Asian Journal of International Law (2022), 1–29
doi:10.1017/S204425132200056X

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

The Customary Obligation to Avoid, Reduce, or Prevent Statelessness in South Asia

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Abstract

South Asia, as a region, consists of several stateless groups as well as groups at the risk of statelessness. However, none of the South Asian states are parties to the 1961 Convention on the Reduction of Statelessness, thus these states do not have specific obligations arising from this Convention to avoid, reduce, or prevent statelessness in the region. In this context, this article ascertains that despite the prevalence of statelessness, there exists state practice and *opinio juris* in South Asia that point to an emerging customary international law obligation to avoid, reduce, or prevent statelessness.

Keywords: statelessness; customary international law; avoidance of statelessness; South Asia

The United Nations High Commissioner for Refugees (UNHCR) estimates that about 40% of the total number of stateless persons in the world are from the Asia-Pacific.[1] In the Asia-Pacific region, South Asia in particular consists of statelessness "hotspots" where thousands remain at risk of statelessness.[2] Bangladesh is the largest host of stateless persons in the world with about 906,000 stateless persons, mainly including Rohingyas from Myanmar; Myanmar comes third with about 620,000 stateless persons;[3] and India hosts about 17,730 stateless persons, which also includes Rohingyas.[4] Apart from this, about 1.9 million in India are at risk of statelessness.[5] There is no clear data on the number of stateless persons

[1] Christoph SPERFELDT, "Statelessness in Southeast Asia: Causes and Responses" *EUI Global Citizenship Observatory* (9 March 2021), online: GLOBALCIT <https://globalcit.eu/statelessness-in-southeast-asia-causes-and-responses/>.

[2] See Institute on Statelessness and Inclusion (ISI), "Statelessness in Numbers: 2019 An Overview and Analysis of Global Statistics" (July 2019) at 7–8, online: ISI <https://files.institutesi.org/ISI_statistics_analysis_2019.pdf>.

[3] Marie MCAULIFFE and Binod KHADRIA, "World Migration Report 2020" *International Organization for Migration* (IOM) (June 2019) at 3, online: IOM <https://publications.iom.int/system/files/pdf/wmr_2020.pdf>.

[4] United Nations High Commissioner for Refugees (UNHCR), "Global Trends: Forced Displacement in 2019" (18 June 2020) at 73, online: UNHCR <https://www.unhcr.org/be/wp-content/uploads/sites/46/2020/07/Global-Trends-Report-2019.pdf>.

[5] UNHCR India, "UN High Commissioner for Refugees Expresses Alarm at Statelessness Risk in India's Assam" (1 September 2019), online: UNHCR <https://www.unhcr.org/news/press/2019/9/5d6a24ba4/un-high-commissioner-refugees-expresses-alarm-statelessness-risk-indias.html>.

in other states in the region. However, persons have been rendered stateless in these states and have also been displaced to other states in the region where they remain stateless.

Despite the number of stateless persons in South Asia, none of the South Asian states are parties to the 1961 Convention on the Reduction of Statelessness (1961 Convention).[6] The 1961 Convention provides rules on the acquisition, loss, and deprivation of nationality to enable states to prevent and reduce statelessness.[7] However, since the South Asian states are not parties to this Convention, they are not subject to the specific obligations to address statelessness that arise from the Convention. These states also lack a specific, domestic legal framework to address statelessness.

Nevertheless, customary international law (CIL) can obligate these states to avoid, reduce, or prevent statelessness in the absence of treaty law. The existence of such a CIL obligation will prove to be of particular significance to this region as, at times, domestic courts in this region have directly applied CIL as part of their domestic law.[8]

Is there a general CIL norm obliging states to avoid, reduce, or prevent statelessness? Scholarship, international organisations, and regional courts point towards the emergence of such an obligation.[9] Evidence of state practice and *opinio juris* arising from South Asia can strengthen the claim that there is an emerging CIL obligation of this nature, particularly in the South Asian region. The existence of this CIL norm will mandate South Asian states to address statelessness in the region.

Accordingly, the aim of this article is to examine state practice and *opinio juris* in South Asia to assess whether support exists for an emerging CIL obligation to avoid, reduce, or prevent statelessness obligating these states to address statelessness in the region. To this end, first, this article notes that, despite the prevalence of statelessness in the South Asian region, there is increasing evidence of state practice and *opinio juris* in the region supporting the obligation to avoid, reduce, or prevent statelessness. Second, this article finds that when evidence of state practice and *opinio juris* is considered with the developments in international law relating to statelessness, there are strong indications of an emerging CIL obligation to avoid, reduce, or prevent statelessness. This article is a novel contribution to scholarship as there are fewer systematic studies on how the obligation to avoid, reduce, or prevent statelessness is, or is emerging, as CIL, particularly in South Asia.

For the purposes of this article, the South Asian region is taken to be Afghanistan, Bangladesh, Bhutan, India, Maldives, Myanmar, Nepal, Pakistan, and Sri Lanka. While Myanmar has at times been considered part of Southeast Asia, and is in fact a member of the Association of Southeast Asian Nations (ASEAN) as opposed to the South Asian Association for Regional Cooperation (SAARC) which the other states are part of, Myanmar is often studied alongside South Asian states in citizenship and statelessness

[6] *Convention on the Reduction of Statelessness*, 30 August 1961, 989 U.N.T.S. 175 (entered into force 13 December 1975) [*1961 Convention*].

[7] UNHCR, "Expert Meeting – Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality: Summary Conclusions" (March 2014) at 2, online: UNHCR <https://www.unhcr.org/protection/statelessness/5465e2cb9/interpreting-1961-statelessness-convention-avoiding-statelessness-resulting.html>.

[8] See *Vellore Citizens Welfare Forum v. Union of India* (UOI) *and Others,* MANU/SC/0686/1996 (Supreme Court of India), at para. 15; see also *Government of the People's Republic of Bangladesh v. Abdul Quader Molla* LEX/BDAD/0004/2013 (Supreme Court of Bangladesh), at para. 670.

[9] See e.g. Council of Europe, "Explanatory Report to the European Convention on Nationality" (6 September 1997) at para. 33, online: COE <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ccde7>; see also William Thomas WORSTER, "The obligation to Grant Nationality to Stateless Children Under International Law" (2019) 27(3) Michigan State International Law Review 441 at 467–8; Kay HAILBRONNER, "Nationality in Public International Law and European Law" in Rainer BAUBÖCK et al., eds., *Acquisition and Loss of Nationality: Volume 1 Comparative Analyses: Policies and Trends in 15 European Countries* (Amsterdam: Amsterdam University Press, 2006) 35 at 65–6.

https://doi.org/10.1017/S204425132200056X Published online by Cambridge University Press

studies.[10] Furthermore, issues of statelessness in Myanmar can be traced to the ethnic and geographical connections between some of the South Asian states such as India and Bangladesh.[11]

This article uses the terms "avoid", "reduce", and "prevent" statelessness interchangeably, as scholarship on the subject often uses these terms alternately when describing an obligation to avoid, reduce, or prevent statelessness, depending on the context in which they are used without making a particular distinction between the three terms. These varied terms exist in literature to describe an obligation to reduce statelessness since the 1961 Convention contains provisions for preventing, reducing, and avoiding statelessness.[12]

This article also uses the terms "citizenship" and "nationality" interchangeably as these terms are used in reference to membership within a state and the human right to nationality. Further, this article uses the term *jus soli* to denote nationality obtained through birth in a particular state and *jus sanguinis* to denote nationality obtained through descent.[13]

I. Evidence of an Emerging CIL Obligation to Avoid, Reduce, or Prevent Statelessness in South Asia

This section examines state practice and *opinio juris* from South Asia relating to the obligation to avoid, reduce, or prevent statelessness. The aim of this examination is to ascertain whether there are indications of state practice and *opinio juris* that contribute to the emergence of a general CIL obligation for states to avoid, reduce, or prevent statelessness. I note that there are indications of an emerging customary obligation to avoid, reduce, or prevent statelessness – something that I will elaborate on in Section II. For instance, the Explanatory Report of the European Convention on Nationality (ECN) and the UNHCR have asserted that there is a CIL obligation on states to avoid statelessness.[14] In this context, this section examines the extent to which any evidence of state practice and *opinio juris* support or fare in light of this emerging CIL obligation.

While this assessment is confined to evidence from South Asia, it does not suggest that the evidence adduced contributes to a regional CIL obligation in South Asia to avoid, reduce, or prevent statelessness.[15] On the contrary, the objective is to see how the evidence from the region fares in the context an emerging, general CIL obligation to

[10] See e.g. Raghu Amay KARNAD, Rajeev DHAVAN, and Bhairav ACHARYA, "Protecting the Forgotten and Excluded: Statelessness in South Asia" *Mahanirban Calcutta Research Group* (2006) at 4, online: MCRG <http://www.mcrg.ac.in/AddReading/2012/Statelessness.pdf>.

[11] Madhura CHAKRABORTY, "Stateless and Suspect: Rohingyas in Myanmar, Bangladesh and India" in Mahanirban Calcutta Research Group (MCRG), "Rohingyas in India: Birth of a Stateless Community" (September 2015) at 41, online: MCRG <http://www.mcrg.ac.in/PP71.pdf>.

[12] See UNHCR, "Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness" (January 2014), online: UNHCR <https://www.refworld.org/pdfid/4cad866e2.pdf>.

[13] See, Peter McMullin Centre on Statelessness, "Factsheet: An Overview of Statelessness" *The University of Melbourne* (October 2021) at 1, online: Melbourne Law School <https://law.unimelb.edu.au/__data/assets/pdf_file/0010/3937168/Statelessness_overview_factsheet_Oct_2021.pdf>.

[14] Council of Europe, *supra* note 9 at para. 33; UNHCR, "Submission by the Office of the United Nations High Commissioner for Refugees in the case of Kurić and Others v. Slovenia (No. 26828/06)" (8 June 2011) at para. 5.3, online: Refworld <https://www.refworld.org/pdfid/4df9cd8c2.pdf>; UNHCR, "Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Bedri HOTI. v. Croatia" (3 July 2015) at para. 2.3.5–4.4, online: Refworld <https://www.refworld.org/docid/560a2cdb4.html>.

[15] According to the International Law Commission's Draft Conclusions on Identification of Customary International Law, "A rule of particular customary international law ... applies only among a limited number of States". See *Draft Conclusions on Identification of Customary International Law*, Report of the International Law Commission (ILC), UN Doc. A/73/10 (2018), at para. 66 [*ILC Draft Conclusions*], at conclusion 16(1)

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avoid, reduce, or prevent statelessness. Admittedly, the fact that this article confines its analysis to evidence of CIL from within the South Asian region is a limitation; nevertheless, I acknowledge that an empirical analysis to test and determine if there exists such a general CIL obligation should include a larger sample of states. In fact, this article indicates the need for a broader study on state practice and *opinio juris* to determine if there is a general CIL obligation to avoid, reduce, or prevent statelessness. Nevertheless, this article is an important step towards deciphering the general practice of states and *opinio juris* in determining whether there is an emerging CIL obligation to avoid, reduce, or prevent statelessness.

While neither courts nor scholars subscribe to a single methodology for identifying CIL, the International Law Commission's Draft Conclusions on Identification of Customary International Law[16] (Draft Conclusions) laid down the methodology for CIL identification, *viz.* analysing state practice and *opinio juris*. This methodology has generally been adopted by states, courts, international organizations, and scholars.[17]

According to the Draft Conclusions, state practice is the conduct of the state "in the exercise of executive, legislative, judicial, or other functions",[18] while *opinio juris* indicates whether such practice is supported by a sense of legal obligation.[19] The conduct of states connected with resolutions of international organizations and conduct pertaining to treaties, treaty provisions, national legislations, and decisions of national courts are evidence of state practice and *opinio juris*.[20] Evidence for both elements could at times overlap: the same evidence could reveal both state practice and *opinio juris*, even though both elements are assessed individually.[21]

A holistic analysis of the evidence should also consider the inconsistent state practice of a particular state in order to ascertain the actual practice of that state.[22] Such inconsistencies should be analysed having regard to the circumstances in which the practice is found.[23] The Draft Conclusions note that when there is varied practice within a state, the weight of the practice from that state may be reduced.[24] In such cases, the commentary to the Draft Conclusions elaborates upon this by stating that this includes situations where "different organs or branches within the State adopt different courses of conduct on the same matter".[25] It also adds that this reduced weightage depends on the circumstances.[26] The commentary notes that there could be differences between practice depending on the hierarchy of the organ of the state whose practice is being considered, and notes also that the "executive branch is often the most relevant on the international plane and thus has particular weight … though account may need to be taken of the constitutional position of the various organs in question".[27]

[16] *Ibid.*

[17] *Ibid*., at 123, 126.

[18] *Ibid*., at 132.

[19] *Ibid*., at 138.

[20] *Ibid*., at 133, 140, 141; Steven WHEATLEY, *The Idea of International Human Rights Law*, 1st ed. (Oxford: Oxford University Press, 2019) at 153.

[21] *ILC Draft Conclusions*, *supra* note 15 at 128–9.

[22] *Ibid*., at 135.

[23] *Ibid*.

[24] *Ibid*., at Conclusion 7(2).

[25] *Ibid.*, at 135.

