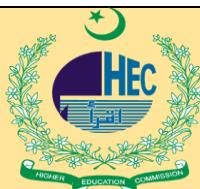



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Naturalization By Investment: A Critical Analysis and the Issue of Stateless Refugees
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ABSTRACT

Naturalization by investment (NBI) is one of the modes through which states confer nationality to individuals Jus sanguinis to the stateless individuals who cross international borders in the pursuit of protection by seeking refuge in neighboring states. This research study explores the potential of NBI in achieving international recognition due to the risk of financial crimes attached to it i.e. affluent people might exploit NBI to avoid prosecution in their state of origin. To do so, they invest their illegal money to buy a new nationality and thereafter relocate. As for the stateless refugees who are in dire need of nationality, this study highlights the obligations upon host states regarding the protection of basic human rights. Nationality being the universal and the basic right of all individuals (including refugees), this research offers a unique perspective for the investment-led naturalization of stateless refugees. Highlighting international criticism against Naturalization by investment (NBI) schemes due to illicit financial flows and missing genuine link, this study analyzes the status of nationality conferred through monetary investment under the international law and further argues that NBI can get international recognition, if nationality is conferred through non-monetary investment. Since, stateless refugees might not be that affluent to buy a citizenship, this research explores how non-monetary investment such as investment via Human Capital can conform to state's aspiration for offering investment citizenship. The study proposes that the global challenge of statelessness which the UNHCR had envisioned to resolve by 2024 couldn't be tackled properly without addressing the plight of stateless refugees. Previous jurisprudence on the protection of stateless refugees is insufficient and largely unexplored. Therefore, this research provides an equitable solution to address the protection needs of stateless refugees in conformity with international law and current state practices.

Keywords: Naturalization by Investment, illegal financial flows, Nationality, Stateless Refugees, Human Capital.

Introduction

The number of people who had been forcibly displaced worldwide had risen to 117 million by the end of 2023, an all-time high.¹ People who are in need of protection either seek safety within their own nation or by traveling across international borders.² Those who crossed international borders are refugees. The 1951 convention relating to the status of refugees (Hereinafter: 1951 Refugees Convention) defines refugee as:

“A group as individuals who have fled their country due to a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion “and crossed an international border to seek safety”³

The number of refugees has increased significantly due to the escalation of international conflicts and wars, rising from 15.4 million in 2012 to 43.4 million by the end of 2023.⁴ Statelessness, however, may also be the reason and consequence of such cross-border displacement.⁵ People who are stateless may be forced to migrate across borders and seek safety in neighboring states due to discrimination and a lack of access to rights in their states of origin.⁶ In a similar vein, statelessness can also result from displacement due to a lack of access to civil documentation, especially birth registration and certification, an inability to demonstrate ties to one's (previous) country of nationality, or prolonged foreign residency that results in a loss of nationality.⁷ Hence, a person may be both stateless and a refugee.

The fact that the international regime for the protection of refugees and stateless people was divided into two different instruments i.e, 1951 Refugee convention and 1961 Statelessness convention, did not negate the existence of a legal connection between the two groups. Stateless people may be eligible for refugee protection, as acknowledged in the very text of Refugee Convention. According to 1951 Refugee Convention Article 1A (2), “A person may be considered a refugee with or without nationality”.⁸ As a result, stateless individuals who have applied for asylum have always been entitled to refugee protection under international law. This protection grants stateless refugees the right to assimilation and naturalization. Article 34 of the 1951 Refugees Convention states that “Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees.”⁹

Some of the conventional modes of naturalization are Marriage, employment, residency and investment.¹⁰ Naturalization by Investment (NBI) enables people to invest in a country and

¹ UNHCR (n.d) “Refugee Statistics”. <https://www.unrefugees.org/refugee-facts/statistics/>. Refer to the Glossary for detailed definitions of each category of forcibly displaced individuals. [Hereinafter: UNHCR (n.d) “Refugee Statistics”]

² European Union Agency for Asylum (n.d.). “Section 1. Global overview of the field of asylum in 2019”. <https://euaa.europa.eu/asylum-report-2020/section-1-global-overview-field-asylum-2019#ar19> [Hereinafter: European Union Agency for Asylum (n.d.) “Global Overview 2019”]

³ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Hereinafter: Refugee Convention 1951) art 1

⁴ UNHCR (n.d) “Refugee Statistics

⁵ European Union Agency for Asylum (n.d.) “Global Overview 2019”.

⁶ IOM UN Migration, *World Migration Report 2020*, Pg No.

⁴⁷ https://publications.iom.int/system/files/pdf/wmr_2020.pdf

⁷ European Union Agency for Asylum (n.d.) “Global Overview 2019”

⁸ Refugee Convention 1951; Also see, Protocol relating to the Status of Refugees (signed 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, art 1A (2) [Hereinafter: Refugee Protocol 1967].

⁹ Refugee Convention 1951. Art 34

¹⁰ Borna, S., & Steam, J. M. (2002). The ethics and efficacy of selling national citizenship. *Journal of Business Ethics*, 37(2), 193-207

become citizens or permanent residents without having previous residence there (FATF/OECD, 2023).¹¹ Some countries grant citizenship to investors based on economic achievements.¹² E.g., Investors in St. Kitts and Nevis can choose between funding the Sugar Industry Diversification Foundation or purchasing real estate to obtain citizenship.¹³ Malta, on the other hand, amended its Citizenship Act to put Maltese citizenship on sale for V650,000.¹⁴ In countries like Austria and Montenegro, exact investment criteria are left up to the authorities' discretion. But in all of these situations, when citizenship is obtained by investment, significant naturalization requirements (such as language, residency, and renunciation of prior citizenship) are waived.¹⁵ However, the money used for the NBI may have been obtained lawfully or unlawfully.¹⁶ NBI programs can be abused by criminals who want to evade law enforcement, launder and conceal billions of dollars' worth of criminal proceeds, facilitate organised crime, and hide assets.¹⁷ The criticism attached to NBI affects the international effect of nationality as other states are not bound to recognize nationality conferred through a mode that violates a state's international legal obligations.¹⁸ This research seeks to establish that utilizing naturalization by investment to confer nationality upon stateless refugees may conform to state's international legal obligation if the requisite investment is not limited to financial or monetary one. Instead, citizenship acquired through investing skills, labour will be more likely to achieve recognition by the other states. Same is akin to current state's practices whereby citizenship schemes are designed to attract Human Capital.

Literature Review

It has long been recognised that the international community faces a challenge in protecting refugees and stateless people. Stateless people and refugees once walked hand in hand.¹⁹ The goal was to draft a single convention for the protection of refugees and stateless people in the wake of World War II. However, there was clearly a lack of focused effort to address the plight and protection needs of stateless refugees because non-refugee stateless persons were excluded from the 1951 Convention relating to the Status of Refugees and later because stateless refugees were not included in the 1961 Convention relating to the reduction of statelessness.²⁰ The fact that the international regime for the protection of refugees and stateless people was divided into two different instruments did not negate the existence of a legal connection between the two groups. Stateless people may be eligible for refugee

¹¹ FATF/OECD. (2023). "Misuse of citizenship and residency by investment programmes". Paris, France: FATF. [Hereinafter FATF/OECD (2023). "Misuse of citizenship by investment" Retrieved from; <https://doi.org/10.1787/ae7ce5fb-en>

¹² Tanasoca, A. (2016). "Citizenship for sale". *European Journal of Sociology*, 57(1), 169-195.

¹³ Dzankic, J. (2012). The pros and cons of ius pecuniae: Investor citizenship in comparative perspective (EUI Working Paper No. 2012/14). Robert Schuman Centre for Advanced Studies. pg 8-9. [Hereinafter: Dzankic J. (2012). "The pros and cons of ius pecuniae: Investor citizenship in comparative perspective"]

¹⁴ Balzan Jurgen. (November 12, 2013). "Contentious Citizenship Scheme Approved", *Malta Today*, Available at <http://www.maltatoday.com.mt/en/newsdetails/news/national/Contentious-citizenshismscheme-approved-20131112>

¹⁵ Dzankic J. (2012). "The pros and cons of ius pecuniae: Investor citizenship in comparative perspective", 11-15.

¹⁶ Frank K.F (2018) "the Wealth Report", Pg 22

¹⁷ FATF/OECD. (2023). "Misuse of citizenship investment"

¹⁸ 1930 Hague Convention, Article 1

¹⁹ Goodwin S G (1994). "The Rights of Refugees and Stateless Persons' in K P Saksena (ed)", *Human Rights Perspective and Challenges (Lancers Books 1994)* 389.

²⁰ Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175. [Hereinafter: Statelessness Convention 1961]. Also see, Ad Hoc Committee on Statelessness and Related Problems. (17 January 1950) 'United Kingdom: Draft Proposal for Article 1' UN Doc E/ AC.32/ L.2.

protection, as acknowledged in the very text of Refugee Convention. According to 1951 Refugee Convention Article 1A (2), "A person may be considered a refugee with or without nationality".²¹ As a result, stateless individuals who have applied for asylum have always been entitled to refugee protection under international law. This protection grants stateless refugees the right to assimilation and naturalisation. Article 34 of the 1951 Refugees Convention states that "Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees."²²

The bifurcated objective i.e, Assimilation and naturalisation was discussed during the 1951 convention's drafting. One of the first objections was that "assimilation" conveys the idea of force'.²³ According to the French delegate, whose country had provided the draft language that the drafters used, said:²⁴ and Canadian representative²⁵: "the goal of assimilation is to provide refugees with an equal opportunity to convince states that they are eligible for citizenship". As far as "facilitation of naturalisation" is concerned, Art. 34 requires state parties to have flexibility with regard to "the administrative formalities taking place between the submission of the application and the decision"²⁶ Hence, state parties are expected to make a good faith effort to help refugees meet the usual requirements for acquisition of the host state's citizenship.

This duty to facilitate assimilation and naturalization urge state parties to eliminate as many formalities as possible from their naturalisation process to give refugees the best chance of obtaining citizenship with the minimum hassle. Art. 34 codifies two distinct types of intended facilitation. First, nations must "expedite" the processing of refugee applications for naturalization.²⁷ The current Hungarian law, which requires refugees to have lived in Hungary continuously for three years instead of the customary eight-year requirement, to get naturalized is a great illustration of committed implementation of this criterion.²⁸ Second, states are supposed to "cut the charges and costs of such proceedings as much as possible." In keeping with this pledge, Canada decided in February 2000 to waive the "right-of-landing fee" for refugees pursuing permanent resident status, which is a prerequisite for citizenship eligibility. According to the Minister of Citizenship and Immigration, "refugees have already faced enormous difficulties and stresses". Hence, we enable them to successfully assimilate into Canadian society by doing away with this cost.²⁹

²¹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1A (2) [Hereinafter: Refugee Convention 1951]; Also see, Protocol relating to the Status of Refugees (signed 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, art 1A (2) [Hereinafter: Refugee Protocol 1967].

