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The Right to Citizenship of Rohingya Children of Bangladeshi Descent Under International Human Rights Law

Mohammad Sabuj*

ABSTRACT

Since the outbreak of violence and persecution against Rohingyas in 2017 they have been fleeing Myanmar and taking refuge in Bangladesh. A significant number of them are married to a Bangladeshi citizen and their children are entitled to Bangladeshi citizenship by descent. However, these Rohingya children are not being registered as Bangladeshi citizen. As a result, a significant number of Rohingya children have become stateless. As Bangladesh is not a party to the statelessness conventions statelessness of these Rohingya children cannot be legally addressed under these conventions. This article explores the citizenship rights of these Rohingya children outside of these conventions. It argues that, although Bangladesh is not a party to the statelessness conventions it is a party to the Convention on the Rights of the Child (CRC) and other international human rights treaties under which it is obliged to grant citizenship status to the Rohingya children born to a Bangladeshi parent.

1. INTRODUCTION

Rohingyas have faced decades of systematic statelessness in Myanmar due to mass denial of their citizenship. Since the breaking of violence and persecution against them in August 2017 they have been fleeing Myanmar at a staggering rate with their families and many of those families have children. About 900,000 Rohingya refugees have travelled to Bangladesh and more than 40% of these refugees are children.[1] It is estimated that out of these children, nearly 10% were born to a Bangladeshi parent.[2] In other words, these 10% of children (about 36,000) have at least one Bangladeshi parent. The citizenship law of Bangladeshi entitles children of whom

* Lecturer in Law, Department of Law and Criminology, Royal Holloway University of London, Egham, Surrey TW20 0EX, United Kingdom. E-mail: Mohammad.sabuj@rhul.ac.uk. The research was funded by the British Academy Small Research Grant (Grant Number SRG 2021/210946). The author is grateful to the Co-I Dr Simon Behrman.

[1] Human Rights Watch, Bangladesh: Rohingya Refugees Stranded at Sea, available at <https://www.hrw.org/news/2020/04/25/bangladesh-rohingya-refugees-stranded-sea> accessed 30 November 2020.

[2] Rahman Nasir Uddin, *Not Rohingya, But Royangya: Stateless People in the Crisis of Existence* (Murdhonno Press 2017) 79; see also UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at < https://www.refworld.org/pdfid/5b081ec94.pdf> accessed 20 November 2020.

one parent is a Bangladeshi to be recognized as Bangladeshi citizen.[3] However, citizenship rights have not been granted to those Rohingya children of whom one parent is a Bangladeshi national.[4] As a result, these Rohingya children are left in a limbo where they are deprived of their right to Bangladeshi citizenship. The ramifications of this situation are intrinsically relevant to the citizenship status of the Rohingyas in Myanmar. This is because Rohingyas have been denied their citizenship in Myanmar despite their residence there for generations.[5] Therefore, the Rohingya refugees are not citizens of Myanmar. They are stateless and their children born in the refugee camps are also stateless. As a result, legal recognition of the right to Bangladeshi citizenship of Rohingya children of Bangladeshi descent is a case for concern as otherwise they will be stateless. The denial of their citizenship right of these children by Bangladeshi authorities has led to arbitrary deprivation of citizenship because Bangladesh is responsible for preventing child statelessness under international human rights treaty obligation to which they are a state party i.e. CRC, ICCPR (International Covenant on Civil and Political Rights). Under these treaty, Bangladesh is responsible to confer nationality to these children even if they are not stateless in law. This is a case when the Rohingya children are legally entitled to be a citizen of Myanmar, but they have been denied this right by Myanmar authorities which made them *de facto* stateless in Bangladesh where they are taking refuge. Denying their citizenship rights by the Bangladeshi authorities is a violation of the CRC, ICCPR, and the Bangladeshi nationality law.

Bangladesh is not a state party to the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) and the 1961 Convention on the Reduction of Statelessness (1961 Convention) which obligate state parties to take certain measures to protect persons who are stateless or at risk of statelessness. Therefore, the protections under these conventions are not available to these stateless Rohingya children taking refuge in Bangladesh. As a result, they are currently staying in Bangladesh as refugees. Moreover, Bangladesh is not a state party to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol and for this reason, these child Rohingya refugees are not entitled to enforce their rights under this convention either. There is no provision for refugees in national legislation of Bangladesh except the regulation governing the presence of refugees in the 1946 Foreigners Act which allows the government to exercise wide discretionary powers through administrative mechanisms.[6] As a result, the rights of these child refugees are at the discretion of the administration and far below international standards.

Bangladesh is a state party to the United Nations Convention on the Rights of the Child (CRC). The CRC has made robust provisions to reduce statelessness of children. Since Bangladesh has signed as well as ratified the CRC in 1990, it has the obligation to confer citizenship to the children born in its territory irrespective of descent according to the UN General Assembly and Human Rights Council resolutions.[7] However, under the current national legislation it is the least responsibility of the Bangladesh government to ensure that children born in the country and outside of it to a Bangladeshi parent do not become stateless. For this purpose, the government of Bangladesh is under a primary obligation, under its current legislation, to officially confer citizenship to children born to a Bangladeshi parent forthwith their birth and without making the application process lengthy or complex. This article examines the

[3] Citizenship Act 1951 (Act No. II of 1951) s 5; Bangladesh Citizenship (Temporary Provisions) Order 1972 (President's Order No. 149 of 1972) Art 4.

[4] UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at <https://www.refworld.org/pdfid/5b081ec94.pdf> accessed 20 November 2020.

[5] United Nations General Assembly Resolution 47:1 'Situation of human rights of Rohingya Muslims and other minorities in Myanmar' (16 July 2021), available at <https://documents.un.org/api/symbol/access?j=G2119187&t=pdf> accessed 3 January 2024.

