



# UNRAVELLING ANOMALY

Detention, Discrimination  
and the Protection Needs of Stateless Persons



**THE EQUAL RIGHTS TRUST**

# **Unravelling Anomaly**

**Detention, Discrimination  
and the Protection Needs of  
Stateless Persons**

**London, July 2010**

The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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*“The stateless person is an anomaly and ... it is often impossible to deal with him in accordance with the legal provisions designed to apply to foreigners who receive the assistance of their national authorities, and who must, in certain cases, be repatriated... Officials must possess rare professional and human qualities if they are to deal adequately with these defenceless beings, who have no clearly defined rights and live by virtue of good-will and tolerance.”*

**UN Study of Statelessness, 1949**

*“The stateless person, without right to residence and without the right to work, had of course constantly to transgress the law. He was liable to jail sentences without ever committing a crime ... Since he was the anomaly for which the general law did not provide, it was better for him to become an anomaly for which it did provide, that of the criminal.”*

**Hannah Arendt, 1951**

*“There are numerous cases of persons held in indefinite detention because they have no nationality, or their nationality status is unclear ... the problem of detention for those without an effective nationality appears to be a global one”.*

**UNHCR, 1997**

*“I asked to be removed from Australia. I signed papers saying I would go to Kuwait, and if they couldn't arrange that then I would go to Palestine, or to Israel, or to Jordan, or to Syria, or to Egypt. Then they asked if I would go to Thailand or the Philippines, or Cambodia. I said yes. My friend took the map of the world and put his finger in the middle of the ocean. He said put us here, we will go anywhere, just take us out of this detention. We didn't have a country.”*

**A Stateless Detainee, 2009**



# EXECUTIVE SUMMARY

This is a report about discrimination and the human rights protection of stateless persons throughout the world, with a particular emphasis on the issue of detention. The report discovers that presently international human rights law is not sufficiently utilised to protect and fulfil the human rights of stateless persons. This is partly due to the existence of the parallel “statelessness mechanism” in international law which affords more restricted and modest protection to the stateless. The resultant lacuna in protection which is manifestly clear in detention related issues must be effectively addressed, and this report proposes recommendations in this regard.

A core problem addressed by the report is the concept of statelessness. The stateless have long been recognised as those who have no nationality (*de jure* stateless) or do not have an effective nationality (*de facto* stateless), i.e. persons who do not benefit from the protection of any state. Historically, it is *de jure* stateless persons who have benefitted from the protection of the statelessness mechanism. While the United Nations High Commissioner for Refugees (UNHCR) - which is the authority mandated with preventing and reducing statelessness as well as protecting the stateless - does also act on behalf of the *de facto* stateless, the historical distinction between the two categories has created a protection hierarchy even within this extremely vulnerable group. The Equal Rights Trust (ERT) challenges this hierarchy and proposes an alternative conceptualisation of statelessness as a basis for providing comprehensive and equal protection to all stateless persons. This conceptualisation builds a definition of statelessness around the inclusive notion of “effective nationality” which is central to contextualising and understanding the statelessness challenge.

The report proposes a strong equality and non-discrimination based approach to enhancing the protection of stateless persons. Equality and non-discrimination law has developed into a powerful tool for the protection of minorities and vulnerable groups. The stateless are most definitely a vulnerable group who are often discriminated against and treated unequally. An equality based protection approach is essential if meaningful and effective protection for the stateless is to be achieved.

The vulnerability of the stateless is most evident in the context of detention. Thousands of stateless persons are detained throughout the world because

they have no effective nationality. The detention of stateless persons is commonplace in many countries from all regions. Such detention is often – and at best – unnecessary and unreasonable; at worst it is arbitrary and degrading. Detention practices may also be humiliating, are at times violent, and may psychologically scar the victims for life. Such detention may be for administrative purposes in the context of immigration, may be legitimised on national security grounds, or may be the result of criminal action being brought against the stateless. In all of these contexts, stateless persons are extremely vulnerable to being detained, and disproportionately impacted by lengthy, unnecessary detention due to their irregular status and difficulties in effectuating their deportation. While the barriers to removing migrants who have an effective nationality are minor or non-existent, the process of identifying countries which would accept stateless persons and cooperate with such proceedings borders on the impossible. The failure of states to recognise such difficulties and accordingly adapt their laws and policies is a significant indictment on the international community.

ERT has conducted field research in Australia, Bangladesh, Egypt, Kenya, Malaysia, Myanmar, Thailand, the UK and USA; and testimony, jurisprudence, interviews, legal and policy developments from these and other countries inform this report. Over the past few years leading up to the publication of this report, there has been a growing body of research and writing on statelessness. This report aims to contribute to this discourse by deepening understanding of the aspects of statelessness it addresses.

This report comprises three parts. **Part One** analyses the concept of statelessness – the challenge that it poses to notions of international human rights and national sovereignty; and the boundaries of statelessness – what is meant by *de facto* and *de jure* statelessness, how useful the distinction between the two is, and whether a more inclusive approach to defining statelessness would result in better protection for all stateless persons. In **Part Two**, the report narrows its focus to the detention of stateless persons. It begins by surveying internationally accepted standards and norms pertaining to the detention of stateless persons and then explores practices of detention in the contexts of immigration, national security and criminal law – drawing from the field research conducted by ERT in countries around the world. **Part Three** identifies some positive developments and good practices adopted around the world, which are steps in the right direction to be further developed and replicated. It also provides recommendations based on observed good practices and the research findings of ERT.



## PART ONE - THE RIGHTS OF THE STATELESS AND TYPES OF STATELESSNESS

### CHAPTER 1: THE RIGHTS OF THE STATELESS

#### Key Findings:

1. Until very recently, the UNHCR, human rights treaty bodies, national, regional and international courts, states and organisations had not seen the challenge of statelessness primarily as a human rights issue. But it is essential that the problems of the stateless are addressed through the prism of well established human rights principles, of which the right to equality and non-discrimination is a key element.

2. The 1954 Convention Relating to the Status of Stateless Persons falls short in protection terms - because it only fully applies to some *de jure* stateless persons, it does not provide explicit guidance on the identification of statelessness and the limited protection it offers is not equivalent to that of later human rights treaties. International human rights law has not been sufficiently used to complement the statelessness regime.

The nation state has historically been the central actor in international law, whose traditional role has been the regulation of relations between equal and sovereign states. Membership of a nation – through nationality – has been a crucial prerequisite for the enjoyment of certain entitlements and rights, including the rights to enter and leave, reside, move around and work in one's country. Consequently, on the one hand, the absence of nationality has become the basis of physical exclusion from a state's territory, as well as of rights exclusion within a territory, often in breach of international human rights law. On the other hand, national laws and policies which define and may exclude certain individuals are a cause of countless persons being rendered stateless.

The 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) only applies to the *de jure* stateless. The limited scope of the Convention is the result of an early position which equated the *de facto* stateless with refugees, while viewing the *de jure* stateless as a distinct group. However, the combined reach of the Refugee and Statelessness Conventions has not offered effective protection to all stateless persons. The *de facto* stateless who do not qualify for refugee status, the *de jure* stateless who are excluded from the full

protection of the 1954 Convention and the many stateless persons who have never crossed an international border with the intention of claiming refugee status, collectively form a large population of persons who remain largely unprotected despite the existence of these two protection regimes.

While statelessness is in itself a violation of the right to nationality, it should not undermine the individual's ability to enjoy other human rights. However, even though international human rights law has transformed the individual into a subject of international law, the actual enjoyment of human rights depends primarily on the national context. Attachment to a nation entitles one to enjoy human rights at a more tangible, effective and immediate level than international human rights mechanisms provide.

This is the challenge that statelessness imposes on the international human rights regime: that of affirming the importance of nationality and promoting the right of everyone to a nationality, while ensuring that the lack of a nationality does not result in vulnerability, exploitation and the violation of human rights. To-date, the international human rights regime has failed to rise to this challenge, a failure which could be primarily put down to two factors:

(i) The conceptual blind spot which has led to the non application of international human rights standards to the stateless in a consistent and holistic manner. This is mainly due to the international statelessness protection mechanism developing in parallel to the more comprehensive and advanced international human rights protection mechanism, and the protection of stateless persons being seen more as a "statelessness" issue than a "human rights" issue.

(ii) The counter-challenge posed by "national sovereignty" to the universal application of international human rights law, which has eroded the enjoyment of rights of peripheral groups such as the stateless.

The failure to rise to this challenge and afford adequate protection to vulnerable persons results in statelessness and also heightens the cost and impact of statelessness. From a rights perspective, the first limb of the human rights challenge is a threat to the right to nationality, and the second limb is a threat to the rights to equality and non-discrimination. Therefore these can be viewed as the pivotal rights in the context of statelessness.

## CHAPTER 2: CRITIQUING THE CATEGORISATION OF THE STATELESS

### Key Findings:

1. *De jure* and *de facto* statelessness may have many different causes. However, all stateless persons face vulnerabilities and challenges and the human rights of all stateless persons must be respected and protected.
2. The categorisation of stateless persons into the two groups of the *de jure* and *de facto* stateless, with greater protection provided to the former, is unjust and discriminatory. The *de facto* stateless are a particularly vulnerable group. This is because they are not protected under any specific treaty. There is also a protection gap in respect of persons who fall into the grey area between *de jure* and *de facto* statelessness.
3. The lack of consular protection is a distinctive factor with regard to *de facto* statelessness, and can arise from different causes: as a result of the non-existence of diplomatic ties between two countries, the non-existence of a consulate due to resource problems or the inability or unwillingness of a consulate to document their nationals.
4. Protection against *refoulement* must be recognised as a factor in *de facto* statelessness, including where the individual is not a refugee. While states have generally accepted their obligations of *non-refoulement* due to human rights considerations, they have not always taken the next step of recognising the individual as having ineffective nationality – and the need to protect on this basis.
5. There may be obstacles to return other than the lack of consular protection or the obligation of *non-refoulement*. Practical or administrative obstacles of a permanent or indefinite nature, such as the non-availability of transport links or the non-acceptance of travel documents, must be recognised as factors which may lead to *de facto* statelessness.
6. There may be situations where persons living in their country of nationality are rendered *de facto* stateless. The inability to obtain documentation, resulting in systematic discrimination and abuse is one such scenario. Such *de facto* stateless persons also have protection needs that should be met.

ERT challenges the hierarchy of *de jure* and *de facto* statelessness and calls for a more comprehensive and inclusive approach to defining statelessness, to ensure that persons are not arbitrarily excluded from protection. All stateless persons should benefit from equal and effective protection of the law. The historical approach of categorising the stateless into two groups and providing greater protection to one is discriminatory and unjust. ERT's position is that all stateless persons suffer from ineffective nationality, and consequently this is the most suitable concept around which to build a definition which is comprehensive, inclusive and non-discriminatory. Chapter 2 argues that there is no tangible link between the type of statelessness (*de jure* or *de facto*) and the level of protection required. The range of protection needs of stateless persons vary according to the extent of vulnerability, discrimination, abuse and exclusion suffered in a particular context and not according to whether an individual is *de jure* or *de facto* stateless. Consequently, protection mechanisms should not discriminate between the *de jure* and *de facto* stateless, and should instead focus on the particular context. When approaching statelessness through a protection lens, it is clear that the inequalities and gaps which result from this hierarchy are unsatisfactory. Chapter 2 therefore proposes a more inclusive and comprehensive approach to defining statelessness built on the notion of ineffective nationality. ERT offers a **five-pronged legal test** to be utilised in determining whether a nationality is effective or not.

(i) **Recognition as a national:** Does the person concerned enjoy a legal nationality, i.e. is he or she *de jure* stateless?

(ii) **Protection of the state:** Does the person enjoy the protection of his/her state, particularly when outside his or her country?

(iii) **Ability to establish nationality:** Does the person concerned have access to documentation (either held by the state, or which is issued by the state) to establish nationality? This access may be through a consulate, or through state officials within the country of presumed nationality.

(iv) **Guarantee of safe return:** Is there a guarantee of safe return to the country of nationality or habitual residence – or is there a risk of “irreparable harm”? Is return practicable?

(v) **Enjoyment of human rights:** Does an individual's lack of documentation, nationality or recognition as a national have a significant negative impact on the enjoyment of his or her human rights?

## PART TWO – STATELESS PERSONS IN DETENTION

### CHAPTER 3: INTERNATIONAL AND REGIONAL LEGAL NORMS RELATING TO DETENTION

#### Key Findings:

- 1. There are very few international and regional court decisions on the detention of stateless persons. However, despite some inconsistencies in the application and development of treaty provisions pertaining to detention, a strong common set of principles related to the detention of asylum seekers and irregular migrants has been established. These principles are equally applicable to the detention of stateless persons and provide strong safeguards which must be adhered to. Accordingly, detention must be lawful, cannot be arbitrary, must at all times be necessary and proportionate to the situation, must be carried out with due diligence and must be subject to appeal and/or review.**
- 2. The widespread lack of guidelines and standards which specifically address the detention of stateless persons is symptomatic of the low prioritisation of the statelessness problem. The lack of clear guidance on this issue results in the need to draw parallels from guidelines and directives on the detention of asylum seekers and migrants in general, and apply them to the specific context of statelessness.**

The Universal Declaration of Human Rights states that *“no one shall be subjected to arbitrary arrest, detention or exile”*, a principle that has become entrenched in international law and reiterated by subsequent human rights instruments including Article 9 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the European Convention on the Protection of Human Rights (ECHR). A strong set of principles which must be applied to establish the legitimacy of detention, including that of stateless persons, has emerged from the authoritative texts and jurisprudence of the UN Treaty bodies and the European courts. Standards of proportionality, necessity and non-arbitrariness must be met in all such detention.

There are very few internationally recognised human rights standards which specifically govern the detention of stateless persons. Most focus on the detention of asylum seekers, and may or may not include some references to stateless persons. There is no normative standard which applies solely or even predominantly to stateless persons. However, texts which are specific

to asylum seekers or irregular migrants can be applied to the detention of stateless persons with limited success.

## **CHAPTER 4: IMMIGRATION DETENTION**

### **Key Findings:**

- 1. ERT research found a clear connection between immigration detention and statelessness. This has not been fully understood, either by national immigration regimes or by non-governmental organisations (NGOs) and lawyers working on behalf of the rights of detainees. The stateless (*de jure* and *de facto*) often form a significant percentage of immigration detainees. Immigration detention regimes which are not sensitive to statelessness are likely to discriminate against the stateless by failing to recognise the needs arising from their special status.**
- 2. Mandatory immigration detention (particularly for foreign national prisoners), and policies which carry a presumption in favour of detention, often lengthy, are becoming increasingly attractive to policy makers.**
- 3. There have however been some positive steps, through jurisprudence and progressive policies, which have drawn from international human rights standards relating to detention and created stronger safeguards for immigration detainees.**
- 4. No states studied by ERT maintain comprehensive statistics on the stateless, or record those who have no legal nationality or no effective nationality. Nor do they record the reasons why detained individuals cannot be removed in such a way that statelessness as an underlying element can be identified.**
- 5. Very few countries have statelessness determination procedures in place, with the result that individuals who cannot be removed because they have no right to enter another country are detained under immigration laws “pending removal”, although removal is practically impossible.**
- 6. Particularly in the UK, stateless detainees who are released from detention, continue to face restrictions on their liberty (through electronic tagging for example) and are often pushed into destitution in**

**breach of their social and economic rights. This is because they are not allowed to work after release, nor are they entitled to social welfare benefits.**

**7. The inaction and indifference of state authorities both in the country of detention and in the country of nationality/habitual residence of stateless detainees is often a major factor contributing to non-removability, and consequent indefinite detention. There have been such cases in all countries researched, but this is particularly true of Kenya and Egypt.**

There are two main forms of administrative immigration detention and restriction of liberty. These are the detention/restriction of liberty pending a decision on an asylum application, and the detention/restriction of liberty of those who are to be removed or deported. The second category includes – on the one hand - rejected asylum seekers and migrants whose applications to remain have been refused but who have not left the country, and – on the other hand – non-nationals who have been convicted of a criminal offence, and have completed their sentences. Detention in these circumstances is especially problematic for stateless persons, and often violates human rights law due to its lengthy, potentially indefinite nature – removal cannot take place if the individual has no country of nationality willing to admit him or her.

Of particular concern in all researched countries is the lack of any procedure for determining who is stateless, which could operate in parallel with – and complement – refugee status determination procedures. As a result, stateless persons who are in need of protection are often compelled to go through asylum procedures, because there is no provision for them to apply for recognition as a stateless person. This means that if they are refused asylum, the fact that they are stateless is not then identified.

The detention, deportation and trafficking of stateless Rohingya in Myanmar, Bangladesh, Malaysia and Thailand is a unique example of acute discrimination and its impact on a community. Rohingya who flee discrimination and arbitrary detention in Myanmar face similar plights in their host countries. The 2009 “push-backs” of hundreds of Rohingya into the sea by the Thai government, and the ineffective regional response to this humanitarian crisis epitomises the extremely vulnerable position of Rohingya in the region.

## CHAPTER 5: SECURITY DETENTION

### Key Findings:

- 1. Security detention is an increasing global phenomenon and its effect on statelessness is largely unknown, mainly due to the covert nature of security detention regimes, the difficulties of obtaining information and statistics about detainees and the barriers to removal of those who are cleared for release. The Guantanamo Bay facility offers insight into this otherwise opaque practice, because of the heightened scrutiny by human rights organisations, lawyers, and lengthy court battles.**
- 2. *De jure* stateless persons who are detained for security purposes and later cleared for release are often non-removable because there is no country of nationality to which they can be deported. *De facto* stateless persons may also be non removable because return to their country of nationality/habitual residence is barred under human rights law if there is a risk that they would be tortured or seriously harmed.**
- 3. Persons who were not stateless before being detained for security purposes may become *de facto* stateless as a result of their security detention. This may occur if the stigma of having been labelled a “terror suspect” renders such persons susceptible to torture and other serious human rights abuses if returned to their home countries. The principle of *non-refoulement* bars return under such circumstances, leaving such individuals not safely deportable to their own country.**

Detention for the purposes of national security is an issue which sharply increased in importance in human rights discourses after September 2001. National governments found it difficult, if not impossible to protect those of their citizens detained as terrorist suspects in Guantanamo Bay, and elsewhere. The position of stateless persons has been even worse because they have no state of nationality to intercede on their behalf.

After seven years in operation, during which many fierce legal battles were fought on behalf of the detainees in the U.S. courts, President Barack Obama signed an Executive Order in January 2009 requiring the closure of detention facilities at Guantanamo Bay. However, the non-removability of many *de jure* and *de facto* detainees meant that President Obama’s one year deadline for the closure of the detention facility was not met. The non-removables include persons from Algeria, Azerbaijan, China, Egypt, Kuwait, Libya, Saudi Arabia,



Syria, Tajikistan, Tunisia, Uzbekistan, the West Bank and Yemen, many of whom cannot return – or be *refouled* – to their country of nationality or last habitual residence. In some cases, the stigma attached to their detention in Guantanamo as suspects in the “war on terror” makes them vulnerable to persecution.

## CHAPTER 6: CRIMINAL DETENTION

### Key Findings:

- 1. There are discriminatory laws in Myanmar which specifically target the Rohingya, prevent them from leading normal lives and render them vulnerable to arrest, extortion, torture and detention. Corrupt officials utilise such laws to elicit bribes from the Rohingya.**
- 2. ERT research indicates that there is a connection between the lack of personal documents and criminal imprisonment. Stateless persons who do not possess personal documents are particularly vulnerable to arrest (often by corrupt authorities) and detention for the violation of laws which are not sensitive to the statelessness challenge. However, more research is required to grasp the true scope of this problem.**
- 3. There is a growing international trend towards the greater criminalisation of irregular migration. This trend has an impact on all irregular migrants. However, the stateless are disproportionately affected due to the reality that many are unable to travel legitimately. The Malaysian practice of caning is of particular concern.**

Information on the criminal detention of stateless persons has not been systematically collected, and because information on detention generally is rarely – if ever – disaggregated to consider statelessness, it is not easily accessible or discernible. However, ERT’s research suggests that this form of detention primarily raises human rights concerns in two contexts. First, *de jure* and *de facto* stateless persons – particularly if they form a distinct ethnic group – may face discrimination within their country of their habitual residence, either as a result of state policies, or because they are vulnerable to corrupt officials, including law enforcement officers, who abuse their irregular status as a means of extorting money from them, for example where stateless persons are detained under criminal law because they lack identity and other documents. Second, outside their countries of habitual residence, there is a visible global pattern in which immigration offences – such as the

use of false documents, illegal entry and overstay – are increasingly carrying criminal sentences. These are particularly harsh on stateless individuals and communities who are often unable to comply with immigration requirements due to their statelessness.

## **PART THREE – POSITIVE DEVELOPMENTS, RECOMMENDATIONS AND CONCLUSIONS**

### **CHAPTER 7: POSITIVE DEVELOPMENTS**

ERT’s research also highlights many positive developments which can be built on and replicated to ensure better protection for the stateless.

Hungary and Spain are the only two countries which have legislation creating dedicated statelessness determination procedures to provide for a separate stateless status. Hungary created its separate determination procedure in 2007, under which it is possible to apply for stateless status. Spain put a statelessness determination procedure in place in 2000. Mexico is perhaps the only country in the world which has a procedure in place, through an executive circular, to determine *de facto* statelessness.

There are some emerging guidelines and standards for the detention of stateless persons which are progressive, based on human rights norms and afford greater protection to the stateless in detention. These must be embraced and applied holistically in countries around the world. The UNHCR Analytical Framework on Statelessness is one such example. It highlights the key questions which must be asked in assessing the detention of stateless persons in different countries. The European Return Directive too imposes some strong procedural safeguards pertaining to removal pending detention. It views detention as a last resort.

### **CHAPTER 8: RECOMMENDATIONS AND CONCLUSIONS**

ERT’s recommendations and conclusions are based both on “good practices” identified in our research, and new ideas as to how this difficult and complex issue can be addressed in a positive and principled way:

- 1. Strengthening the International Statelessness Regime** – A global commitment is needed to eradicate statelessness and protect the stateless, not only through increased ratification of the two statelessness conventions,

but also through a serious commitment by states to fulfil their obligations under the treaties. The UN Treaty Bodies, the UN Human Rights Council's Special Rapporteurs and local and international NGOs all have a role to play in recommending and lobbying states to ratify the conventions. States are also urged to go beyond those clauses in the 1954 Convention which limit protection, such as the "lawful stay" clause. States are urged, in this regard, to devise criteria based on which they grant lawful stay to stateless persons who are illegally within their territory, and accordingly extend all the rights under the 1954 Convention in a non-discriminatory manner.

**2. Reaffirming the Centrality of Human Rights Principles in Protecting the Stateless** – States, the UNHCR, the UN Treaty Bodies, the UN Human Rights Council's Special Rapporteurs, national, regional and international courts and organisations working on behalf of the stateless must recognise that the protection of stateless persons is primarily a human rights issue, which must be addressed through the application of human rights law, as well as through the statelessness treaty regime. A comprehensive body of jurisprudence and authoritative interpretation should be developed.

**3. Equality and Non-Discrimination** – Principles of equality and non-discrimination are of particular relevance to the stateless, and must be central to all laws, policies and practices which have an impact on them. The most desirable way of ensuring this is for states to adopt a holistic understanding of equality and non-discrimination, and incorporate it into national law through comprehensive equality legislation.

**4. Abolishing Hierarchies within Statelessness** – The *de jure* – *de facto* dichotomy, which creates a hierarchy within statelessness and results in discrimination between the two groups must be replaced with a more comprehensive, inclusive and fair understanding of statelessness, which promotes equal and effective protection for all. The definition should be based on the notion of effective nationality. Until this is achieved, *de jure* statelessness should be interpreted in as broad a manner as possible, so as to bring many groups presently recognised as *de facto* stateless under the protection of the 1954 Convention. Additionally, greater protection must be provided for the *de facto* stateless through progressive policies and practices such as the Mexican process for identifying and protecting *de facto* stateless persons. Furthermore, organisations which work on behalf of refugees and the stateless must include the *de facto* stateless within their mandates. The UNHCR is now developing more comprehensive definitions of *de jure* and *de facto* stateless-

ness. This should be an open-ended approach which has the flexibility to recognise unanticipated scenarios of statelessness in the future.

#### **5. Implementing National Statelessness Determination Procedures**

– Effective and fair statelessness determination procedures must be put in place. Such procedures must not be limited to identifying only the *de jure* stateless, but should identify all persons who have no effective nationality. This would ensure that statelessness is identified in the course of immigration procedures, or when an application for political asylum is refused, thus establishing situations where an individual has no effective nationality, cannot be removed to another country, and should not therefore be detained “pending removal”. This will enable detention to be used as a last, rather than first resort. Steps must also be taken to determine whether those already in detention awaiting deportation are stateless.

#### **6. Information and Statistics on Stateless Populations**

– All states should maintain information and statistics on stateless populations, particularly those in detention. *De facto* stateless persons should be included within these statistics, which should be broken down in such a manner that the reason behind ineffective nationality is clearly identified.

#### **7. The Stateless and Refugees**

– The strong connection between statelessness and refugees must be affirmed. This was the basis on which the 1951 and 1954 Conventions were drafted. The parallel routes taken by the two conventions – i.e. the development of the refugee protection regime and until recently the near stagnation of the statelessness regime - has been detrimental to both refugee and stateless populations. By strengthening stateless mechanisms, the protection afforded to the stateless acts as a safety net for refugees, for example where they are wrongly refused recognition, in addition to being a valuable protection tool in its own right.

#### **8. The Integration and Naturalisation of Stateless Persons**

– States should expedite the integration of all stateless immigrants into society, through the provision of documents, access to education, healthcare, employment and social welfare and ultimately through the facilitation of their naturalisation. In the short term, Bridging Visas or their equivalent should be provided to the stateless so as to regularise their status.

#### **9. The *Non-Refoulement* Dilemma**

– States must consistently and comprehensively fulfil their obligations of *non-refoulement* in a manner which does not undermine the liberty of those who have a right not to be *refouled*.

Stateless persons who cannot be removed to their countries of habitual residence for fear of persecution, torture or acute discrimination, must not be kept in lengthy detention (if any detention at all is necessary and non-arbitrary).

**10. Protecting Those Who Do Not Have Consular Protection** – The lack of consular protection is a distinctive factor with regard to ineffective nationality, which can arise due to, *inter alia*, the absence of diplomatic ties between two countries, the non-existence of a consulate due to resource problems, and the failure of a consulate to co-operate with removal. Consideration is needed of how these gaps can be filled, including whether an international organisation such as the UNHCR could act as “default” consul on behalf of such persons.

**11. Adopting International Standards on the Detention of Stateless Persons** – There is a need to develop international detention standards which are specific to stateless persons. They should reflect the expertise of both the UNHCR and the UN human rights system, as well as the principles and standards developed by international, regional and national courts. The existing UNHCR guidelines on the detention of asylum seekers referred to in this report can be used as a template for the development of statelessness-specific principles. Key stakeholders including the UNHCR, the UN Working Group on Arbitrary Detention and NGOs must work together to develop such a set of guidelines, and ERT is dedicated to catalysing this process.