²² Refugee Convention 1951. Art 34

²³ Statement of Mr. Robinson of Israel (Aug. 21, 1950) UN Doc. E/AC.32/SR.39, at 26.

²⁴ "Proposal for a French Draft Convention, (Jan. 17, 1950) UN Doc. E/AC.32/L.3,

²⁵ Statement of Mr. Juvigny of France. (Aug. 21, 1950) UN Doc. E/AC.32/SR.39, at 27–28.

²⁶ Statement of Mr. Ordonneau of France. (Feb. 2, 1950) UN Doc. E/AC.32/SR.22, at 3.

²⁷ Statement of Mr. Cuvelier of Belgium (Feb. 2, 1950), UN Doc. E/AC.32/SR.22, at 3; Also see, Statement of Sir Leslie Brass of the United Kingdom (Feb. 2, 1950) UN Doc. E/AC.32/SR.22, at 3; Also see, S. Blay and M. Tsamenyi, (1990) "Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees," 2(4) *International Journal of Refugee Law* 527, at 542.

²⁸ M.-E. Fullerton (1996). "Hungary, Refugees, and the Law of Return," *International Journal of Refugee Law* 4(8) at 516–517.

²⁹ Minister of Citizenship and Immigration Elinor Caplan (Feb. 28, 2000), "Landing Fee Eliminated for Refugees".

Host states have a "duty" to facilitate assimilation and naturalisation, as stipulated in Article 34.³⁰ Thus, it would be inappropriate to interpret Art. 34 as without force. Grahl-Madsen has noted that a state must judge for itself whether it is "possible" for it to naturalise a certain person or a certain number of refugees.³¹ According to the 1951 Refugee Convention, the other Contracting States may have a basis for complaint if, for instance, one of them flatly refuses to assimilate and naturalise any refugee and cannot provide any justification other than unwillingness.³² Because a state "shall facilitate as far as possible the assimilation and naturalisation of refugees" [emphasis added]³³ At the very least, state parties must give a good faith explanation for the exclusion of stateless refugees from naturalization.³⁴

Some of the conventional modes of naturalisation are Marriage, employment, residency and investment.³⁵ Naturalisation by Investment (NBI) enables people to invest in a nation and become citizens or permanent residents without having previous residence there (FATF/OECD, 2023).³⁶

Some countries grant citizenship to investors based on economic achievements.³⁷ E.g., Austrian citizenship was awarded to a Russian singer and a Saudi hotel businessman who were judged to have achieved "exceptional achievement in the national interest".³⁸ There are comprehensive NBI programs in other nations, such as Malta, St. Kitts and Nevis, and the Commonwealth of Dominica. The precise type and quantity of investments are highly regulated. Investors in St. Kitts and Nevis can choose between funding the Sugar Industry Diversification Foundation or purchasing real estate to obtain citizenship.³⁹ Malta, on the other hand, amended its Citizenship Act to put Maltese citizenship on sale for V650,000.⁴⁰ In countries like Austria and Montenegro, exact investment criteria are left up to the authorities' discretion. But in all of these situations, when citizenship is obtained by investment, significant naturalisation requirements (such as language, residency, and renunciation of prior citizenship) are waived.⁴¹

³⁰ UNHRC (Aug. 25, 2004) UNHRC Comm. No. 1136/2002, UN Doc. CCPR/C/81/D/1136/2002, *Borzov v. Estonia*. decided, at para. 7.4.

³¹ Grahl-Madsen (October 1997), "Commentary of the Refugee Convention 1951", *UN High Commissioner for Refugees (UNHCR)*, [Hereinafter: Grahl Madsen Commentary on Refugee Convention 1951], <https://www.refworld.org/reference/research/unhcr/1997/en/72739> [accessed 25 December 2024]

³² Grahl Madsen Commentary on Refugee Convention 1951. pg 246-247.

³³ Grahl Madsen Commentary on Refugee Convention 1951. pg 246

³⁴ J.-F. Durieux. (1992). "Capturing the Central American Refugee Phenomenon: Refugee Law-Making in Mexico and Belize," 4(3) *International Journal of Refugee Law* 301

³⁵ Borna, S., & Steam, J. M. (2002). The ethics and efficacy of selling national citizenship. *Journal of Business Ethics*, 37(2), 193-207

³⁶ FATF/OECD. (2023). "Misuse of citizenship and residency by investment programmes". Paris, France: FATF. [Hereinafter FATF/OECD (2023). "Misuse of citizenship by investment" Retrieved from; <https://doi.org/10.1787/ae7ce5fb-en>

³⁷ Tanasoca, A. (2016). "Citizenship for sale". *European Journal of Sociology*, 57(1), 169-195.

³⁸ Julia M and Ignatzi C. (November 15, 2013). "European Citizenship Sold to the Super Wealthy", *Deutsche Welle*. Available at <http://www.dw.de/european-citizenship-sold-to-the-superwealthy/a-1675619>

³⁹ Dzankic, J. (2012). The pros and cons of ius pecuniae: Investor citizenship in comparative perspective (EUI Working Paper No. 2012/14). Robert Schuman Centre for Advanced Studies. pg 8-9. [Hereinafter: Dzankic J. (2012). "The pros and cons of ius pecuniae: Investor citizenship in comparative perspective"]

⁴⁰ Balzan Jurgen. (November 12, 2013). "Contentious Citizenship Scheme Approved", *Malta Today*, Available at <http://www.maltatoday.com.mt/en/newsdetails/news/national/Contentious-citizenshipscheme-approved-20131112>

⁴¹ Dzankic J. (2012). "The pros and cons of ius pecuniae: Investor citizenship in comparative perspective", 11-15.

Saint Kitts and Nevis have been the pioneers of NBI since the 1980s and 1990s.⁴² It was after 2007-2009 financial crisis that, EU countries expanded Citizenship by Investment (CBI) programs to boost their economies.⁴³ Through such programs, more than 132,000 individuals were granted citizenship or residency in EU member states between 2011 and 2019, resulting in a total investment of EUR 21.4 billion.⁴⁴ According to the 2018 Knight Frank wealth report, 34% of high-net-worth individuals (HNWIs) own a second passport.⁴⁵

In view NBI initiatives benefit affluent individuals by expediting migration procedures to get citizenship and related privileges, as well as host countries by promoting economic growth. However, the money used for the NBI may have been obtained lawfully or unlawfully.⁴⁶ Even though many clients have good intentions and assets, NBI programs can be abused by criminals who want to evade law enforcement, launder and conceal billions of dollars' worth of criminal proceeds, facilitate organised crime, and hide assets.⁴⁷

While some argue that NBI schemes are more transparent than other citizenship acquisition methods,⁴⁸ others argue on its disadvantages. For instance, attaching a price to citizenship threatens the ideal of citizenship itself.⁴⁹ Most famously, Gary Becker, suggested that nationality should be linked to investment in order to draw in highly skilled persons with an entrepreneurial mindset and to open up immigration to people from more nations.⁵⁰ Borna and Stearns [2002] maintained the same line of argument.⁵¹ Their overall emphasise is that Selling citizenship is not in any way worse than the current immigration laws, either morally or financially.⁵²

From moral perspective, Hidalgo is the most recent defender for investor citizenship. He contends that states have the right to impose pricing limitations if they can lawfully restrict access to citizenship. However, this assumption could not be accurate. First of all, just because I can legally murder my opponent to defend myself during a conflict does not entail that I may legally enslave him once he has given up and is no longer a threat. More generally, I can only use my authority in a way that is appropriate for the reason I was assigned with it. Other requirements are unacceptable and amount to a misuse of authority. Therefore, whether it is

⁴² Shachar, A. (2017). "Citizenship for sale?" In *The Oxford Handbook of Citizenship* (pp. 794-796). Oxford, England: Oxford University Press. [Hereinafter Shachar. A (2017) "Citizenship for sale?"]

⁴³ Džankić J. (2018). "Immigrant investor programmes in the EU". *Journal of contemporary European studies*, 26-1, p. 65.

⁴⁴ European Added Value Unit. (2021). "Avenues for EU action on citizenship and residence by investment schemes". *European Parliamentary Research Service*.

[www.europarl.europa.eu/RegData/etudes/STUD/2021/694217/EPRS_STU\(2021\)694217_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/694217/EPRS_STU(2021)694217_EN.pdf)

⁴⁵ Frank K.F (2018). *The Wealth Report: A global perspective on prime property and investment* (12th edition). Knight Frank Research. [Hereinafter: Frank K.F (2018) "the Wealth Report"]

<https://content.knightfrank.com/resources/knightfrank.com/wealthreport2018/the-wealth-report-2018>

⁴⁶ Frank K.F (2018) "the Wealth Report", Pg 22

⁴⁷ FATF/OECD. (2023). "Misuse of citizenship investment"

⁴⁸ Kochenov, D. (2014). "Citizenship for real: Its hypocrisy, its randomness, its price." In A. Shachar & R. Bauboc (Eds.), *Should citizenship be for sale?* (EUI Working Paper, pp. 27-30).

⁴⁹ Shachar, A., & Hirsch, R. (2014). "On citizenship, states, and markets". *Journal of Political Philosophy*, 22(2).

⁵⁰ Becker Gary S., Edward P. Lazear (March 1, 2013). "A Market Solution to Immigration Reform", *Wall Street Journal*. Also see, Becker Gary S. (1987). "Why Not Let Immigrants Pay for Speedy Entry?" *The Economics of Life* New York, McGrawHill: 58-60

⁵¹ Borna Shaheen and James N. Stearns (2002). "The Ethics and Efficacy of Selling National Citizenship", *Journal of Business Ethics*, 37: pg 193-207. [Borna Shaheen and James N. Stearns (2002)]

⁵² Borna Shaheen and James N. Stearns (2002). Pg 200-203.

acceptable to grant citizenship in exchange for substantial financial contributions depends on state's purpose to grant or refuse citizenship.

