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The Rights of Non-Citizens: Refugees and the Stateless

People are particularly vulnerable to human rights violations when they are outside their State of citizenship, or they cannot be recognized as a citizen by any State, in the case of stateless people.

Individuals residing inside their State often receive government services, are protected by law, and usually speak the local language, all of which gives them greater protection. However, if that person is not recognized as a citizen (and especially if they are not legally in that country), they become much more vulnerable to abuse. The vulnerability of these people has led to the introduction of human rights standards to increase their protection. Coming chapters will examine how people living outside their State, people travelling between States, and stateless individuals should be protected by examining the main categories of non citizens: in this chapter stateless people and refugees, and migrant workers and trafficked persons in the next chapter. This is by no means all the types of non citizens, but they are the most vulnerable.

If someone does not hold citizenship documents, is migrating irregularly, or is undocumented (that is, without paperwork such as visas or passports), they are vulnerable to mistreatment, discrimination, exploitation, crime, and a range of other threats. They are vulnerable to abuse, for example most migrant workers do not get the same treatment as national workers. They do not get the services they may need, say access to health or education. The reasons are that they may not be adequately protected by national laws, and in some cases, may not even be protected by their consulates (consulate services are provided by embassies to help their citizens in another country), leaving them without any form of protection at all, unless they can access their human rights. In some cases their human rights are the only legal protection they can access, though there are great challenges to recognizing the human rights of these non citizens.

International standards, mechanisms, and organizations dedicated specifically to the protection of non-citizens, do exist. All non-citizens should still be able to enjoy their human rights simply because they are human, but most countries in Southeast Asia tend to ignore, or at least hide, the violations and threats faced by migrants, refugees, and migrant workers. In response to these vulnerabilities, migrant workers, refugees and asylum seekers, trafficked and stateless persons, have special rights to help protect them, because the international community recognizes the need for their protection.

DISCUSSION AND DEBATE

How to protect non-citizens from discrimination and exploitation

Discrimination and exploitation of non-citizens may take many forms. For example, it can take the form of verbal insults, physical threats and abuse, or a less obvious forms of discrimination such as unfavorable treatment or increased difficulty to access services. You may hear people talk poorly about migrants or refugees as if they are a burden on your society. You may also have seen exploitation of non-citizens yourself, although it often takes place behind the closed doors of factories, on isolated hillsides in plantations, or in the kitchens of a local restaurant. Alternatively, you may have seen workers on a construction site and wondered if they are being paid enough, if they have a safe place to sleep, or if they are able to leave the work site.



However, citizens may be exploited alongside non-citizens, so it is not always clear if the non-citizen is being singled out. You may not know if a person is a citizen or a non-citizen until you see their identification cards. Thus, the discrimination and exploitation of non-citizens is often able to hide in plain sight.

What can be done to give better protection, and better respect, for the rights of non citizens? What information should people know so they will stop discriminating them?

6.1 Migration in Southeast Asia

6.1.1 Terminology

Before examining the human rights context, it is first useful to look at some of main migration concepts and terminologies. These may appear confusing and problematic, but there is often an important reason why these terms are used. This textbook uses the term ‘non-citizens’ to refer to people who are in a State where they are not a citizen. This includes such people as refugees and asylum seekers (and this distinction will be detailed below), immigrants, migrant workers, tourists, diplomats, expatriates, stateless and trafficked persons (though it is possible that a trafficked person can be a citizen of the State where they are trafficked, though this tends not to happen). The term ‘non-citizens’ is used because it is broader and encompasses all of the above, and it is the status of being a non citizen which leads to vulnerability and threats to a person’s security.

Migration itself (that is the process of moving from one country to another) can be termed irregular, regular, forced, or voluntary. Regular implies the migrant reached the country in a regular way which is recognized by the States and is legal, such as coming through an airport and having a passport and visa. An irregular arrival applies to someone who bypassed the proper channels and therefore may not have the necessary documentation, such as an arrival stamp in their passport or a valid visa, or they may have not gone through an immigration checkpoint when they arrived. Forced migration occurs when someone is compelled to leave their country because they were forced out by conflict or the threat of violence, which is commonly the case for refugees.

Migrants themselves may be termed regular or irregular, documented or undocumented, and legal or illegal. Each of these terms implies the same thing: whether individuals have the proper documentation to be inside a country. If migrants possess such documents as passports and visas, they are considered to be regular, documented, or legally in a country. There is an important politics behind these terms as they give distinctions between different types of non-citizens. Those without the proper documents are deemed to have committed a crime and will be treated as illegal migrants. All States in Southeast Asia use the term ‘illegal migrants’ to term those people in their country who do not have the proper documentation. Calling someone ‘illegal’ suggests they are involved in some kind of criminal activity, and that they can be arrested. But can a one year old child of undocumented migrant workers be considered a criminal? The preferred term in this situation is “undocumented” as it takes away the presumption of criminality. Further, legal status can be blurred. For example, if someone accidentally overstays their visa, do they automatically become a criminal? However, States have tended to use the distinction between illegal and legal migration to better control non-citizens: in other words, labeling undocumented people as illegal gives the State an excuse to arrest and expel any individuals who cannot produce the correct documentation.

A major concern is that by strictly policing people's opportunities to legally enter a country will result in people being forced to illegally enter the country. Trends favoring restrictive migration policies in the region do not have the desired results of less migrants and higher numbers of documented migrants, but instead may change documented migrants into undocumented ones. Another impact of restricting migration is the growth of organizations involved in the informal smuggling of people for labor. Smuggling, forged documentation, and bribery of officials, are all methods employed to cross borders illegally. By increasing illegal or irregular entry into a country will also increase the vulnerability of people to human rights abuses. High rates of irregular migration in the region have severe implications. Irregular migration combined with flawed identification and documentation systems, and increases in criminal enterprises, result in insecurity. For individuals migrating in an irregular way, there is a vulnerability to human rights violations, exploitation, and trafficking.

CONCEPT

Calling a person illegal

Human rights defenders prefer the term 'irregular' or 'undocumented' to 'illegal.' Calling a person illegal has many negative connotations. It implies that the person has knowingly committed a crime. It represents them as bad, or evil. However, an undocumented status commonly occurs because governments often make legal documentation very difficult or expensive, forcing migrants to take on an undocumented status. When it comes to migration, few people break the law because they want to break the law, rather they do it because they lack the means (such as documents or money) to comply with regulations.



6.1.1 Historical and Economic Context to Migration in Southeast Asia

Through migration, people have been able to escape persecution. Millions of migrating workers have improved their livelihoods and the livelihoods of their families. People regularly migrate for their education and migrants have traveled to establish new communities in distant countries. In fact, there is a long history of migration within the Southeast Asia region, and also to the region from outside. For instance, people from India and China have migrated to countries in Southeast Asia for centuries. Migration has always been the norm and not the exception of the way people live in this region.

Porous borders, armed conflicts, mixed economic growth, inconsistent legal infrastructures, long-standing historical migration patterns, demographic transitions, and limited formal channels for migration, have combined to result in high levels of undocumented migration and strained relationships between governments and migrants in Southeast Asia. The movement of people is highly dynamic, resulting in complex flows between countries. Much migration in the 1970s and 1980s occurred as a result of large-scale conflicts, such as the American war in Vietnam (which also split across borders in Laos and Cambodia), and the ongoing conflicts in Myanmar. Likewise, the "Asian Miracle" of the 1980s, when manufacturing and banking sectors in the region developed rapidly, has also led to significant migration to find work.

The huge demand for labor from developing countries such as Thailand, Malaysia, and Singapore encouraged many men, women, and even whole families to migrate. The regional economy contributes to large scale migration in two ways. First, there are relatively poor nations bordering rich ones (Myanmar and Thailand, for example), where large numbers of workers will move to meet the demand for workers. Second, periods of rapid economic development often require large working populations which cannot be met by natural population growth alone. Recent studies, by organizations such as ILO and IOM, note that migration is a result of the rapid growth in demand for skilled and less skilled migrants, the high proportion of women entering the migrant workforce, and a commercialized recruitment industry.