**12. Promoting Alternatives to Detention in an Immigration Context** – The established international norms protecting persons against arbitrary detention should be applied to stateless persons. Any exceptions should be narrow. In all cases, non-detention in a non-criminal context is the solution most in keeping with international human rights principles. Positive alternatives to detention including community based alternatives must be promoted. Detention should never be mandatory. In limited cases where detention cannot be avoided, there should be a maximum limit of six months detention pending removal, after which, if removal is not possible, detainees should be released. The U.S. post-*Zadvydas* regulations are a step in the right direction in this regard. The notion of “reasonable time” employed by the UK must be discarded as this creates a situation where persons remain indefinitely in detention until they manage to successfully challenge their detention in courts. In the case of foreign nationals convicted for a crime, removal proceedings should begin at least six months before their criminal sentence ends, with the presumption that if removal cannot be secured by the time the full sentence

has been served, removal is highly unlikely if not impossible and further detention should not be authorised.

**13. The Non-Deportation of Persons who have been Resident in a Country since Early Childhood** – Stateless persons who have been resident within a state or territory since childhood should not be deported from these states or territories under any circumstances. In such situations, the states in which they have spent their formative years and most of their lives should be viewed as their countries of habitual residence. Such persons should have facilitated access to naturalisation in accordance with the provisions of the 1954 Convention.

**14. Immigration Laws with Criminal Penalties Should be Reviewed** – States should review their immigration laws and make them sensitive to the reality of statelessness and the reasons behind the lack of personal documents. Stateless persons should not be criminally penalised as a result of their status. Immigration regimes must identify the stateless and be consistent with state obligations under international human rights law.

**15. Release into Enforced Destitution** – Stateless persons should not be released from detention into destitution. Providing such persons with access to employment, welfare, education and healthcare is a basic positive obligation of states.

**16. Continued and Unfounded Security Detention Must End** – Continued security detention of persons who have been cleared for release is not acceptable. Such persons must be allowed residence in a country in which they are not a threat. Detaining states must expedite the release of such persons, and in the very least, temporarily release them onto their territory with basic welfare guarantees, until a suitable third country accepts them.

**17. Compensation for Stateless Detainees** – Due compensation must be provided to stateless persons who have remained in detention for unnecessarily lengthy periods, when they have been cleared for release (for example, in the context of security detention), have been sentenced wrongly (in the context of criminal detention) or when there has been no reasonable prospect of removal (in the context of immigration detention).







# INTRODUCTION

In its landmark 1949 report “A Study of Statelessness”, the United Nations (UN) described statelessness as an “anomaly”. At the same time, Hannah Arendt, a German Jew and a refugee from Nazi Germany, criticised “*civilized countries*” for treating the stateless as criminals, since they did not fit into the normal framework of “state-citizen” or “state-foreign citizen” affairs.<sup>1</sup> Despite the considerable progress of international law (including treaties for the “stateless” and the development of international human rights law), too little has since changed. Innumerable practical difficulties, vulnerabilities and insecurities continue to weigh down the stateless and destroy their lives.

The stateless have long been recognised as those who either have no nationality (*de jure* stateless)<sup>2</sup> or whose nationality is not effective because they do not benefit from the protection of any state (*de facto* stateless).<sup>3</sup> The lack of ties between nation and individual has evolved into a complex and multi-dimensional global problem. It has been compounded by geo-political shifts, conflicts, and the unparalleled increase in migration which has shaped the contemporary world. Even though most stateless persons live in the country in which they were born (or a successor state), they are more likely to travel through multiple countries – in search of personal and economic security – than ever before. States are tightening their borders, imposing stricter immigration regimes and increasingly resorting to the detention of irregular and unwanted migrants. Such changes were perhaps unanticipated by the stateless protection mechanism which was established over fifty years ago.<sup>4</sup> Consequently, it is ill-equipped to effectively protect the stateless in the world today.

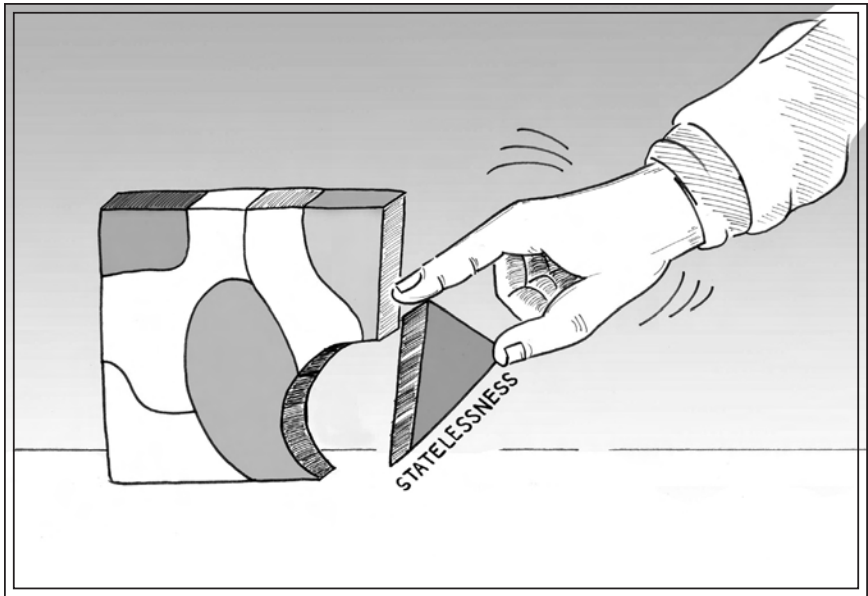
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1 Arendt, Hannah, *The Origins of Totalitarianism*, Schocken Books, New York [2004], p. 363.

2 The 1954 Convention Relating to the Status of Stateless Persons defines a stateless person as one “*who is not considered as a national by any state under the operation of its law*”. Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) ECOSOC RES/526 A(XVII) (1954 Convention), Article 1(1).

3 The UNHCR has defined a *de facto* stateless person as one who is “*unable to demonstrate that he/she is de jure stateless, yet he/she has no effective nationality and does not enjoy national protection*”. See UN High Commissioner for Refugees, *Nationality and Statelessness. A Handbook for Parliamentarians*, 20 October 2005, p. 11.

4 There are two UN Conventions on statelessness: the 1954 Convention and the Convention on the Reduction of Statelessness (adopted on 30 August 1961, entered into force 13 December 1975) UNGA RES/896 (IX) (1961 Convention). Of the two, it is the 1954 Convention which provides a framework for the protection of stateless persons.



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When the Universal Declaration of Human Rights (UDHR) was adopted in 1948, a new world order was envisioned, in which the rights enumerated within the Declaration were seen as inherent in every person by virtue of their humanity. This marked the beginning of the international human rights regime, which obligates states to promote and protect the human rights of all persons, irrespective of where they are, and whether they have a nationality or not. The rights to equality and non-discrimination are amongst the foundational principles of human rights law. They obligate states to treat all persons equally.<sup>5</sup> It is only in clearly defined exceptions that distinctions may be made between citizens and non-citizens, and only to the extent that the exceptions serve a legitimate objective and are proportionate to it.<sup>6</sup>

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5 It must be noted that equal treatment does not necessarily mean identical treatment. See The Equal Rights Trust, *Declaration of Principles on Equality*, London 2008, p. 5.

6 UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The rights of non-citizens: final report of the Special Rapporteur, David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283*, 26 May 2003, E/CN.4/Sub.2/2003/23.

Under the UDHR everyone has the right to a nationality.<sup>7</sup> Nationality is a complex concept which has historical, social, cultural, legal and emotional connotations. In a legal context, courts have defined nationality as “*a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties*”;<sup>8</sup> and also as “*the political and legal bond that links a person to a given State and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from the State*”.<sup>9</sup> These two definitions emphasise the integral role played by an effective nationality in offering security, protection and grounding to a person’s life. Significantly, nationality entitles the citizen to the diplomatic protection of his/her state when in another country.

The United Nations High Commissioner for Refugees (UNHCR) estimated that in 2008 there were approximately 12 million stateless persons in the world.<sup>10</sup> This is a cautious estimate based on a conservative and legalistic understanding of statelessness.

Although everyone has a right to a nationality, it takes more than the possession of a passport to fulfil this right. In order to be meaningful, it must be interpreted as the right to an “effective” nationality, which can be enjoyed by the individual both within their country of nationality and outside it. In this context, the following statement by the Inter-American Court of Human Rights is particularly significant:

*States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of a nationality... owing to arbitrary deprivation or the granting of a nationality that, in actual fact, is not effective.*<sup>11</sup>

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7 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA RES/217/A(III) (UDHR), Article 15.

8 See *Nottebohm Case (Liechtenstein v Guatemala)*, Second Phase, International Court of Justice (ICJ), 6 April 1955.

9 *Castillo Petruzzi et al. Case*, Inter-American Court of Human Rights, 30 May 1999.

10 UN High Commissioner for Refugees, *2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, 6 June 2009.

11 *Case of the Yean and Bosico Children v the Dominican Republic*, Inter-American Court of Human Rights, Case No. 12, 189 (8 September 2005), Para 142.

We are now beginning to go beyond the formal definitions to understand statelessness in a new light: not only in terms of gaps in nationality law, but also through using a human rights perspective. Seen through this lens, the multiple vulnerabilities of the stateless become clearer: they belong nowhere and often face discrimination, suspicion, ill-treatment, harassment and rejection whether in their countries of habitual residence, or in an immigration context. Statelessness is the most serious violation of the right to nationality. Furthermore, the stateless are extremely vulnerable to other human rights abuses as a direct consequence of their statelessness. Unnecessary, arbitrary, indefinite – and hence illegal – detention is one such consequence and a focus of this report.

Despite the complexity of the subject matter, its impact on individual rights and its widespread nature, statelessness has received relatively little attention when compared with the vast discourse surrounding refugees and their rights. The global human rights movement has not prioritised the stateless, and so has failed an extremely vulnerable group in great need of international human rights protection.

There are many reasons for this gap in protection. As will be argued in chapter 1, the issue of statelessness is at the very core of the tension between the universality of human rights on the one hand, and state sovereignty on the other. Perhaps for this reason, there has often been little political will to address and reverse statelessness. *“Concern for non-nationals is often not at the forefront of national politics or governance nor, for that matter, of national or local elections.”*<sup>12</sup> Despite reiterated calls on states to consider acceding to the statelessness conventions,<sup>13</sup> few states support the modest UN statelessness treaty regime.

The vulnerability of the stateless is most evident in the context of detention, which is commonplace in many countries from all regions of the world. Such detention is often – and at best – unnecessary and unreasonable; at worst it is arbitrary and degrading. Detention practices may also be humiliating, are at times violent, and may psychologically scar the victims for life.

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12 UN High Commissioner for Refugees, *UNHCR's Role in Supervising International Protection Standards in the Context of its Mandate - Keynote Address by Volker Türk*, 20 May 2010, available at: <http://www.unhcr.org/refworld/docid/4bf8c962.html> [accessed 25 May 2010].

13 The UNHCR has made many such calls. For example, see Para 4 of the United Nations General Assembly Resolution 61/137 on 25 January 2007.

Documental evidence of nationality is an essential prerequisite to travel, and to acquire an immigration status which allows a person to work, study, and access housing, services and medical care. The lack of personal documents is a common problem for the stateless, which pushes some into the irregular and criminal margins of society, where they are compelled to operate in black economies and through fraud in order to survive. Such activities render them liable to arrest, to criminal detention and to conviction, as well as making them vulnerable to extortion at the hands of corrupt authorities, smugglers and exploitative employers. Consequently, in many contexts, stateless persons can be at disproportionate risk of being detained for such “criminal” activities as illegal arrival or entry and working without authorisation or documents. Stateless communities are also at times subject to discriminatory laws within their countries of habitual residence, which specifically target them, criminalising activities that are taken for granted by the overwhelming majority of world citizens (for example, obtaining approval of marriage by the authorities).<sup>14</sup>

More visible, however, is the unnecessary and sometimes indefinite detention of stateless persons in immigration contexts. Increasingly restrictive immigration policies, which subject irregular migrants to detention pending deportation proceedings, fail to accommodate the stateless, who may not legally remain, but cannot be deported because they have no country of nationality to be deported to. The stateless thus find themselves in a state of limbo: detained while fruitless efforts to secure their removal to third states are made. The problem is compounded by the fact that despite international treaty provisions, few countries have statelessness determination procedures in place as part of their immigration policy. Stateless persons are consequently compelled to use asylum channels to make their claims to be allowed residence. Many fail as a result of being pushed into a procedure they do not fit within, are refused asylum, and are then subject to detention pending deportation. This can result in lengthy and indefinite detention.

Since September 2001, there has been a global increase in practices of security detention.<sup>15</sup> While much is now known about security detainees who

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14 In Myanmar, according to a local order issued in 1994, stateless Rohingya must obtain state permission before marrying. Failure to do so results in harassment and extortion and even prosecution with a maximum jail sentence of 10 years under Section 493 of the Penal Code of Myanmar. See Part 2 below for further information.

15 See UN General Assembly, *Protection of human rights and fundamental freedoms while countering terrorism: note by the Secretary-General, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 15 August 2007, A/62/263.

were held by the U.S. in Guantanamo Bay, many other countries including the UK, Kenya, Malaysia and Australia have also increased security detention after 9/11. The immense barriers to closing down the Guantanamo Bay facility faced by the Obama administration are at least in part the result of statelessness, and the related difficulty of finding suitable, safe new homes for detainees who have been cleared for release. In some cases *de jure* stateless persons who have been cleared for release from Guantanamo Bay have remained in detention because they have no country to be removed to. In others, the stigma attached to having been a terror suspect, even when later cleared for release, has created a real risk of such persons suffering irreparable harm (including torture) if returned to their own countries, and has consequently rendered persons *de facto* stateless.<sup>16</sup> This is due to the bar on *refoulement* to their own countries when there is fear of irreparable harm, torture or persecution.

For these reasons, the detention of stateless persons has been chosen as the central subject of this report, which records and assesses the international and national protection available to stateless persons whose liberty has been unduly constrained. It addresses the issue of detention, both in an immigration context and in the countries of habitual residence of the stateless, with an emphasis on immigration detention. The security detention and the criminal detention of stateless persons are also discussed.

Viewing statelessness from a detention perspective makes it easier to identify the protection gaps, and the conceptual shortcomings in how statelessness has been defined and approached. This report begins by addressing these gaps in protection. They include the fact that the treaty definition of statelessness does not cover the *de facto* stateless; that international standards pertaining to the stateless obligate protection only of the *de jure* stateless; and the inconsistent application of international human rights norms and principles of equality and non-discrimination when dealing with the stateless.

## **The Experience of Statelessness**

The Equal Rights Trust has documented a variety of ways in which people have experienced statelessness. The lack of identity cards and other personal

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16 See Chapter 5 below and also see The Equal Rights Trust, *From Mariel Cubans to Guantanamo Detainees: Stateless Persons Detained under U.S. Authority*, January 2010, available at: [http://www.equalrightstrust.org/ertdocumentbank/Statelessness\\_in\\_USA\\_17\\_Jan.pdf](http://www.equalrightstrust.org/ertdocumentbank/Statelessness_in_USA_17_Jan.pdf).

documents, and the experience of detention and deportation feature in the stories of Mr. X and Mr. Y, which many stateless persons around the world can relate to.

***De Jure Statelessness: The Story of Mr. Y<sup>17</sup>***

*I was born in Jeddah, Saudi Arabia in 1971. I am from the Karney tribe. I do not know my exact date of birth. My mother was Yemeni and is from the Radazne tribe. My father is Saudi Arabian and he is from the Karney tribe. My parents did not marry, and so I did not inherit Saudi nationality from my father. Under Yemeni law, I could not obtain Yemeni nationality from my mother, because it does not pass through the female line. So I was stateless. My father left my mother and me when I was about one year old, so I do not know much about him. In 1975, my mother and I went to live with a man named Abdulla and his children. They were from the same tribe as my mother. Abdulla was a painter. When I was about 9 years old, my mother was arrested and we were deported back to Yemen. I don't know why. When I was about 14 years old, she died.*

*I did not feel safe living in Yemen without any documents, and I could not get any because I was not a citizen of Yemen or of Saudi Arabia. So a few years ago, I went to Saudi Arabia, travelling on a false passport, where I worked as a calligrapher.*

***My arrest and deportation to Somalia***

*In 2006, I was arrested for having a false ID, and sentenced to one and a half years in prison. I was held in prison for 9 months. They decided to deport me to Somalia. I do not know why, but I think it was because there was no Somali government, so I could just be taken there. I refused to get on the airplane several times when*

17 ERT Interview with a stateless detainee (Mr Y), June 2009, Detention Centre, Greater Cairo, Egypt (ERT-SPD-EG-001). Throughout this report, ERT has withheld information about the identities of some of the interviewees to protect them from persecution or other harm. ERT keeps records of the true identities of all respondents and would consider disclosing them if the interests of justice so require.

*I was taken to the airport, and I would then be brought back to prison. I finally agreed to get on the airplane, and I was taken to Somalia.*

*I arrived during the war in Mogadishu. I tried to go and register with the ICRC [International Committee of the Red Cross] in Mogadishu, but I could not because the office was in the middle of the war zone. I stayed in Mogadishu for one day, and then went to Somaliland, where I lived for two years. The UNHCR supported me and I opened a calligraphy shop. But I wanted to leave Somaliland, so I went through Ethiopia, to Addis Ababa, and then to al Hamra in [eastern] Sudan, where I was arrested. I spent two days in jail, and I bribed the guard to let me out. I then walked for about 20 days and was smuggled into Egypt.*

***My arrest in Egypt and my detention***

*When I got to Egypt, I was arrested, and taken before a military tribunal. I was sentenced to a 1000 Egyptian pounds [approximately 180 U.S. dollars] fine and one year in prison. The sentence was dropped, but I was not released, and I am still in prison because I am stateless and there is no country which will accept me, and to which Egypt can deport me.*

***De Facto Statelessness - The Story of Mr. X<sup>18</sup>***

Mr X was born in Kuwait to Sudanese parents who were in the country as foreign workers. In 1992, following the Iraqi invasion of Kuwait, he and his mother relocated to Sudan. The following year, Mr. X moved to Syria to avoid military service in the Sudanese army.

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18 This case study is compiled from publicly available material, including: The Australian Commonwealth Ombudsman, *Immigration Report 277/07* (2007); and Minister for Immigration and Citizenship, *Minister's Tabling Statement*, 13 February 2008.



Mr X arrived in Australia by boat in October 2000 and was detained. His application for a Protection Visa was refused in June 2001; his request for release on compassionate grounds was refused in September 2002. He told the Department of Immigration that he was a citizen of Sudan, but this could not be verified. Early in 2003, he unsuccessfully applied for visas to go to Syria, India, Sri Lanka and Hong Kong.

In December 2003, Mr. X was removed from Australia to Tanzania under a five-guard escort, because although his Sudanese nationality had not been established, the Sudanese Consul in Dar es Salaam had indicated that he would be prepared to interview Mr. X in Tanzania, during a seven-day transit period, in order to establish his nationality. Relying upon advice from a contracted removal company that identification would be achievable in Tanzania, the Department issued an Australian Certificate of Identity for travel purposes, despite Migration Instructions which state: *“Before making any arrangements for enforced departure, it is important to establish...whether the proposed receiving country will accept the person.”*<sup>19</sup>

Following his interview, the Sudanese authorities did not accept that Mr. X was a Sudanese citizen. He was then held for three days at the airport in Dar es Salaam, and for a further three days at a police station. He was then returned to Australia via Johannesburg, where he was also temporarily detained. Upon his return, thirteen days after his removal, Mr. X was detained at the Perth Immigration Detention Centre, and then transferred to the Baxter Immigration Detention Centre. During this period he was diagnosed with major depression, and was placed under suicide and self-harm observation. A psychological report noted *“trauma-related symptoms”* and that Mr. X *“retained a sense of hopelessness throughout his time in detention”*.

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19 Australian Migration Series Instructions 376 – Implementation of Enforced Departures – Planning – 4.3.1.

In June 2005, Mr. X was released from immigration detention on a Removal Pending Bridging Visa, which enables the holder to live in the community, work and access social services until removal becomes feasible. The Department of Immigration has said that it will not seek to remove Mr. X again while his nationality remains unverified, and advises that “*removal to Sudan is considered unlikely due to the political unrest in that country*”. In 2007, the Australian Commonwealth Ombudsman recommended that Mr. X be granted a permanent visa on compassionate grounds.

These two testimonies illustrate the experiences of a *de jure* and a *de facto* stateless person. Together, they encapsulate the statelessness challenge. They demonstrate the great cost of failing to adequately cater to this particularly vulnerable group. Importantly, they also depict the similarities of the protection needs of all stateless persons, and consequently the injustice of a protection mechanism which applies to some but not to others with similar needs.

### **Methodology and Structure of ERT Research and This Report**

This report is the result of a two year research and advocacy project of ERT which had the dual objectives of:

- (i) Filling the gap in evidence and documentation regarding the reality of detention of stateless persons around the world; and
- (ii) Developing legal arguments and formulating principles and guidelines which would provide better protection for stateless persons.

Literature Review and Call for Evidence - Initially, ERT carried out a review of available information, literature and analysis concerning statelessness in general and the detention of stateless persons in particular. This was complemented by a call for evidence which ERT sent to over 60 key organisations and individuals world-wide. As part of this process, the ERT team established dialogue with those working with stateless populations and others monitoring detention practices. Of particular significance was the assistance of the Statelessness Unit of the UNHCR, Geneva. The ERT team consulted with inter-

national and, where relevant, national experts in the fields of human rights including equality and non-discrimination, refugee and immigration law and policy throughout the project. This resulted in the identification of a number of cases of stateless persons in detention. Organisations consulted include the International Refugee Rights Initiative (IRRI) in Kampala, the European Commission for Refugees and Exiles (ECRE) in Brussels, the Jesuit Refugee Service (JRS) in Bangkok, the Hungarian Helsinki Committee, the London Detainee Support Group, the European Roma Rights Centre (ERRC) in Budapest, Refugees International in Washington, the Open Society Justice Initiative (OSJI) in New York, Suaram in Malaysia and Amnesty International offices world-wide.

Working Papers - ERT then prepared two working papers on the detention of stateless persons. The Research Working Paper documented existing research and work on the issue of statelessness and stateless people in detention or other forms of restriction. The Legal Working Paper explored and critiqued the international legal framework pertaining to the rights of stateless persons in general and those in detention in particular.

In October 2008, drafts of the two working papers were circulated to a group of 21 human rights, equality and non-discrimination, immigration and refugee experts, and an expert roundtable was convened.<sup>20</sup> This consultation primarily focused on building effective legal arguments to improve the protection available to stateless persons in detention. The working papers were published in January 2009.<sup>21</sup>

Field Research - ERT then identified countries for field research purposes, chosen to reflect the practical and thematic scope of the project. All countries researched have a significant problem pertaining to the detention of stateless persons. Collectively they represent different geographic regions, different legal systems, different detention regimes (immigration detention, criminal detention and security detention) and different approaches to statelessness.

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20 See Annex A for the list of participants at the Experts' Roundtable.

21 See The Equal Rights Trust, *Research Working Paper: The Protection of Stateless Persons in Detention*, January 2009, available at: <http://www.equalrightstrust.org/ertdocumentbank/ERT%20Research%20Working%20Paper.pdf>; and The Equal Rights Trust, *Legal Working Paper: The Protection of Stateless Persons in Detention under International Law*, January 2009, available at: <http://www.equalrightstrust.org/ertdocumentbank/ERT%20Legal%20Working%20Paper.pdf>.

Nine countries were identified for in-depth field research: Australia, Bangladesh, Egypt, Kenya, Malaysia, Myanmar, Thailand, the UK and USA.

Researchers reviewed legislation, jurisprudence and policy in each country; visited detention centres and gathered testimony from present and former detainees; interviewed lawyers, experts, government authorities, activists and organisations working on behalf of detainees; and produced country reports and interview transcripts.<sup>22</sup> In addition to this in-depth country research, the Spanish statelessness detention procedure, the Palestinian situation, and statelessness in Latin America and Somalia were also studied. This report draws on all of these sources.

In the past few years, there has been a growing body of research and writing on statelessness.<sup>23</sup> This report aims to contribute to this discourse by deepening the understanding of detention-related challenges pertaining to the stateless.

Structure of the Report - Part One of the report analyses the concept of statelessness and the challenge that it poses to notions of international human rights and national sovereignty; and the boundaries of statelessness – what is meant by *de facto* and *de jure* statelessness, how useful the distinction between the two is, and whether a more inclusive approach to defining statelessness would result in better protection for all stateless persons.

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22 Two of these country reports have been published separately by ERT. The Equal Rights Trust, *Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia*, January 2010, available at: <http://www.equalrightstrust.org/ertdocumentbank/ERTMalaysiaReportFinal.pdf>; and The Equal Rights Trust, *From Mariel Cubans to Guantanamo Detainees: Stateless Persons Detained under U.S. Authority*, see above, note 16.

23 See for example, “classic” studies such as Goodwin-Gill, Guy, *The Refugee in International Law*, 3<sup>rd</sup> ed. OUP, 2007; and Weis, Paul, *Nationality and Statelessness in International Law*, 2<sup>nd</sup> ed. 1979; see also recent studies and publications: Weissbrodt, David, *The Human Rights of Non-Citizens*, OUP, 2008; Van Waas, Laura, *Nationality Matters: Statelessness Under International Law*, Antwerp: Intersentia, 2008; Refugees International, *Nationality rights for all: a progress report and global survey on statelessness*, Washington, 2009; Blitz, Brad and Lynch, Maureen, “Statelessness and the benefits of citizenship: a comparative study”, *Forced Migration Review*, Issue 32, Special Issue on Statelessness, 2009; Gyulai, Gabor, *Forgotten Without Reason: Protection of non-refugee stateless persons in Central Europe*, Hungarian Helsinki Committee, 2007; Batchelor, Carol, “Stateless Persons: Some Gaps in International Protection”, 1995, 7 *International Journal of Refugee Law* 232; UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians*, Geneva, 2005; *Statelessness: an analytical framework for prevention, reduction and protection*, Geneva, 2008; Open Society Justice Initiative, *Human Rights and Legal Identity: Approaches to Combating Statelessness and Arbitrary Deprivation of Nationality*, Thematic Conference Paper, 2006; and Manby, Bronwen, *Struggles for Citizenship in Africa*, Zed Books, 2009.

**Part Two** then focuses on situations of detention of stateless persons. It begins by surveying internationally accepted standards and norms pertaining to the detention of stateless persons and then explores practices of detention in the contexts of immigration, national security and criminal law – drawing from the field research conducted by ERT in countries around the world.

**Part Three** identifies some of the positive developments and better practices adopted by the countries researched in dealing with the statelessness challenge, and makes recommendations based on observed good practices and the research findings of ERT.