To the contrary, some contend that the restricted rules experienced by refugees are in contrast to the growing mobility of rich migrants.⁵³ Additionally, nations that sell their citizenship also sell their ability to enter other nations without the latter's consent.⁵⁴ Though each state has considerable discretion over who it grants citizenship to, the practice of granting nationality for solely economic reasons without taking into account identity links, potential illegal motives, or consequences on other sovereign nations is creating mistrust and tensions between historically friendly countries.⁵⁵ For instance, Canada has already revoked the visa-free access of a number of countries⁵⁶, including Antigua and Barbuda due to their permissiveness in awarding citizenship, where obtaining citizenship only requires five days of residency on the island and costs only \$100,000.⁵⁷

Research Gap

By a thorough literature review, researcher found that, while states have discretion in nationality matters under the municipal law, International law can place restrictions on such discretion.⁵⁸ The 1930 Hague Convention also recognizes the limitations placed by international law on states' rights in nationality matters, declaring that other nations ought to accept a state's nationality laws to the extent that they are consistent with international agreements, norms, and legal principles pertaining to nationality.⁵⁹ Among them is the 1951 Refugee Convention wherein states are bound to assimilate and naturalize refugees and 1961 Statelessness Convention wherein states are bound to reduce and prevent statelessness. Nonetheless, there is a dearth of academic research on the 1951 Refugee Convention's ability to address the subset of stateless people who are also refugees. The relationship between the refugee convention and the problem of statelessness is severely unexplored.⁶⁰ As noted by Maryellen Fullerton (2015): "The intersection of statelessness and international refugee law is uncharted territory, and the need for exploring it is urgent,"⁶¹ to assist and improve the protection of an estimated 1.5 million stateless people who are in a refugee-like situation.⁶²

Similarly, having an obligation to naturalize refugees and stateless individuals under Article 34 of the 1951 convention and Article 32 of 1954 convention relating to the status of

⁵³ Mavelli, L. (2018). "Citizenship for sale and the neoliberal political economy of belonging". *International Studies Quarterly*.

⁵⁴ Garnier, S. (2020, January 26). *Citizenship by Investment: Transactions of National Identity*. Harvard International Review. [Hereinafter: Garnier, S. (2020, January 26) <https://hir.harvard.edu/citizenship-by-investment/>

⁵⁵ Garnier, S. (2020, January 26)

⁵⁶ Selling citizenship is big business—and controversial. (2018, September 29). *The Economist*. <https://www.economist.com/international/2018/09/29/selling-citizenship-is-big-business-and-controversial?ref=hir.harvard.edu>

⁵⁷ *Antigua and Barbuda Citizenship by Investment - Arton Capital*. (2024, August 6). Arton Capital. <https://www.artoncapital.com/global-citizen-programs/antigua-and-barbuda/?ref=hir.harvard.edu>

⁵⁸ Nationality Decrees in Tunis and Morocco Opinion (1923) Permanent Court of International Justice (PCIJ) Series B No. 4, 24. [Hereinafter: PCIJ Advisory Opinion 1923]. See, further, C. F. Amerasinghe (2008), "Diplomatic Protection" *Oxford Monographs in International Law*, at 4. See also Nottebohm above.

⁵⁹ 1930 Hague Convention, Article 1

⁶⁰ Michelle M.F and Helen H.L (April 2019). "International refugees Law and protection of stateless persons". *Oxford University Press*. [Hereinafter: Michelle M.F and Helen H.L (April 2019)]

⁶¹ Fullerton (2015) 'Comparative Perspectives on Statelessness and Persecution' *Kansas Law Review*, Vol. 63, 863, 902

⁶² Michelle M.F and Helen H.L (April 2019)

stateless people respectively, the potential of conferring nationality to stateless refugees utilizing the naturalization by investment schemes of host states as a driving force towards mitigating statelessness has remained largely unexplored. In addition to that, there is little debate on the virtues attached with naturalization by investment schemes including non-discrimination and transparency which if applied to stateless refugees would yield better outcome as this class of stateless individuals are most vulnerable to discriminatory treatment by hosts states and making them beneficiary of investment citizenship would empower them to act as rational actors capable of addressing their own needs, as opposed to passive recipients of humanitarian aid in camps.⁶³

Research Objectives

Having discovered the gaps in the contemporary legal regime, this research has following objectives. It specifically aims to;

- i. To analyze national and international aspect of states autonomy in granting nationality.
- ii. To analyze the status of Naturalization by investment under International Law.
- iii. To determine how Naturalization by investment is applied to stateless refugees would conform to international obligations.
- iv. To suggest that investment through Human capital should be encouraged for acquiring citizenship.

To achieve these research objectives, researcher in **PART I** of this study makes it clear that states are autonomous in their domestic jurisdiction to determine the rules of naturalization. Nationality acquired on such rules can't be held defective or illegal, albeit the missing genuine link, for its functioning within local settings.

PART II discusses that international law imposes certain bars on state's power to determine the rules of acquisition of nationality. Under Art 1 of the Hague Convention 1930, states are autonomous in determining who are their nationals but such nationality will be recognized by other states only if it conforms to international obligations. Though a state's nationality laws even if they violate international obligations does not make the nationality defective in local settings yet it is not liable to be recognized by other states. Hence, to be held valid under international law, nationality must be conferred through such modes as would conform to the state's International legal obligations. This chapter analyze the status of NBI in International law from two perspectives: (1) Genuine Link and; (2) State's responsibility for Internationally wrongful acts. As held by International law commission, Genuine Link is not a sole basis to determine the legal status of nationality, yet in practice, EU states are urged to ensure that nationality is not awarded absent any genuine link to the country or its citizens," strongly implying that "[g]ranting naturalization based on a monetary payment alone" does not qualify as establishing such a connection In view, Malta updated its NBI rules requiring 12 month residence of investor. With regard to internationally wrongful acts, this Chapter clarifies that most NBI schemes violate international obligations such as obligation to observe non-discrimination, obligation to prevent corruption and avoid and reduce statelessness. Further that, Naturalization of stateless refugees by investment via Human Capital would conform to state's obligations with regard to non-refoulement (UNHCR, 1951.Art 42.1), obligation to integrate refugees into national mainstream (UNHCR, 1951. Art 34) and obligation to observe non-discrimination in nationality laws.

⁶³ International Refugee Rights Initiative. (2014, June).

PART III highlights that states exploit their citizenship programs to attract Human capital and investments to uplift their economies and earn prestige and good reputation internationally. Citizenship on the basis of talent / skills (also known as Olympic citizenship) are common modes of naturalization throughout the world.

PART IV argued that NBI schemes if applied on stateless refugees by utilizing their Human Capital and exempting them from monetary investments aligns with state's aspiration to attract human capital as well as uplift their national economies as has been inherent in NBI schemes and Olympic citizenship schemes.

PART V concludes the entire research.

PART I

Naturalization By Investment: A Valid Mode of Conferring Nationality?

According to Article 1 of the 1930 Hague Convention, national autonomy in matters of nationality has two aspects: an internal (national) aspect and an international one. The national aspect refers to the right of states to independently establish the guidelines for gaining and losing nationality in their internal legal systems.⁶⁴ However, the international aspect pertains to the question of whether and to what extent other states are required to acknowledge the grant or loss of a particular State's nationality. This Chapter seeks to analyze the national aspect of Naturalization by investment i.e, whether states have a right to structure the rules on acquisition of nationality such that it gets restricted to only wealthy individuals. Whether a state conferring nationality on the basis NBI is barred by any facet or principle of citizenship norms in their domestic settings. This chapter highlights international perspective regarding the wrongs attached with it, why does it seem to be unfair and whether the absence of Genuine link in the nationality conferred through NBI makes the nationality defective as a local matter.

Concerns Against Naturalization by Investment

There are following international concerns against naturalization by investment which casts doubts upon its validity as a mode of conferring nationality.

Legal concerns:

There is a global criticism against Naturalization by monetary and business investment as these schemes are susceptible to spread corruption and tax evasion.⁶⁵ Affluent foreigners may relocate to another state in order to avoid criminal persecution in their home states, in which case the states offering nationality via NBI commits complicity in the hiding of crime for financial gain.⁶⁶ An Indian millionaire, Mehul Choksi, for instance, who is wanted in India for a \$2 billion fraud plot involving the Punjab National Bank, recently relocated to Antigua and Barbuda, where he has been a citizen since 2018.⁶⁷ The OECD is increasingly concerned that its attempts to combat tax evasion and money laundering may be hampered by investment citizenship.⁶⁸ If wealthy offenders start fleeing to countries with liberal laws, citizenship-by-investment could be complicit in impeding the effectiveness of the international justice system.⁶⁹

1.1.1 Ethical concerns:

⁶⁴ Crawford, J. (2012) "Brownlie's Principles of Public International Law (Oxford: OUP)". De Groot, D. A. J. G. (2018) Free Movement of Dual EU Citizens, European Papers, 3(3), pp. 1075–1113

⁶⁵ Garnier, S. (2020, January 26). 'Citizenship by Investment'

⁶⁶ Garnier, S. (2020, January 26). 'Citizenship by Investment'

⁶⁷ Garnier, S. (2020, January 26). 'Citizenship by Investment'

⁶⁸ Garnier, S. (2020, January 26). 'Citizenship by Investment'

⁶⁹ Garnier, S. (2020, January 26). 'Citizenship by Investment' pg 17

Investment citizenship raises ethical questions since it might serve as a fertile ground for the continuation of inequality and the commodification of civic rights and responsibilities. Citizenship-buying is only available to the wealthiest individuals worldwide because the majority of citizenship programs need financial investments in the nation's economy. If states start selling state identity to anyone who can pay for it, regardless of their connections to the country, it is conveying to its actual people that their national identity is meaningless. Citizenship entails political obligations. Voting should only be allowed to those who are concerned about the political future of their country. One might raise objection that selling citizenship would actually force other migrants to relocate. While selling nationality to affluent foreigners, states would begin refusing entry to other migrants, including refugees, in order to create way for those buying nationality. Therefore, selling citizenship to wealthy foreigners would unfairly displace migrants who actually have better moral grounds for admission.⁷⁰

Given these objections, selling citizenship is considered as presumptively wrong and unfair by numerous legal scholars.⁷¹

Whether The Absence of Genuine Link Makes the Nationality Defective as A Local Matter?

In International Law, Naturalization by investment is mostly criticized on the ground of absence of the Genuine Link. Since, the genuine link concerns the debate on international effect (i.e, recognition by other states) of nationality by investment, same shall be discussed at length in the upcoming chapter. However, at this stage it is vital to discuss whether international law bars states from conferring investment-based nationality absent the genuine link.

