Part I of this chapter. Hence, it is imperative that the Indian state recognise stateless persons formally and issue identity certificates to them, thereby ensuring recognition of their equal legal personhood for them to avail their rights. These certificates will ensure that their special situation would be addressed. The only pieces of legislation that recognise the status of stateless persons are the **Passports Rules, 1980**, framed under the **Passports Act, 1967**, which grant the MEA the power to issue certificates of identity. However, the duty of the state under international law, constitutional law, and human rights law (as argued above) does not end with issuing certificates of identity. India must grant them nationality in accordance with international law obligations to ensure that they can enjoy their right to nationality.

137 The framework of domestic law governing the status of non-citizens in India broadly consists of four instruments: the Constitution (Articles 5 – 11); the Citizenship Act, 1955 (Sections 2, 3, 6, 6A, 6B, 10); the Foreigners Act, 1946 (Sections 2, 3, 8, 9); and the Passports Act, 1967 (Section 4). These laws collectively cover the conditions for acquisition of Indian citizenship and the Executive’s power to regulate the entry and movements of foreigners on Indian soil, while the latter directs the issuance of identity certificates for Indians and non-citizens in Indian Territory.

138 See also Article 32 of the 1954 Statelessness Convention: ‘The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings’.

THE CITIZENSHIP ACT, 1955

2. Interpretation. (1) In this Act, unless the context otherwise requires,

(b) “illegal migrant” means a foreigner who has entered into India

(i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or

(ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time;

THE FOREIGNERS ACT, 1946

2. Definitions. — In this Act—

(a) “foreigner” means a person who is not a citizen of India;

Relevant provisions of the Passports Act, 1967 and the Passports Rules, 1980

THE PASSPORTS ACT, 1967

4. Classes of passports and travel documents

(2) The following classes of travel documents may be issued under this Act, namely: –

(a) emergency certificate authorising a person to enter India;

(b) certificate of identity for the purpose of establishing the identity of person;

(c) such other certificate or document as may be prescribed.

THE PASSPORT RULES, 1980

Part II: Travel Documents

Classes of Travel Documents	Classes of Persons to Whom Issuable
1	2
2. Certificate of Identity	(i) Stateless persons residing in India, foreigners, whose country is not represented in India, or whose national, status is in doubt. (ii) Persons exempted under section 22 from the operation of the provisions of clause (a) of sub-section (2) of section 6.

As emphasised in previous sections, the lack of legal status is a direct infringement of an individual's right to a dignified life under **Article 21** of the Indian Constitution. In a juridical framework, a dignified existence can only be secured through recognition as an individual member of the civic community, which in turn forms the foundation for the free exercise of bodily integrity, autonomy, and self-determination.¹³⁹ In *Sheikh Abdul Aziz*, the Delhi High Court recognised this urgency of determining the legal status of the petitioner.¹⁴⁰ The Court excoriated the Central Government for its inaction in issuing a stateless certificate to the petitioner after nationality determination had failed, particularly after he had been confined in detention for an additional seven years, well beyond his initial sentence under **Section 14** of the **Foreigners Act**. It understood that the issuance of a stateless certificate, under **Rule 4** of the **Passports Rules, 1980**, and the subsequent granting of a Long-Term Visa ('LTV'), were essential for the petitioner's release from detention, and enabling his right to a dignified existence upon Indian soil. In *National Human Rights Commission (Chakma case)*, the Supreme Court held that eligible stateless individuals, like the Chakmas in Arunachal Pradesh, have constitutional and statutory rights to be considered for Indian citizenship.¹⁴¹ Local administrative officers cannot refuse to act upon Chakma individuals' applications under **Section 5** of the **Citizenship Act** to the Central Government. The Court also held that the state is obliged to protect Chakmas from eviction and threats of assault even while their citizenship applications are pending. These cases indicate Indian courts' proactive approach in reducing indeterminacy of status for individuals, assuring the terms of their membership in the civic community.

For stateless persons in India, international law necessitates that the burden is always upon the Indian state to fairly and expeditiously determine legal status for such persons. As we have

¹³⁹ *Case of Girls Yean and Bosico* (n 128).

¹⁴⁰ *Sheikh Abdul Aziz v State* (2015) W.P.(CRL) 1426/2013 (Delhi High Court).

¹⁴¹ *National Human Rights Commission v State of Arunachal Pradesh* (1996) 1 SCC 742 (*Chakma case*).

argued at length above, the state's sovereign prerogative in citizenship matters is implicitly circumscribed by international law and human rights standards. Therefore, it is the state's obligation to establish whether they are recognised nationals of any other country. If the state fails in establishing that, they must be naturalised i.e. granted Indian nationality.

It is also important to note that statelessness should not operate as an impediment to an eventual path to Indian citizenship. The naturalisation of stateless persons within the ambit of India's existing citizenship laws has precedent: the Delhi High Court in *Namgyal Dolkar* ordered the MEA to issue an Indian passport to the petitioner who, despite holding a stateless identity certificate and being born to two Tibetan refugees, was eligible for Indian citizenship by birth under **Section 3 (1)(a)** of the **Citizenship Act**.¹⁴²

The significance of naturalising stateless persons residing in a State was recently followed by the ECtHR as well. In *Sudita Keita*, the applicant had arrived in Hungary in 2002.¹⁴³ He was subsequently recognised as a stateless person after the local courts recognised that the burden on the applicant to prove lawful stay was contrary to Hungary's international law obligations relating to statelessness. Furthermore, in the case at hand, the ECtHR held that the stateless applicant had been left in a vulnerable position for 15 years without access to an effective and accessible naturalisation procedure. With reference to international law on statelessness, the Court highlighted that his situation had resulted in grave difficulties in access to healthcare and employment, and violated his right to private and family life.

This report further argues that stateless persons should be automatically naturalised (i.e. grant of nationality) since any formal requirements in this regard would place an undue burden upon them. Such a process would fail to recognise the underlying discrimination and lack of access to documents. This is visible in

¹⁴² *Namgyal Dolkar v Govt. of India, Ministry of External Affairs* (2010) (120) DRJ 749 (Delhi High Court).

¹⁴³ *Sudita Keita v Hungary* App No 42321/15 (ECtHR, 12 May 2020).

the Sri Lankan experience with grant of nationality as elaborated in Section I.C.1 of this chapter.

Hence, it is only through naturalisation that stateless persons can access the full extent of their rights. Their exceptionally vulnerable situation and international law obligations demands that the state shall automatically recognise them as citizens.

B. CONCLUSION AND RECOMMENDATIONS

Stateless persons in Indian territory shall be recognised. The burden of proof of nationality shall be on the Indian state. As argued above, if the state fails to prove that they are nationals of another country, they shall be naturalised in India as per international law on statelessness. This grant of nationality shall be automatic since it must overcome the structural flaws in nationality laws. Recommendations in this regard include:

- India must ensure the speedy, comprehensive, and efficient issuance of identity certificates to all stateless persons in its territory. The issuance of identity certificates shall be easily accessible both geographically and economically, by facilitating free consultations in various places, including remote areas. These certificates should enable their stability of residence and self-employment, ensuring their greater participation and integration into the local economy and community without discrimination. This must be done as an interim measure before they are granted Indian nationality, or another nationality is established.
- India should make necessary changes in its laws by foregrounding the vulnerability of stateless individuals within the domestic legal framework. Citizenship law should allow for automatic naturalisation of stateless persons in India without any heavy requirements. Good practices in this regard include:

- **Vietnam** codified a definition of ‘stateless person’ in their nationality law in 2008, in consonance with the definition in the **1954 Convention**. This was accompanied by provisions establishing a clear and simplified procedure for naturalisation, after five years of permanent residence. The **2008 law** also provides facilitated naturalisation for stateless persons who do not have adequate identity papers but have been residing in Vietnam for 20 years or longer.¹⁴⁴
- **Tajikistan** introduced a new law allowing irregular migrants and stateless persons to obtain residence permits, which also enables them to apply for citizenship after three years.¹⁴⁵
- In 2000, **Greece** amended its laws to reduce the period of residency required for stateless people to be eligible for naturalisation. Similarly, **Brazil** halved the residency requirements to facilitate naturalisation of stateless persons.¹⁴⁶
- **Thailand** amended its nationality laws in 2008 to provide Thai citizenship to all persons born in Thailand before 1992.¹⁴⁷
- **Uzbekistan** conferred citizenship to registered stateless persons who were granted permanent residency before 1995, via a new provision in their citizenship law.¹⁴⁸
- **Bosnia and Herzegovina** adopted a law waiving the proof of mastery of language and livelihood.¹⁴⁹ Such provisions

¹⁴⁴ UNHCR ‘Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights Compilation Report – Universal Periodic Review: Socialist Republic of Viet Nam’ (2013) <<https://www.refworld.org/docid/51c946514.html>> accessed 5 April 2020.

¹⁴⁵ UNHCR, ‘UNHCR welcomes Tajikistan’s new law tackling statelessness’ (UNHCR, 30 January 2020) <<https://www.unhcr.org/news/press/2020/1/5e32a8e74/unhcr-welcomes-tajikistans-new-law-tackling-statelessness.html>> accessed 5 April 2020.

¹⁴⁶ UNHCR ‘Good Practices in Nationality Laws for the Prevention and Reduction of Statelessness - Handbook for Parliamentarians’ (n 129).

¹⁴⁷ UNHCR ‘Good Practices: Addressing Statelessness in South East Asia’ (2011) <<https://www.refworld.org/docid/4d6e0a792.html>> accessed 18 March 2020.

¹⁴⁸ UNHCR, ‘Uzbekistan to end statelessness for 50,000 people’ (UNHCR, 17 March 2020) <<https://www.unhcr.org/news/press/2020/3/5e70b9474/uzbekistan-end-statelessness-50000-people.html>> accessed 5 April 2020.

¹⁴⁹ UNHCR ‘Good Practices in Nationality Laws for the Prevention and Reduction of Statelessness - Handbook for Parliamentarians’ (n 129).

recognise the importance of nationality to protect rights of individuals, and do not make this right conditional upon their economic situation and language skills.

- **Bosnia and Herzegovina** and **Greece**, recognising the widespread difficulties faced by stateless people in furnishing documents as proof, adopted laws that lowered documentation requirements for stateless people.¹⁵⁰

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SECTION II.B

¹⁵⁰ *ibid.*

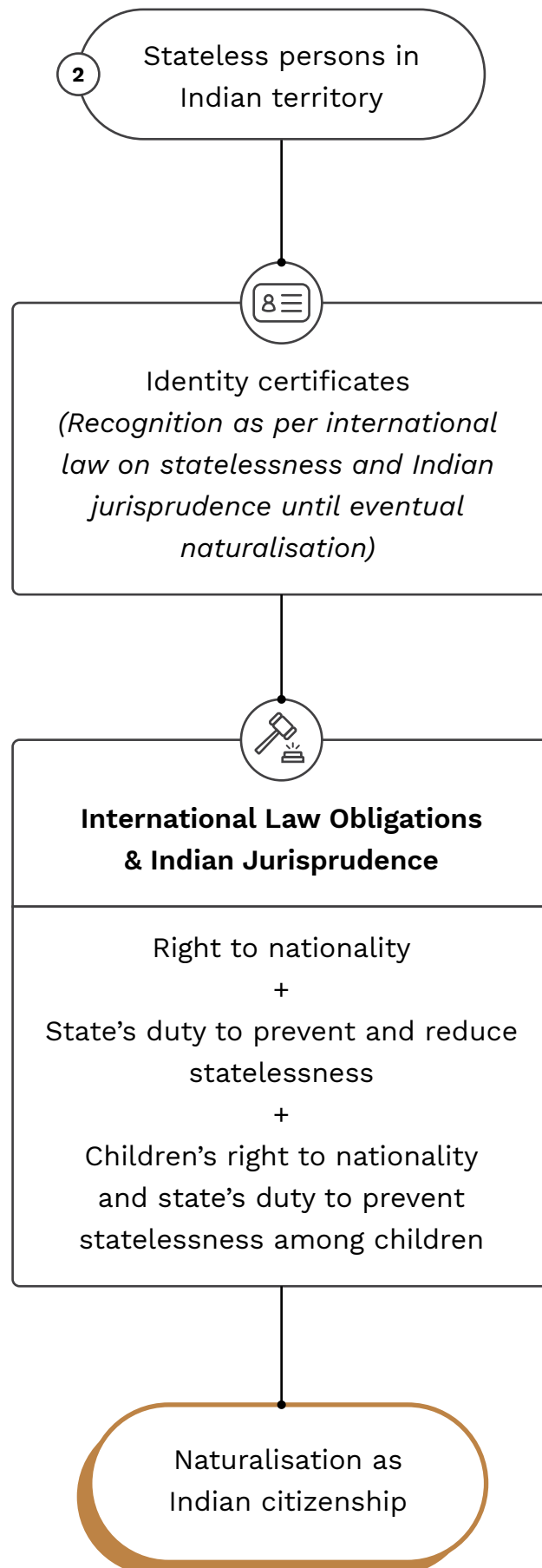
III. Summary and Key Recommendations

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SECTION III.

The following flow charts briefly summarise our key arguments in this section.





Our key recommendations are as follows:

1. India must at least accede to the following international legal instruments:

- 1954 Convention
- 1961 Convention; and
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ('CRMW').

2. India must enact a national legislation for stateless persons that is consistent with international law on statelessness

India must enact such an aforementioned legislation including and not limited to provisions regarding the following issues:

- Stateless persons in India shall have a path to citizenship.
- The Indian state should provide an automatic path to citizenship to all children who would otherwise be rendered stateless.
- The 1986 and the 2003 amendments to the **Citizenship Act** must be done away with, keeping the pre-1986 amendment *jus soli* principle intact.

- The birth registration system in India should be made more efficient, uniform and non-discriminatory to prevent and reduce statelessness among children.
- India must ensure the speedy, comprehensive, and efficient issuance of identity certificates to all stateless persons, identifying them as such. These should enable their stable residence and grant them employment rights in the private sector.
- India must provide effective remedies for those seeking to resolve their documentation status.

3. India must affirm the citizenship of all the people facing arbitrary deprivation of citizenship

India must affirm the citizenship of all the precarious citizens in Assam who have ended up in this vulnerable position as a result of arbitrary citizenship deprivation exercises. These exercises – NRC and FTs – must be immediately halted. Precarious citizens are on the brink of statelessness since they are facing the threat of arbitrary deprivation of nationality, which violates Indian and international law. Their right to nationality and India's obligation to eradicate statelessness make it imperative for the state to affirm their citizenship. This affirmation must be a non-discretionary, non-bureaucratic process. Any application process would risk discrimination, abuse and exclusion. In other words, it shall be an automatic affirmation of the citizenship these persons rightly have.

4. India should amend its citizenship laws to implement more flexible naturalisation routes

India is obligated under international law on statelessness to naturalise stateless persons in Indian territory. This applies to persons who were stateless when they arrived in India and have been residing in the country since then. Naturalisation would fulfil the obligation to prevent and reduce statelessness by operationalising their right to nationality. The present practice of examining elements such as the length of the stay in the territory, place of birth, family situation, establishment of permanent residence in the country, integration within society, share of a common culture, knowledge of the language and history would prove ineffective as a blanket solution to the issue. Given the socio-economic deprivation of stateless persons, they may be left out if the authorities exercise their discretion on the above-mentioned elements. The 2003 Sri Lankan law on grant of nationality shall be followed as the best practice. NGOs and legal aid organisations could play a role in enumerating the potential beneficiaries and assist them in accessing the resultant citizenship documents.

5. India should expand the powers of the National and State Human Rights Commissions

India should expand the enforcement rights of the National Human Rights Commission ('NHRC') and State Human Rights Commissions ('SHRCs') and broaden their competencies as consultative actors, so that their recommendations are implemented by State and Central Governments. The Commissions would thus be able to function akin to an Ombudsman dealing with discrimination faced by vulnerable people, like those rendered stateless. For example, Montenegro created an Ombudsman dealing with racism and xenophobia to tackle racial discrimination faced by Roma people, which is able to influence the elaboration of policies.¹⁵¹ Thus, commissions dealing with human rights of people facing statelessness in Assam such as the NHRC, the National Commission for Minorities, and the National Commission for Women should be promoted as core actors in the fields of nationality and registration.

¹⁵¹ European Commission against Racism and Intolerance, 'ECRI Report on Montenegro (fifth monitoring cycle)' (CRI, 19 September 2017) 37 <<https://rm.coe.int/second-report-on-montenegro/16808b5942>> accessed 26 May 2020. The role of the Ombudsman in Montenegro enabled to initiate policies on the matters it was tackling. Particularly, the dedicated Ombudsman's action lead to the establishment of concrete measures to compensate the discrimination and difficulties of Roma people in the access to education. Free preschools providing language classes to Roma children were opened.

CHAPTER II

DETENTION

SECURING CITIZENSHIP

This chapter examines a palpable and direct consequence of precarious citizenship and statelessness – detention. Detention constitutes an imminent and visceral threat to life and liberty, and also affects all other political liberties. This chapter clarifies the legal position and provides arguments, guidelines, and recommendations to prevent arbitrary detention of persons who are either stateless or at the verge of being rendered stateless, with specific focus on the situation of precarious citizens in Assam. This chapter argues that the detention of precarious citizens in Assam is arbitrary and prohibited under law. It specifically argues that indefinite detention is inherently arbitrary and is prohibited. It delves into alternatives to detention followed by substantive and procedural rights of detained precarious citizens. Lastly, it focuses on the children in detention in Assam.

The bleak and deplorable conditions found inside detention camps in Assam leave much to be desired. The NHRC Report of the Special Monitor on Minorities describes the bleak realities of detention centres in Assam.¹⁵² It states that there are presently no independent detention centres in Assam, though they are under construction. Jail complexes in six districts have been converted into detention facilities, of which one is an all-women detention facility, where children below the age of six can reside with their mothers. This becomes concerning as there is no segregation of space inside these camps; detainees are kept along with convicts and undertrials, which has resulted in overcrowding.¹⁵³ Each person has only 2-3 square feet of space,¹⁵⁴ which is hardly enough to even move or turn around. This has further implications, as the lack of distinction between detainees

152 National Human Rights Commission, 'Report on NHRC Mission to Assam's Detention Centres from 22 to 24 January, 2018' (*CJP*, 2018) <<https://cjp.org.in/wp-content/uploads/2018/11/NHRC-Report-Assam-Detention-Centres-26-3-2018-1.pdf>> accessed 27 May 2020.

153 Amnesty International, 'Between Fear and Hatred: Surviving Migration Detention in Assam' (Amnesty International 2018) <<https://amnesty.org.in/assam-detention-centres/>> accessed 16 June 2020.

154 LiveLaw News Network, 'COVID-19: Plea in SC Seeks Release of Persons from Foreigners Detention Centres in Assam [Read Application]' *LiveLaw.in* (1 April 2020) 8 <<https://www.livelaw.in/top-stories/covid-19-plea-in-sc-seeks-release-of-persons-from-foreigners-detention-centres-in-assam-154652>> accessed 1 April 2020.

and convicts makes for a mentally unhealthy environment.¹⁵⁵ Jail security guards treat detainees as criminals, thus subjecting them to extreme mental duress.¹⁵⁶ Detainees have complained of poor food quality, resorting to hunger strikes inside the centres.¹⁵⁷ Further, several personal items (such as blankets) have to be shared by detainees due to shortage. This leads to the spread of skin diseases, which has been identified as a common illness at Goalpara District Jail.¹⁵⁸ Other issues within detention centres include shortage of medical supplies,¹⁵⁹ handcuffing of detainee patients,¹⁶⁰ poor water quality,¹⁶¹ etc.

The chapter is organised into four sections. Section I looks at the at the blanket prohibition against arbitrary detention of stateless and precarious citizens. It hinges upon two principles – the right not to be arbitrarily detained and the right against indefinite detention. Developing this further, Section II discusses the benefits of alternatives to detention for stateless persons in India and provides examples of good practices around the world. Section III explores the procedural and substantive rights of persons who are detained for deportation on the presumption of a legitimate purpose with special focus on precarious citizens in Assam. Lastly, Section IV describes the supplementary rights of children in detention who are stateless or at the verge of statelessness in the context of international treaty obligations and Indian constitutional law.