# PART ONE

## THE RIGHTS OF THE STATELESS AND TYPES OF STATELESSNESS

PART ONE of this report comprises two chapters. CHAPTER 1: THE RIGHTS OF THE STATELESS approaches statelessness as a human rights problem, and critiques the existing statelessness mechanisms from a human rights perspective. The first section of this chapter – *The Statelessness Challenge* – examines the two central issues which have contributed to statelessness not being addressed primarily as a human rights problem: namely, the human rights blind spot pertaining to statelessness and the national sovereignty challenge. This is followed by a section on *Nationality, Equality and Non-Discrimination* which articulates international principles and norms which must be utilised to ensure greater protection for the stateless. The final section assesses the international statelessness regime which consists of two international treaties.

CHAPTER 2: CRITIQUING THE CATEGORISATION OF THE STATELESS explores the hierarchies of the legal definition of statelessness; it identifies inconsistencies and proposes an alternative, more inclusive definition. There are two sections under this chapter. The first – *Categories of Stateless Persons* – looks at *de jure* statelessness, *de facto* statelessness and the grey area in between. Through case studies and analysis, we show that the protection needs of all stateless persons are of equal human rights concern, even though in reality, *de jure* stateless persons are entitled to greater protection than the *de facto* stateless. The next section – *The De Jure-De Facto Dichotomy and the Ineffective Nationality Test* – examines the discrepancies in protection caused by a definition and approach to statelessness which has prioritised the needs of one group (the *de jure* stateless) over the other (the *de facto* stateless). This section explores a more inclusive and comprehensive method of defining statelessness, based on the notion of ineffective nationality. ERT argues that this approach would provide the basis for the equal protection of all stateless persons.



He took the water, and washed his hands, saying,  
I'm innocent of the blood of this just person



# CHAPTER 1: THE RIGHTS OF THE STATELESS

The nation state has historically been the central actor in international law, whose traditional role has been the regulation of relations between equal and sovereign states. Membership of a nation – through nationality – has been a crucial prerequisite for the individual to enjoy certain entitlements and rights including the rights to enter and leave, reside, move around and work in one's country. Rules for immigration and citizenship are defined by national laws and policies - an exercise of state sovereignty, over which international mechanisms have traditionally had little control. States have the authority to define who is a citizen, and what rights and entitlements citizens have. By extension this means that states also define who is not a citizen. One consequence of this situation is that the lack of nationality is the basis on which individuals are physically excluded from a state's territory, as well as excluded from rights within a territory, often in breach of international human rights law. Another consequence is that national laws and policies which define citizenship in a discriminatory manner unfairly exclude certain individuals and communities from accessing citizenship and are a cause of countless persons being rendered stateless.

It has been observed that:

*The special vulnerability of migrants stems from the fact that they are not citizens of the country in which they live. (...) This dissociation between nationality and physical presence has many consequences. As strangers to a society, migrants may be unfamiliar with the national language, laws and practice, and so less able than others to know and assert their rights. They may face discrimination, and be subjected to unequal treatment and unequal opportunities at work, and in their daily lives. They may also face racism and xenophobia. At times of political tension, they may be the first to be suspected – or scapegoated – as security risks.<sup>24</sup>*

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24 Grant, Stefanie, *International Migration and Human Rights*, Policy Analysis and Research Programme of the Global Commission on International Migration, 2005, pp. 1-2, available at: <http://www.gcim.org/attachements/TP7.pdf> [accessed on 14 February 2009].

Stateless persons face all these vulnerabilities and more, for they face them on a permanent basis, wherever they may be. And, unlike migrants with an effective nationality, stateless persons do not benefit from diplomatic protection when away from their country of habitual residence. Our research confirmed that life as a stateless person is often a life of uncertainty and insecurity. The lack of personal documents which is integrally linked to statelessness creates many practical problems for stateless persons in their countries of habitual residence. The most basic facilities and services become inaccessible, for example opening bank accounts, obtaining an education, accessing health care and being eligible to work. Furthermore, the stateless are most often excluded from benefits and services which are restricted to nationals, e.g. social welfare programmes, free/subsidised education, or health care. When individuals are outside their countries of habitual residence, these problems can escalate due to the lack of both consular protection, and of a country to which the stateless individual is entitled to return. National authorities are often uncertain as to how such persons must be dealt with. Mistakes are made, policies are silent or insensitive to such difficulties and the result can be unnecessary and at times indefinite detention awaiting a deportation which is impossible to put into effect.

The UN's landmark "A Study of Statelessness" was written in 1949. Its description of statelessness is as true today as when it was written:

*The stateless person does not fit smoothly into the legal administrative or social life of his country of sojourn. The provisions of international law which determine the status of foreigners are designed to apply to foreigners having a nationality. The stateless person is an anomaly and for reasons of principle or method it is often impossible to deal with him in accordance with the legal provisions designed to apply to foreigners who receive the assistance of their national authorities, and who must, in certain cases, be repatriated by the countries of which they are nationals. ... Administrative authorities which have to deal with stateless persons, having no definite legal status and without protection, encounter very great and often insurmountable difficulties. Officials must possess rare professional and human qualities if they are to deal adequately with these defenceless beings, who have no clearly defined rights and live by virtue of good-will and tolerance.<sup>25</sup>*

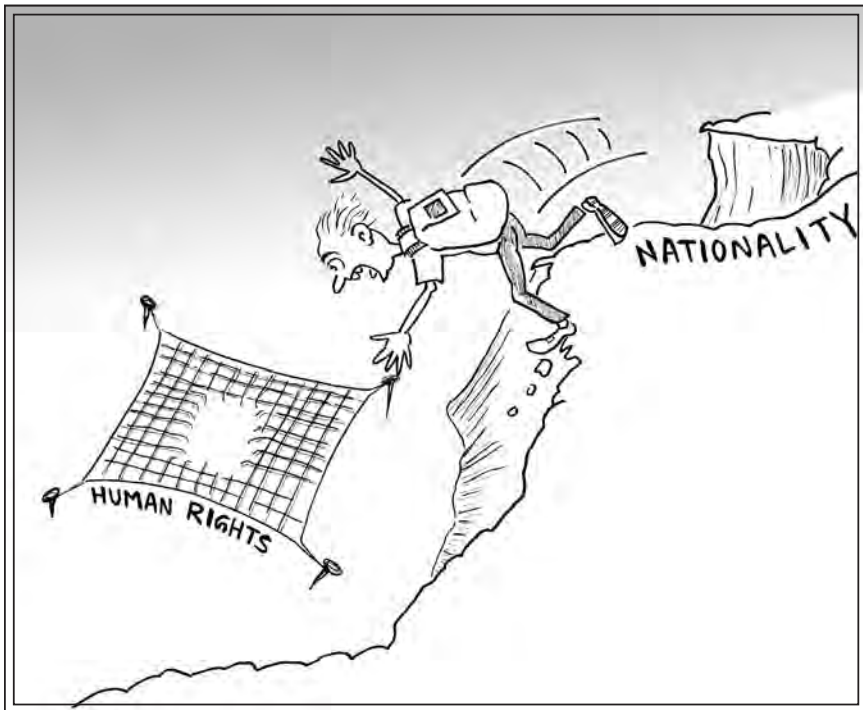
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25 UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness*, United Nations, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/Add.1, pp. 8 – 9.

## 1.1 THE STATELESSNESS CHALLENGE

Since the UN study was written in 1949, the development of international human rights law has somewhat modified the centrality of the nation-state in international law, through the recognition of individuals as having rights and obligations of their own, by virtue of our shared humanity. International human rights law regulates the relations between states and individuals, enabling individuals to demand that their rights be promoted, protected and fulfilled by states, and providing a framework within which the actions of states can be challenged. International human rights are universal, protecting all persons, regardless of their nationality or the lack of it.

Consequently, while statelessness is in itself a violation of the right to nationality, it should not also undermine the individual's ability to enjoy other human rights. One effect of the development of international human rights law is that the lack of a nationality should no longer detract from the individual's enjoyment of human rights. However, in reality the relationship be-



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tween nationality and human rights is more symbiotic. Nationality continues to play an extremely important role in most aspects of a person's life; it consequently continues to be integral to human rights as well. Identity, security, liberty, pride, ownership and belonging are all sentiments which are strongly linked with nationality. Even though international human rights law has transformed the individual into a subject of international law in principle, the actual enjoyment of human rights depends in practice primarily on the national context – the purview of national constitutions, courts and legislators. Attachment to a nation entitles citizens to enjoy human rights at a more tangible, effective and immediate level than international human rights mechanisms provide. This is why the right to a nationality has been repeatedly described as the right to have rights.<sup>26</sup>

But, at least in theory, nationality is not a pre-condition to enjoying human rights. International human rights law creates a legal framework which generally requires states to protect everyone, including those without any nationality – the stateless – from human rights violations. Loss of nationality should therefore be the impetus for international human rights mechanisms to offer greater protection, instead of leading to – even being the catalyst for – further exclusion from rights. Overcoming this gap between principle and practice is one of the biggest challenges faced by the international human rights regime.

The universality of human rights is particularly relevant to the protection of the stateless, because it requires that all persons enjoy human rights regardless of their nationality (or lack of it in this context), and that states generally afford all persons equal protection of the law.

The basic protection afforded by general human rights instruments to all human beings is thus central to the protection of the stateless. The core international human rights treaties form a comprehensive body of authority which

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26 See, for example, the judgment of Chief Justice Warren in the landmark U.S. case of *Trop v Dulles*, 356 US 86, 101-102 (1958); See also Batchelor, Carol, "Statelessness and the Problem of Resolving Nationality Status", *International Journal of Refugee Law*, 1998, 10: 156, p. 159; and de Groot, Gerard-Rene, *A Clarification of the Fundamental Rights Implications of Stateless and Persons Erased from the Register of Residents*, Directorate General Internal Policies of the Union, European Parliament, 2007, available at: [http://www.libertysecurity.org/IMG/pdf\\_clarification\\_of\\_FR\\_implications\\_en.pdf](http://www.libertysecurity.org/IMG/pdf_clarification_of_FR_implications_en.pdf) [accessed on 14 February 2009].

collectively imposes strong obligations on all states.<sup>27</sup> For example, the rights entrenched in the International Covenant on Civil and Political Rights (ICCPR) are afforded to all “persons” and not limited to “citizens” or “nationals”. The Human Rights Committee (HRC) has stated that “*in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness*”.<sup>28</sup> Consequently despite the fact that the legal systems of most countries would differentiate between nationals and non-nationals, international human rights norms establish a core minimum standard which must be afforded to all persons – regardless of nationality - within the territories of state parties.<sup>29</sup>

It must be noted, however, that human rights and equality law does allow for states to make certain legitimate distinctions between nationals and non-nationals in strictly defined exceptions. This is particularly so in the context of immigration. For example, while nationals have the right to enter and reside in their own country, non-nationals require the permission of the state to do so.<sup>30</sup> Furthermore, Article 25 of the ICCPR, which is the only Convention right expressly applicable only to citizens, sets out that they have a right:

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27 They include the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); the Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNGA RES/2106(XX) (CERD); the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA RES/34/180 (CEDAW); the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA/RES/44/25 (CRC); the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) UNGA/RES/45/158 (CMW); the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNGA/61/611 (CRPD); as well as their Optional Protocols and the General Comments of the UN treaty bodies.

28 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, 11/04/86, Para 1.

29 It must be noted that the transfer of international norms into national systems would depend on whether the system in question is monist or dualist in character. While in monist systems international treaties, once ratified, automatically become the law of the land, in dualist systems, enabling legislation is required post-ratification.

30 See Article 12 (3) of the ICCPR. However, see also UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, above, note 28.

- a. *To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- b. *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- c. *To have access, on general terms of equality, to public service in his country.*<sup>31</sup>

However, these rights may be extended to non-citizens as well, and are also subject to the general non-discrimination provisions of the Covenant.<sup>32</sup>

**This is the challenge that statelessness presents to the international human rights regime: the challenge of affirming the importance of nationality and promoting the right of everyone to a nationality, while ensuring that the lack of a nationality does not result in vulnerability, exploitation and the violation of human rights.** From the evidence gathered through ERT research and multiple other sources, it is clear that the international human rights regime has failed to rise to the statelessness challenge. This failure is due primarily to two factors:

(i) A conceptual blind spot which has led to the non-application of international human rights standards to the stateless in a consistent and holistic manner.

(ii) The counter-challenge posed by “national sovereignty” to the universal application of international human rights law, which has often excluded peripheral groups such as the stateless from the enjoyment of human rights.

### **1.1.1 A Human Rights Blind-Spot**

The international statelessness regime was created in the early 1950s before international human rights law had developed. Since then, international human rights treaty law has grown both quantitatively and qualitatively through the acceptance by states of a range of treaties – covenants and conventions – giving legal effect to the UDHR.

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31 See Article 25 of the ICCPR.

32 See Articles 2 and 26 of the ICCPR. See also UN Human Rights Committee, *General Comment No. 18: Non-discrimination*, 10/11/1989.

The substantive difference between the 1998 Guiding Principles on Internal Displacement and the 1954 Convention on the Status of Stateless Persons illustrates this change. Internally Displaced Persons are another extremely vulnerable group which can overlap with the stateless. Both documents were designed to obligate or influence stronger protection for a vulnerable group. The Guiding Principles have a strong human rights core, and articulate a wide range of rights, which are grounded on the concepts of dignity, equality and non-discrimination.<sup>33</sup> In contrast, the 1954 Convention is less developed from a rights perspective, and does not go beyond articulating a few broad human rights principles.<sup>34</sup>

In essence, the stateless and the internally displaced share many common vulnerabilities and problems.<sup>35</sup> The discrepancy in protection afforded by the two instruments is primarily a reflection of the development of the law at the time they were each drafted. The strong grounding of the Guiding Principles in human rights language is a result of a historic process – the principles were drafted just over ten years ago, at a time when international human rights law was well developed, more entrenched and globally more widely accepted. The Statelessness Convention, on the other hand, was drafted almost sixty years ago, before the development of international human rights law.

Perhaps as a result of this history, the international statelessness regime and human rights law have tended to run on parallel and separate lines. Thus the issue of statelessness has been viewed predominantly through the Statelessness Conventions and “statelessness problems” have been seen as being different from “human rights problems”. This conceptual blind-spot has in effect

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33 These include the right to equality (Principle 1), non-discrimination (Principle 4), life (Principle 10), dignity (Principle 11), liberty and security of the person (Principle 12), freedom of movement (Principle 14), respect of family life (Principle 17), an adequate standard of living (Principle 18), recognition as a person before the law (Principle 20), freedom of thought, conscience and religion, employment and language rights (Principle 22) and the right to education (Principle 23). See UN High Commissioner for Refugees, *Guiding Principles on Internal Displacement*, 22 July 1998, E/CN.4/1998/53/Add.2.

34 See, for example, general provisions in the 1954 Convention on non-discrimination (Article 3) and religion (Article 4). See Section 1.3.1.1 below for further elaboration.

35 The difference is that internal displacement is more likely to be a temporary humanitarian crisis, and statelessness is more likely to be a more permanent state of affairs (though there are many protracted internal displacement situations around the world and *de facto* statelessness, in particular, can be a temporary and fluid situation).

denied the stateless the attention of human rights protection mechanisms in a consistent and sustainable manner.

Another factor underlying this difference may be that the international agency charged with protecting the stateless is the UNHCR. The strong link between the stateless and refugees, who are both denied the effective protection of a state of nationality, together with the legal and operational protection mandate of the UNHCR, make the latter the most obvious and suitable UN organisation to take the stateless under its wing. However, one of the inadvertent side-effects of this move has been that until recently the issue of statelessness had escaped the concerted attention of the UN human rights system – the Human Rights Council [formerly the Human Rights Commission] and the treaty bodies. A recent study examined the lack of reference to statelessness in the general comments and statements of the CEDAW Committee.<sup>36</sup> Statelessness should be seen as a fundamental human rights issue, directly under the mandate of the core covenants and conventions. It is noteworthy that there has been a gradual shift in this direction over the past few years, and some recent general comments of the treaty bodies have specifically targeted the stateless.<sup>37</sup>

This is not to say that the existing statelessness conventions have no place in today's world. They offer some strong procedural safeguards and impose very practical obligations (including the duty to provide identity papers) on states. However, international human rights law must now be recognised as articulating the fundamental, minimum rights of stateless persons throughout the world.

### **1.1.2 The National Sovereignty Barrier**

The second barrier to the effective application of human rights norms to the stateless arises from the inherent tension between universal human rights on the one hand, and state sovereignty on the other.

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36 Edwards, Alice (On behalf of the UN High Commissioner for Refugees), *Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women*, August 2009, PPLAS/2009/02.

37 See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, Art. 2, Para 2, E/C.12/GC/20, 25 May 2009.



Nation states which have ratified international human rights treaties are quick to distinguish between laws and policies for their citizens on the one hand (in which human rights should be respected) and foreign affairs, national security and immigration on the other (in which human rights are less likely to be respected). The argument is one of national sovereignty, and the right of states to protect their people and borders. In the aftermath of 11 September 2001, the national sovereignty argument has grown stronger, to the detriment of human rights protection.

According to the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism:

*Apart from special provisions related to detention of terrorism suspects, most States' immigration legislation contains provisions for the detention of foreigners, including asylum-seekers. In many countries ... it appears that as one measure to counter terrorism, such detentions are increasing or taking new forms that may lack the safeguards required by international human rights standards. The administrative detention of foreigners, including asylum-seekers, raises issues related to the necessity and proportionality of such measures, the right to speedy and effective court review of any form of detention, the rights of detained persons including their right to the best attainable health, and possible violations of the prohibition against discrimination.*<sup>38</sup>

A review of state practice reveals that “[i]n many countries there are institutional and endemic problems confronting non-citizens. The situation... has worsened as several countries have detained or otherwise violated the rights of non-citizens in response to fears of terrorism”.<sup>39</sup> The stateless – anomalies to the status quo – are a high risk group in this regard: irregular, undocumented and unwanted.

It is not that international human rights law is not sufficiently nuanced to accommodate security and immigration concerns. Indeed, one of the strengths of human rights law is its flexibility to provide for derogations in times of emergency. Furthermore, certain rights are, with good reason, exclusively the

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38 See above, note 15, Para 41.

39 See above, note 6.

domain of nationals and not to be enjoyed by immigrants.<sup>40</sup> However, these are the areas and issues upon which sovereignty and universality can clash head on. The trend in the recent past has been that the sovereignty argument has outweighed the universality one, encroaching further into the established territory of human rights. And, as with all encroachment, it is the peripheries which succumb first. The irregular migrant, the cleared for release terror suspect and the stateless are those peripheral people, who in the name of national sovereignty are being increasingly stripped of their fundamental human rights.<sup>41</sup>

The treaty bodies have attempted to resolve this issue. Article 13 of the IC-CPR, for example, offers procedural and substantive safeguards which uphold the rights of non-nationals in the process of being expelled from the territories of state parties to the Covenant. In its General Comment on Article 13, the HRC has addressed the balance between state sovereignty on the one hand, and the rights of non-nationals on the other:

*The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the state to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*<sup>42</sup>

Through interpreting the ICCPR in such a progressive manner, the Committee has given a clear signal that state sovereignty is not always absolute even in the context of national borders and immigration.

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40 For example, in many countries, only nationals have the right to vote in parliamentary and presidential elections.

41 See Part Two of this report for country specific examples of this point.

42 See above, note 28, Para 5.

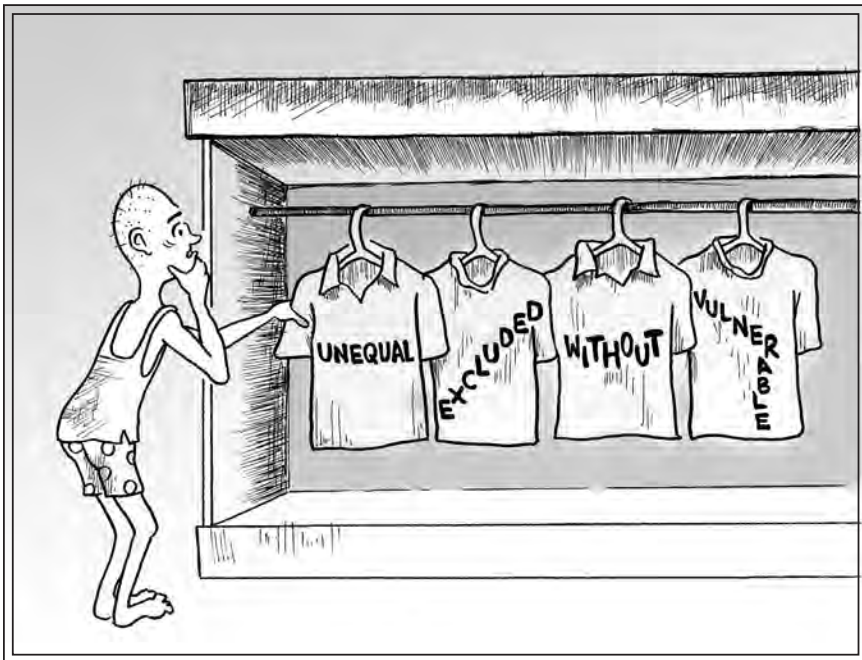
## 1.2 NATIONALITY, EQUALITY AND NON-DISCRIMINATION

As argued above, the challenge that statelessness imposes on human rights is that of:

**(i) affirming the importance of nationality and promoting the right of everyone to a nationality; while at the same time**

**(ii) ensuring that the lack of a nationality does not result in vulnerability, exploitation and the violation of human rights.**

The failure to rise to this challenge and afford adequate protection to vulnerable persons results in statelessness and also heightens the cost and impact of statelessness. From a rights perspective, the first limb of the human rights challenge is a threat to the right to nationality, and the second limb is a threat to the rights to equality and non-discrimination. These can be viewed as the pivotal rights in the context of statelessness.



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The interconnected and universal nature of human rights means that when these pivotal rights are compromised, all other human rights become more open to violation and erosion. For example, as will be analysed in Part Two of this report, discriminatory laws and policies can lead to situations of arbitrary and indefinite detention of stateless persons – an illustration of how the violation of the rights to equality and non-discrimination can result in further violations of the rights to liberty and freedom of movement.

It is also evident that there is a strong nexus between the right to a nationality and equality and non-discrimination. The concept of nationality and of belonging to a nation remains fundamental to human well-being. Nationality – or the withholding and/or stripping of nationality – can become a powerful weapon at the disposal of states in creating or dealing with unwanted or undervalued minorities. Consequently, minorities are particularly vulnerable to statelessness. As stated by the UN independent expert on minority issues:

*Many minorities live in a precarious legal situation because, even though they may be entitled under law to citizenship in the State in which they live, they are often denied or deprived of that right and may in fact exist in a situation of statelessness. While many conditions give rise to the creation of statelessness, including protracted refugee situations and State succession, most stateless persons today are members of minority groups.<sup>43</sup>*

The arbitrary deprivation or denial of nationality is a weapon of exclusion, exploitation and de-legitimation. It can be used to perpetuate marginalisation and discrimination both within the country concerned and also in other countries to which such persons may hope to escape. The Rohingya of Myanmar are a quintessential case of discrimination through de-nationalisation. An ethnic and religious minority living in northern Myanmar, the Rohingya were legally de-nationalised in 1982 through the promulgation of a new citizenship law, which did not include the Rohingya in a list of national ethnicities. They have been subject to immense discrimination, abuse and deprivation. The Rohingya are a community in flight: it is believed that today more Rohingya live outside Myanmar than within it. And even having escaped Myanmar borders, the Diaspora community continues to suffer acute dis-

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43 UN Human Rights Council, *Report of the independent expert on minority issues, Gay McDougall*, 28 February 2008, A/HRC/7/23, p. 2.

crimination, poverty and abuse in their new homes, be they in Bangladesh, Malaysia, Saudi Arabia or Thailand.

However, this does not mean that all statelessness is caused by intentional discrimination, exclusion and deprivation. Conflicts and gaps within and amongst national laws have also played a role as will be explained below. In these cases and others, elements of discrimination particularly against women and minorities may play a role in the creation of statelessness.

### 1.2.1 The Right to a Nationality<sup>44</sup>

Nationality is a concept of both national and international law. The international law concept of nationality is a universally accepted set of customary principles and treaty body standards (including international human rights law) which establish certain rights and obligations to both individual and state, which are attached to nationality. Under national law, individual states may afford greater rights to and/or different obligations upon their citizens (such as free university education, or compulsory military or civil service). In the context of statelessness, the international law standards pertaining to nationality emerge as more important and significant than national laws due to their universal acceptance and the common minimum standard they articulate.

Article 15 of the Universal Declaration of Human Rights (UDHR) states that *“everyone has the right to a nationality”*, and that *“no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”*.<sup>45</sup> However, the body of binding international treaties which followed the UDHR do not assert the right to a nationality in the same broad and general terms. But it should be stressed that the right itself is firmly a part of the human rights corpus, as the UDHR is now widely regarded as reflecting customary international law.

While it can be argued that everyone has an inherent right to a nationality, the answer to the question of which nationality is not so forthcoming. This is because *“international law has traditionally afforded states broad discre-*

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44 For a detailed and authoritative analysis of the right to a nationality, see UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34.

45 UDHR, Articles 15 (1) and 15 (2).

tion to define the contours of and delimit access to nationality".<sup>46</sup> Nationality or citizenship law and policy has always been an expression of state sovereignty. This brings us back to the sovereignty-universality dichotomy; for while international human rights law enshrines a right to nationality, that right can only be provided through an exercise of state sovereignty. Theoretically, international human rights law lays down standards which nations have bound themselves to and consequently are obligated to uphold. However, the practical realisation of the right to nationality, particularly the right to nationality of persons unwanted by their states, is a sensitive, difficult and highly politicised issue: **In the context of migration**, this is because migration is viewed negatively in most countries, and irregular migrants bear the brunt of this negative sentiment. Fostering political goodwill and support for the nationalisation of irregular migrants who have no effective nationality is consequently an extremely difficult challenge. **In the context of persons within their country of habitual residence**, it is because most such cases have a long history of discrimination and conflict, which must be addressed in order to ensure effective nationality to victimised minorities.

***Key Treaty Provisions  
Articulating the Right to a Nationality<sup>47</sup>***

**UN International Covenant on Civil and Political Rights,  
1966 [Article 24 (3)]**

Every child has the right to acquire a nationality.

**UN Convention on the Elimination of All Forms of Racial  
Discrimination, 1965 [Article 5 (d) (iii)]**

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law... [and to] the enjoyment of ... the right to nationality.

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46 Open Society Justice Initiative, see above, note 23, p. 4.

47 For a full list of treaty provisions see UN High Commissioner for Refugees, *Extracts relating to nationality and statelessness from selected universal and regional human rights instruments*, November 2009, available at: <http://www.unhcr.org/4517da8e2.html> [accessed on 15 February 2010].