Interestingly, this genuine link is also missing in nationality conferred by *jus sanguinis* and *jus soli* and still both are recognized as valid modes of conferring nationality.

Nationality by Jus Sanguinis Disregards Genuine Link:

Some people continue to get identified with the nationality of their ancestors, even if the territorial connection was severed by emigration centuries ago. None of the states put those who obtain citizenship *jus sanguinis* through any kind of integration test. They don't have to have visited or own property in their state of ancestral citizenship, or have any other vested interest. As a result, states do not rank its inhabitants according to their ancestry or sociological ties, or what Nottebohm refers to as the "social fact of attachment."

Nationality by Jus Soli recognized despite the missing genuine link:

Individuals who get citizenship *jus soli* does not sustain a connection to the state of birth into adulthood.⁷² Given this, Nottebohm's applicability to investor citizenship as a local issue is undermined by the shaky ties that many people have to their state of birth citizenship. In today's world of economic globalisation and migration, there are innumerable people who have obtained nationality through birth, descent, or the operation of state law with which they have the most tenuous link".⁷³

⁷⁰ HIDALGO, J. (2016). Selling Citizenship: A Defence. *Journal of Applied Philosophy*, 33(3), 223–239.

<https://www.jstor.org/stable/26813149> [Hereinafter: Hidalgo J. (2016) "Selling Citizenship: A Defence"]

⁷¹ Hidalgo J. (2016) "Selling Citizenship: A Defence" ; Also see Abizadeh. (28 April, 2014), 'Review of The Ethics of Immigration,' *Notre Dame Philosophical Reviews*; Also see Shachar A & Ran Hirschl (2014), 'On citizenship, states, and markets,' *Journal of Political Philosophy* 22,2: 231–257, at p. 250.

⁷² Robert D. Sloane. (2009). "Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality". *Harvard International Law Journal* Vol 1. Available at:

https://scholarship.law.bu.edu/faculty_scholarship/489 [Hereinafter: Robert (2009) "Breaking the Genuine Link"]

⁷³ International Law Commission. (2006). "Draft articles on diplomatic protection with commentaries" UN Doc A/CN 4/L 646 [Hereinafter: ILC Draft Articles (2006)]

Due to globalization, the threshold for proving ties to a state, its citizens, and its economy is significantly lower now than it has ever been in the past.⁷⁴ Individuals are unlikely to have underlying social ties to the state from which they have gained investor citizenship. However, at least for those programs that require an investment, investor citizens will at least have an ongoing economic stake in the nation.⁷⁵ It is hard to argue that such a financial stake is less significant than the occasionally tenuous connections proving eligibility for citizenship on other grounds. The validity of investment as a criterion for obtaining naturalization appears to be beyond the scope of international law.⁷⁶

Nationality Under the reserved domain of a State:

In the case of Nationality decrees in Tunis and Morocco, ICJ opined that, "Nationality lies within the reserved domain of state's jurisdiction."⁷⁷ Article 3 of European Convention on Nationality (ECN) provides that, "It is for each state to determine under its own law who are its nationals."⁷⁸ Likewise, according to draft protocol on Nationality of the African Union, "It is for each state party to determine under its own national laws who are its nationals."⁷⁹ States discretion in nationality matters is also affirmed by European and American Courts of Human Rights in their judgments.⁸⁰

In view above, it is concluded that since the principle of genuine link laid down in *Nottebohm* Judgment of ICJ is limited to the doctrine of dominant nationality, it is not a sole threshold to determine the legality of Naturalization by investment. The principle doesn't restrict state's power to allocate nationality but the international impact of nationality in a limited set of situations, such as diplomatic protection.⁸¹ As a matter of fact, the majority of investment citizenship initiatives would be consistent with international law as long as they don't cause a state to violate its obligations under international law.⁸² This part concludes that naturalization by investment may be unfair on legal and ethical grounds, yet states are autonomous in determining the terms of acquisition of their respective nationalities. Even if such terms violate international law does not make the nationality defective within their domestic jurisdictions, yet it may have adverse consequences in international operations as other states are not bound to recognize it.⁸³

In connection to this, whether citizenship conferred through investment may result into the breach of a state's international legal obligations so as to affect its validity in international law will be discussed in the next part.

PART II

Status Of Naturalization by Investment in International Law: Extent of State's Recognition

⁷⁴ ILC Draft Articles (2006)

⁷⁵ See Louis F E Goldie. (1963). "The Critical Date" 12 International and Comparative Law Quarterly Vol 12.

⁷⁶ See Louis F E Goldie. (1963). "The Critical Date" 12 International and Comparative Law Quarterly Vol 12.

⁷⁷ The Advisory Opinion of the Permanent Court of International Justice (PCIJ) in Nationality Decrees Issued in Tunis and Morocco, at 24

⁷⁸ European Convention on Nationality (1997) Art 3.

⁷⁹ Protocol to the African Charter on "Human and Peoples' Rights Relating to the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa," adopted by the African Union on February 18, 2024

⁸⁰ See, the European Court of Human Rights in *Petropavlovsk v. Latvia* [2015] ECHR Application No. 44230/06, para. 80, and the Inter-American Court of Human Rights in Case of the Girls Yean and Bosico v. Dominican Republic [2005] IACtHR Series C No. 130 (2005), para. 140.

⁸¹ Spiro, P. J. & Temple University. (2022). "Investment Citizenship and the Long Leash of International Law" In Chapter. <https://doi.org/10.1017/9781108675123.007> [Hereinafter: Spiro, P. J. & Temple University. (2022)].

"Investment Citizenship"]

⁸² Spiro, P. J. & Temple University. (2022). "Investment Citizenship"

⁸³ Hague Convention 1930, Art 1.

As has been discussed in the preceding chapter, under International law, national autonomy in matters of nationality has two aspects: an internal (national) one and an international one.⁸⁴ This chapter seeks to explore and analyze the international aspect of state's autonomy in nationality matters i.e, the question whether, and to what extent, other States have the obligation to recognize the grant or loss of the nationality of a certain State.

A grant of citizenship could be contrary to international law and in such a case other States need not recognize such citizenship. This principle had already been stated in Hague convention 1930 as well as by the Permanent Court of International Justice in its advisory opinion of 1923:

The question whether a certain matter is or is not solely within the jurisdiction of a State depends upon the development of international relations. Thus, in the present state of international law, it may well happen that, a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law (PCIJ Advisory Opinion. (1923)).⁸⁵

In this context, three questions will be analyzed in depth in this chapter. Firstly, whether the concept of genuine link propounded by ICJ in its Nottebohm dicta is an international custom or principle of law generally recognized with regard to nationality in derogation of which states would not be bound to recognize the investment-based nationality. Secondly, whether naturalization by investment results into breach of international obligations of a state which may affect the extent of its recognition by other states. Thirdly, how the naturalization of refugees would conform to a state's international legal obligations so as to be liable for recognition by other states.

Genuine Link: An International Custom / Principle of Law?

The genuine link has been rejected by national and international tribunals in determination of nationality disputes as well as international law commission and other legal scholars which shows that it is not an international custom or principle of law recognized by states. However, recognition of this principle can be traced in nationality legislation of European Union. A systematic account of such instances has been detailed below:

Soufraki Case [2004]:

Hussein Nuaman Soufraki, a foreign investor who was born and reared in Italy, automatically lost his Italian nationality when he became a Canadian citizen in 1991. He was then unable to regain his Italian nationality in accordance with Italian law.⁸⁶ Considering that he filed the arbitration under BIT between Italy and the United Arab Emirates ("UAE"), while, on the relevant dates, he was not of Italian nationality, the tribunal duly relinquished its jurisdiction.⁸⁷ Firstly, the tribunal impliedly rejected the genuine link theory. If, as a general rule, valid nationality in international law must be based on genuine link⁸⁸, then the Soufraki tribunal

⁸⁵ PCIJ Advisory Opinion. (1923). See also Lawrence Preuss, (1935). International Law and Deprivation of Nationality' 23 GeoJ 250, 254; Jennings and Watts (eds), Oppenheim's International Law (n 5) 851– 52 [378].

⁸⁶ See Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7 (July 7, 2004) (Award on Jurisdiction), reprinted in 12 ICSID Rep. 158, ¶¶ 48–52 (2007). [Hereinafter: Soufraki v. United Arab Emirates (2004)]

⁸⁷ Soufraki v. United Arab Emirates (2004) pg 84

⁸⁸ Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6) (emphasis added).

would have allowed the arbitration in recognition of the Italian nationality of Soufraki.⁸⁹ The case of Soufraki provides further evidence that the genuine link theory, in the robust form that the International Court of Justice has articulated, is not international law.⁹⁰ The authority to award nationality is still within the purview of state's internal power, just as the way it was prior to the Nottebohm era.⁹¹

Mario Micheletti et al v Delegación [1992]:

In the Micheletti case,⁹² the Court of justice of the European Union (CJEU), in its first decision in the field of nationality, disregarded the genuine link requirement.

Facts: Mario Vicente Micheletti was born, raised, and completed his education in Argentina. He was a dual citizen of Argentina and Italy. After moving to Spain, he intended to open a dental office there. According to Article 9 of the Spanish Código civil, the nationality of the last state of residence Argentina in the dentist's case is given preference in cases involving dual nationals. His Italian nationality was not acknowledged by the Spanish government. As a result, Spain refused Micheletti the ability to start the practice, which was only granted to citizens of EU Member States by EU legislation, and treated him as an Argentinian rather than an Italian.