155 Amnesty International, 'Between Fear and Hatred: Surviving Migration Detention in Assam' (n 153).

156 *ibid.*

157 Sangeeta Pisharoty, 'Bad Food, Hunger Strikes: What Life Is Like If You're Not On Assam's NRC List' (*Huffpost*, 21 August 2019) <www.huffingtonpost.in/entry/bad-food-hunger-strikes-detention-centre-assam-nrc_in_5d5a398ae4boeb875f25e5b4> accessed 6 July 2020.

158 Studio Nilima, 'Report Of Visit To District Jail, Goalpara' (*Studio Nilima*, 2019) <<http://studionilima.com/pdf/ReportonGoalparaJailVisit.pdf>> accessed 5 July 2020.

159 *ibid.*

160 Amnesty International, 'Between Fear and Hatred: Surviving Migration Detention in Assam' (n 153).

161 Studio Nilima, 'Report Of Visit To District Jail, Goalpara' (n 158).

I. Prohibition of Arbitrary Detention of Stateless Persons and Precarious Citizens

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SECTION I.

The Assam government is detaining precarious citizens in the province to deport them to their alleged country of nationality.¹⁶² In pursuance of this objective, precarious citizens are detained upon being declared as ‘foreigners’ by the FTs.¹⁶³ The persons excluded from the NRC facing the threat of arbitrary deprivation of nationality also face the threat of detention. Precarious citizens in Assam are Indian nationals and have the right to reside in India. The alleged state of nationality i.e. Bangladesh also maintains that they are not its nationals.¹⁶⁴

This section assesses the legality of detention of precarious citizens in Assam and stateless persons in India as per relevant standards prescribed in international law. It first examines whether such detention is arbitrary through the test of legitimate purpose and proportionality, and then applies these standards to assess the legality of indefinite detention.

162 Home and Political Department, Government of Assam, *Foreigners’ Issue* (White Paper, 2012) <<https://cjp.org.in/wp-content/uploads/2018/10/White-Paper-On-Foreigners-Issue-20-10-2012.pdf>> accessed 24 May 2020.

163 *ibid.*

164 Shoaib Daniyal, ‘Bangladesh government expresses concerns over Assam’s NRC process for the first time’ (*Scroll.in*, 18 July 2019) <<https://scroll.in/latest/930979/bangladesh-government-expresses-concerns-over-assams-nrc-process-for-first-time>> accessed 13 July 2020.

A. STANDARDS FOR ASSESSING WHETHER DETENTION IS ARBITRARY

Article 9 of the **UDHR** prescribes that no one shall be subjected to arbitrary arrest, detention or exile. It is also reflected in **Article 9** of the **ICCPR** which provides for the right against arbitrary arrest or detention. It is a part of customary international law and has arguably achieved a non-derogable character in treaty law.¹⁶⁵

The notion of arbitrariness has been interpreted as not merely ‘against the law’ but in an expansive manner which includes elements of inappropriateness, injustice, lack of predictability and due process of law.¹⁶⁶ Accordingly, detention must be pursued for a legitimate purpose, for the shortest period, and only as a measure of last resort.¹⁶⁷ Additionally, it has to satisfy the standard of proportionality in light of the circumstances of each individual case.¹⁶⁸ Further, the detention must be subject to automatic and periodic review to determine its relevance to the individual case.¹⁶⁹

¹⁶⁵ See UN Human Rights Committee ‘CCPR General Comment No. 35: Article 9 (Liberty and security of person)’ (2014) UN Doc CCPR/C/GC/35; UN Human Rights Committee ‘General Comment No. 29: States of Emergency (Article 4)’ (2014) UN Doc CCPR/C/21/Rev.1/Add.11; UNHRC ‘Report of the Working Group on Arbitrary Detention to the 22nd session of the Human Rights Council’ (24 December 2012) A/HRC/22/44, 20.

¹⁶⁶ *Van Alpen v the Netherlands* Comm no 305/1988 (UN Human Rights Committee, 23 July 1990).

¹⁶⁷ *Working Group On Arbitrary Detention - Revised Deliberation No. 5 On Deprivation Of Liberty Of Migrants* (Office of the High Commissioner for Human Rights 2018) <https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf> accessed 21 July 2020.

¹⁶⁸ UN Human Rights Committee ‘General Comment No. 35’ (n 165), para 18.

¹⁶⁹ *ibid.*

A.1 Legitimate Purpose

The test of 'legitimate purpose' ensures that detention is resorted to only in the presence of a justifiable object. For an object to be legitimate, it ought to be reasonable and factually plausible. The legitimate purposes cited by states may include but are not limited to 'removal', 'public order', and 'public health'.¹⁷⁰ The UN Working Group on Arbitrary Detention prescribes that deportation (or removal) is valid as a legitimate purpose only in exceptional circumstances when the nexus between deprivation of liberty and deportation is close and proximate.¹⁷¹

This international practice finds resonance in regional legal frameworks. For instance, although the Council of Europe authorises detention for removal under **Article 5(1)(f)** of the **ECHR**, courts have interpreted this authorisation restrictively. It only applies to persons who have not been determined to be stateless, since detention of stateless persons cannot possibly serve the purpose of securing deportation.¹⁷² According to an EU directive, detention is no longer legitimately justified when a reasonable prospect of removal ceases to exist.¹⁷³ At the same time, purposes such as national security have been regarded as illegitimate for justifying detention of stateless persons.¹⁷⁴

In India, the **White Paper on the Foreigners' Issue** drafted by the Government of Assam is an official statement which represents the rationale behind detention of precarious citizens

¹⁷⁰ UNHCR 'Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to The Detention of Asylum-Seekers and Alternatives to Detention' (2012) <<https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>> accessed 24 June 2020 (UNHCR Detention Guidelines). See also The Equal Rights Trust, 'Guidelines to Protect Stateless Persons from Arbitrary Detention' (2012) <<https://www.equalrightstrust.org/ertdocumentbank/guidelines%20complete.pdf>> accessed 27 June 2020 (ERT Guidelines).

¹⁷¹ UNHRC 'Report of the Working Group on Arbitrary Detention to the 13th session of the Human Rights Council' (18 January 2010) A/HRC/13/30. See also *FKGA v Australia* Comm no 2094/2011 (UN Human Rights Committee, 20 August 2013), para 9(3).

¹⁷² *Okonkwo v Austria* App no 35117/97 (ECtHR, 22 May 2001).

¹⁷³ Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

¹⁷⁴ *Amie and Others v Bulgaria* App no 58149/08 (ECtHR, 12 February 2013).

and highlights two characteristics of the legitimate purpose cited. Firstly, ‘foreigners’ are detained in detention centres for administrative expediency i.e. to prevent them from committing ‘the act of vanishing’.¹⁷⁵ This is to ensure the availability of a person declared as a foreigner by the FT for the removal action, i.e. deportation. Secondly, the detention of foreigners is for the purpose of eventual deportation. The White Paper explicitly states that an individual declared as a ‘foreigner’ is detained until they are pushed back to their country of origin.¹⁷⁶ It also clearly states the concerning Indian practice of pushbacks where ‘foreigners’ are compelled into Bangladesh by Border Security Force given the lack of a bilateral deportation policy between India and Bangladesh.¹⁷⁷ The White Paper does not talk about the existence of review mechanisms that seek to periodically review circumstances relevant to each individual case (feasibility of deportation within a given timeframe, possibility of release, etc.).

It is important to note that detention of ‘foreigners’ solely for the purpose of ‘administrative expediency’ is not a legitimate purpose under international law. This is further reflected in **Guideline 27** of the **Equal Rights Trust Guidelines to Protect Stateless Persons for Arbitrary Detention** (‘ERT Guidelines’).¹⁷⁸ However, the State may frame its legitimate purpose as deportation to obscure the administrative convenience involved in its action. It may cite justifications of ‘flight risk’ i.e. person may disappear if not detained. In such circumstances, however, the removal action must be imminent – ‘a matter of hours or a day’.¹⁷⁹ It is clear that the deportation of any person detained in detention centre in Assam is not imminent as per this standard.

¹⁷⁵ Home and Political Department, Government of Assam, *Foreigners’ Issue* (n 162).

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ ERT Guidelines (n 170).

¹⁷⁹ British Institute of International and Comparative Law, ‘Immigration Detention And The Rule Of Law: Safeguarding Principles’ (2013) <https://www.biicl.org/files/6559_immigration_detention_and_the_rol_-_web_version.pdf> accessed 25 July 2020.

This is evidenced by their prolonged detention in deplorable conditions¹⁸⁰ as well as the inconsistent rates of deportation [↘].

see Section I.B.1 (Chapter II),
pg 115

Furthermore, **Guideline 28(i)** of the **ERT Guidelines** states that removal ceases to be a legitimate object when it is not practicable within a reasonable period of time.¹⁸¹ This necessitates the periodic review of the feasibility of removal action and detention pending such removal by domestic authorities. No such review procedure in this context exists in Indian law. In consideration of the ongoing pandemic, the Supreme Court's recent order allows for the conditional release of detainees who have served a period of two years in detention.¹⁸² This means that a detainee must complete two years in detention to be considered eligible for release, and must additionally comply with other conditions prescribed in the orders such as reporting requirements, deposit of sureties, verifiable residence, etc. The Court did not provide any rationale in concluding this duration. This order is silent on the aspect of periodic review of the proportionality of the detention, taking into consideration the circumstances of each individual case. Therefore, it fails to recognise and address the possibility of detention turning infructuous as a result of the State's inability to complete the removal action within a stipulated timeframe. The terms and conditions of release are determined by an exigency – the COVID-19 outbreak – not by an engagement with the substantive rights of detainees.

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SECTION I.A.1

Significantly, most persons detained under the guise of deportation have a 'genuine link' to India [↘] and are subject to processes which put them at the risk of arbitrary deprivation of their Indian nationality. Furthermore, the state of their alleged nationality (such as Bangladesh) does not acknowledge such persons as its citizens.¹⁸³ Hence, they are Indian nationals and

see Section I.A.1. (Chapter I),
pg 43

180 Studio Nilima, 'Report Of Visit To District Jail, Goalpara' (n 158). See also Sangeeta Pisharoty, 'Bad Food, Hunger Strikes: What Life Is Like If You're Not On Assam's NRC List' (n 157).

181 ERT Guidelines (n 170).

182 *Re: Contagion of COVID 19 Virus in Prisons (2020)* WP (C) 1/2020 (Supreme Court).

183 Shoaib Daniyal, 'Bangladesh government expresses concerns over Assam's NRC process for the first time' (n 164).

cannot be deported to another country they are not nationals of. The detention period capped at two years amounts to arbitrary detention since it does not serve any legitimate purpose.

In the case of stateless persons on Indian territory, deportation is an impossibility for the want of nationality. Despite this paradox, Indian practice presumes deportation of ‘foreigners’ to be a viable possibility, thereby allowing the state to detain stateless persons to facilitate deportation, as in the case of *Sheikh Abdul Aziz*.¹⁸⁴ The detention of stateless persons for deportation would also run the risk of becoming arbitrary since they enjoy marginal access to rights and could remain in detention indefinitely.

Furthermore, this position cannot be accepted since India lacks any semblance of a deportation policy which may effectuate the stated goals of the law. Observing the said discrepancy, the Supreme Court in the case of *Assam Sanmilita Mahasangha* directed the government to draft regulations on deportation to prevent undue delays.¹⁸⁵ Determination of a person’s nationality along with a bilateral arrangement with the concerned state to send back its alleged citizens constitutes a *sine qua non* to achieve the goal of deportation. In the absence of procedures to ensure either, deportation can no longer be sustained as a ‘legitimate aim’ for detaining stateless persons or precarious citizens.

A.2 Proportionality

It is also important to bear in mind the responsibility of the state to consider the applicability and feasibility of less restrictive measures and alternatives to detention before resorting to detention.¹⁸⁶ This is in line with the principle of proportionality vis-à-vis administrative detention, which requires

¹⁸⁴ *Sheikh Abdul Aziz v State* (2015) W.P.(CRL) 1426/2013 (Delhi High Court).

¹⁸⁵ *Assam Sanmilita Mahasangha and Others v Union of India and Others* (2017) SCC OnLine SC 1878 [38].

¹⁸⁶ *A v Australia* Communication No. 560/1993 CCPR/C/59/D/560/1993 [9.2]. See also UN Commission on Human Rights ‘Report On The Visit Of The Working Group To The United Kingdom On The Issue Of Immigrants And Asylum Seekers’ (18 December 1998) UN Doc E/CN.4/1999/63/Add.3 para 33.

detention to be a measure of last resort.¹⁸⁷ In this context, detaining authorities are obliged to exhaust all less restrictive measures before resorting to detention. The White Paper states that a person, upon being declared as a ‘foreigner’, is taken into custody and kept in detention till their eventual deportation.¹⁸⁸ There is no less restrictive measure envisioned to ensure that the person can be located if removal becomes possible. The state can utilise several options (such as reporting obligations, surety amounts, among others) as set out in the SC order allowing for release of detainees before resorting to detention as the appropriate measure [↗].¹⁸⁹ However, as seen in the White Paper Report, the authorities immediately resort to detention of persons declared foreigners. This renders the detention of precarious citizens in Assam disproportionate under international law.

Stateless persons also face similar treatment since they fall into the same legal category as ‘foreigners’. As seen in *Sheikh Abdul Aziz*, stateless persons in India can also be detained for deportation despite the impossibility of the same.¹⁹⁰ Hundreds of stateless Rohingya refugees are in detention in India with some facing indefinite detention.¹⁹¹ The detention of stateless persons is also disproportionate as it is caused by the lack of any consideration for less restrictive measures and alternatives to detention.

Furthermore, the detention of precarious citizens in Assam and stateless persons in Indian territory also falls short of the proportionality standard articulated vis-à-vis the Indian Constitution. **Article 21** of the **Constitution** enshrines the right to life and personal liberty, which extends to all persons,

187 UNHRC ‘Report of the Working Group on Arbitrary Detention to the 13th session of the Human Rights Council’ (n 171).

188 Home and Political Department, Government of Assam, *Foreigners’ Issue* (n 162).

189 *Re: Contagion of COVID 19 Virus in Prisons* (n 182).

190 *Sheikh Abdul Aziz* (n 184), orders dated 17 April 2015 and 28 May 2015.

191 Institute on Statelessness and Inclusion, ‘Human rights and Covid-19: What now for the Rohingya?’ (Briefing Paper, August 2020) <https://files.institutesi.org/Covid19_The_Rohingya_Briefing_Paper.pdf> accessed 19 August 2020.

including foreigners. This principle has been affirmed by the Supreme Court in *Louis De Raedt, Nilabati Behera* and *D.K. Basu* cases.¹⁹² Furthermore, the Supreme Court in *K.S. Puttaswamy II* emphatically stated that constitutional provisions shall be read and interpreted to enhance their conformity with the global human rights regime.¹⁹³ The judgement also established that restrictions to the enjoyment of Article 21 must satisfy the proportionality test. The majority opinion in *Puttaswamy II* adopted a four-prong test. In order to be considered as a measure proportional to its stated aim, detention of ‘foreigners’ has to satisfy the test on all four count [see box].

Test of Proportionality under Article 21 of the Indian Constitution

- i. The measure that restricts a right must have a legitimate goal; (legitimate goal stage)
- ii. The measure must be a suitable means for achieving this goal; (suitability or rational connection stage)
- iii. There should be no other measure available that is less restrictive and equally effective as the measure in question; (necessity stage)
- iv. The measure must not have a disproportionate impact on the holder of this right. (balancing stage)

¹⁹² See *Louis De Raedt & Ors v Union of India & Ors* (1991) 3 SCC 554, *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 and *Shri D.K. Basu v State of West Bengal with Ashok K. Johri v State of U.P.* (1997) 1 SCC 416.

¹⁹³ *K S Puttaswamy v Union of India* (2019) 1 SCC 1 (Puttaswamy II).

The state's stated legitimate purpose for detaining precarious citizens is deportation (as evidenced from the White Paper Report). To achieve this purpose, the setting up of detention centres has been authorised by the Government of India in accordance with the provisions of the **Foreigners Act, 1946** and the **Foreigners Order, 1948**. All sovereign nations have the right to regulate the presence of foreign nationals on its territory, including the discretion to deport them.¹⁹⁴ For the purpose of this argument, this premise is taken as valid and satisfying the first count of the test.

Declared Foreign Nationals and Convicted Foreigners

Indian law makes a distinction between 'declared foreigners' and 'convicted foreigners'. Declared foreigners are those who are unable to prove their Indian nationality (Section 9, Foreigners Act). Convicted foreigners are nationals of other countries (Section 8, Foreigners Act) who are convicted of illegally entering India. While the former are detained pending deportation, the latter have to undergo incarceration for violating the provisions (Sections 13, 14, 14-A, 14-B, 14-C) of the Foreigner's Act before they are deported.

¹⁹⁴ Walter Kälin, 'Aliens, Expulsion and Deportation' (Oxford Public International Law, October 2010) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e745>> accessed 3 July 2020.

However, detention does not satisfy the second prong of the test since detention of precarious citizens does not exhibit a rational connection to the end purpose of deportation/removal. This argument is backed by two reasons. Firstly, deportations of precarious citizens and stateless persons is not practicable. This is because precarious citizens, as has been reiterated above, have a genuine link to India and cannot be deported to another state. Stateless persons do not have any proof of their nationality and cannot be deported to a state that is unwilling to accept them. In both instances, removal is not a possibility. Detention in this instance exposes both groups to the risk of indefinite detention. Secondly, the rates of deportation as compared to the number of persons declared as foreigners are disproportionate. The Assam government's affidavit in *Supreme Court Legal Services Committee* states that only six declared foreigners have been deported.¹⁹⁵ This information is sourced from a Lok Sabha unstarred question, which states this number is 'as of October 2019' according to the data provided by the Assam government.¹⁹⁶ This response does not fully clarify the timeframe of such deportations, making it difficult to infer the rate at which such persons have been deported over the years. According to a report by Amnesty International, 128 declared foreigners had been deported to Bangladesh (the alleged country of origin) till 31 August 2018.¹⁹⁷ The low rate of deportation becomes an important factor when juxtaposed with the increasing rate of persons declared by the FTs as 'foreigners'.¹⁹⁸ Another Lok Sabha unstarred question from July 2019 stated that 63,959 persons had been declared foreigners

195 *Supreme Court Legal Services Committee v Union of India* (2018) W.P. (C) 1045/2018; Deborah Grey, 'Hurdles in releasing detention camp inmates cause anxiety in Assam: Amicus curiae Prashant Bhushan's report exposes plight of innocent people' (*Citizens for Justice and Peace*, 21 February 2020) <<https://cjp.org.in/hurdles-in-releasing-detention-camp-inmates-cause-anxiety-in-assam/>> accessed 9 May 2020.

196 An unstarred question is questions raised in the houses of Indian Parliament which is answered in writing. See, Ministry of Home Affairs, *Lok Sabha Unstarred Question No. 3558* (2019) <<http://164.100.24.220/loksabhaquestions/annex/172/AU3558.pdf>> accessed 17 July 2020.

197 Amnesty International, 'Between Fear and Hatred: Surviving Migration Detention in Assam' (n 153).

198 South Asia Human Rights Documentation Centre, 'Lawfulness of Detention of Declared Foreigners in Assam under International Law' (2019) 9-10 <<https://www.dtp.unsw.edu.au/sites/default/files/u4/Lawfulness%20of%20Detention%20of%20Declared%20Foreigners%20in%20Assam-SAHRDC.pdf>> accessed 8 June 2020.

by the FTs.¹⁹⁹ This number increased to 1,29,009 persons as per a Lok Sabha question raised in December 2019.²⁰⁰ This sharp rise in the number of persons declared foreigners raises further questions about the bleak possibilities for deportation, given the number of foreigners deported as of October 2019. Therefore, the detention of precarious citizens and stateless persons is not a suitable means to achieving the state's legitimate purpose, i.e., removal. Hence, the detention of both groups of persons violates their rights under **Article 21** of the **Indian Constitution**.