[26] *Ibid.*

[27] *Ibid*. The ILC used the phrase "may be reduced" in Conclusion 7(1) to ensure that there is no hierarchy in conflicting practice within a state. While the executive branch is mentioned as an example, this is not added to create a hierarchy. This explanation was welcomed "since it clarified that not all observed inconsistencies in the practice of a State's organs ought to result in reducing the weight given to that State's practice". See *Fifth Report*

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A crucial circumstance when dealing with obligations related to human rights is that states often violate human rights norms, even norms laid down in their own legislation. Can it then be said that the dominant practice of the state should be taken to be the practice of the Executive, rendering practice in the form of national legislation as possessing lesser weight? As Wheatley explains, what is required is to see if, considering all the evidence available as to state practice, a state, when engaging in a particular practice, can claim a right to carry out what is alleged as a human rights violation.[28] Wheatley gives an example of a state with domestic legislation that prohibits enforced disappearance but whose police practices enforce disappearance. In such circumstances, "unless the state claims a right or liberty in international law to carry out a policy of enforced disappearance", the action of committing enforced disappearance cannot count as state practice.[29]

This reflects the position that the International Court of Justice (ICJ) took in *Military and Paramilitary Activities in and Against Nicaragua*. In dealing with the existence of a CIL norm of non-intervention in light of evidence of state practice of intervention, the ICJ held that it has to consider "whether there might be indications of a practice illustrative of belief in a kind of general right for states to intervene".[30] In relation to consistency of state practice for the establishment of a CIL rule, the ICJ noted that "instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule".[31]

Such a holistic understanding of the evidence for state practice is also in line with the Draft Conclusions to regard the overall context, nature, and circumstances in which the evidence of state practice is found.[32] While setting out the Draft Conclusions, the International Law Commission (ILC) was confronted with the question of whether there should be a different methodology for determining rules of CIL in international human rights law. However, the ILC accepted the two-element approach for the determination of CIL, and noted that there could be "difference in application of the two-element approach in different fields".[33] For this reason, the Draft Conclusions necessitated that the context, nature, and circumstances of the evidence should be considered.[34]

In the analysis that follows in this section, inconsistent state practice going against the principle of avoidance of statelessness, particularly in light of other evidence affirming the principle, is considered as a violation of the principle of avoidance of statelessness rather than creating a new rule. This is because the principle of avoidance of statelessness is well-established as a principle arising from the prohibition of the arbitrary deprivation of nationality, which is found in Article 15(2) of the Universal Declaration of Human Rights (UDHR).[35] Accordingly, where, for instance, there is national legislation affirming

on Identification of Customary International Law, Report of the Special Rapporteur of the ILC, Michael WOOD, UN Doc. A/CN.4/717 (14 March 2018) [*Fifth Report*] at 27–8, para. 61.

[28] Wheatley, *supra* note 20 at 137.

[29] *Ibid*., at 136–7.

[30] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 at para. 206.

[31] *Ibid*., at para. 186.

[32] See *ILC Draft Conclusions*, *supra* note 15 at conclusion 3(1).

[33] See *Second Report on Identification of Customary International Law,* Report of the Special Rapporteur of the ILC, Michael WOOD, Report of the ILC, UN Doc. A/CN.4/672 (22 May 2014), at para. 28–31.

[34] *Ibid*.; see also *Fifth Report*, *supra* note 27 at para 33.

[35] See e.g. Alice EDWARDS, "The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects" in Alice EDWARDS and Laura van WAAS, eds., *Nationality and Statelessness under International Law* (Cambridge: Cambridge University, 2014) 11 at 27–9; see also Andrea Marilyn Pragashini IMMANUEL, "The Meaning of 'Life' Under the Indian Constitution and the Obligation not to Render Persons Stateless: With Reference to the NRC in Assam" (2021) 3(1) Statelessness & Citizenship Review 186 at 192–3.

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the avoidance of statelessness, any violations in implementation cannot constitute state practice unless the state can claim a right to violate the principle of avoidance of statelessness. In fact, while Article 8 of the 1961 Convention prescribes that there cannot be a deprivation of nationality resulting in statelessness, it still permits states to create statelessness on limited grounds.

International law does not prohibit states from creating statelessness. Nevertheless, where a national legislation or another practice goes against the principle of avoidance of statelessness and where it does not pertain to a ground under Article 8, such a practice is a violation of the principle and does not create a new rule.

Another concern is ascertaining whether state practice is consistent across the states under consideration.[36] In this analysis, what is required is not complete consistency of practice but "substantial uniformity".[37] Thus, the evidence of inconsistent state practice has to be considered in light of other evidence of that state's practice as well as evidence of other states' practices that are available. If there is overall support for the existence of the norm, the instances of inconsistent state practice found are to be treated as breaches of the obligation.

Furthermore, when considering state practice of human rights norms there could be a dearth of state practice, given that when it comes to a state's treatment of its own individuals other states often hesitate to comment on the action or inaction of the state in question.[38] State practice could also indicate violations of the very rule one is seeking to establish.[39] Nevertheless, given the wide array of forms of state practice mentioned in the Draft Conclusions, including conduct connected with adoption of resolutions before international organizations, conduct connected with treaties, and decisions of national courts,[40] analysis of state practice does not have to be confined to condemnation of human rights violations by other states. Since state practice could originate from the conduct of the legislative, executive, and judicial organs of the state, and such organs could engage in practice in the belief that the law necessitates such practice, their conduct could act as evidence for the determination of CIL.[41]

With these principles in mind, below is an analysis of both state practice and *opinio juris* of the South Asian states pertaining to the obligation to avoid, reduce, or prevent statelessness under the heads of national legislation and judicial decisions, conduct connected with international organizations, and treaties. Other evidence of practice and *opinio juris* mentioned in the Draft Conclusions have not been considered because there is negligible, if any, evidence available. For instance, public statements are not considered in this analysis as states generally do not assert or acknowledge that they are creating statelessness.[42]

A. National Legislation and Judicial Decisions

Legislative acts are key indicators of state practice and *opinio juris* as they reflect the belief of the legislature, a state organ, concerning legal norms.[43] Certain elements in nationality

[36] *ILC Draft Conclusions*, *supra* note 15 at conclusion 8.

[37] *Ibid*., at 137.

[38] Olivier De SCHUTTER, *International Human Rights Law: Cases, Materials, Commentary*, 3rd ed. (Cambridge: Cambridge University Press, 2019) at 62.

[39] Wheatley, *supra* note 20 at 130.

[40] *ILC Draft Conclusions*, *supra* note 15 at conclusion 6.

[41] Wheatley, *supra* note 20 at 135.

[42] See e.g. Ministry of External Affairs (MEA), Government of India, "Statement by MEA on National Register of Citizens in Assam" (2 September 2019), online: MEA (India) <https://www.mea.gov.in/Speeches-Statements.htm?dtl/31782/Statement+by+MEA+on+National+Register+of+Citizens+in+Assam>.

[43] *ILC Draft Conclusions*, *supra* note 15 at conclusion 6; Noora ARAJÄRVI, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals*, 1st ed. (London/New York: Routledge, 2014) at 89.

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legislation aid in the prevention and the reduction of statelessness; namely, avoiding childhood statelessness; eliminating gender discrimination from nationality laws; providing for naturalization of stateless persons; protecting persons from statelessness as a result of conflict of laws and automatic loss of nationality; ensuring equality and non-discrimination in nationality matters; and ensuring that any deprivation or loss of nationality does not leave individuals stateless.[44] The presence of these elements is evidence of both state practice and *opinio juris* with regard to the obligation to avoid, reduce, or prevent statelessness because in making national legislation, states are both creating practice and, given the normative value of national legislation, undertaking the practice "with a sense of legal right or obligation".[45]

Similarly, decisions of national courts can be evidence of both state practice and *opinio juris* since national courts are organs of the state.[46] Accordingly, when a judicial decision adheres to or applies the obligation of avoidance, reduction, or prevention of statelessness, this is evidence of both state practice and *opinio juris*. Given their normative value, judicial decisions, especially those that interpret or overrule national legislation, indicate *opinio juris* or a belief of a legal obligation of the state.

This part analyses national legislation and judicial decisions together because judicial decisions constitute the law of the land in many of the South Asian states,[47] and where national legislation has created statelessness, the courts have addressed the issue. At the outset, I acknowledge the limitations in conducting this research on national legislations and the judicial decisions of the South Asian states. For instance, national legislations and judicial decisions were either accessed through online databases or supplemented by material in these databases.[48] Where legislations and judicial decisions were not publicly accessible in English, I relied on secondary material in online databases.[49] Furthermore, in the search for pertinent judicial decisions, there were also limitations in accessing them.[50] These limit the overall analysis of state practice and *opinio juris* drawn from these resources.

[44] Inter-Parliamentary Union (IPU), "Good Practices in Nationality Laws for the Prevention and Reduction of Statelessness" (2018), online: IPU <https://www.ipu.org/resources/publications/handbooks/2018-11/good-practices-in-nationality-laws-prevention-and-reduction-statelessness>; Marilyn ACHIRON, "Nationality and Statelessness: Handbook for Parliamentarians No. 22" *UNHCR* (July 2014) at 29–42, online: UNHCR <https://www.unhcr.org/protection/statelessness/53d8ddab6/nationality-statelessness-handbook-parliamentarians-22.html>.

[45] *ILC Draft Conclusions*, *supra* note 15 at conclusion 9. In this regard, state practice evidenced through national legislation is not a "mere usage or habit" as it has the force of law.

[46] *ILC Draft Conclusions*, *supra* note 15 at conclusions 5, 6, 10.

[47] This article analyses the decisions of higher courts as they carry "greater weight" as evidence of state practice. See *ILC Draft Conclusions*, *supra* note 15 at 134.

[48] These online databases include: UNHCR's Refworld, the International Labour Organization's NATLEX, European Union Institute (EUI) Global Citizenship Observatory (GLOBALCIT), European Union Democracy Observatory (EUDO) Citizenship Observatory, Laws of Bangladesh: Government of the People's Republic of Bangladesh Legislative and Parliamentary Affairs Division (http://bdlaws.minlaw.gov.bd/), Chancery Law Chronicles (https://clcbd.org/), Manupatra (https://www.manupatrafast.com/), India Code: Digital Repository of All Central and State Acts (https://www.indiacode.nic.in/), High Court of Delhi (https://delhihighcourt.nic.in/), and Government of Nepal: Ministry of Health and Population (https://mohp.gov.np/np).

[49] These online databases include: Forum for Women, Law and Development (https://fwld.org/), UNHCR Submission for the Universal Periodic Review – Maldives – UPR 36th Session (in relation to Maldives), European Union Institute (EUI) Global Citizenship Observatory (GLOBALCIT), and European Union Democracy Observatory (EUDO) Citizenship Observatory.

[50] For instance, judicial decisions could not be found for Afghanistan, Bhutan, Maldives, and Sri Lanka. While this may be because there may not be relevant judicial decisions from these states on avoiding, reducing, or preventing statelessness, it also could be that these decisions are inaccessible because of constraints in terms of language or lack of public access to such material.

https://doi.org/10.1017/S204425132200056X Published online by Cambridge University Press

1. Afghanistan

Since August 2021, when the Taliban became the Government of Afghanistan, it is unclear which constitution and citizenship laws were being followed in Afghanistan. While reports referred to decrees that the Taliban Government has issued, it is unclear whether a new constitution had been drafted, or the extent to which the Constitution from 2004 was no longer in force (although the Taliban had dissolved the Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan).[51] In any case, the legitimacy of the legislative acts of the Taliban, and whether these would constitute state practice, is a separate question under international law. Given these ambiguities, for the purposes of this article the 2004 Constitution and the Citizenship Law from 2000 are taken as reference points.

The Citizenship Law guarantees equality of citizenship for all its citizens and provides for acquisition of citizenship for foreigners without discrimination based on ethnicity, language, sex, or education.[52] The Constitution provides that no individual shall be deprived of Afghan citizenship.[53] These provisions reflect the obligation to avoid and prevent statelessness and promote equality.

Further examples suggest that Afghanistan's citizenship law favours the avoidance of child statelessness. First, Afghanistan recognizes a child as a citizen, irrespective of the place of birth, as long as one of the parents is an Afghan citizen.[54] Second, foundlings (abandoned children) and children of stateless persons are considered to be Afghan when they are found in Afghan territory.[55] Third, a child born in Afghanistan to foreign parents can claim Afghan citizenship.[56] Fourth, where the parents acquire Afghan citizenship, their children below the age of eighteen also receive citizenship, while children over the age of eighteen can request citizenship.[57] Fifth, renunciation, abandonment, and forfeiture of citizenship of parents does not affect the citizenship of their children.[58]

Nevertheless, citizenship in Afghanistan is granted to a child based on whether the marriage of the parents is legitimate according to Sharia law. This can render stateless a child born out of a marriage not recognized by Sharia.[59] However, international human rights law prohibits discrimination between legitimate children and children born out of wedlock.[60] Therefore, Afghanistan cannot claim the right to render persons

[51] See Security Council Report, "June 2022 Monthly Forecast: Afghanistan" (31 May 2022), online: Security Council Report <https://www.securitycouncilreport.org/monthly-forecast/2022-06/afghanistan-17.php>; see also Ikramuddin KAMIL, "What the Taliban's Constitution Means for Afghanistan" *Fair Observer* (26 January 2022), online: Fair Observer <https://www.fairobserver.com/region/central_south_asia/ikramuddin-kamil-afghanistan-constitution-taliban-news-afghan-world-news-43794/>; see also Asian News International (ANI), "Taliban Plans to Form 'Commission' in 2022 to Draft New Constitution" (23 September 2021), online: ANI News <https://www.aninews.in/news/world/asia/taliban-plans-to-form-commission-in-2022-to-draft-new-constitution20210923235409/>.