Migrant workers take many routes. Workers migrating out of the region tend to be from Indonesia, the Philippines, and Thailand, to the Middle East and East Asia. As to the actual work involved, men mainly work in construction while women are found in domestic work and factories. Most migrant workers leaving the region are documented. Within the region, the majority of documented and undocumented migrant workers tend to migrate to bordering countries. The largest flows are from the Philippines, Indonesia, and Burma to the more developed countries of Singapore, Thailand, and Malaysia. There are also smaller, but significant, flows of people from Laos and Cambodia into these three countries. However, one problem often encountered when studying migration is that data is difficult to collect because of the large number of undocumented migrants. A further complexity to understanding migration is that paths are often mixed, with workers, refugees, trafficked people, and even tourists all being part of the same flow, and often being mixed together. Distinguishing between forced or unforced migration is difficult: the law assumes those who leave their country directly due to political reasons are forced migrants, whereas others who move because the conflict indirectly caused their poverty (for example, if the army confiscated their food crops) are not necessarily considered forced. Some movement occurs clearly for economic reasons (such as Philippine domestic laborers into Singapore), and some movement is clearly forced (such as political refugees from Myanmar). However, the dynamics of migration are much more complex on the ground. Refugees may start as economic migrants, economic migrants may become trafficked, and victims of trafficking may seek refugee status, and so on. In some situations, it is problematic to assume that economic problems can be distinguished from political problems, as a person's reasons for seeking economic security are often connected to their political vulnerability.

For decades, migration has taken place without any regional protection mechanisms. Migration policies in the region remain fragmented, underdeveloped, and unenforceable, as government efforts to manage migration have either been ineffective, or co-opted by private sector demand. Early efforts such as the Bangkok Declaration on Irregular Migration (1999), which recognized the existence of irregular migrants and the need for States to act on this, were useful in terms of highlighting actual problems, but were ultimately unenforceable and therefore could not protect migrant workers. Recently, there has been a growth in regional migration regulations with more formal agreements, such as the bilateral migrant worker agreements signed between Thailand and Cambodia, Laos and Myanmar; there are also regional level meetings, such as the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, which has the objective of increasing awareness and coordination in counter trafficking activities between States and international organizations such as the UNHCR and IOM. However, the growth in regulation has only had a moderate impact on the protection of non-citizens.

Governments often favor migration policies which attempt to dictate the number and types of migrants, but these policies are not realistic as migration is heavily dependent on social, cultural, and economic factors. For example, migration in the region significantly altered after the terrorist attacks on 11 September 2001. Governments began to see migration as a security concern, and using emerging laws around trafficking and smuggling, attempted to reduce irregular migration. Some countries have largely been ignorant of their migrant population. For much of the 1990s and 2000s, Myanmar established a policy for its few workers in the Middle East, but it went for decades without a policy (or even recognition) that an estimated 2 million Myanmar citizens were working in Thailand.

Compounding the vulnerability associated with migration in Southeast Asia is the increase in discrimination against migrants by citizens. People fear that migrants cause an increase in crime. The domestic workforce may see migrant labor as a potential threat to their jobs and wages. Further, Southeast Asia governments tend to treat migration as a security issue, comparing it to transitional crime. Not surprisingly, this creates a situation where migrants are seen as threats to local communities, social harmony, and national security. In addition, States may focus only on profiting from migration, rather than protecting it. Thus, in some cases, migrants may become victims of corruption and exploitation even before they leave their country. Then, upon arrival in their country of work, they may also face discriminatory laws and law enforcement, hate crimes, trafficking, and a range of other violations.

DISCUSSION AND DEBATE

How accurate are people's fears of migrants?

What are the most common ways migrants are criticized in your country? How accurate are these criticisms? These are some common criticisms made:

- Migrants bring crime
- If we treat migrants too well they will flood into the country and take it over
- Migrants are taking our jobs
- Migrants bring disease
- Migrants use all our social services like health
- Migrants do not respect our culture

How should you respond to these statements? While there is not a lot of research on these issues, it appears that most of these claims are incorrect. For example migrants tend to have lower rates of criminal activity. Migrants tend to contribute much more to the economy through their work than they take with social services. Migrants have never flooded into a country and taken it over, at most they become a large minority after generations of living in the country. Further, most people's family history (including most students reading this textbook), are the product of migration.

Say you meet someone in the street who expresses the above views, what are the best ways to respond to their fears of migration? How can you convince someone that migration is good, rather than bad, for a country?



6.2 The Four Categories of Non-Citizen Rights: An Overview

There are four categories of non-citizen rights which this textbook will discuss. These are: (1) refugees, (2) statelessness, (3) migrant workers, and (4) trafficked persons. Each category has a particular status, a specific set of human rights, and protection concerns. Each of these categories will be understood by examining firstly international law and treaties relevant to protecting people of this status, and then looking at the challenges to their protection. Before going into detail, it is useful to provide an overview of the relevant treaties and definitions of the four categories of non-citizens.

Refugees

Refugee status is defined by the 1951 United Nations Convention Relating to the Status of Refugees (revised by the 1967 Protocol Relating to the Status of Refugees). A refugee is a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

As the definition shows, refugee status applies to people who are being persecuted in their home country and cannot return. These rights ensure such individuals are able to live safely and humanely outside their country until they desire to return home.

Statelessness

Statelessness is defined in the 1954 Convention Relating to the Status of Stateless Persons as:

a person who is not considered as a national by any State under the operation of its law.

Even though most stateless people live in the country where they were born, they often lack the privileges, services, and protection that are reserved for citizens or nationals. The laws protecting stateless persons ensure they will get legal recognition and protection.

Migrant workers and their family members

A migrant worker is defined in the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as:

a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national.

Migrant workers live outside their home State for the purpose of work. Migrant workers regularly do not get the same rights and protections as national workers, and they are vulnerable to exploitation both at the workplace and in the community where they live if they do not have the correct documentation.

Trafficked persons

Human trafficking is defined by the 2003 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (The Palermo Protocol), and refers to:

the [actions of] recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Unlike the conventions above, the Palermo Protocol defines a crime, rather than a status. Trafficked persons are victims of the crime described above. Individuals who are trafficked have specific rights to prevent further victimization and to assist them in rehabilitation.

It should be noted that the four treaties mentioned here come from different historical periods which means that they see human rights differently, and they address the problems in a different way. The Refugee and Statelessness Conventions are post World War II treaties, both adopted in the early 1950s. The human rights protection offered by these treaties are not strong because the International human rights framework was not developed. It was not till later in the 1960s that the first human rights treaties were adopted. The Migrant Worker Convention, being drafted in the 1980s, adopted in 1990, but not coming into force till 2003 is a more expansive treaty and is the biggest of the four treaties. It is also the only treaty that is considered a human rights treaty within the United Nations system. The long duration between its drafting and entering into force is reflected in its low ratification rate, and it is the least ratified treaty of the four. Finally, the Trafficking Protocol emerges in the 2000s, as a response to global migration movements, and is a response to rising criminal activities. This treaty protects the rights of trafficked persons, but importantly also defines trafficking as an international crime. Because it empowers States by criminalizing this activity, it is widely ratified.

6.2.1 Gaps and Overlaps in Legal Protection

The above four categories of non-citizens should not be seen as distinct and unrelated; yet neither do they nicely fit together and complement each other. Rather, it should be recognized that people can move between these categories quickly, or inhabit more than one category. It is possible (though unlikely) that a stateless person could wake up in the morning as a migrant worker, be forced into a trafficked situation, and end up with refugee status that evening. The result is that non-citizen protection is full of gaps, overlaps, and grey which can make identification and protection difficult. One case of this in Southeast Asia concerns the Rohingya people of Myanmar who can inhabit all four categories.



FOCUS ON

The Rohingya

The story of the Rohingyas in Myanmar reveals the vulnerability of stateless populations. The Rohingyas had their citizenship taken away when the Myanmar government introduced new citizenship rules under its 1982 citizenship law. These laws excluded the group from one of Myanmar's 135 officially recognized ethnic groups. To the Myanmar government the Rohingyas are actually Bangladeshis (and often called Bengalis in official documents and the media), even though historical records show them having lived in the region for at least 300 years.

Myanmar law severely limits the rights of the Rohingyas. Because they are stateless they cannot access education or health services. They need special registration and approval to get married or freely move in the country. Recent civil disturbances have resulted in many Rohingya being killed in mob violence. If they try to move from the systemic discrimination they face in their own country, they can be exploited as migrant workers, and they are regularly trafficked.