Furthermore, detention for deportation also fails the third and fourth counts of the proportionality test. The existence, applicability and feasibility of less intrusive measures is not explored by the state in its attempt to achieve its legitimate aim (i.e., identification and deportation of illegal immigrants/foreigners). The state directly resorts to the detention of declared foreigners and holds them in detention centres pending deportation (see discussion on White Paper Report by the Assam Government above). Thus, the detention of precarious citizens in Assam violates the third count of the test. Finally, as the detention has a disproportionate impact on stateless persons and precarious citizens, it also fails the fourth count of the proportionality test. This is because the principal legislation authorising detention – **Foreigners Act, 1946** – does not provide for adequate procedural and substantive safeguards. These include the right to periodic review of the viability of their detention vis-à-vis their removal from Indian territory, the right against punitive detention, etc. Detainees are presently kept in detention centres operating within prisons, with no delineation between declared foreign nationals and convicts/undertrials.²⁰¹ This confirms that the detention of precarious citizens in Assam, and stateless persons in India, is also disproportionate under domestic law.

199 Ministry of Home Affairs, *Lok Sabha Unstarred Question No. 1724* (2019) <<http://164.100.24.220/loksabhaquestions/annex/171/AU1724.pdf>> accessed 17 July 2020.

200 Ministry of Home Affairs, *Lok Sabha Unstarred Question No. 3558* (2019) <<http://164.100.24.220/loksabhaquestions/annex/172/AU3558.pdf>> accessed 17 July 2020.

201 National Human Rights Commission, 'Report on NHRC Mission to Assam's Detention Centres from 22 to 24 January, 2018' (n 152).

A.3 CONCLUSION AND RECOMMENDATIONS

This section establishes that detention of precarious citizens in Assam and stateless persons in India is arbitrary and violates the rule of law. It does not serve any legitimate purpose and is disproportionate as per both international law and Indian law. Precarious citizens and stateless persons must not be detained. Detention without legitimate purpose may also lead to indefinite detention. Recommendations in this regard, include:

- Conduct independent and rigorous assessment of detention centres to ensure no precarious citizen or stateless person is being arbitrarily detained with the unlawful aim of deportation.
- Courts must recognise the prohibition of arbitrary detention. Courts must not order the detention of stateless persons and precarious citizens.
- Any precarious citizen in Assam or stateless person in detention must be immediately released.
- Provide regular information to detainees about their deportation status to ensure foreseeability, review, and representation.
- Devise a fair deportation policy, keeping in mind bilateral arrangements with other countries.

B. THE PROHIBITION OF INDEFINITE DETENTION

B.1 Indefinite detention is inherently arbitrary and violates multiple fundamental rights

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SECTION I.B.1

The indefinite detention of a person, coupled with the lack of information about their potential release and of legal safeguards to challenge the detention, necessarily amounts to arbitrary detention.²⁰² Since persons subject to this kind of detention cannot foresee their possible release, it undermines the very essence of the rule of law.

Indefinite detention continues to be a risk despite a clear and unequivocal prohibition of arbitrary detention of precarious citizens in Assam as well as stateless persons. Precarious citizens in Assam were detained indefinitely until the Supreme Court capped the period of detention first at three years and then at two years.²⁰³ Despite the Supreme Court order allowing for release from detention after two years, the release is contingent upon providing two sureties of Rs. 5,000 each. Anyone not able to furnish this amount would languish in detention beyond two years. It is also pertinent to note that stateless persons in India do not enjoy any such conditional limitation of detention and remain at the risk of indefinite detention.

202 UN Human Rights Committee 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2233/2013' (2016) UN Doc CCPR/C/116/D/2233/2013. See also *Medvedyev and Others v France* App no 3394/03 (ECtHR, 29 March 2010) [80]; and International Commission of Jurists, 'Migration and International Human Rights Law Practitioner's Guide' (*International Commission of Jurists*, 2014) <<https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRLaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>> accessed 12 May 2020.

203 *Re: Contagion of COVID 19 Virus in Prisons* (n 182).

Data on number of immigration detainees in Assam

- 1) State of Assam affidavit in the case of *Supreme Court Legal Services Committee* (April 2020): 823 'Declared Foreign Nationals' in detention as of 31 January 2019.
- 2) Lok Sabha unstarred question no. 322 (Answered 4th February): 2019 figures indicate 525 persons in detention. The data is for detainees kept in detention centres from 2017–2019, with a yearly breakdown provided.
- 3) Rajya Sabha starred question no. 181 (Answered 11 March 2020): 802 persons in detention as of 6 March 2020.
- 4) Gauhati High Court's order in suo motu petition for implementing SC order (27 April 2020): Numbers provided by the Special Director General for Border Police Assam state that 241 persons had been released out of 291 that were eligible. 222 were released prior to filing the affidavit and 19 soon after.

The number of persons detained in Assam remains unclear [see box].²⁰⁴ The different government estimates of the

²⁰⁴ See Affidavit on behalf of State of Assam in compliance with order dated 28.01.2019 in *Supreme Court Legal Services Committee v Union of India* (2018) W.P. (C) 1045/2018 (Supreme Court of India); Ministry of Home Affairs, *Lok Sabha Unstarred Question No. 322* (2020) <<http://164.100.24.220/loksabhaquestions/annex/173/AU322.pdf>> accessed 25 May 2020; Ministry of Home Affairs, *Rajya Sabha Starred Question No. 181* (2020) <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2020-pdfs/rs-11032020/181.pdf>> accessed 25 May 2020 and *XXX v In re: Union of India and Ors* (2020) WP(C)(Suo Motu) 1/2020 (Gauhati High Court).

total number of detainees in the Assam detention centres – ranging from 300 to 800 – indicate a lack of consistency in reporting. These detention centres come under the purview of the Central government as per the Foreigners Act. However, the Assam government manages the detention centres situated inside jails as well as some which are situated outside jails. The lack of transparency surrounding the circumstances inside detention centres along with their mismanagement, indicate that the actual numbers may be much higher. Many persons may indefinitely languish in detention centres with little awareness and information about their rights and possibilities of legal recourse.

Precarious citizens in Assam have a genuine link to India and hence, they have a right against arbitrary deprivation of Indian nationality [↗]. Their cultural, social, and economic ties to the community and the nation are not different from those whose Indian nationality does not hang in the balance. Therefore, they are not comparable to foreigners (all non-nationals in Indian law) and cannot be deported. The orders made by the Supreme Court and Gauhati High Court [↗] are deficient in this regard, as they do not lay down or recognise a right against indefinite detention. Both court orders prescribe differing durations for which persons can be detained but they lack any rationale in prescribing this duration. They fail to even delve into the rights of vulnerable groups such as women and children. Bearing this context in mind, this section argues for a formal prohibition of indefinite detention for precarious citizens and stateless persons in a rights-based language.

see Section I.A.1. (Chapter I),
pg 43

see Section I.A.1 and I.A.2
(Chapter II), pg 105, pg 108

It should be noted that no Indian court has ever sanctioned the indefinite detention of non-nationals.²⁰⁵ The jurisprudence of the Supreme Court has mostly dealt with the detection and deportation of foreigners, which does not imply any sanction for indefinite detention. The Gauhati High Court, in the case of

²⁰⁵ CJP Team, 'Petition Against Assam's Detention Camps In SC | CJP' (CJP, 2018) <<https://cjp.org.in/petition-against-assams-detention-camps-in-sc/>> accessed 5 April 2020.

Moslem Mondal ordered the Central Government and the Government of Assam to deport persons from India within two months of the date of their detection as foreigners.²⁰⁶ The Court further directed that the detected persons would be detained only during the intervening period before they were to be deported. Even though the Court deals with what it thinks are *prima facie* foreigners, it did not want to keep such persons in detention centres for an unreasonably long duration. However, the fact remains that such persons are not deported swiftly and indefinitely languish in detention [↘]. Their detention is arbitrary and unlawful since they cannot be deported and detention is justified only as long as deportation is in process or reasonably foreseeable.²⁰⁷ Therefore, there must be no detention in cases where deportation is not possible, regardless of the stipulated time period of such detention.

Furthermore, there is a conspicuous silence on applicable guidelines relating to the duration of detention and rights guaranteed to detainees. The Central Government circulated a Model Detention Manual to all State Governments and Union Territories last year; however, its ambit was restricted to amenities to be provided in detention centres.²⁰⁸ Similarly, there is no such policy framework at the state level. There is dispute as to whether the Assam Jail Manual (the framework governing convicts in jails) applies to detention of precarious citizens. This ambiguity stems from the fact that detainees are kept inside jails complexes, without any segregation from convicts and undertrial prisoners. From the perspective of jail authorities, this raises a question as to whether these detainees fall within the ambit of the Manual. As per official clarifications, the Dibrugarh Jail administration replied that it followed the Rules of the Assam Jail Manual in a restrictive manner vis-à-vis accommodation, diet and

206 *State of Assam v Moslem Mondal* (2013) 3 Gau LR 402 (Gauhati High Court).

207 UNHCR, International Detention Coalition and Association for the Prevention of Torture, 'Monitoring Immigration Detention' (2014) <<https://idcoalition.org/wp-content/uploads/2015/06/Monitoring-Immigration-Detention-Practical-Manual.pdf>> accessed 2 July 2020.

208 Ministry of Home Affairs, *Rajya Sabha Unstarred Question No. 1943* (2019) <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2019-pdfs/rs-10072019/1943.pdf>> accessed 8 March 2020.

healthcare.²⁰⁹ However, there is no specific manual or policy that clearly establishes the procedural and substantive safeguards available to detainees.²¹⁰ Thus, detainees in Assam find themselves in a state of limbo, characterised by deplorable conditions inside camps and no formal affirmation of their rights during this period. This further necessitates the formal recognition of these rights, regardless of the Supreme Court's order with reference to Assam.

Stateless persons continue to be at risk of indefinite detention since they are not eligible for release under any mechanism and the lack of guidelines relating to rights in detention. As explained in Part I of this chapter, they cannot be deported and hence, they cannot be detained for deportation. Their indefinite detention has no legitimate purpose and it is disproportionate and contrary to law in these cases. This necessitates the prevention of detention of stateless persons as well as immediate release of those currently in detention.

Similar efforts to limit the length of detention of foreign nationals in a specific timeframe can be noticed at the European level. For the detention of illegally staying third-country nationals, the European Returns Directive stipulates a time limit of 6 months which can be extended in exceptional circumstances to 18 months.²¹¹ This timeframe is not applicable in the case of precarious citizens in Assam since it only applies to determined foreign nationals. It is still pertinent to note that these directives strike a fair balance between respect for human dignity and limitations to the right to liberty of third-country nationals pending deportation. Almost all EU member states comply with this time-limit. The French practice should be noted here as a

209 Tahmina Laskar, 'CHRI's RTI Intervention Details about Detention Centres in Assam' (*CHRI*, 22 May 2019) <<https://www.humanrightsinitiative.org/blog/chris-rti-intervention-reveals-details-about-detention-centres-and-the-nrc-process-in-assam>> accessed 12 March 2020.

210 *ibid.*

211 Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, art 15(5).

good practice which sets a maximum period of detention of 90 days.²¹²

B.2 Stateless persons and precarious citizens facing indefinite detention shall be entitled to compensation and rehabilitation

Article 9(5) of the **ICCPR** affirms the right to compensation in cases of unlawful arrest or detention. As argued above, arbitrary detention of precarious citizens or stateless persons, as well as indefinite detention of stateless persons in India is unlawful. Such persons would be entitled to compensation. This section argues that a roadmap for developing an airtight framework of compensation and rehabilitation in such cases can be derived from international law, as well as existing Indian and European jurisprudence.

The Indian Supreme Court has established the principle of compensation for breaches of basic human rights by the state. This primarily stems from the case of *Nilabati Behera*,²¹³ as discussed above. The petitioner received compensation of Rs. 150,000 for the custodial death of her son. This case was further affirmed by *D.K Basu*, which highlights how the reservation made by India vis-à-vis **Article 9(5)** of the **ICCPR**²¹⁴ has been circumvented by the Court's jurisprudence in developing the right of compensation in cases of established unconstitutional deprivation of a person's right under Article 21.²¹⁵ Precarious citizens in Assam facing indefinite detention who are Indian citizens for all purposes, are entitled to compensation and rehabilitation under this framework.

212 Law regarding the rights of foreign nationals in France 2016, art 6.

213 *Nilabati Behera* (n 192).

214 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Relevant reservation: 'With reference to article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.'

215 *Shri D.K. Basu* (n 192).

Furthermore, the scope of awarding compensation extends to all persons, including stateless persons. This is exemplified by the case of *Sheikh Abdul Aziz*, as discussed previously, where the petitioner was awarded interim compensation of Rs. 200,000 for his prolonged detention in a high security prison.²¹⁶

At the European level, the ECtHR also guarantees the applicant a direct and enforceable right to financial compensation before national courts if she is the victim of arbitrary detention.²¹⁷ With a specific focus on statelessness, the Court adequately granted this compensation to non-nationals who faced an indefinite period of detention without adequate legal safeguards.²¹⁸ Relying on a broad and protective interpretation, the Court extended this right of compensation to any detention that results in feelings of distress, anxiety and frustration for the detainee.²¹⁹

²¹⁶ *Sheikh Abdul Aziz* (n 184).

²¹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms art 5(5).

²¹⁸ *A. and Others v the United Kingdom* App no 3455/05 (ECtHR, 19 February 2019) [229].

²¹⁹ *Sahakyan v Armenia* App no 66256/11 (ECtHR, 10 November 2015) [29]. See also *Teymurazyan v Armenia* App no 17521/09 (ECtHR, 15 March 2018) [76].

B.3 CONCLUSION AND RECOMMENDATIONS

In light of the current context in India, this section advocates that courts must unequivocally recognise the right against indefinite detention of precarious citizens in Assam and stateless persons in India. Decisions to detain can only be made if there is a reasonable prospect for removal and a clear and established time-limit to prevent the alarming, unlawful phenomenon of indefinite detention. In conclusion, since there is no prospect for removal of precarious citizens in Assam and stateless persons in India, they shall not be detained. Precarious citizens in Assam who have a genuine link to India cannot be deported either, as argued above. Stateless persons have no nationality i.e. there is no receiving state for deportation. Their detention is arbitrary i.e. it is without any legitimate purpose, is disproportionate and risks becoming indefinite, which is unlawful under both international and Indian constitutional law. Stateless persons and precarious citizens who undergo or have undergone indefinite detention shall be compensated and rehabilitated by the state. Recommendations in this regard, include:

- Court must recognise the prohibition of indefinite detention. Any court order without this recognition will result in a risk of arbitrary detention.
- The state must establish a credible and accurate mechanism for reporting the numbers of detainees in Assam detention centres.
- The state must circulate a detention manual containing the procedural and substantive rights of detained precarious citizens and stateless persons.
- Allow NGOs and civil society full and unimpeded access to all detention facilities to verify the numbers and conditions of detainees.
- Provide a right to compensation and rehabilitation for all individuals who have been held in detention for an unreasonable amount of time.

II. Alternatives to Detention

An alternative to detention is any legislation, policy or practice that imposes a less coercive or intrusive deprivation of liberty or restriction on movement than detention.

—ERT GUIDELINES, 2012

Under international law, states have an obligation to assess whether less restrictive and coercive measures exist for achieving the legitimate purpose of immigration control, in accordance with the principles of proportionality and necessity.²²⁰ Such measures should ensure the maximum possible enjoyment of human rights of the individual. The United Nations High Commissioner for Refugees ('UNHCR') highlighted that the choice of alternative should be influenced by an individual assessment of the needs and circumstances of the stateless person.²²¹ This is in line with the principle of minimum intervention, as stipulated by the **UNHCR Guidelines on Detention** as well as the **UN Standard Minimum Rules for Non-Custodial Measures**. Although the latter is in the context of non-custodial measures in the criminal justice system, the rules provide guidance on procedural and substantive safeguards that

220 ICCPR art 9. See also *FKGA v Australia* Comm no 2094/2011 (UN Human Rights Committee, 20 August 2013) [9(3)].

221 UNHCR 'UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (1999), Guideline 1.

are to be upheld in the context of alternatives to detention, including the principle of minimum intervention.

The detention of both precarious citizens in Assam and stateless persons, along with the conditions that the detainees are subjected to, leave much to be desired. The lack of clarity on applicable guidelines as well as the deplorable conditions of the detention centres impact the detainees in many ways. A total of twenty-nine detainees died in detention between 2016 and January 2020,²²² with ten detainees dying between March 2019 and February 2020.²²³ Many detainees suffer from serious mental ailments with little access to mental healthcare services and facilities.²²⁴ It has also been observed in the past that many ‘foreigners’ have been in detention for up to four decades.²²⁵ The lack of bilateral negotiation between India and Bangladesh on repatriation formalities further puts them at the risk of being detained indefinitely.²²⁶

222 LiveLaw News Network, ‘COVID-19: Plea in SC Seeks Release of Persons from Foreigners Detention Centres in Assam’ (n 154).

223 Ministry of Home Affairs, *Lok Sabha Unstarred Question No. 3880 (2020)* <<https://mha.gov.in/MHA1/Par2017/pdfs/par2020-pdfs/ls-17032020/3880.pdf>> accessed 20 May 2020.

224 National Human Rights Commission, ‘Report on NHRC Mission to Assam’s Detention Centres from 22 to 24 January, 2018’ (n 152).

225 CJP Team, ‘Petition Against Assam’s Detention Camps In SC | CJP’ (n 205).

226 Shoaib Daniyal, ‘Bangladesh government expresses concerns over Assam’s NRC process for the first time’ (n 164).

The following section addresses the situation of stateless persons who belong to another country but are seeking asylum in India. Alternatives to detention are not applicable to non-asylum-seeking stateless persons, who are residing in their own country and possess a right to live there.²²⁷ Hence, precarious citizens in Assam are not the subject of this section since they are Indian citizens and have a right to reside in India. They cannot be detained for deportation. Alternatives to detention are not relevant in their context.

International law principles in relation to alternatives to detention

- 1. Minimum Intervention**
- 2. Proportionality**
- 3. Necessity**
- 4. Non-Discrimination**

²²⁷ UNHCR Detention Guidelines (n 170).

A. CLARIFICATIONS VIS-À-VIS ALTERNATIVES/ CHARACTER OF ALTERNATIVES TO DETENTION

In an endeavour to implement alternatives to detention, the state must be mindful of the following:

A.1 'Alternatives to Detention' does not mean 'Alternative Forms of Detention'

The meaning and scope of alternatives to detention has been understood differently in the context of implementation.

The ERT Guidelines do not make a distinction between the terms 'alternatives to detention' and 'alternative forms of detention'.²²⁸ The ERT Guidelines argue that many alternatives are restrictive of individual liberty to a certain extent. Therefore, the conception of alternatives to detention is with reference to the deprivation of liberty imposed by detention, i.e. they are lesser forms of deprivation.

The International Detention Coalition ('IDC') takes another approach in its Handbook on immigration detention.²²⁹ The IDC Handbook regards freedom of movement as an essential characteristic of an alternative to detention. Therefore, measures which substantially curtail or completely deny freedom of movement such as electronic monitoring are not alternative forms of detention.

The approach adopted by IDC is also recommended by the **UNHCR Guidelines on Detention** [see box].²³⁰ **Guideline 4.3** urges states to consider alternatives to detention, within which it calls for this distinction. This report endorses the approach taken by UNHCR and IDC, as a higher threshold must be applied to regulatory measures that involve substantially depriving the

²²⁸ ERT Guidelines (n 170).

²²⁹ International Detention Coalition, 'There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised Edition)' (2015) <<https://idcoalition.org/wp-content/uploads/2016/01/There-Are-Alternatives-2015.pdf>> accessed 11 March 2020.

²³⁰ UNHCR Detention Guidelines (n 170).

UNHCR Guidelines on Detention (2012)

The UNHCR Guidelines on Detention reflect the state of international law on detention, with emphasis on persons who are detained in connection to matters relating to immigration. These guidelines also cover stateless persons who are seeking asylum in a country other than their own (as envisioned in Article 12(4) of the ICCPR). Guideline 4.3 calls for considering alternatives to detention. The relevant points cited in this document are:

- The circumstances of the particular asylum-seeker have to be taken into consideration to determine the availability, effectiveness and the appropriateness of the use of alternatives. (Point no. 35)
- Alternatives to detention should not be used as alternative forms of detention. Neither should they turn into alternatives to release. (Point no. 38)
- States should uphold the principle of ‘minimum intervention’ and take into consideration the specific situation of vulnerable groups such as women, children, and persons with disabilities. (Point no. 39)
- The use of certain forms of electronic monitoring – ankle and wrist bracelets – should be avoided. (Point no. 40)

individual of their liberty. Furthermore, the ERT Guidelines take a more administration-oriented approach, as opposed to the rights-based approach used by IDC. This distinction is important to make for distinguishing between ‘alternatives’ and ‘alternative forms’ of detention. If this distinction is not made, measures curtailing freedom of movement can be justified on the ground that some degree of deprivation is bound to happen while resorting to alternatives. Those measures would be alternative forms of detention and must be subject to the same procedural and substantive safeguards as detention before being used by the state.