Held: The CJEU held that Spain was obligated to fully acknowledge Micheletti's Italian nationality. Applying the "genuine link" criteria to deny internal market safeguards in the EU, where nationality-based discrimination is illegal, would be a clear breach of EU law's fundamental tenets.⁹³ "Effective nationality, whose origin lies in a 'romantic period' of international relations and, in particular, in the concept of diplomatic protection," was rejected by the Court. In the same sentence, the opinion disregarded the reference to Nottebohm, "the well-known (and, it is worth remembering, controversial)" ICJ ruling.⁹⁴

International Law Commission & Legal Scholars:

Nottebohm was also rejected by the International Law Commission.⁹⁵ Article 4 of ILC Draft Articles on diplomatic protection provides that, "A state of nationality means a state whose nationality that person has acquired in accordance with the law of that state by birth, descent, naturalization, succession of states or any other manner, not inconsistent with International law." This article doesn't require a state to prove a genuine link between itself and its national.⁹⁶ Legal commentators have likewise strongly criticized the decision. According to Macklin, "there is strong consensus among legal scholars who take Nottebohm seriously as jurisprudence that it was wrong then, and may be even more wrong now." She comes to the conclusion that the decision in Nottebohm case should be "retired."⁹⁷ The ruling is "utterly arbitrary and potentially harmful rule of international law," according to Kochenov.⁹⁸

⁸⁹ Cf. A.C. Sinclair. (Oct, 2004). "Nationality Requirements for Investors in ICSID Arbitration – The Award in Soufraki v. The United Arab Emirates". 1:4 TRANSNAT'L DISPUTE MGMT. 1, 2

⁹⁰ Robert (2009) *Breaking the genuine link*.

⁹¹ Nationality Decrees Issued in Tunis and Morocco (French Zone), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7).

⁹² Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria (7 July 1992) Judgment of the Court. Case C-369/90.

⁹³ Tratnik, M., and Weingerl, P. (2019) Investment Migration and State Autonomy: A Quest for the Relevant Link, Investment Migration Working Papers IMC-RP 4. [Hereinafter: Tratnik, M., and Weingerl, P. (2019)]

⁹⁴ Opinion of AG Tesauro (1992) C-369/90 Micheletti EU: C:47, para 5; Also see, Tratnik, M., and Weingerl, P. (2019)

⁹⁵ International Law Commission (2006). "Draft articles on diplomatic protection with commentaries" UN Doc A/CN 4/L 646, Art 4 Para 5, adopted by the International Law Commission at its fifty-eighth session, in 2006, appears in Yearbook of the International Law Commission, 2006, vol. II, Part Two.

⁹⁷ Audrey Macklin (2018), "Is It Time to Retire Nottebohm?" 111 *American Journal of International Law* 492.

Genuine Link, A must for investor citizenship in the European Union

Under the EU Commission Report 2019, genuine link has been put into the realm of EU citizenship Laws as a central basis as is evident from the case of Malta as discussed below:

The Case of Malta

With a somewhat high total investment cost (€1.15 million), Malta's program is standard in the CBI environment. In addition to granting visa-free entry into the EU and the ability to settle there, Malta citizenship also grants visa-free entry into the US.⁹⁹ Several elements of the EU governmental system responded negatively to Malta's move. Malta's offer was rejected by the European Parliament and the European Commission.¹⁰⁰ In response to the European Parliament's motion, the Commission published a report in 2019 that criticised the investment citizenship initiatives in Malta, Cyprus, and Bulgaria. Investor citizenship initiatives are associated with "certain inherent risks, in particular as regards security, money laundering, tax evasion, and corruption," according to the report.¹⁰¹ The EU Commission's fundamental concern in its 2019 report was that investment citizenship gives corrupt actors a way to get access to and privileges in other Member States.

Investor citizenship was also criticised from a legal standpoint in the Commission's findings. The Commission argued that naturalization should only be granted to those who have a history of ties to a nation in accordance with international law. The Commission argued:

*"The Nottebohm case of the International Court of Justice establishes that, for nationality acquired through naturalization to be recognized in the international arena, it should be granted on the basis of a genuine connection between the individual and the State in question. The "bond of nationality" is traditionally based either on a genuine connection with the people of the country (by descent, origin or marriage) or on a genuine connection with the country, established either by birth or prior effective residence in the country for a meaningful duration. Other elements may be required to attest to the existence of a genuine bond with the country, such as knowledge of a national language and/or of the culture of the country, links with the community"*¹⁰²

The report concluded that "each Member State needs to ensure that nationality is not awarded absent any genuine link to the country or its citizens." Strongly suggesting that "[g]ranting naturalization based on a monetary investment alone" does not constitute as establishing such a link.¹⁰³

Therefore, Malta implemented a policy requiring donors and investors to have a legal residency in Malta for a minimum of 12 months prior to obtaining Maltese nationality in order to satisfy

⁹⁸ Kochenov, D. (2012). Conclusion: where is EU citizenship going? The fraudulent Dr. Rottmann and the state of the union in Europe. In *Globalisation, Migration, and the Future of Europe* (pp. 240-253). Routledge.

⁹⁹ Spiro, P. J. & Temple University. (2022). Investment Citizenship and the Long Leash of International Law. In *Chapter*. <https://doi.org/10.1017/9781108675123.007> [Hereinafter: Spiro, P. J. & Temple University. (2022)] Pg 140

¹⁰⁰ European Parliament resolution (January 16, 2014) 2013/2995 (RSP), on EU citizenship for sale OJ C482/117 (expressing concern that "undermines the very concept of European citizenship"); Also see, Peter L. (January 23, 2014). "EU questions Malta on passport sale for rich foreigners" *BBC News* www.bbc.com/news/world-europe-25858025, accessed October 15, 2020.

¹⁰¹ European Commission (2019), "Investor Citizenship and Residence Schemes in the European Union (Report)" COM 12 final. [Hereinafter: European Commission (2019) "Report on Investor Citizenship"]

¹⁰² European Commission (2019) "Report on Investor Citizenship"

¹⁰³ European Commission (2019) "Report on Investor Citizenship"

the genuine link criteria.¹⁰⁴ This is due to the fact that once an individual is granted nationality by investment in any EU member state, other EU member states are required to respect his citizenship rights.¹⁰⁵ The idea of honest cooperation among EU nations may be broken if nationality is granted unilaterally to everyone without a real/genuine connection.¹⁰⁶ Thus, in condemning CBI programs, the Commission relies on the genuine link criterion that was rejected both by the ILC and the CJEU.¹⁰⁷

From case study of Malta, it needs to be noted that:

- a) The sovereignty of states in nationality matters does not release member states from other duties imposed by international law in other areas, such as preventing and reducing statelessness or combating corruption and tax avoidance.¹⁰⁸
- b) Practical concerns due to lack of due diligence in the naturalization procedure of investment-based naturalization shouldn't cast doubt upon the principled independence of Member States, which permits them to select links they believe are pertinent for awarding citizenships.¹⁰⁹

Naturalization By Investment: An Internationally Wrongful Act?

Having examined the legal status of Naturalization by investment through genuine link perspective and given the financial crimes that gets impetus under its cover, it is now important to carry on the debate on naturalization by investment in the context of breach of international legal obligations to address our second question in this chapter. Article 3 of the ILC Draft Article on International Responsibility states that a state commits an internationally wrongful act when it perpetrates an act or omission that violates the state's international obligations.¹¹⁰

An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law.¹¹¹ When any act or omission of state gives rise to the breach of international obligations that it owes to the other states under any bilateral or multilateral treaties, such act or omission may be attributed to the state and therefore international claims may be brought against it.¹¹²

2.2.1. *Naturalization by investment: breach of international obligations?*

¹⁰⁴ Spiro, P. J. & Temple University (2022)

¹⁰⁵ European Commission (2019) "Report on Investor Citizenship"

¹⁰⁶ Weingerl, P., & Tratnik, M. (2019). *Citizenship by Investment Programs from the Perspective of International and EU Law*. University of Maribor Press, *LEXONOMICA* (pp. 95–126).

<https://doi.org/10.18690/lexonomica.11.2.95-126.2019> pg 120 [Hereinafter: Weingerl, P., & Tratnik, M. (2019)].

"Citizenship by Investment Programs from the Perspective of International and EU Law"]

¹⁰⁷ Guarascio, F (December 3, 2019). "EU pressures Malta over Bank of Valletta 'golden passport' clients" *REUTERS* <https://www.reuters.com/article/us-malta-bank-of-valletta-eu-passports/eu-pressures-malta-over-bank-of-valletta-golden-passport-clients-idUSKBN1Y61CT> [accessed on 25 December 2024].

¹⁰⁸ Weingerl, P., & Tratnik, M. (2019). "Citizenship by Investment Programs from the Perspective of International and EU Law" (pp. 95–126)

¹⁰⁹ Weingerl, P., & Tratnik, M. (2019). "Citizenship by Investment Programs from the Perspective of International and EU Law"

¹¹⁰ International Law Commission (12 December 2001). "Articles on responsibility of States for internationally wrongful acts", annexed to General Assembly resolution 54/83 [Hereinafter: ILC Draft Articles 2001] article 3.

¹¹¹ International Law Commission's commentary to article 4 of ILC Draft Articles 2001, paras. (8)

¹¹² International Law Commission's commentary to article 4 of ILC Draft Articles 2001, paras. (8)-(10).

States are liable for breaches of their obligations e.g., the breach of a treaty (Shaw, M, 2024).¹¹³ In this context there are following obligations that are or may get affected due to naturalization by investment programmes on sole ground of wealth on one hand and keeping those in need of nationality like refugees, stateless.

Obligation to observe non-discrimination in nationality matters

The fundamental goal of non-discrimination law is to guarantee "that individuals should be judged according to their personal qualities rather than economic status." Art. 26 of the Civil and Political Covenant contains the fundamental provision of non-discrimination in international human rights law.¹¹⁴ which provides that:

"The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

According to the Human Rights Committee's General Comment 18, Article 26 addresses the duties placed on State parties with respect to their laws and how they are applied.¹¹⁵ Therefore, when a State party adopts nationality law, it must adhere to article 26's requirement that its content not be discriminatory.¹¹⁶ The term "discrimination" is defined in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination as follows:

The term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Investment citizenship tends to "exclude" stateless refugees from being able to get naturalized due to their economic status instead of personal qualities which is against the core of non-discrimination law. Offering investment nationality to wealthy applicants having multiple nationalities discriminates against the stateless refugees who are deprived of their wealth yet in the desperate need of citizenship.¹¹⁷ The duty of non-discrimination has the greatest value to stateless refugees because their main concern is to be accepted by the host community with any sense of persecution or alienation.

Obligation to prevent Corruption

Article 1 of the United Nations Convention against Corruption obliges states to encourage and reinforce measures to prevent and combat corruption more effectively and efficiently.¹¹⁸ The notion of prevention stems from the due diligence required to be exercised by states within their borders.¹¹⁹ However, naturalization by investment programs with weak monitoring and

¹¹³ Shaw, M. (2024, November 19). *International law / Definition, History, Characteristics, Examples, & Facts*. Encyclopedia Britannica. <https://www.britannica.com/topic/international-law/States-in-international-law>

¹¹⁴ United Nations (General Assembly). (1966). International Covenant on Civil and Political Rights. *Treaty Series*, 999, 171. Art. 26.