[6] *Foreigners Act 1946*, Act no. XXXI of 1946 (23 November 1946).

[7] See s 1.3 (below) which discusses how these resolutions bind the member states to confer citizenship to the children born in their soil.

obligation of Bangladesh government to recognize the citizenship rights of Rohingya children who have at least one Bangladeshi parent. It argues that the deprivation of citizenship of these Rohingya children is arbitrary and discriminatory as compared to non-Rohingya children. It also argues that the reasons for this are inadequate or no application of the CRC at the state level in Bangladesh, arbitrary exercise of wide discretionary power by the administrative authorities in the citizenship determination process, and lack of judicial oversight of those administrative powers. It will also argue that the government must enact and implement laws governing the statelessness of Rohingya children in a manner that is consistent with their international obligations under the CRC and other international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR).

This article begins with an examination of the citizenship law of Bangladesh to understand the extent of legal protection available to Rohingya children. It will outline the provisions of 1954 convention, 1961 convention, and the 1951 Refugee Convention in relation to child statelessness to show that citizenship law of Bangladesh is far below the current international standard. This article will also examine the international conventions and instruments in relation to statelessness of children to which Bangladesh is a state party such as the CRC and the International Covenant on Civil and Political Rights (ICCPR) to show that Bangladesh government is obliged, even outside of the stateless conventions and Refugee convention, to recognize the citizenship of the Rohingya children who have at least one Bangladeshi parent. It concludes that Bangladesh must recognize the citizenship right of these Rohingya children to comply with its citizenship law and the international standard of statelessness law in order to prevent child statelessness particularly those of Rohingya children born to a Bangladeshi parent.

2. CITIZENSHIP LAW OF BANGLADESH

The statutes that regulate citizenship in Bangladesh are the Citizenship Act 1951 (CA 1951) and the Bangladesh Citizenship (Temporary Provisions) Order 1972 (BCTP Order 1972).[8] This section explores these statutes to identify Bangladeshi citizenship status of those Rohingya children born to a Bangladeshi parent. It includes an analysis of the law in line with the statutory provisions and the decisions of the High Court Division and Appellate Division of the Supreme Court of Bangladesh. It shows that the current practice of the Bangladeshi government is discriminatory between children of Rohingya and non-Rohingya Bangladeshis. It concludes that the law, as it currently in force, is arbitrary and far below the international standard.

The CA 1951 confers citizenship by descent to anyone who is born to a Bangladeshi parent.[9] The CA 1951 was initially enacted to determine Pakistani citizenship status after the partition of India and Pakistan in 1947.[10] This statute was adopted by the then newly independent Bangladesh after its independence from Pakistan in 1971 to confer Bangladeshi citizenship to the residents of the then East Pakistan (which is now Bangladesh).[11] Although the Bangladesh (Adaptation of Existing Laws) Order of 1972 automatically adopted all the laws in force immediately before the independence such adoption had not automatically re-enacted those laws which conflicted with a post-independence statute.[12] Moreover, the CA has not been amended since its enactment in 1951 to make it consistent with the laws after the independence of

[8] Citizenship Act 1951 (Act No. II of 1951); Bangladesh Citizenship (Temporary Provisions) Order 1972 (President's Order No. 149 of 1972).
[9] CA 1951, s 5.
[10] Ridwanul Hoque, *Report on Citizenship Law: Bangladesh* (European University Institute 2016) 2.
[11] Ibid, 3.
[12] Bangladesh (Adaptation of Existing Laws) Order 1972 (President's Order No. 48 of 1972).

Bangladesh in 1971 in relation to citizenship by descent.[13] As a result, this Act serves very little to identify citizenship status of anyone who was born after the independence of Bangladesh and this applies particularly to a significant number of Rohingya children who were born to a Bangladeshi parent after the independence of Bangladesh inside and outside of its territory.

Most of the Bangladeshi parents of Rohingya children obtained their citizenship on or after the independence of Bangladesh in 1971 and on that basis their citizenship was conferred by the BCTP Order 1972 rather than the CA 1951. Article 2 of the BCTP Order outlines who can become a Bangladeshi citizen. This article automatically conferred Bangladeshi citizenship to anyone who or whose father or grandfather was born in the territories now comprised in Bangladesh (previously known as East Pakistan) and who was a permanent resident of such territories on the 25th March 1971 and continued to be a resident.[14] This provision is subject to the condition that they are not disqualified from being a citizen or permanent resident by or under any law.[15] As a result, Bangladeshi citizenship law is subject to a 'general disqualification clause' which confers the Government of Bangladesh a power to make a final decision in case of any doubt as to whether any person is a Bangladeshi citizen or not.[16] As a result, Bangladeshi citizenship status of anyone born to a Bangladeshi parent, whether in Bangladesh or aboard, is subject to the law in BCTP Order (*de jure* position) and the final decision of Bangladesh government (*de facto* position). Neither the *de jure* position nor the *de facto* position alone can confer Bangladeshi citizenship by descent. In other words, in order to become a Bangladeshi citizen by descent a person must satisfy *de jure* as well as *de facto* citizenship status. According to the power conferred on the government, it may disqualify anyone of their Bangladeshi citizenship by making a declaration to that effect.[17] Since the independence of Bangladesh its successive governments have not made a declaration to deny citizenship to any Rohingya child born to a Bangladeshi citizen and for this reason their Bangladeshi citizenship is recognized by both *de facto* and *de jure* citizenship legal provisions of the BCTP Order 1972.[18] While these Rohingya children satisfy the *de jure* provision their citizenship right has been denied under the *de facto* provision. This is because the Bangladeshi government has issued administrative orders to the registrars of births and marriages for not issuing marriage and birth certificates to any marriage between a Rohingya and Bangladeshi citizen as well as any children born to them respectively.[19] On the contrary, no such order has been issued with respect to marriages between a non-Rohingya foreigner and a Bangladeshi citizen and children born to them. Marriage and birth certificates are the key documents to make an application for Bangladeshi citizenship. This has resulted in discrimination between children of Rohingya and non-Rohingya Bangladeshis.