A.2 ‘Alternatives to Detention’ cannot become alternatives to unconditional release

The UNHCR Guidelines on Detention urge that alternatives to detention should not become alternatives to release.²³¹ The Special Rapporteur on the Human Rights of Migrants affirmed that alternatives to detention should not be used by the state as alternatives to unconditional release, stating that ‘persons who are eligible for release without conditions should not be diverted into alternatives’.²³²

States are required to have a range of alternatives to detention. This is in consonance with the principles of proportionality and equal treatment before the law, to ensure maximum possible enjoyment of human rights. Established by legislation, there should be a sliding scale of alternatives that are assessed for their proportionality and necessity on a case-to-case basis.²³³ Measures adopted by the state that substantially deprive the individual of their liberty constitute alternative forms of detention (as discussed above). Furthermore, the decision to use alternatives must be made based on an individual assessment of the needs and circumstances of the person(s) concerned. The

²³¹ UNHCR Detention Guidelines (n 170).

²³² UNHRC ‘Report of the Special Rapporteur on the human rights of migrants to the 20th session of the Human Rights Council’ (2 April 2012) UN Doc A/HRC/20/24 [53].

²³³ *ibid.*

principle of minimum intervention must be borne in mind when deciding on a suitable alternative to detention.²³⁴

B. EXAMPLES OF ALTERNATIVES TO DETENTION

In Europe, alternatives to detention are suggested at the regional level by the EU.²³⁵ There is an obligation to give priority to less coercive measures and **Article 7(3)** of the European Parliament and Council of Europe **2013 Directive** lists examples of alternatives.²³⁶ Consequently, a total of 24 EU Member States provide alternatives to detention with different specificities and frameworks.

The aim of this section is to evaluate various alternatives to detention recommended by the literature on detention. The purpose of this evaluation is to assess the desirability of such measures and whether they can be feasibly implemented in the Indian context. The best implementations of each alternative to detention by states and the peculiarities of these models is also discussed below.

²³⁴ *ibid.*

²³⁵ Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

²³⁶ *ibid.*

1. Release with reporting obligation to the police or immigration authorities

Preferable conditions for implementation

Flexibility of the location of the reporting point.²³⁷

Case by case decisions.

Application in Europe

Adopted by 23 states.

Best practice:

Bulgaria: reporting point based on the area of residency but requires a guarantor to certify the place of living.²³⁸

Belgium: families with minor children applying for international protection are placed in state-owned houses where they have freedom of movement and are assisted by case managers.²³⁹

²³⁷ European Migration Network, 'Synthesis Report for the EMN Focussed Study in 2014: The use of detention and alternative to detention in the context of immigration policies' (2014) 34 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/00_synthesis_report_detention_study_final.pdf> accessed 15 June 2020.

²³⁸ European Migration Network Bulgaria, 'Use of detention and alternative to detention in Bulgaria' (2014) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/03a.bulgaria_detention_study_final_en_version_august2014.pdf> accessed 15 June 2020.

²³⁹ European Migration Network Belgium, 'Use of detention and alternative to detention in Belgium' (2014) <https://emnbelgium.be/sites/default/files/publications/be_report_emn_study_detention_and_alternatives_to_detention_2014_-_final.pdf> accessed 16 June 2020.

Implementation perspectives in India

Reporting requirement is a condition for the release of detainees who have been in detention centres awaiting deportation for more than two years. However, frequency of reporting becomes an issue. Reporting once a week can be an onerous burden for many people who live far away from police stations. Given the economic marginalisation of these communities, reporting could also be an expensive process.

Recommendation:

- Expedite the availability of such alternatives to detainees.
- Take into consideration and make appropriate relaxations for elderly/sick detainees. Travelling to the police station for reporting should be avoided in their case.

2. Release on bail or provision of a guarantor

Preferable conditions for implementation

Flexibility of the amount based on resources.

Application in Europe

Permitted under the law of 13 states in Europe (between €500 to €5000).

Rarely used in practice.²⁴⁰

Best practice:

Croatia: international organizations dedicated to the protection of human rights are authorised to act as a guarantor.²⁴¹

²⁴⁰ European Migration Network, 'Synthesis Report for the EMN focussed study in 2014' (n 237) 34.

²⁴¹ European Migration Network Croatia, 'Use of detention and alternative to detention in Croatia' (2014) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/04.croatia_detention_and_alternatives_study_en_version_final.pdf> accessed 16 June 2020.

Implementation perspectives in India

Use of sureties as a condition for release can be an onerous condition. This is primarily for two reasons. Firstly, stateless persons currently in detention may not have the financial capability to deposit a surety amount. Additionally, they may not have links with citizens, who will be willing to stand in as sureties for their release. Secondly, such persons are liable to be viewed with suspicion, owing to their declaration as foreigners/illegal immigrants. This would discourage citizens from coming forward and standing as sureties for the detainees.

Recommendation:

In this situation, an important role can be played by civil society organizations and NGOs by assisting detainees in arranging for sureties in order to secure their release and acting as their guarantor.

3. Case management ▶

Preferable conditions for implementation

Strong role of NGOs &
civil society.

Application in Europe

Best practice:

Germany, United Kingdom²⁴³ & Poland
(pilot program) have had very positive
results.²⁴⁴

²⁴² International Detention Coalition, European Alternatives to Detention Network and PICUM, 'Implementing Case Management-based Alternatives to Detention in Europe' (2020) <https://www.picum.org/wp-content/uploads/2020/04/Concept-Paper-on-Case-Management_EN.pdf> accessed 16 June 2020.

²⁴³ European Migration Network, 'Synthesis Report for the EMN focussed study in 2014' (n 237) 35.

²⁴⁴ European Migration Network Poland, 'Practical measures for reducing Irregular Migration in Poland' (2012) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/20a._poland_national_report_irregular_migration_march2013_en.pdf> accessed 16 June 2020.

²⁴⁵ Anuradha Mukherjee, 'In India's Assam, A Solidarity Network Has Emerged to Help Those at Risk of Becoming Stateless' (*The Conversation*, 16 December 2019) <<https://theconversation.com/in-indias-assam-a-solidarity-network-has-emerged-to-help-those-at-risk-of-becoming-stateless-128558>> accessed 16 June 2020. See also Parichay, 'Objective' <<https://www.parichay.org.in/objective>> accessed 17 June 2020.

- ▶ Case management is a structured social work approach which implies personal support throughout a person's immigration procedure, with the aim to work towards case resolution. It involves a case manager, who develops a relationship with the individual and assists them in engaging with immigration procedures, helping them make an informed decision.²⁴²

Implementation perspectives in India

This alternative can be implemented in collaboration with NGOs and legal aid counsels who can advise persons on questions of documentation, legal proceedings, etc. An example of this work can be seen in Assam, where NGOs and lawyers are working with detained 'foreigners' in Assam.²⁴⁵

4. Electronic monitoring

Application in Europe

Implemented in **France, Portugal, Ireland**, United Kingdom. It has not proved to be effective against absconding and violates freedom of movement. Furthermore, there is stigma attached to this practice.²⁴⁶

²⁴⁶ European Migration Network, 'Synthesis Report for the EMN focussed study in 2014' (n 237) 26.

Implementation perspectives in India

Recommendation:

Not recommended since it restricts individual liberty and can amount to an alternative form of detention.

C. CONCLUSION AND RECOMMENDATIONS

The various alternatives to detention must be observed and taken into account before considering detention in each case. This obligation has proven to be beneficial for both the administration and the detainees. Therefore, the difference between these two approaches exists, but the consequences are radically different in terms of human rights protection and cost for the state.

In fact, the European Commission highlighted that the fundamental rights in detention are far more difficult to protect than they are for persons placed in alternatives to detention.²⁴⁷ The nature of detention is dangerous for human rights and, as observed above, the rights are constantly violated. For instance, statistics brought by the Latvian administration confirm this assumption as zero complaints were filled by persons in alternatives to detention while nine violations were reported in detention centres between 2008 and 2014.²⁴⁸ This strengthens the position that alternatives to detention are the ideal solution to considerably reduce constant rights violations.

Finally, on the financial side, statistics provide insights on the cost-effectiveness of detention as an interim measure compared to alternatives to detention. The statistics suggest that placing persons in alternatives to detention is significantly less costly than placing them in a detention centre.²⁴⁹ For instance, Belgium reported that until December 2012, the average daily cost of a person in a family unit was €90 whereas the average daily cost in a detention centre was between €180 and €190.²⁵⁰ This difference can be explained by the choice of alternatives to detention such as reporting obligation (the state is not providing a residence here), case management or

²⁴⁷ *ibid.*

²⁴⁸ European Migration Network Latvia, 'Use of detention and alternative to detention in Latvia' (2014) <http://www.emn.lv/wp-content/uploads/EMN_study_Detention1.pdf> accessed 17 June 2020.

²⁴⁹ European Migration Network, 'Synthesis Report for the EMN focussed study in 2014' (n 237) 38.

²⁵⁰ European Migration Network Belgium, 'Use of detention and alternative to detention in Belgium' (n 239).

release on bail that can be implemented without associated costs, whereas the total costs of maintaining people in detention centres is significant. Recommendations in this regard, include:

- Invest more resources into operationalising a case management system available to detainees, inviting participation from civil society actors and international organizations, as a feasible and viable alternative to detention. This can be tailored to benefit detainees at present and in the future.
- Expedite the availability of existing alternatives to detention used in the Indian context to detainees in Assam.

III. Rights of Persons Detained for Deportation

This segment argues for procedural and substantive rights in cases where individuals have been detained under the pretext of a legitimate purpose. It will focus on the situation of precarious citizens in Assam, since they are detained on the unlawful pretext of deportation. In this regard, procedural rights [↘] ensure that detention always remains proportionate and lawful by having a proximate nexus with the legitimate purpose. On the other hand, substantive rights (as elaborated in Section E.1-E.2) protect the detainees from violation of basic dignity and personhood. Certain socio-economic rights (such as right to nourishment, health etc.) will be discussed in the next chapter of the report.

see Section A.1-D.2,
pg 144 - pg 159

A.1 RIGHT TO REVIEW

144

SECTION III.A.1

Right

Right to Automatic, Regular and Periodic Review

International law

Article 9(3) of the ICCPR requires the review proceedings to take place before a court.

Indian law

a. Article 22 of the **Constitution** provides an upper limit for detention, post which such detention may be amenable to a review by an advisory board consisting of persons qualified to be appointed as High Court judges. These safeguards for detainees enshrined under Article 22 are extended to protect persons detained under the provisions of the Foreigner's Act.²⁵¹

↓ Footnotes continued on next page

European practice

At the European level, detention measures must be reviewed ‘at reasonable periods of time’.²⁵²

Best practice:

Finland: The public officer taking the decision to detain must notify a district court without delay, which will itself answer any question related to the validity of the decision no later than four days after its adoption.²⁵³

Indian practice

a. As of 2018, more than 1000 persons have been detained in Assam detention camps (out of which around 500 have been detained for more than 5 years) without any recourse to a review.²⁵⁴

b. While the NRC procedure allows both appeal and review of determinations made under **Sec. 9** of the **Foreigners (Tribunal) Order, 1964**, the detention of individuals is seldom reviewed.

c. Following the Supreme Court’s recent order to release those who have been detained for more than three years (now reduced to two years) in detention camps, the FT gave conditional bail to 10 detainees.²⁵⁵ As of 23 June 2020, 335 detainees were released in accordance with the Supreme Court order out of the 349 eligible detainees.²⁵⁶

Right to Automatic, Regular and Periodic Review

251 *Mohd. Iqbal v Superintendent, Central Jail, Tihar, New Delhi and Ors* AIR 1969 Del 45 (Delhi High Court) [9].

252 Council of Europe Committee of Ministers ‘Twenty Guidelines on Forced Return’ (4 May 2005) Guideline 8; Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, art 15 (3).

253 Act on the Enforcement of Combination Sentences 2017 (Finland), s 25.

254 As mentioned above, the new numbers in government reports since 2018 are inconsistent and the actual numbers are expected to have risen since 2018. See Amnesty International, ‘Between Fear and Hatred: Surviving Migration Detention in Assam’ (n 153).

255 The Hindu, ‘10 declared foreigners released from Assam detention camp’ *The Hindu* (Guwahati, 16 August 2019) <<https://www.thehindu.com/news/national/10-declared-foreigners-released-from-assam-detention-camp/article29262234.ec>> accessed 16 June 2020. According to the affidavit by Special Director General of Police (Border) before the Gauhati High Court on 27 April 2020, 222 detainees who have spent more than 2 years in jail were released as per the new Supreme Court order. The conditions of release are not known. These numbers are not reliable either because the affidavit contradicts other government statements on the total number of detainees.

256 *XXX v In re: Union of India and Ors* (2020) WP(C) (Suo Motu) 1/2020 (Gauhati High Court), order dated 23 June 2020.

A.2 RECOMMENDATIONS

- Set a regular judicial review on the appropriateness of the decision to detain in the specific context of detention for the purpose of deportation/removal, in order to consider its specificities and the vulnerability of detainees.
- Provide for a specific list of grounds to be subject to judicial review such as length of the procedure, validity of the decision, reasonable prospect for removal etc.
- Define a regular and automatic review process for decisions to detain by stipulating precise time frames to challenge the decision.

B.1 RIGHT TO RELEASE

148

Right

SECTION III.B.1

Right to Release ▶

International law

Right to release will be ensured if the detained person is automatically released after the expiration of a maximum period of detention as established by law.²⁵⁷

Indian law

a. Precarious citizens in Assam must be released after 2 years in detention as per the recent Supreme Court order.

b. The surety amount sought for the release of individuals from detention centres is now set at two sureties of Rs. 5,000 each.

c. Delhi High Court: In the case of Sheikh Abdul Aziz, the court directed the state to release the petitioner if he could not be deported within two weeks (after he had been under detention for 10 years).²⁵⁸ He was subsequently released, declared stateless and issued identity papers to live and work in India.²⁵⁹

↓ Footnotes continued on next page

- ▶ Automatic release of detainees when legitimate purpose is rendered infructuous or reasonable time for deportation has been afforded to the administration.

Also includes the right to be rehabilitated after release.

European practice

The EU Returns Directive guarantees the right to release in Article 15(2)(b) in the case of a ‘reasonable prospect of removal.’²⁶⁰ Such a prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country.²⁶¹

Best practice:

Finland: Residence permit on compassionate grounds is granted on the condition that the person is not intentionally refusing or obstructing the return.²⁶²

Hungary: Temporary Residential Certificate for a maximum of six months is granted to people released from detention.²⁶³

Right to Release

257 UNHRC ‘Report of the UN Working Group on Arbitrary Detention to the 13th session of the Human Rights Council’ (15 January 2010) UN Doc A/HRC/13/30 [61]. See also UNHRC ‘Report of the UN Working Group on Arbitrary Detention: Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the right to development’ (10 January 2008) UN Doc A/HRC/7/4.

258 *Sheikh Abdul Aziz* (n 184).

259 Aneesh Mathur, “‘Stateless man’ to get visa, ID to stay in India’ The Indian Express (Delhi, 29 May 2014) <<https://indianexpress.com/article/cities/delhi/stateless-man-to-get-visa-id-to-stay-in-india/>> accessed 17 June 2020.

260 *Said Shamilovich Kadzoev v Direksia Migratsia’ pri Ministerstvo na vatreshniteraboti* Case C-357/09 (CJEU, 30 November 2009) [60].

261 *ibid.*

262 Aliens Act 2004 (Finland), s 51.

263 National Directorate General for Aliens Policing (Hungary), ‘Residence Permit for Other Purposes’ <http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=57&Itemid=811&lang=en> accessed 12 April 2020.

B.2 RECOMMENDATIONS

- Stateless persons facing indefinite detention must be released.
- Stateless persons released from detention should not face re-detention and must receive legal status in accordance with their rights.
- Precarious citizens in Assam must be immediately released from detention and should not face detention again.
- Ensure that detainees can be released without any condition linked to onerous sureties.

C.1 RIGHT OF DETAINEES TO INFORMATION AND NOTICE

152

Right

SECTION III.C.1

Right to Notice and Information ▶

International law

Article 19 of the ICCPR guarantees the right to freedom of expression. It has been interpreted to include a right to information and a consequent duty upon the government in making information available to the public.²⁶⁴

Indian law

a. Article 22 of the **Constitution**

b. *D.K. Basu* lays down rights afforded to detainees in the first hour of detention, including the right to inform family members about detention and the right to know about grounds for arrest and detention, right to medical examination etc.²⁶⁵

↓ Footnotes continued on next page

- Includes the right to know the grounds of detention and rights of detainees in vernacular language.

European practice

Article 5(2) of the ECHR:²⁶⁶ Right to be informed about reasons for arrest and any charges faced in either oral (Cyprus, Netherlands, Serbia) or written form (Czech Republic, France).²⁶⁷

ECTHR in *Abdolkhani* and *Karimnia*: the burden of proof is upon the State to demonstrate. The communication of the grounds of detention to the detainee must be proved by the administration, otherwise it will be considered as a violation of the right to information.²⁶⁸

Best practice:

Sweden: Instructions to the Migration Board to act openly towards detainees to answer all their legal/procedural enquiries.²⁶⁹

Slovak Republic: An interpreter is involved to translate legal documents and laws in the language of the detainee after which both the detainee and the interpreter testify to the same and sign. This system ensures effective tracking of the transmission of the information.²⁷⁰

Right to Notice and Information

264 Convention for the Protection of Human Rights and Fundamental Freedoms art 5(2). Art 5(2): 'Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him'.

265 European Migration Network, 'Synthesis Report for the EMN focussed study in 2014' (n 237).

266 UN Economic and Social Commission on Human Rights, 'Report of the Special Rapporteur Abid Hussain 2001/55' (1999) E/CN.4/1999/64.

267 *Shri D.K. Basu* (n 192).

268 *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR, 22 September 2009) [138].

269 European Migration Network, 'Synthesis Report for the EMN focussed study in 2014' (n 237) 26.

270 *ibid.*

C.2 RECOMMENDATIONS

- Guarantee access to NGOs in detention centres to deliver information through oral and written forms.
- Create a community-based service to deliver information effectively in the right vernacular language. All the rights of detainees should be displayed in a common area in detention camps in the vernacular language.
- Civil society members should be allowed to hold workshops in order to ensure that all detainees are fully aware of their rights.

D.1 RIGHT TO LEGAL AID

156

Right

SECTION III.D.1

Right to Legal Aid ▶

International law

Article 9(1) ICCPR: The Human Rights Council requires detainees to enjoy the right to challenge the legality of their detention before Court, to be informed of the grounds of their detention, and have access to legal assistance.

Indian law

1. Article 39-A of the Constitution: ‘legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.’²⁷¹

2. *Francis Coralie Mullin*: the Supreme Court recognised the right of a detainee to consult a legal adviser of his choice not only for anything related to defence in a criminal proceeding but also for securing release.²⁷²

↓ Footnotes continued on next page

- ▶ Includes the right to have accessible legal representation of one's choice.

European practice

Right to legal aid is recognised by every member of the EU.

25 countries provide free legal aid.

The cost of this assistance is either supported by the state (**France, Spain**), or NGOs themselves provide the legal advice (**Bulgaria, Denmark**).²⁷³

Indian practice

1. The Assam government provides legal aid to those who are left out of the NRC.²⁷⁴

2. Such a right is limited to NRC hearings and appeals but is not available to those who have been declared foreigners by the FTs.

3. The NHRC Special Monitor report on Assam detention centres also proposed the need to recognise a right to legal aid.²⁷⁵

Right to Legal Aid

271 Constitution of India 1950, art 39A.

272 *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 1 SCC 608.

273 European Migration Network, 'Synthesis Report for the EMN focussed study in 2014' (n 237) 26.

274 Ministry of Home Affairs, *Lok Sabha Unstarred Question No. 1724* (2019) <<http://164.100.24.220/loksabhaquestions/annex/171/AU1724.pdf>> accessed 17 July 2020.