[52] *Law on Citizenship of the Islamic Emirate of Afghanistan* (English Translation), 24 June 2000, art. 2, 14.

[53] *The Constitution of Afghanistan*, 3 January 2004 (ratified 26 January 2004), art. 4, 28.

[54] *Law on Citizenship of the Islamic Emirate of Afghanistan (English Translation)*, *supra* note 52, art. 11; Athayi ABDULLAH, "Report on Citizenship Law: Afghanistan" *GLOBALCIT* (March 2017) at 8, online: GLOBALCIT <https://cadmus.eui.eu/bitstream/handle/1814/45933/GLOBALCIT_CR_2017_09.pdf>.

[55] *Law on Citizenship of the Islamic Emirate of Afghanistan* (English Translation), *supra* note 52, art. 12.; Abdullah, *supra* note 54 at 9–11.

[56] *Law on Citizenship of the Islamic Emirate of Afghanistan* (English Translation), *supra* note 52, art. 13.

[57] *Ibid*., art. 17.

[58] *Ibid*., art. 26, 27, 34.

[59] Abdullah, *supra* note 54 at 8–9.

[60] *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990) [*CRC*], art. 2, 7; *CCPR* (Human Rights Committee) *General Comment No. 17: Article 24 (Rights of the Child)*, UN Human Rights Committee, (7 April 1989) at para. 8; Serena FORLATI, "Nationality as a human right" in Alessandra ANNONI and Serena FORLATI, eds., *The Changing Role of Nationality in International Law* (London/New York:

https://doi.org/10.1017/S204425132200056X Published online by Cambridge University Press

stateless on the ground of legitimacy of the marriage of their parents. Even though this is state practice and *opinio juris* against the obligation to avoid statelessness, as Afghanistan cannot claim a right to render children stateless on a discriminatory basis, this cannot undermine the evidence arising from Afghanistan in favour of the obligation to avoid, reduce, or prevent statelessness.

An Afghan will not lose citizenship on account of residence abroad or because of marriage to a foreigner.[61] If a person acquires Afghan citizenship, this does not automatically affect the citizenship of their spouse.[62] A person can hold Afghan citizenship irrespective of the renunciation or forfeiture of the citizenship of their spouse.[63] In this way, Afghan citizenship law prevents statelessness on account of marriage and conflict of laws.

Lastly, a stateless person can apply for Afghan citizenship or acquire citizenship when they marry an Afghan citizen.[64] Furthermore, Afghan citizenship can be obtained in accordance with international treaties if there is no contradiction with Islam.[65]

Based on a holistic analysis of the evidence of Afghan state practice and *opinio juris*, Afghan citizenship law supports the obligation to avoid, prevent, or reduce statelessness.[66]

2. Bangladesh

Following the commencement of the Citizenship Act, 1951,[67] the citizenship laws of Bangladesh recognize everyone born in Bangladesh as citizens. This means that foundlings and stateless children will receive citizenship if they were born in Bangladesh.[68] Such a *jus soli* citizenship regime can avoid, prevent, or reduce statelessness.

Children can also receive citizenship through either of their parents, irrespective of their place of birth, as long as their birth is registered at a Bangladesh Consulate or Mission.[69] Furthermore, children of naturalized citizens can receive the citizenship of their parents.[70] These indicate support for the principle of avoidance of statelessness in children.

Despite the *jus soli* regime, Rohingya children born in Bangladesh have not been given citizenship.[71] Nevertheless, this can be construed as a violation by Bangladesh of its own national legislation guaranteeing nationality at birth and a violation of Article 7 of the Convention on the Rights of the Child (CRC) to which Bangladesh is a party. In any case, Bangladesh's Foreigners Act, 1946 recognizes that a foreigner who acquired Bangladesh nationality at birth is deemed to retain it unless the government directs

Routledge, 2013) 18 at 24. Afghanistan is a party to both the International Covenant on Civil and Political Rights and the *CRC*.

[61] *Law on Citizenship of the Islamic Emirate of Afghanistan* (English Translation), *supra* note 52, art. 5, 28; Abdullah, *supra* note 54 at 8.

[62] *Law on Citizenship of the Islamic Emirate of Afghanistan* (English Translation), *supra* note 52, art. 16. Even if a foreigner married to an Afghan citizen acquires Afghan citizenship, they have the liberty to obtain their prior citizenship following divorce or death of the Afghan spouse; see art. 21(1).

[63] *Ibid*., art. 26, 34.

[64] *Ibid*., art. 15, 19. The conditions for applying for citizenship under Article 15 are straightforward including that the applicant should be at least eighteen years of age, having lived for "somewhat more than five years" in Afghanistan and should not have committed any crimes during their stay. See *ibid*., art. 15.

[65] *Ibid*., art. 22.

[66] The author did not find any relevant case law from Afghanistan on the issue of statelessness.

[67] *The Citizenship Act, 1951 (Act No. II of 1951)* [Bangladesh], 13 April 1951, art. 4; Ridwanul HOQUE, "Report on Citizenship Law: Bangladesh" *EUDO Citizenship Observatory* (December 2016) at 13–14, online: EUDO Citizenship Observatory <https://cadmus.eui.eu/bitstream/handle/1814/44545/EudoCit_2016_14Bangladesh.pdf>.

[68] Hoque, *supra* note 67 at 18.

[69] *The Citizenship Act, 1951*, *supra* note 67, art. 5.

[70] *The Naturalisation Act, 1926 (Act No. VII of 1926)* [Bangladesh], 26 February 1926, art. 5; Hoque, *supra* note 67 at 15.

[71] Hoque, *supra* note 67 at 13–14.

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otherwise.[72] Therefore, Bangladesh cannot claim a right to not provide nationality to Rohingya children born in Bangladesh; thus, this practice of Bangladesh does not negate the existence of a CIL norm to avoid, reduce, or prevent statelessness.

Bangladesh's citizenship law is gender discriminatory as it does not recognize the right of a woman to transmit citizenship to her non-citizen husband.[73] Nevertheless, Bangladesh cannot claim a right to adopt gender discriminatory legislation in violation of its own constitution that guarantees equality.[74] In fact, the Bangladesh Government is reconsidering this gender discriminatory position through a proposed amendment to the citizenship law.[75] Therefore, this gender discriminatory law does not take away from the CIL obligation to avoid, reduce, or prevent statelessness; rather, Bangladesh's action indicates support for this obligation.

The courts in Bangladesh have endorsed the principle of avoidance of statelessness through a liberal interpretation of citizenship law.[76] For instance, the High Court Division affirmed the citizenship of the stateless Biharis on the basis of their birth in Bangladeshi territory.[77] The Supreme Court of Bangladesh, while noting that Bangladesh had not signed the 1961 Convention, acknowledged that features of international norms pertaining to statelessness were part of domestic law by way of judicial decisions and that citizenship claims are to be "upheld rather than destroyed".[78] In cases where the continued citizenship of persons has been in question, courts have leaned in favour of such continuation.[79] Therefore, Bangladeshi citizenship law, as interpreted by Bangladeshi courts, support the norm of avoidance, prevention, or reduction of statelessness.

3. Bhutan

Bhutan grants citizenship based on the Bhutanese citizenship of both parents.[80] This leaves out children born to a foreign national and a Bhutanese citizen, for whom there is no Bhutanese citizenship. Furthermore, the law provides that a child of Bhutanese parents leaving the country voluntarily and without recording their names in the citizenship register will lose citizenship.[81] This also leads to child statelessness. Since Bhutan is a party to the CRC it should follow Article 7 of the CRC, which recognizes the right of a child to birth registration and the right to acquire a nationality. The CRC also obligates states to ensure these rights through their national laws, particularly where the child would become stateless.[82] While Bhutan's nationality legislation does not support these principles, this cannot

[72] *The Foreigners Act, 1946* (*Act No. XXXI of 1946*) [Bangladesh], 23 November 1946, art. 8; Naureen RAHIM, "Citizenship and Statelessness" in Mohammad SHAHABUDDIN, ed., *Bangladesh and International Law* (Oxon/New York: Routledge, 2021) 98 at 102.

[73] Hoque, *supra* note 67 at 17; see also *The Citizenship Act, 1951*, *supra* note 67, art. 10(2).

[74] Hoque, *supra* note 67 at 17.

[75] See *ibid*.; see also Ministry of Women and Children Affairs (MOWCA), Bangladesh, "The Eighth Periodic Report of the Government of the People's Republic of Bangladesh: Submitted under Article 18" (May 2015) at para. 75, online: MOWCA <https://mowca.portal.gov.bd/sites/default/files/files/mowca.portal.gov.bd/page/762c7e6e_69ce_4979_817c_f7dbc2b561ed/8th%20Periodic%20Report-%20CEDAW.pdf>.

[76] Hoque, *supra* note 67 at 21.

[77] *Abid Khan and Others v. Government of Bangladesh and Others* (2003) 55 DLR 318 (Supreme Court of Bangladesh – High Court Division); *Md. Sadaqat Khan (Fakku) and 10 Others v. The Chief Election Commissioner, Bangladesh Election Commission and Others* (2008) 60 DLR (AD) 407 (Supreme Court of Bangladesh – High Court Division), at para. 37

[78] *Bangladesh v. Professor Golam Azam and Others*, (1994) 23 CLC (AD) (Supreme Court of Bangladesh), at para. 48.

[79] *Annada Prosad Das v. The People's Republic of Bangladesh and Others*, LEX/BDHC/0034/2001 (Supreme Court of Bangladesh – High Court Division).

[80] *The Bhutan Citizenship Act, 1985*, (entered into force 10 June 1985) section 2.

[81] *Ibid*., section 6(d).

[82] *CRC*, *supra* note 60, art. 7(2).

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be taken as evidence against the obligation to prevent, reduce, or avoid statelessness since Bhutanese citizenship law stands in violation of Article 7 of the CRC.

A combined reading of the 1958 and the 1985 Bhutanese citizenship legislation shows that a woman's nationality is dependent on either her husband or her father.[83] Non-Bhutanese women also found it difficult to acquire and maintain their Bhutanese nationality on account of changes to the citizenship laws[84] that lead to statelessness. However, Bhutan cannot create statelessness on a gender discriminatory basis in violation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[85]

Bhutan deprived the Nepali-speaking Lhotshampas of Bhutan of citizenship, leaving them stateless on a racial and ethnic basis.[86] However, this is not relevant practice to conclude against a CIL obligation to avoid, reduce, or prevent statelessness in South Asia, since this is in violation of the prohibition of racial discrimination, a *jus cogens* norm.[87] No other evidence of state practice and *opinio juris* pertaining to the obligation to avoid, reduce, or prevent statelessness from Bhutan was found.[88]

From the above, it can be concluded that the national legislation of Bhutan does not support an obligation to avoid, reduce, or prevent statelessness. However, Bhutan cannot claim a right to cause statelessness in the manner described above because Bhutan's actions are in violation of other international human rights law commitments.

4. India

While Indian citizenship law was based on *jus soli* before 1986, it has now shifted to a *jus sanguinis* system of nationality, whereby a person can acquire nationality only if both parents are Indian citizens or if one parent is a citizen and the other is not an illegal migrant.[89] As long as this link with an Indian parent is established, children born outside the country can also obtain citizenship.[90] However, statelessness can result if a child is born to an Indian citizen and an illegal migrant, violating India's obligations under the CRC.

India adopts a gender-neutral method of registering for citizenship based on marriage to an Indian citizen.[91] This supports the norm of avoidance of statelessness. However, if a person married to an Indian citizen is an illegal migrant that person cannot acquire citizenship by registration.[92] This also creates statelessness.

India's 2019 Citizenship Amendment Act provides citizenship only to persecuted non-Muslim minorities from Afghanistan, Bangladesh, and Pakistan.[93] This is a discriminatory piece of legislation that violates the international law principle of non-

[83] Tang Lay LEE, "Refugees from Bhutan: Nationality, Statelessness and the Right to Return" (1998) 10 International Journal of Refugee Law 118 at 143.

[84] *Ibid*.

[85] See *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981) [*CEDAW*], art. 9.

[86] Lee, *supra* note 83 at 143.

[87] *Draft Conclusions on Peremptory Norms of General International Law (jus cogens)*, Report of the International Law Commission (ILC), UN Doc. A/74/10 (2019), at para. 57, annex; see also Edwards, *supra* note 35 at 26.

[88] The author did not find any relevant case law from Bhutan on the issue of statelessness.

[89] See *The Citizenship Act, 1955* (*Act No. 57 of 1955*) [India], 30 December 1955, section 3.

[90] See *ibid*., section 4.

[91] See *ibid*., section 4, 5; see also Asha BANGAR, "Statelessness in India" *Institute on Statelessness and Inclusion* (June 2017) at 3, online: ISI <https://files.institutesi.org/WP2017_02.pdf>.