**UN Convention on the Elimination of All Forms of Discrimination against Women, 1979 [Article 9]**

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality...
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

**UN Convention on the Rights of the Child, 1989 [Article 7 (1)]**

The child shall be registered immediately after birth and shall have ... the right to acquire a nationality...

**American Convention on Human Rights, 1969 [Article 20]**

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

**European Convention on Nationality, 1997 [Article 4]**

- a. Everyone has the right to a nationality;
- b. Statelessness shall be avoided;
- c. No one shall be arbitrarily deprived of his or her nationality;
- d. Neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.

Furthermore, as the Inter-American Court of Human Rights has ruled:

*Although the determination of who is a national of a particular state continues to fall within the ambit of state sovereignty, states' discretion must be limited by international human rights that exist to protect individuals against arbitrary state actions. States are particularly limited in their discretion to grant nationality by their obligations to guarantee equal*

*protection before the law and to prevent, avoid, and reduce statelessness.*<sup>48</sup>

According to the Open Society Justice Initiative, “three norms have developed to constrain state power in regulating citizenship, namely the prohibition against discrimination, the state duty to avoid statelessness, and the right to be free from arbitrary deprivation of citizenship.”<sup>49</sup>

The limitation of state sovereignty in the determination of nationality and the treatment of non-nationals - through international human rights law in general and the principle of equality in particular - is an increasingly accepted norm of international law, even if there is less agreement on its practical application. “While acquisition and loss of nationality are essentially governed by internal legislation, their regulation is of direct concern to the international order.”<sup>50</sup> This means that the notion of national sovereignty must be approached in a manner which reaffirms the rights of the stateless, as opposed to undermining them. States are legally obligated to minimise statelessness and to respect, protect and fulfil the rights of the stateless. As Gyulai argues:

*The deprivation of nationality is to be regarded as a grave violation of human rights ... the obligation to protect stateless persons (i.e. victims of a serious human rights violation) can be indirectly derived from states’ obligation to respect the right to nationality.*<sup>51</sup>

## **1.2.2 Equality and Non-Discrimination**

The rights to equality and non-discrimination are central to international human rights law. “All human beings are born free and equal in dignity and rights.”<sup>52</sup> Article 2 (1) of the ICCPR obligates state parties to

*respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present*

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48 See above, note 11.

49 Open Society Justice Initiative, see above, note 23, p. 3.

50 See above, note 44, Para 19.

51 Gyulai, Gabor, see above, note 23, p. 12.

52 UDHR, Art. 1.



*Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*<sup>53</sup>

Article 26 enshrines the right to equality and non-discrimination more generally, irrespective of whether another Covenant right is involved or not:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*<sup>54</sup>

The HRC, in its authoritative comment on non-discrimination under the ICCPR, has stated that Article 26:

*[P]rovides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities... Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.*<sup>55</sup>

All other major international and regional human rights treaties also have strong equality and non-discrimination clauses. Some treaties like the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are dedicated to combating discrimination targeted at specific vulnerable groups and resultant inequalities. Additionally, regional treaties such as the European Convention for the Protection of Hu-

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53 ICCPR, Art. 2 (1).

54 ICCPR, Art. 26.

55 UN Human Rights Committee, see above, note 32.

man Rights and Fundamental Freedoms (ECHR),<sup>56</sup> the American Convention on Human Rights (ACHR),<sup>57</sup> and the African Charter on Human and People's Rights (ACHPR),<sup>58</sup> protect the rights to equality and non-discrimination. The two rights combined are an essential pre-requisite in promoting and protecting the human rights of the stateless. As will be demonstrated through this report, stateless populations are acutely vulnerable to discrimination from multiple actors. All countries researched in this report have laws, policies and/or practices which have been discriminatory towards the stateless.

In October 2008, the Equal Rights Trust facilitated a process through which 128 equality and human rights experts from around the world consulted and agreed on a set of principles on equality. The principles reflect concepts and jurisprudence already developed in international, regional and national legal contexts. The Declaration of Principles on Equality promotes a unified approach to equality and non-discrimination, bringing together human rights and non-discrimination principles in a manner which ensures better protection for the vulnerable.<sup>59</sup> Article 1 of the Declaration defines the right to equality as:

*[T]he right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.<sup>60</sup>*

The right to equality is a universal right, to which everyone is entitled, regardless of their nationality or lack thereof. It has many elements, which must be individually and collectively fulfilled in order for full and effective equality to be achieved. They include:

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56 European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950 (ECHR), Art. 14.

57 American Convention on Human Rights, adopted on 22 November 1969, entered into force 18 July 1978, OAS Treaty Series, No 36 (ACHR), Art. 24.

58 African [Banjul] Charter on Human and Peoples' Rights, adopted on 27 June 1981, entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (ACHPR), Art. 2 and 3.

59 See above, note 5.

60 *Ibid.*, Art. 1.

- (i) the right to recognition of the equal worth and equal dignity of each human being;*
- (ii) the right to equality before the law;*
- (iii) the right to equal protection and benefit of the law;*
- (iv) the right to be treated with the same respect and consideration as all others;*
- (v) the right to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.<sup>61</sup>*

Stateless persons must benefit from each of the above elements of equality. Affirmation of the fundamental rights to equality and non-discrimination as stand-alone rights as well as in conjunction with all other human rights is central to understanding and promoting the rights of stateless persons under international law. The former Special Rapporteur on the Rights of Non-citizens stated that:

*All persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.<sup>62</sup>*

Consequently, states should ensure that any equality and anti-discrimination legislation applies not only to citizens, but also to non-citizens including the stateless. Furthermore, states should specifically monitor the application of such legislation to non-citizens and the stateless.

States may distinguish between citizens and non-citizens in certain strictly defined areas including immigration control. However, such distinction cannot extend to general human rights which stateless persons are entitled to enjoy on an equal basis. Accordingly, the central principle of non-discrimination and equality is a particularly strong factor which sets limits to the reach of state sovereignty. As the UN Committee on the Elimination of Racial Discrimination (CERD) has stated, even though a nation is permitted to distinguish between citizens and non-citizens, this is to be seen as an exception to the principle of equality and consequently, “*must be construed so as to avoid*

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61 *Ibid.*, Commentary by Dimitrina Petrova, p. 30.

62 See above, note 6.

*undermining the basic prohibition of discrimination*".<sup>63</sup> To realise full and effective equality it may be necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals.<sup>64</sup> It is this understanding of equality which must be held on to, and applied to the stateless, so as to ensure that their particular vulnerabilities are taken into account when resolving the problems specific to them.

### 1.2.2.1 Non-Discrimination

The Declaration of Principles on Equality identifies the right to non-discrimination as "*a free standing, fundamental right, subsumed in the right to equality*".<sup>65</sup> Accordingly, discrimination is prohibited on many grounds including:

*[R]ace, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.*<sup>66</sup>

The Declaration also prohibits discrimination based on any other ground where such discrimination:

*(i) [C]auses or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above ... [or] when it is on the ground of the association of a person with other persons to whom a prohib-*

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63 UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non Citizens*, 01/10/2004.

64 See above, note 5, Art. 2.

65 *Ibid.*, Art. 4.

66 *Ibid.*, Art. 5.

*ited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.<sup>67</sup>*

Discrimination can be direct or indirect. Furthermore, harassment also constitutes discrimination in certain circumstances. According to the Declaration, an act of discrimination may be committed intentionally or unintentionally:

*Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.*

*Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*

*Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>68</sup>*

This comprehensive definition encompasses discrimination of the stateless. While international human rights law does not prohibit distinctions in rela-

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67 *Ibid.*

68 *Ibid.*

tion to immigration, such distinctions must be justified on a proportionality basis. This report has identified instances of excessive use of immigration control which go beyond the threshold of justified differential treatment.<sup>69</sup> The detention of stateless persons which may be permissible in an immigration context when carried out according to established principles of international law is often implemented in a discriminatory manner.<sup>70</sup> Furthermore, the harassment which stateless persons suffer in many detention contexts also amounts to discrimination. A unified perspective on equality and non-discrimination is critical to developing strategies to combat statelessness and the inequality and discrimination that stateless people face.

The discrimination faced by stateless persons, either within or outside their country of habitual residence, is often linked to race, ethnicity, and nationality (or the lack of it). Consequently, it is often presumed that statelessness can be combated through addressing racism or racial/ethnic discrimination. But this approach alone has been insufficient. In practice statelessness occurs, and the stateless suffer human rights violations, not merely as a result of discrimination against racial/ethnic groups. It is also the result of laws, policies and practices that discriminate on grounds of gender, religion, political belief, marriage and civil status.

#### 1.2.2.2 Treaty Body Standards

The UN Committee on Economic, Social and Cultural Rights (CESCR) in a recent interpretation of state obligations under the ICESCR asserted that:

*The ground of nationality should not bar access to Covenant rights ... [t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.*<sup>71</sup>

This obligation to apply Covenant rights equally between citizens and non-citizens carries considerable weight in light of the fact that non-discrimina-

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69 See the discussion of the *Belmarsh* case in Section 1.2.2.3 below.

70 See chapter 4 of this report.

71 See above, note 37, Para 30.

tion is an immediate and cross-cutting obligation in the Covenant,<sup>72</sup> and that the CESCR has established that “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party” to the Covenant.<sup>73</sup> Non-citizens, including refugees, asylum seekers and stateless persons therefore should generally benefit from the rights enshrined in the ICESCR, particularly in respect of the minimum core content of those rights.<sup>74</sup>

The principle of non-discrimination in the enjoyment of human rights by nationals and non-nationals has also been applied by the HRC in its interpretation of state obligations under the ICCPR. While nationality is not explicitly enumerated as a prohibited ground of discrimination in Article 2(1) of the ICCPR,<sup>75</sup> the Committee in its 1986 General Comment stated that:

*In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness ... the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof.*<sup>76</sup>

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72 *Ibid.*, Para 7. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Article 2, paragraph 1 of the Covenant)*, 1990, Para 1.

73 See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations*, Para 10, with respect to “minimum core obligations”.

74 It should be noted however that despite this progressive interpretation, the Committee remains textually bound in its interpretation of the scope of the guarantees of equality and non-discrimination in the Covenant and has made clear that this interpretation is without prejudice to the application of Article 2(3) of the ICESCR, which states that “[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”.

75 According to Article 2 (1) of the ICCPR: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

76 See above, note 28, Paras 1 - 2. The Committee has also confirmed that “the provisions of Article 2 of ICESCR do not detract from the full application of Article 26 ICCPR”. See UN Human Rights Committee Communication No. 182/1984, *Zwaarn de Vries v Netherlands* (1987), Para 12.1.

Further, the stand-alone non-discrimination provision found in Article 26 of the ICCPR “prohibits any discrimination under the law”,<sup>77</sup> thereby extending the guarantee of non-discrimination beyond the immediate scope of the Covenant rights. This general principle of non-discrimination in the enjoyment of rights and of equal protection of the law for nationals and non-nationals is also found in other international treaties and has been elaborated upon by the respective monitoring bodies. CERD has stated that:

*Although some ... rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law ... [u]nder the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.<sup>78</sup>*

### 1.2.2.3 Regional and National Jurisprudence

Both national and regional courts have made strong equality based judgments in the recent past. In the UK for example, the House of Lords held in the *Belmarsh* case that as international law does not discriminate between nationals and non-nationals in terms of their right to liberty, the state cannot do so either.<sup>79</sup> The importance of this principle lies in the fact that states are compelled to maintain the same standards when drafting law or policy which impacts on the liberty of nationals as well as non-nationals. The administrative detention or restriction of liberty of the stateless in immigration policy must pass the same proportionality threshold as the administrative detention of nationals in other circumstances.

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77 UN Human Rights Committee, see above, note 32, Para 1.

78 See above, note 63, Paras 3-4.

79 *A and Others v Secretary of State for the Home Department* [2004] UKHL 56. The judgment held the indefinite detention of non-British national terror suspects at the Belmarsh detention facility to be illegal because the power to detain indefinitely applied only to non-citizens and not to citizens.



It is accepted legal principle that equal treatment is not equivalent to identical treatment.<sup>80</sup> Whilst the right to non-discrimination inherently permits distinctions to be made between different people according to their circumstances, distinctions must be objectively and reasonably justified, pursue a legitimate aim, and be proportionate to that aim.<sup>81</sup>

International and regional courts and tribunals have provided guidance concerning the scope of distinctions on grounds of nationality.<sup>82</sup> In the 2009 case of *Andrejeva v Latvia* the European Court of Human Rights upheld the need for “*very weighty reasons*” to justify distinctions based on nationality, in relation to the pension rights of a stateless “*permanently resident non-citizen*” in Latvia.<sup>83</sup> This right was reserved for Latvian citizens and so the applicant, a “*permanently resident non-citizen*” of Latvia, was denied the pension in question solely because she did not have Latvian citizenship.

The court found that although the difference in treatment in the present case pursued the legitimate aim of protecting the country’s economic system, the means employed were not proportionate to that aim. The court distinguished the applicant in this case from its previous jurisprudence concerning discrimination on grounds of nationality, highlighting that the applicant was a stateless person. Finding that there were not sufficiently weighty reasons to justify the use of nationality as a sole criterion for the difference in treatment, the court gave special regard to the fact that the applicant had the status of a “*permanently resident non-citizen*” of Latvia, that Latvia was the only State with which she had any stable legal ties, and thus the only state which objectively could assume responsibility for her in terms of social security.<sup>84</sup>

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80 European Court of Human Rights, *Thlimmenos v Greece*, Application No. 34369/97, Judgment of 6 April 2000.

81 European Court of Human Rights, *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium* (Belgian Linguistics Case), Judgment of 23 July 1968, Series A, No. 6, Para 10. See also UN Human Rights Committee, *General Comment No. 18: Non-discrimination*, see above, note 32; and UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, see above, note 37.

82 See, for example, Inter-American Court of Human Rights, *Advisory opinion OC-18/03*, 17 September 2003, on *Juridical Condition and Rights of the Undocumented Migrants*, Requested by the United Mexican States.

83 European Court of Human Rights, *Andrejeva v Latvia*, Application No. 55707/00, Judgment of 18 February 2009. The case concerned the transitional provisions of the Latvian State Pensions Act that created an entitlement to a retirement pension in respect of periods of employment conducted prior to 1991 in the territory of the former USSR (“outside Latvia” in the version in force before 1 January 2006).

84 *Ibid.*, Para 88.

By paying regard to the specific situation of the applicant as a stateless non-citizen, the court acknowledged the unique challenges that stateless persons face in the realisation of their rights – challenges that must be given special consideration when weighing the proportionality between the aim and means of differential treatment between citizens and non-citizens.

#### 1.2.2.4 The Practical Implementation of Equality Standards

Despite these emerging norms, the stateless remain one of the most unequal, vulnerable and discriminated categories of persons. The USA case of *Zadvydas*<sup>85</sup> demonstrates how the perception of the stateless as being “unequal” results in unjustifiable discrimination.

Kestutis Zadvydas was born to Lithuanian parents in a displaced persons’ camp in Germany in 1948. When he was eight years old, he emigrated to the United States with his family, and acquired residency. When he grew up he became engaged in criminal activity, ranging from drug crimes to petty theft, for which he was imprisoned. When he was released from prison on parole, he was taken into Immigration and Naturalization Service (INS) custody and ordered to be deported to Germany in 1994. However, Germany refused to accept Zadvydas because he was not a German citizen. Shortly thereafter, Lithuania refused to accept him as he was neither a Lithuanian citizen nor a permanent resident. In 1996, the INS asked the Dominican Republic (his wife’s country) to accept him, but this effort too proved unsuccessful. In 1998, Lithuania rejected, as inadequately documented, Zadvydas’ effort to obtain Lithuanian citizenship based on his parents’ citizenship. Without anywhere to remove him to, the INS kept Zadvydas in detention until he successfully challenged the legality of his detention in court, seven years later.

The case of *Zadvydas* illustrates the rights implications of the failure to identify and take into account the specific situation of stateless persons in the immigration context. With no country willing to accept him, *Zadvydas* was left in detention for seven years while unsuccessful efforts to deport him to three countries were made. The failure of the national immigration system to identify his statelessness, and distinguish him from other migrants, resulted in his arbitrary and indefinite detention.

Without a doubt, a robust equality approach can lead – and in the *Zadvydas* case could have led to a system which is fairer, less discriminatory and also more efficient and cost-effective in terms of detention.

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85 *Zadvydas v Davis*, 533 U.S. 678 (2001).

### 1.3 THE INTERNATIONAL STATELESSNESS REGIME

The two most important international treaties which directly address the issue of statelessness are the 1954 Convention on the Status of Stateless Persons (the 1954 Convention) and the 1961 Convention on the Reduction of Statelessness (the 1961 Convention). More recently, the 1997 European Convention on Nationality and the 2006 European Convention on the Avoidance of Statelessness in Relation to State Succession directly address the issue in a regional context. However, low levels of ratification and the limited scope of protection offered to stateless persons have undermined the effectiveness of all these instruments.

#### 1.3.1 Convention Relating to the Status of Stateless Persons

The 1954 Convention is the primary instrument which regulates the legal status and treatment of *de jure* stateless persons. Despite containing important provisions to regularise the status of stateless persons and ensure basic rights, the 1954 Convention has four significant weaknesses. Many of the protections apply only to stateless persons who are considered to be lawfully staying in a particular country; many provisions require no more preferential treatment to be extended to stateless persons than to non-nationals generally; and there is no comprehensive non-discrimination provision. Perhaps most importantly, the Convention only affords protection to the *de jure* stateless, thus creating a hierarchy within statelessness.

According to Carol Batchelor:

*The 1954 Convention ... is the primary international instrument adopted to date to regulate and improve the legal status of stateless persons and to ensure to them fundamental rights and freedoms without discrimination. ... [the Convention] attempts to resolve the legal void in which a stateless person often exists by identifying the problem of statelessness, promoting the acquisition of a legal identity, and providing, in appropriate cases, for residence which will serve as a basis for access to basic social and economic rights.*<sup>86</sup>

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86 Batchelor, Carol, "The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation", *Refuge*, 2004, 22(2).



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### 1.3.1.1 The Provisions of the Convention

The Convention was drafted before – and therefore was not enriched by – the development of international human rights law through international treaties. However, the Convention contains a strong protection basis. The preamble recalls both the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, and the “endeavour” of the UN to assure stateless persons “*the widest possible exercise of these rights and freedoms*”.<sup>87</sup> But it does not then articulate general human rights principles in a manner specific to the stateless. The non-discrimination provision found in Article 3 of the Convention does not prohibit discrimination on grounds of nationality or statelessness but rather stipulates that the provisions of the Convention apply to stateless persons without discrimination as to race, religion or country of origin.<sup>88</sup> This mirrors Article 3 of the 1951 Convention relating to the Status of Refugees (the Refugee Convention), and falls short of the guarantee of non-discrimination found in later, general treaties such as the ICCPR, ICESCR, or those adopted to address specific issues and protect vulnerable groups, including the CRC, CEDAW, CERD and CRPD.

However, the Convention does contain a number of provisions which obligate state parties to extend administrative assistance to the stateless and issue them with identity papers (regardless of legal status)<sup>89</sup> and travel documents,<sup>90</sup> as well as to facilitate the naturalisation of stateless persons.<sup>91</sup> Furthermore, the Convention requires the treatment of stateless persons to be at least as favourable as that accorded to nationals, in respect to the freedom of religion, intellectual property, access to courts, rationing, elementary public education, public relief and assistance, labour legislation and social security.<sup>92</sup> Article 7(1) of the Convention further stipulates that, except where the Convention contains more favourable provisions, States “*shall accord to*

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87 See the preamble to the 1954 Convention.

88 See Article 3 of the 1954 Convention.

89 See Articles 25 and 27 respectively of the 1954 Convention.

90 See Article 28 of the 1954 Convention. Although the requirement to issue travel documents applies only to stateless persons lawfully staying within the state territory, states are encouraged to issue travel documents to all stateless persons regardless of status, and to “*give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence*”.

91 See Article 32 of the 1954 Convention.

92 See Articles 4, 14, 16, 20, 22(1), 23 and 24 respectively of the 1954 Convention.

*stateless persons the same treatment as is accorded to aliens generally*".<sup>93</sup> However, many of its provisions require treatment no more favourable than that of aliens generally.<sup>94</sup>

Many of the Convention provisions, including those that confer no better treatment than that afforded to aliens, explicitly require that the individual is lawfully staying in the territory of the state in order to benefit from them.<sup>95</sup> Lawful entry into and stay in a country can be a particularly difficult prospect for the stateless person who, by virtue of his or her stateless status, may have no documentation. This problem is further compounded because states differ in approach as to what constitutes "lawful stay" and may for example require the individual to be granted a residence permit, rather than a limited visitor permit, before he is considered to be "lawfully staying" within the country.<sup>96</sup>

### 1.3.1.2 The Convention Definition of Statelessness

Critically, as stated above, the 1954 Convention defines a stateless person as one "*who is not considered as a national by any state under the operation of its law*".<sup>97</sup> Thus the Convention only requires states to guarantee Convention protection to *de jure* stateless persons, a group defined in a narrow, strictly legal manner.

A related problem arises from the definition of *de jure* statelessness: it requires the individual seeking protection to establish a negative; i.e. that there is no state in the world which considers the person concerned to be its citizen. Only those who can prove that they fall within the scope of this definition – and therefore can establish that they have no nationality – are entitled to protection. The difficulty of doing so, especially for a detainee in the potentially hostile environment of an immigration proceeding, must not be underestimated.

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93 See Article 7(1) of the 1954 Convention.

94 See Articles 13 (movable and immovable property), 15 (right of association), 17 (wage-earning employment), 21 (housing), 22(2) (public education other than elementary education) and 26 (freedom of movement) of the 1954 Convention.

95 See Articles 15 (right of association), 17 (employment), 21 (housing), 23 (public relief), 24 (social security), 26 (freedom of movement), 28 (travel documents) and 30(1) (non-expulsion) of the 1954 Convention.

96 See above, note 86. This study found that "*the majority of countries in the EU do not anticipate an automatic right to residence based on recognition as a stateless person*".

97 See Article 1(1) of the 1954 Convention.

The definition can be used to create a procedural obstacle to the enjoyment of human rights, and to exclude stateless persons from human rights protection. The speedy determination of nationality (or lack of it) is an essential prerequisite to stronger protection for the stateless. It is therefore important that determination processes are time-bound and follow strict criteria, to prevent long-drawn out efforts to establish nationality in multiple countries. In the *Zadvydas* case discussed above, the U.S. authorities unsuccessfully attempted to establish Zadvydas' nationality in Lithuania, Germany and the Dominican Republic, but still continued to keep him in detention and pursue his deportation.<sup>98</sup>

The Convention is silent on the procedure to be followed in determining whether a person is stateless or not. Whilst the establishment of such a procedure is implicit in the Convention, the explicit articulation of protective and "stateless friendly" norms on issues such as the burden of proof, administrative detention and timeframes for decision making are needed. It must be noted that the 1951 Convention Relating to the Status of Refugees does not contain any practical procedural rule either. But this gap has been gradually filled by norms which integrate general human rights principles.

### 1.3.1.3 Poor Ratification

The Convention also suffers from a low level of ratification – a problem faced by all the statelessness related treaties, highlighting the lack of political will to effectively address the issue. As of June 2010, only 65 countries had ratified the Convention, a number which has been boosted by a recent accession drive carried out by the UNHCR.<sup>99</sup>

This is not to say that there is no great potential within the 1954 Convention to provide better protection for stateless persons. Due to the strong connection between refugees and the stateless, the 1954 Convention was initially intended to be a protocol of the Refugee Convention. The two documents are therefore very similar in terms of structure and language. One significant difference is that the Refugee Convention does not contain a "lawful pres-

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98 See the discussion in Section 1.2.2.4 above.

99 See the UN Treaty Collection Database, available at: [http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSOnline&mtdsg\\_no=V~3&chapter=5&Temp=mtdsg2&lang=en](http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSOnline&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en) [accessed on 6 June 2010]. In contrast, the Convention on the Rights of the Child has been ratified by 193 states.

ence” requirement to enjoy Convention rights.<sup>100</sup> However, despite also being a product of the same generation, the Refugee Convention has become a far more useful and used mechanism. One reason for this is the greater consensus of the international community behind the Convention – many more states acknowledge their obligations to protect refugees than they do towards the stateless.<sup>101</sup> But it is also because the Refugee Convention has been applied as a living document. As international human rights law developed, the Refugee Convention has been enriched. A massive body of jurisprudence, principle and commentary has developed and expanded the Convention whilst staying true to its fundamental principles. Furthermore, a subsidiary protection regime has developed to cover protection gaps. Formal procedures (however problematic they may be in their operation) to process asylum claims and grant refugee status are in place in most countries; and there is a large professional network of lawyers, academics, activists and NGOs dedicated to the wellbeing of refugees, compared to a stark lack of services to protect the stateless. The 1954 Convention must follow suit and also develop into a strong, living document which provides effective and equal protection to all stateless persons.

### **1.3.2 Convention on the Reduction of Statelessness**

As its name implies, the 1961 Convention obligates state parties to prevent, reduce and avoid statelessness through taking certain positive measures. This Convention is a crucial mechanism in the effort to combat statelessness. However, it does not directly offer protection to stateless persons. Its relevance to this report is therefore lower than that of the 1954 Convention. The 1961 Convention has an even lower ratification rate than the 1954 Convention; only 37 countries had ratified it as of June 2010.<sup>102</sup>

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100 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), Art. 31.

101 The 1951 Refugee Convention has 144 states parties (and there are 147 states which are party to either the Refugee Convention or its 1967 Protocol), see the UN Treaty Collection Database, above, note 99.

102 See above, note 99.



### 1.3.3 The Role of the UNHCR

Unlike the later human rights treaties, the 1954 Convention does not create a supervisory body to oversee its implementation.<sup>103</sup> Nor does it require states to co-operate with the UNHCR, as does the 1951 Convention.<sup>104</sup> But when the Convention entered into force in 1974, the UN General Assembly gave the UNHCR a supervisory mandate on a temporary basis.<sup>105</sup> This was extended indefinitely in 1976.<sup>106</sup> Since then, the UNHCR has undertaken a responsibility under both the 1954 and 1961 Conventions.

In the light of the low levels of ratification of the Statelessness Conventions, in 1995 the Executive Committee of the UNHCR (ExCom) requested the UNHCR to promote accession to the two Statelessness Conventions as well as to provide technical and advisory services to states interested in amending their nationality legislation to meet the standards of the Conventions.<sup>107</sup>

The ExCom has since carried out various activities and adopted guidelines on the issue of statelessness. According to Carol Batchelor:

*UNHCR advocates globally for enhanced co-operation between states, in consultation with other concerned organizations and civil society, to assess situations of statelessness and to further appropriate solutions aimed at ensuring that all stateless persons have a legal status.*<sup>108</sup>

In 2006, the ExCom set out in detail the UNHCR's role pertaining to identification, prevention and reduction of statelessness and the protection of stateless persons.<sup>109</sup> This ExCom's Conclusion does not distinguish between

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103 However, Article 11 of the 1961 Convention does call for the establishment of "a body to which a person claiming the benefit of (the) ... Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority".