Further discrimination occurred from the provisions of CA in relation to citizenship by descent.[20] This provision discriminated between children born to a Bangladeshi mother and father. Although the 2009 amendment to the CA 1951 extended citizenship by descent to a

[13] The only amendment that was made to the CA was to include the word 'mother' in order to recognize citizenship of those children born to a Bangladeshi mother. This amendment was made to remove the discriminatory provision which only recognized citizenship by descent through the father. This amendment was made in 2009 by the Citizenship (Amendment) Act, 2009 (Act. No. XVII of 2009) (with effect from 31st December 2008), s 2.

[14] ibid, Art 2 (i); citizenship by descent is also recognised in the Citizenship Act 1951 (Act No. II of 1951), s 5.

[15] Ibid, Art 2 (ii); see also *Md Abid Khan v Government of Bangladesh* (2001) High Court Division, Supreme Court of Bangladesh, Writ Petition no. 3831.

[16] BCTP Order 1972, Art 3.

[17] BCTP Order 1972, Art 2A.

[18] The 2017 Universal Period Review report of the United Nations High Commissioner for Refugees (UNHCR) confirms that Bangladeshi government has not officially recognised Bangladeshi citizenship of the Rohingya children born to a Bangladeshi citizen: see UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at < https://www.refworld.org/pdfid/5b081ec94.pdf> accessed 20 November 2020.

[19] UNHCR, 'Rohingya refugee crisis: Registration of the marriages and divorces of refugees' (29 January 2019), available at < Rohingya refugee crisis: Registration of the marriages and divorces of refugees—Bangladesh | ReliefWeb> (accessed 7 January 2024).

[20] CA 1951, s. 5.

Bangladeshi mother (before this amendment it was only available to a Bangladeshi father) and thereby removed this discrimination, this amendment does not have retrospective effect.[21] As a result, this discrimination continues in respect to children born to Bangladeshi mothers before 31 December 2008. Moreover, many Rohingya children were born to a Bangladeshi mother outside of Bangladesh, such as in Myanmar, who did not register their citizenship in any Bangladeshi mission as required by the CA.[22] This situation has resulted in non-recognition of Bangladeshi citizenship of these Rohingya children as they cannot prove their birth registration. Since these children took refuge in Bangladesh, they became stateless due to not being able to establish their Bangladeshi or Myanmar citizenship. It can be argued that this provision does not apply to these Rohingya children as the application of CA 1951 in Bangladeshi post-independence citizenship law and particularly in modern times is mainly historical.[23] The highest judiciary of Bangladesh, the Appellate Division of the Supreme Court, has also confirmed the historical application of the CA 1951.[24] Therefore, any inconsistency between the CA 1951 and post-independence legislation of Bangladesh such as the BCTP Order 1972 must be resolved in favour of the latter. The Bangladesh Constitution guarantees citizenship rights without discrimination between citizens by birth and by descent.[25] Hence the registration requirement is also arbitrary as it discriminates between children born inside and outside of Bangladesh to a Bangladeshi parent. Furthermore, those Rohingya children born to at least one Bangladeshi parent who were married since they took refuge in Bangladesh are not being recognized as Bangladeshi citizenship by the government authorities and accordingly became stateless.[26] Bangladeshi government has already made a notification that instructed the registrars of Muslim marriages not to register a marriage between Bangladeshi citizens and Rohingya refugees.[27] As a result, these citizenship deprivations are arbitrary in nature which requires a particular attention.

In line with the international standard determination of citizenship by operation of the law is recognized in Bangladesh.[28] However, the *de facto* position is that there is no procedure set by law for such determination.[29] The *de facto* power conferred on the government that authorized them to make final decisions on statelessness and their arbitrary exercise of such power resulted in statelessness of these Rohingya children. In any event, these children can make an application for Bangladeshi citizenship.[30] However, their application is most likely to be unsuccessful due to the exercise of the *de facto* power by the Bangladeshi government and the applicants' last known status as Rohingya refugees.[31] As a result, they are likely to be treated as foreigners taking refuge in Bangladesh and based on this they cannot challenge this decision in a Bangladeshi court of law.[32] Moreover, they can be forcefully deported from Bangladesh due to being classed as stateless and because the rule against refoulement of refugees do not apply to Bangladesh as it is not a state party to the 1951 Refugee convention.[33] In addition, they may be subject to inhuman and degrading treatment in Bangladesh due to being a foreigner who can be detained without trial

[21] The Citizenship (Amendment) Act, 2009 (Act. No. XVII of 2009) (with effect from 31st December, 2008), s 2.
[22] CA 1951, s 5(a).
[23] For an example of historical application of the CA 1951 to Bangladeshi citizenship law see Ridwanul Hoque, *Report on Citizenship Law: Bangladesh* (European University Institute 2016) 10, 13.
[24] *Bangladesh v Prof Golam Azam* (1994) 46 Dhaka Law Reports (AD) 193.
[25] Constitution of the People's Republic of Bangladesh 1972, Art 27, 31.
[26] Ridwanul Hoque, *Report on Citizenship Law: Bangladesh* (European University Institute 2016) 26.
[27] Ibid.
[28] Constitution of the People's Republic of Bangladesh 1972, Art 6, 152 (1).
[29] Ridwanul Hoque, *Report on Citizenship Law: Bangladesh* (European University Institute 2016) 8.
[30] BCTP Order, Art 4; see also the draft Citizenship Bill 2016, s 6.
[31] Foreigners Act 1946, s 8 (1).
[32] Ibid.
[33] It has been argued that although Bangladesh is not a party to the 1951 Refugee Convention it applies to Bangladesh under the customary international law but this argument hardly persuaded the Bangladeshi judiciary and only given cursory consideration: see *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh* (2016) High Court Division, Supreme Court of Bangladesh, Writ Petition no. 10504.