[92] See *The Citizenship Act, 1955*, *supra* note 89, section 5(1)(c).

[93] Human Rights Watch, "'Shoot the Traitors': Discrimination Against Muslims under India's New Citizenship Policy" *Human Rights Watch* (9 April 2020), online: Human Rights Watch <https://www.hrw.org/report/2020/04/09/shoot-traitors/discrimination-against-muslims-under-indias-new-citizenship-policy#>.

https://doi.org/10.1017/S204425132200056X Published online by Cambridge University Press

discrimination.[94] Further, India's citizenship verification exercise in the state of Assam, the exercise of updating the National Register of Citizens (NRC), has been accused of creating statelessness.[95] Nevertheless, following criticism of the exercise, the Indian government has explained that those excluded from the NRC will not be stateless.[96] This explanation clearly indicates that the state does not expect its practice to amount to statelessness, showing *opinio juris* not to create statelessness.

While Indian citizenship law does not address statelessness, courts have come to the aid of stateless populations such as the Chakmas, the Sri Lanka Hill Tamils, and Indian-born Tibetans, and has directed the government to consider their citizenship applications.[97] Furthermore, citizenship has been granted to Hindu Sikh refugees from Afghanistan and Pakistan.[98] These are instances of state practice and *opinio juris* supporting the principle of avoidance of statelessness. However, not all stateless communities in the country are given citizenship. For instance, the Rohingyas, who are recognized widely as stateless persons, are not given citizenship in India.

In any case, post-partition and post-1971, courts have passed deportation orders for those that are found to be non-nationals or foreigners. For persons without a nationality or with undeterminable nationality, the Supreme Court and the High Courts have attempted to avoid, reduce, or prevent statelessness.[99] Courts have taken a strict approach in deciding citizenship-related cases, particularly those involving migrants from Bangladesh.[100] Nevertheless, where the courts have found persons stateless, they have directed the government to provide protection to such persons.[101] This means that

[94] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976) [*ICCPR*], art. 24; *Universal Declaration of Human Rights*, GA Res. 217 (III), UN Doc. A/810 (1948) [*UDHR*], art. 2, 7; see also Michelle Foster, Adil Hasan Khan, "Citizenship (Amendment) Act 2019 and International Law" *The University of Melbourne* (01 April 2021) at 9–18, online: Melbourne Law School <https://law.unimelb.edu.au/__data/assets/pdf_file/0005/3769484/Citizenship-Amendment-Act-and-International-Law.pdf>.

[95] Vatsal RAJ, "The National Register of Citizens and India's Commitment Deficit to International Law" *LSE Blog* (10 August 2020), online: LSE Blog <https://blogs.lse.ac.uk/humanrights/2020/08/10/the-national-register-of-citizens-and-indias-commitment-deficit-to-international-law/>.

[96] Ministry of External Affairs, *supra* note 42.

[97] See e.g. *Phuntsok Wangyal and Others v. Ministry of External Affairs and Others*, MANU/DE/2650/2016 (Delhi High Court); see also *National Human Rights Commission v. State of Arunachal Pradesh & Another* MANU/SC/1047/1996 (Supreme Court of India) at para. 19–21; *P. Ulaganathan v. The Government of India and Others*, MANU/TN/2803/2019 (Madras High Court) at para. 14; *Tenzin Tselha v. Union of India and Others*, MANU/DE/3179/2016 (Delhi High Court).

[98] See e.g. Jayant SRIRAM, "4,300 Hindu, Sikh Refugees from Pakistan, Afghanistan Get Citizenship" *The Hindu* (15 June 2015), online: *The Hindu* <https://www.thehindu.com/news/national/4.300-Hindu-and-Sikh-refugees-from-Pakistan-and-Afghanistan-get-citizenship-in-India/article60177482.ece>.

[99] Sitharaman KAKARALA, Deepika PRAKASH, and Maanvi TIKU, *India and the Challenge of Statelessness: A Review of the Legal Framework Relating to Nationality* (Delhi: NLUD Press, 2012) at 61–72; *Gangadhar Yashwant Bhandare v. Erasmo Jesus De Sequiria*, MANU/SC/0288/1975 (Supreme Court of India) at para. 24–5; *Sudhangsu Mazumdar and Others v. C.S. Jha and Others* MANU/WB/0062/1967 at para. 52; *Prabhleen Kaur v Union of India & Another*, MANU/DE/3647/2018 at para. 33 (Delhi High Court); *Ramesh Chennamaneni v. Union of India and Others*, MANU/TL/0182/2019 (Telengana High Court) at para. 47–50; *Jasmeet Kaur v. Navtej Singh* MANU/DE/2875/2017 (Delhi High Court) at para. 29; *Mangal Sain v. Shanno Devi*, MANU/PH/0057/1959 (Punjab-Haryana High Court) at para. 17; On appeal, while the Supreme Court upheld the ruling of the Punjab-Haryana High Court, it did not comment on the possible statelessness of the individual if citizenship were denied. See *Shanno Devi v. Mangal Sain*, MANU/SC/0189/1960 (Supreme Court of India).

[100] See Niraja Gopal JAYAL, *Citizenship and its Discontents: An Indian History*, 1st ed. (London/Massachusetts: Harvard University Press, 2013) at 71–2.

[101] *Sheikh Abdul Aziz v. State NCT of Delhi* (Delhi High Court, 17.04.2014); *Sheikh Abdul Aziz v. State NCT of Delhi* (Delhi High Court, 26.09.2014)

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despite Indian state practice resulting in statelessness, on a holistic analysis India has strived to avoid, reduce, or prevent statelessness.

5. Maldives

While Maldives recognizes citizenship on the basis of descent, a person cannot be a citizen of Maldives if he/she is a non-Muslim.[102] This violates the principle of non-discrimination: since Maldives cannot claim a right to deny people citizenship on the basis of religion, it cannot constitute as relevant state practice or *opinio juris* for the obligation to avoid, reduce, or prevent statelessness.[103] Furthermore, before a person applies for citizenship of Maldives they have to renounce their existing citizenship to qualify for a right to apply.[104] This can lead to statelessness and does not promote the obligation to avoid, reduce, or prevent statelessness.[105]

6. Myanmar

Since 1982, Myanmar has recognized citizenship based on ethnicity.[106] Many within Myanmar who were previously citizens have been demoted to the status of associate or naturalized citizens or non-citizen, leading to statelessness.[107] This violates the *jus cogens* prohibition on racial discrimination.[108] Associate and naturalized citizens are treated differently to full citizens. For instance, in relation to associate and naturalized citizens, there are further grounds for loss of citizenship that do not apply to full citizens.[109] This also contributes to statelessness and, since full citizenship is based on ethnicity, this differential treatment also violates the prohibition on racial discrimination.

Another instance where statelessness could be created because of Myanmar's citizenship law is when a Burmese citizen registers with another country as a citizen or takes a passport or certificate of another country,[110] which applies equally to all three categories of citizens. In such cases, the person affected automatically ceases to be a citizen of Myanmar, which could then lead to statelessness. Once a person becomes a citizen of another state, they cannot reapply for Myanmar citizenship.[111]

Myanmar recognizes citizenship based on the Burmese citizenship of both parents, irrespective of the place of birth.[112] This prevents the statelessness of children born outside the territory of Myanmar. Furthermore, the law provides that a citizen will not automatically lose or acquire citizenship on account of marriage to a foreigner or a citizen, respectively.[113] This also prevents and avoids statelessness arising due to changes in marital status. On the other hand, a person born to a citizen and a foreigner can only apply for

[102] UNHCR, "UNHCR Submission for the Universal Periodic Review – Maldives – 3rd Cycle, UPR 36th Session" (October 2019) at 3, online: Refworld <https://www.refworld.org/docid/5e17493b2.html>.

[103] See *ICCPR*, *supra* note, 94 art. 2; *UDHR*, *supra* note 94, art. 2, 7.

[104] UNHCR, *supra* note 102.

[105] The author did not find any relevant case law from Maldives on the issue of statelessness.

[106] *Burma Citizenship Law, 1982*, section 3.

[107] José María ARRAIZA and Olivier VONK, "Report on Citizenship Law: Myanmar" *GLOBALCIT* (October 2017) at 11-2, online: GLOBALCIT <https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1>.

[108] See Michelle FOSTER and Timnah Rachel BAKER, "Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law" (2021) 11(1) Columbia Journal of Race and Law 83 at 139; Edwards, *supra* note 35 at 26.

[109] Arraiza and Vonk, *supra* note 107 at 12.

[110] *Burma Citizenship Law, 1982*, 15 October 1982, art. 16, 17, 34, 57.

[111] *Ibid*., art. 22, 41.

[112] *Ibid*., art. 5, 7.

[113] *Ibid*., art. 15.

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naturalized citizenship.[114] Therefore, Myanmar's citizenship law is not conducive to avoiding the statelessness of children as their citizenship status can depend on the status of their parents, leading to child statelessness in violation of Myanmar's obligations under the CRC.[115] This does not promote the obligation to avoid, prevent, or reduce statelessness.

7. Nepal

The Constitution of Nepal provides that a citizen cannot be deprived of the right to hold citizenship.[116] Nepal's citizenship law provides citizenship to foundlings within Nepal's territory until parentage can be traced.[117] This supports the principle of avoidance of statelessness.

However, Nepal's citizenship law provides for automatic loss of citizenship if a person obtains another citizenship simultaneously as Nepalese citizenship and does not choose between the two citizenships within two years after attaining sixteen years of age,[118] which can lead to statelessness. Nevertheless, the law also provides for resumption of Nepalese citizenship after renunciation of the foreign citizenship.[119] Furthermore, Nepal provides non-residential citizenship to a person holding foreign citizenship and is resident outside of Nepal and other SAARC countries if a parent or grandparent was a citizen of Nepal by birth or descent.[120] This form of dual nationality prevents non-residents from being stateless.

In addition, Nepal's citizenship law provides that where territory is acceded to Nepal, persons residing in such a territory shall become citizens of Nepal.[121] This is a provision meant to prevent statelessness arising out of state successions, and supports the obligation to avoid, reduce, or prevent statelessness.

In Nepal, a person can obtain citizenship on the basis of descent, either through the Nepalese father or the mother.[122] However, if a child has a foreign father, the mother cannot transmit citizenship and the child can obtain naturalized citizenship through permanent domicile in Nepal.[123] Furthermore, the citizenship law does not permit a foreign woman to obtain Nepalese citizenship through marriage unless she begins the process of renouncing her nationality.[124] Such a condition does not exist for a foreign man married to a Nepalese woman.[125] These are gender discriminatory provisions in violation of Nepal's obligations under international human rights law.[126] This cannot defeat the principle of avoidance of statelessness as Nepal cannot claim a right to determine who its nationals are on a gender discriminatory basis. In fact, Nepalese courts have often ruled against gender discriminatory implementation of citizenship laws.[127] This shows

[114] *Ibid*., art. 43.

[115] *Ibid*., art. 29, 51.

[116] *The Constitution of Nepal, 2015*, 20 September 2015, art. 10.

[117] *Nepal Citizenship Act, 2063* (*2006*) (*Act No. 25 of the year 2063*), 26 November 2006, section 3(3).

[118] *Ibid*., section 10(3).

[119] *Ibid*., section 11; Sabin SHRESTHA, "Report on Citizenship Law: Nepal" *GLOBALCIT* (March 2017) at 13, online: GLOBALCIT <https://cadmus.eui.eu/bitstream/handle/1814/45932/GLOBALCIT_CR_2017_08.pdf?sequence=1&isAllowed=y>.

[120] *The Constitution of Nepal, 2015*, *supra* note 116, art. 14.

[121] *Nepal Citizenship Act, 2063* (*2006*), *supra* note 117, section 7.

[122] *Ibid*., section 3(1); *The Constitution of Nepal, 2015*, *supra* note 116, art. 11(2)(b).

[123] *Nepal Citizenship Act, 2063* (*2006*), *supra* note 117, section 3(1), 5(2); Shrestha, *supra* note 119 at 6.

[124] *Nepal Citizenship Act, 2063* (*2006*), *supra* note 117, section 5(1).

[125] Shrestha, *supra* note 119 at 7.

[126] *CEDAW*, *supra* note 85, art. 2; *ICCPR*, *supra* note 94, art. 26; *UDHR*, *supra* note 94, art. 7.

[127] See Nepal Civil Society Network of Citizenship Rights, the Global Campaign for Equal Nationality Rights and the Institute on Statelessness and Inclusion, "Joint Submission to the Human Rights Council at the 23rd

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that the courts in Nepal support the principle of avoidance of statelessness, constituting state practice and *opinio juris*.

In July 2022, the House of Representatives approved an amendment to the 2006 citizenship law,[128] which is pending endorsement from the National Assembly and the President.[129] While this amendment has addressed some of the problems in the 2006 law, and supports the obligation to avoid, reduce, or prevent statelessness, some issues remain. The 2006 law allowed those born in Nepal before 13 April 1990 to apply for citizenship by birth within two years from the commencement of the Act but did not provide citizenship for their children.[130] The new amendment will enable the children of those who acquired citizenship through this process to receive citizenship by descent.[131] Furthermore, with a declaration from the mother that the father is unidentified, a child of a Nepali woman can receive citizenship by descent.[132] These provisions aim to avoid, reduce, or prevent child statelessness.