104 See Article 35 of the Refugee Convention.

105 United Nations General Assembly Resolution 3274 (XXIX) of December 10, 1974, UN Doc. 3274 (XXIX).

106 United Nations General Assembly Resolution 31/36 of Nov. 1976, UN Doc. A/RES/31/36.

107 UN High Commissioner for Refugees, *Executive Committee Conclusion No. 78 (XLVI) 1995*, UN Doc. A/AC.96/860.

108 See above, note 86.

109 UN High Commissioner for Refugees, *Executive Committee Conclusion No. 106 (LVII) 2006*.

*de jure* and *de facto* statelessness. Consequently, the UNHCR assumed a mandate on behalf of both *de facto* and *de jure* stateless persons, despite the fact that it had not clearly defined *de facto* statelessness.<sup>110</sup> However, despite its mandate for the stateless, the primary focus of the UNHCR has always been the protection of refugees. The UNHCR also has a more recent mandate on behalf of Internally Displaced Persons (IDPs). It is a welcome development therefore, that the UNHCR is presently reviewing the definition of statelessness and consequently its mandate with regard to the stateless.

**Chapter 1 has reaffirmed that the stateless – human beings who have no nationality or do not have an effective nationality – are entitled to the equal protection of international human rights law. This protection must be provided in their countries of habitual residence or “sojourn”, and in a non-discriminatory manner. The right to a nationality is of utmost importance to the stateless, but their enjoyment of most other rights must not be impeded because of their lack of nationality. However, the practical realisation of such rights has been hampered by political indifference, the tension between national sovereignty and human rights law, and the human rights “blind spot”. The right to a nationality and the rights to equality and non-discrimination are those most likely to be violated in the statelessness context; this can in turn have a snowball effect on the protection of other human rights of the stateless. Consequently, the right to a nationality – which must be understood as the right to an effective nationality – and the rights to equality and non-discrimination of the stateless must be protected. The existing statelessness mechanism has fallen short of providing satisfactory protection in this regard due to various reasons including the failure of the mechanism to protect the *de facto* stateless.**

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110 UN High Commissioner for Refugees, *UNHCR and De Facto Statelessness*, April 2010, LPPR/2010/01. See specifically p. ii. This paper is part of a process initiated by the UNHCR to arrive at a more comprehensive definition of *de facto* and *de jure* statelessness.

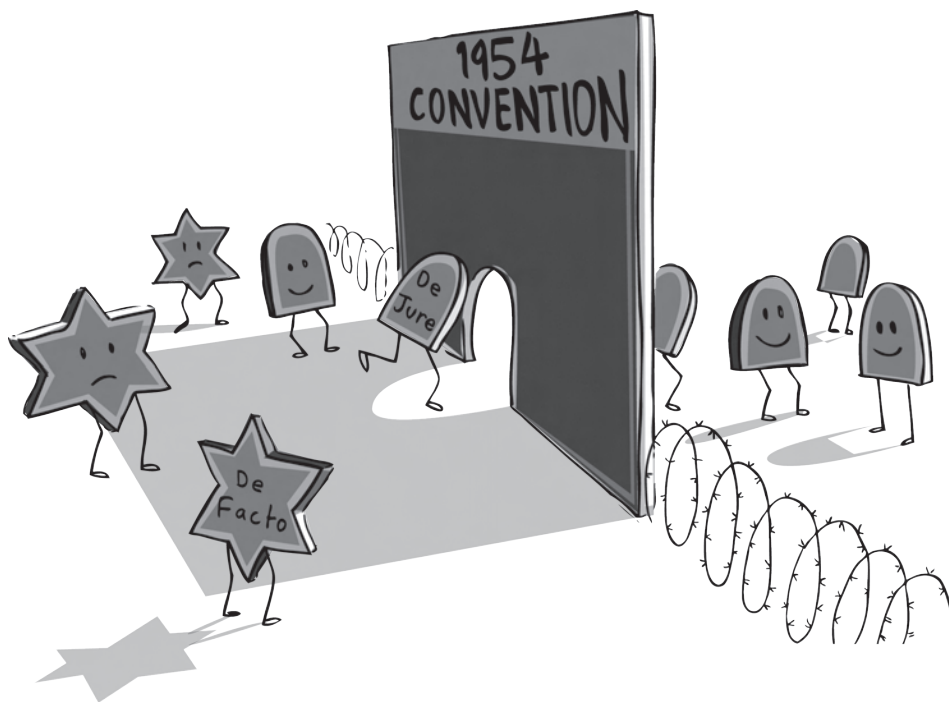
**Key Findings:**

1. Until very recently, the UNHCR, human rights treaty bodies, national, regional and international courts, states and organisations had not seen the challenge of statelessness primarily as a human rights issue. But it is essential that the problems of the stateless are addressed through the prism of well established human rights principles, of which the right to equality and non-discrimination is a key element.

2. The 1954 Convention Relating to the Status of Stateless Persons falls short in protection terms - because it only fully applies to some *de jure* stateless persons, it does not provide explicit guidance on the identification of statelessness and the limited protection it offers is not equivalent to that of later human rights treaties. International human rights law has not been sufficiently used to complement the statelessness regime.

## CHAPTER 2: CRITIQUING THE CATEGORISATION OF THE STATELESS

Stateless persons have historically been divided into two categories: those who have no legal nationality – the *de jure* stateless, and those who have no “effective” nationality – the *de facto* stateless. This categorisation is the result of an early position which broadly equated the *de facto* stateless with refugees, while viewing the *de jure* stateless as a distinct group. This is why the 1954 Convention was initially intended as a Protocol to the Refugee Convention: it was felt that the Refugee Convention offered protection to the *de facto* stateless, and that a separate additional instrument was necessary for the protection of the *de jure* stateless. However, the reality is more complex. While, as will be made clear later in this report, all refugees are either *de facto* or *de jure* stateless persons,



all *de facto* stateless persons are not refugees. According to the UNHCR, most stateless persons who require their assistance do not qualify to be refugees.<sup>111</sup> Consequently, the narrow construction of *de jure* and *de facto* statelessness has left many persons without the protection they deserve.

The combined reach of the Refugee and Statelessness Conventions has not spread as wide as is necessary to offer protection to all stateless persons. Moreover, because the concept of *de facto* statelessness has not yet been defined in a robust and comprehensive manner, many persons who should be identified as stateless persons do not receive any protection. This lacuna can be partially filled by defining *de jure* statelessness in a broader, more inclusive manner.

In this chapter, the present categorisation of statelessness is first explored. It is argued that this categorisation is insufficient and unjust on two counts. Firstly, it establishes a protection hierarchy – some *de jure* stateless persons benefit from the protection of the 1954 Convention, while other *de jure* stateless persons (those who are not legally staying in a country) only partially benefit from Convention protection and *de facto* stateless persons do not benefit from any protection at all (unless they are refugees).<sup>112</sup> Secondly, there are persons and communities who are difficult to categorise as either *de jure* or *de facto* stateless due to their particular circumstances or the lack of personal documents. These persons fall into a grey area, and their protection may depend on whether a generous approach is taken – and they are considered *de jure* stateless – or not.

The chapter concludes by offering an alternative approach to defining statelessness. This is the “ineffective nationality” test. It is based on the premise that statelessness is the violation of the right to a nationality, and occurs when a person has no nationality, or when his or her nationality is rendered ineffective. ERT recommends a legal test which can be applied

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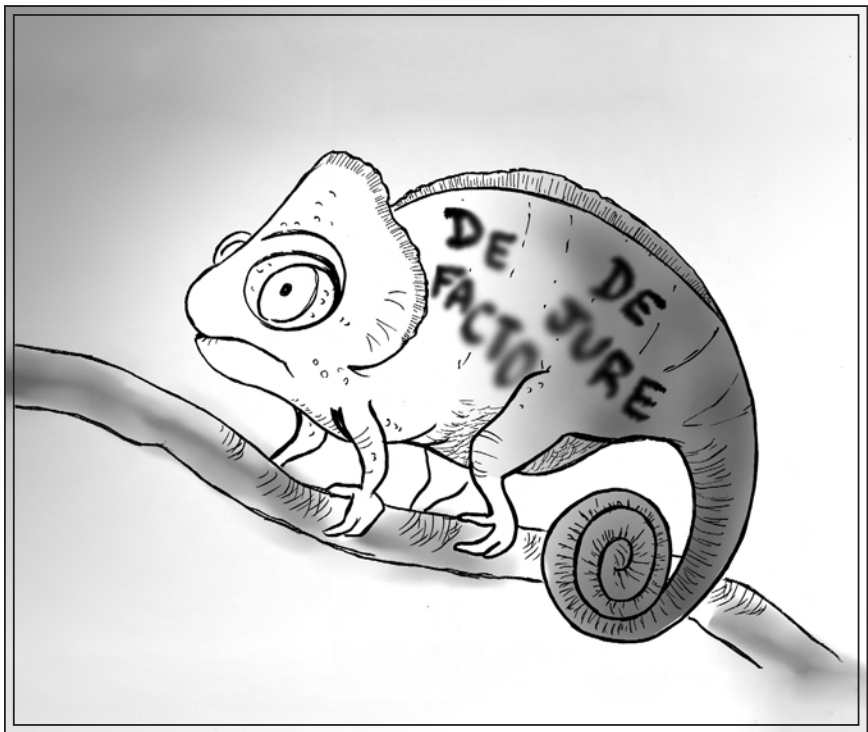
111 See above, note 3, p. 12.

112 According to Article 1. A. (2) of the Refugee Convention, a refugee is a person who, “... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

in deciding whether a nationality is effective or not, and argues that equal protection should be provided to all persons whose nationality is ineffective.

## 2.1 CATEGORIES OF STATELESS PERSONS

Because there are well developed mechanisms and institutions which provide protection to refugees, this report does not focus on persons who have been recognised as refugees. However, persons who should be recognised as refugees but are not for various reasons (including asylum seekers who are wrongfully determined not to be refugees) are highly relevant to this study. Figures 1 and 2 identify the most vulnerable groups of *de jure* and *de facto* stateless persons who are the focus of this report:



**Figure 1: De jure Stateless Persons<sup>113</sup>**

<b>Persons outside their country of habitual residence</b>	Recognised refugees benefitting from the protection of the 1951 Refugee Convention	
	Persons not recognised as refugees but benefitting from the protection of the 1954 Convention	
	Persons not recognised as refugees and not benefitting from all the protection of the 1954 Convention (e.g. due to illegal presence) but benefitting from a meaningful form of complementary protection <sup>114</sup>	
	Persons not recognised as refugees, who do not benefit from complementary protection and do not benefit from all the protection of the 1954 Convention	The most vulnerable groups which are most likely to have their liberty unduly constrained and to suffer indefinite detention and other human rights violations
<b>Persons within their country of habitual residence</b>	Persons displaced internally through deliberate policies of displacement and marginalisation actively pursued by states	
	Persons who have not been internally displaced but suffer overt discrimination and exclusion which can cause irreparable harm	
	Persons who have not been internally displaced and do not suffer overt discrimination but may face administrative difficulties in terms of travel, employment, property ownership, etc.	

113 The shaded sections in each table represent the most vulnerable groups who are most likely to have their liberty unduly constrained and to suffer indefinite detention and other human rights violations.

114 For example, the EU Qualification Directive obligates EU states to provide subsidiary protection for non-nationals within their territory who risk serious harm in their country of origin. The Directive defines serious harm as the death penalty or execution; torture or inhuman or degrading treatment or punishment; or serious threat to the individual's life due to indiscriminate violence or armed conflict. See Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal L 304, 30/09/2004 P. 0012 – 0023* (Qualification Directive).

**Figure 2: De facto Stateless Persons**

<b>Persons outside their country of habitual residence</b>	Recognised refugees benefitting from the protection of the 1951 Refugee Convention	
	Persons not recognised as refugees and who by virtue of being de facto stateless do not benefit from the protection of the 1954 Convention, but benefit from a meaningful form of complementary protection <sup>115</sup>	
	Persons not recognised as refugees, who do not benefit from complementary protection and who by virtue of being de facto stateless do not benefit from the protection of the 1954 Convention	<b>The most vulnerable groups which are most likely to have their liberty unduly constrained and to suffer indefinite detention and other human rights violations</b>
<b>Persons within their country of habitual residence</b>	Persons displaced internally through deliberate policies of displacement and marginalisation actively pursued by states	
	Persons who have not been internally displaced but suffer overt discrimination and exclusion which can cause irreparable harm	

As Figures 1 and 2 indicate, not all stateless persons are equally vulnerable to arbitrary detention and other human rights violations without any protection. Some are recognised as refugees or are provided some complementary form of protection. Others may suffer administrative and travel related inconvenience due to their statelessness but are not direct victims of acute discrimination. It is the persons who fall into the categories which have been highlighted in the tables who are at greatest risk.

115 *Ibid.*



The following section takes a closer look at the two categories of *de jure* and *de facto* statelessness. It also looks at certain groups who are difficult to place in either category due to their specific context.

### 2.1.1 *De Jure* Statelessness

As articulated above, a *de jure* stateless person has no legal nationality. The 1954 Convention Relating to the Status of Stateless Persons defines a stateless person as one “*who is not considered as a national by any state under the operation of its law*”<sup>116</sup> There can be many factors which lead to *de jure* statelessness: from a conflict of laws and problems arising from state succession, to the deliberate and discriminatory deprivation of nationality. The underlying causes of *de jure* statelessness include:

(i) Conflict of laws - A person may be rendered stateless at birth, through conflicting national laws. For example, an individual born to parents who are nationals of a foreign state, may be rendered stateless if the state of his birth grants nationality by descent (*jus sanguinis*) whilst the state of his parents only grants nationality by place of birth (*jus soli*). Similarly, a person changing nationality may be rendered stateless. Statelessness may arise in situations where the nationality laws of the state to which a person is applying requires the renunciation of nationality before acquiring the new one. This outcome can be prevented if state laws prohibited the renunciation of nationality where the individual has not acquired an alternate nationality. An example of how conflict of laws can engender statelessness is a person born in Germany (whose nationality laws are based on *jus sanguinis*) of parents who are U.S. citizens, where the person has not been subsequently naturalised in the U.S.

(ii) Policy and law which affects children - Children may be born into situations where the law or policy of the land renders them stateless. Conflict of laws is one of the possible causes behind this. Some states do not permit women to pass their nationality to their children. The children of stateless men may become stateless in such situations. Orphaned, adopted and extra-marital children are particularly vulnerable to restrictive policies and laws, which may on occasion cause their statelessness. For example, a Lebanese woman who is married to a stateless man will not be able to pass on her nationality to their children.

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116 See Article 1(1) of the 1954 Convention.

(iii) Policy and law which affects women - Some states automatically withdraw the nationality of a woman who marries a non-national. In such instances, if the nation of her spouse does not automatically provide her with citizenship, she would be rendered stateless. Even if citizenship is provided, the dissolution of marriage may result in the woman losing the nationality she acquired through marriage, without automatically re-acquiring her original nationality. For example, Iranian women who marry foreigners lose their Iranian citizenship.

(iv) Administrative practices - Bureaucracy and “red-tape” can result in persons failing to acquire a nationality which they are eligible to. Excessive administrative fees, unreasonable application deadlines and the inability to produce documents are all factors which have resulted in people being unable to acquire a nationality. For example, in Malaysia, the birth of infants must be registered within a strict time-frame. Consequently, children born out of customary marriages (which are not legally recognised) and consequently not registered at birth, may become stateless.

(v) State succession and statelessness - Changes in the territory and/or sovereignty of a state can often result in groups of persons falling in-between the cracks of old and new nationality laws. Such situations can result in statelessness on a much larger scale than the situations discussed above. Independence after colonial rule, the dissolution of a state into smaller states or the confederation of several states into one, are all situations which may trigger new citizenship laws and administrative procedures which result in statelessness. An example of this scenario is the Russian population of Latvia, which was rendered stateless after Latvia gained independence and adopted restrictive nationality legislation.

(vi) Discrimination and statelessness - While the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) provides that persons shall not be deprived of the right to nationality on discriminatory grounds,<sup>117</sup> there continue to be instances of racial, ethnic and religious discrimination resulting in groups of persons being denied citizenship and consequently made stateless. For example, Kurds in Syria and Rohingya in Myanmar illustrate this scenario.

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117 CERD, Article 5(3).

The above six categories, however, are not mutually exclusive; two or more causes can combine to generate a situation of statelessness. The infamous 1991 “erasure” from all official registers of the newly independent Slovenia of persons who were predominantly of Serbian or other former Yugoslav Republic ethnicity, coupled with a highly restrictive ethnicity-based nationality law, displayed elements of state-succession and discrimination as pathways to statelessness.<sup>118</sup>

It follows that three types of *de jure* stateless can be distinguished. Firstly, there are individuals who are the victims of a conflict of laws or administrative malfunction. Such persons are the anomaly within otherwise functioning systems, the unlucky few, who with persistence and help may at some stage be able to acquire their nationality of choice. Secondly, there are individuals who are victims of directly discriminatory laws and policies, particularly women and children. Finally there are the communities – most often minorities, the victims of targeted policies of discrimination or groups affected by state succession. In some situations, the discriminatory deprivation of nationality on a large scale can amount to persecution and consequently give rise to refugee status. Two of the most significant *de jure* stateless communities are Palestinians and the Rohingya of Myanmar.

#### 2.1.1.1 Case Study – The Rohingya in Myanmar

The Rohingya are a *de jure* stateless community.<sup>119</sup> The Rohingya are an ethnic, linguistic and religious minority from Arakan State in Myanmar.<sup>120</sup> They are predominantly concentrated in the three townships of northern Arakan State adjacent to Bangladesh. They are ethnically related to the Chittagonian Bengali people living across the border in Bangladesh and practice Sunni Islam. The Rohingya and the Chittagonian share many cultural similarities

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118 The Equal Rights Trust, “Testimony of an ‘Erased’ Man from Slovenia”, *The Equal Rights Review*, Vol. 1 (2008), pp. 67-71, available at: <http://www.equalrightstrust.org/ertdocumentbank/Erased%20Testimony.pdf>.

119 For a more detailed analysis of the Rohingya issue see The Equal Rights Trust, *Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia*, above note 22.

120 The Rohingya identity is particularly complex, and fluid, and sometimes controversial. For example, Muslim communities in Sittwe have traditionally preferred to identify themselves as “Arakanese Muslims”, as a religious group among Arakenese people, rather than as Rohingya, even though their dialect is similar to the one spoken in North Arakan. The authorities also treat them slightly differently since marriage restrictions are not imposed in Sittwe. In this report, the term “Rohingya” is being used throughout for the sake of simplicity.

as well as a common history as the Arakan Kingdom encompassed the Chit-tagong region during the 15<sup>th</sup> and 16<sup>th</sup> centuries AD.

The three townships of Maungdaw, Buthidaung and Rathedaung in North Arakan have a total population estimated at 910,000 of which 80% (725,000) are Rohingya.<sup>121</sup> Beyond North Arakan, Rohingya are also found in smaller numbers in other townships and Sittwe, the capital city of Arakan State, reportedly has a large Rohingya community.

Since Myanmar's independence in 1948, the Rohingya have been gradually excluded from the process of nation-building. Their situation worsened after the military takeover in 1962 and the Rohingya became progressively subject to restrictions and harsh treatment by the state. Under the 1974 Constitution, Arakan was recognised as a state within Myanmar but renamed Rakhine State – a name which has Buddhist connotations. Similarly, the historic name of the state capital, Akyab, was changed to Sittwe. Muslims viewed this as a long-term conscious policy to exclude their culture and people from the Arakan territory.<sup>122</sup>

At the end of 1977, violent attacks on Rohingya by both the army and the Rakhine Buddhist population led to a mass exodus of more than 200,000 Rohingya to Bangladesh. Repatriation followed under a bilateral agreement between the governments of Bangladesh and Myanmar (to which the UNHCR was not a party). To ensure repatriation, Bangladesh used coercive tactics and withheld food rations; 12,000 refugees died between 1 June 1978 and 31 March 1979.<sup>123</sup>

Subsequently, Myanmar's military regime promulgated the 1982 Citizenship Law depriving the Rohingya of the right to citizenship.<sup>124</sup> The law categorises citizens of Myanmar into three: full, associate and naturalised. Full citizens are those who belong to one of the 135 "national races" as stipulated by the

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121 See EuropeAid, *Strategic Assessment and Evaluation of Assistance to Northern Rakhine State in Myanmar*, TRANSTEC, 19 December 2006.

122 Smith, Martin, *The Muslim Rohingyas of Burma*, unpublished draft of a paper presented at the Conference of Burma Centrum Nederland, 11 December 1995.

123 Linquist, Alan, *Report on the 1978-1979 Bangladesh refugee relief operation*, June 1979, available at: [http://www.burmalibrary.org/docs/LINDQUIST\\_REPORT.htm](http://www.burmalibrary.org/docs/LINDQUIST_REPORT.htm) [accessed on 6 March 2010]. Mr. Linquist was the Head of the Cox's Bazar Sub-Office of the UNHCR in 1978.

124 *Burma Citizenship Law* [Myanmar], 15 October 1982, available at: <http://www.unhcr.org/refworld/docid/3ae6b4f71b.html> [accessed 17 July 2009].

state.<sup>125</sup> The Rohingya do not appear on this list and the government of Myanmar does not recognise the term “Rohingya”.<sup>126</sup> It has been observed that:

*[T]he Rohingya are recognised neither as citizens nor as foreigners. The Burmese government also objects to them being described as stateless persons but appears to have created a special category: “Myanmar residents”, which is not a legal status.*<sup>127</sup>

Myanmar consistently refers to the Rohingya as illegal immigrants from Bangladesh. In 1998 in a letter to the then UNHCR High Commissioner Mrs. Sadako Ogata, Lt-Gen. Khin Nyunt, First Secretary of the State Peace and Development Council, wrote:

*Suffice it to say that the issue is essentially one of migration, of people seeking greener pastures. These people are not originally from Myanmar but have illegally migrated to Myanmar because of population pressures in their own country. ...They are racially, ethnically, culturally different from the other national races in our country. Their language as well as religion is also different.*<sup>128</sup>

On 9 February 2009, Ye Myint Aung, the Myanmarese Consul in Hong Kong, in a letter to all heads of foreign missions and the media stated that:

*In reality, Rohingya are neither “Myanmar People” nor Myanmar’s ethnic group. You will see in the photos that their complexion is “dark brown”. The complexion of Myanmar people is fair and soft, good looking as well ... [The Rohingya] are as ugly as ogres.*<sup>129</sup>

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125 The list of 135 “national races” was published by Col. Hla Min, *Political Situation of Myanmar and its Role in the Region*, Office of Strategic Studies, Ministry of Defence, Union of Myanmar, February 2001, pp. 95-99. It is also available on the following Myanmar Ministry of Hotels and Tourism website: <http://www.myanmar.gov.mm/ministry/hotel/fact/race.htm> [accessed on 23 May 2010].

126 Lewa, Chris, “North Arakan: An open prison for the Rohingya in Burma”, *Forced Migration Review*, Issue 32, April 2009.

127 *Ibid.*

128 Letter from Lt Gen Khin Nyunt, First Secretary of State Peace and Development Council, to Mrs. Sadako Ogata dated 5 February 1998.

129 Agence France Press, *Myanmar envoy brands boat people ‘ugly as ogres’*, 10 February 2009, available at: [http://www.google.com/hostednews/afp/article/ALeqM5j\\_x2afxntqjUV3PuaTz6jy12\\_Yg](http://www.google.com/hostednews/afp/article/ALeqM5j_x2afxntqjUV3PuaTz6jy12_Yg) [accessed on 10 March 2010].

In 1991, a strong Myanmarese army presence along the Bangladesh border in North Arakan resulted in widespread forced labour, rape and other human rights abuses, which triggered a mass outflow of some 250,000 Rohingya to Bangladesh (about 30% of the total Rohingya population of North Arakan at the time). In 1994, a mass repatriation of approximately 236,000 Rohingya back into Myanmar took place, although there had been no significant improvement in the human rights situation. On the contrary, the establishment in 1992 of a paramilitary border administration force named NaSaKa was followed by greater restrictions on the Rohingya population including restrictions on movement and marriage. Repression of the Rohingya reflects deliberate policies of exclusion against a despised minority group perceived as foreign invaders.

Many Rohingya should be recognised as refugees because of the persecution they suffer in their home country. However, only a small number are formally recognised as refugees in Bangladesh, Malaysia and elsewhere. Hundreds of thousands do not receive refugee protection outside Myanmar. The second and third generations of these populations are not protected as stateless persons. Furthermore, there is a large Rohingya population of close to one million still within Myanmar, who are not protected by their home state.

On 2 April 2007, six UN human rights experts issued a joint statement urging Myanmar to:

*... [R]epeal or amend the 1982 Citizenship Law to ensure compliance of its legislation with the country's international human rights obligations ... and to guarantee that the right to nationality ... finds meaningful expression within Myanmar's borders.<sup>130</sup>*

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130 They were the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sergio Pinheiro; the Independent Expert on minority issues, Gay McDougall; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène; the Special Rapporteur on adequate housing, Miloon Kothari; the Special Rapporteur on the right to food, Jean Ziegler; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt. See UN Press Release, *UN human rights experts call on Myanmar to address discrimination against Muslim minority in North Rakhine State*, 2 April 2007, available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/F0ED9448671A73E6C12572B100553470?opendocument> [accessed on 13 March 2009].

### 2.1.2 *De Facto* Statelessness

The previous section considered *de jure* statelessness. *De facto* statelessness is more difficult to grapple with because its definition is based on the notion of “ineffective nationality” which has not yet been established as a technical legal concept. An early United Nations approach characterised *de facto* stateless persons as those who:

*[H]aving left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals.*<sup>131</sup>

This approach – which pre-dates both the 1951 Refugee Convention and the 1954 Statelessness Convention – excludes from protection *de facto* stateless persons who never crossed international borders, as well as those who did not meet the criteria necessary to be given refugee status.

The UNHCR offered a new, broader but vaguer understanding in 1961, stating that “*there are many persons who, without being de jure stateless, do not possess an effective nationality. They are usually called de facto stateless persons.*”<sup>132</sup> In a more recent publication, the UNHCR has defined a *de facto* stateless person as one who is “*unable to demonstrate that he/she is de jure stateless, yet he/she has no effective nationality and does not enjoy national protection.*”<sup>133</sup>

But this leaves unanswered the question of what is meant by “effective nationality”.<sup>134</sup> Consequently, *de facto* statelessness has never been comprehensively defined and the extent of the problem never fully understood. The UNHCR is addressing this protection gap through a process of reflection and consultation, in which ERT is participating. A recent UNHCR paper analyses the historical development of the notion of *de facto* statelessness and proposes this working definition:

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131 See above, note 25. See also Weis, Paul, above note 23, p. 164.