Because of these conditions many Rohingya leave Myanmar to look for work. There are hundreds of thousands of Rohingya living as refugees in Bangladesh. Many Rohingya travel to Thailand and Malaysia to work as undocumented migrant workers. When they are on route, there have been multiple cases of Rohingya being trafficked, or sold as labour between Malaysia and Thailand.

State officials in Myanmar and neighbouring countries have used their undetermined status as a way of avoiding any responsibility for them. Myanmar claims they are Bangladeshi, Bangladesh says they are from Myanmar, and Thailand and Malaysia see them as illegal migrants. Some Rohingyas claim refugee status in countries such as Australia, but getting there to claim refugee status is a long and dangerous voyage.

Many gaps exist in the protection of non-citizens. On a daily basis, migrant workers, many of whom are indebted to some sort of agent or employer, are transported to a work site and paid a small fee to do difficult or dangerous tasks; whether or not they are exploited is a matter of context and perception. If a person should be considered a forced migrant, a migrant worker, or a victim of trafficking may be unclear. In addition, refugees who assert their right to work are also vulnerable to exploitation which may amount to trafficking. Partially, these problems are caused because there are no clear rules on how to identify and categorize non-citizens which need protection. Governments may prefer to identify all undocumented people as illegal and who should be deported. States would also prefer to consider someone a victim of trafficking rather than a refugee, because States should repatriate victims of trafficking but cannot return refugees to a place where they may face persecution.

6.3 The Refugee Convention

Individuals seeking protection from their own States by escaping their country and travelling elsewhere have been receiving protection for thousands of years, though it is only recently that this protection occurs in international law. The UDHR was the

first international document to recognize the right to seek and enjoy asylum from persecution, although, previously, the League Of Nations did offer legal protection for some groups fleeing persecution (for example, from Russia and Germany). While the UDHR was universal in its protection, and based refugee protection on the individual and not the group, it did so in a rather vague way, stating, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” This statement does not specifically mention refugees (rather it talks of “those seeking asylum”), and it is soft in wording its protection. For example, it makes no clear mention of State obligations or duties; rather individuals have a right to “seek and enjoy” protection. At the time, in the late 1940s, refugees were a significant concern as there was a huge movement of populations at the end of World War II, creating a refugee population of a size that than the world had never seen since. Action was needed, so in 1950 the UN High Commissioner for Refugees (UNHCR) was established. Following that, in 1951 the UN Convention Relating to the Status of Refugees (commonly called the Refugee Convention) was adopted. The Refugee Convention defines the term “refugee” and this definition is still the most commonly used one today. The definition is a very important because it outlines certain requirements that must be met before a person can claim refugee status. In order to gain the protection of refugee rights from the convention it is necessary for all people to fit the definition.

6.3.1 Definition of a Refugee

A refugee, according to the Refugee Convention, is a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

In order for a person to be considered a refugee they must fit all the elements of this definition. The process of doing so is called Refugee Status Determination (RSD). When a State, or an organization such as the UNHCR, wants to recognize someone as a refugee they will need to see if each of these elements is met. The key elements of the definition are:

- **Well founded fear:** The person must be in fear of persecution, and this fear must be legitimate; that is, there must be a “real chance” of persecution supported by evidence. In many cases, the person is persecuted by the State, but this may be done by non state actors as well.

The fear is made up of two elements: the subjective element, or if that person has a genuine fear; and objective element, or if there is a strong reason to believe the person has something to fear. Both must be proven. Generally, claiming refugee status is considered evidence enough that the person has a subjective fear of persecution. To determine if the person’s fear is objective may need an investigation, commonly done by UNHCR, to see if there is a real risk of persecution, which can generally be determined by asking credible NGOs or experts, by consulting reliable country of origin information such as those provided by Human Rights reports or credible media coverage, and by determining whether there has already been past persecution or persecution of similarly situated persons.

- **Persecution:** The persecution should be at the level of a serious human rights violation (forms of discrimination, denial of basic services like food, water or healthcare, or arbitrary arrest may be persecution depending on their severity; threat to life, torture, and detention are persecution). While there is no agreed definition of what is persecution, something like having to travel too far to a hospital is not serious, but a law which forbids access to healthcare because of a person's religion could be considered persecution.
- **Five Grounds:** The risk of persecution must be on account of:
 - a. race,
 - b. religion,
 - c. nationality,
 - d. political belief,
 - e. or 'member of a particular social group.' This refers to a group of persons who share some characteristic that is fundamental to them, such as being a woman, a homosexual, or a member of a caste. Defining the social group can be difficult, at least one court has ruled that being a taxi driver, for example, is not a social group because the person can change their job and it is not fundamental to their character, but others have ruled that being a journalist or a human rights defender may be a valid social group. A woman or a trafficked person cannot change this status (a woman cannot just become a man, nor can a trafficked person become 'untrafficked'). This category is more general and flexible than the others, and has been used more recently to protect women facing persecution (of forced abortions, violence, or honor killing). It must be noted, however, that the social group must be "particular," not general. For example, "women" is often too general to be considered a social group and must be qualified to something more specific like, "young women of a tribe who have not been subjected to female genital mutilation and who oppose the practice."
- **Nexus:** It is important that the persecution is because the person is in at least one of these categories, though it is common for people to fit into more than one category and for the motivations of the persecutor to be mixed. This is called the nexus requirement: the persecution relates to the category.
- **Alienage:** The person needs to be outside their country to claim refugee status. This requirement, called 'alienage,' is necessary because a refugee needs to ask for protection from another State. Asking for refugee status at an embassy in the person's own country is not enough, though there may be other forms of protection the embassy can offer.
- **No State protection available:** The person has to flee the State because they cannot access or, due to fear of persecution, are unwilling to seek protection within their State. If their own government can protect them, they do not need to claim refugee status. Most commonly, people seek refugee protection because it is the State which is persecuting them in the first place; for example a government jailing political opponents, but even if the persecutor is a non-state actor, where the State cannot or will not protect the person from that actor, the person is eligible for refugee protection.

DISCUSSION AND DEBATE

Refugee Status Determination

Can a woman fleeing her country because she faces domestic violence get refugee status?



The first point to address is whether the country she fled to has ratified the Refugee Convention. If it has, the country will first make the decision based on the above criteria. If it has not, she may need to ask for help from the UNHCR. Once it can be established that the country has agreed to the Convention and there is enough evidence of the violence she faces (for example, hospital records or statements from her family), then one can accept that she does face persecution. Further, she can also be considered a member of a social group (being a woman, or a married woman). However, it must be asked if she seeks protection from the State she is fleeing from. If the State does offer such protection (for example, legal protection, women's shelters or trained police), there is no reason for her to seek asylum. If her State cannot offer protection (for example, there is no law against domestic violence, or the police do not try to protect her from this violence), then there are reasonable grounds for her to be considered a refugee. It is clear that the subjective nature of assessing the main elements will mean that different States can give different findings on the same case.

On an individual level, the process of being identified as a refugee begins when the person seeking refugee status seeks protection. From that moment, they should be given the protection by the Refugee Convention until the State determines whether they fit the definition or not. There is a trend for States to call people who are in the process of having their status recognized as 'asylum seekers.' The Refugee Convention does not use the term 'asylum seeker,' it is a term which only appeared in the 1970s though it is now commonly used. In a sense, the term 'asylum seeker' is used to deny refugees their full refugee rights by not calling them a refugee. If the claim is not recognized by the State, the State may then decide to return the refugee to their country of origin, or ask them to leave the country. Although the recognition of the claim is technical in basis, the decision may also be influenced by political or social factors (although it should not be). States each have their own processes and standards for recognizing refugees. Some countries have set a very difficult standard. Japan, for example, consistently recognizes less than 1% of the asylum claims made each year. In 2013, Japan granted refugee status in only 6 cases, although there were more than 3,000 applicants, and many, many more people in Japan who should be considered a refugee but did not undertake the process because there is little chance they would be recognized. Sometimes States will quickly accept refugees from opposition countries (the USA was quick to recognize Soviet and Chinese refugees during the cold war, and vice versa). Many States have established independent refugee tribunals to assess claims.