¹¹⁵ UN Human Rights Committee (10 Nov 1989), CCPR General Comment No. 18: Non-discrimination, Para 12. Hereinafter: CCPR General Comment No. 18] <https://www.refworld.org/legal/general/hrc/1989/en/6268> [accessed 23 December 2024]

¹¹⁶ Ibid

¹¹⁷ HIDALGO J. (August 2016). "Selling Citizenship: A defense". *Journal of Applied Philosophy*, Vol. 33, No. 3 pp. 223- 239

¹¹⁸ United Nations. (2003). United Nations Convention Against Corruption. *Treaty Series*, 2349, 41. adopted by General Assembly resolution 58/4 of 31.

¹¹⁹ Corfu Channel, (1949). "United Kingdom v. Albania", Merits, Judgment, ICJ Reports (1949), para. 22.

financial transparency and without diligence contradict state's obligations with regard to prevention of corruption. As found by FATF in its 2023 report, CBI /NBI programs can be exploited by illicit actors to facilitate financial crimes, such as money laundering, corruption, fraud and tax evasion and these programs can help them to launder the proceeds of crime.¹²⁰

Obligation to reduce, avoid and prevent statelessness

The 1961 Convention provides rules on the acquisition, loss, and deprivation of nationality to enable states to prevent, avoid and reduce statelessness.¹²¹ Under the Convention, states owe a legal obligation to refrain from acts that would lead to statelessness.¹²² Breach of international obligations can be entailed by the omissions as well as by the actions of state. Under Article 1 of the 1961 convention, states owe an obligation to confer nationality to persons who would otherwise be stateless:¹²³

- a) At birth, by operation of law or,
- b) Upon an application if such person has always been stateless.

Children born to stateless refugees or refugees who can't confer their nationality to their children may be covered under this clause.¹²⁴ Further, as identified by UNHCR, Article 24 (right of child to nationality) of the ICCPR is a provision relating to the prevention and reduction of statelessness.¹²⁵

Further, in an attempt to avoid, reduce and prevent statelessness, Article 32 of 1954 convention relating to status of stateless refugees obliges states to naturalize stateless individuals under expedited and cost-effective procedures.¹²⁶

However, conferring nationality on the ones who already have a nationality on sole basis of wealth and leaving the refugees and their children stateless doesn't meet the requirements and standards of compliance to which a state is obliged under the 1954 and 1961 statelessness conventions. This may amount to omission in breach of an international obligation within the meanings of article 3 of Draft Articles on state responsibility for internationally wrongful acts.¹²⁷ Because, as held by ICJ "Instances of state conduct inconsistent with a given rule should be treated as breaches of that rule."¹²⁸

Would Investment-Led Naturalization of Refugees Conform to State's International Obligations?

The last question to be addressed in this chapter refers to naturalization of refugees and how redirecting investment-based programs towards naturalization of refugees would conform to state's international legal obligations. This would help us to understand the extent to which

¹²⁰ FATF/OECD. (2023). "Misuse of citizenship"

¹²¹ UNHCR, (March 2014) "Expert Meeting– Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality: Summary Conclusions" at 2, online: UNHCR

¹²² United Nations High Commissioner for Refugees (UNHCR). (May 2014, Geneva). Introductory note on Convention on the reduction of statelessness 1961

¹²³ UNHCR, Convention on the reduction of statelessness 1961. (enforced on 13-Dec-1975). Art 1.

¹²⁴ UNHCR's Global Law and Policy Database. (2024, February 12). *Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children: ("Dakar Conclusions") 10, 12.* Refworld.

<https://www.refworld.org/reference/confdoc/unhcr/2011/en/82667>

¹²⁵ UNHCR. (October 2016) "ICCPR International Covenant on Civil and Political Rights: Quick Reference Guide– Statelessness and Human Rights Treaties", online: <https://www.refworld.org/docid/58c25e3a4.html>

¹²⁶ 1954 Convention relating to the status of stateless persons, Art 32.

¹²⁷ ILC Draft Articles 2006. Art 3

¹²⁸ (*Nicaragua v. United States of America*), [1986] I.C.J. Rep. 14 at para. 206

investment-based nationality if conferred upon refugees would be recognized by other states under the operation of international law.

Obligation of non-refoulement of refugees

Once a stateless person seek refuge in another state, the principle of non-refoulement and obligation to integrate him in national mainstream is attracted to the host state. The principle of non refoulement (not to return a refugee to a risk of persecution) constitutes an essential and non-derogable component of international refugee protection as has been reaffirmed by the executive committee of UNHCR in numerous conclusions since 1977 as well as GA resolutions.¹²⁹ The central importance of the obligation is reflected in Article 42(1) of the 1951 Refugee Convention as well as other regional treaties.¹³⁰ The principle of non-refoulement applies to all irrespective of their nationality or statelessness status.¹³¹ According to the OHCHR (2018):

*"The prohibition of refoulement under international human rights law applies to any form of removal or transfer of persons, regardless of their status, where there are substantial grounds for believing that the returnee would be at risk of irreparable harm upon return on account of torture, ill-treatment or other serious breaches of human rights obligations."*¹³²

Returning a refugee to his state of origin where he got stripped of his nationality may expose him to cruel and degrading treatment in breach of article 5 UDHR, Article 7 ICCPR and Article 2(1) of Committee against torture (CAT). Since the identity of the person in question has been stripped away, leaving him into significant mental suffering, states run the risk of violating the absolute and customary prohibition of torture and cruel, inhuman, or degrading treatment by rendering people stateless.¹³³ The US Supreme Court ruled in *Trop v. Dulles* that denaturalization constituted cruel because "denaturalization strips the citizen of his status in the national and international political community."¹³⁴ Similarly, leaving the refugee stateless, may also violate this provision of international law and could rise to the level of constituting torture.¹³⁵ It must be noted that the obligation of naturalization of refugees has been codified in the 1951 Refugee Convention next to the obligation of non-refoulement which shows that preventing a refugee from being returned is a minimum requirement and may be insufficient to

¹²⁹ UNHCR, Advisory Opinion (26 January 2007) "On the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol" <https://www.unhcr.org/4d9486929.pdf>, para 12. Also see UNGA 73rd session (17 December 2018). UN Doc A/RES/73/151, preamble.

¹³⁰ Arab Convention on Regulating Status of Refugees in the Arab Countries. Art 8(2) ; OAU Convention Governing Specific Aspects of Refugee Problems in Africa. Art. II(3) ; Bangkok Principles on the Status and Treatment of Refugees . Art. 3. Cartagena Declaration on Refugees. Conclusion 5 ; Inter-American Convention to Prevent and Punish Torture. Art 13(4); American Convention on Human Rights. Article 22(8) ; Charter of Fundamental Rights of the EU. Article 19(2).

¹³¹ OHCHR (2018). 'Global Compact for Migration – Technical note: The principle of non-refoulement under international human rights law'. [Hereinafter: OHCHR (2018) 'Global Compact for Migration'] available at: <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNonRefoulementUnderInternationalHumanRightsLaw.pdf>, p 1.

¹³² OHCHR (2018) 'Global Compact for Migration' p 1.

¹³³ Asser Institute, & Ashurst LLP. (2022). "Institute on Statelessness and Inclusion, Open Society Justice Initiative" COMMENTARY TO THE PRINCIPLES ON DEPRIVATION OF NATIONALITY AS A NATIONAL SECURITY MEASURE. Para 164. In *COMMENTARY*. https://files.institutesi.org/Principles_COMMENTARY.pdf

¹³⁴ United States Supreme Court (1958), *Trop v Dulles*, 356 US 86 (1958), available at: <https://supreme.justia.com/cases/federal/us/356/86/>.

¹³⁵ ACmHPR, Amnesty International v Zambia (1999), Communication 212/98. See also ACmHPR, John K. Modise v Botswana (2000), Communication 97/93_14AR.

address the refugee's predicament especially when they are also stateless; in fact, a solution requires permanent protection, which is best attained through naturalization. Hence, naturalization of stateless refugees would conform state's obligations under the 1951 Refugees convention.

Obligation to integrate refugees in national mainstream

To remedy above mentioned instances of cruel and degrading treatment of refugees either by refoulement or by keeping them stateless in host states, article 34 of the 1951 Refugees Convention and article 32 of 1954 statelessness convention obliges host states to facilitate as far as possible the assimilation and naturalization of refugees and stateless persons respectively."

The goal of assimilation is to provide refugees with an equal opportunity to convince states that they are eligible for citizenship". As far as "facilitation of naturalization" is concerned, Art. 34 requires state parties to have flexibility with regard to "the administrative formalities taking place between the submission of the application and the decision"¹³⁶ Hence, state parties are expected to make a good faith effort to help refugees meet the usual requirements for acquisition of the host state's citizenship,¹³⁷ First, by "expediting" the process of refugee applications for naturalization, and second, by "minimizing the fees and expenses of such procedures."¹³⁸

Host states have a "duty" to facilitate assimilation and naturalization, as stipulated in Article 34.¹³⁹ Thus, it would be inappropriate to interpret Art. 34 as without force. Grahl-Madsen has noted that a state must judge for itself whether it is "possible" for it to naturalise a certain person or a certain number of refugees.¹⁴⁰ According to the 1951 Refugee Convention, other Contracting States may have a basis for complaint if, for instance, one of them flatly refuses to assimilate and naturalize any refugee and cannot provide any justification other than unwillingness.¹⁴¹ Because a state "shall facilitate as far as possible the assimilation and naturalization of refugees" [emphasis added]¹⁴² At the very least, state parties must give a good faith explanation for the exclusion of stateless refugees from naturalization.¹⁴³

Obligation to observe Non-discrimination:

According to the Human Rights Committee's CCPR General Comment 18 on non-discrimination, states parties may be required by the equality principle to implement affirmative action in order to reduce or eradicate circumstances that support discrimination.¹⁴⁴ For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.

¹³⁶ Statement of Mr. Ordonneau of France. (Feb. 2, 1950) UN Doc. E/AC.32/SR.22, at 3.

¹³⁷ National Human Rights Commission v. State of Arunachal Pradesh, (1996) 83 AIR 1234 (India SC, Jan. 9, 1996).

¹³⁸ Statement of Mr. Cuvelier of Belgium (Feb. 2, 1950). UN Doc. E/AC.32/SR.22, at 3 ; Statement of Sir Leslie Brass of the United Kingdom (Feb. 2, 1950). UN Doc. E/AC.32/SR.22, at 3. ; S. Blay and M. Tsamenyi. (1990).

"Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees," 2(4) International Journal of Refugee Law 527, at 542.

¹³⁹ UNHRC (Aug. 25, 2004) UNHRC Comm. No. 1136/2002, UN Doc. CCPR/C/81/D/1136/2002, *Borzov v. Estonia*. decided, at para. 7.4.

¹⁴⁰ Grahl-Madsen Commentary on the Refugee Convention 1951

¹⁴¹ Grahl Madsen Commentary on Refugee Convention 1951. pg 246-247.

¹⁴² Grahl Madsen Commentary on Refugee Convention 1951. pg 246

¹⁴³ J.-F. Durieux. (1992). "Capturing the Central American Refugee Phenomenon: Refugee Law-Making in Mexico and Belize," 4(3) *International Journal of Refugee Law* 301

¹⁴⁴ CCPR General Comment No. 18: Non-discrimination,

Such action may involve preferential treatment in specific matters.¹⁴⁵ Such preferential treatment for the naturalization of stateless refugees by dispensing with monetary investments and utilizing their Human Capital as investment into their state's economy conforms to the state's obligation to assimilate and facilitate the naturalization of refugees under Article 34 of the 1951 Refugee Convention. The Human Rights Committee also noted that differential treatment, if reasonable and aimed to achieve a legitimate purpose under the covenant will not constitute discrimination.¹⁴⁶

From the discussion made above, it can be concluded that naturalization by investment can't be held invalid under international law solely on the basis of missing genuine link. International tribunals in their decisions have continued to withhold nationalities missing the genuine link. Rather, it is the culture of international financial crime that make investment-based nationality programmes susceptible to be in compliance with international law. That's because, prevention of corruption, money laundering, tax evasion are obligations to which states have committed under international conventions and thus owe obligation against other states. In international law the idea of breach of an obligation is synonymous to the infringement of the subjective rights of others.¹⁴⁷ Drawing analogy to this, conferring nationality based on investment upon stateless refugees is liable to be recognized by other states as same goes in line with international obligation owed by a state under 1954 and 1961 statelessness conventions as well as 1951 refugee convention.

PART III

State's Aspirations Inherent in Their Naturalization Schemes

There are different modes applied by states to grant nationality under their naturalization by investment schemes. States have broader discretion in determining what they consider as investment beneficial to their wider interests.¹⁴⁸ It is also termed as Facilitated naturalization.¹⁴⁹ In this part, the author will precisely discuss on facilitated naturalization based on talent and skill as same relates to the state's aspiration towards attracting Human Capital that is the main line of argument in the throughout research to establish how the naturalization of stateless refugees would be consistent with the current state practices with regard to their naturalization schemes.

Facilitated Naturalization by Talent (Olympic Citizenship):

One of the most prominent instance of facilitated naturalization is the naturalization of foreign athletes to get them hired in national teams competing in the Olympics or other international sporting events.¹⁵⁰ According to Shachar (2011), the main goal of this "Olympic citizenship," is "the spread of the talent-for-citizenship exchange, be it in sports, culture, science, or other fields."¹⁵¹ Interestingly, a few weeks prior to the 2006 Winter Olympics in Turin, President Bush enacted a congressional bill with a unique clause giving citizenship to foreigners of remarkable

¹⁴⁵ CCPR General Comment No. 18: Non-discrimination, Para 10.

¹⁴⁶ CCPR General Comment No. 18: Non-discrimination, Para 13.

¹⁴⁷ ILC draft Articles 2001 Commentary. Art 3 para 9.

¹⁴⁸ OECD (2011), *Naturalization: A Passport for the Better Integration of Immigrants?* Pg 69 OECD Publishing. doi: 10.1787/9789264099104-e.

¹⁴⁹ Christian H. (n.d.). *"Facilitated Naturalization*

¹⁵⁰ Shachar. A (June 2011). "Picking Winners: Olympic Citizenship and the Global Race for Talent". *The Yale Law Journal*. Vol. 120, No. 8. [Hereinafter: Shachar. A (June 2011). "Picking Winners"]

<https://www.jstor.org/stable/41149587>

¹⁵¹ Shachar. A (June 2011). "Picking Winners"

talent.¹⁵² The Canadian-born ice dancer Tanith Belbin and the Russian-born ice dancer Maxim Zavozin were able to represent the United States because of this legal manoeuvre. For the United States, Belbin and her partner won a silver medal.¹⁵³

The Case of Becky Hammon

Becky Hammon belonged to America. She was not shortlisted for women's Olympic basketball squad for the 2008 Beijing Summer Games.¹⁵⁴ Hammon decided to follow her lifelong dream of competing in the Olympics by obtaining Russian citizenship, a process accelerated by the nation's authorities.¹⁵⁵ With her brand-new passport in hand, Hammon could compete in the Olympics for Russia. There is no denying that Hammon had nothing but the most tenuous ties to Russia before she was granted citizenship in an expedited process.¹⁵⁶

The Case of Marlene Ottey:

Originally from Jamaica Merlene Ottey won nine Olympic medals in six Olympic Games between 1980 Moscow and 2000 Sydney, as well as multiple world championship wins in between while representing Jamaica.¹⁵⁷ Afterwards, Ottey obtained Slovenian citizenship in 2002 and represented Slovenia at the 2004 Summer Olympics in Athens.¹⁵⁸ Since 2004, she has represented Slovenia at international competitions.

The Case of Naim Suleimanov:

Bulgarian weightlifting champion Nain Suleimanov was convinced to relocate to Turkey by Turkish officials in 1986. After that, he changed his name to Nairn Siileymanoglu, applied to become a Turkish citizen, and represented Turkey with gold medals in the 1988, 1992, and 1996 Olympics.¹⁵⁹ According to reports, the Turkish government gave the financially distressed Bulgarian government over \$1 million so that Siileymanoglu could represent Turkey at the 1988 Seoul Olympics.¹⁶⁰

The Case of Italy Torino Winter Games:

In order to bolster its own team, Italy, the 2006 Winter Games host, turned to expedited citizenship permits. A minimum of ten members of the Italian national hockey team were Canadian.¹⁶¹ They had no links to Italy, and some had never visited there.

The International Ice Hockey Federation's Director categorically denounced the practice, saying, "[Y]ou shouldn't be able to just grab a passport and represent a country at an event."¹⁶² However, the governing transnational sporting bodies had little power to protest the passport swap once the recruiting country, Italy, was willing to flexibly interpret its own standard

¹⁵² US Congress (2005). S. Res. 2044, 109th Cong. (enacted)

¹⁵³ Associated Press (June 10, 2010). "2006 Olympic Silver Medallists Belbin-Agosto Retire". http://www.tsn.ca/figure_skating/story/?id=324246.

¹⁵⁴ Schwarz. M (June 5, 2008). "Olympics Opportunity Too Much for Hammon To Pass Up". ESPN.com, <http://sports.espn.go.com/oly/news/story?id=3427>

¹⁵⁵ Shachar. A (June 2011). "Picking Winners"

¹⁵⁶ Shachar. A (June 2011). "Picking Winners"

¹⁵⁷ BBC News (July 23, 2010). "Merlene Ottey, 50, Set To Break European Record" <http://news.bbc.co.uk/sport2/hi/athletics/8849204.stm>

¹⁵⁸ Shachar. A (June 2011). "Picking Winners"

¹⁵⁹ Ibid

¹⁶⁰ Vecsey. G (July 22, 1996) 'Pocket Hercules,' N.Y. Times, http://www.nytimes.com/packages/html/sports/year_in_sports/o7.22.html.

¹⁶¹ Gerlin. A (Feb. 12, 2006), "Waiving the Flag". Time, <http://www.time.com/time/magazine/article/0,9171,158938>

¹⁶² Ibid

membership requirements by granting citizenship to these players, provided that doing so did not contravene Italy's international legal obligations.¹⁶³

In fact, not only athletes but individuals with other specific expertise and distinction in particular fields are offered facilitated naturalization. For Example, Albert Einstein was appointed professor of theoretical physics at Princeton USA in 1933 and then became a U.S. citizen in 1940.¹⁶⁴ The narrative of brain gain for the United States has recently been dubbed the "Einstein principle".¹⁶⁵ According to Shachar (2011), one hundred American scholars received Nobel Prizes between 1901 and 1991. Foreign-born researchers or their offspring made up over half of these awardees.

The above-mentioned case studies shows that the key element of global competition is no longer the trade of goods and services or flows of capital but the competition for people.¹⁶⁶ The term "Human Capital", that used to be seen from the exclusive purview of economists and business firms, has infiltrated and transformed the realm of citizenship. This is because, investment in homegrown talent usually require much more time and heavy front-end costs.¹⁶⁷ Therefore, to save the time and cost on building human capital, countries seek to attract athletes, Nobel Prize winners, scientists, acclaimed artists, and other high-demand migrants realizing the power of citizenship.¹⁶⁸ How this race to capture human capital and strengthening state economies aligns with the main idea of my research i.e, Naturalization of stateless refugees will be discussed in the forthcoming part.

PART IV

Utilizing Naturalization as A Mean to Alleviate Refugee Crises and Eradicate Statelessness

Regardless of the critics available in legal scholarship against naturalization by monetary and business investments, many scholars have a joint consensus upon naturalization on some of the non-transferable and intangible attributes such as skills, language, loyalty etc. Since state's aspiration towards offering citizenship on the basis of talent is to attract intangible human capital and make contributions to state's economy, this part seeks to explore how Human Capital can be secured and utilized by naturalizing stateless refugees in a bid to meet the similar aspirations.

Naturalization Of Stateless Refugees and International Law

In international Law, all individuals are entitled to nationality regardless of their ethnic or social status.¹⁶⁹ Some of the International conventions specifically provides for elimination of statelessness such as 1961 statelessness convention, American Convention 1969 Art 20.2; ECN, 1997 Art 4(b); Arab Charter, 2004 Art 29(2).¹⁷⁰ The right to nationality and obligation to prevent statelessness is 'intimately linked' to the principle of non- discrimination, the duty not to render anyone stateless, and the right to identity.¹⁷¹

¹⁶³ Shachar. A (June 2011). "Picking Winners

¹⁶⁴ Shachar. A (June 2011). "Picking Winners

¹⁶⁵ Darrell M (2010). "West, Brain Gain: Rethinking U.S. Immigration Policy" 126-32

¹⁶⁶ Shachar. A (June 2011). "Picking Winners

¹⁶⁷ John Bale (1991). "The Brawn Drain: Foreign Student-Athletes in American Universities". Pg 98

¹⁶⁸ Shachar. A (June 2011). "Picking Winners

¹⁶⁹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 15 ; Also see, American Convention (1969) art 20 ; Also see European Convention on Nationality (1997) Art 4 & 6; Also see, ASEAN Human Rights Declaration (2012), art 18 ; Also see, Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms 1995. art 24: '1 ; Arab Charter on Human Rights (2004), art 24 & 29.