275 National Human Rights Commission, 'Report on NHRC Mission to Assam's Detention Centres from 22 to 24 January, 2018' (n 152).

D.2 RECOMMENDATIONS

- Guarantee an unconditional right to legal aid to every detainee without discrimination.
- Create programs in order to provide legal assistance to families of detained persons.
- Guarantee permanent and irrevocable access to detention centres to civil society and non-governmental organisations.

E.1 RIGHT AGAINST PUNITIVE DETENTION

160

SECTION III.E.1

Right

Right Against Punitive Detention

International law

Working Group on Arbitrary

Detention: It must take place in 'appropriate, sanitary, non-punitive facilities and should not take place in prisons'.²⁷⁶

UN Special Rapporteur on Human

Rights of Migrants: authorities in charge should not be security forces but officials trained in human rights, cultural sensitivity, and age and gender considerations.²⁷⁷

Indian law

1. Francis Coralie Mullin: The Supreme Court held that when detention is for non-punitive reasons, it should translate into enhanced rights for those who are detained, since non-punitive detention does not constitute punishment.²⁷⁸

↓ Footnotes continued on next page

European practice

All EU member states have separated immigration detainees from ordinary prisoners.²⁷⁹

CJEU in 2014: States cannot justify punitive detention by the unavailability or lack of space in specific structures in the area.²⁸⁰ This led to the creation of relocation systems.

Best practice:

Luxembourg²⁸¹ and the **United Kingdom**²⁸² adopted a system to release migrants according to a lower priority criterion.

Sweden created a prioritisation system based on risk.²⁸³

Cyprus, Hungary, Lithuania & Finland: created dedicated sections in detention centres for detainees posing a security risk without compromising the standards prescribed by the EU law.²⁸⁴

Indian practice

1. Detaining authorities in Assam do not make a distinction between declared foreigners and convicted foreigners.²⁸⁵ The detention of declared foreigners is administrative, not punitive.

2. Detained precarious citizens in Assam are housed in erstwhile jails, which have now been converted to detention centres for deportation.²⁸⁶

Right Against Punitive Detention

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- 276 UNHRC 'Report of the UN Working Group on Arbitrary Detention to the 27th session of the Human Rights Council' (30 June 2014) UN Doc A/HRC/27/48, para 77.
- 277 UNHRC, 'Report of the Special Rapporteur on the human rights of migrants to the 20th session of the Human Rights Council' (2 April 2012) UN Doc A/HRC/20/24.
- 278 *Francis Coralie Mullin* (n 274).
- 279 National Human Rights Commission, 'Report on NHRC Mission to Assam's Detention Centres from 22 to 24 January, 2018' (n 153).
- 280 *Adala Bero v Regierungspräsidium Kassel, Ettayebi Bouzalmate v Kreisverwaltung Kleve and Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik* Joined Cases C-473/13, C-514/13 and C-474/13 (CJEU, 2014).
- 281 European Migration Network Luxembourg, 'Use of detention and alternative to detention in Luxembourg' (2014) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/18_luxembourg_study_detention_and_alternatives_to_detention_en_final_version.pdf> accessed 3 March 2020.
- 282 European Migration Network United Kingdom, 'Use of detention and alternative to detention in the United Kingdom' (2014) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/28a_uk_use_of_detention_study_en_final.pdf> accessed 6 March 2020.
- 283 European Migration Network Sweden, 'Use of detention and alternative to detention in Sweden' (2014) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/27a-sweden_detention_study_august2014_en.pdf> accessed 8 March 2020.
- 284 European Migration Network, 'Synthesis Report for the EMN focussed study in 2014' (n 237) 27.
- 285 National Human Rights Commission, 'Report on NHRC Mission to Assam's Detention Centres from 22 to 24 January, 2018' (n 152).
- 286 *ibid.*

E.2 RECOMMENDATIONS

- Consider alternatives to detention for stateless persons [\[↗\]](#) against punitive detention since they are not prone to escaping from legal consequences due to their vulnerable condition.
- Advocate for the replacement of security forces in detention facilities by state officials aware of human rights, cultural sensitivity, and age and gender considerations
- Incorporate substantive safeguards available to detainees in the Model Detention Centre manual circulated to States and Union Territories.

IV. Rights of Child Detainees

All the rights and prohibitions against detention established and elaborated above apply in the case of children. However, given their special and vulnerable condition, children enjoy additional standards of protection. This section begins with an argument against detaining children on the premise that such detention violates international law pertaining to child rights. Additionally, the state can deploy less intrusive measures in dealing with children. However, given that children may be under detention at present, this section details the rights of such child detainees to be ensured by the state.

The situation of children detained in Assam is cause for grave concern. There is a lack of clarity about the number of children that are currently in detention; however, their presence in detention centres is a confirmed fact.²⁸⁷ A recent affirmation is found in the application filed before the Supreme Court seeking the release of declared foreigners in the detention centres in light of the COVID-19 outbreak.²⁸⁸ The application mentions the increased vulnerability of the detainees, which includes elderly people and children living in crowded conditions. There were 31 children in detention centres as per available information.²⁸⁹ The conditions of these detention centres pose debilitating effects on mental health, without adequate treatment and opportunities for education and recreation.²⁹⁰ The impact of this situation on children is exponentially greater and liable to pose severe harm to their health.

287 Tahmina Laskar, 'CHRI's RTI Intervention Details about Detention Centres in Assam' (n 209).

288 LiveLaw News Network, 'COVID-19: Plea in SC Seeks Release of Persons from Foreigners Detention Centres in Assam' (n 154).

289 Bikash Singh, 'Gauhati High Court Orders Release of Dinesh Prajapati From Detention Camp' *The Economic Times* (4 October 2018) <<https://economictimes.indiatimes.com/news/politics-and-nation/gauhati-high-court-orders-release-of-dinesh-prajapati-from-detention-camp/articleshow/66073153.cms>> accessed 13 April 2020.

290 CJP Team, 'Petition Against Assam's Detention Camps in SC | CJP' (n 205).

A. DETENTION OF CHILDREN SHOULD NOT TAKE PLACE IN PRINCIPLE

166

SECTION IV.A

As per international law and Indian statutes, detention of children should not take place. The Central Government's submission before the Supreme Court in the ongoing case of *Assam Public Works* is a welcome development, stating that children of parents declared as citizens in the NRC shall not be sent to detention centres and shall not be separated from their parents.²⁹¹ The absolute prohibition of detention also applies to 'foundlings' as a particularly vulnerable category of children. It is argued that children should qualify for protection under the **Juvenile Justice Act, 2015** ('JJ Act') as 'Children in Need of Care and Protection'²⁹² ('CNCP'). This section addresses the categories of children who are vulnerable and need protection. This section also seeks to establish safeguards that necessitate compliance when dealing with children in detention.

²⁹¹ *Assam Public Works v Union of India* (2009) W.P. (C) 274/2009; Sanchita Kadam, 'The CJP Effect: SC Orders No Children Be Sent to Detention Camps in Assam' (*Citizens for Justice and Peace*, 6 January 2020) <<https://cjp.org.in/the-cjp-effect-sc-orders-no-children-be-sent-to-detention-camps-in-assam/>> accessed 2 April 2020.

²⁹² The Juvenile Justice (Care and Protection of Children) Act 2015 (The JJ Act 2015).

A.1 Principle of ‘Best Interests of the Child’

Detention of children for the purpose of deportation is a flagrant and unjustified breach of the fundamental principle of best interests of the child protected by **Article 3** of the **CRC**. India is a party to the convention and has incorporated the principle in **Chapter II** of the **JJ Act**.²⁹³ As stated by the CRC Committee, the best interests principle is satisfied by the strong prohibition of detention of children since such deprivations of liberty have an extraordinarily adverse impact on the child’s well-being and development.²⁹⁴ This prohibition particularly must be enforced if the child is detained on the sole basis of their parent’s migration status.²⁹⁵

While the lack of data is deplorable with regard to the age of the children currently detained in Assam, it is extremely likely that all categories of children and more specifically the most vulnerable ones, such as unaccompanied and young children, are in detention. In light of these elements, India is obligated to cease its current practice of detaining children in detention centres. All the children currently in detention must be immediately released as per international law and Indian law on the issue.

A.2 Detained children as ‘Children in Need of Care and Protection’ under the JJ Act

The Object of the Act includes the making of comprehensive provisions for all children in consonance with the standards prescribed in the CRC. Therefore, the JJ Act can be used to operationalise India’s international obligations to address the vulnerabilities of both stateless children and children at risk of statelessness.

²⁹³ *ibid.*

²⁹⁴ CRC art 33.

²⁹⁵ Committee on the Rights of the Child, ‘Report of the 2012 Day of General Discussions, the Rights of all Children in the Context of Migration’ (28 September 2012) <<https://www.refworld.org/docid/51efb6fa4.html>> accessed 20 June 2020.

THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

1 (4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including — (i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law; (ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection.

2 (14) “child in need of care and protection” means a child —

(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed;

The scope of the term CNCP encompasses the broad categories of children who are at the risk of detention and its consequent negative impact. **Section 2(14)(i)** of the **JJ Act** refers to a child who is found without any home or settled place of abode and without any ostensible means of subsistence.²⁹⁶ This can cover children whose parents are in detention, who are stateless or are suspected of being foreign nationals. Such children would qualify for protection under the JJ Act. Further, **Section 2(14)(vii)** extends the scope of CNCP to foundlings i.e. children ‘whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed’.²⁹⁷ This argument is further corroborated by the view taken by Justice Lokur on the scope of the definition of CNCP, stating that the term must be given a broad interpretation.²⁹⁸ This means stateless children as well as children at the risk of statelessness qualify for protection under the JJ Act.

²⁹⁶ The JJ Act 2015, s 2(14).

²⁹⁷ A foundling is a child of unknown parentage found abandoned within the territory of a state.

²⁹⁸ *Exploitation of Children in Orphanages in State of Tamil Nadu v Union of India* (2017) 7 SCC 578 [64].

A.3 CONCLUSION AND RECOMMENDATIONS

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SECTION IV.A.3

The CRC and the JJ Act extend a large set of protections to these vulnerable children. The state must conform with best interests of children as mentioned in the JJ Act, keeping in line with international law. Detention of children for removal shall never take place, irrespective of the citizenship status of their parents. Recommendations in this regard, include:

- Release all children in detention in Assam as well as stateless children in detention in India as per international law and Indian law. NGOs shall be allowed unimpeded access to detention centres in Assam to ensure that no children remain in detention.
- Children at the risk of statelessness and currently in detention should be presented before the district Child Welfare Committee for drawing up protection plans on a case-by-case basis, bearing in mind the best interests of the child.
- Develop alternatives to detention for stateless children and their families. Non-custodial, community-based alternatives shall be prioritised.

B. RIGHTS OF CHILDREN IN DETENTION

As argued above, despite the prohibition of arbitrary detention of children, there is evidence indicating that children remain in detention in Assam due to their precarious citizenship. This section responds to rights of children in detention until they are released as per international law and Indian law on the issue.

Right

1. Right to Family Unity

(if parents are also being detained)

Indian context

Children below 6 years of age are kept alongside their mothers in the detention centre.²⁹⁹

Issue:

there is no clarity on circumstances of children over 6 years of age.

European context

Families in detention must be provided with separate accommodation to ensure their privacy.³⁰⁰

Best practice:

In **Belgium**, children accompanied by their parents are, in principle, not detained but transferred to return houses or to an open reception centre which are adequate, child-friendly alternatives to detention.³⁰¹

Recommendations

- Conduct an assessment on the compliance of the detention measure with the best interest of the child as per the family unity principle.
- Develop more alternatives to detention for stateless children to avoid the disruption of family unity, such as reception centres.

299 CJP Team, 'Petition Against Assam's Detention Camps In SC | CJP' (n 205).

300 Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2002] OJ L180/96, art 11(4).

301 Law on access to the territory, stay, settlement and removal of foreigners 1980 (Belgium), art 74/9 (3).

Right

2. Right to Education at an off-site facility

Indian context

The Supreme Court has held that India is obligated to provide free and compulsory education to all children between 6 and 14 years. The court has clarified the vast scope of **Article 21A** of the **Constitution**, referring to India's participation in the drafting of the UDHR as well as the ratification of the CRC.³⁰²

Issue:

lack of data regarding any educational opportunity for children in detention in Assam.

European context

EU member states must provide minors, whose removal has been postponed, with access to a basic education system, depending on the length of their stay.³⁰³

Best practice:

Czech Republic allows migrant children to attend schools at the local elementary school outside the detention facilities.³⁰⁴

The **ECtHR** also requires the classes to be free as a bar against discrimination on the immigration and nationality status.³⁰⁵

Recommendations

- Children must have access to an education system where they are taught by qualified teachers through programmes integrated in India's education system, regardless of the length of their stay in detention facilities.
- They must benefit from free classes to avoid any discrimination.
- Education should be provided outside of detention facilities in line with the best interests of the child.

302 *Maharishi Mahesh Yogi Vedic Vishwavidyalaya v State of Madhya Pradesh* (2013) 15 SCC 677.

303 Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, art 14(1).

304 European Union Agency for Fundamental Rights, 'European legal and policy framework on immigration detention of children' (2017) 81 <<https://fra.europa.eu/en/publication/2017/european-legal-and-policy-framework-immigration-detention-children>> accessed 12 May 2020.

305 *Ponomaryovi v Bulgaria* App no 5335/05 (ECtHR, 21 June 2011) [59] – [63].

3. Right to Recreation and Play

Indian context

Article 31, CRC and principle of ‘Best Interests of the Child’ is applicable.

Issue:

lack of data concerning children’s access to leisure activities in detention in Assam.

European context

This right is protected in Europe but suffers from poor and uneven implementation in the region.³⁰⁶

Best practice:

In **Lithuania**, children may participate in recreational activities in one of the country’s detention centres.³⁰⁷

Recommendations

- Ensure recreational activities in which children facing statelessness can meet local children and young people through NGOs or social workers.
- Sensitise the public with information on the significance of this right for children.
- Guarantee access without discrimination on the child's legal status.

306 Parliament and Council Directive 2013/33/EU of 26 June 2013 (n 300), arts 11 and 12. See also European Parliament and Parliament and Council Directive 2008/115/EC of 16 December 2008 (n 303), art 17(3).

307 European Union Agency for Fundamental Rights, 'European legal and policy framework on immigration detention of children' (2017) 82 <<https://fra.europa.eu/en/publication/2017/european-legal-and-policy-framework-immigration-detention-children>> accessed 12 May 2020.

4. Right to Medical Treatment

Indian context

There is an obligation to provide access to health care services to all children.³⁰⁸ The state must ensure satisfactory health conditions and health-related education.³⁰⁹

Issue:

lack of information on the health conditions of children.

European context

Necessary healthcare must be provided, at least with regards to emergency care and to essential treatment of illness and serious mental disorders.³¹⁰

First challenge: the consent of unaccompanied children to medical treatment (rigorous assessment of the age and maturity of the child by **Finland, the Netherlands, Slovenia** and **Spain**).³¹¹

Second challenge: lack of paediatricians and mental health specialists

Best practice:

In **Poland**, children benefit from regular visits from paediatricians in the centre.³¹²

In **Portugal**, children may benefit from psychological services to help them deal with anxiety, stress, depression, etc. and can also be referred to the hospital or psychiatric services if necessary.³¹³

Recommendations

- Ensure that the consultations are conducted in a child-friendly manner and are respectful of the child's right to confidentiality.
- Organise regular visits by medical professionals from outside the facilities.
- Provide children information about available mental health services.
- Conduct medical screenings of newly arrived stateless children identifying potential issues, both physical and mental, that need care.
- Ensure a rigorous assessment of the child's free and deliberate consent to medical treatment.

308 UN Committee on the Rights of the Child, 'General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child' (2003) UN Doc CRC/GC/2003/5.

309 UN Committee on the Rights of the Child, 'General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (2013) UN Doc CRC/C/GC/15 [6].

310 Parliament and Council Directive 2013/33/EU of 26 June 2013 (n 300), art 19.

311 European Union Agency for Fundamental Rights, 'European legal and policy framework on immigration detention of children' (2017) 83 <<https://fra.europa.eu/en/publication/2017/european-legal-and-policy-framework-immigration-detention-children>> accessed 12 May 2020.

312 Poland, Bieszczadzki Border Guard Division (Bieszczadzkiego Oddział Straży Granicznej), 'Reply to Helsinki Foundation for Human Rights to the request for disclosure of public records' (11 February 2016) OA/ XIV/182/16.

313 Maria de Jesus Barroso Soares, *Muros que nos separam: Detenção de requerentes de asilo e migrantes irregulares na UE* (Paulinas 2010) [30, 48, 70].

V. Summary and Key Recommendations

This chapter dealt extensively with standards and constraints governing the detention of precarious citizens and stateless persons by the state. The Indian experience indicates that persons on the far end of the slippery slope of citizenship are at the risk of being detained for deportation. They include precarious citizens in Assam and stateless persons in Indian territory among others. Under international and Indian municipal law, all persons, including precarious citizens and stateless persons, possess a right against arbitrary detention. Such a right entails that they shall not be detained without a legitimate purpose i.e. the possibility of deportation. Given that persons who are stateless are not recognised as nationals of any country, their detention under the guise of deportation is illegal. Similarly, precarious citizens in Assam cannot be indefinitely detained pending deportation, as this constitutes a violation of their inalienable human rights and contradicts orders of the Supreme Court. They are Indian nationals residing in their country of nationalism. Any deprivation of personal liberty must be checked by cogent procedural and substantive rights. There is a special emphasis on the non-derogable rights and best interests of children, who must never be detained. In the rare situations where children have to be detained, such detention must conform to procedural and substantive safeguards, and must be accompanied by access to education and recreation for their holistic development. Finally, alternatives to detention have been proposed, for stateless persons in India, keeping in line with the principle of ‘minimum intervention’ during the period of determining their status.

1. India must recognise the prohibition of arbitrary detention of precarious citizens and stateless persons and release them immediately

The government and the courts must not sanction the detention of precarious citizens in Assam and stateless persons in Indian territory. The state must conduct exercises mapping the status and duration of detention of all detainees in existing detention centres in Assam and release them immediately. Stateless persons and precarious citizens cannot be detained under the guise of deportation. Children, in particular, must never be detained. Clear and comprehensive regulations must be drafted by each state, with periodic review of detention measures and the right to release when there is no imminent prospect of removal. Such guidelines will help minimise the possibility of indefinite detention of stateless persons.

2. India must develop a streamlined deportation policy to create a sense of foreseeability for persons detained for deportation

To fully ensure that no detainees find themselves in detention for disproportionately long periods pending deportation, the Government of India should arrive at bilateral agreements with the governments of other countries in order to streamline a status determination and deportation policy for all impugned foreigners.

3. Indian states must divert costs from construction of detention centres to less liberty-restrictive alternatives to detention

As prisons fall under the **State List** of the **Seventh Schedule** of the **Constitution**, state governments must actively invest in alternatives to detention that are less infringing of personal liberty of stateless persons and more cost-effective. The availability of alternatives is essential to prevent detainees from languishing in detention centres for an indefinite duration.

4. Civil society organizations must be allowed free access to detention centres

Civil society organizations, both domestic and international, must be allowed free and unrestricted access to detention centres and to all detainees, in order to assess their needs and assist them in procuring information and legal aid in furtherance of their civil rights. NGOs can also collaborate with the government towards maintaining a case management system for detainees.



CHAPTER III

SOCIO-ECONOMIC RIGHTS

SECURING CITIZENSHIP

In today's society, all entitlements, pursuits, or goals require membership of a state and the corresponding documentation that is in turn recognised by this state. This is true not just for civil and political rights such as liberty and freedom, or the right to vote, but also for access to socio-economic entitlements and goods. Thus, social security in the form of food, healthcare, education and such are inextricably connected to the support of the state. The absence of this connection as well as the lack of recognition by the state of such membership makes it nearly impossible to even simply survive. Furthermore, due to the interrelated nature of human rights, statelessness remains both the cause and consequence of violations of civil, political, and socio-economic rights. These rights are undoubtedly intertwined for socially disadvantaged communities in particular. A person's right to health is dependent on their access to nutrition (right to food) and their physical living conditions (right to housing), which are limited by the availability of employment opportunities (right to employment/livelihood). In a similar manner, the capacity to work in turn depends on the quality of health and wellbeing of the individual.