for a long period of time in appalling conditions in remote detention centres where arrested refuges are kept.[34] Bangladesh government has recently relocated, without consulting the UN and the concerned Rohingyas, 31,439 Rohingyas to an isolated island known as 'Bhasan Char' which is located 37 miles off the coast of Bay of Bengal.[35] This is a remote island controlled by the Bangladesh Police and Navy. According to the Amnesty International, the refugees in Bhasan Char live in a prison as they are not allowed to leave their shelter.[36] They also reported that the security officials have sexually harassed some of the refugees, threatened with deportation, and both members of Navy and some host community labourers have engaged in extortion.[37] The law enforcement agencies have been accused of involved in extrajudicial killings of Rohingya refuges under the guise of war on drugs.[38] They may also be subject to detention under the Foreigners 1946 Act. In *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh*, a stateless Rohingya could not prove their nationality and hence detained under the Foreigners Act 1946 for more than two years.[39] These actions by the authorities remained legally unchallenged because there is no refugee law framework in Bangladesh except the Foreigners Act,[40] and the provisions of this Act is far below international standard. Furthermore, they are not able to exercise their basic human rights due to not being able to provide documentary evidence to prove Bangladeshi citizenship status such as a birth certificate or birth registration document. Additionally, they cannot also challenge exercise of the *de facto* arbitrary power by the government officials as no judicial intervention has been made or hearing offered to review exercise of such power. These are *de facto* position which resulted in arbitrary deprivation of Bangladeshi citizenship and consequently statelessness of these Rohingya children.

As Bangladesh is not a state party to the 1951 Refugee convention the Rohingya refugees are subject to the Foreigners Act 1946 which do not confer right to asylum, permanent residency, or citizenship in Bangladesh.[41] As a result the Bangladeshi authorities are exercising wide discretion under the citizenship law and the only protection available to Rohingyas is through administrative mechanisms.[42] For instance, the administration has unequivocally stated that Bangladesh accepted Rohingya refugees from Myanmar not out of any obligation but rather acting under its prerogative and on a humanitarian ground.[43] Therefore, the Rohingya children born to a Bangladeshi parent are being left in a limbo. The government of Bangladesh has proposed a bill in February 2016 which is currently undergoing the parliamentary process. This draft Citizenship Bill of 2016 has adopted a drastic provision to prevent growing number of Rohingyas taking refuge in Bangladesh from marrying Bangladeshi citizen. It provided that foreign spouse cannot obtain Bangladeshi citizenship through marriage if they are unauthorized immigrant.[44] This provision, if becomes legislation, would result in statelessness of those

[34] Foreigners Act 1946, ss 3 and 4; see also Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987, Art 3 (The Bangladesh is a state party to this convention).
[35] UNHCR Operational Data Portal, available at <https://data.unhcr.org/en/country/bgd> accessed 5 January 2024.
[36] Amnesty International, 'Let Us Speak for Our Rights: Human Rights Situation of Rohingya Refugees in Bangladesh' (15 September 2020), available at < https://www.amnesty.org/en/documents/asa13/2884/2020/en/> accessed 6 January 2024.
[37] Ibid.
[38] Amnesty International, 'Bangladesh: Killed in "crossfire": Allegations of extrajudicial executions in Bangladesh in the guise of a war on drugs' (4 November 2019), available at <Bangladesh: Killed in "crossfire": Allegations of extrajudicial executions in Bangladesh in the guise of a war on drugs—Amnesty International> (accessed 6 January 2024).
[39] *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh* (2016) High Court Division, Supreme Court of Bangladesh, Writ Petition no. 10504.
[40] Foreigners Act 1946, s 3(2) (e) (i).
[41] See the Foreigners Act 1946.
[42] UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at < https://www.refworld.org/pdfid/5b081ec94.pdf> accessed 20 November 2020.
[43] Ridwanul Hoque, *Report on Citizenship Law: Bangladesh* (European University Institute 2016) 12.
[44] The Draft Citizenship Bill 2016, s 11.

Rohingyas who are married to a Bangladeshi citizen. This would also result in statelessness of any children born from this marriage and this is because when a parent is stateless this increases the risk of the child becoming stateless as well.[45] Further effect of this provision is that the Rohingyas would be categorized as 'unauthorized immigrant' who can never be a citizen of Bangladesh by marrying a Bangladeshi citizen and it would be very difficult for any children to provide documentary evidence to establish their Bangladeshi citizenship by descent. The UNHCR's Periodic Review has concluded that Bangladeshi government is not including adequate information in the birth certificate to indicate the nationality of children born to a Rohingya Bangladeshi parent.[46] Although the government has enacted the Children Act 2013 with the aim to implement the CRC in the domestic law no provision of the Act addresses the issues in relation to citizenship rights of the Rohingya children born to a Bangladeshi parent and the arbitrary withholding of these rights by the government.[47] Thus the Children Act 2013 does not implement the CRC regarding prevention of child statelessness. As a result, the Bangladeshi citizenship law, as it is currently in force, is arbitrary and falls way below the international standard in relation to citizenship and statelessness of children. It can be concluded that the approach of Bangladeshi government towards citizenship by descent is very regressive. This approach of the government officials together with other barriers stated above and the current exercise of wide discretionary power by the executives have created further obstacles for these Rohingya children in claiming Bangladeshi citizenship according to the law. Therefore, the citizenship law of Bangladesh must be amended to maintain the minimum international standard that the country is obliged to do in order to discharge its obligation under the CRC and ICCPR.