Non-resident Nepalis outside the South Asian region can receive citizenship under the amendment. To an extent, this has the potential to avoid statelessness,[133] although it does not provide a solution for the gender discriminatory provisions mentioned before.[134] However – and as already mentioned – by not addressing gender discriminatory provisions in their nationality legislation, Nepal is violating its obligations under CEDAW rather than creating a new norm. Overall, the amendment shows increased state practice and *opinio juris* towards the obligation to avoid, reduce, or prevent statelessness.

8. Pakistan

Pakistan's citizenship law recognizes *jus soli* citizenship to all born within Pakistan territory.[135] Furthermore, the citizenship law recognizes citizenship based on descent, even if a person is born outside the country, if the birth is registered in the Pakistan Consulate or Mission.[136] This indicates state practice and *opinio juris* for the principle of avoidance and prevention of statelessness. However, Afghan refugees born in Pakistan are not granted citizenship by birth.[137] Nevertheless, the government has proposed providing them with citizenship under existing citizenship law.[138] This also supports the principle of prevention and reduction of statelessness.

Session of the Universal Periodic Review" at 4, online: ISI <https://files.institutesi.org/NepalUPR2015.pdf>; see also Sabin SHRESTHA and Subin MULMI, "Legal Analysis of Citizenship Law of Nepal: A Comparative Study of the Nepal Citizenship Act, 2006 with the Constitution, Precedents, International Human Rights Obligation and Best Practices" *Forum for Women, Law and Development (FWLD)* (November 2016) at 20–2, online: FWLD <http://fwld.org/wp-content/uploads/2016/12/Legal-Analysis-of-Citizenship-Law-of-Nepal-Citizenship-Report-English.pdf>.

[128] Since this is a recent development, at the time of writing, an English translation of the Bill is not publicly available.

[129] See Binod GHIMIRE, "Everything You Need to Know About New Amendment to the Citizenship Act" *The Kathmandu Post* (25 July 2022), online: The Kathmandu Post <https://kathmandupost.com/national/2022/07/25/everything-you-need-to-know-about-new-amendment-to-the-citizenship-act#:~:text=Similarly%2C%20Article%2011%20(5),citizenship%20of%20Nepal%20by%20descent>.

[130] *Nepal Citizenship Act, 2063 (2006)*, *supra* note 117, section 4. See also Shrestha, *supra* note 119 at 7.

[131] See Ghimire, *supra* note 129.

[132] *Ibid*.

[133] *Ibid*.

[134] *Ibid*.

[135] *The Pakistan Citizenship Act, 1951* (*Act No. II of 1951*), 13 April 1951, section 4.

[136] *Ibid.*, section 5.

[137] Faryal NAZIR, "Report on Citizenship Law: Pakistan" *EUDO Citizenship Observatory* (December 2016) at 5, online: EUDO Citizenship Observatory <https://cadmus.eui.eu/bitstream/handle/1814/44544/EudoCit_2016_13Pakistan.pdf?sequence=1>.

[138] Memphis BARKER, "Pakistan's Imran Khan Pledges Citizenship for 1.5m Afghan refugees" *The Guardian* (17 September 2018), online: *The Guardian* <https://www.theguardian.com/world/2018/sep/17/pakistan-imran-khan-citizenship-pledge-afghan-refugees>.

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A non-Pakistani woman marrying a Pakistani citizen is entitled to Pakistani citizenship.[139] Furthermore, Pakistan allows Pakistani female citizens married to foreigners to acquire another nationality by marriage and still retain Pakistani citizenship.[140] Women can also transmit their Pakistani citizenship to their children.[141] These are indicators of good practices to prevent and reduce statelessness. Apart from this, Pakistan also prescribes that the President can order that in an acceded territory persons connected with the territory are citizens of Pakistan.[142]

Pakistani courts have supported the obligation to avoid, prevent, or reduce statelessness.[143] The Federal Shariat Court recognized the right to nationality in Article 15 of the UDHR and noted Pakistan's obligations under international instruments in dealing with a question of whether a married Pakistani woman's foreign husband should be entitled to Pakistani citizenship.[144] The Lahore High Court has recognized the importance of the right to be a citizen and how the loss of citizenship leads to deprivation of the right to have rights, rendering a person stateless. By this, the Court recognized that no Pakistani citizen could be made to lose citizenship on account of dual nationality, except voluntarily.[145] These judicial decisions reflect state practice and *opinio juris* towards the norm of avoidance, reduction, or prevention of statelessness.

9. Sri Lanka

Sri Lanka recognizes citizenship based on descent through either parent, irrespective of their place of birth.[146] It also considers foundlings as citizens.[147] These support the obligation to avoid, reduce, or prevent statelessness. Furthermore, a person can obtain citizenship by way of their Sri Lankan spouse by registration if they are of full age and sound mind and fulfil the residence requirements.[148] This is rooted in gender equality and prevents statelessness on account of marriage.

However, Sri Lanka does not provide citizenship by registration unless a person renounces their citizenship of another country.[149] This can lead to statelessness if a person is denied Sri Lankan citizenship after renunciation, due to other factors. Since a decision where citizenship by registration is refused cannot be contested before a court (as per the law), this could lead to an irrevocable situation of statelessness.[150]

On the other hand, Sri Lanka's citizenship laws provide citizenship to three categories of persons to reduce statelessness: stateless Indian Tamils in Sri Lanka, those compelled to leave Sri Lanka and take up residence in India, and persons of Chinese origin who were stateless in Sri Lanka.[151] Sri Lanka has recognized that "it is in the national interest that

[139] *The Pakistan Citizenship Act, 1951, supra* note 135, section 10.
[140] *Ibid*., section 14(4); Nazir, *supra* note 137 at 18.
[141] *The Pakistan Citizenship Act, 1951*, *supra* note 135, section 5; Nazir, *supra* note 137 at 6.
[142] *The Pakistan Citizenship Act, 1951 supra* note 135, section 13.
[143] See e.g. *Pakistan v. Waliullah Sufyani*, LEX/SCPK/0016/1965 (Supreme Court of Pakistan), at para. 15.
[144] *In Re: Suo Motu Case No. 1/K of 2006 (Gender Equality)*, LEX/FSPK/0003/2007 (Federal Shariat Court).
[145] *Umar Ahmad Ghumman v Government of Pakistan and Others*, LEX/LHPK/0030/2002 (Lahore High Court).
[146] *Citizenship Act, 1948* [Sri Lanka], 15 November 1948, section 5.
[147] *Ibid*., section 7.
[148] *Ibid*., section 12.
[149] *Ibid*., section 15(1).
[150] *Ibid*., section 11(3).
[151] *Grant of Citizenship to Persons of Indian Origin (Amendment) Act (No. 6 of 2009)* [Sri Lanka], 18 February 2009, section 3; *Grant of Citizenship to Persons of Chinese Origin (Special Provisions) Act (No. 38 of 2008)* [Sri Lanka], 31 October 2008; Luwie GANESHATHASAN and Asanga WELIKAL, "Report on Citizenship Law: Sri Lanka" *GLOBALCIT* (May 2017) at 10–12, online: GLOBALCIT <https://cadmus.eui.eu/bitstream/handle/1814/46448/RSCAS_GLOBALCIT_CR_2017_10.pdf>.

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the problem of stateless persons in Sri Lanka should be solved without delay".[152] These show specific state practice and *opinio juris* to avoid, reduce, or prevent statelessness.[153]

10. Assessment of state practice and opinio juris from national legislations and judicial decisions

Thus far, this section has outlined state practice and *opinio juris* arising from national legislations and judicial decisions in South Asia pertaining to the obligation to avoid, reduce, or prevent statelessness. It is observed that most states in the region have issues of statelessness and have also taken steps to remedy statelessness. Across the South Asian region, some national legislations support the obligation to avoid, reduce, or prevent statelessness by providing citizenship to foundlings, thus avoiding child statelessness, and by providing gender-neutral citizenship, thus preventing statelessness arising on the basis of gender. Few states have provided citizenship to foreign spouses married to their citizens, while some states have provided citizenship to stateless groups within their territory. National courts have supported both this practice and *opinio juris* in deciding against the creation of statelessness, recognizing the obligation to avoid, reduce, or prevent statelessness, and by intervening in situations that could lead to statelessness. Therefore, there is overwhelming support from states in the region in favour of the obligation to avoid, reduce, or prevent statelessness. Given that such practice is arising from national legislations and court decisions that have the force of law, these practices are accompanied with the belief that the states are required to prevent, avoid, or reduce statelessness or, in other words, *opinio juris*.

Discriminatory legislation and discriminatory court decisions from these states cannot be considered as affecting the evidence in favour of the obligation – states cannot claim a right to discriminate in nationality matters in violation of human rights principles and international and national constitutional obligations. However, looking beyond practices that violate international human rights law, some laws still allow or permit statelessness to occur. Such circumstances do not always fall within the exceptions generally recognized under international law.[154] Nevertheless, weighing such instances against the overall positive affirmations of the principle of avoidance, reduction, or the prevention of statelessness across the region, state practice against the principle must be considered as violations of the CIL norm rather than as creating a new norm, as explained in the *Nicaragua* case and at the beginning of this section.[155]

What is required is to see if, in light of all the evidence available as to state practice, a state, in engaging in a particular practice, can actually claim a right to carry out what is alleged to be a human rights violation.[156] Some of the practices described above that result in statelessness are generally accepted in international treaties as exceptions to the principle of avoidance of statelessness. In relation to other practices, the question is whether states can claim a right to create statelessness. For instance, states cannot claim a right to create statelessness on a discriminatory basis. Hence, any discriminatory nationality legislation would violate the obligation to avoid, reduce, or prevent statelessness. In any case, the above evidence of state practice and *opinio juris* show that states often affirm the obligation rather than deny it.

From the above, it is concluded that the national legislations and judicial decisions of the South Asian states as evidence of state practice and *opinio juris* support the obligation to avoid, reduce, or prevent statelessness. As highlighted before, several violations of this obligation have taken place in the region. Nevertheless, there is strong support in favour

[152] *Grant of Citizenship to Stateless Persons Act (No. 5 of 1986)* [Sri Lanka], 21 February 1987, Preamble.
[153] The author did not find any relevant case law from Sri Lanka on the issue of statelessness.
[154] See e.g. *1961 Convention*, *supra* note 6, art. 8.
[155] See *Nicaragua v. United States of America*, *supra* note 30 at para. 186.
[156] Wheatley, *supra* note 20 at 137.

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of an emerging CIL obligation in the national legislation and judicial decisions of these states.

B. Conduct Connected with International Organizations and Intergovernmental Conferences

The Draft Conclusions lists "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" as a form of both state practice and *opinio juris*.[157] Such conduct includes statements made in relation to a resolution of an international organization or its adoption as well as its voting record, which demonstrates the legal convictions of such states.[158]

Given that the obligation to avoid, reduce, or prevent statelessness arises from the right to nationality, this article examines the conduct of the participant South Asian states in the drafting of the UDHR. Although this state practice and *opinio juris* predates 1948, the UDHR continues to have normative value. In fact, some South Asian courts have referred to the UDHR and specifically to the right to a nationality under Article 15 in their decisions.[159]

Furthermore, this article examines the conduct of the participant South Asian states in the Conference on Elimination or Reduction of Future Statelessness that dealt with the drafting of the 1961 Convention. This is because three South Asian states participated in the drafting of this instrument. While none of these states later signed or acceded to the Convention, the statements made at this Conference are considered in light of the theme of the Conference and the CIL norm identified in this article. While considerable time has passed since the drafting of the 1961 Convention, the Conference was dedicated solely for the purpose of considering the elimination and reduction of statelessness and, given the topic of this article, it is taken for analysis. In doing so, it is recognized that despite the passage of time, the South Asian states have not rejected this Convention in terms of the core principle underlying the Convention; that is, the principle of avoiding, reducing, or preventing statelessness, which has been recognized even in their national legislation and court decisions. However, keeping in mind that the states have not signed the Convention, analysis relating to the Conference and the Convention is placed under "Conduct Connected with International Organizations and Intergovernmental Conferences", while the next part on "International Treaties and Conventions" discuss the treaties to which they are parties. Furthermore, the fact that the states have not signed the Convention speaks more to the fact that they did not accept the way the obligation to avoid, reduce, or prevent statelessness had been construed in the Convention rather than a rejection of the core principle of avoidance of statelessness.

Finally, several United Nations General Assembly (UNGA) resolutions have affirmed the principle of avoidance of statelessness. Since all states in the region are part of the United Nations and the UNGA, the resolutions on statelessness or urging states to reduce statelessness could represent state practice and *opinio juris* of these states. The voting record of the South Asian states to these UNGA resolutions could indicate a specific belief held by and the practice of these states as to the CIL norm in question, so they are examined.[160] By way of comparison, although all states in the region, except Myanmar, are members of

[157] *ILC Draft Conclusions*, *supra* note 15 at conclusion 6, 10.

[158] *Ibid.*, at 134–41; Patrick DUMBERRY, *The Formation and Identification of Rules of Customary International Law in International Investment Law*, 2nd ed. (Cambridge: Cambridge University Press, 2018) at 260–1.