132 UN Doc A/CONF.9/11 (30 Jun. 1961), 4, as cited in Batchelor, see above, note 23, p. 251.

133 See above, note 3, p. 11.

134 See above, note 8.

*De facto stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country.*

*Persons who have more than one nationality are de facto stateless only if they are outside all the countries of their nationality and are unable, or for valid reasons, are unwilling to avail themselves of the protection of any of those countries.*<sup>135</sup>

This working definition is strikingly similar to the initial 1949 UN approach referred to above. Before arriving at this definition, the UNHCR paper looked at different vulnerable groups who have increasingly been regarded by the UNHCR and others as *de facto* stateless, as the “traditional view” of *de facto* statelessness was broadened. These groups are:

- *Persons who do not enjoy the rights attached to their nationality;*
- *Persons who are unable to establish their nationality, or who are of undetermined nationality;*
- *Persons who, in the context of state succession, are attributed the nationality of a state other than that of the state of their habitual residence.*<sup>136</sup>

However, after analysing each of these groups, the paper concluded that:

*[E]ach of these categories is invalid, since in some cases the persons concerned are actually de jure stateless, in other cases they fit the traditional conception of de facto statelessness, and in yet other cases they should not be considered de facto stateless at all.*<sup>137</sup>

Given that this is a working definition, it is premature to comment. However, it must be stated that the definition’s exclusion of persons who are inside their country of nationality is a matter for concern.

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135 See above, note 110, p. 61.

136 *Ibid.*, p.32.

137 *Ibid.*, p. 60.



### 2.1.2.1 Scenarios of *De Facto* Statelessness

ERT's approach has been to identify different scenarios which amount to *de facto* statelessness. The *de facto* stateless would range from those who have been deprived of effective nationality and state protection by administrative mistake, to those targeted for discrimination, persecution and abuse by the state. In between these two extremes would be those within their home countries who face undue administrative and bureaucratic indifference, delays and corruption; those who lack documentation; those who are in a foreign land and find themselves without consular protection; and those who are nationals of a "collapsed" or "failing" state.

*De facto* statelessness is most evident and problematic in the context of immigration – when state authorities attempt to remove persons from their country but fail to do so for various reasons as mentioned below. This immigration context is particularly relevant to Part Two of this report and the discussion on immigration detention. However, *de facto* statelessness may be relevant to non-immigration contexts as well. The following scenarios of "*de facto*" statelessness have been identified through ERT research:

- (i) Lack of consular protection because:
- a. There are no diplomatic relations with the country of nationality. For example, the U.S. cannot deport irregular immigrants to Cuba for this reason. This creates a situation of limbo in which the U.S. authorities are unable to deport a Cuban national and are equally unwilling to allow them to remain within the USA; or
  - b. The country of nationality has no consulate or diplomatic representation. Many small or poor countries cannot afford to maintain consulates globally; or
  - c. There is a consulate, but it does not co-operate in providing documentation or confirming nationality and admission. For example in the UK, some citizens of countries such as Algeria and Iran, against whom removal proceedings are instigated, remain non-deportable because their respective consulates do not issue them with travel documents. This may be because – in the absence of passports or other documentation – the consulates do not believe that the persons concerned are citizens of their countries. Or it may be a result of arbitrariness and inefficiency on the part of the consulate concerned.

In such situations when persons do not receive consular protection, they must be considered to be *de facto* stateless.

(ii) The non-availability of transport facilities and/or the non-recognition of the travel documents issued by a particular country. For example, Somali passports are not recognised by many countries. This too can create a situation of limbo where deportation proceedings are indefinitely postponed. To give three examples:

a. According to the immigration policy of New Zealand:

*There is currently no authority in Somalia that is recognised by the New Zealand Government as being competent to issue passports on behalf of Somalia. As a result Somali passports are not acceptable travel documents for travel to New Zealand and visas or permits must not be endorsed in them.*<sup>138</sup>

b. In the USA, the Department of State has stated that:

*There is no competent civil authority in Somalia. The Government of Somalia ceased to exist in December of 1990. Since that time the country has undergone a destructive and brutal civil war, in the course of which most records were destroyed. Those few records not destroyed are in the hands of private individuals or are otherwise not retrievable. There are no police records, birth certificates, school records etc., available from Somalia... Somali passports are no longer valid for visa-issuance purposes.*<sup>139</sup>

c. The Immigration and Refugee Board of Canada has stated that:

*Canada will not accept the Somali passport as a valid travel document because since 1991, Somalia has been functioning with virtually no government, and satellite "Somali embassies" with no oversight from a central government have sold blank passport stock to finance their operations.*<sup>140</sup>

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138 New Zealand Immigration Service Operations Manual, A2.15 Unacceptable Travel Documents, available at: <http://www.immigration.govt.nz/opsmanual/4851.htm> [accessed on 6 June 2010].

139 U.S. Department of State, Somalia Reciprocity Schedule, available at: [http://travel.state.gov/visa/firvi/reciprocity/reciprocity\\_3671.html](http://travel.state.gov/visa/firvi/reciprocity/reciprocity_3671.html) [accessed on 15 August 2009]

140 Immigration and Refugee Board of Canada, Somalia: Passports and other documentation that could assist with identification, 7 May 2007, SOM102471.E, available at: <http://www.unhcr.org/refworld/docid/46fa53791e.html> [accessed on 6 April 2009]

(iii) In some contexts, implementation of the principle of *non-refoulement* can lead to *de facto* statelessness. This principle of human rights and refugee law prohibits states from removing non-citizens to a situation of persecution or irreparable harm.<sup>141</sup> The principle of *non-refoulement* has become an “*essential and non-derogable*”<sup>142</sup> cornerstone of refugee law, and is now part of international human rights law.<sup>143</sup> In the context of statelessness, the refugee law obligation of *non-refoulement* is irrelevant. However, the principle has a broader human rights application. The Convention against Torture prohibits its state parties from deporting persons to countries where they would be in danger of being subjected to torture.<sup>144</sup> While the ICCPR does not contain any express bar to *refoulement*, the HRC has stated that, “*states parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement*”.<sup>145</sup>

Perhaps most relevant to stateless persons is General Comment 31 of the Committee, which states that:

*[T]he Article 2 obligation requiring that state parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable damage, such*

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141 See Office of the High Commissioner for Human Rights, *Discussion paper: Expulsions of aliens in international human rights law*, Geneva, September 2006, available at: <http://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf> [accessed on 6 January 2009]. Also see UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html> [accessed 6 January 2009], for a useful discussion on this principle.

142 *Ibid.*

143 Goodwin-Gill, Guy, “Non-refoulement and the new asylum seekers”, *Virginia Journal of International Law*, 26(1986), p. 897.

144 See Article 3 of the CAT.

145 UN Human Rights Committee, *General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, 10/03/92, Para 9. The principle has since been strengthened to the extent that in its opinion in the case of *Kindler v Canada*, the Committee held that if a violation of a person’s rights were a necessary and foreseeable consequence of a state party deporting a person, the state party itself may be in violation of the Covenant. See CCPR/C/48/D/470/1991, 5 November 1993, Para 13.2.

*as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may be subsequently removed.*<sup>146</sup>

Like the HRC, the European Court of Human Rights has also interpreted the text of the ECHR to prohibit *refoulement* in certain situations,<sup>147</sup> and has extended this to cases of deportation as well.<sup>148</sup> The ACHR also upholds the principle of *non-refoulement*<sup>149</sup> and the Inter-American Court of Human Rights has the power to adopt provisional measures “*in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons*.”<sup>150</sup> The Court has used these powers in the past to intervene in the threatened collective expulsion of stateless Haitians and Dominicans of Haitian origin by the Dominican Republic.<sup>151</sup>

The principle of *non-refoulement* is particularly relevant to stateless persons in security and immigration detention. However, the problem often faced by stateless persons is that even though they may benefit from the principle of *non-refoulement*, the alternative they are often afforded is one which also violates their rights – continued detention. For example, the UN Working Group on Arbitrary Detention found that the detention of a Somali national for four and a half years, because it was unsafe to deport him to his country of origin, was arbitrary.<sup>152</sup> Indefinite detention has been deemed to be arbitrary as well as a form of cruel, inhuman and degrading treatment. Therefore it is obvious that resorting to indefinite detention in order to protect a person from possible torture, cruel, inhuman or degrading treatment in another country is absurd. If the motivation to not *refoul* persons is based on

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146 UN Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26/05/2004, Para 12.

147 See, for example, European Court of Human Rights, *Soering v United Kingdom*, (1989) 11 EHRR. 439.

148 European Court of Human Rights, *Vilvarajah v United Kingdom* (1991) 14 EHRR. 248.

149 See Article 22 (8) of the ACHR.

150 See Article 63 (2) of the ACHR.

151 Orders of the Inter-American Court of Human Rights dated 18 August 2000, 12 November 2000, and 26 May 2001 (Ser. E) (2000 and 2001).

152 UN Working Group on Arbitrary Detention, *Opinion 45/200611*, as cited in the Report of the Working Group on Arbitrary Detention, *Annual Report 2007*, Human Rights Council, Seventh Session, UN Doc. A/HRC/7/4, 10 January 2008, Para 48.

a commitment to protect them from torture, cruel, inhuman and degrading treatment, the consequences of actions under such a commitment must not result in a violation of the same right.

(iv) A fourth scenario is the extreme case of the failed state. In a situation where a state has completely lost the ability to operate as a state and to fulfil its obligations to its citizens, there is a strong argument to be made that both in an immigration context and also within the territory of the state concerned, its citizens are without an effective nationality.

(v) Finally, there are persons who lack documentation and/or recognition as a citizen in their own country. This may result in situations of arrest and detention, restriction of movement including the inability to travel internationally, the inability to access services which are the legitimate entitlement of citizens, as well as the systematic violation of human rights including in the context of internal displacement. ERT believes that such situations may result in *de facto* statelessness, but further reflection is needed on this matter.

All these scenarios are manifestations of legal and socio-political realities which shape human experience. The nature of each situation may change with the passing of time, and is in that sense not permanent. For example, the lack of personal identity documentation can be addressed through a documentation drive. Furthermore, there is often an unpredictability attached to how long it would take for the situation to change (if it ever will). Therefore such scenarios can be viewed as being “barriers” to effective nationality and not as situations of statelessness *per se*.<sup>153</sup> It is the combined elements of time and gravity of the consequences which would transform such a barrier into a scenario resulting in statelessness. For example, in the context of consular protection, the question of how much time must pass before the non-existence or non-cooperation of a consulate would result in a situation of *de facto* statelessness is pertinent. It would be wrong to argue that the failure of a consulate to reply immediately to a request for documentation renders a person stateless.

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153 For example, the UK Border Agency views situations of non-cooperation by consulates or those in which there is an obligation of *non-refoulement* as “barriers to removal”. See UK Border Agency response to ERT Questionnaire. 1 April 2009.

### 2.1.2.2 Case Study – Somalia and *De Facto* Statelessness

Somalia is an example of a situation in which most of the above scenarios converge. But despite the existence of multiple reasons to consider Somalis as *de facto* stateless persons in need of international protection, a number of states disregard their lack of effective nationality and attempt to circumvent all obstacles to removal and return unwanted Somalis to Somalia. The country has been without an effective state structure since the fall of Siad Barre's regime in 1991. According to UK Border Agency operational guidance on Somalia in 2007:

*The human rights situation in Somalia is defined by the absence of effective state institutions. Somalis enjoy substantial freedoms - of association, expression, movement - but live largely without the protection of the state, access to security or institutional rule of law.*<sup>154</sup>

In its position paper of November 2005, the UNHCR called on all governments to refrain from any forced returns to southern and central Somalia.<sup>155</sup> The paper emphasised that “*an internal flight alternative is not applicable in Somalia, as no effective protection can be expected to be available to a person in an area of the country, from where he/she does not originate*”<sup>156</sup>; and recommended that asylum-seekers originating from southern and central Somalia are in need of international protection and, generally, should be granted refugee status or complementary forms of protection.<sup>157</sup>

Many of the Somali nationals in the UK should be recognised as refugees or be provided with subsidiary protection under the EU Qualifications Directive. The EU Qualifications Directive defines a person eligible for subsidiary protection as:

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154 UK Border and Immigration Agency, *Operational Guidance Somalia*, v15.0 12 November 2007, available at: <http://www.unhcr.org/refworld/pdfid/47454ca92.pdf>

155 UN High Commissioner for Refugees, *UNHCR Advisory on the Return of Somali Nationals to Somalia*, 2 November 2005, Para 8, available at: <http://www.unhcr.org/refworld/docid/437082c04.html> [accessed 3 June 2009].

156 *Ibid.*, Para 5. See also UN High Commissioner for Refugees, *UNHCR Position on the Return of Rejected Asylum Seekers to Somalia*, 10 January 2004, available at: <http://www.unhcr.org/refworld/docid/4020dc864.html> [accessed 3 June 2009].

157 See above, note 155, Para 7.

*A third country national ... who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned if returned to his or her country of origin ... would face a real risk of suffering serious harm ... and is unable or owing to such risk unwilling to avail himself or herself of the protection of that country.*<sup>158</sup>

Article 15 of the Directive defines serious harm as:

- (a) *(The) death penalty or execution; or*
- (b) *torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or*
- (c) *serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.*<sup>159</sup>

However, the UK continues to attempt to narrow the criteria for protection. The UK authorities do not accept UNHCR's position, arguing that it "*provides a broad assessment of the situation in Somalia*" and "*asylum and human rights claims are not decided on the basis of the general situation - they are based on the circumstances of the particular individual and the risk to that individual.*"<sup>160</sup> The UK maintains that an internal flight alternative remains viable for some applicants.<sup>161</sup>

The UK Asylum and Immigration Tribunal (AIT) has found that a state of internal armed conflict exists in central and southern Somalia, but that outside of Mogadishu the level of indiscriminate violence was not such that all civilians are at individual risk solely on account of being present in that region.<sup>162</sup> For individuals to be granted humanitarian protection on grounds that to stay in Mogadishu would expose them to a real risk of treatment contrary to Article 3 of the ECHR and Article 15 of the Qualifications Directive, they

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158 See Article 2 (e) of the Qualification Directive, above, note 114.

159 *Ibid.*, Art. 15.

160 UKBA, Operational Guidance Note: Somalia, March 2009.

161 *AM and MM Somalia* Country Guidance [2008], as referred to in the UK Border Agency Operation Guidance Note on Somalia, 2009.

162 *AM & AM (armed conflict: risk categories) Somalia* Country Guidance [2008] UKAIT 00091.

would have to show that there was no viable relocation option available to them outside of Mogadishu.<sup>163</sup>

However, in February 2009 in the case of *Elgafaji v Staatssecretaris van Justitie* the European Court of Justice ruled that article 15(c) of the Qualification Directive went beyond article 3 ECHR<sup>164</sup> protection:

*[A]rticle 15(c) of the Directive, in conjunction with article 2(e) of the Directive, must be interpreted as meaning that the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances, and the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place ... reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.<sup>165</sup>*

The case of *HH (Somalia)*<sup>166</sup> concerned a Somali citizen who was recommended for deportation following an immigration offence in November 2006. On appeal, she claimed that she would suffer persecution if returned to Somalia as she was from the minority Ashraf clan. A tribunal in March 2007 rejected that claim and concluded that she was from a majority clan in Mogadishu. In January 2008, the AIT dismissed her appeal on Article 3 ECHR and article 15(c) Qualification Directive grounds. They held that despite the serious situation in and around Mogadishu in 2007, there was no reason to believe that women were being particularly targeted, or that a member of a majority clan would be unable to find protection from other clan members. They held

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163 See above, note 160, Para 5.3.

164 According to Article 3 of the ECHR: *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

165 *Elgafaji v Staatssecretaris van Justitie* [2009] 1 WLR 2100, Para 43.

166 *HH (Somalia) and others v Secretary of State for the Home Department* [2010] EWCA Civ 426.



that Article 15(c) did not add anything to the provisions of Articles 2 and 3 of the ECHR.

HH then appealed to the Court of Appeal. After HH's original appeal was heard, the *Elgafaji* case clarified the application of Article 15(c). The respondents in HH's case conceded that Article 15(c) had not been applied in conformity with these rulings, but held that had it been, the outcome would have been the same, therefore there was no material error of law. The Court of Appeal rejected the appeal on this basis. However, they recognised that this decision was at the time of their judgment obsolete due to the deteriorating circumstances post-January 2008. They therefore recommended a fresh application for protection.

While the most recent Operational Guidance Note on Somalia states that “[t]here is no policy precluding the return of failed Somali asylum seekers to any region of Somalia”<sup>167</sup>, the country guidance case of *AM & AM* emphasised the difficulty and uncertainty surrounding such returns:

*[I]n the context of Somali cases there are more uncertainties surrounding method [of removal] than are normally to be found in the context of removals to other countries. ... There are uncertainties (at least currently) about what travel documents will be required and/or accepted; the timing of the return flights (so as to ensure parties to the conflict do not seek to fire at civilian aircraft) and, crucially, about what arrangements need to be in place to ensure safe en route travel. ... it cannot be ruled out that ensuring such safety may depend on returnees at least having had the opportunity to arrange an armed escort beforehand. All will depend on the situation at the actual time of any enforced removal.*<sup>168</sup>

Consequently, operational guidance notes state that “If any protective measures are necessary in order to travel from the airport, it is feasible to arrange such measures... The grant of asylum is therefore not likely to be appropriate in such cases.”<sup>169</sup> The “protective measures” referred to include the use of pre-

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167 See above, note 160, Para 5.2.

168 See above, note 162, Para 31.

169 See above, note 160, Para 3.7.13.

arranged armed militia escort which was also addressed in the *AM&AM* case and deemed lawful.

Despite evidence pointing to Somalia being a failing (if not failed) state, in which its citizens do not enjoy effective nationality or state protection to the extent that armed escorts may be necessary for some returnees, UK authorities continue in their attempts to deport Somalis. The UK is not alone in this regard, with the USA too taking a similar stance. An approach which is more sensitive to *de facto* statelessness is essential if a change in policy and attitude is to be effected.

### **2.1.3 Grey Areas**

By categorising stateless persons into the two groups of *de jure* and *de facto* stateless and affording Convention protection only to the *de jure* stateless, a hierarchy which results in unequal protection has been established. Another dimension is added to this problem by the reality that in certain contexts it is difficult to identify which category of statelessness a particular person or group falls into; this is acute where the evidence of statelessness takes the form of a lack of personal identity documentation. Several communities in Kenya are examples of this.

#### 2.1.3.1 Case Study - Kenya's Stateless Populations

While some of Kenya's stateless can be classified as being *de jure* stateless, this conclusion is not always easily reached. The connection between lack of documentation on the one hand, and statelessness on the other is particularly relevant. Three communities in particular – the Kenyan Nubians, Somalis and the Coastal Arabs – have long been on the margins of Kenyan citizenship. Faced with discrimination, bureaucracy and lack of documentation, they have been engaged in a long struggle, with limited success, to be recognised as Kenyan citizens. While some members of such communities do have Kenyan citizenship, many do not, and all suffer varying degrees of “ineffective nationality”. Furthermore, the nationality status of persons within these communities is fluid, and because of this, it is difficult to attempt to make a clear distinction between the *de jure* and the *de facto* stateless amongst them.

### Kenyan Nubians

The Nubian community in Kenya originated from Sudan. They were conscripted into the British colonial army, brought to Kenya in the 19<sup>th</sup> century, and have lived in Kenya for over a century. They number close to 100,000, but are not included amongst the 42 officially recognised ethnic groups of Kenya which are eligible for citizenship.<sup>170</sup> The Nubian community is not included in the census reports and official figures remain unknown. According to Adam Hussein – a Kenyan Nubian activist, the Kenyan Nubians remain one of the country’s most invisible and under-represented communities economically, politically, socially and culturally. This, he says, is as a result of prolonged discrimination, exclusion and violation of their human rights and fundamental freedoms over many decades.<sup>171</sup>

Citizenship in Kenya is determined according to the principle of *jus sanguinis* (parentage), but the law also provides citizenship for other Africans brought to the country by the colonial authorities.<sup>172</sup> In 2003 the Nubians asked the Constitutional Court to declare them to be citizens by birth, and failed. In 2005 the Nubian community filed an application to the African Commission on Human and Peoples’ Rights (ACHPR) under the African Charter on Human Rights. The case is awaiting judgment at present, but perhaps as a result, the Kenyan government recently acknowledged the need to review its policy pertaining to immigration and citizenship.

It is possible for Nubians to obtain Kenyan citizenship through an individual application process. In the past, applicants have had to demonstrate that one of their grandparents was born in or had become a citizen of Kenya. Nubian applications are routinely subjected to the scrutiny of a “vetting committee”, comprised of security and immigration officials, as well as community elders who can presumably vouch for an applicant’s identity.

In the Kenyan streets, it is not uncommon for persons to be stopped by police officers and be ordered to produce their passport or identification card. A

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170 See Lynch, Maureen and Southwick, Katherine, *Kenya: National Registration Processes Leave Minorities on the Edge of Statelessness*, Refugees International, 23 May 2008, available at: <http://www.refugeesinternational.org/policy/field-report/kenya-national-registration-processes-leave-minorities-edge-statelessness> [accessed on 15 October 2009].

171 Hussein, Adam, “Kenyan Nubians: standing up to statelessness”, *Forced Migration Review*, Issue No. 32, April 2009, p. 19.

172 See Section 92 (1) of the Constitution of Kenya.

group of Nubians in Kisii informed ERT that their day must end by 6 p.m., when they must leave the town to avoid police harassment. This was an unofficial curfew, made possible because of the denial of or delays in issuing identification cards to Kenyan Nubians. Those who do not have their identity documents end up being detained for short periods of time by police officers who release them upon payment of a bribe. *“This has turned the Nubians into a quick and unlawful source of money”*, complained a Nubian in Kisii.

The Kenyan government uses both ethnicity and territory to establish belonging. Since both Nubian ethnicity and their territory of occupancy are contested by the government, most Nubians live as stateless persons excluded from citizenship rights and without adequate protection. They live in temporary structures and often on contested lands. In terms of the *de jure* – *de facto* stateless distinction, some Nubians are *de jure* stateless, others have citizenship but are still *de facto* stateless, while yet others do not have documentation but theoretically should be regarded as citizens. Thus, within this one ethnic group, there are a variety of cases, including individuals whose status can only be established through lengthy investigation.

### Kenyan Somalis

Traditionally, Somalis live in pastoralist communities throughout the region. Due to decades of waxing and waning Somali separatism, and the fact that Kenya hosts thousands of refugees from Somalia, the government imposes strict registration processes on Kenyan Somalis. The process is reportedly inconsistent and burdened with suspicion, harassment, and corruption. Applicants must appear before vetting committees, the outcome of which one person described as “random, pure luck.” Individuals are sometimes required to register in their “home” districts, places not easily accessible, with which a person may have no practical connection. They may be asked to show a pink card from a screening process that occurred in the late 1980s, but that did not cover all Kenyan Somalis. Individuals have obtained national ID through bribery. One person said, “As long as I have cash in my pocket, that’s my ID”.<sup>173</sup>

The Galje’el, a Somali sub-clan of about 3,000 persons living in the Tana River region, have lived in Kenya for decades but the state claims that they are Somalis and not Kenyans. In 1989, a government action distinguished Kenyan Somalis from Non-Kenyan Somalis. Many Galje’el Somalis were “branded” non-Kenyans, and their identity cards were confiscated. The Galje’el were

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173 See above, note 170.

forced to move to a remote area of the country with no water, grazing land, or basic amenities. Lacking identification cards, they cannot travel freely for fear of arrest.<sup>174</sup>

Some have resorted to bribery to obtain documentation, while others have changed their identities to expedite registration, declaring they are from a different ethnic group or naming non Galje'el persons as their parents.

From Mandera in Kenya's North Eastern Province to Nairobi there are several road blocks mounted by Kenyan police officers to ostensibly check out contraband goods and firearms and to generally provide security to travellers. However, these road blocks, according to Abdi Billow, a resident of Wajir in the North Eastern Province, are a source of illegal enrichment for the policemen, because Somalis are selectively asked by police to produce their ID cards while other passengers cross without a problem.

Some of the poorest Kenyan Somalis have registered themselves as refugees so as to receive shelter and food, at the risk of losing their Kenyan nationality. To deal with this problem of loss of citizenship, the state has recently centralised its registration data and discussions are underway to grant amnesty to those Kenyans who may have registered themselves as refugees and vice versa.

These vulnerable Kenyan communities include persons who are *de jure* stateless, others who have received citizenship but do not enjoy effective nationality, and still others who have never received personal documents, and therefore are not easily identifiable as either *de jure* or *de facto* stateless. In such cases, a long investigative process would be necessary on a case-by-case basis to determine whether individuals are *de jure* stateless (and consequently eligible for protection under the 1954 Convention) or not. This context may be contrasted with the Rohingya who are clearly *de jure* stateless and Somalis who have a nationality which is ineffective. However, it is evident that all such persons have protection needs which arise from their ineffective nationality. It is much easier to establish this reality, than it is to scrutinise which category of statelessness they fall into. Consequently, ERT proposes the "ineffective nationality test" as a means of establishing whether persons require special protection or not.

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174 *Ibid.*

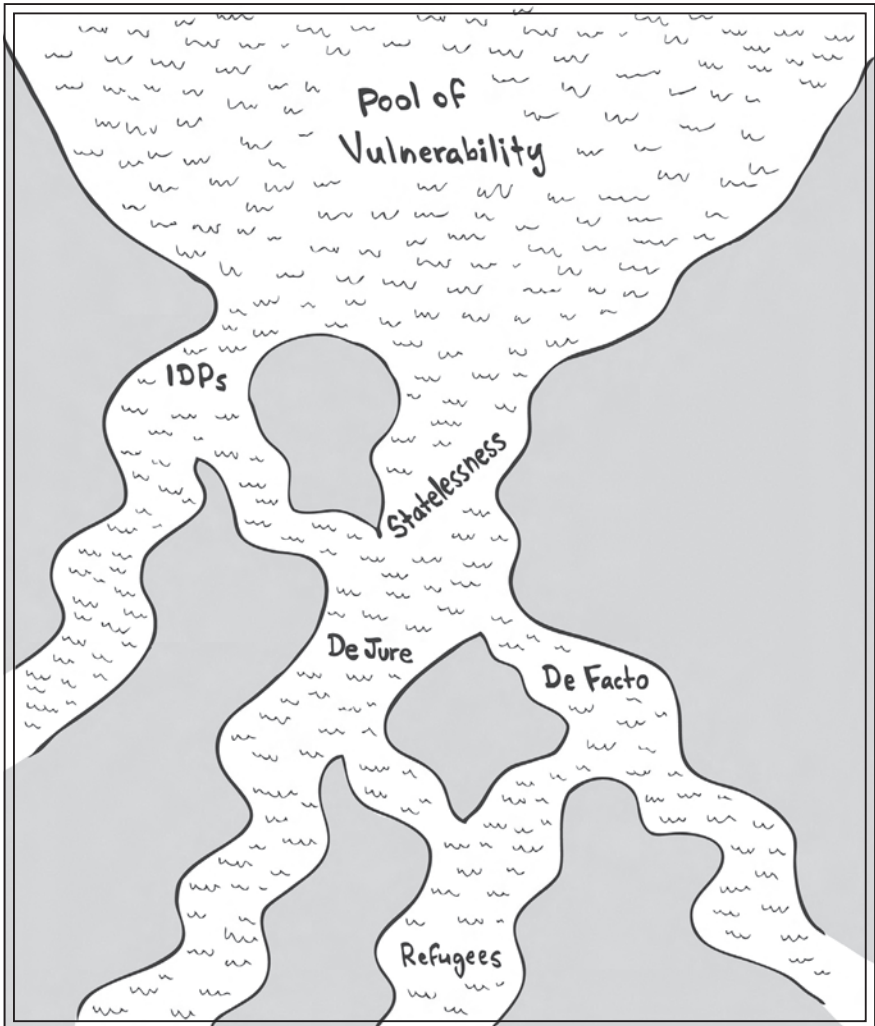
## **2.2 THE *DE JURE* - *DE FACTO* DICHOTOMY AND THE INEFFECTIVE NATIONALITY TEST**

This report challenges the hierarchy within statelessness. It argues that the distinction between *de jure* and *de facto* stateless should have limited applicability, and should in no way result in the unequal and discriminatory treatment of the *de facto* stateless, or those whose statelessness is indistinct.