3. CHILD STATELESSNESS IN INTERNATIONAL LAW

The International Covenant on Civil and Political Rights (ICCPR) 1966 and Convention on the Rights of the Child (CRC) 1989 recognize the right to a nationality as a fundamental human right.[48] The general prohibition of arbitrary deprivation of nationality has also been adopted in other instruments of international human rights law.[49] Therefore, arbitrary deprivation of nationality is prohibited in international law. What is 'arbitrary deprivation' is a very important issue that requires special attention. In this regard, the United Nations Human Rights Council (UNHRC) has stated in its General Comment 27 that:

> '20....This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them.'[50]

The above General Comment from the UNHRC acknowledges that a citizenship deprivation is arbitrary if it violates international law. This position has been supported by Eric Fripp who has stated that 'arbitrary deprivation of nationality may mean a deprivation which defies national law or one which is in accordance with such law but is objectionable for some other reason, such

[45] UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at < https://www.refworld.org/pdfid/5b081ec94.pdf> accessed 20 November 2020.
[46] ibid.
[47] Children Act 2013, preamble.
[48] ICCPR, art 24(3); and CRC, Art 7.
[49] Human Rights Committee, *General Comment 27, Freedom of Movement (Art 12)* U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).
[50] UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, available at: https://www.refworld.org/docid/45139c394.html accessed 4 August 2020.

as discrimination for some prohibited reason or absence of due process.'[51] Therefore, arbitrary deprivation may occur even where such deprivation is in accordance with national law but in breach of general international law such as discrimination between children born to a parent belonging to a minority group and rest of the citizens, out-of-country deprivations, and children born to a national in refugee camps.[52] Moreover, the prohibition on discrimination is considered a *jus cogens* norm of international law.[53] Articles 2(1) and 26 of the ICCPR prohibited discrimination based on birth or other status. The International Law Commission (ILC) has also affirmed that the right of States to decide who their nationals are is not absolute and that, in particular, States must comply with their human rights obligations concerning the granting of nationality.[54] Similarly, The Secretary-General's Annual Report to the Human Rights Council in 2009 states that "Measures leading to the deprivation of nationality must serve a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law."[55] Furthermore, the principle of non-discrimination is at the very core of international law. For instance, Article 2 of the Universal Declaration of Human Rights (UDHR) and Article 2 of the Convention on the Elimination of All Forms of Racial Discrimination 1969 (CERD). The Human Rights Committee, in its general comment No. 16, stated that the expression 'arbitrary deprivation' was relevant to the protection of the right provided for in Article 17 of the ICCPR.[56] In the Committee's view, the expression 'arbitrary interference' could also extend to interference provided for under the law.[57] In its general comment No. 27, the Committee further indicated that the reference to the concept of arbitrariness in this context was intended to emphasize that it applied to all State action, legislative, administrative, and judicial, and guaranteed that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant (i.e. ICCPR) and should, in any event, be reasonable in the particular circumstances.[58]

The international legal framework on the prohibition of deprivation of citizenship is reaffirmed across many core UN human rights conventions, including the ICCPR.[59] Alongside the core human rights treaties, the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) and the 1961 Convention on the Reduction of Statelessness (1961 Convention) obligate state parties to take certain measures to protect persons who are stateless or at risk of statelessness.[60] In 2011, to mark the 50th anniversary of the 1961 Convention, United Nations High Commissioner for Refugees (UNHCR) launched a worldwide campaign on statelessness. The plight of people around the world not recognized as a national of any state under the operation of its law and the urgent work needed to address the deprivations they experience as a result remain a central concern in the work of the Office of UNHCR.[61] The 1961 Convention's purpose is to prevent statelessness, thereby reducing it over time. Although international law

[51] Eric Fripp, 'Deprivation of Nationality and Public International Law – An Outline', 28 Immigr, Asylum Nat L 367, 373 (2014).

[52] GA Res A/RES/50/152, Office of the United Nations High Commissioner for Refugees, 9 February 1996, para. 15, referring to the prohibition of arbitrary deprivation as a fundamental principle of international law.

[53] *South West Africa Cases (Liberia v. South Africa; Ethiopia v. South Africa)* 1962 ICJ Rep. 319.

[54] *Yearbook of the International Law Commission*, 1997, vol. II (1), p. 20.

[55] UNGA, A/HRC/13/34, para 25 (accessed 4 August 2020).

[56] UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at <https://www.refworld.org/docid/453883f922.html> accessed 4 August 2020.

[57] Ibid.

[58] UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, available at: https://www.refworld.org/docid/45139c394.html accessed 4 August 2020.

[59] ICCPR, Art. 24.

[60] Convention Relating to the Status of Stateless Persons 1954, Art. 1(1); and Convention on the Reduction of Statelessness 1961, Art 1.

[61] United Nations High Commissioner for Refugees/Asylum Aid, *Mapping Statelessness* (UNHCR: London, November 2011) 10; See also UNHCR, *Commemoration of the Anniversary of the 100th Session of the Human Rights Committee (Statement by UNHCR)*, 2010, available at <http://www.unhcr.org/refworld/docid/4cd798752.html> accessed 29 March 2020.

endorses that everyone has a right to a nationality, it does not set out a specific nationality to which a person is entitled. Responsibility for conferring nationality lies with individual States.