In other words, the interrelatedness of rights is heightened for those who find themselves in conditions of poverty or for those most marginalised, such as stateless persons and precarious citizens. Their lived realities make special protections vital not just for flourishing but their very survival. Thus, this last chapter of the report focuses on the extent of socio-economic entitlements available to these communities. In doing so, it makes a pointed case for the Indian state to provide protection to stateless persons and ensure that precarious citizens have access to the same rights as other citizens.

I. Background, Context, and Scope

A. SCOPE OF CHAPTER AND INTENDED BENEFICIARIES

Firstly, it has been conclusively demonstrated in the Status chapter that individuals currently left out of the NRC due to deficiencies in documentation and arbitrary proceedings, are Indian citizens whose Indian citizenship status should be immediately affirmed. Therefore, it is strongly urged that the Indian Government continue to provide the full gamut of social and economic entitlements – rights guaranteed by the Constitution – to the precarious citizens in Assam.

On the other hand, for stateless persons, customary international law and India's other human rights commitments provide the necessary protections in the absence of the ratification of the 1954 and 1961 Conventions. Therefore, the majority of this chapter will lay out the nature of socio-economic entitlements that are promised both in international law and domestic law frameworks to stateless persons as they await naturalisation.

In this context, it shall be noted that one needs identity documents in order to receive socio-economic entitlements, but their availability and issuance remains a huge barrier. This involves burdensome bureaucratic obstacles and vague mechanisms that often trap citizens themselves, thereby making access to documentation an essential pre-requisite [↗]. Aadhaar cards are a fitting example of such leakages in welfare mechanisms. Without diverging into the pressing privacy concerns of the system, it has been found that as of 2019, roughly 8% of the population, amounting to over 102 million people (of which 75 million are children) are not in possession of an

see Section II.A (Chapter III),
pg 201

Aadhaar card.³¹⁴ It has also been found that one-fourth of all unenrolled children in India (over a million) were unable to enrol due to a lack of Aadhaar verification or identification since most schools are mandating submission of Aadhaar proof for admission.³¹⁵

This barrier is almost universal to those living in poverty but is further exacerbated for those at risk of sliding down on the slippery slope of citizenship, which includes refugees, stateless persons, as well as precarious citizens in Assam. One of the concerning situations in the state is that after marriage, women are often deleted from their parental ration cards, thus making the tracing of their legacies from 1971 extremely difficult.³¹⁶ This is confirmed by reports on the Reangs tribe wherein it was found that 25% of the tribe was excluded from the NRC, and this demographic was overwhelmingly composed of women who had failed to prove their legacies in the absence of identification documents.³¹⁷ There have also been reports of students excluded from the NRC list being denied admission to public educational institutes due to the inability to prove permanent residency, showing that these qualifying factors are often interrelated.³¹⁸ Therefore, it is clear that in a country where even citizens fall through the cracks of welfare systems, there is a dire need for positive steps to be taken to ensure the protection of stateless persons and precarious citizens, in addition to making the systems more robust for all.

314 TNN, 'Aadhaar irony: Those who need it most don't have it yet' *The Times of India* (New Delhi, 26 November 2019) <<https://timesofindia.indiatimes.com/india/aadhaar-irony-those-who-need-it-most-dont-have-it-yet/articleshow/72239439.cms>> accessed 18 June 2020.

315 *ibid.*

316 Arunabh Saikia, 'In Assam, many women, children fail to make NRC even as their family members are counted as citizens' (*Scroll.in*, 31 August 2019) <<https://scroll.in/article/935823/in-assam-many-women-children-fail-to-make-nrc-even-as-their-family-members-are-counted-as-citizens>> accessed 18 June 2020.

317 Prasanta Majumdar, 'Assam NRC: Rights body says over one lakh tribals excluded' *The New Indian Express* (Guwahati, 2 September 2019) <<https://www.newindianexpress.com/nation/2019/sep/02/assam-nrc-rights-body-says-over-one-lakh-tribals-excluded-2027904.html>> accessed 18 June 2020.

318 Parth Sharma, 'No Permanent Residency Proof, Aspiring Engineer Denied Admission in Assam Institute' *News18* (Assam, 19 July 2018) <<https://www.news18.com/news/india/no-permanent-residency-proof-aspiring-engineer-denied-admission-in-assam-institute-1816475.html>> accessed 18 June 2020.

B. SOCIO-ECONOMIC FRAMEWORKS

B.1 International law obligations

As previously mentioned, this report acknowledges the fact that Indian citizens themselves are routinely deprived of these rights in practice. However, despite this unfortunate reality, a State has a legal and moral duty to provide access to fundamental entitlements to all individuals in its territory, regardless of their nationality. These fundamental entitlements refer to social and economic protection which includes access to healthcare, the right to housing and sanitation, the right to education and the right to work and employment, among others.

In international law, **Article 25** of the **UDHR** covers a vast range of rights, including access to adequate water, food, clothing, housing, medical care and other social protections.³¹⁹ This ‘minimum threshold’ for a standard of living is applicable to all persons and is certainly not conditional on citizenship. Based on the principles of equality and non-discrimination, the rights espoused in Article 25 of the UDHR provide the core grounding to the more specific articulations of socio-economic rights in the **International Covenant on Economic, Social and Cultural Rights** (**ICESCR**). The vast majority of human rights are applicable to everyone, regardless of nationality or immigration status (including stateless persons) as confirmed by **General Comment No. 15**³²⁰ and **31**.³²¹ Specifically, in relation to socio-economic rights, the Committee for Economic, Social, and Cultural Rights (‘CESCR’) in 2009 clarified the interpretation and applicability of ICESCR, stating that the Covenant rights apply to ‘everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status

³¹⁹ UDHR art 25.

³²⁰ UN Human Rights Committee ‘CCPR General Comment No. 15: The Position of Aliens Under the Covenant’ (1986) <<https://www.refworld.org/docid/45139acfc.html>> accessed 18 June 2020.

³²¹ UN Human Rights Committee ‘CCPR General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant’ (2004) UN Doc CCPR/C/21/Rev.1/Add.13.

ARTICLE 25 OF THE UDHR

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

and documentation'.³²² This unequivocally clarifies that socio-economic rights recognised in international law are positively enforceable or applicable to all persons, including non-citizens, stateless persons and precarious citizens, regardless of their citizenship status.

The **1954 Convention** is the sole treaty framework that directly prescribes standards of treatment of stateless persons to be implemented by states. While India is not yet a signatory to this pertinent treaty, many of its provisions are now either customary international law, or at the very least offer important approaches relating to the protection of stateless persons that can serve as a useful model, as stated in the UNHCR Statelessness Handbook.³²³ The 1954 Convention provides a broad framework of civil, economic, social and cultural rights that must be granted to stateless persons. The broad categories include welfare rights to rationing, housing, public education, public relief, labour legislation, social security, access to identity documentation and gainful employment (wage earning, self-employment, access to liberal professions), among others.

³²² UN Committee on Economic, Social and Cultural Rights 'CESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights (art 2, [30] of the International Covenant on Economic, Social and Cultural Rights)' (2009) UN Doc E/C.12/GC/20.

³²³ UNHCR 'Handbook on Protection of Stateless Persons' (2014) 58.

B.2 Lessons from protection frameworks for non-nationals

India does not have a comprehensive policy governing refugees that have fled to India or for stateless persons and their protections. The Indian government's approach towards different precarious citizens of other nationalities and stateless persons has been varied. The Tibetan community and those refugees recognised by (and registered with) the UNHCR serve as two distinct examples. Though the legal, social and political positions of these two communities are clearly distinguishable, their access to socio-economic rights present a blueprint of the rights that could and should be made available to stateless persons. Much like stateless persons, refugees find themselves at the risk of sliding further down on the slippery slope of citizenship. Therefore, it is appropriate to refer to the Indian refugee framework and approaches to inform our recommendations for stateless persons and precarious citizens. The nexus between the two frameworks can also be observed from the fact that the **1954 Convention** and the **1951 Refugee Convention** have a shared drafting history where the former is largely modelled on the provisions of the latter.³²⁴

An important caveat, however, is that the status of the Tibetan community is not a completely transposable model to stateless individuals, as Tibetans are specifically recognised and protected by the Indian Government. Depending on when they arrived in India (after the Dalai Lama's 'flight into exile' in 1959) they possess stateless identity certificates, are considered 'temporary refugees in India', or fall into the category of 'Long Term Stay'.³²⁵ On the other hand, the refugees who are recognised and registered by the UNHCR, such as the Afghans, Somalians and certain Burmese groups, are 'entitled to an assessment for a Refugee Certificate; a visa if granted a certificate, though often shorter-term; and the possibility of naturalisation, but this

³²⁴ *ibid* 45.

³²⁵ Anne-Sophie Bentz, 'Being a Tibetan Refugee in India' (2012) 31(1) *Refugee Survey Quarterly* 80, 85.

depends on irregular and opaque criteria'.³²⁶ Their access to socio-economic rights, therefore, is dependent on and varies according to their specific contexts and the kind of documentation they have.³²⁷ The UNHCR works with a number of implementing partners, such as Don Bosco and the Development and Justice Initiative ('DAJI') to facilitate support and access to these rights.³²⁸ Don Bosco particularly focuses on assisting vulnerable refugee children. It provides them with support in the form of 'rescue operations, short-stay homes, home reparation, institutional rehabilitation, child protection mechanisms, advocacy, education skill trainings, accompaniment and foster care'.³²⁹ Nonetheless, despite the variations in the terminology and categorisation of the legal status of precarious citizens in India, the refugee framework illustrates the crucial socio-economic rights that have been made available to non-citizen communities, as outlined below.

326 Jessica Field, Anubhav Dutt Tiwari and Yamini Mookherjee, 'Urban refugees in Delhi: self-reliance can't be exclusively entrepreneurial' (IIED 2017) <<https://pubs.iied.org/17427IIED/>> accessed 20 June 2020.

327 *ibid.*

328 *ibid.*

329 Delhi BOSCO, 'Refugee Assistance Project' <<https://boscodelhi.org/project-2.php>> accessed 2 April 2020.

Healthcare

Measures by Government of India for Tibetans

- Access to facilities in settlement colonies, administered by the Central Tibet Administration.³³⁰
- Access to Indian hospitals but ineligible for state healthcare subsidies available to citizens.³³¹

Measures by Government of India for Rohingya refugees

- In principle, they have equal access to Primary Health Centres.³³² However, reports persist of Rohingyas being denied treatment due to lack of Indian documentation. Prescription medicines are expensive and inaccessible.³³³
- Limited coverage by Anganwadis for maternal, neonatal, and early childhood care.³³⁴

330 Bentz (n 325) 80, 95.

331 Tibet Justice Centre, 'Tibet's Stateless Nationals III: The Status of Tibetan Refugees in India' (2016) 99 <<https://www.bu.edu/law/files/2016/09/Tibets-Stateless-Nationals-II-FINAL-report.pdf>> accessed 12 March 2020.

332 *Mohammad Salimullah v Union of India* (W.P. (C) No. 793/2017). See the Affidavit filed by Union of India on 15 Mar 2018: Supreme Court Observer, 'Rohingya Deportation' (SCO, 2017) <<https://www.scoobserver.in/court-case/rohingya-deportation-case>> accessed 18 June 2020. See also *Jaffar Ullah & Anr v Union of India* (2018) WP (C) 859/2013, order dated 11 May 2018.

333 Development and Justice Initiative (DAJI), 'The Rohingya in India: Situational Analysis Report' (DAJI 2013) <<http://www.daji.org.in/images/Report-Rohingya-Situational-Analysis-2013.pdf>> accessed 1 June 2020. See also Neha Dixit, 'For Rohingya Refugees in India, Even Basic Nutrition Services are a Distant Dream' (*The Wire*, 5 February 2018) <<https://thewire.in/health/rohingya-refugees-india-even-basic-nutrition-services-distant-dream>> accessed 5 June 2020.

334 DAJI, 'The Rohingya in India: Situational Analysis Report' (n 333).

Right

Food and Nutrition

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SECTION I.B.2

Measures by Government of India for Tibetans

- Access to PDS rations.³³⁵

Measures by Government of India for Rohingya refugees

- Dependent upon rations supplied by UNHCR/local NGOs.³³⁶
- Limited access to Anganwadis in certain states for infant nutritional requirements.

³³⁵ Canada: Immigration and Refugee Board of Canada, 'India: Residency rights of Tibetan refugees, including the requirements and procedures for Tibetan refugees to obtain a Registration Certificate; rights to employment, education, health care, and other social services; consequences for Tibetans without a Registration Certificate, including instances of refoulement' (2 January 2015) <<https://www.refworld.org/docid/556826c64.html>> accessed 8 April 2020.

³³⁶ Dixit (n 333).

Shelter, Housing and Sanitation

Measures by Government of India for Tibetans

- Tibetan refugee settlements, established in the 1960s on Government land and administered through officers appointed by the Tibetan Government-in-Exile.³³⁷ Lease agreements signed with the Central Tibetan Relief Committee.³³⁸

Measures by Government of India for Rohingya refugees

- The majority live in clusters of shanties, with shared toilets and water facilities. Wastewater from toilets flows out into open drains; some are forced to manually collect and dispose of faeces.³³⁹
- Access to clean drinking water remains erratic, dependent upon sympathetic local residents.³⁴⁰

³³⁷ Bentz (n 325) 80, 95.

³³⁸ Canada: Immigration and Refugee Board of Canada, 'India: Residency rights of Tibetan refugees' (n 335).

³³⁹ DAJI, 'The Rohingya in India: Situational Analysis Report' (n 333). See also Somya Lakhani and Anand Mohan J, 'Rohingya refugee camps: Ground reality points at unliveable conditions with no drinking water or healthcare' *The Indian Express* (New Delhi, April 16 2018) <<https://indianexpress.com/article/cities/delhi/rohingya-refugee-camps-ground-reality-points-at-unlivable-conditions-with-no-drinking-water-or-healthcare-5138818/>> accessed 3 June 2020.

³⁴⁰ DAJI, 'The Rohingya in India: Situational Analysis Report' (n 333).

Right

Education

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SECTION I.B.2

Measures by Government of India for Tibetans

- Tibetan secondary and high schools.
- Access to higher education in Indian colleges and universities.³⁴¹ Eligible for Government scholarships.³⁴²

Measures by Government of India for Rohingya refugees

- Children under age 14 technically have access to primary schools under the RTE Act, but implementation is erratic – admissions denied due to lack of documentation.
- When allowed to attend local schools, they are barred from the midday meal scheme.³⁴³

341 Bentz (n 325) 80, 99.

342 Canada: Immigration and Refugee Board of Canada, 'India: Situation of Tibetan refugees and those not recognized as refugees; including legal rights and living conditions' (23 December 1999) <<https://www.refworld.org/docid/3ae6ad4124.html>> accessed 1 April 2020.

343 Dixit (n 333).

Right

Employment

Measures by Government of India for Tibetans

- Non-interference with employment.³⁴⁴ Seasonal sweater selling, agriculture, and small enterprises are their primary sources of income.³⁴⁵
- Eligible for trade licenses in nursing, teaching, chartered accountancy, medicine, and engineering as per Tibetan Rehabilitation Policy, 2014.³⁴⁶
- Not eligible for government jobs.³⁴⁷

Measures by Government of India for Rohingya refugees

- Common sources of livelihood are rag-picking, construction work, sanitation work, and various kinds of unskilled labour in the informal sector.³⁴⁸ This work is precarious and makes for a very unstable source of income.³⁴⁹

344 Bentz (n 325) 80, 95.

345 Tibet Justice Centre, 'Tibet's Stateless Nationals III: The Status of Tibetan Refugees in India' (n 331).

346 Canada: Immigration and Refugee Board of Canada, 'India: Residency rights of Tibetan refugees' (n 335). See also Ministry of Home Affairs, Government of India, 'The Tibetan Rehabilitation Policy 2014' (*Social and Resource Development Fund*, 2015) <<https://sardfund.org/wp-content/uploads/tibetan-rehab-policy-2014.pdf>> accessed 22 June 2020.

347 Canada: Immigration and Refugee Board of Canada, 'India: Residency rights of Tibetan refugees' (n 335).

348 DAJI, 'The Rohingya in India: Situational Analysis Report' (n 333).

349 Institute on Statelessness and Inclusion, 'Human rights and Covid-19: What now for the Rohingya?' (Briefing Paper, August 2020) <https://files.institutesi.org/Covid19_The_Rohingya_Briefing_Paper.pdf> accessed 19 August 2020.

B.3 Minimum core obligations and protection

While it has been established that ICESCR rights are applicable to non-citizens as well, the preemptive question remains as to whether India can claim resource constraints as a defence for not providing the same. Unlike the ICCPR, the **ICESCR** recognises a progressive realisation of socio-economic rights in **Article 2(1)** to acknowledge the difficulty in implementing these protections in a short duration of time. This permits gradual expansion of protection based on the financial resources of the state. However, the minimum core obligation concept balances out or limits the constraint that progressive realisation often places in the implementation of human rights for stateless persons. Minimum core obligations translate to a minimum level of protection that must be entirely fulfilled immediately. This means India must satisfy, at the very least, minimum essential levels of each right including access to foodstuffs, primary health care, basic shelter and housing, and education.³⁵⁰ This principle of minimum core obligation and non-derogability has been recognised by Indian courts. Most recently, relying on **General Comment No. 3** and **14**, the Delhi High Court held that the Indian government owed a constitutional duty to provide free medical treatment for which it could not cite financial constraints as an excuse to not fulfil its obligation relating to access to medication.³⁵¹

Therefore, given the immense resource constraint and difficulty faced in providing socio-economic rights to citizens themselves, this report advocates for a reasonable minimum core approach towards protections and entitlements for non-citizens in contrast to the expansive gamut of rights constitutionally owed to citizens. This minimum core obligation translates to providing all the essentials for survival of non-nationals in India on an urgent basis.³⁵²

350 UN Committee on Economic, Social and Cultural Rights 'CESCR General Comment No. 3: The Nature of States Parties' Obligations (art 2, [1] of the International Covenant on Economic, Social and Cultural Rights)' (1990) UN Doc E/1991/23.

351 *Mohd. Ahmed (minor) v Union of India* (2014) W.P.(C) 7279/2013 (Delhi High Court) [43], [67], [69].

352 David Blichitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19(1) South African Journal on Human Rights 1.

Regardless of international commitments, Indian domestic law also guarantees protection of these socio-economic entitlements for non-citizens. Such state obligations are derived from India's expansive **Article 21** jurisprudence which applies to 'persons' and is markedly not limited to citizens. In *Francis Coralie Mullin*, the Supreme Court held that assuring the dignity of the individual and all that goes along with it, namely the bare necessities of life such as nutrition, clothing, and shelter, is a goal of the Indian state.³⁵³ More specifically, in the *Chakma case*, the Supreme Court held that the state government was obligated to 'act impartially and carry out its legal obligations to safeguard the life, health, and well-being of the Chakmas residing in the State without being inhibited by local politics'.³⁵⁴ These two cases, and the text of **Article 14** and **21** of the **Constitution**, remain the primary sources of domestic law confirming the state's obligation towards non-citizens residing in India.

353 *Francis Coralie Mullin v The Administrator, Union territory of Delhi* (1981) 1 SCC 608.

354 *National Human Rights Commission v State of Arunachal Pradesh* (1996) 1 SCC 742 (*Chakma case*).

II. List of Socio-Economic Rights

A.1 ACCESS TO DOCUMENTATION

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SECTION II.A.1

Access to documentation is an important prerequisite for access to socio-economic rights and welfare entitlements. Lack of identity documents is a major impediment in availing any services at schools, hospitals, banks, etc., even for those persons who are not facing threats to their Indian citizenship. The nexus between documentation and accessing welfare mechanisms or rights is clear from the following example – as per the National Family Health Survey (2015-16), only 80% children under the age of five had their births registered and only 62% had birth certificates.³⁵⁵ The possession of such documents is determined largely by wealth with caste and religion further contributing to exclusion.³⁵⁶ It was also found that women with access to mobility and resources were more likely to have registered births and that this factor was further affected by whether they had institutional deliveries, education, and belonged to upper castes, among other factors.³⁵⁷

Similarly, the initial stages of the Assam NRC reflect the bleak reality that women and the poor face the brunt of the NRC process as a consequence of being ‘document poor’.³⁵⁸ The Status chapter [↗] has already argued why such persons, who were excluded from the NRC, cannot be arbitrarily deprived of their Indian nationality. The government must affirm their citizenship. They

see Section I.A.3 (Chapter I),
pg 50

355 International Institute for Population Sciences (IIPS) and ICF, ‘National Family Health Survey (NFHS-4), 2015-16: India’ (IIPS 2017) 18 <<http://rchiips.org/NFHS/NFHS-4Reports/India.pdf>> accessed 4 June 2020.