Another category of protection involves displaced people; that is, people who are displaced by war or natural disaster. Although these two events are not part of the Refugee Convention, often refugee bodies (such as UNHCR) have considered they have a duty to protect these victims as well. Of most concern here are internally displaced people (IDPs), which are people who have been forced to move from their homes but have not crossed an international border. Some IDPs may actually be refugees if they could reach a border, but they remain displaced within their own

country. Thus, because no borders are crossed, they cannot seek protection under the 1951 Convention. Around the world in 2014, there are an estimated 33 million persons who have been internally displaced. In Southeast Asia, there are countries which have large IDP populations. These include Myanmar, with people displaced by the ethnic conflicts in the Kachin, Karen, Arakan and Shan States. The Philippines has an IDP population in the southern island of Mindanao. There are displaced Hmong in Laos and also people displaced in the three southern provinces in Thailand.

There are 147 State parties to the Refugee Convention, although in Southeast Asia only the Philippines, Cambodia, and Timor Leste have ratified it. Even across Asia, few countries are party to the treaty. There is only one country in South Asia, Afghanistan, which has signed the convention, though this country is the largest refugee producing country in the region. The low number of ratifying States is partially due to the original wording of the 1951 treaty, which gave geographic and time limits: basically, a refugee in this convention was limited to people displaced in Europe because of World War II. Obviously, these refugees have little relationship to Asia and for countries like India, there was little incentive to agree to such a treaty. In order to remedy this, the 1967 Protocol Relating to the Status of Refugees widened the definition by removing geographical and time limitations, making a refugee simply anyone who fitted the definition. However, Asian states generally have very conservative and cautious attitudes to refugees, perhaps because some countries face huge refugee inflows – Pakistan, Iran, and Thailand have received hundreds of thousands, and in some cases millions of refugees.

There are several regional refugee protection mechanisms such as the one offered by the African Union. This has a wider definition than the Refugee Convention because it includes people fleeing from “events seriously disturbing public disorder.” In addition, the Organization of American States’ (OAS) Cartagena Declaration on Refugees built upon the African Union’s refugee definition by including threats of generalized violence, foreign aggression, internal conflicts, and massive violations of human rights, as reasons for awarding refugee status.

DISCUSSION AND DEBATE

Environmental Refugees

Although the term “environmental refugee” does not yet have a legal definition, it generally refers to a person who has been displaced by environmental changes. While not a common occurrence, it is becoming more so. For example, the floods in Bangkok (2011), Manila (2012), and Jakarta (2013) displaced possibly millions of people for short periods of time. It is now recognized that as the climate changes and sea levels rise, millions of people will be forced to move out of low lying areas such as the Mekong and Irrawaddy Delta, and Bangkok. But where will they go?

Would you consider these people refugees and give them the rights to seek protection in neighboring countries? If not, what protection and services can these people get?

Are people displaced by environmental disasters refugees? Should they be covered by the refugee convention, or is another convention needed for them?



6.3.2 Refugee Convention Standards

The Refugee Convention offers very strong protection in terms of a person's security within the receiving State. Even though it was drafted before livelihood and basic economic, social and cultural rights were established as human rights, the Convention still offers substantial protection. These include basic needs (food and housing), legal protection (including rights in detention), and even rights to work. However, these rights are based more on the basic needs (giving enough for someone to survive) and not on human rights which ensures a person's dignity. A particular area of concern involves the protection of refugees' economic rights, such as work. States fear some refugees' claims are solely economic; that is, they only flee their country in order to work in another for economic benefit alone. For these reasons it is rare for a refugee to be given full working rights.

A fundamental refugee standard is found in Art 33 or the principle of non-refoulement which is not returning a person (refouling them) to the country they are seeking protection from. This principle can now be considered customary law meaning that even if States have not ratified the Refugee Convention outlining this principle, they must still obey it. However, the State can send asylum seekers or refugees to a third country where their lives and liberties will be secure. Further, States cannot reject, or disallow entry to persons who may be seeking asylum. States are not obligated to grant asylum, but they cannot deny access to seek it.

FOCUS ON

Article 33 Prohibition of Expulsion or Return (“Refoulement”)

- No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
- The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Non-refoulement ensures that a person will not be forcibly returned to their country where they will face persecution regardless of the legal status of refugee protection where they are. Even if a State has not signed the Refugee Convention, or any other human rights treaty, they must still refrain from deporting that person back to his or her country. This does not mean that refoulement does not happen. Within Southeast Asia there have been cases of Hmong being sent back to Laos, Ugiyars to China, and North Koreans to North Korea, even though it is suspected that these people will face persecution.



6.4 Refugees populations and protection in Southeast Asia

There are two main populations of refugees in Southeast Asia. Firstly there are refugees who come from outside the region, from places like Sri Lanka, Afghanistan, Pakistan, and Somalia. They seek refuge in Southeast Asia before attempting to find resettlement elsewhere. It is very difficult to estimate the size of this population because many of them are in an undocumented status and are urban refugees, hiding in large cities such as Bangkok, Jakarta, and Kuala Lumpur. Countries in the region with significant populations of refugees from outside the region include Thailand, where it is estimated there are more than 10,000 urban refugees in Bangkok, mainly from Afghanistan, Sri Lanka, Pakistan, and conflicts zones in Africa such as Somalia and Sudan. There are larger numbers in Indonesia, where people from Afghanistan, Sri Lanka, and Pakistan may be looking to enter Australia or find resettlement in Western Europe. Malaysia also hosts a number of refugees from these countries.

The second major population of refugees are those from within the region. Southeast Asia has a long history of refugee flows, with the American War in Vietnam and other communist insurgencies throughout the 1960s and 70s resulting in large refugee populations from Vietnam and Cambodia to Thailand, Hong Kong, and most other Southeast Asia States. Currently the largest refugee flow is that of Myanmar people to Malaysia and Thailand, though there are many smaller flows of people as well, such as the Hmong (from Laos), Montangards (from Vietnam), and Papuans (from Indonesia).

Refugees live in two situations, that of camp refugees and urban refugees. Camp refugees reside in a camp where it is expected they will stay until the conditions change and they can re-enter their country. The main examples of these are Burmese refugees who reside in camps along the Thai-Burma border, and also in camps in Bangladesh and India. These are the only refugee camps in Southeast Asia. Since the Thai Government has not ratified the Refugee Convention and does not recognize refugee rights, it does not call these places 'Refugee Camps', but rather uses the term 'Temporary Shelter,' implying that sometime soon the camps will close and the refugees return to their country. As can be seen by the age of these camps (most camps in Thailand are around 30 years old), these have not proved to be temporary solutions. There are families who have lived in the camps for three generations, with children being born, growing up, getting married and having children within the camp.

In the camps most people have their basic needs met by humanitarian organizations, but a variety of rights are denied to them such as freedom of movement and the right to work, making their economic livelihood difficult as they must rely on charity from whatever organizations provide for their basic needs. Camp refugees who do leave the camp to find work do so without documentation and are at risk of deportation if caught. On the other hand, even if they do find jobs, they are at risk of exploitation or even trafficking, because whatever work they find will be in the informal sector. Once children graduate from primary school (which is available), there may not be access to a high school or university. However, refugees themselves have been actively responding to these concerns. Most camps now have committees and youth groups who are active in education and training. There are many small cottage industries and informal education programs to improve the dignity of their daily lives. The Thai government is restrictive towards the camps because it believes if the conditions are too good, it will attract more refugees to enter. Further, the government is concerned that the camp populations will stay in Thailand rather than resettle in or repatriate to Myanmar.

The second refugee group comprises of urban refugees. These are people more commonly from outside the region who live in city centers. Because few Southeast Asia States have ratified the Refugee Convention, most urban refugees are waiting for recognition from the UNHCR in hope of third country resettlement, though this process often takes years. While they are waiting the refugees often live in a legal limbo and could be expelled from the country at any time. Urban refugees encounter a range of human rights violations. They often face significant security threats (for example, of arrest and detention by local officials because they are undocumented). Even if they possess a “person of concern” card from the UNHCR, this does not guarantee their freedom from detention. Further, their families may not get access to healthcare or education. While they may find jobs, these are likely to be in the informal sector with low wages and increased risks.