In addition to international treaties and conventions outlined above, the general principles of international law also recognize the prohibition of deprivation of citizenship. These general principles are binding on all states.[62] Any state violating a general principle of international law is responsible for immediately ceasing unlawful conduct and offering appropriate guarantees that it will not repeat the illegal actions in the future.[63] Moreover, the overall consequence of a state's failure to comply with international law may be disadvantageous. For instance, if a state is frequently depriving citizenship of its nationals based on unlawful discrimination it may not only face criticism by the international community but also lose any benefits in situations such as humanitarian crises. For instance, other states may reject assistance or cooperation to tackle cross-border terrorism or mass influx of refugees. In addition, as a violator of a fundamental human right a state is likely to lose or weaken its political influence in international organizations such as the UNHCR, UNHRC, UNGA (United Nations General Assembly).

The Secretary General's report to the UN General Assembly expressed serious concerns generally on statelessness and particularly that of children. It recognized that statelessness is contrary to the principle of the best interests of the child and that arbitrary deprivation of nationality places children in a situation of increased vulnerability to human rights violations.[64] The report reaffirmed the responsibility of the state to reduce child statelessness in accordance with the Assembly resolution 61/137 and Human Rights Council resolution 26/14. The General Assembly resolution 61/137 emphasizes that prevention and reduction of statelessness are primarily the responsibility of States, in appropriate cooperation with the international community.[65] The Human Rights Council (HRC) resolution 26/14 urges all States to prevent statelessness through legislative and other measures aimed at ensuring that all children are registered immediately after birth and have the right to acquire a nationality and that individuals do not become stateless thereafter.[66] Another HRC resolution i.e. 32/5, reaffirmed its previous resolutions 7/10 of 27 March 2008, 10/13 of 26 March 2009, 13/2 of 24 March 2010, 20/4 of 5 July 2012, 20/5 of 16 July 2012 and 26/14 of 26 June 2014, and all previous resolutions adopted by the Commission on Human Rights on the issue of human rights and the arbitrary deprivation of nationality.[67] It called upon every state to provide birth certificates to children born immediately after their birth and confer nationality to children under the CRC. These resolutions, taken together, require every member state to ensure that the right to nationality is conferred to every child born in their territory immediately after their birth.

Every state has ratified at least one treaty containing legal obligations to protect human rights and all states have acknowledged that 'the promotion and protection of all human rights is a legitimate concern of the international community'.[68] This acknowledgement has a direct

[62] James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 51. Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm D Evans (ed), *International Law* (Fifth edn, Oxford University Press 2018) at 89.

[63] Jan Klabbers, *International Law* (2nd edn, Cambridge University Press 2017) 144.

[64] Report of the Secretary General, Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless (16 December 2015), available at <https://www.unhcr.org/ibelong/wp-content/uploads/Report-of-the-Secretary-General-on-Childhood-Statelessness.pdf> accessed 7 January 2024.

[65] GA Res. 61/137 adopted by the General Assembly on 19 December 2006, available at <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_137.pdf> accessed 7 January 2024.

[66] GA Res. 26/11 adopted by the Human Rights Council, Human rights and arbitrary deprivation of nationality (11 July 2014), available at <https://documents.un.org/api/symbol/access?j=G1408099&t=pdf> accessed 7 January 2024.

[67] GA Res. 32/5 adopted by the Human Rights Council, Human rights and arbitrary deprivation of nationality (30 June 2016), available at <https://www.refworld.org/legal/resolution/unhrc/2016/en/112364> accessed 7 January 2024.

[68] Vienna Declaration (1993) 32 ILM 1661, para 4.

effect on state sovereignty in that one aspect of each state's control and authority over its activities on its territory and within its jurisdiction is now subject to international legal review.[69] Any state that has signed and ratified a key human rights treaty, such as the ICCPR, is responsible for having in place a domestic legal system where any breaches of human rights can be challenged.[70] Where a domestic legal system fails to address the breaches in line with international law the UN may get involved to investigate it.[71] For instance, United Nations Human Rights Council (UNHRC), United Nations High Commissioner for Refugees (UNHCR), and UN Special Rapporteurs appointed for the states have the mandate of the UN to investigate human rights breaches. If the investigation finds any breaches a debate may be held on the state's human rights abuse and a condemnation issued. For instance, the UNHRC may adopt resolutions at the General Assembly to condemn human rights violations and state parties can recourse those resolutions to support such condemnation and stop violations. The UNHRC adopted such a resolution to condemn human rights violations against the Rohingyas and other minorities in Myanmar.[72] If the breaches continue UN Security Council (UNSC) resolutions may be passed condemning the state's abuse of human rights.[73] For instance, the UNSC adopted a resolution at its 9231st meeting, condemning human rights abuse by the Myanmar authorities and calling for the safe return of the Rohingya refugees.[74] Abuse of human rights can be reported by the UN Secretary General and special rapporteurs in their reports to the General Assembly.[75] In the absence of any challenges, compliance with international law is subject to human rights treaty mechanisms that require states to provide periodic reports to internal committees outlining how they have complied with their treaty obligations.[76] As a result, the challenge and review systems make it more difficult for states to claim that other states that criticize their human rights are meddling in their internal affairs.[77] Furthermore, the state may have sanctions issued against it for committing an internationally wrongful act. Both pecuniary and non-pecuniary sanctions have been issued in the regional human rights courts i.e. Inter American Court of Human Rights (IACtHR) and European Court of Human Rights (ECtHR), for arbitrary deprivation of nationality by state authorities that resulted in statelessness and human rights violations. For instance, the IACtHR in *Expelled Dominicans and Haitians v. Dominican Republic* issued non-pecuniary sanction against the Dominican Republic for the arbitrary detention and expulsion of Haitians and Dominicans of Haitian descent from the Dominican Republic and the barriers to registering and obtaining nationality for individuals of Haitian descent born in the Republic.[78] This sanction led the way to repeal the arbitrary

[69] Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm D Evans (ed), *International Law* (Fifth edn, Oxford University Press 2018) at 259.