One of the difficulties in addressing statelessness lies in the broad range of stateless persons, who suffer different degrees of vulnerability in multiple contexts. The distinction between *de jure* and *de facto* stateless persons may be of limited use at the level of identifying the *de jure* stateless, but it is counterproductive in terms of meeting the protection needs of the stateless population in its entirety. The human rights challenge pertaining to statelessness does not change based on whether a person is *de facto* or *de jure* stateless. Furthermore, boxing the stateless into one or the other category is not an easy task, as statelessness can be a very fluid status. In some contexts the status of statelessness can be both temporary and recurring; in others it can be permanent. As a situation changes, a stateless person may find himself an IDP, and then a refugee, or he may even find that his previously “ineffective” nationality has been rendered “effective”.

Instead of attempting such a categorisation, the stateless population can be perceived as a broad spectrum ranging from those whose statelessness has minimal negative impact on their lives, to those whose statelessness is both cause and consequence of acute discrimination, vulnerability and persecution. This spectrum is insensitive to the categorisation of *de facto* and *de jure*, being shaped instead by the realities faced by the stateless in their daily lives.

An analogy may be drawn from the world of education by comparing a child who has never been admitted into school with a child who has been admitted to a school which does not (or cannot) offer the child a proper education. The possible reasons are many; for example, a child living in an extremely remote area with no transport links to the school, there being no teachers or facilities in the school, or the school being located in a warzone. Child A – who has not been admitted into school, is equivalent to the *de jure* stateless, whilst child B who has not benefitted from his schooling is equivalent to the *de facto* stateless. The two children do not receive an education for different reasons – and it is the problem of a lack of education which must be effectively addressed.



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Even though ERT considers the *de jure* - *de facto* dichotomy to be limiting and thus not altogether useful in practice, it is aware that this dichotomy has been the basis on which the law and protection agendas have developed over the past sixty years. Consequently, it is not desirable to avoid this categorisation wherever it is relevant. In using these terms, however, it is critical to keep in mind that the importance of offering equal and effective protection to all stateless persons is paramount. A first step towards achieving such equal protection would be through the universal and non-discriminatory application of the statelessness regime.

### 2.2.1 The Ineffective Nationality Test

The right to a nationality as enshrined in the Universal Declaration on Human Rights must be understood as the right to an “effective nationality”, for a nationality which is not effective is of no value to anyone. Understanding the right to a nationality in such terms puts in question the distinction between the *de jure* and *de facto* stateless. Not having a nationality by law, and not having a nationality in effect, are both violations of the right to a nationality and both are manifestations of statelessness. It is acknowledged that the withdrawal or non-provision of a nationality is a different type of violation to the failure (intentional or not) to give effect to nationality. However, distinguishing between the two in a manner which results in protection for only one group is unequal and discriminatory. A better approach would be to assess the protection needs of each group and act to meet them on the basis of substantive equality of rights.

ERT therefore takes the position that **all persons who suffer from ineffective nationality (whether they have a legal nationality or not) should be regarded as stateless.** This approach provides a more comprehensive, inclusive and fair starting point to ensuring equal protection to all stateless persons in a non-discriminatory manner. The case studies depicted above illustrate the point that all stateless persons – be they *de jure* (like the Rohingya), *de facto* (like some Somalis) or falling into grey areas (such as the Kenyan stateless groups) – share common ground, because they do not benefit from state protection of their rights and have no effective nationality.

By taking the ineffective nationality approach to defining statelessness, the close link between refugees and the stateless becomes even more evident. The persecution suffered by refugees at the hands of their state must be placed on the high end of the spectrum of ineffective nationality. Consequently, all refugees, by virtue of not having an effective nationality, are stateless.



Some IDPs may also be viewed as stateless persons whose nationality is ineffective to protect them, and who are thus in need of international protection. Examples include those whose displacement has been caused not by natural disasters or otherwise uncontrollable events, but through deliberate policies of displacement and marginalisation actively pursued by states targeting their own citizens.

The notion of ineffective nationality needs to be construed as a technical legal term in order for it to be useful as a definition of statelessness. It must be comprehensive and inclusive to the extent that all persons who require protection because they are in effect stateless are covered by it. However, it must have clear limits and not be too broad or porous.

To go back to the analogy of the school, at what point along the spectrum of education does a school begin to provide its students with an “effective education”? At the very high end of the spectrum are schools with vast resources at their hands, the best teachers, computer technology, a rich array of sports and extra curricular activities, a strong curriculum and support structures built in to ensure that students have all their emotional and psychological needs met – the most elite schools in the world. At the lowest end is the school which is merely a shell of a building, with one teacher who attends once a month, responsible for all students of all ages – who also attend only when transport, work responsibilities and the ongoing civil conflict allow. With no curriculum to follow, no textbooks and the school playground recently bombed, this school clearly does not offer any education to its impoverished students. In-between these two extremes are the vast array of schools which provide their students with different standards of education. Where along this spectrum does the education reach a satisfactory level to be deemed “effective”?

A similar spectrum can be drawn with regard to nationality. At some point along this spectrum would lie the dividing line between effective and ineffective nationality. There are many factors which can render a nationality ineffective. Revisiting the International Court of Justice and Inter-American Court of Human Rights definitions of nationality cited above,<sup>175</sup> it becomes evident that from a legal perspective the most tangible components of an effective nationality are the existence of reciprocal rights and duties between the state and the individual and of diplomatic protection. Consequently, fac-

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175 See above, notes 8 and 9.

tors which should be taken into consideration when determining whether a person enjoys an effective nationality include:

(i) **Recognition as a national** – Does the person concerned enjoy a legal nationality, i.e. is he or she *de jure* stateless?

(ii) **Protection by the state** – Does the person enjoy the protection of his/her state, particularly when outside that state?

(iii) **Ability to establish nationality** – Does the person concerned have access to documentation (either held by the state, or which is issued by the state) to establish nationality? This access may be through a consulate, or through state officials within the country of presumed nationality.

(iv) **Guarantee of safe return** – Is there a guarantee of safe return to the country of nationality or habitual residence – or is there a risk of “irreparable harm”? Is return practicable?

(v) **Enjoyment of human rights** – Does an individual’s lack of documentation, nationality or recognition as a national have a significant negative impact on the enjoyment of her or his human rights?

The ineffective nationality test would take into consideration all these factors. The complete absence of one of them, or cumulative impact on two or more may render nationality ineffective. As mentioned in the discussion of *de facto* statelessness above, the elements of time and gravity are particularly important in this regard. The longer a situation persists, and/or the more significant the impact on the individual’s ability to lead a meaningful life, the more likely it is that his/her nationality would be deemed ineffective under this test. Revisiting the different case studies depicted above, it is clear that one or more of the elements of the “ineffective nationality test” are relevant to each case. Consequently, all individuals concerned should be recognised as stateless and accordingly protected.

In conclusion, it must be said that there must be greater appreciation of the uncertainty faced by vulnerable groups whose nationality is potentially ineffective. There is a dynamism and fluidity with which their situations can change very rapidly: an election may bring in a new sympathetic government committed to addressing the needs of such groups; the diplomatic ties between two countries may suddenly strengthen or deteriorate with positive or

negative impact; a consulate which has been indifferent to a particular type of cases may suddenly act on a next instance. This means that statelessness must not be seen only as a phenomenon which is permanent, but also as one which may be temporary, which nonetheless has an immensely negative impact on the individual.

**Chapter 2 has looked more closely at the definition of statelessness. It examined the existing categories of statelessness and analysed the close connection between the phenomena of statelessness, refugees and internal displacement. The chapter critiqued the hierarchy between *de jure* and *de facto* statelessness, and also highlighted another shortcoming of the present categorisation – that there are persons who fall in the grey area between the two categories. Chapter 2 further argued that there is no tangible link between the type of statelessness (*de jure* or *de facto*) and the level of protection required. The range of protection needs of stateless persons vary according to the extent of vulnerability, discrimination, abuse and exclusion suffered in a particular context and not according to whether an individual is *de jure* or *de facto* stateless. Consequently, protection mechanisms should not discriminate between the *de jure* and *de facto* stateless, and should instead focus on the particular context. When approaching statelessness through a protection lens, it is clear that the inequalities and gaps which result from this hierarchy are unsatisfactory. This chapter therefore proposed a more inclusive and comprehensive approach to defining statelessness. This approach is built on the notion of ineffective nationality. ERT offers a five-pronged legal test to be utilised in determining whether a nationality is effective or not. Accordingly, recognition as a national, protection by the state, ability to establish nationality, guarantee of safe return and the enjoyment of human rights are all factors which cumulatively impact on the effectiveness of a nationality.**

## Key Findings:

1. *De jure* and *de facto* statelessness may have many different causes. However, all stateless persons face vulnerabilities and challenges and the human rights of all stateless persons must be respected and protected.
2. The categorisation of stateless persons into the two groups of the *de jure* and *de facto* stateless, with greater protection provided to the former, is unjust and discriminatory. The *de facto* stateless are a particularly vulnerable group. This is because they are not protected under any specific treaty. There is also a protection gap in respect of persons who fall into the grey area between *de jure* and *de facto* statelessness.
3. The lack of consular protection is a distinctive factor with regard to *de facto* statelessness, and can arise from different causes: as a result of the non-existence of diplomatic ties between two countries, the non-existence of a consulate due to resource problems or the inability or unwillingness of a consulate to document their nationals.
4. Protection against *refoulement* must be recognised as a factor in *de facto* statelessness, including where the individual is not a refugee. While states have generally accepted their obligations of *non-refoulement* due to human rights considerations, they have not always taken the next step of recognising the individual as having ineffective nationality – and the need to protect on this basis.
5. There may be obstacles to return other than the lack of consular protection or the obligation of *non-refoulement*. Practical or administrative obstacles of a permanent or indefinite nature – such as the non-availability of transport links or the non-acceptance of travel documents must be recognised as factors which may lead to *de facto* statelessness.
6. There may be situations where persons living in their country of nationality are rendered *de facto* stateless. The inability to obtain documentation, resulting in systematic discrimination and abuse is one such scenario. Such *de facto* stateless persons also have protection needs that should be met. However further reflection is needed in regard to this category of *de facto* stateless persons.

# PART TWO

## STATELESS PERSONS IN DETENTION

In PART ONE, some of the big questions pertaining to statelessness were addressed: who the stateless are, how international law protects them and what gaps in protection exist. In PART TWO, the focus is narrowed to detention issues.

CHAPTER 3: INTERNATIONAL AND REGIONAL LEGAL NORMS RELATING TO DETENTION looks at the principles and norms pertaining to the detention and restriction of liberty of the stateless. This chapter is divided into two sections. The first section – *International and Regional Jurisprudence* – looks closely at how Article 9 of the ICCPR and Article 5 of the ECHR have been developed by the courts and treaty bodies in their application to the detention of non-nationals, including stateless persons. In the second section – *Emerging Standards and Guidelines on the Detention of Stateless Persons* – the UNHCR Guidelines on the Detention of Asylum Seekers and various European texts including the Return Directive are analysed.

The next three chapters set out ERT’s research findings pertaining to the detention of stateless persons in different countries. The most visible form of restriction of liberty from an international human rights perspective is the administrative immigration detention of stateless persons outside their country of habitual residence. This is also the area in which international human rights law can potentially have the greatest impact. Other forms of detention or restriction of liberty include criminal detention and security detention.

CHAPTER 4: IMMIGRATION DETENTION reviews the two main forms of administrative immigration detention and restriction of liberty. These are the detention/restriction of liberty pending a decision on an asylum application, and the detention/restriction of liberty of those who are to be removed or deported. This chapter is divided into three sections based on the geographic and thematic grouping of the countries researched by ERT. The first section is on the immigration detention of stateless persons in the United States, the United Kingdom and Australia, followed by a section on the immigration detention of stateless persons in Kenya and Egypt. The final section is on the immigration detention of stateless Rohingya in Bangladesh, Malaysia and

Thailand, and provides insights into the cyclical nature of discrimination, exclusion, detention, deportation and trafficking suffered by Rohingya in each of these countries.

CHAPTER 5: SECURITY DETENTION begins by recognising a growing global trend of resorting to this type of detention, after which a closer look at prolonged efforts to close down the Guantanamo Bay facility is taken. Guantanamo Bay is a prime example of the human cost of emergency policies of detention which have failed to give due consideration to human rights and the statelessness challenge.

CHAPTER 6: CRIMINAL DETENTION provides a brief insight into discriminatory practices of criminal detention pertaining to the stateless. Stateless persons in criminal detention are particularly difficult to identify, as statistical information on prison populations does not indicate whether a person is stateless or not. Chapter 6 first provides a case study of the discriminatory criminal detention practices targeting the Rohingya within their own country – Myanmar. It then focuses on criminal detention linked with statelessness and the lack of documentation. Corrupt practices of law enforcement officials in Bangladesh are described in this context. Finally this chapter comments on the alarming new global trend of criminalising immigration offences and consequent detention.

## CHAPTER 3: INTERNATIONAL AND REGIONAL LEGAL NORMS RELATING TO DETENTION

Well established international human rights norms – both substantive and procedural – apply to detention generally, and have specific relevance to stateless persons in detention. Article 9 of the UDHR establishes that “*no one shall be subjected to arbitrary arrest, detention or exile*”. This principle has been repeated and developed in international and regional human rights law, as well as norms dealing explicitly with detention.<sup>176</sup>

While detention may be viewed as the extreme form of restriction of liberty, other lesser forms of restriction also cause human rights concerns. Restriction of liberty is a broad term, and there is no generally applicable tangible point at which the degree of restriction of liberty may be considered to be arbitrary and consequently illegal. Such legality must be determined on a case by case basis, according to the principle of proportionality.

The test of proportionality is a legal test accepted and used by courts around the world to determine whether state actions which derogate from or limit the application of specific human rights are justifiable from a rights perspective. In deciding whether a legal measure is proportionate, a court should ask three questions: whether the legislative objective is sufficiently important to justify limiting a fundamental right; whether the measures designed to meet the legislative objective are rationally connected to it; and whether the means used to restrict the right to freedom are no more than is necessary to accomplish the objective.<sup>177</sup> In addition to these questions, a judgment on proportionality “*must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the (relevant) Convention*”.<sup>178</sup>

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176 See, for example, Articles 9 and 10 of the ICCPR, Article 37(d) of the CRC, Article 5 of the ECHR, Articles 6 and 7 of the ACHPR, Article 7 of the ACHR. See also EXCOM Conclusion no. 44 (XXXVII), the UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (1988) and the UN Standard Minimum Rules for the Treatment of Prisoners (1955).

177 *R v Secretary of State for the Home Department ex p Daly*, [2001] UKHL 2 WLR 1622.

178 *Huang v Secretary of State for the Home Department* [2007] UKHL 11.



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Of course, absolute rights are non-derogable, and cannot be compromised in any context. Certain rights remain non-derogable at all times;<sup>179</sup> they include the right to life,<sup>180</sup> freedom from torture, cruel, inhuman or degrading treatment or punishment,<sup>181</sup> freedom from slavery,<sup>182</sup> and freedom of thought, conscience and religion.<sup>183</sup> Thus, any form of detention or restriction of liberty which violates these rights would be illegitimate to the extent that it does so. Furthermore, derogations on derogable rights in times of emergency which “involve discrimination solely on the ground of race, colour, sex, language, religion or social origin” are not permissible.<sup>184</sup>

As stated above, many international and regional human rights treaties contain detailed substantive and procedural rights pertaining to detention. In addition to the right to liberty and security of the person, human rights norms pertaining to arbitrariness, cruel, inhuman or degrading treatment

179 ICCPR, Art. 4 (2).

180 *Ibid.*, Art. 6.

181 *Ibid.*, Art. 7.

182 *Ibid.*, Art. 8.

183 *Ibid.*, Art. 18.

184 *Ibid.*, Art. 4 (1).



and equality and non-discrimination collectively provide a strong basis for protection. These norms have been further developed through the authoritative comments of the treaty bodies and jurisprudence of the courts.

The degree to which norms pertaining to arbitrary detention have become entrenched in international human rights law is evident in the fact that the American Law Institute has identified the prohibition of prolonged arbitrary detention as a *jus cogens* norm of customary international law.<sup>185</sup> Other such *jus cogens* norms which are relevant to the detention of stateless persons are the prohibition of torture, cruel, inhuman or degrading treatment and systematic racial discrimination.<sup>186</sup>

### 3.1 INTERNATIONAL AND REGIONAL JURISPRUDENCE

Many of the cases challenging detention which are relevant to the stateless have been in the context of immigration detention. The most developed jurisprudence and comment in this regard has emerged from the UN Human Rights Committee (applying the ICCPR) and the European Court of Human Rights (applying the ECHR). Consequently, it is useful to examine how the law has been developed in the UN system and in the European Court of Human Rights (ECtHR), to protect individuals from arbitrary and unlawful detention in the immigration context.

#### 3.1.1 The UN Treaty Body System

Article 9 of the ICCPR guarantees the right to liberty and security of the person:

*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*<sup>187</sup>

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185 *Jus cogens* principles of international law are universally applicable norms which form the core content of a State's international obligations that cannot be derogated from under any circumstances.

186 Restatement (Third) The Foreign Relations Law of the United States, American Law Institute (1987), Vol. 2, 161 – as cited in Steiner, Henry and Alston, Philip, *International Human Rights in Context: Law, Politics, Morals*, 2<sup>nd</sup> Ed. Oxford: OUP, 2000, p. 233.

187 ICCPR, Art. 9 (1).

Article 10 further stipulates that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.<sup>188</sup>

The Human Rights Committee has approached the notion of arbitrariness in a broad and progressive manner. Arbitrary actions can either be those which contravene existing laws,<sup>189</sup> or those which are *prima facie* legal, but are in fact inappropriate, unjust, unpredictable and consequently arbitrary.<sup>190</sup>

## School for Justice-Impaired States



188 *Ibid.*, Art. 10 (1). See also UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, 11/04/86, Para 7.

189 See Shaw, Antony and Butler, Andrew, “Arbitrary Arrest and Detention Under the New Zealand Bill of Rights: The New Zealand Courts Stumble in Applying the International Covenant”, *New Zealand Law Journal*, 139 (1993), p. 140.

190 See UN Human Rights Committee Communication 305/1988: *Van Alphen v the Netherlands* (23 July 1990) CCPR/C/39/D/305/1988.

In a landmark opinion concerning Australia's use of mandatory detention, the Committee held *inter alia* that the failure of immigration authorities to consider factors including the likelihood of absconding, lack of co-operation with the immigration authorities, and to examine the availability of other, less intrusive means of achieving the same ends, might render the detention of an asylum seeker arbitrary:

*[T]he notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context ... every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.*<sup>191</sup>

The Committee has also held that being lawful is not sufficient, and that detention must also not have been imposed on grounds of administrative expediency, and must further satisfy the requirements of necessity and proportionality.<sup>192</sup>

Looking at the above, it is evident that arbitrariness is tested against five key factors (amongst others):

- Is the detention necessary?
- Is it discriminatory?

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191 *A. v Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (1997) Para 9.2 – 9.4.

192 *Van Alphen v the Netherlands*, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (1990).

- Is there a right to review?
- What is the duration?
- Is it proportionate?

All these factors are interconnected and must be viewed holistically to understand the impact of detention on the human rights of stateless persons.

Many countries fail to guarantee the right to judicial or administrative review of the lawfulness of detention, or a right to appeal against detention and deportation in cases of administrative immigration detention. Or if they do, the detainees are not always informed of their right to appeal. Lack of awareness and access to lawyers as well as language difficulties and the absence of interpreters or translation facilities are all factors which stack up against detainees in such circumstances, rendering it nearly impossible for them to effectively exercise their right to review or appeal.<sup>193</sup>

In terms of proportionality, it must be noted that mandatory detention is by nature a disproportionate response to deportation and consequently arbitrary. The United Nations Working Group on Arbitrary Detention<sup>194</sup> and the UN Human Rights Committee have both stated so.<sup>195</sup>

### 3.1.1.1 Non-Discrimination and Detention

The Human Rights Committee has interpreted the ICCPR's prohibition of arbitrary detention as applying to all cases of deprivation of liberty by arrest or detention including cases of immigration control.<sup>196</sup> In the ICERD, Article 1 (2) provides for the possibility of differentiating between citizens and non-citizens. However, Article 1 (3) declares that the legal provisions of States parties concerning nationality, citizenship or naturalisation must not dis-

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193 Office of the High Commissioner on Human Rights, *Administrative Detention of Migrants*, pp. 7 - 8, available at: <http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf> [accessed on 6 January 2009].

194 United Nations Economic and Social Council, Commission on Human Rights, Civil and Political Rights, including Questions of: Torture and Detention, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN4/2000/4 (1999) Annex 2.

195 See *A v Australia*, Case No 560/1993, Views adopted on 3 April 1997, UN Doc. A/52/40, Vol. II, Annex VI Sec. L; and *C. v Australia*, Case No. 900/1999, Views adopted on 28 October 2002, UN Doc. A/58/40, Vol. II, Annex VI R.

196 UN Human Rights Committee, *General Comment No. 08: Right to liberty and security of persons (Art. 9)* 30/06/82.

criminate against any particular nationality. The Committee on the Elimination of Racial Discrimination has also stated that:

*Article 1, paragraph 2 (of ICERD) must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The security of non-citizens – including the stateless – must be ensured with regard to arbitrary detention.*<sup>197</sup>

### 3.1.1.2 Indefinite Detention amounting to Cruel, Inhuman or Degrading Treatment

There are two aspects of detention which may result in the cruel, inhuman or degrading treatment of detainees. While each aspect may separately lead to this outcome, together they intensify it.

The first is the conditions prevailing in detention centres. The UNHCR has set out the conditions which should be observed in immigration detention; they should be “*humane with respect shown for the inherent dignity of the person*”; separate facilities should be used ensuring separation from convicted criminals; there should be separate facilities for men, women and children, unless they are relatives; there should be opportunity for regular contact with friends, relatives, religious, social and legal counsel; medical and psychological treatment should be available; there should be opportunity for physical exercise, recreation, education, vocational training and the exercise of religion; and there should be effective grievance mechanisms in place.<sup>198</sup>

The second aspect is that the duration of detention may result in cruel, inhuman or degrading treatment of the detainee. Indefinite detention is particularly problematic, considering the uncertainty and psychological trauma that

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197 UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non Citizens*, 01/10/2004, Para 2.

198 UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, Guideline 10 (UNHCR Guidelines), available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html> [accessed on 28 June 2010].

goes with it, and consequently the “deprivation of liberty should never be indefinite”.<sup>199</sup>

The Human Rights Committee has held that detention which may have initially been legal may become arbitrary if it is unduly prolonged or not subject to periodic review,<sup>200</sup> and that “*detention should not continue beyond the period for which the State can provide appropriate justification*”.<sup>201</sup> Furthermore, the Working Group on Arbitrary Detention has stated that a maximum period of detention should be set by law and that custody may in no case be unlimited or of excessive length.<sup>202</sup>

National courts have applied the ICCPR and reached similar conclusions to those of the Human Rights Committee. Thus the Court of Appeal of New Zealand observed that *prima facie* lawful detentions may be deemed arbitrary if they exhibit “*elements of inappropriateness, injustice, or lack of predictability or proportionality*” and that the word “arbitrary” brings both illegal and unjust acts within the scope of the ICCPR.<sup>203</sup>

### 3.1.2 The European Convention on Human Rights

The European Convention on Human Rights contains more comprehensive provisions on liberty and security of the person than those of the ICCPR. Article 5 (1) guarantees the right of everyone to liberty and security of person, and also contains an exhaustive list of grounds on which liberty can be restricted “*in accordance with a procedure prescribed by law*”. For example, Article 5 (1) (f), allows “*the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition*”.<sup>204</sup>

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199 See above, note 193.

200 de Zayas, Alfred, “The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights”, in Alfredsson et al. (eds), *International Human Rights Monitoring Mechanisms*, Martinus Nijhof Publishers, The Hague, 2001, pp. 67-121.

201 CCPR/C/D/59/560/1993, Para 9.4; and *C. v Australia* (900/1999), ICCPR/C/76/D/900/1999 (28 October 2002), Para 8.2.

202 Report of the UN Working Group on Arbitrary Detention to the Human Rights Council, 56<sup>th</sup> Session, E/CN.4/2000/4, 28 December 1999.

203 *Manga v Attorney General* (2002) 2 NZLR 65, p. 71.

204 See Article 5 (1) (f) of the ECHR.

Although the European Court of Human Rights has been somewhat inconsistent in how it has developed the law with regard to Article 5 (1) (f), a strong common set of principles has been established.

Firstly, while detention must comply with national law, this in itself is not sufficient, and any deprivation of liberty should not be arbitrary.<sup>205</sup> Consequently, detention which does comply with national law may still be deemed arbitrary. Thus, Article 5 protects the individual against arbitrary interference by the state with his right to liberty.<sup>206</sup> Key principles pertaining to arbitrariness have been developed by the European Court of Human Rights in its jurisprudence over the years.

(i) The deprivation of liberty must “conform to the procedural and substantive requirements laid down by an already existing law”.<sup>207</sup> Furthermore, the legal provisions which provide for the deprivation of liberty must be clear and accessible and enable the person concerned to foresee the consequences of his or her acts.<sup>208</sup>

(ii) Detention which complies with national law will be arbitrary if there has been an element of bad faith or deception on the part of the authorities.<sup>209</sup>

(iii) Both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 (1).<sup>210</sup>

(iv) There must be a clear nexus between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.<sup>211</sup>

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205 See *Amuur v France* (19776/92), 25 June 1996, Para 50.