FOCUS ON

The Thailand Border Consortium (TBC)

The TBC is a humanitarian organization which works for refugee rights protection and promotion on the Thai-Burmese border. The Thai-Myanmar border is home to 92,000 registered refugees from Myanmar, as well as tens of thousands more unregistered displaced people and asylum-seekers who also receive services from the TBC.

Formed in response to the influx of Burmese refugees fleeing to Thailand in 1984, the TBC is a consortium of 12 international organizations from 10 different countries. The TBC primarily works to support an adequate standard of living in camps by providing services and food, coordinating health and education services, assisting community development, working with refugee agencies in the resettlement of refugees, whilst also engaging in research. The TBC's presence on the ground and international network allows it to act as a line of communication into and out of the camps.

6.4.1 Refugee Organizations: The UNHCR

The UNHCR was established with a mandate to protect, assist, and find solutions for refugees. The mandate was originally written in 1950 and has been gradually expanded over the decades, for example, to include the stateless and to provide humanitarian assistance. The UNHCR engages in activities ranging from State engagement and advocacy, to training and capacity building, to providing food and shelter to people of concern. Under the current mandate, these are some of the more common activities of the UNHCR:

- Finding durable solutions to refugee situations: finding a way for a person to move from a refugee status to some other form of protection. According to the UNHCR, this is done in one of three ways:
 - **Local Integration:** The person is integrated and becomes a citizen of the country where they claimed refugee status. For example, a Pakistani Armadiyya family claims refugee status in Australia which is granted by the government; they then become citizens of Australia, ending their refugee status. In reality this is the least common durable solution. Local integration is probably the least used durable solution as no Southeast Asian countries support this.

- **Resettlement:** The person is resettled in a third country. For example, many Burmese refugees in Thailand have resettled in the USA, Sweden, or Norway, and have become citizens there.
- **Repatriation:** A person is resettled back into their own country after the threat of persecution ends. For example, this occurred at the end of the conflict in Cambodia in the early 1990s, and refugees living in camps in Thailand were repatriated. If Myanmar is considered politically stable, it is quite possible that in the next decade the Burmese living in camps in Thailand will be repatriated to Myanmar once it is ensured that the conditions are safe enough.
- **Emergency response and humanitarian assistance:** the UNHCR is well known for its work in helping people who have been displaced by conflict or natural disaster. During disasters in Southeast Asia (for example, the tsunami of 2004), the UNHCR provided food and shelter to many people.
- **Protection of refugees:** the UNHCR works to protect refugees no matter where they are. It is common for the organization to work in countries which have not ratified the Refugee Convention because it has a mandate which allows it to recognize refugee status. These refugees are called 'Mandate Refugees,' as opposed to convention refugees who are protected by the Refugee Convention. However, UNHCR recognition does not mean governments must also recognize this status. Rather, it means these people will be deemed "persons of concern" and will thus receive UNCHR assistance and be available for a durable solution.

The UNHCR's mandate and activities can be limited by the State it is in, which may reduce it to a supervisory or service provider role. Further, the UNHCR is unable to receive individual complaints, nor is there a State reporting procedure for refugee protection. However, over the years, the UNHCR has expanded its mandate to include persons in refugee-like situations, internally displaced persons, stateless persons, returnees, and other people of concern.

6.4.2. Refugee Organizations: Civil Society Organizations

Governments in the region are not meeting their responsibility to provide for the protection and needs of refugees. As most States have not ratified the refugee convention they are reluctant to recognize refugee rights and are cautious in showing too much support in the belief that this may attract more refugees, or be considered as a waste of money by citizens. As a result, much of the support services for refugees fall to civil society actors, such as local NGOs. There is much to be done in the areas of service delivery, protection, and the promotion of refugee rights in the region. Some of the significant work done by these civil society actors includes:

- **Providing for livelihoods:** Refugees mostly are not allowed to work and they will need food, housing, and economic security. Some NGOs work in this area of providing services through having food parcels, or shelters where refugees can stay. For camp refugees in Thailand, the TBC is involved in providing livelihoods to over 100,000 people every day.
- **Legal assistance:** Claiming refugee status is a legal process, and refugees need assistance in making their claim by collecting information to demonstrate that they fit the convention definition. Even though most Southeast Asian countries have not ratified the refugee convention, the refugees still need to collect

documentation for their claim so they are recognized by a third country (such as Australia or Canada), or UNHCR. Further, they may need legal assistance to ensure they do not get deported from the country they are in, or if they face detention because of their undocumented status.

- **Advocacy:** Some NGOs work on advocating for the respect of refugees and recognition of their rights. This may involve pressuring government to respect the rights of refugees in their country, and to not refool them. It also means talking to local communities so they support refugee rights and do not discriminate against them.
- **Health:** Apart from general health concerns involved with people living in insecure environments, many refugees have faced trauma. They have fled their country because they faced persecution and they may have faced abuse and threats. Because of this some refugees need mental health assistance.
- **Education and Training:** For refugee families, it can be challenging to find education for the children. It may be unsafe for the children to travel, the education will be in a different language, and the subjects taught may be different. Some NGOs provide childcare or basic lessons to children. They may also look at working with local schools to provide special places and assistance for the refugee children.

These organizations work in a challenging context. They are working with people of an undocumented status and thus may be considered to be engaging with criminals by some governments. Many governments and citizens discriminate against refugees and may dislike the fact that organizations are spending money on them. Refugee organizations have limited resources to address often huge tasks.

CASE STUDY

Responding to Urban Refugees in Thailand

The difficulties faced by urban refugees are often different from those faced by refugees in camps, but are no less serious. Urban refugees have a range of needs. There are basic livelihood needs of food and housing. Some organizations can arrange shelters for refugees and their families, or provide them with food, though in most cases the needs of the community overwhelms the small resources available to refugee organizations.

Refugee children have education needs. They should be provided with free and compulsory primary education, but this is not always the case. The education is likely to be in a language they do not understand, and travelling to and from the school may be dangerous if the child's parents are undocumented. Urban refugees often need legal assistance, especially with preparing their claim for refugee status. A number of organizations provide legal aid to refugees and assist them with their claim. Further, these organizations may be able to help refugees who have been detained and face deportation.

Mental health is another area where there can be great needs. Given that refugees have often left traumatic situations, post-traumatic stress disorder is common, resulting in heightened mental health risks. Organizations can provide counseling and in some cases access to healthcare to assist people in dealing with their traumas.



6.5 Stateless Persons

To be 'stateless' means that no State considers you to be a citizen under their laws. Citizenship and a nationality are fundamental in ensuring that a person is able to exercise their human rights. Not being a citizen means that a person may miss out on services a State must provide, such as healthcare, education, documentation like passports, driving licenses, and so on. Such individuals may also miss out on legal protection because they cannot go to the police for help for fear of being arrested. Stateless people face difficulties in travel because they do not have the necessary documents and identification. Even after death, they may be refused a death certificate, so it is entirely possible there will be no records of their life. As these examples show, stateless people can face violations throughout their lives in many ways.

The right to citizenship is found in the UDHR, Art 15, which says: "everyone has the right to a nationality" and "no one shall be arbitrarily deprived of his nationality." However, even after the adoption of the UDHR, the world has not taken the problem of statelessness very seriously. While there was a large number of stateless people directly after WWII, once these concerns were resolved there was little activity in this area. For example, the conventions on statelessness are routinely ignored, and few States ratify them. Until recently, few organizations addressed this problem and more attention has been given to refugees and trafficking. The reason is simple; statelessness is hard to see and therefore easy to ignore. Most stateless people live on the margins, for example, when affected persons live in border areas which States may govern only partially, or they hide within society because they do not want their undocumented status to be known to the authorities. For these reasons it is difficult to count the exact numbers of stateless people. There are currently an estimated 12 million stateless people in the world according to UNHCR; in Southeast Asia, this number could be in the region of hundreds of thousands, and maybe as high as over a million. Only recently has there been a renewed interest and increased activity on protecting the rights of stateless people.

FOCUS ON

Examples of Statelessness in Southeast Asia

Brunei: Statelessness is found amongst permanent Chinese residents in Brunei. Families who have lived in Brunei for generations are still not given nationality, because Brunei nationality is dependent on either blood ties, or the ability to pass a difficult citizenship test about culture, customs, and language. Many of Brunei's Chinese residents will remain stateless unless there is legislative change.