[70] See Human Rights Committee, General Comment No 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the [International] Covenant [on Civil and Political Rights]', UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 2.

[71] Nigel Rodley, 'International Human Rights Law' in Malcolm D Evans (ed), *International Law* (Fifth edn, Oxford University Press 2018) at 774.

[72] United Nations General Assembly Resolution 47:1 'Situation of human rights of Rohingya Muslims and other minorities in Myanmar' (12 July 2021), available at <https://documents.un.org/api/symbol/access?j=G2119187&t=pdf (accessed 3 January 2024).

[73] Nigel Rodley, 'International Human Rights Law' in Malcolm D. Evans (ed), *International Law* (Fifth edn, Oxford University Press 2018) at 774.

[74] United Nations Security Council Resolution 2669 (2022), adopted by the Security Council at its 9231st meeting, on 21 December 2022, available at < https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/N2276733.pdf> (accessed 7 January 2024).

[75] Similar report was made to the UN General Assembly by the Secretary General concerning human rights of the Rohingya refugees in the 78th session (14 August 2023), available at, <https://documents.un.org/api/symbol/access?j=N2323062&t=pdf> n2323062.pdf (un.org) (accessed 7 January 2024).

[76] Fredrick Megret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights law* (Third edn, Oxford University Press 2018) at 86.

[77] Ibid.

[78] *Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282 (28 August,2014).

national law of the Dominican Republic.[79] Similarly, the ECtHR in *Kurić and Others v. Slovenia* successfully issued pecuniary sanction against the Republic of Slovenia for denying the citizenship right (that resulted into statelessness) of some former Yugoslav republics who had habitually resided and worked in Slovenia but who were not registered as immigrants in Slovenia and therefore did not count as permanent residents.[80] These cases show a strong prospect of success of similar claims in the United Nations Compensation Commission (UNCC) which was set up by the UN Security Council.[81] Articles 5.1 and 5.2 of the UNCC's Rules allow a state or appointed body i.e. UNHRC, and UNHCR, to make applications for sanctions against the state that is responsible for internationally wrongful act by denying the right of citizenship which resulted in statelessness.[82]

The International Law Commission provides that the characterization of an act of a state is governed by international law.[83] Such characterization is not affected by the characterization of the same act as lawful by internal law', and in a large body of international decisions.[84] Therefore, even where a national legislation authorizes the government authorities to deprive citizenship such decision may not be legal in international law. However, the legality of deprivation of citizenship is often defended by states on national security grounds.[85] They do it by denying or distinguishing application of the treaties and conventions and claiming citizenship deprivation as an exception to the general prohibition. Such denial is a violation of the obligation *erga omnes* which denotes to common interest of every state in upholding international law.[86] Likewise, the general principle of international law also requires every state to deal with its citizens according to the law.[87]

In line with the explanation of the concept of arbitrary deprivation, this is the case where the citizenship rights of the Rohingya children have been put on hold by Bangladeshi government based on their discriminatory exercise of *de facto* power conferred by its nationality law. Furthermore, international law recognizes that any power of deprivation shall be according to law and shall provide for the person concerned the right to a fair hearing by a court or other similar independent body.[88] However, to date no judicial hearing has been offered to the discriminatory exercise of this *de facto* governmental power. As a result, no judicial oversight of those administrative powers is available to these Rohingya children.

4. STATE RESPONSIBILITY OF BANGLADESH UNDER INTERNATIONAL LAW IN TO PREVENT CHILD STATELESSNESS

Depriving a child of his or her right to a nationality and making them stateless is a violation of the CRC and ICCPR.[89] This right has been recognised in the Bangladeshi nationality law. However, the *de facto* position of this law has conferred on the government officers a power to deprive citizenship. As a result, a significant number of Rohingya children who are born to a Bangladeshi national have been denied of their Bangladeshi citizenship and left in a limbo.

[79] Dominicanos por Derechos, 'The Institute on Statelessness and Inclusion & The Center for Justice and International Law, Joint Submission to the Human Rights Council at the 32nd Session of the Universal Periodic Review: The Dominican Republic', paras. 22–23, 31 (July 12, 2018), available at https://files.institutesi.org/ UPR32_DominicanRepublic.pdf accessed 7 January 2024.

[80] *Kurić and Others v. Slovenia*, 2012-IV Eur. Ct. H.R. 1

[81] Maria Jose Recalde-Vela, 'Access to Redress for Stateless Persons Under International Law: Challenges and Opportunities', 24(2) Tilburg L Rev 182 (2019).

[82] UNCC Governing Council, S/AC.26/1992/10 (26 June 1992), at 5.

[83] The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, Art. 3.

[84] Ibid.

[85] Alison Harvey, 'Recent Developments on Deprivation of Nationality on Grounds of National Security and Terrorism Resulting in Statelessness', 28 Immigr, Asylum Nat L 336, 341 (2014).

[86] Christian Tams, *Enforcing Obligation Erga Omnes in International Law* (Cambridge University Press 2005) at 6.

[87] James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) at 52.

[88] Convention on the Reduction of Statelessness (CSR) 1961, Art 8(4).

[89] For discussion about the violation of CRC and ICCPR see s 1.3 (above).

Moreover, they have not been offered any judicial review of this discriminatory and arbitrary deprivation of citizenship.