[159] See for instance *Bangladesh v. Professor Golam Azam and Others*, *supra* note 78 at para. 48; see also *Prabhleen Kaur v Union of India & Another*, *supra* note 99 at para. 33; *Ramesh Chennamaneni v. Union of India and Others*, *supra* note 99 at para. 47–50; *Pakistan v. Waliullah Sufyani*, *supra* note 143 at para. 15.

[160] For the sake of convenience and given the object of this article, this examination of UNGA Resolutions is confined to the years 2000–2020.

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SAARC – and since the SAARC has not dealt with the issue of citizenship or statelessness – the conduct of SAARC is not examined in this article.

With respect to the UDHR, Article 15 of the UDHR, which guarantees everyone the right to nationality, was adopted without any abstentions.[161] This means that Afghanistan, Burma (Myanmar as it was then called), India, and Pakistan, who were part of the negotiations, voted in favour of the adoption of the UDHR and Article 15.[162] Article 15 itself was born out of concerns for stateless persons with the idea of eliminating statelessness[163] and, in fact, it was India, alongside the United Kingdom, who proposed the clause, "No one shall be arbitrarily deprived of his nationality, or denied the right to change his nationality."[164] This clause gained wide acceptance in the UDHR,[165] while the general right to nationality remained contentious.[166] India expressed that it "accepted the principle that everyone had the right to a nationality, but had abstained from voting because the implications of that principle would become sufficiently clear only after the Economic and Social Council had completed its study of the subject."[167] The practice of the South Asian states in drafting and the adopting the UDHR, with nationality being included as a human right with a prohibition on its arbitrary deprivation in Article 15 of the UDHR, indicates *opinio juris*.

Next, with respect to the 1961 Convention, while the South Asian states have not signed the 1961 Convention, India, Pakistan, and Ceylon (Sri Lanka as it was then called) participated in the Conference on the Elimination or Reduction of Future Statelessness convened by the UN Secretary-General. Their conduct at the Conference revealed an acceptance of the principle of avoidance of statelessness while not compromising on the privilege of states to determine who their nationals are. The absence of this compromise does not weaken the evidence for a CIL norm to avoid statelessness, since these states affirmed throughout the conference that the Convention was intended to reduce and not eliminate statelessness and that states could, in some instances, allow for statelessness to occur.

For instance, India noted that Indian laws on voluntary renunciation of nationality and citizenship by *jus soli* promoted avoidance of statelessness.[168] India was also in favour of not rendering persons stateless on account of a change in their personal status, such as marriage, and was against a natural born citizen losing his/her citizenship.[169] Nevertheless, India supported the principle that a state should be able to deprive persons of their citizenship (if to do so is in the public interest, or in a case where a person is living abroad and does not register with an Indian mission) and also supported the

[161] William A. SCHABAS, *The Universal Declaration of Human Rights: The Travaux Préparatoires*, 1st ed. (Cambridge: Cambridge University Press, 2013) at 3089.

[162] *Ibid*., at 3090.

[163] *Ibid*., at 823, 1079, 1284, 1434, 1757–61.

[164] *Ibid*., at 1618–24, 1757–61.

[165] *Ibid*., at 1761.

[166] *Ibid*., at 1764.

[167] *Ibid*., at 2458. In earlier negotiations of the text, the Indian delegate had noted that there was a right not to be deprived of a nationality and did not support a right to a nationality per se on account of difficulties in for example, "if a person fled from his country and sought asylum in another, thus losing his nationality, had he the right to claim the nationality of the country that sheltered him? That was a debatable point." See *ibid*., at 1763.

[168] *United Nations Conference on Elimination or Reduction of Future Statelessness*, Summary Records of the 2nd meeting of the Committee of the Whole, UN Doc. A/CONF.9/C.1/SR.2 (24 April 1961) at 4; *United Nations Conference on Elimination or Reduction of Future Statelessness*, Summary Record of the 4th Plenary meeting, UN Doc. A/CONF.9/SR.4 (24 April 1961) at 4–5.

[169] *United Nations Conference on Elimination or Reduction of Future Statelessness*, Summary Records of the 7th meeting of the Committee of the Whole, UN Doc. A/CONF.9/C.1/SR.7 (24 April 1961) at 3; *United Nations Conference on Elimination or Reduction of Future Statelessness*, Summary Records of the 8th meeting of the Committee of the Whole, UN Doc. A/CONF.9/C.1/SR.8 (24 April 1961) at 8.

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German proposal in relation to the deprivation of nationality.[170] These exceptions to the rule, as recognized by India, are also general exceptions to the rule of avoidance of statelessness, as mentioned before.

However, it is true that since 1961, India has modified its citizenship law and it no longer follows a *jus soli* system of citizenship. Nevertheless, this does not mean that India no longer supports the principle of avoidance of statelessness. First, the 1961 Convention itself allows state parties to follow a *jus sanguinis* legal regime. In fact, the Convention is drafted in such a way that both *jus soli* and *jus sanguinis* states can follow the provisions of the Convention.[171] Hence, India's move away from *jus soli* does not mean a rejection of the principle of avoidance of statelessness. Second, in any case, this has to be viewed in light of India's support for the obligation to avoid, reduce, or prevent statelessness as evidenced from national legislation and court decisions as well as its statements at the Conference on the Elimination or Reduction of Future Statelessness. Such a holistic analysis shows both state practice and *opinio juris* in favour of the obligation.

Pakistan supported the Danish amendment to grant nationality to foundlings within a state territory.[172] While it maintained that its stance remains that statelessness should not be created, just like India, it did not accept a principle of elimination of statelessness and so supported the right of states to deprive persons of their citizenship even if statelessness was a consequence of such an act.[173]

Ceylon did not agree with the language used in the drafting of Article 1 of the Convention because it "considered it of cardinal importance that states should be free to decide who their citizens should be".[174] Nevertheless, it was quick to add that the "Government was far from opposed to granting Ceylonese nationality to all people who would otherwise be stateless".[175]

Hence, based on this evidence of state practice and *opinio juris* represented by the statements made during this intergovernmental conference, it is clear that these three South Asian states sought to uphold the principle of avoidance of statelessness, but not a complete elimination of statelessness. It can be seen, therefore, that there is evidentiary support for the CIL obligation to avoid, reduce, or prevent statelessness.

Third, the examination of UNGA Resolutions between 2000 and 2020 show that several resolutions containing the principle of prevention, reduction, or avoidance of statelessness as being the responsibility of states were adopted without a vote.[176] Since these resolutions are based on the consensus of the UNGA, they are evidence of the support for the

[170] *United Nations Conference on Elimination or Reduction of Future Statelessness*, Summary Record of the 13th Plenary meeting, UN Doc. A/CONF.9/SR.13 (24 April 1961) at 5–6; *United Nations Conference on Elimination or Reduction of Future Statelessness*, Summary Records of the 15th meeting of the Committee of the Whole, UN Doc. A/CONF.9/C.1/SR.15 (24 April 1961) at 4–5.

[171] See Paul WEIS, "The United Nations Convention on the Reduction of Statelessness, 1961" (1962) 11(4) International & Comparative Law Quarterly 1073 at 1079–82.

[172] *United Nations Conference on Elimination or Reduction of Future Statelessness*, Summary Records of the 5th meeting of the Committee of the Whole, UN Doc. A/CONF.9/C.1/SR.5 (24 April 1961) at 9.

[173] *United Nations Conference on Elimination or Reduction of Future Statelessness*, Summary Records of the 22nd Plenary Meeting, UN Doc. A/CONF.9/SR.22 (11 October 1961) at 2–3.

[174] *United Nations Conference on Elimination or Reduction of Future Statelessness*, Summary Records of the 4th meeting of the Committee of the Whole, UN Doc. A/CONF.9/C.1/SR.4 (24 April 1961) at 6.

[175] *Ibid*.

[176] See *Office of the United Nations High Commissioner for Refugees*, Resolution Adopted by the General Assembly, UN Doc. A/RES/50/152 (9 February 1996); see also *Office of the United Nations High Commissioner for Refugees*, Resolution Adopted by the General Assembly on 18 December 2008, UN Doc. A/RES/63/148 (27 January 2009); *Office of the United Nations High Commissioner for Refugees*, Resolution Adopted by the General Assembly on 18 December 2009, UN Doc. A/RES/64/127 (27 January 2010); *Office of the United Nations High Commissioner for Refugees*, Resolution Adopted by the General Assembly on 20 December 2012, UN Doc. A/RES/67/149 (6 March

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obligation to avoid, reduce, or prevent statelessness by the South Asian states. Furthermore, the resolutions that the UNGA adopted during this period pertaining to the Rohingya of Myanmar, which urged Myanmar to eliminate statelessness or ensure the right to nationality or resolve problems relating to nationality, were also adopted without a vote, showing the consensus of the South Asian states to the principles mentioned therein.[177] Apart from these, specific resolutions have been adopted by a vote in relation to the situation of the Rohingyas in Myanmar, for whom some of the South Asian states have extended support. For instance, the Resolution adopted by the General Assembly on 22 December 2018, which called on Myanmar to eliminate statelessness and discrimination against the Rohingya, was supported by Afghanistan, Bangladesh, and Pakistan, while Bhutan, India, Nepal, and Sri Lanka abstained from voting.[178] The Resolution adopted by the General Assembly on 24 December 2011 called upon Myanmar to grant citizenship to the Rohingya. Afghanistan and India voted in favour of this resolution while Myanmar, Sri Lanka, and Bangladesh voted against the resolution. Nepal and Pakistan abstained from voting and Bhutan was absent.[179]

All the above conduct of South Asian states connected with international organizations reveal both state practice and *opinio juris* for the obligation to avoid, reduce, or prevent statelessness.

C. International Treaties and Conventions

Treaties can provide evidence of state practice since the states that become party to the treaty have committed to act in compliance with the treaty.[180] Further, negotiation, conclusion, and subsequent implementation of the treaty can be taken as evidence of state practice,[181] while treaty provisions, particularly in human right treaties, and the drafting process can constitute evidence of *opinio juris*.[182] In short, the signing, ratification, and the *travaux préparatoires* of a treaty can indicate both state practice and *opinio juris*

South Asian states are parties to multilateral conventions where they have agreed to be legally bound by a right to nationality. All South Asian states under consideration in this article, except for Bhutan and Myanmar, are parties to the International Covenant on Civil and Political Rights (ICCPR) which guarantees the right of a child to nationality. All South Asian states are parties to the CEDAW and the CRC, the former guaranteeing women equal rights with men to acquire, change, or retain their nationality, with the latter guaranteeing the right of a child to nationality. All states, except Bhutan and Myanmar, are parties to the International Convention on the Elimination of All Forms of Racial Discrimination

2013); *Office of the United Nations High Commissioner for Refugees*, Resolution Adopted by the General Assembly on 18 December 2013, UN Doc. A/RES/68/141 (28 January 2014).

[177] See *Situation of Human Rights in Myanmar*, Resolution Adopted by the General Assembly, UN Doc. A/RES/67/233 (8 April 2013); *Situation of Human Rights in Myanmar*, Resolution Adopted by the General Assembly on 27 December 2013, UN Doc. A/RES/68/242 (24 February 2014); *Situation of Human Rights in Myanmar*, Resolution Adopted by the General Assembly on 29 December 2014, UN Doc. A/RES/69/248 (21 January 2015); *Situation of Human Rights in Myanmar*, Resolution Adopted by the General Assembly on 23 December 2015, UN Doc. A/RES/70/233 (4 March 2016).

[178] *Situation of Human Rights in Myanmar*, Resolution Adopted by the General Assembly on 22 December 2018, UN Doc. A/RES/73/264 (22 January 2019).

[179] *Situation of Human Rights in Myanmar*, Resolution Adopted by the General Assembly, UN Doc. A/RES/66/230 (3 April 2012); see also *Situation of Human Rights in Myanmar*, Resolution Adopted by the General Assembly, UN Doc. A/RES/65/241 (21 March 2011); *Situation of Human Rights in Myanmar*, Resolution Adopted by the General Assembly, UN Doc. A/RES/64/238 (26 March 2010).

[180] Dumberry, *supra* note 158 at 160–1.

[181] *ILC Draft Conclusions*, *supra* note 15 at 134.

[182] *Ibid*., at 141; Arajärvi, *supra* note 43 at 31.

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(ICERD), which obliges state parties to prohibit and eliminate racial discrimination in the enjoyment of their right to nationality. Bhutan is a signatory but has not ratified the Convention. While India and Pakistan are signatories to the Convention on the Nationality of Married Women, Sri Lanka is also a party to it. This Convention, though with limited membership among the South Asian states, protects the right to nationality of married women. South Asian states, recognizing the right to nationality in these treaties, shows the existence of state practice and *opinio juris* for the norm of reducing, preventing, or avoiding statelessness.