Myanmar: The Rohingya population were citizens of Myanmar until the Citizenship law changed in 1982, which has taken their citizenship away. There are around 600,000 stateless Rohingya now in the country.

Indonesia: Previously, if an Indonesian lived outside the country without returning for a period of five years, they would lose their citizenship. Many thousands of Indonesian migrant workers living abroad became stateless because of this law. This law has changed because of concerns raised about stateless Indonesians.



Laos, Myanmar, Thailand: Hill tribe communities along the borders between Thai, Laos and Myanmar border may not be recognized as a citizen of any of these countries, though they may have lived there, for generations. Previously, in Thailand some hill tribe people could only be recognized as citizens if they could prove that they have were in the country for the 1956 census. If they do not have this documentation they would become stateless. This law has changed because of concerns raised about statelessness.

Thailand: Children of undocumented migrant workers who do not receive birth registration have difficulty and sometimes cannot claim their citizenship from Myanmar because of the lack of their birth certificate.

Vietnam: Vietnamese women who marry foreigners and take up their nationality would need to renounce, or give up, her Vietnamese nationality (as Vietnam allowed only a single nationality). However, if the marriage failed, she would lose her husband's nationality but would not automatically regain her Vietnamese nationality. This occurred a number of times to Vietnamese women who married with a Taiwanese man, and become Taiwanese nationals. Vietnam previously does not allow its citizens dual nationality, and nor did it allow people who have lost their citizenship to take it up again. This situation only changed in 2008 with the introduction of new nationality laws because of concerns raised about stateless Vietnamese women.

6.5.1 Defining Statelessness

Statelessness is defined in the first article of the 1954 Convention Relating to the Status of Stateless Persons as:

A person who is not considered as a national by any State under the operation of its law.

This definition appears relatively simple, though there are some important elements which need to be understood. The definition is considered part of customary law, so no State can deny the existence of Stateless people, or have an opposing definition. The key elements are:

First, only States can confer nationality. People living in regions not considered a State, or in a newly emerged State, may face difficulties being recognized as a citizen. To determine if someone is stateless it is not necessary to check all 193 States to see if they recognize the person. Rather, each State which a person may have a link to through birth, parents, residence, or marriage may be considered for nationality. Also, important here is how a State confers recognition, that is what department or what documents are necessary to be recognized as a citizen. Governments may be underfunded and not have the resources to provide the documentation like passports or birth registration, or decide not to provide them because of some kind of discrimination.



CONCEPT

Nationality

The terms, 'national,' 'citizen,' and, 'subject' are similar concepts that mean the same thing: they form a link, both political and legal, between a person and a State. Nationality allows a person to get protection from the State, and they may also have duties towards that State. Some differences may exist within a State between a citizen and a national; there may even be different categories of nationality with differing rights, privileges, and duties. For example, in some countries, permanent residents or naturalized citizens may not get the same voting or welfare rights. These distinctions, however, should not stop a national from attaining their human rights.

Second, The State decides who is a national through its laws. This is a more complex question as it entails determining how a State considers someone a national. Individuals acquire nationality through a limited number of ways outlined below:

1. Descent: nationality comes from one's mother or father
2. Place of birth: nationality is given because you were born in a particular country
3. Marriage: nationality is gained from a husband or wife
4. Residence: nationality is given by living somewhere
5. Naturalization: a person applies to a country to become a national and the country gives them nationality

The most common way now of getting a nationality is through descent, as this is recognized in every Southeast Asia State. No Southeast Asia State recognizes place of birth, and only a small number (for example the USA) award nationality this way. While some countries Southeast Asia allow nationality through marriage and naturalization, the conditions can be difficult and expensive. People may need to pass an examination on language and culture, live for long periods in the country, and have a job. Some countries have been known to sell their citizenship by allowing easy naturalization for those willing to pay. Sometimes nationality is considered automatic, especially descent and place of birth, whereas the other ways of getting nationality tend not to be automatic, and individuals must apply to the State to get their nationality recognized. A person is stateless if they cannot get citizenship through any of the above.

DISCUSSION AND DEBATE

Your Laws of Nationality

Nationality laws can be complex. They may be found in the constitution, in citizenship laws, and in laws of marriage. Many countries in Southeast Asia have updated their laws of citizenship in the past decade. Search for these laws which may be found on the website of your Department of Immigration or equivalent government ministry, or in a section of the constitution. After you read through the laws, answer the following questions:

How did you get your nationality? Was it because you were born in a particular country, or was it due to your parent's nationality? How did your parents get their nationality? What about your grandparents?

Are you allowed to have dual nationality? If you marry a foreigner, can you give them your nationality? What about your children?

Are there gaps in the laws? Can you think of situations where someone, say someone married to, or born to, a citizen of your country, can become stateless because the laws in your country do not recognize them?

The convention only recognizes those who are stateless because the law does not recognize them. These people are *de jure* stateless, stateless by the law. If someone is stateless because they have not undergone the necessary documentation (say they are a child born outside their country and have not yet applied for nationality), and the law would recognize them as a citizen, then the convention would not consider them stateless even though in fact they are. These people are called *de facto* stateless, or stateless in fact but not in law.

FOCUS ON

De Jure vs. De Facto Statelessness

De jure and *de facto* statelessness are distinct. *De jure* statelessness means a person has no legal nationality. *De facto* statelessness refers to a person in fact has no nationality, but should qualify through law to have a nationality. *De jure* and *de facto* stateless persons face the same vulnerabilities, because neither receives protection, services, or benefits from a state. A problem in the statelessness conventions is that they tend to recognize *de jure* but not *de facto* stateless persons, leading to *de facto* stateless persons being granted less protection, despite having the same needs and vulnerabilities as *de jure* stateless persons.

6.5.2 Stateless Rights Violations

Stateless persons face a range of human rights violations. Two of the more common relate to discrimination and detention. Discrimination can take many forms. For example, they may be systematically excluded from goods and services, or lack access to healthcare, education, and other public services. They probably cannot participate in politics. They lack access to police protection or courts, leaving them vulnerable when harmed, exploited, or otherwise wronged. This often leaves stateless persons unable to challenge contracts, wages, or living conditions. In addition, the lack of access to the justice system leaves stateless persons perpetually vulnerable to exploitation and crime. Likewise, their lands and resources will often be unprotected, making it possible for the State or corporations to simply claim or seize their property. To protect themselves, stateless persons may be forced to pay bribes or engage in damaging and dangerous activities. And finally, to add insult to injury, the media may portray these groups as backwards or inferior, thereby dehumanizing them and often creating hatred towards groups that already lack protection. Perhaps the worst case scenario is when stateless persons are treated as criminals.

Discrimination against stateless persons often results in detention, particularly immigration detention. Stateless persons may be stopped while traveling within the State they have always lived and put into a detention facility. The use of indefinite detention against the stateless is a particularly severe violation of human rights, and is experienced by individuals who are held until they can prove where they are from, which is a difficult if not impossible task without documentation. Such an example illustrates the importance of due diligence procedures in immigration systems because stateless persons have a right to special protection. When immigration systems do not adequately account for statelessness, those who should receive greater protection often lose out the most.

6.5.3 The Statelessness Conventions

There are two stateless conventions: the Convention Relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961). The first was intended to be a protocol to the Refugee Convention, as the Refugee Convention does also protect stateless people. However, a decision was made to treat the problem of statelessness as a separate problem with its own convention. The first Convention acted as a foundation for defining statelessness, and it also outlined the protection stateless persons should receive. The 1954 Convention's main objective was to allow stateless people to enjoy as many of their human rights as possible. The treaty sets out a number of rights which it is expected stateless people should enjoy. These include:

- Treatment and rights like other aliens
- Access to documents or certifications normally delivered to aliens
- No exceptional measures to be taken against stateless persons because of their previous nationality
- Recognition of marital status
- Right to be treated like nationals with respect to religion, elementary education, housing, access to justice, rationing of goods, labor laws, and public relief

- Rights to property like other aliens
- Economic right like to work, associate, like other aliens
- No expulsion, except on grounds of national security and public order

As can be seen there are a number of weaknesses in the 1954 Convention. Stateless people do not get their full rights, as many of their rights as equivalent to other non-citizens (who are called aliens in the convention). Even if they are born and grew up in the country, they are still considered alien. The convention also only recognizes *de jure* stateless people. Finally, there is no protection mechanism linked to the convention which could in some way caution the State if they violate the rights of stateless people.