When urging for recognition of Bangladeshi citizenship to these Rohingya children under international law Bangladeshi authorities have denied the application of the 1954 and 1961 statelessness conventions and the 1951 Refugee convention as it is not a state party to these international treaties.[90] However, Bangladesh is a state party to the CRC and ICCPR which apply to child statelessness. To broaden the scope of operations of the statelessness conventions, this part of the article argues to resort to other sources of international law to which Bangladesh is a state party. It concludes that Bangladesh is responsible for protecting children against discrimination and arbitrariness, and for upholding international standards.[91] It also concludes that Bangladesh is responsible for removing all the obstacles to accessing nationality for children to its nationals.[92]

International human rights law recognizes the right of every person to a nationality and its provisions aid the application of CRC.[93] The CRC made robust provisions to reduce statelessness of Children. Article 7(2) of the CRC explicitly requires States parties to ensure the implementation of the right to acquire a nationality in accordance with their national legislation and their obligations under the relevant international human rights instruments, in particular where the child would otherwise be stateless.[94] Similarly, the Human Rights Committee, in the context of the provision of Article 24(3) of the ICCPR, stated that the purpose of that provision is to prevent a child from being afforded less protection by society and the State because he is stateless.[95] Since Bangladesh is a state party to the CRC it is responsible under international law to ensure that children born into a Bangladeshi parent do not become stateless. For this purpose, Bangladesh is under a primary obligation to officially confer citizenship to children born to a Bangladeshi parent forthwith their birth and without making the application process lengthy or complex. This obligation to children has been emphasized by the UNHRC in its General Comment 17 which stated at [8] that:

> '8. …States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents. The measures adopted to ensure that children have a nationality should always be referred to in reports by States parties.'[96]

In addition, the CRC has made provisions for every Member State to consider the 'best interest of the child' as a primary consideration when it makes decisions on citizenship involving children.[97] Most statelessness is contrary to the principle of the best interests of the child and therefore arbitrary. This arbitrary deprivation of nationality places children in a situation of increased

[90] UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at < https://www.refworld.org/pdfid/5b081ec94.pdf> accessed 20 November 2020.
[91] 'Addressing the right to a Nationality through the Convention on the Rights of the Child' (Institute on Statelessness and Inclusion: June 2016) at 9.
[92] Ibid, 17.
[93] Vienna Convention on the Laws of Treaties 1969 (United Nations, "Treaty Series", vol. 1155, p. 331), Art 32 (3).
[94] CRC 1989, Art 7 (2).
[95] UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989, available at: https://www.refworld.org/docid/45139b464.html accessed 5 August 2020.
[96] UN Human Rights Committee, General Comment No 17: Rights of the Child (Art 24) 29 September 1989.
[97] CRC, Art 3.

vulnerability to human rights violations.[98] As a result, state authorities are under a duty to consider 'the best interest of a child' while making a decision to deprive citizenship of a child or those who have a child.[99]

States have a responsibility to prevent and reduce statelessness, in appropriate cooperation with the international community, in accordance with the General Assembly resolution 61/137 and the Security Council resolution 26/14.[100] Furthermore, the fundamental nature of the right to a nationality and the prohibition of arbitrary deprivation of nationality have been reaffirmed by the General Assembly in its resolution 50/152 and the Human Rights Council in its resolutions 7/10, 10/13, 13/2, 20/5 and 26/14.[101] Therefore, States must enact laws governing deprivation of nationality in a manner that is consistent with their international obligations, including in the field of human rights. Therefore, it can be argued that Bangladesh must comply with the provision of the CRC and recognize the citizenship status of the Rohingya children born to a Bangladeshi parent without any delay. In addition, Bangladesh is also a state party to the ICCPR which expressly provided for preventing child statelessness. As a result, Bangladesh is legally obliged to recognize Bangladeshi citizenship of these Rohingya children in order to discharge its obligation in international law. This obligation is enforceable even outside of the 1954 and 1961 statelessness conventions and the 1951 Refugee Convention to which Bangladesh is not a state party.

5. CONCLUSION

This article argues that the citizenship deprivations of Rohingya children born to a Bangladeshi parent are not only inconsistent but also violation of international law. It has shown that these Rohingya are being denied their right to a Bangladeshi citizenship by the government in exercise of their *de facto* power conferred under Bangladeshi citizenship law. It argues that such deprivation is discriminatory between children born to a Rohingya and non-Rohingya parent. This discrimination is being continued due to the absence of a judicial review of citizenship deprivation of these children. As a result, the deprivation is arbitrary in international law. However, the application of international law to Bangladesh is limited to the few international conventions such as CRC and ICCPR. This is because Bangladesh is not a state party to the two Statelessness Conventions and the Refugee Convention. Although Bangladesh is not a party to these conventions they indirectly apply to its law by the direct application of CRC and ICCPR to which it is a state party. Therefore, outside of the 1954 and 1961 statelessness conventions and the 1951 Refugee Convention Bangladesh must comply with the international conventions to which it is a state party such as the CRC and ICCPR. By complying with these conventions Bangladesh will discharge its current legal obligations under international law as well as maintain the minimum international legal standard in preventing child statelessness and their right to a nationality.

[98] Report of the Secretary General, Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire a nationality, inter alia, of the country in which they are born, if they otherwise would be stateless (United Nations General Assembly 2015) 1.

[99] This was emphasized by the Joint Committee of Human Rights during a parliamentary debate on the bill that was proposed to enact the Immigration Act 2014. See HL Paper 142, HC 1120, para. 49.

[100] Report of the Secretary General, Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire a nationality, inter alia, of the country in which they are born, if they otherwise would be stateless (United Nations General Assembly, 16 December 2015), available at < https://www.unhcr.org/ibelong/wp-content/uploads/Report-of-the-Secretary-General-on-Childhood-Statelessness.pdf> accessed 18 December 2023.

[101] Ibid.