Examination of the *travaux préparatoires* of these instruments confirms this. For instance, UNHCR identifies Article 3 (equal rights of men and women in enjoyment of civil and political rights); Article 23 (equality of rights of spouses as to marriage); and Article 24 (right of child to nationality) of the ICCPR as provisions relating to the prevention and reduction of statelessness.[183] A reading of these provisions indicates that there can be no discrimination on the basis of sex as to acquisition or loss of nationality on account of marriage or in the transmission of a parent's nationality to children.[184] Additionally, children have the right to acquire a nationality and 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/she is born.[185] The *travaux préparatoires* of the ICCPR indicate that Afghanistan was, in fact, one of the sponsors of Article 24,[186] and Article 24 itself was proposed to eliminate statelessness.[187] This provision, though facing questions as to whether it was necessary to be included in the ICCPR and whether a state could undertake to accord its nationality to every child born within its territory, was eventually adopted by 57 votes to one with 14 abstentions.[188] Although the South Asian states did not immediately accede to the ICCPR, even though they contributed to the drafting of the Covenant, there have been references to the Covenant in their domestic law.[189] Furthermore, none of the states have made declarations or reservations as to Article 24.

Similarly, all states in the region are parties to the CEDAW and none of the states have made declarations or reservations to Article 9, which guarantees the right of women to acquire, change, or retain their nationality and obliges state parties to ensure that marriage does not render a woman stateless. Article 9 is considered as the provision relating to the reduction of statelessness in the CEDAW.[190] The *travaux préparatoires* particularly

[183] UNHCR, "ICCPR International Covenant on Civil and Political Rights: Quick Reference Guide – Statelessness and Human Rights Treaties" (October 2016), online: UNHCR <https://www.refworld.org/docid/58c25e3a4.html>.

[184] *CCPR General Comment No. 28: Article 3* (*The Equality of Rights Between Men and Women*), UN Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add.10, (29 March 2000) at para. 25; *CCPR General Comment No. 19: Article 23* (*The Family*) *Protection of the Family, the Right to Marriage and Equality of the Spouses*, UN Human Rights Committee, (27 July 1990) at para. 7.

[185] *CCPR General Comment No. 17: Article 24* (*Rights of the Child*), *supra* note 60 at para. 8.

[186] *Draft International Covenants on Human Rights*, Report of the Third Committee, UN Doc. A/5655 (10 December 1963) at para. 60–1.

[187] *Ibid*., at para. 76.

[188] *Ibid*., at para. 85.

[189] See *The Protection of Human Rights Act, 1993* (*No. 10 of 1994*), 8 January 1994, section 2(1)(f) [India]; see also *International Covenant on Civil and Political Rights* (*ICCPR*) *Act* (*No. 56 of 2007*), 16 November 2007 [Sri Lanka]; see also Muhammad Ekramul HAQUE, "The Bangladesh Constitutional Framework and Human Rights" (2011) 22(1) Dhaka University Law Journal 55 at 59–61; see also National Human Rights Commission, "A study of the domestication status of international covenant on civil and political rights in Nepal" *NHRC Nepal* (May 2007), online: NHRC Nepal <https://www.nhrcnepal.org/uploads/publication/ICCPR_Study_Report.pdf>.

[190] Radha GOVIL and Alice EDWARDS, "Women, Nationality and Statelessness: The Problem of Unequal Rights" in Alice EDWARDS and Laura van WAAS, eds., *Nationality and Statelessness under International Law* (Cambridge: Cambridge University Press, 2014) 169 at 185.

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note Pakistan's communication to the Secretary of the Commission on the Status of Women, where Pakistan advocates for equality in the legal capacity of a woman and the right to custody of children in accordance with her personal law.[191] While this does not mention nationality, it has an effect on nationality.[192] Pakistan's communication proposes non-discriminatory policies in the acquisition and transmission of nationality, supporting the provision relating to nationality in the Convention,[193] which has the effect of avoiding statelessness.[194] On the other hand, while Afghanistan expressed its reservations to Article 16 of the CEDAW during its drafting, it did not make any final reservations to this Article, showing its acceptance of the right to nationality and the consequent principle of avoidance of statelessness.

Again, all states considered in this article are parties to the CRC and have not expressed any particular reservations to Article 7, which recognizes the right of the child to acquire a nationality. In fact, the *travaux préparatoires* indicates that Pakistan was one of the states that supported this provision.[195]

From the above, in signing, ratifying, and participating in drafting the treaties, the South Asian states supported the obligation to avoid, prevent, or reduce statelessness.

D. Overall Assessment of State Practice and Opinio Juris from South Asia on the Obligation to Avoid, Reduce, or Prevent Statelessness

So far, this section has examined the judicial decisions and national legislations of the South Asian states, their conduct within international organizations, and those treaties to which they are party to examine if there is evidence of state practice and *opinio juris* supporting the existence of a CIL obligation to avoid, reduce, or prevent statelessness. This examination has revealed sufficient evidence to support the existence of this CIL obligation in the region.

First, it is acknowledged that, at times, there are inconsistencies in state practice within a state and between states in relation to this obligation. However, most of these inconsistencies are to be treated as breaches of the obligation to avoid, reduce, or prevent statelessness rather than as creating a new obligation, since these inconsistencies violate the core obligation of states to avoid statelessness as well as other human rights principles in international human rights law, such as non-discrimination. Considering the weight of evidence in favour of the obligation and considering also that the evidence against the norm is less, and most of the time violates other international human rights law

[191] *International Instruments Relating to the Status of Women: Implementation of the Declaration on the Elimination of Discrimination Against Women*, Communication dated 13 December 1976 Addressed to the Secretary of the Commission on the Status of Women by the Permanent Representative of Pakistan to the United Nations Office at Geneva, UN Doc. E/CN.6/606, art. 5.

[192] *Ibid*., art. 5; Lars Adam REHOF, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women*, 1st ed. (Dordecht/Boston/London: Martinus Nijhoff Publishers, 1993) at 108.

[193] Savitri W.E. GOONESEKERE, "Article 9" in Marsha A. FREEMAN, Beate RUDOLF and Christine CHINKIN, eds., *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (New York: Oxford University Press, 2012) 233 at 236.

[194] Unequal citizenship laws result in statelessness. See Govil and Edwards, *supra* note 190 at 169–71. It follows that a state supporting non-discriminatory nationality laws could be taken as support for the principle of avoidance of statelessness.

[195] *Question of a Convention on the Rights of the Child*, Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc. E/CN.4/1989/48 (2 March 1989) at para. 93. The *travaux préparatoires* shows that Pakistan, along with Algeria, Egypt, Iraq, Jordan, Kuwait, Libya, Morocco, Oman, and Tunisia proposed an amendment that included with the right to a name and nationality, the right of the child to know his/her parents.

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principles, there is strong state practice and *opinio juris* arising from South Asia in favour of an emerging CIL obligation to avoid, reduce, or prevent statelessness.

Second, there is almost no positive evidence of state practice and *opinio juris* arising from states such as Bhutan, Maldives, and Myanmar in relation to the CIL norm in question. Could these states claim to be persistent objectors to the norm? A persistent objector should oppose the rule when it is being formed and there should be clear expression of the objections which is to be maintained persistently.[196] Bhutan, Maldives, and Myanmar have not made any such objections and the fact that there is minimal evidence of state practice from these states in support of the principle shows that they cannot claim to be persistent objectors. The practice of, say, the deprivation of the Lhotshampas of Bhutan or the Rohingyas of Myanmar of citizenship, cannot be taken as a persistent objection to the principle of avoidance of statelessness; rather, they are breaches of not just this principle but also other related international norms such as the prohibition on racial discrimination. In fact, according to the Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*), the persistent objector rule does not apply in cases of *jus cogens* norms.[197] Since the ILC has identified the prohibition on racial discrimination as a *jus cogens* norm, state practice in violation of this norm cannot be considered to be a persistent objection to the obligation to avoid, reduce, or prevent statelessness.[198] In any case, practice alone, without some form of expression of the objection to the rule, cannot make a state a persistent objector.[199] These states have not made any objection to the obligation to avoid, reduce, or prevent statelessness.

Therefore, since there is evidence in the region, and to a limited extent from these states, in support of the obligation to avoid, reduce, or prevent statelessness, it can be concluded that despite the presence of statelessness in this region (many of which are due to violations of other international human rights law principles), there is also state practice and *opinio juris* arising from this region in support of an emerging CIL obligation to avoid, reduce, or prevent statelessness.

II. The Obligation to Avoid, Reduce, or Prevent Statelessness as an Emerging CIL Norm

Having considered the evidence of state practice and *opinio juris* from South Asia pertaining to a CIL obligation to avoid, reduce, or prevent statelessness, this section notes that when this evidence is considered in light of the other developments in international human rights law there is a strong indication of an emerging CIL obligation to avoid, reduce, or prevent statelessness. This is an important point because, in the past, with the power to decide who its nationals are within the "reserved domain" of states, international law only interfered with nationality decisions of states in exceptional circumstances.[200] Scholars found it hard to identify a CIL rule preventing, avoiding, or reducing statelessness. While scholars agreed that statelessness was undesirable for a state and for the international community, they found it hard to contemplate a CIL

[196] *ILC Draft Conclusions*, *supra* note 15 at conclusion 15.

[197] *Draft Conclusions on Peremptory Norms of General International Law (jus cogens)*, *supra* note 87 at conclusion 14(3).

[198] See *ibid*., annex.

[199] James A. GREEN, *The Persistent Objector Rule in International Law*, 1st ed. (Oxford: Oxford University Press, 2016) at 81.

[200] See *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, [1923] P.C.I.J. (Ser. C) No. 2 at 24; Alice SIRONI, "Nationality of Individuals in Public International Law: A Functional Approach" in Alessandra ANNONI and Serena FORLATI, eds., *The Changing Role of Nationality in International Law* (London/New York: Routledge, 2013) 54 at 54–5.

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obligation on states to avoid statelessness.[201] For instance, Weis believed that since states determine who their nationals are, and since there are few restrictions on their right to withdraw nationality, statelessness "cannot be entirely prevented by customary international law".[202] He concludes that there is no CIL norm to avoid statelessness except in cases of discrimination in the withdrawal of nationality of a person and in cases where states are obliged by specific treaties to confer nationality.[203] Boll also agrees that withdrawal of nationality rendering a person stateless could be construed as an international problem, but concludes that a "claim that there exists an obligation to avoid statelessness may overstep the requirements of international law".[204] Since the right of states to determine who its nationals are is well-rooted in international law,[205] a rule mandating states to prevent, avoid, or reduce statelessness presents a paradox.[206]

As such, statelessness is "undesirable"[207] and the power of states to determine who its nationals are is to be exercised in consonance with treaties as well as CIL.[208] Today, with the development of multilateral treaties, human rights law, regional conventions, and case law affirming and supporting the human right to nationality, states do not have unfettered power in nationality matters.[209] The obligation to avoid statelessness arising from the right to nationality and the prohibition on the arbitrary deprivation of nationality in Article 15 of the UDHR are considered limits on the state's right to determine nationality.[210] Although international law allows states to decide who their nationals are, it draws the line when this could lead to statelessness. This does not mean that international law prohibits states from creating statelessness. In certain circumstances, state parties to the 1961 Convention can cause deprivation of nationality that leads to statelessness. However, these Convention grounds are limited, and Article 8 of the 1961 Convention prescribes, a general rule, that there cannot be a deprivation of nationality resulting in statelessness. As van Waas writes, "states are certainly under an overall duty to promote the right to a nationality and prevent statelessness".[211]

Despite these developments, some scholars find it difficult to assert that the obligation to avoid, reduce, or prevent statelessness is part of CIL.[212] Dörr and van Waas doubt the existence of *opinio juris* "to compel states" to avoid statelessness.[213] Furthermore, since the right to nationality from which this obligation stems is subject to non-specificity and

[201] See generally Paul WEIS, *Nationality and Statelessness in International Law*, 2nd ed. (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979) at 161–98.

[202] *Ibid*., at 197.

[203] *Ibid*., at 197–8.

[204] Alfred Michael BOLL, *Multiple Nationality and International Law*, 1st ed. (Leiden/Boston: Martinus Nijhoff Publishers, 2007) at 102–3.

[205] See *Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase)*, [1955] I.C.J. Rep. 4 at 20; see also *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, 179 L.N.T.S. 89 (entered into force 01 July 1937) [*1930 Hague Convention*], art. 1.

[206] Weis, *supra* note 201 at 197.

[207] Weis, *supra* note 201 at 162; Boll, *supra* note 204 at 102–3.

[208] See *Nationality Decrees Issued in Tunis and Morocco*, *supra* note 200 at 24; see also Carol A. BATCHELOR, "Statelessness and the Problem of Resolving Nationality Status" (1998) 10(1) International Journal of Refugee Law 156 at 160.

[209] See Batchelor, *supra* note 208 at 168.

[210] Carmen TIBURCIO, *The Human Rights of Aliens Under International and Comparative Law*, 1st ed. (The Hague: Kluwer Law International, 2001) at 19–20; Batchelor, *supra* note 208 at 168–9.

[211] Laura VAN WAAS, *Nationality Matters: Statelessness under International Law*, 1st ed. (Intersentia, 2008) at 40.

[212] See for instance Ineta ZIEMELE, "State Succession and Issues of Nationality and Statelessness" in Alice EDWARDS, Laura VAN WAAS, eds., *Nationality and Statelessness under International Law* (Cambridge: Cambridge University Press, 2014) 217 at 243.

[213] Van Waas, *supra* note 211 at 40; Oliver DÖRR, "Nationality" (2006) Max Planck Encyclopedia of Public International Law at para. 9.