The 1961 Convention attempts to reduce statelessness by providing a number of practices which should ensure no one becomes stateless:

- A child born without access to any nationality will be given the nationality of the State in which she or he is born.
- A child born on a ship will get the nationality of the ship
- Both the mother and father can pass their nationality to their children
- Loss of nationality is only possible if the person has another nationality
- Nationality cannot be determined on racial, ethnic, or religious grounds

These two conventions form an important part of the legal framework to protect stateless people. Unfortunately they are not widely ratified, and their ratification in Southeast Asia is very low. The Philippines is the only State in Southeast Asia to ratify the Convention Relating to the Status of Statelessness, and this was only done recently, in 2011. No country in the region has ratified the Convention on the Reduction of Statelessness.

Statelessness is also recognized in other treaties. The Refugee Convention covers both refugees and stateless people. However, some stateless people (especially those still in the country where they are denied citizenship) cannot claim refugee protection, hence they must turn to the 1954 Convention to protect their rights. Protection from statelessness also appears in the CRC (Arts 7 and 8), the CEDAW (Art 9), the ICCPR (Art 24) and the ICERD (Art 5), the ICRMW and the CRPD.

FOCUS ON

Effective Nationality

Nationality is not merely the possession of documents which prove a person is a citizen, but it should also include the rights and protections which a citizen should expect. If a person does not have these rights, then nationality is ineffective. The concept of effective nationality has been proposed by The Equal Rights Trust, an independent international organization, as an alternative to the categories of *de jure* and *de facto* citizenship as a better measure of the rights of citizenship. The Equal Rights Trust offers a five-pronged test to determine whether a person has an effective nationality or not:



1. Recognition as a national: does the person enjoy a legal nationality (that is, is he or she *de jure* stateless)?
2. Protection of the State: does the person enjoy the protection of his/her State, particularly when outside his/her country?
3. Ability to establish nationality: does the person have access to documentation (either held by the State or issued by it) to establish nationality? This access may be through a consulate or through State officials within the country of presumed nationality.
4. Guarantee of safe return: is there a guarantee of safe return to the country of nationality or habitual residence, or is there a risk of “irreparable harm”? Is return practicable?
5. Enjoyment of human rights: does a person’s lack of documentation, nationality, or recognition as a national have a significant negative impact on the enjoyment of his or her human rights?

6.5.4 Causes of Stateless

In Southeast Asia, there are a variety of ways someone becomes stateless.

Border and marginal communities

Most commonly, statelessness occurs when an individual lives in a border region which the State only governs from a distance, and where there is little regular contact with the State. This is true for a large number of hill tribe groups along the borders between Myanmar, Thailand, Laos, Cambodia, and Vietnam. It is also true for many communities in the Philippines who live on the border with Malaysia on the island of Borneo. In many such cases, people simply do not possess birth certificates or other documentation to show where they live or their parent’s status. As a result, their children often inherit their statelessness.

Migration

Problems can arise if people travel for long periods of time, or have children outside their home country. For example, Indonesia previously had a law revoking the citizenship of anyone living outside the country for more than 5 years of their citizenship. This was repealed in 2006 allowing over 100,000 Indonesians in Malaysia to reclaim their nationality.

In many cases, parents who live outside their home country may be unable to pass nationality on to their children. For example, if a child born to undocumented migrant workers is not registered at birth, the child may face difficulties acquiring citizenship because when they return to their country they will lack documentation to show the name, date, or place of birth of the child. This has often been the case for the children of Myanmar workers in Malaysia and Thailand. Further, the children may not be able to return to their country because of security or cost, meaning they are *de facto* stateless

Transferring or losing nationality

On occasion, individuals are forced to give up their nationality, or may attempt to change nationality which can result in statelessness. For example, some countries force wives to renounce their citizenship upon marriage to a foreigner, but such women cannot retrieve this nationality if the marriage fails.

Some States have laws on the automatic renunciation of citizenship if the person votes in a foreign election or joins a foreign army, which can make them stateless. Some countries in Southeast Asia, including Vietnam, Singapore, Indonesia, and Malaysia, only allow one nationality. Therefore, if an individual were to acquire nationality from another country, he or she would be forced to give up their original nationality. Indeed, in some cases, persons may lose their original nationality before they obtain a new one.

Unequal descent

In some countries, women do not have the same rights to pass on nationality to their children as men. Currently, only Malaysia does not allow women to pass on their nationality if a child is born out of wedlock. However, as little as ten years ago, this unequal conferral of nationality was present in many other countries as well. Statelessness can result if a child's mother cannot pass on nationality, and cannot claim its father's nationality, either because the father was not present to confer it, or his country prevented him from doing so.

Other reasons

Statelessness can occur in many other ways, including the change of status of a State, changing nationality laws, or through human trafficking. A particularly disturbing method occurs through discrimination. In these cases, the State often removes the nationality of a group because of their ethnicity or religion. This can be seen in the case of the Rohingya (discussed above); an ethnic Muslim minority in Western Myanmar, whose nationality was taken away essentially because of their religion and ethnicity.

6.5.5 Actions to Eliminate Statelessness

There are four responses to resolve the problem of statelessness which have been identified by experts and organizations, such as the UNHCR, working on issues of statelessness. These are identification, prevention, reduction, and protection. Each of these responses involve many possible activities for States and NGOs to undertake to reduce the vulnerabilities of stateless people.

Identification

These are activities to locate people who are stateless, and to determine the numbers of stateless people. Most States do not know how many stateless people reside in their territory, and given that many stateless people try to hide their lack of nationality, they can be difficult to locate and count. When surveys were first conducted over a decade ago, low numbers of stateless people were found in those Southeast Asia States which tried to identify their stateless populations. However, it was discovered that many people did not tell the truth and reveal their status to the people giving the survey for fear of being detained. Many NGOs and government departments are working to resolve this problem by holding surveys and meetings to raise awareness about the right to nationality. When the content of the survey was changed (by asking, for example, if they would register for nationality if the government offered the service for free and with no threat of detention, rather than 'are you stateless'), the number of stateless people increased significantly. In Southeast Asia, Lao PDR and Vietnam have recognized stateless persons in their nationality laws and endeavour to provide them citizenship. Formalizing the status of statelessness may help ease identification and formalize subsequent protection.

Prevention

These are actions to prevent statelessness in the first place, and can include changing laws, registering children, or granting nationality to ensure people do not become stateless. Most Southeast Asia countries have been active in this area by in particular changing nationality laws. Examples include recent changes to nationality law in Indonesia, Vietnam, and Thailand (all between 2006-2009) to ensure rights such as universal birth registration and gender equality in nationality through descent. Nationality law reform in Vietnam (2008) allowed for some Vietnamese to be granted their nationality even if they had previously renounced it, which restored citizenship to those Vietnamese women who had to renounce their Vietnamese citizenship when marrying foreigners. Changes to nationality laws in Indonesia (2006) recognized indigenous group previously not given citizenship, and restored nationality to those workers who had lived outside of the country long enough to lose their citizenship. Malaysian laws now give citizenship to a child born to a Malaysian mother who has access to no other citizenship. All countries in the region have universal birth registration for a child born in their country, no matter what the child's or parent's documented status.

Awareness is an important aspect of prevention. Thus, governments, NGOs, and academia in Southeast Asia work to disseminate information about statelessness in the region. This entails not only informing the public, but also seeking a better understanding of the concept.

CASE STUDY

Surveying Hill Tribe Communities in Thailand

In a report by UNHCR titled *Good Practices Addressing Statelessness in Southeast Asia*, they discuss a survey of Hill Tribes in Thailand, conducted in 2005-2006 by the Thai Ministry of Social Development and Human Security and UNESCO. The survey was of 65,000 individuals, from 12,000 households in 192 villages in Chiang Mai, Chiang Rai, and Mae Hong Son. As the report notes:

The survey confirmed the extent of non-citizenship among hill tribe members, with 38% of respondents lacking Thai nationality. In addition to legal restrictions—non-citizens may not, for instance, vote in government elections—the survey pointed to persistent problems non-citizens face when trying to access basic services. The survey showed that, compared to Thai nationals, non-citizens were 99% less likely to access public healthcare and 25% less likely to access financial credit. Regarding education, non-citizens were 73% less likely to enter primary school and 98% less likely to progress to higher education. However, despite this, education rates among hill tribe members has steadily improved across generations.