356 *ibid.*

357 *ibid.* See also Itismita Mohanty and Tesfaye Alemayehu Gebremedhin, ‘Maternal autonomy and birth registration in India: Who gets counted?’ (2018) 13 PLoS ONE 1 <<https://doi.org/10.1371/journal.pone.0194095>> accessed 1 June 2020.

358 Human Rights Watch, ‘“Shoot the traitors” Discrimination Against Muslims under India’s New Citizenship Policy’ (9 April 2020) <<https://www.hrw.org/report/2020/04/09/shoot-traitors/discrimination-against-muslims-under-indias-new-citizenship-policy>> accessed 20 April 2020.

shall not face the brunt of the institutional issue of lack of documentation.

It is also clear that individuals who either arrived as or were born in India as stateless persons, require special documentation recognising their legal status. The **1954 Convention** expressly advocates for identity papers (**Article 27**) and travel documents (**Article 28**) to protect stateless persons. Some Asian states have provided travel documents to resident stateless individuals.³⁵⁹ While the necessity is not merely limited to travel documents, the approach demonstrated is to make ‘residence’ the qualifying factor for issuance of documentation to those at the risk of being rendered stateless.³⁶⁰ Such documentation can further serve as a prerequisite when seeking access to India’s public healthcare system, welfare schemes targeted at economically weaker sections of society and enrolment in schools.

A.2 RECOMMENDATIONS

- Good practices in this regard include:
 - In **Sri Lanka**, the UNHCR, along with UNDP’s ‘Equal Access to Justice Project’ and the Government of Sri Lanka, initiated mobile documentation clinics for undocumented Indian origin persons in plantation areas. As per UNHCR reports, during 2007 and 2008, these clinics directly benefited more than 10,000 persons who were able to obtain documentation including birth certificates and identity cards, in addition to being informed of procedures for obtaining other documentation.³⁶¹

359 UNHCR ‘Good Practices: Addressing Statelessness in South East Asia’ (2011) 22 <<https://www.refworld.org/docid/4d6e0a792.html>> accessed 18 March 2020.

360 *ibid.*

361 UNHCR ‘Addressing Situations of Statelessness’ (2009) 47 <<https://www.unhcr.org/en-ie/4922d4370.pdf>> accessed 5 June 2020.

- In the Western Balkans, the ‘Social Inclusion of and Access to Human Rights for Roma, Ashkali, and Egyptian communities’ project sought to raise awareness regarding the importance of civil registration and documentation among 700,000 people, in addition to providing free legal assistance on these civil registrations.³⁶²
- Precarious citizens who have been excluded from the Assam NRC must have full access to all socio-economic entitlements that they are eligible for as Indian nationals.
- The central government must issue identity certificates to all stateless persons residing in India, wherein residence must be considered as adequate proof and demonstration of their connection to India. These cards would be similar to the UNHCR refugee card which helps the government and UNHCR partners to support refugees in accessing socio-economic entitlements and protection.
- The central and state governments must organise mass mobile documentation camps to assist people in accessing and generating adequate identity documentation.

B.1 RIGHT TO HEALTH AND ACCESS TO HEALTHCARE

The right to health is a fundamental, basic human right that is expressed most explicitly in **Article 12** of the **ICESCR**, which recognises ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.³⁶³ This right includes access to both preventive, curative, and palliative

³⁶² *ibid.*

³⁶³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 12.

healthcare, and the social determinants for health.³⁶⁴ The CESCR has explicitly confirmed that State parties have a core obligation to facilitate and ensure that at the very least, minimum levels of all rights recognised by the Covenant, including essential primary healthcare, are available to everyone.³⁶⁵ India, being a party to the ICESCR, is bound by these obligations which have been interpreted to include access to health facilities, goods and services by all, without discrimination. This is applicable with special emphasis on vulnerable sections of the population, including those rendered vulnerable by legal processes such as persons with precarious citizenship and those rendered vulnerable by systemic factors of poverty.³⁶⁶ This right to health is also acknowledged in other treaty obligations that bind the Indian state, namely **Article 5 (e) (iv)** of the **ICERD**, **Article 24** of the **CRC** and in **Articles 11(1) (f)** and **12** of the **CEDAW**.

However, such a right to healthcare remains an unrealised reality in the Indian context, even for citizens. Its direct mention can be traced to **Article 47** of the **Constitution** which falls within the non-justiciable aspirations that must guide state policy. The Supreme Court has held that the right to live with human dignity under Article 21 derives from the Directive Principles of State Policy.³⁶⁷ In *Parmanand Katara*, it was held that the Constitution casts a total, absolute, and paramount obligation on the State to preserve life for which medical practitioners, regardless of whether at a private or government hospital, are duty bound to provide medical assistance for the preservation of life.³⁶⁸ The positive obligation on the state in relation to access to healthcare has been elaborated in *Paschim Banga Khet Mazdoor* where it was held that providing adequate medical facilities for the people is

364 WHO Regional Office for Europe, 'Report on the health of refugees and migrants in the WHO European Region: no public health without refugee and migrant health' (WHO, 2018) <<https://www.euro.who.int/en/publications/abstracts/report-on-the-health-of-refugees-and-migrants-in-the-who-european-region-no-public-health-without-refugee-and-migrant-health-2018>> accessed 4 June 2020.

365 CESCR General Comment No. 3 (n 350).

366 *ibid.* See also UN Committee on Economic, Social and Cultural Rights 'CESCR General Comment No. 14: The right to the highest attainable standard of health (art 12 of the Covenant)' (2000) UN Doc E/C.12/2000/4.

367 *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802.

368 *Parmanand Katara v Union of India* (1989) 4 SC C 286.

an essential obligation undertaken by the government in a welfare state.³⁶⁹ This served as an extension of safeguarding the right to life of all persons, and thus applicable to precarious citizens and stateless persons too. It was also held that the failure of a government hospital to provide a patient with timely medical treatment results in violation of the patient's right to life.³⁷⁰ This integral right to healthcare in turn also casts a constitutional obligation upon the state to provide health facilities.³⁷¹ In *C.E.C.S. Ltd.*, the Supreme Court interpreted **Articles 29** and **31** in relation to a social minimum standard for workers and held that the right to social and economic justice, and the right to health in particular, are fundamental rights.³⁷² It also held that the right to healthcare is a fundamental right under **Article 21**, to be read with **Articles 39(e), 41, 43, 48A**.³⁷³ In the *Chakma* case, the Supreme Court explicitly recognised the State's duty to provide healthcare to non-citizens.³⁷⁴ Therefore, access to quality public healthcare, given the nature of **Article 21** jurisprudence, and India's international treaty obligations, must be extended to include stateless persons. Precarious citizens in Assam must not face any impediment in accessing this right as Indian nationals.

To put this right in perspective, implementing partners of UNHCR India provide support to refugees by helping them access government dispensaries and hospitals.³⁷⁵ This includes giving them the requisite information regarding facilities, as well as making available certain tests and supplies that might be difficult to procure otherwise.³⁷⁶ Afghan refugees, for example, are able to access medical facilities via government trusts and hospitals,

369 *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37.

370 *State of Punjab v Ram Lubhaya Bagga* (1998) 4 SCC 117. In this case, the Supreme Court upheld the state's obligation and duty to maintain health services for citizens in a manner that is accessible.

371 *State of Punjab v Mohinder Singh Chawla* (1997) 2 SCC 83.

372 *C.E.C.S. Ltd. & Ors v S.C. Bose & Ors* (1992) 1 SCC 441.

373 *Consumer Education & Research Centre v Union of India* AIR 1995 SC 922.

374 *Chakma* case (n 354).

375 UNHCR, 'Factsheet India' (UNHCR, February 2016) <<https://www.unhcr.org/protection/operations/50001ec69/india-fact-sheet.html>> accessed 4 June 2020.

376 *ibid.*

and in some situations even their medical bills have been reimbursed by the UNHCR (or their implementing partners).³⁷⁷

B.2 RECOMMENDATIONS

- Good practices in this regard include:
 - **Thailand's** Universal Healthcare programme was initiated with the pointed objective of providing access to those without a nationality and remains an exemplar for similar intervention and engagement by other Asian states.³⁷⁸
 - In the **French** system, universal health insurance is available to asylum seekers (same as applicable to legal residents and citizens), while low income migrants are offered restricted state medical aid. Remarkably, anyone that does not fall within these systems/schemes is still also eligible for emergency services and care, with an active effort by the government to train and sensitise practitioners on the importance of non-discrimination in providing quality services.³⁷⁹
 - **Moldova's** mandatory health insurance scheme for asylum seekers and stateless persons includes protection from preventive diseases, treatments, referrals, and medical examinations, with a dedicated effort to ensure the right to health of such migrants is promoted by state officials.³⁸⁰
- In India, persons from Below Poverty Line ('BPL') and economically weaker communities are included into welfare schemes to access free, or where charged, affordable public healthcare system. These schemes must be made available to

377 Jessica Field and Srinivas Burra (eds), *The Global Compact on Refugees: Indian Perspectives and Experiences* (Academicians Working Group and UNHCR India 2020) 217.

378 UNHCR 'Good Practices: Addressing Statelessness in South East Asia' (n 359).

379 WHO Regional Office for Europe, 'Health of refugees and migrants: Regional situation analysis, practices, experiences, lessons learned and ways forward' (WHO, 2018) 13 <<https://www.who.int/migrants/publications/EURO-report.pdf>> accessed 4 June 2020.

380 *ibid.*

all persons within Indian territory, including stateless persons. This means ensuring documentation so that these vulnerable persons can avail schemes such as the *Ayushman Bharat Pradhan Mantri Jan Aarogya Yojana*³⁸¹ and state-provided healthcare insurance.

C.1 FOOD AND NUTRITION

Food, nutrition, and water are essential for survival. The right to food and sufficient nutrition (and concomitantly, the right to water) are inseparable from the right to life and the right to health. This has been codified in a range of international instruments that India is party to. **Article 25** of the **UDHR** recognises the right of everyone to an adequate standard of living, which includes adequate food, among other essentials. This was reinforced and substantiated in **Article 11** of the **ICESCR**, which clarifies two distinct components of the right to food: the right to adequate food, and the fundamental right to be free from hunger. These two elements create an important distinction between relative and absolute standards. The right to adequate food is a ‘progressive realization’, where states party to the covenant are ‘required to put in place measures, policies, and programs that lead to its full realization over time’, whereas the right to freedom from discrimination in accessing food, and the right to be free from hunger, are absolute standards, as both are ‘the core minimum content of the right to food’.³⁸² In 1999, the CESCR issued **General Comment 12**, which defined the substantive content of the right to food under international law. It stresses that food must be accessible, physically and economically, to everyone and the food provided must be safe and contain enough nutrients for optimal physical and mental development. It further

381 National Health Authority, ‘Ayushman Bharat Pradhan Mantri Jan Arogya Yojana’ (2018) <<https://pmjay.gov.in/>> accessed 24 June 2020.

382 Susan Randolph and Shareen Hertel, ‘The Right to Food: A Global Perspective’ in Lanse Minkler (ed) *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013) 23-24.

emphasises that states are obliged to fulfil this right through the twin obligations to facilitate (through proactive legislative, administrative, and budgetary measures to bolster people's access to food) and provide (directly providing food when it is not possible for people to access food or the resources necessary to effectively utilise food).³⁸³ Thus, the core minimum content of the right to food comprises the prevention of starvation, and that the food provided must be adequate for everyone. Stateless persons are thus entitled to adequate food and water for their subsistence.

To this end, India should ensure stateless persons receive food grains, kerosene, and subsidised rations via the Public Distribution System ('PDS') through collaborative budgetary and administrative efforts between the Central and the State Governments. It is unlawful for the Indian state to limit the categories of persons who can access PDS in the face of the obligation to allow everyone the realisation of right to adequate food within the Indian territory.³⁸⁴

C.2 RECOMMENDATIONS

- India should utilise the PDS to ensure delivery of food grains, kerosene and subsidised rations to stateless persons at their residence. This can include special sub-schemes within the PDS like the *Antyodaya Anna Yojana*, which provides higher entitlements (35 kg a month as opposed to 5 kg of subsidised grain) to the poorest families in the BPL category.³⁸⁵

383 UN Committee on Economic, Social and Cultural Rights 'CESCR General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)' (1999) UN Doc E/C.12/1999/5. See also Susan Randolph and Shareen Hertel, 'The Right to Food: A Global Perspective' in Lanse Minkler (ed), *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013) 25-26.

384 PDS (Control) Order 2015, rule 4(2).

385 Department of Food and Public Distribution, 'Antyodaya Anna Yojana (AAY)' (2020) <<https://dfpd.gov.in/pds-aay.htm>> accessed 25 June 2020.

- All children, including those pending nationality determinations, must have access to the mid-day meal scheme, which provides a balanced and nutritious mid-day meal to all primary school children. This will be in tandem with India's obligations under **Article 24** of the **CRC**, which directs measures to prevent malnutrition and disease and commit to preventive health care.

D.1 SHELTER AND HOUSING

Article 11 of the **ICESCR** recognises 'the right of everyone to an adequate standard of living for himself and his family, including... adequate housing'.³⁸⁶ While interpreting this right, the CESCR has explained that to successfully satisfy its obligations under Article 11, the state must demonstrate that it has taken all steps necessary, whether as an individual state or by securing international assistance, to 'ascertain the full extent of homelessness and inadequate housing within its jurisdiction'.³⁸⁷ Parallel international obligations that recognise the right to shelter and adequate housing, include **Article 25(1)** of the **UDHR**, **Articles 14(2)** and **15(2)** of **CEDAW**, **Article 5(e)(iii)** of **ICERD** and **Article 27(3)** of **CRC**, among others.

The right to housing and proof of residence are interconnected with access to basic services and are often the cause or consequence of other human rights violations, much like the right to nationality.³⁸⁸ Access to adequate housing and proof of residence is often a prerequisite for gaining access to the right to work, education, financial independence, and privacy, among others, making it a vital right. Stateless populations and non-citizens are more prone to forced evictions, a risk which is

³⁸⁶ ICESCR art 11.

³⁸⁷ UN Committee on Economic, Social and Cultural Rights 'CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11, Para. 13, of the Covenant)' (1991) UN Doc E/1992/23.

³⁸⁸ Benjamin Gronowski, 'The Right to a Nationality and the Right to Adequate Housing: An Analysis of the Intersection of Two Largely 'Invisible' Human Rights Violations' (2019) 1(2) *Statelessness and Citizenship Review* 239, 241.

exacerbated for marginalised identities such as women, children, indigenous persons and minorities. The conditions of poverty and resulting discrimination further aggravate living conditions for this vulnerable demographic. The discrimination and barriers that stateless persons face in relation to accessing shelter, include discriminatory lending practices, the threat and execution of forced evictions, and segregation, among others.³⁸⁹

D.2 RECOMMENDATIONS

- Good practices in this regard include:
 - **Ecuador's** Human Mobility Law 2017 facilitates recognised stateless persons to acquire temporary lawful residence status, which in turn entitles them to healthcare access, the right to work, and other social security benefits.³⁹⁰
 - The recently established Statelessness Determination Process in the **Philippines** provides for an explicit right to residence for a person found to be stateless and their family member.³⁹¹
- India must include stateless persons in state-driven housing programmes such as *Pradhan Mantri Awas Yojna* which seeks to provide affordable housing to the urban poor by 2022.³⁹²

E.1 EDUCATION

The right to education is distinctly important in equipping stateless persons to access employment opportunities and

³⁸⁹ *ibid.*

³⁹⁰ Organic Law on Human Mobility (Ecuador).

³⁹¹ Department of Justice, Manila, 'Department Circular No. 058 - Establishing the Refugees and Stateless Status Determination Procedure' (2012) <<https://www.refworld.org/docid/5086932e.html>> accessed 3 February 2020.

³⁹² Ministry of Housing and Urban Affairs, 'Pradhan Mantri Awas Yojana (Urban)-PMAY (U)' (2015) <<https://pmaymis.gov.in/>> accessed 23 June 2020.

working for their betterment, so as to escape destitution and exploitation. **Article 26** of the **UDHR** provides for the right to education for all persons for the full development of the human personality and to strengthen respect for human rights and fundamental freedoms. This right has been further affirmed in international treaties, including the **ICESCR (Articles 13 and 14)**, **CRC (Articles 28 and 29)**, **ICERD (Articles 5 and 7)** and the **CRPD (Article 24)**. Given the fact that stateless persons face multiple barriers in accessing education, the state has to ensure that education is made accessible to such persons in conformity with the principles laid down in international instruments. This is affirmed by the Committee on the Elimination of Racial Discrimination ('CERD') in **General Recommendation XXX** (2002). This Recommendation calls on states to ensure that public educational institutions are open to non-citizens and children of undocumented migrant residents within their respective territories.³⁹³

The strongest manifestation of the right to education is present within the **ICESCR. Article 13** of the Convention calls for the recognition of the right for everyone. The aim of this provision is to ensure the development of human personality and to cultivate effective participation in society. India recorded a reservation to this Article stating that the government reserved its right to 'apply its law relating to foreigners'.³⁹⁴ However, it is important to note that the said reservation does not vitiate the state's obligation to provide education to stateless persons and precarious citizens, as shown above. It would come into effect only in cases of persons who are recognised nationals of another state.

The right to education and its application to all persons is further corroborated by Indian case law. In *Maharishi Mahesh Yogi Vedic Vidyalaya*, the Supreme Court affirmed India's obligation to implement the provisions contained in the UDHR and CRC vis-à-

393 UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXX on Discrimination against Non-Citizens' (2002) 5 <<https://www.refworld.org/docid/45139e084.html>> accessed 20 July 2020.

394 ICESCR art 13.

vis education.³⁹⁵ It took note of India's participation in drafting the declaration as well as the ratification of the convention. Thus, the Court clarified the scope of the right enshrined in **Article 21A** of the Constitution which provides for free and compulsory education for all children aged 6 to 14 to be ensured by the State.

However, no consideration has been given yet to statelessness in adjudications on **Article 21A** by the Supreme Court. Furthermore, there are several inadequacies with respect to Article 21A and its implementation. The lack of any sanctions for not attending or enrolling in school render the provision toothless.³⁹⁶ The **Right to Education Act** provides for prohibition of discrimination against children from disadvantaged and weaker groups, which would not necessarily ensure that stateless children receive education.³⁹⁷ Furthermore, Article 21A requires that quality education should be imparted without discrimination on the basis of socio-economic or cultural background.³⁹⁸ To achieve this purpose, it is important that teachers possess the requisite competence.

The UNHCR officially states that refugee children in India have access to free education at government schools 'at par with local children'.³⁹⁹ Moreover, UNHCR facilitates government school enrolment and retention drives to aid refugee families in the procedures regarding enrolment as well as language and other support classes through their implementing partners.⁴⁰⁰ In April 2017, the government issued an order for the provision of educational facilities for refugees.⁴⁰¹ However, it is not always guaranteed that educational institutions will recognise their documentation.

395 *Maharishi Mahesh Yogi Vedic Vidyalaya v State of Madhya Pradesh* (2013) 15 SCC 677.

396 Florian Matthey-Prakash, *The Right to Education in India* (OUP 2019).

397 The Right of Children to Free and Compulsory Education Act 2009.

398 *State of Tamil Nadu v K Shyam Sunder* (2011) 8 SCC 737.