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ambiguity, there are doubts about the CIL nature of the obligation on states to avoid statelessness.[214] While Dörr maintains that statelessness is undesirable, he opines that, apart from specific treaty obligations undertaken by states and binding instruments creating an obligation in this regard, there is a lack of *opinio juris* to establish a rule of CIL obliging states to avoid statelessness.[215] Furthermore, although the right to nationality is part of several international and regional human rights instruments, it falters in its application.[216] Unlike other human rights in the UDHR, there is no guidance as to which state has to confer nationality on those without a nationality, and how the individual can claim such a right.[217] Similarly, the ICCPR in guaranteeing the right to acquire nationality for every child is silent on how this right is to be implemented.[218] In the context of secession and state succession, Zimmermann writes that there is no standard in international law as to which states should grant nationality to avoid statelessness in the case of secession or in the case of the circumstances mentioned in the 1961 Convention. He notes that since there is scepticism surrounding the right to nationality under Article 15 of the UDHR being a CIL, there is no general CIL to avoid statelessness.[219]

First, the analysis in the previous section indicates that, even in a region with statelessness "hotspots", there is *opinio juris* for the obligation to avoid, reduce, or prevent statelessness. This is not only because of specific treaty obligations of the South Asian states but is, as indicated above, also based on other evidence of *opinio juris*, including evidence based on national legislations and judicial decisions in these states. Second, despite the uncertainty surrounding the right to nationality in the UDHR, international treaties have expanded the content of the right to nationality, which in turn restrains state discretion in nationality matters.[220] Some aspects relating to the right to nationality have been recognized as part of CIL and reinforce the status of this right. These include the right not to be arbitrarily deprived of nationality,[221] the right to voluntarily renounce nationality,[222] and the right to nationality at birth,[223] all of which flow from the right to a nationality.[224] Since some of the rights that make up the right to a nationality are part of CIL, it should follow that there is an emerging right to nationality as part of CIL, even when its implementation is contentious. Furthermore, since several human rights in the UDHR are now part of CIL,[225] the existence of a CIL obligation to avoid, reduce, or prevent statelessness that flows from a possible customary right to nationality is not unfathomable.

[214] See Dörr, *supra* note 213 at para. 9; see also Batchelor, *supra* note 208 at 168–9.

[215] Dörr, *supra* note 213 at para. 9.

[216] See Batchelor, *supra* note 208 at 168–9.

[217] *Ibid*.

[218] *ICCPR*, *supra* note 94, art. 24.

[219] Andreas ZIMMERMANN, "Secession and the law of State succession" in Marcelo G. KOHEN, ed., *Secession: International Law Perspectives* (New York: Cambridge University Press, 2006) 208 at 228.

[220] Mirna ADJAMI and Julia HARRINGTON, "The Scope and Content of Article 15 of the Universal Declaration of Human Rights" (2008) 27(3) Refugee Survey Quarterly 93 at 94; Michelle FOSTER and Hélène LAMBERT, "Statelessness as a Human Rights Issue: A Concept Whose Time Has Come" (2016) 28(3) International Journal of Refugee Law 564 at 572.

[221] See Hélène LAMBERT, "Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees" *UNHCR* (October 2014) 8, online: UNHCR <https://www.unhcr.org/protection/globalconsult/5433f0f09/33-refugee-status-arbitrary-deprivation-nationality-statelessness-context.html>.

[222] Sironi, *supra* note 200 at 55.

[223] Worster, *supra* note 9 at 536–8.

[224] *Report of the Secretary General: Human rights and Arbitrary Deprivation of Nationality*, Human Rights Council, UN Doc A/HRC/13/34 (14 December 2009) at para. 4; Michelle FOSTER and Hélène LAMBERT, *International Refugee Law and the Protection of Stateless Persons*, 1st ed. (Oxford: Oxford University Press, 2019) at 74.

[225] See William A. SCHABAS, *The Customary International Law of Human Rights*, 1st ed. (Oxford: Oxford University Press, 2021) at 82–3.

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In fact, there is an increasing trend to presume in favour of a CIL obligation to avoid, reduce, or prevent statelessness based on the right to nationality.[226] While Adjami and Harrington call this obligation as an "emerging norm",[227] Hailbronner affirms the existence in CIL of the obligation to avoid statelessness based on this obligation being part of international instruments.[228] Worster explains about a presumption in favour of a norm in CIL against the creation of statelessness and, after an investigation of state practice and *opinio juris*, concludes that:

> there is strong evidence that there is a right to a nationality under customary international law, but more specifically, that there is a right for children to receive the nationality of their place of birth, if they would otherwise be stateless.[229]

In general, scholars indicate a stronger presumption of a CIL norm against rendering children stateless.[230] Nevertheless, both the Explanatory Report to the ECN and the UNHCR acknowledge a general obligation to avoid statelessness as part of CIL.[231] The UN Human Rights Council has affirmed the avoidance of statelessness as a fundamental principle of international law,[232] while the UNGA declared the prevention and reduction of statelessness as the primary responsibility of states.[233] As noted before, all these developments are related to the right to a nationality in human rights law.

The Court of Justice of the European Union, when dealing with questions on withdrawal of Member State citizenship and consequently European Union citizenship, asks states to consider the repercussions of such withdrawal and whether such repercussions would be proportional to the gravity of the offence necessitating the withdrawal.[234] This supports the obligation to avoid statelessness.[235] Similarly, the European Court of Human Rights has supported the obligation by identifying that denial of nationality can impact a person's right to private life under Article 8 of the European Convention on Human Rights, despite the absence of a right to nationality in the Convention.[236] On the other

[226] Annam FAROOQ, "Expunging Statelessness from Terrorist Expatriation Statutes" (2016) 44(3) Hofstra Law Review 933 at 947–51; UNHCR, *supra* note 7 at 2; see also Jeffrey L BLACKMAN, "State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law" (1998) 19(4) Michigan Journal of International Law 1141 at 1176.

[227] Adjami and Harrington, *supra* note 220 at 103.

[228] Hailbronner, *supra* note 9 at 65–6.

[229] Worster, *supra* note 9 at 492.

[230] Ziemele, *supra* note 212 at 243; John TOBIN and Florence SEOW, "Article 7: The Rights of Birth Registration, a Name, Nationality and to Know and be Cared for by Parents" in John TOBIN, ed., *The UN Convention on the Rights of the Child: A Commentary* (Oxford: Oxford University Press, 2019) 237 at 255–6; Schabas, *supra* note 225 at 257-8.

[231] Council of Europe, *supra* note 9 at para. 33; UNHCR, "Submission by the Office of the United Nations High Commissioner for Refugees in the case of Kurić and Others v. Slovenia (No. 26828/06)", *supra* note 14 at para. 5.3; UNHCR, "Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Bedri HOTI. v. Croatia", *supra* note 14 at paras. 2.3.5–4.4.

[232] *Report of the Secretary-General: Human rights and arbitrary deprivation of nationality*, Human Rights Council, UN Doc A/HRC/25/28 (19 December 2013) at para. 6.

[233] *Office of the United Nations High Commissioner for Refugees*, Resolution Adopted by the General Assembly, UN Doc A/RES/61/137 (25 January 2007).

[234] *Janko Rottman v. Freistaat Bayern*, CJEU (Grand Chamber), (2010) ECR I-01449 at para. 56; *M.G. Tjebbes and Others v. Minister van Buitenlandse Zaken*, CJEU (Grand Chamber), (12 March 2019) C-221/17 ECLI: EU:C:2019:189 at para. 43–4.

[235] Laura VAN WAAS, "Fighting Statelessness and Discriminatory Nationality Law in Europe" (2012) 14(3) European Journal of International Law 243 at 245, 256; Caia VLIEKS, "Tjebbes and Others v. Minister van Buitenlandse Zaken: A Next Step in European Union Case Law on Nationality Matters?" (2019) 24 Tilburg Law Review 142 at 145.

[236] *Genovese v. Malta*, *Judgment*, European Court of Human Rights, (11 October 2011) Application No. 53124/09 at para. 29–30.

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hand, the African Court on Human and Peoples' Rights has recognized the right to nationality as part of customary international law.[237] Furthermore, the African Committee of Experts on the Rights and Welfare of the Child, recognizing the impact of statelessness on children, noted that states' discretion to grant nationality is:

> limited by international human rights standards...as well as customary international law and general principles of law that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness.[238]

The Inter-American Court of Human Rights also echoes the notion that the obligation to prevent, avoid, or reduce statelessness is a limitation on the authority of states to determine who its nationals are.[239]

From the above, it is evident that, given the developments in international human rights law, there is growing indication of an emerging CIL obligation to avoid, reduce, or prevent statelessness. The power of states to determine nationality is constrained by the right to nationality and the consequent obligation to avoid, reduce, or prevent statelessness. While this may have seemed improbable before, following the UDHR in 1948, with the development of international human rights law and the right to nationality and with evidence of state practice and *opinio juris* from regions like South Asia, there are definite indications that support the existence of a CIL obligation to avoid, reduce, or prevent statelessness. Even with limitations in the application of the right to nationality, developments in international law indicate that scholars, regional courts, and international organizations recognize a general obligation on states to avoid, reduce, or prevent statelessness. Several scholars also hint at the emergence of this obligation as a CIL norm that is applicable to states outside the 1961 Convention. In general, there is consensus that statelessness is not an acceptable situation and states have to take measures to address situations of statelessness. There are exceptions to this obligation of states in the 1961 Convention[240] and the ECN.[241] It is generally agreed that these limited exceptions are to be interpreted narrowly,[242] and that in cases where statelessness is the result on one of these grounds, such a decision should not be taken without considering the principle of proportionality.[243]

With the affirmations in favour of the CIL obligation to avoid, reduce, or prevent statelessness and the legal recognition of the obligation to avoid, reduce, or prevent statelessness as a fundamental principle arising from the right to a nationality under Article 15 of the UDHR described in this section, the evidence of state practice and *opinio juris* from South Asia, assessed in the previous section, indicate a strong presumption in favour of an emerging CIL obligation to avoid, reduce, or prevent statelessness. The developments in international human rights law described in this section indicate that with the right to

[237] *Anudo Ochieng Anudo v. United Republic of Tanzania*, African Court on Human and Peoples' Rights, (22 August 2018) App no 012/2015 at para. 76.

[238] *Decision on the Communication Submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on Behalf of Children of Nubian Descent in Kenya) against the Government of Kenya*, African Committee of Experts on the Rights and Welfare of the Child, (22 March 2011) Communication: No. Com/002/2009 at para. 46-8.

[239] *Girls Yean and Bosico v. Dominican Republic*, Inter-American Court of Human Rights (IACHR), (8 September 2005) IACHR Series C No. 130 at para. 140, 142; *Case of Expelled Dominicans and Haitians v. Dominican Republic*, IACHR, (28 August 2014) IACHR Series C, No. 282 at para. 256.

[240] *1961 Convention*, *supra* note 6, art. 8(3).

[241] *European Convention on Nationality*, 6 November 1997, ETS 166 (entered into force 01 March 2000), art. 7.

[242] Foster and Lambert, *supra* note 220 at 580.

[243] UNHCR, *supra* note 7 at 12.

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a nationality in the UDHR and in other human rights treaties; with the developments relating to this human right to nationality indicated through the jurisprudence of regional courts; and with international organizations such as the UNHCR affirming its customary nature; the obligation to avoid, reduce, or prevent statelessness is well on its way to becoming recognized as a CIL obligation.

III. Conclusion

This article attempted to find out if there are indications of an emerging CIL obligation to avoid, reduce, or prevent statelessness to determine the obligation to avoid statelessness for non-state parties to the 1961 Convention. This article has assessed state practice and *opinio juris* arising from South Asia, a region with several instances of statelessness. This assessment indicated that while there are violations of the principle of avoidance of statelessness and other human rights obligations of these states, there is also strong state practice and *opinio juris* in favour of the obligation to avoid, reduce, or prevent statelessness in South Asia – demonstrated by their national legislations, judicial decisions, conduct before international organizations and intergovernmental conferences, and conduct connected with treaties. This indicates a strong presumption in favour of an emerging CIL obligation to avoid, reduce, or prevent statelessness.

Further research of state practice and *opinio juris* could confirm the existence of such a CIL obligation constraining the power of states in nationality matters, and to compel states that are not parties to the 1961 Convention to respect the CIL obligation to avoid, reduce, or prevent statelessness.

While further research is required to fully assess the customary nature of this obligation, the developments in international human rights law pertaining to the right to nationality support and contextualize the evidence of state practice and *opinio juris* from the South Asian states. While nationality matters used to remain within the exclusive dominion of states, these developments, together with state practice and *opinio juris* for a CIL obligation to avoid, reduce, or prevent statelessness, constrain the actions and decisions of states in their determination of the nationality of individuals.

Acknowledgements. The author is deeply grateful to the two anonymous reviewers, the editors of the Asian Journal of International Law, Professor Gudmundur EIRIKSSON, Professor Michelle FOSTER, Mr. Aashish YADAV, and Mr. Haris JAMIL for their useful comments on a draft of this article. The author is also grateful to Ms. Shivanjali SHUKLA and Ms. Gurbani BHATIA for their excellent research assistance.

Funding Statement. None

Competing interests. The author declares none.

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Cite this article: IMMANUEL AMP (2022). The Customary Obligation to Avoid, Reduce, or Prevent Statelessness in South Asia. *Asian Journal of International Law* 1–29. https://doi.org/10.1017/S204425132200056X