Reduction

These activities aim to give stateless individuals nationality. This can be achieved through mobile registration units to ensure children in remote areas get birth registration, or people nationality documentation. It can also include changing laws to restore nationality to those who have previously lost it. Cambodia's campaign for universal birth registration is a good example of an effort to reduce the number of stateless persons through simplifying procedures and outreach.



Protection

Stateless people should get their full human rights, and this can be achieved by ensuring that a State's protection bodies (such as NHRIs, police, and government ministries) recognize and work with stateless people. The protection of stateless people's rights include ensuring their access to health and education, and that they have some form of identification so they can travel or get basic services. While protection of the rights of stateless people remains weak in many areas, there have been some significant improvements over the past decade as States have realized that stateless people do not create a burden, and rather by recognizing them as citizens they can contribute productively to the State.

A. Chapter Summary and Key Points

Non Citizens and rights

People are particularly vulnerable to human rights violations when they are outside their State of citizenship, or if they are not recognized as a citizen by any State, in the case of stateless people. In some cases their human rights are the only legal protection they can access, though there are great challenges to recognizing their human rights. Most countries in Southeast Asia tend to ignore, or at least hide, the violations and threats faced by migrants, refugees, stateless and migrant workers. In response to these vulnerabilities non citizens have special rights to help protect them.

Terminology

The term non-citizen refers to people who are in a State where they are not a citizen, and is used because it encompasses all categories of people who cannot access rights and protection from their State. Migration may be regular, meaning travel through approved channels with the proper documentation, irregular meaning those who bypass the proper channels and therefore may not have the necessary documentation, or forced migration when someone is compelled to leave their country because of conflict or the threat of violence. Migrants may be documented, meaning they carry the correct documents, or undocumented, meaning they do not have the necessary documents. States can refer to migrants as legal, meaning they have not broken the laws to enter the country, or illegal, meaning the governments considers them to have broken the law. When States use the term illegal migrants it suggests they are involved in some kind of criminal activity and that they can be arrested. But sometimes governments often make legal documentation very difficult or expensive, forcing migrants to take on an undocumented status.

Migration

There is a long history of migration within the Southeast Asia region. The movement of people in Southeast Asia is highly dynamic because of open borders unequal economic growth, and people fleeing armed conflicts. There are large flows within the region, and from the region to outside countries in the Middle East and East Asia. The protection of migrants is weak, as there are no regional laws, and discrimination

of non citizens is present in all countries in Southeast Asia. There are also gaps in the international laws which provide protection for non citizens because there are no clear rules on how to identify and categorize non-citizens which need protection and the tendency for governments to identify all undocumented people as illegal

Refugees

Refugees are individuals seeking protection from their State who are recognized under the 1951 Refugee Convention. To be a refugee they must fit the definition which includes being persecuted by a State because of their race, religion, political opinion, nationality or member of a social group. When a person seeking refugee status declares themselves a refugee they should be accorded the protection afforded by the Refugee Convention until the State determines if they fit the definition or not in a process called Refugee Status Determination. The rights include basic needs, legal protection, and rights to work. A fundamental protection is not returning a person (refouling them) to the country they are seeking to escape from. A person who fits the definition but has not been able to get to another country may be an Internally Displaced Person (IDP).

There are two main populations of refugees in Southeast Asia: refugees who come from outside the region, who are mainly urban refugees from South Asia and Africa, and those from within the region, who are mainly Burmese people in Malaysia and Thailand. Refugees live in two situations, that of camp refugees, which are found along the Thai-Myanmar border, and urban refugees who are people more commonly from outside the region who live in cities like Bangkok, Jakarta and Kuala Lumpur while waiting recognition from the UNHCR in hope of third country resettlement

Refugee Organizations

The UNHCR is the United Nations agency dealing with refugees. It is mandated to protect, assist and find solutions for refugees. It is also authorized to assist persons in refugee-like situations, internally displaced persons, stateless persons, returnees, and other people of concern. It looks for durable solutions such as repatriation or resettlement for these people. There are many civil society actors, such as local NGOs, who provide a range of services, legal assistance, and advocacy for refugees.

Statelessness

To be 'stateless' means that no State considers a person to be a citizen under their laws. Stateless people face violations throughout their lives in many ways, such as lack of access to government services and threats to security. The problem of statelessness was ignored until recently. A person may get nationality through descent, place of birth, marriage, residence, and naturalization. While most countries in Southeast Asia allow nationality through marriage and naturalization, the conditions can be difficult and expensive. *De jure* statelessness means a person has no legal nationality. *De facto* statelessness refers to a person in fact has no nationality, but should qualify through law to have a nationality.

Stateless Conventions

The two stateless conventions are Convention Relating to the Status of Stateless Persons (1954) which gives the definition of statelessness, and the Convention on the Reduction of Statelessness (1961) which provides numerous ways States can reduce the occurrence of statelessness. Statelessness is also recognized in other treaties such as the Refugee Convention, CRC, CEDAW, and ICCPR.

Causes and Solutions to Statelessness

People can become stateless because they live in a border region which the State only governs from a distance, and where there is little regular contact with the State. They can become stateless when people travel for long periods of time or have children outside their home country. Or they can lose nationality when transferring from one nationality to another. Unequal descent is when a mother cannot pass her nationality to her child, can also cause statelessness. Finally, people can lose their citizenship through discrimination, where governments choose not to recognize a minority group as citizens.

There are four responses to resolve the problem of statelessness: identification, or locating people who are stateless, in order to provide them citizenship; prevention, or changing laws and registering children to stop statelessness occurring, reduction, or providing nationality to people who should have citizenship, and protection, or ensuring stateless people's human rights are recognized.

B. Typical exam or essay questions

- In your country research the significant populations (if any) of stateless people, refugees, migrant workers, and trafficked victims. Why does your country have these populations?
- What vulnerabilities and threats do non citizens face in your country? Consider forms of discrimination against non citizens, and what is being done to protect the rights of these non-citizens?
- Which of the four treaties mentioned in section 4.2 has your government ratified? For the treaties it has ratified, why do you think it has done this? For those that it has not ratified, what is stopping the government from this?
- How can a refugee claim his or her rights in your country? If the person is a refugee, what services and protection will they get?
- What is the nationality law in your country, and does it provide nationality equally to women, children, and minority groups?
- How has your country contributed to the reduction in statelessness? Have there been recent modification of the laws, or change in policy around awarding nationality?

C. Further Reading:

Overviews of migration, non-citizens and rights Southeast Asia.

- Surveys of the current status and history of migration in the region can be found in research reports from The International Organization for Migration (IOM)
- The International Labor Organization (ILO).
- The *Asian and Pacific Migration Journal* from Philippines also regularly produces research in the area.

There are very few texts addressing non citizens rights in general, apart from the work of David Weissbrodt, the Special Rapporteur for Non Citizens which can be found on the internet.

Refugees

The following authors have written textbooks on refugee law and rights (and their work can be found through internet searches):

- Guy Goodwin-Gill and Jane McAdam
- BS Chimni.
- James Hathaway
- Vitit Muntarbhorn has a 1992 book called the *Status of refugees in Asia*

The *Refugee Law Reader* is a free, online textbook on refugee law and it has a section of refugee protection in Asia.

For research on refugee issues and refugee rights, the UNHCR websites is very useful, in particular their *Global Report*, *New Issues in Refugee Research* series, *Refugees Magazine* and their *Handbooks*.

Most documents on refugees and statelessness can be found on their Refworld site.

The *Forced Migration Review* is a very useful magazine which is freely available on the internet

Statelessness

Other guides and texts include:

- Equal Rights Trust. This organization produces a number of reports, including the recent *Unravelling Anomaly*
- Refugees International has a program on statelessness with research reports
- Refworld has numerous documents on the international law context to statelessness
- The UNHCR homepage on statelessness has many guides, research, and links to the conventions.