399 UNHCR, 'Factsheet India' (n 375).

400 UNHCR, 'Factsheet India' (n 375).

401 Jessica Field and Srinivas Burra (eds), *The Global Compact on Refugees* (n 377) 111.

E.2 RECOMMENDATIONS

- The Indian state must report on existing numbers of stateless children in the National Survey on Out-of-School Children.
- India must take necessary steps in line with **General Comment 13 of the CESCR** and **General Recommendation XXX** of the **CERD** to prevent segregation and differential treatment of stateless children in elementary and secondary schooling as well as access to higher education.⁴⁰²
- The Indian state shall involve civil society actors such as NGOs to ensure access to education for stateless children. The example of **Malaysia** and the work done by the NGO 'NurSalam' may be instructive in this regard.⁴⁰³

F.1 EMPLOYMENT

The right to work is a crucial facet of the right to a dignified existence. Gainful employment is necessary not merely for subsistence, but also for 'self-realisation, development of human personality, and inclusion in society'.⁴⁰⁴ In the absence of an effective nationality, stateless persons are shut out of contributing to the labour economy and the mobility it offers, and are vulnerable to marginalization, exploitation, and inhumane working conditions.

The right to work was first explicitly included under **Article 23(1)** of the **UDHR**. **Article 6** of the **ICESCR** requires state parties to fully realise this right through 'technical and

402 UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXX' (n 393), para 31. See UN Committee on Economic, Social and Cultural Rights 'CESCR General Comment No. 13: The Right to Education (Art. 13 of the Covenant)' (1999) UN Doc E/C.12/1999/10.

403 UNHCR 'Good Practices: Addressing Statelessness in South East Asia' (n 359).

404 Angelika Nussberger, 'Work, Right to, International Protection' (*Max Planck Encyclopaedias of International Law*, 2017) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e891>> accessed 30 June 2020.

vocational guidance and training programmes, policies and techniques to achieve steady economic, social, and cultural development, and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual’.⁴⁰⁵ Apart from these treaties that India is party to, the Supreme Court has interpreted the right to livelihood into the right to life under Article 21. *Olga Tellis* dealt with the forcible eviction of pavement slum dwellers by the Municipal Corporation.⁴⁰⁶ The petitioners stated that they were compelled to live on the pavement due to its proximity to their place of work, thus saving them time and money. The Court held that their forcible eviction would amount to a deprivation of their livelihood, which is protected by the right to life. The close nexus between life and means of livelihood necessitates that the deprivation of livelihood ‘would not only denude the life of its effective content and meaningfulness but it would make life impossible to live’.⁴⁰⁷ It is imperative, therefore, that precarious citizens in Assam and stateless persons are not divested of their right to livelihood.

With respect to refugee groups, the Indian government has historically provided LTVs to refugees and has not stopped them from being employed in the informal sector.⁴⁰⁸ However, this access to employment is uneven and differs from one refugee community to another. For example, Rohingya refugees struggle to find employment outside of the informal sector for a multitude of reasons including their language skills, which are a product of their specific contexts.⁴⁰⁹ Nonetheless, the implementing partners of the UNHCR provide support in the form of ‘vocational training, skills training, and innovative strategies’ which has meant the development of skills such as tailoring, embroidery, and electronics in the case of the Afghan refugee community.⁴¹⁰

405 ICESCR art 6.

406 *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.

407 *ibid.*

408 Jessica Field and Srinivas Burra (eds), *The Global Compact on Refugees* (n 377) 112.

409 Jessica Field, Anubhav Dutt Tiwari and Yamini Mookherjee, ‘Urban refugees in Delhi’ (n 326).

410 Jessica Field and Srinivas Burra (eds), *The Global Compact on Refugees* (n 377) 216.

F.2 RECOMMENDATIONS

- India must provide identity certificates to all stateless persons which shall ensure stability of residence and employment. This is essential towards the greater assimilation of stateless persons into local economies and communities. Current Ministry of Home Affairs guidelines stipulate that stateless persons would be granted long term visas for an initial period of one year only, before having to apply for renewal.⁴¹¹
- The government could collaborate with civil society organisations to provide language training, vocational and technical training and other skill development programmes to stateless populations.

⁴¹¹ Ministry of Home Affairs, 'Long Term Visas' (2018) <https://mha.gov.in/PDF_Other/AnnexVI_01022018.pdf> accessed 14 June 2020.

III. Stateless Children and Their Socio-Economic Rights

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SECTION III.A

A. INDIA'S OBLIGATIONS UNDER THE CRC FOR THE DEVELOPMENT OF ALL CHILDREN FACING STATELESSNESS

As emphasised in this report, India is bound by the CRC. Additionally, the different decisions and recommendations of the Committee on the Rights of the Child are binding towards India, as it is the authoritative interpretative body of the CRC.⁴¹²

Article 3 of the **CRC** sets forth the concept of 'best interest of the child', which has to be the primary consideration in all actions concerning a decision that would impact children.⁴¹³ The obligation entails that a child shall not be separated from their parents, except under strict exceptions that would be in the sole interest of the child.⁴¹⁴ **Article 9** of the **CRC** (which has also been incorporated within the **Juvenile Justice (Care and Protection of Children) Act, 2000**) clarifies that if such separation has to be made, then at least some contact should be kept with the parent, unless it is contrary to the child's best interest.

Development in its broadest sense is a 'holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development'.⁴¹⁵ Implementation measures should aim for optimal development for all children and ensuring the child's capacity for developing talents and abilities to their fullest potential, thus preparing the child for a responsible life in a free society. This capacity requires healthcare,

⁴¹² CRC art 45 (d).

⁴¹³ Committee on the Rights of the Child 'General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)' (2003) UN Doc CRC/GC/2003/5, [45]-[47].

⁴¹⁴ CRC art 9.

⁴¹⁵ Committee on the Rights of the Child 'General Comment No. 5' (n 413), [12].

an adequate standard of living, and an education. Furthermore, as stated by the ECtHR in *Belgian Linguistic*, although the right to education provides states with a wide margin of appreciation to enshrine this right for children, this margin shall not undermine the right of education itself.⁴¹⁶ Hence, states must provide children with a proper education system for such rights to be considered as effective – the mere existence of an education system is insufficient. Regarding the right to health towards children, the Court held that special healthcare must be provided to children belonging to vulnerable groups. The ECtHR arrived at this decision while focusing on the vulnerability of communities like the Roma.⁴¹⁷ The ECtHR recalled the ‘positive obligation to provide access to utilities, especially to a socially disadvantaged group’ for the welfare of children among these groups.⁴¹⁸ Hence, children belonging to vulnerable groups should be offered extra protection with respect to healthcare and access to these health facilities.

B. INDIA’S OBLIGATION UNDER THE CRC AND ARTICLE 21 TO REGISTER ALL BIRTHS IN ITS TERRITORY

As noted earlier, **Article 7** of the **CRC** mandates the immediate birth registration of a child. States should continue implementing a comprehensive strategy in order to achieve 100 percent birth registration as soon as possible.⁴¹⁹ This right of registration prohibits all types of discrimination, whether discrimination against children born out of a wedlock or because of their

⁴¹⁶ *Relating to certain aspects of the laws on the use of languages in education in Belgium v Belgium* App no 1474/62 (ECtHR, 23 July 1968).

⁴¹⁷ *DH and others v Czech Republic* App no 57325/0013 (ECtHR, November 2007) 205.

⁴¹⁸ *Hudorovič v Slovenia* App nos 24816/14 and 25140/14 (ECtHR, 10 March 2020) 143.

⁴¹⁹ Committee on the Right of the Child, Sao Tome and Principe CRC/C/15/Add.235 [30].

nationality.⁴²⁰ It is important to note that an inefficient birth registration system is not only a violation of the state's obligations under the CRC but also an **Article 21** violation [↗].

C. RECOMMENDATIONS

- The Indian state must provide adequate housing to stateless families with children on a priority basis. Local authorities providing health support must ensure that stateless children and the children facing statelessness receive extra care since they are a vulnerable group.
- India must ensure that all children, irrespective of nationality status, have universal access to public educational institutions under the right to education. Local authorities must be sensitised to ensure that stateless children are not hindered from accessing education in order to ensure the development of the child.
- India should take heed from state practice in **Thailand**⁴²¹ to improve the existing birth registration system by:
 - Introducing birth registration units and public awareness campaigns to reach the most remote areas of its territory;
 - Strengthening cooperation between the birth registration authority and maternity clinics, hospitals, midwives and traditional birth attendants, in order to achieve better birth registration coverage in the country;

⁴²⁰ Committee on the Right of the Child Uruguay CRC/C/15/Add.62 [11]. See also *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*, Decision no 002/Com/002/2009 (ACERWC, 22 March 2011). <<https://www.refworld.org/cases,ACERWC,4f5f04492.html>> accessed 18 June 2020.

⁴²¹ Committee on the Right of the Child 'Consideration of reports submitted by States parties under article 44 of the Convention: Thailand' (2012) UN Doc CRC/C/THA/CO/2 [32].

- Continuing to develop and widely disseminate clear guidelines and regulations on birth registration to officials at the national and local levels;
- Ensuring that children whose births have not been registered and who are without official documentation have access to basic services, such as health and education, while waiting to be properly registered.

IV. Summary and Key Recommendations

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SECTION IV.

This chapter has highlighted how statelessness and its corresponding outcomes are deeply intertwined with socio-economic rights. In recognition of this and the fact that citizens themselves are struggling to access these rights, there are both domestic and international legal checks in place to protect vulnerable communities. The Indian state's approach to the Tibetan and refugee community (via the UNHCR), as well as international legal instruments, such as **Article 25** of the **UDHR**, exemplify the principle that all persons (regardless of their citizenship status) should be afforded basic protections in the form of socio-economic rights. These rights broadly include access to documentation, health and healthcare, food and nutrition, shelter, housing, education, and employment, as well as a particular obligation to protect children under the **CRC** and **Article 21** of the Indian Constitution. Thus, the following recommendations with regards to the obligations of the Indian state represent the fundamental principle (that has been asserted by Indian courts) that state limitations – financial, or otherwise – cannot prevent the state from meeting these minimum requirements to protect vulnerable communities residing within its territory.

1. India must sign and ratify the 1954 Convention and the 1961 Convention

India must sign and ratify both statelessness conventions which clarify the standards of treatment owed to stateless persons. The 1954 Convention prescribes some welfare rights at par with those enjoyed by nationals (**Article 20-23**). It lays down a foundational level of protection relating to housing, access to education, healthcare, employment guarantees, among other welfare mechanisms. Unfettered by this Convention, India should strategise and enact further levels of protection to stateless persons, as suggested in this chapter.

2. India must strengthen access to documentation for stateless persons

All stateless persons must receive an identity card similar to the UNHCR refugee card which recognises the vulnerable status of the person and grants them immediate access to socio-economic entitlements such as public schooling for minors, access to healthcare, and ration through the PDS, among others. This is only possible through an overall integration of these identity cards as an eligibility criterion for access to existing and targeted welfare mechanisms.

3. India must continue and strengthen access to the full gamut of rights available to everyone in its territory

The state must organise mass mobile documentation camps to ensure all Indian residents get any documentation that they might be lacking. This will allow the state to ensure targeted relief and consideration to everyone in Indian territory. Persons excluded from the arbitrary NRC process must not suffer any form of deprivation from access to and ownership of property, housing, employment, or any other entitlement or right enumerated in this report.

4. India must ensure that no persons are excluded from socio-economic welfare schemes

As this report has argued, the Indian state must ensure that the Indian citizens excluded from the NRC in Assam are not denied access to the state's welfare mechanisms for citizens. Stateless persons in Indian territory must be issued identity certificates, essential to ensuring continued stability of residence for optimal access to social security measures, effective employment, and integration with the local community. Children, in particular, must not be denied access to welfare schemes at any stage, including when their birth registrations and identity documents are pending.

5. India should develop a collaborative and inclusive delivery mechanism for socio-economic entitlements

India must strengthen and enhance its service delivery mechanism for food, housing, sanitation, and healthcare in tandem with the concerned state governments. Public health and sanitation are State subjects under **List II** of the **Seventh Schedule** of the **Constitution**.⁴²² Social security and insurance, welfare of labour, and education are under the ambit of the Centre and the State Governments in the **Concurrent List**.⁴²³ It is essential that there is smooth coordination between the Centre and the states in order to ensure effective last-mile delivery to all vulnerable persons.

6. Civil society actors must consult, collaborate, and advocate with the Government for stateless persons' needs

Civil society organizations must advocate for the inclusion of stateless persons in public welfare schemes. They have key roles to play in accountability, transparency, participation, and inclusion of stateless persons in development programmes.⁴²⁴ The government must collaborate with civil society organizations for effective mapping of stateless populations and their needs to minimise disruptions in supply chains of essential goods and services.

⁴²² Constitution of India 1950, Entry 6, List II, Seventh Schedule.

⁴²³ Constitution of India 1950, Entries 23-26, List III, Seventh Schedule.

⁴²⁴ Institute of Statelessness and Inclusion, 'Statelessness, Human Rights, and the Sustainable Development Agenda' (2017) 37 <https://files.institutesi.org/SDG_working-paper2017.pdf> accessed 14 June 2020.

Key Recommendations

1. India must at least accede to the following international legal instruments:

- 1954 Convention
- 1961 Convention; and
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ('CRMW').

2. India must enact a national legislation for stateless persons that is consistent with international law on statelessness

India must enact such an aforementioned legislation including and not limited to provisions regarding the following issues:

- Stateless persons in India shall have a path to citizenship.
- The Indian state should provide an automatic path to citizenship to all children who would otherwise be rendered stateless.
- The 1986 and the 2003 amendments to the **Citizenship Act** must be done away with, keeping the pre-1986 amendment *jus soli* principle intact.

- The birth registration system in India should be made more efficient, uniform and non-discriminatory to prevent and reduce statelessness among children.
- India must ensure the speedy, comprehensive, and efficient issuance of identity certificates to all stateless persons, identifying them as such. These should enable their stable residence and grant them employment rights in the private sector.
- India must provide effective remedies for those seeking to resolve their documentation status.

3. India must affirm the citizenship of all the people facing arbitrary deprivation of citizenship

India must affirm the citizenship of all the precarious citizens in Assam who have ended up in this vulnerable position as a result of arbitrary citizenship deprivation exercises. These exercises – NRC and FTs – must be immediately halted. Precarious citizens are at the brink of statelessness since they are facing the threat of arbitrary deprivation of nationality, which violates Indian and international law. Their right to nationality and India's obligation to eradicate statelessness make it imperative for the state to affirm their citizenship. This affirmation must be a non-discretionary, non-bureaucratic process. Any application process would risk discrimination, abuse and exclusion. In other words, it shall be an automatic affirmation of the citizenship these persons rightly have.

4. India should amend its citizenship laws to implement more flexible naturalisation routes

India is obligated under international law on statelessness to naturalise stateless persons in Indian territory. This applies to persons who were stateless when they arrived in India and have been residing in the country since then. Naturalisation would fulfil the obligation to prevent and reduce statelessness by operationalising their right to nationality. The present practice of examining elements such as the length of the stay in the territory, place of birth, family situation, establishment of permanent residence in the country, integration within society, share of a common culture, knowledge of the language and history would prove ineffective as a blanket solution to the issue. Given the socio-economic deprivation of stateless persons, they may be left out if the authorities exercise their discretion on the above-mentioned elements. The 2003 Sri Lankan law on grant of nationality shall be followed as the best practice. NGOs and legal aid organisations could play a role in enumerating the potential beneficiaries and assist them in accessing the resultant citizenship documents.

5. India should expand the powers of the National and State Human Rights Commissions

India should expand the enforcement rights of the National Human Rights Commission ('NHRC') and State Human Rights Commissions ('SHRCs') and broaden their competencies as consultative actors, so that their recommendations are implemented by State and Central Governments. The Commissions would thus be able to function akin to an Ombudsman dealing with discrimination faced by vulnerable people, like those rendered stateless. Therefore, commissions dealing with human rights of people facing statelessness in Assam such as the NHRC, the National Commission for Minorities, and the National Commission for Women should be promoted as core actors in the fields of nationality and registration.

6. India must recognise the prohibition of arbitrary detention of precarious citizens and stateless persons and release them immediately

The government and the courts must not sanction the detention of precarious citizens in Assam and stateless persons in Indian territory. The state must conduct exercises mapping the status and duration of detention of all detainees in existing detention centres in Assam and release them immediately. Stateless persons and precarious citizens cannot be detained under the guise of deportation. Children, in particular, must never be detained. Clear and comprehensive regulations must be drafted by each state, with periodic review of detention measures and the right to release when there is no imminent prospect of removal. Such guidelines will help minimise the possibility of indefinite detention of stateless persons.

7. India must develop a streamlined deportation policy to create a sense of foreseeability for persons detained for deportation

To fully ensure that no detainees find themselves in detention for disproportionately long periods pending deportation, the Government of India should arrive at bilateral agreements with the governments of other countries in order to streamline a status determination and deportation policy for all impugned foreigners.

8. Indian states must divert costs from construction of detention centres to less liberty-restrictive alternatives to detention

As prisons fall under the **State List** of the **Seventh Schedule** of the **Constitution**, state governments must actively invest in alternatives to detention that are less infringing of personal liberty of stateless persons and more cost-effective. The availability of alternatives is essential to prevent detainees from languishing in detention centres for an indefinite duration.

9. Civil society organizations must be allowed free access to detention centres

Civil society organizations, both domestic and international, must be allowed free and unrestricted access to detention centres and to all detainees, in order to assess their needs and assist them in procuring information and legal aid in furtherance of their civil rights. NGOs can also collaborate with the government towards maintaining a case management system for detainees.

10. India must strengthen access to documentation for stateless persons

All stateless persons must receive an identity card similar to the UNHCR refugee card which recognises the vulnerable status of the person and grants them immediate access to socio-economic entitlements such as public schooling for minors, access to healthcare, and ration through the PDS, among others. This is only possible through an overall integration of these identity cards as an eligibility criterion for access to existing and targeted welfare mechanisms.

11. India must continue and strengthen access to the full gamut of rights available to everyone in its territory

The state must organise mass mobile documentation camps to ensure all Indian residents get any documentation that they might be lacking. This will allow the state to ensure targeted relief and consideration to everyone in Indian territory. Persons excluded from the arbitrary NRC process must not suffer any form of deprivation from access to and ownership of property, housing, employment, or any other entitlement/right enumerated in this report.

12. India must ensure that no persons are excluded from socio-economic welfare schemes

As this report has argued, the Indian state must ensure that the Indian citizens excluded from the NRC in Assam are not denied access to the state's welfare mechanisms for citizens. Stateless persons in Indian territory must be issued identity certificates, essential to ensuring continued stability of residence for optimal access to social security measures, effective employment, and integration with the local community. Children, in particular, must not be denied access to welfare schemes at any stage, including when their birth registrations and identity documents are pending.

13. India should develop a collaborative and inclusive delivery mechanism for socio-economic entitlements

India must strengthen and enhance its service delivery mechanism for food, housing, sanitation, and healthcare in tandem with the concerned state governments. Public health and sanitation are State subjects under **List II** of the **Seventh Schedule** of the **Constitution**.⁴²⁵ Social security and insurance, welfare of labour, and education are under the ambit of the Centre and the State Governments in the **Concurrent List**.⁴²⁶ It is essential that there is smooth coordination between the Centre and the State in order to ensure effective last-mile delivery to all vulnerable persons.

14. Civil society actors must consult, collaborate, and advocate with the Government for stateless persons' needs

Civil society organizations must advocate for the inclusion of stateless persons in public welfare schemes. They have key roles to play in accountability, transparency, participation, and inclusion of stateless persons in development programmes.⁴²⁷ The government must collaborate with civil society organizations for effective mapping of stateless populations and their needs to minimise disruptions in supply chains of essential goods and services.

⁴²⁵ Constitution of India 1950, Entry 6, List II, Seventh Schedule.

⁴²⁶ Constitution of India 1950, Entries 23-26, List III, Seventh Schedule.

⁴²⁷ Institute of Statelessness and Inclusion, 'Statelessness, Human Rights, and the Sustainable Development Agenda' (2017) 37 <https://files.institutesi.org/SDG_working-paper2017.pdf> accessed 14 June 2020.

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Securing Citizenship addresses the crisis of citizenship in India vis-à-vis precarious citizens in Assam facing the threat of arbitrary deprivation of nationality, and stateless persons in India. It draws from Indian and international law, and is divided into three chapters – citizenship status, detention and socio-economic rights. It argues that India is legally bound to prevent and reduce statelessness. India must affirm the citizenship of precarious citizens in Assam. It also argues that India cannot detain precarious citizens and stateless persons, and must ensure the full gamut of socio-economic rights is available to stateless persons in the Indian territory.