¹⁷⁰ American Convention (1969) art 20(2); ECN 1997 art 4(b); Arab Charter 2004 art 29(2)

¹⁷¹ UNHRC (30 June 2016). Resolution 32/5 on "Human rights and arbitrary deprivation of nationality". Human Rights Council. A/HRC/RES/32/5.

Granting nationality based on naturalization by investment is presumptively permissible under international law only when it is conferred without breaching international obligations including non-discrimination, corruption, tax evasion etc.¹⁷² It is particularly permissible and consistent with International law when conferred on those who are the subject of protection under the international legal framework on statelessness and refugees.¹⁷³ As evidenced by an expanding body of international jurisprudence that reveals instances of international law intruding into states' exclusive domain of competence, two major limitations on states' discretion in matters pertaining to nationality are the duty to prevent statelessness and the prohibition of arbitrary deprivation of nationality.¹⁷⁴ Hence, in compliance of the duty to prevent statelessness, which most of the states have committed to by becoming party to 1954 and 1961 Statelessness conventions, and the duty to assimilate and integrate refugees into national mainstream to which states have committed under the 1951 refugee convention, no state is likely to object against the naturalization of stateless refugees. Further, article 34 of the Refugee Convention 1951 and Article 32 of the 1954 Convention relating to the Status of Stateless Persons, mandate contracting states to expedite the naturalization of refugee and stateless persons respectively with cost effect procedures. This notion is based on the fact that individuals who are stateless or who have lost the protection of their country of origin and who, in this regard, resemble stateless individuals have a stronger claim than other migrants to the nationality of their host state.¹⁷⁵

Human Capital and Stateless Refugees

As we move into "knowledge-based" economies, the importance of human capital becomes even more significant than ever to the extent that power of citizenship is being recognized to attract human capital and global talent¹⁷⁶ as discussed in the preceding part. Human capital is an intangible and non-transferable asset. As defined by OECD report 1998.¹⁷⁷

"The knowledge, skills, competences and other attributes embodied in individuals that are relevant to economic activity".

In a competitive global environment, more and more nations are competing for talent and human capital by bending their naturalization laws to grant foreign "imports" expedited citizenship grants.¹⁷⁸ Human capital is defined as human qualities that includes both an individual's educational attainment and their capacity to put a variety of skills to productive use.¹⁷⁹ Hence, the researcher hereby draw an inference towards maximizing productivity of stateless refugees as a facet of Human Capital by offering citizenship and freeing them from the sense of alienation and persecution. Instead, inculcating in them the sense of integration into

¹⁷² Batchelor Carol A. (1998). "Statelessness and the Problem of Resolving Nationality Status". *International Journal of Refugee Law* Vol. 10 No. 1/2. [Hereinafter: Batchelor Carol A. (1998)]. Pg 159

¹⁷³ Batchelor Carol A. (1998)

¹⁷⁴ Refugee Convention 1951 ; Statelessness Convention 1954 ; Statelessness Convention 1961

¹⁷⁵ Groenendijk R.B and Waldrauch. H (2006). "Acquisition and Loss of Nationality Policies and Trends in 15 European States, Volume 1: Comparative analysis" *Amsterdam University Press*.

¹⁷⁶ Donald J. Johnston (1998) "Human Capital Investment: An international comparison". *OECD Centre for educational research and innovation*.

¹⁷⁷ Donald J. Johnston (1998) "Human Capital Investment: An international comparison". *OECD Centre for educational research and innovation*. Pg 9

¹⁷⁸ Banton, C. (2023, September 1). *Economic Value: Definition, examples, ways to estimate*. Investopedia. <https://www.investopedia.com/terms/e/economic-value.asp>

¹⁷⁹ Ibid

the host community. Bringing people to the places where their talent can be fulfilled to the maximum also conforms to the states aspirations to attract Human Capital via other modes.¹⁸⁰

Aligning state's interest to capture Human Capital with Naturalization of refugees

States grant of Olympic citizenship is driven by state's aspiration to capture human capital to bypass the cost of building and developing it. Whereas, citizenship-by-investment increases public revenue and investment, and can boost economies. Swiss lawyer Christian Kalin, chairman of Henley & Partners, criticizes the "outdated" notion of citizenship that limits people to their birthplace, remarking: "What is wrong with admitting talented people who will contribute?"¹⁸¹

Such interests of states to capture human capital and seeking contribution in national economy can be well-aligned when these states offer Naturalization by investment schemes to stateless refugees. Those young, adult and elderly men and women in want of asylum are (to some extent) developed human capital that can be further thrived to inculcate in them other industry specific skills to boost national economy. The inter-governmental funds and budgetary allocations that are spent as cost of integrating refugees (discussed below) can be best spent on developing refugees into aspired Human Capital, for wider economic gains, instead of leaving them as passive recipient of economic aid in refugee camps.

Cost of Integrating Refugees

In general, the amount of money that governments spend on integrating asylum seekers varies greatly between nations. It includes long-term integration assistance as well as the registration and processing of asylum applications. The expenses can be substantial for the nations most impacted by the current influx in refugees. For instance, Germany spent €16 billion, or 0.5% of GDP, on its refugees in 2015, while receiving up to 900,000 asylum requests. Sweden spent €6 billion (1.35% of GDP) in 2015 after receiving 163,000 asylum seekers, the highest per capita ratio ever recorded in the OECD at 1.6% of the total population. In 2014–15, Canada expanded its resettlement program to include 25,000 more Syrian refugees; the country estimates that the cost of this additional effort amounted to CAD 510 million over the next six years.¹⁸²

Figure 1: Typical assignment of responsibilities for refugee-related tasks and functions in decentralised countries

Central government	Sub-central government
Registration	Primary and secondary education
Asylum procedure	Social welfare, minimum income
Refugee camps, emergency housing	Housing after the refugee camp
Immediate first aid	Active labour market policy
Possibly basic language training	(Extended) language training
Civic integration training	

Spending on social safety and education are two of the most crucial areas of expenditure for refugees and asylum seekers during the early stages of settlement. Refer to Figure 1. Intergovernmental grants are the primary source of this type of expenditure. In France, the interior ministry gives communities a one-time payment of €1,000 per asylum applicant to help build new facilities for receiving them. In Germany, each asylum seeker receives a set monthly

¹⁸⁰ Donald J. Johnston (1998) "Human Capital Investment: An international comparison". *OECD Centre for educational research and innovation*. Pg 9

¹⁸¹ Nunis, B. S. T. a. V. (2019, October 9). *How selling citizenship is now big business*.

<https://www.bbc.com/news/business-49958628?ref=hir.harvard.edu>

¹⁸² OECD (Jan 13, 2017). "Migration Policy Database". Pg 2

payment of €670 from the federal government. At least 40% of the US funds for refugee resettlement is sent directly to the states for social assistance and integrating programs.¹⁸³ In view above, it is evident that intergovernmental funds worth billions of dollars are spent on integration of refugees which involves their education and social protection. Given state's aspirations for improving national economies and attracting developed human capital and given the main criticism against naturalization by investment on the ground that nationality should be conferred on non-transferable attributes such as skills, language and social ties rather than transferable attributes like wealth, this chapter concludes that, it is both permissible and practicable to confer nationality on stateless refugees under certain investment schemes that value human capital as a valid mode of investment as it conforms to state's economic aspirations inherent in Olympic citizenship and sale of citizenship. This approach also aligns with economic mantra of maximizing utility- bringing people to the places where their talent can be fulfilled to the maximum. Integrating refugees into national mainstream by providing nationality can be a way to secure human capital (by freeing refugees from sense of persecution and alienation) and utilize them in the growth of national economy as it offers cheap labor alongside upholding the prestige of citizenship status (civic and political rights) that, according to legal scholars, should be based on intangible and non-transferable attributes like skills, education, loyalty inherent in a state's human capital for better integration into the host state (OECD, 2011).¹⁸⁴

PART V

Conclusion

UNHCR has been given a worldwide mandate by the UN General Assembly to identify and protect stateless people as well as prevent and reduce statelessness. In light of this, the UNHCR started the #IBelong campaign in 2014 with the goal of eradicating statelessness by 2024.¹⁸⁵ However, this research concludes that the global campaign against statelessness is not conclusive without addressing the plight of refugees which may also be stateless. It was recognized in the very text of the Refugee Convention 1951 that stateless persons might be entitled to refugee protection. Article 1A (2) of the 1951 Refugee Convention contemplates a refugee as someone with or without a nationality.¹⁸⁶ Hence, from the outset, stateless persons who have sought refuge have been entitled to refugee protection as a matter of international law. This protection makes stateless refugees entitled to assimilation and naturalization as enshrined under article 34 of the 1951 Refugees Convention i.e, "Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees". To address the plight of stateless refugees in line with international obligations, this research has analyzed the potential of Naturalization by investment as a mode to confer nationality on stateless refugees. This research has established the applicability of Naturalization by investment to confer nationality upon stateless refugees being in conformity with international law and state practices. This study has made a reasonable conclusion that NBI schemes if applied on stateless refugees by utilizing their Human Capital and exempting them from monetary investments aligns with state's aspiration to attract human capital and uplifting their national economies as has been

¹⁸³ Ibid

¹⁸⁴ OECD (2011), Naturalization: A Passport for the Better Integration of Immigrants? Pg 69 OECD Publishing. doi: 10.1787/9789264099104-e

¹⁸⁵ UNHCR. (n.d.). *High-Level Segment on Statelessness / Resources*. Retrieved 20 May 2020, from <https://www.unhcr.org/ibelong/high-level-segment-statelessness/>

¹⁸⁶ Refugees convention 1951, Art 1A(2) ; Protocol relating to the Status of Refugees (signed 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, art 1A(2).

inherent in naturalization schemes via other modes like investment and talent, instead of leaving them as passive recipient of economic grants / aid in refugee camps.

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