206 *Winterwerp v the Netherlands*, Judgment of 24 October 1979, Series A no. 33, Para 37; and *Brogan and Others v the United Kingdom*, Judgment of 29 November 1988, Series A no. 145-B, Para 58.

207 **McBride, Jeremy**, *Irregular migrants and the European Convention on Human Rights*, Council of Europe, Parliamentary Assembly, **Committee on Migration, Refugees and Population**, AS/Mig/Inf (2005), Para 59. McBride refers to Appl. No 7729/76, *Agee v United Kingdom* (1976) 7 DR 164 and *Amuur v France* (19776/92), 25 June 1996.

208 See *Dougoz v Greece* (40907/98), 6 March 2001.

209 See, for example, *Bozano v France*, Judgment of 18 December 1986, Series A No. 111; and *Čonka v Belgium*, Appl. No. 51564/99, ECHR 2002- I.

210 *Winterwerp v the Netherlands*, Judgment of 24 October 1979, Series A No. 33, Para 39; *Bouamar v Belgium*, Judgment of 29 February 1988, Series A No. 129, Para 50.

211 *Bouamar v Belgium*, Judgment of 29 February 1988, Series A No. 129, Para 50; *Aerts v Belgium*, Judgment of 30 July 1998, Reports 1998-V, Para 46; *Enhorn v Sweden*, Appl. No. 56529/00, Para 42.

(v) The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty.<sup>212</sup>

(vi) The duration of the detention is a relevant factor in striking such a balance.<sup>213</sup>

(vii) Detainees must have the right to access judicial or administrative review of the lawfulness of detention, as well as a right to appeal against detention and deportation in cases of administrative immigration detention. In a case dealing with the *incommunicado* detention of a stateless person in Bulgaria pending deportation, with no right of review or appeal under Bulgarian law, the European Court held that this was a violation of Article 5(4) of the ECHR and its underlying rationale of the protection of individuals against arbitrariness.<sup>214</sup>

Jeremy McBride has summarised factors which will make the otherwise “lawful” detention of a person contrary to European human rights law [Article 5 ECHR]:

*...[T]he detention decision must not be arbitrary in the light of the facts of the case or actuated by bad faith or an improper purpose such as disguised extradition in the absence of any power allowing such a measure. It should also comply with the principle of legal certainty and will need to be judicially authorised. It has also been suggested by the Court that there should be procedures and time-limits for access to legal, humanitarian and social assistance.*<sup>215</sup>

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212 See *Vasileva v Denmark*, Appl. No. 52792/99, Para 37, 25 September 2003.

213 *Ibid.* See also *McVeigh and Others v the United Kingdom*, Appl. Nos. 8022/77, 8025/77, 8027/77, Commission decision of 18 March 1981, DR 25, pp. 37-38 and 42.

214 *Al-Nashif v Bulgaria* (Appl. No. 50963/99 (2002).

215 See above, note 207. McBride cites the cases of *Bozano v France* (9990/82), 18 December 1986; *Shamsa v Poland* (45355/99 and 45357/99), 27 November 2003; *Gonzalez v Spain* (43544/98), 29 June 1999 (AD) and *Amuur v France* (19776/92), 25 June 1996.



However, the *Chahal v United Kingdom*<sup>216</sup> and the *Saadi v United Kingdom*<sup>217</sup> decisions have been regressive. In *Chahal*, it was held that that states enjoy an “undeniable sovereign right to control aliens’ entry into and residence in their territory”;<sup>218</sup> and that as long as “action [was] being taken with a view to deportation”, there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing.<sup>219</sup> Consequently, the Court limited the application of the principle of proportionality with regard to Article 5 (1) (f) only to the length of detention.<sup>220</sup>

In *Saadi*,<sup>221</sup> the Grand Chamber of the European Court of Human Rights in a split decision held that Article 5 (1) (f) had not been contravened by detaining an individual for the purpose of expediting an asylum claim. The Court held that since Mr. Saadi was only detained for seven days for the purpose of ensuring a speedier asylum decision, there was consequently no violation of Article 5 (1) (f).

The dissenting opinion was extremely critical of the majority judgment’s propensity to:

*[T]reat completely without distinction all categories of non-nationals in all situations – illegal immigrants, persons liable to be deported and those who have committed offences – including them without qualification under the general heading of immigration control, which falls within the scope of States’ unlimited sovereignty.*<sup>222</sup>

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216 *Chahal v the United Kingdom*, Appl. No. 70/1995/576/662, ECHR, 11 November 1996.

217 *Saadi v the United Kingdom* [GC], Appl. No. 13229/03, ECHR, 29 January 2008.

218 *Ibid.*, Para 64, referring to *Chahal*, Para 73.

219 *Ibid.*, Para 72. Quoting from *Chahal*, Para 112.

220 *Ibid.*, Para 72, referring to *Chahal*, Para 113.

221 The case concerned Mr. Saadi - an Iraqi Kurd doctor, who fled the Kurdish Autonomous Region of Iraq in December 2000, after having facilitated the escape of three fellow members of the Iraqi Workers Communist Party who had been injured in an attack. He arrived in the UK on 30 December 2000, and immediately claimed asylum. As there was no room at the Oakington Reception Centre, Saadi was granted temporary admission and instructed to check into a nearby hotel and report back to the airport the following morning. He did so, and remained in “temporary admission” until 2 January 2001, when he was detained at the Oakington Centre, with the purpose of expediting the processing of his asylum claim – where he remained in detention for seven days.

222 See above, note 217, Dissenting Opinion.

A more nuanced approach, which recognised the necessity to differentiate between vulnerable and protected groups such as asylum seekers (and based on the same logic, stateless persons) would have been more consistent with the principle of proportionality.

The dissent concluded with the following strong statement:

*Ultimately, are we now also to accept that Article 5 of the Convention, which has played a major role in ensuring controls of arbitrary detention, should afford a lower level of protection as regards asylum and immigration which, in social and human terms, are the most crucial issues facing us in the years to come? Is it a crime to be a foreigner? We do not think so.*<sup>223</sup>

In the more recent case of *Mikolenko v Estonia*,<sup>224</sup> the Court held that while the applicant's initial detention did fall within the scope of Article 5 (1) (f), it ceased to be justified as time passed, due to the lack of due diligence of the authorities in conducting deportation proceedings against the detainee.<sup>225</sup> The facts of the *Mikolenko* case were wholly different to those of the *Saadi* case discussed above. Mikolenko was a former Soviet and Russian Army officer who had served from 1983 in Estonian territory. After Estonia obtained independence in 1991, Mikolenko was refused an extension of his residence permit. After a lengthy legal battle in which he challenged the refusal, the Supreme Court of Estonia dismissed his challenge in April 2003. He was subsequently ordered to leave the country, and detained pending deportation in October 2003. Mikolenko did not cooperate with his deportation proceedings (he refused to fill an application for a Russian passport) and the Russian authorities refused to accept him on a temporary travel document issued by Estonia. He consequently was not removable and remained detained for more than three years and eleven months, prompting the above decision of the Court.

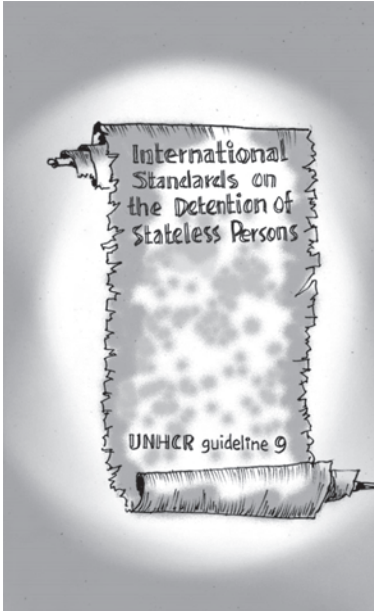
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223 *Ibid.*

224 *Mikolenko v Estonia*, Appl. No. 10664/05.

225 *Ibid.*, Para 63.

## 3.2 EMERGING STANDARDS AND GUIDELINES ON THE DETENTION OF STATELESS PERSONS



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While it is clear from the above that broad legal concepts of arbitrariness, proportionality, necessity and discrimination have been used by the Human Rights Committee and the European Court of Human Rights to develop general principles on detention, there are hardly any international standards which give specific guidance on the detention of stateless persons. Most criteria focus on the detention of asylum seekers, and may (or may not) include some references to stateless persons. **There is no single set of guidelines which apply specifically to the detention of stateless persons.** The section below therefore draws on guidelines and standards which protect asylum seekers or migrants to identify a set of rules for the stateless in detention. But

it is important to bear in mind that stateless persons do not at present have the same protections as asylum seekers and refugees.

### 3.2.1 The UNHCR Position

The UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* do expressly refer to the detention of stateless persons [in the Ninth Guideline]. Accordingly, stateless persons:

*[A]re entitled to benefit from the same standards of treatment as those in detention generally. Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in*

*order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.*<sup>226</sup>

But the Guidelines only apply to *de jure* stateless persons, and not to all detainees whose nationality is ineffective. This is an example of the negative impact of the hierarchies within statelessness.

The Guidelines define detention as:

*[C]onfinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.*<sup>227</sup>

They further state that “*there is a qualitative difference between detention and other restrictions on freedom of movement*”, and that “*when considering whether an asylum-seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed*”.<sup>228</sup>

According to the UNHCR, for administrative detention not to be arbitrary,

*[I]t must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.*<sup>229</sup>

The Guidelines also state that “*as a general principle asylum seekers should not be detained*”.<sup>230</sup> They recognise that asylum seekers are often compelled to use illegal means to enter a country of potential refuge, and have often had traumatic experiences, which must be taken into account when imposing any

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226 See Guideline 9 of the UNHCR Guidelines.

227 *Ibid.*, Guideline 1.

228 *Ibid.*

229 *Ibid.*

230 *Ibid.*, Guideline 2.

restriction of liberty. This reflects Article 31 of the Refugee Convention according to which:

*The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization...*<sup>231</sup>

But, as discussed above, the 1954 Convention does not afford similar protection to stateless persons who illegally enter and stay in another country, despite the fact that being stateless may make them unable to enter a country legally. However, where stateless persons enter a country and apply for asylum they must be afforded the protection of Article 31 of the Refugee Convention as well as the UNHCR Guidelines while their applications are being processed.

Guideline Three proceeds to spell out the exceptional circumstances in which detention of asylum seekers may be permissible. These include situations in which it is necessary to verify identity, determine the elements on which the claim to asylum is based, cases in which asylum seekers have destroyed their documents or engaged in fraud to mislead the authorities, and which are in the interests of national security and public order.<sup>232</sup> However, certain safeguards should apply even in such circumstances. Provision for detention must be clearly prescribed by national law. There should be a presumption against detention and viable alternatives should have priority over detention.<sup>233</sup> The UN Working Group on Arbitrary Detention has also recommended that “*alternative and noncustodial measures, such as reporting requirements, should always be considered before resorting to detention*”<sup>234</sup>

The viable alternatives recommended by the UNHCR, which are seen as permissible restrictions of liberty, are reporting requirements (periodic reporting to the authorities), residency requirements (obligation to reside at a spe-

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231 See Article 31 of the Refugee Convention.

232 See Guideline 3 of the UNHCR Guidelines. See also UNHCR ExCom Conclusion No. 44 (XXXVII).

233 *Ibid.*

234 UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, 18 December 1998, E/CN.4/1999/63/Add.3.

cific address or within a particular administrative district), the provision of a guarantor or surety, release on bail and residence in open centres (obligation to live in collective accommodation centres, where they would be allowed to leave and return during stipulated times).<sup>235</sup> The fact that “*the choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned and prevailing local conditions*”<sup>236</sup> is evidence of the proportionality principle in practice.

Guideline Five states that children should not be detained as a general rule, and that in exceptional cases when they are subject to detention, it should be “*in accordance with Article 37 of the Convention on the Rights of the Child ... as a measure of last resort, for the shortest appropriate period of time and in accordance with the exceptions stated at Guideline 3*”.<sup>237</sup>

### **3.2.2 European Law and Positions**

#### **3.2.2.1 The European Union Return Directive**

The European Return Directive establishes some standards for the detention pending removal of individuals who are not citizens of the EU (including stateless persons).<sup>238</sup> There are many positive developments which this Directive has brought about. Importantly, it commits states to take due account of accepted international norms including respect for family life, the best interest of the child and the principle of *non-refoulement* when implementing the Directive.<sup>239</sup> Furthermore, the Directive imposes many procedural and substantive safeguards including the right to appeal against or seek review of removal decisions, and the right to receive free legal representation and linguistic assistance.<sup>240</sup>

However, the Directive does allow for detention. According to Article 15 which sets the standard for pre-deportation administrative detention:

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235 See Guideline 4 of the UNHCR Guidelines.

236 *Ibid.*

237 *Ibid.*, Guideline 5.

238 European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 December 2008, 2008/115/EC (Return Directive).

239 *Ibid.*, Art. 5.

240 *Ibid.*, Art. 13.

*Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.*<sup>241</sup>

*Detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.*<sup>242</sup>

*When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.*<sup>243</sup>

While the Directive limits the length of detention, and so bars indefinite detention, in so doing it sets the outer limit at 18 months – a very long period of detention. Under the Directive, “each Member State shall set a limited period of detention, which may not exceed six months”. And this may not be extended except for “a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer”.<sup>244</sup>

The Directive does provide for judicial review of immigration detention. But the fact that it legitimises six month periods of detention, which may be extended for a further 12 months, must be seen as a retrograde step in human rights terms. It is a matter for concern that such lengthy periods of detention for merely administrative purposes are being promoted and accepted as standards which conform with human rights norms. In a strong critique of this development, UN High Commissioner for Human Rights Navanethem Pillay cited the EU Return Directive as one example of the “increasingly restrictive and often punitive approaches to migration in many developed countries”. She further stated that the Return Directive:

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241 *Ibid.*, Art. 15 (1).

242 *Ibid.*, Art. 15(3).

243 *Ibid.* Art. 15(4).

244 *Ibid.*, Art. 15 (5) and 15(6).

*[A]ppears excessive, especially if obstacles to removal are beyond the immigrant's control, for example if their home country fails to provide the necessary documentation. ... It is very much feared that EU states may resort to detention excessively and make it the rule rather than the exception.*<sup>245</sup>

### 3.2.2.2 The European Committee for the Prevention of Torture

The European Committee for the Prevention of Torture (ECPT) too has articulated standards of detention which are treaty based, and which specifically deal with irregular migrants and asylum seekers (amongst other groups), and these standards can be applied to the stateless as well.<sup>246</sup> The Committee report notes that some European states detain irregular migrants in prisons and concludes that “a prison establishment is by definition not a suitable place in which to hold someone who is neither accused nor convicted of a criminal offence”.<sup>247</sup> Furthermore, the standards declare that:

*Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. For example, detained irregular migrants should have every opportunity to remain in meaningful contact with the outside world (including frequent opportunities to make telephone calls and receive visits) and should be restricted in their freedom of movement within the detention facility as little as possible.*<sup>248</sup>

Equally relevant to the stateless is the Committee's position that countries which automatically and routinely resort to the administrative detention of irregular migrants, sometimes with no time limitation or judicial review, run the risk of violating the rulings of the European Court of Human Rights.<sup>249</sup>

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<sup>245</sup> Pillay, Navanethem, UN High Commissioner for Human Rights, *Immigrants among millions unlawfully detained*, 2 October 2008, available at: <http://www.alertnet.org/thenews/newsdesk/L2538064.htm> [accessed on 8 May 2010].

<sup>246</sup> The Council of Europe, *The CPT Standards – 'Substantive' sections of the CPT's General Reports* [CPT/Inf/E (2002) 1, Rev. 2009].

<sup>247</sup> *Ibid.*, Para 77, p. 48.

<sup>248</sup> *Ibid.*, Para 79, p. 50.

<sup>249</sup> *Ibid.*, Para 80, p. 50.



The Committee proceeds to set out standards which must be maintained when detaining irregular migrants. These include access to a lawyer and a medical doctor, visitation rights from family, friends and well-wishers (including NGOs), and that detention should be authorised by an individual detention order.<sup>250</sup>

Perhaps most importantly, the Committee states that in order to fulfil their obligation of *non-refoulement*, countries must give all irregular migrants ready access to an asylum procedure or other residence procedure.<sup>251</sup> Had the Committee specifically addressed the challenge of statelessness, perhaps it would have called for the implementation of statelessness determination procedures at this stage as well.

### 3.2.2.3 The Council of Europe

The Parliamentary Assembly of the Council of Europe has resolved that “*detention of irregular migrants should be used only as a last resort and not for an excessive period of time*.”<sup>252</sup> Certain minimum standards apply to irregular migrants (including stateless persons) in detention. Of these, the most relevant to stateless persons in detention are:

- the duty to hold such detainees in special facilities and to afford them the right to contact anyone of their choice;<sup>253</sup>
- the requirement that such detention be judicially authorised, scrutinised and subject to judicial review;<sup>254</sup>
- the right of asylum and *non-refoulement*;<sup>255</sup>
- the entitlement of irregular migrants being deported to a remedy before a competent, independent and impartial authority, for

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250 *Ibid.*, Para 81 - 92, pp. 50 - 52.

251 *Ibid.*, Para 93, p. 53.

252 **The Council of Europe**, *Parliamentary Assembly, Resolution 1509 on the Human Rights of Irregular Migrants* (2006), Para 12 (4), available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1509.htm> [accessed on 6 January 2009].

253 *Ibid.*

254 *Ibid.*, Para 12.5.

255 *Ibid.*, Para 12.8.

the purpose of which interpretation services and legal aid should be made available;<sup>256</sup>

- the right of all such persons to have effective access to the European Court of Human Rights.<sup>257</sup>

The Council of Ministers has placed limits on the use of detention during removal proceedings. Accordingly:

*A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.*<sup>258</sup>

This guideline therefore imposes a strong obligation to use detention only as a last resort. Additionally, the guidelines impose an obligation to release detainees when removal is impossible or arrangements are halted,<sup>259</sup> and a duty to ensure that such detention is for as short a period as possible.<sup>260</sup> The guidelines also provide for the judicial review of the legality of such detention,<sup>261</sup> and have clear provisions on what constitutes acceptable conditions of detention.<sup>262</sup>

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256 *Ibid.*, Para 12.9.

257 *Ibid.*, Para 12.10.

258 Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR). *Twenty guidelines on forced return*, CM(2005)40 final (9 May 2005), Guideline 6 (1).

259 *Ibid.*, Guideline 7.

260 *Ibid.*, Guideline 8.

261 *Ibid.*, Guideline 9.

262 *Ibid.*, Guideline 10.

Chapter 3 has reviewed established and emerging standards, principles and norms which relate to the detention of stateless persons. The UDHR states that *“no one shall be subjected to arbitrary arrest, detention or exile”*, a principle that has become entrenched in international law and reiterated by subsequent human rights instruments.

We have analysed the application of Article 9 of the ICCPR and Article 5 of the ECHR to the detention of non-citizens including stateless persons in this regard. The chapter also commented on emerging standards and guidelines on the detention of stateless persons. It is only Guideline 9 of the UNHCR Guidelines Relating to the Detention of Asylum Seekers which specifically focuses on statelessness. However, other guidelines, principles and standards on the detention of asylum seekers and immigrants are also relevant to the stateless.

### Key Findings:

1. There are very few international and regional court decisions on the detention of stateless persons. However, despite some inconsistencies in the application and development of treaty provisions pertaining to detention, a strong common set of principles related to the detention of asylum seekers and irregular migrants has been established. These principles are equally applicable to the detention of stateless persons and provide strong safeguards which must be adhered to. Accordingly, detention must be lawful, cannot be arbitrary, must at all times be necessary and proportionate to the situation, must be carried out with due diligence and must be subject to appeal and/or review.
2. The widespread lack of guidelines and standards which specifically address the detention of stateless persons is symptomatic of the low prioritisation of the statelessness problem. The lack of clear guidance on this issue results in the need to draw parallels from guidelines and directives on the detention of asylum seekers and migrants in general, and apply them to the specific context of statelessness.

## CHAPTER 4: IMMIGRATION DETENTION

As stated above, the two main forms of administrative immigration detention and restriction of liberty are:

- (i) The detention/restriction of liberty pending a decision on an asylum application;
- (ii) The detention/restriction of liberty of those who are to be removed or deported.

The second category includes both rejected asylum seekers and migrants whose applications to remain have been refused but who have not left the country, and non-nationals who have been convicted of a criminal offence, have completed their sentences and are awaiting deportation. This category is particularly problematic, especially when the states concerned do not take into account the barriers to removing stateless persons, when formulating policy. In its most recent report, the UN Working Group on Arbitrary Detention has noted that in many countries, the detention of irregular migrants (including the stateless) is mandatory and automatic, and that:

*Some national laws do not provide for detention to be ordered by a judge, or for judicial review of the detention order. Detainees often do not enjoy the right to challenge the legality of their detention. There is no maximum length of detention established by law, which leads to prolonged or, in the worst case, potentially indefinite detention in cases, for example, where the expulsion of a migrant cannot be carried out for legal or practical reasons.<sup>263</sup>*

While UNHCR guidelines explicitly state that statelessness should not lead to indefinite detention,<sup>264</sup> the practice in some countries researched by ERT

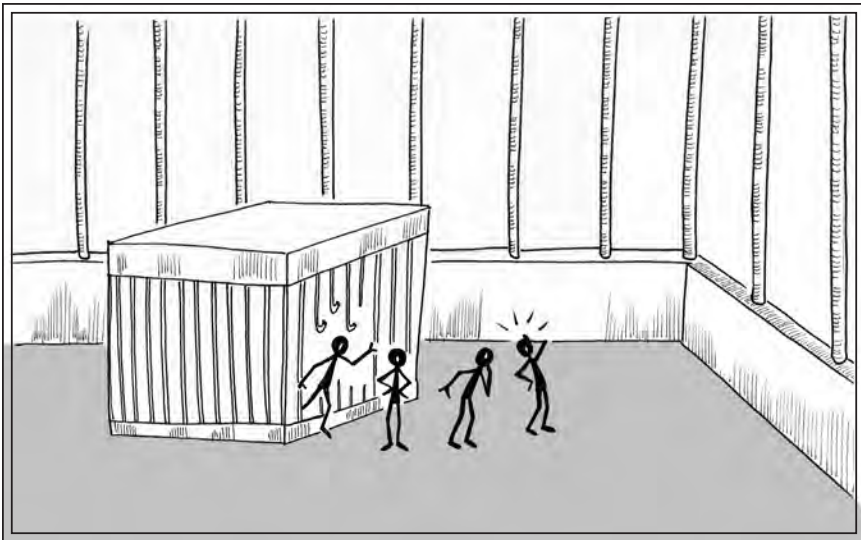
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263 UN Human Rights Council, *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council*, 13<sup>th</sup> Session, A/HRC/13/30 15 January 2010, Para 62, available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30\\_AEV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30_AEV.pdf) [accessed on 25 March 2010].

264 See Guideline 9 of the UNHCR Guidelines.

does result in people being indefinitely detained or restricted in their liberty simply because they are stateless. The Working Group raised serious concern over the absence of legally established maximum lengths of detention in some countries, stating that:

*[T]here are situations in which a removal order cannot be executed because, for example, the consular representation of the country of origin of the migrant does not cooperate or there is simply no means of transportation available to the home country. An example of a legal limitation for removal is the principle of non-refoulement. In such cases, where the obstacle to the removal of the detained migrants does not lie within their sphere of responsibility, the detainee should be released to avoid potentially indefinite detention from occurring, which would be arbitrary... The principle of proportionality requires that detention always has a legitimate aim, which would not exist if there were no longer a real and tangible prospect of removal.<sup>265</sup>*



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265 See above, note 263.

Regarding the immigration detention of stateless persons, ERT's research findings are grouped in three categories. Firstly, in order to identify the core challenges and trends pertaining to the immigration detention of stateless persons, ERT findings in the UK, USA and Australia are analysed. These three countries have detailed laws, policies and jurisprudence on immigration detention, but they have failed to address the specific challenge arising from statelessness. Secondly, we look at the situation in Kenya and Egypt – two countries with no clear policy pertaining to the stateless. Finally, as a case study of an acute problem of statelessness, immigration detention practices in Thailand, Malaysia and Bangladesh pertaining to the Rohingya are analysed. ERT's research findings in all of these countries confirms the urgency with which the words of the UN High Commissioner for Human Rights that “[t]he great majority of immigrants, refugees and asylum seekers are not criminals and therefore should not be confined in detention centres like criminals”,<sup>266</sup> must be heeded.

#### **4.1 IMMIGRATION DETENTION OF STATELESS PERSONS IN THE UNITED STATES, THE UNITED KINGDOM, AND AUSTRALIA**

The USA, UK and Australia are countries with complex and comprehensive immigration laws, regulations and policies. While the UK and Australia are parties to the 1954 and 1961 Statelessness Conventions, the USA is not. All three countries are legally dualist by nature, meaning that rights derived from an international treaty are only enforceable under national law if the treaty has been enacted into domestic legislation. Consequently, although the UK and Australia have ratified the Statelessness Conventions, since their parliaments have not legislated to incorporate them into domestic law, stateless persons cannot claim rights under these conventions in domestic courts.

Immigration law and policy in all three countries falls well short of affording satisfactory protection to the stateless. Of particular concern is the lack of any formal procedure for determining who is stateless, which could operate in parallel with – and complement - refugee status determination procedures. As a result, stateless persons who are in need of protection are often compelled to go through asylum procedures, because there is no procedure through which they can apply for recognition as a stateless person. This means that if they are refused asylum, the fact that they are stateless often remains unidentified, because officials have no clear duty to consider whether

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266 See above, note 245.



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they may be stateless and the persons concerned have no opportunity to seek protection as stateless persons. They may then be treated as other rejected asylum seekers and placed in immigration detention “pending removal”, on the assumption that – like other migrants - they have a country of nationality to which they can be removed.

Australia, the UK and USA all have detained stateless immigrants pending deportation, sometimes for indefinite periods. An additional factor is that these three countries, and most others, rely on the 1954 Convention’s definition of stateless persons as being *de jure* stateless, to the exclusion of the *de facto* stateless. This means that jurisprudence as well as statistics on statelessness relate to the *de jure* stateless and do not include the many others without an effective nationality who are also detained.

One of the primary concerns pertaining to all three countries is that there is a severe lack of **statistics and information** on stateless persons in immigration detention. This gap is indicative of general attitudes which do not consider statelessness to be a distinct issue.

In the UK, for example, there is little published information on the detention of stateless persons as a distinct group. The UK Border Agency (UKBA) has stated that in the breakdown of data by nationality, the stateless are categorised as “other or not known” and consequently there is no known disaggregated record of stateless persons and persons of disputed nationality in the UK.<sup>267</sup> There are no separate records of the number of stateless persons detained or who have had their liberty restricted in any manner as they generally fall under the category of “other and not known”. The UKBA maintains no central statistics on cases where barriers to removal such as disputed nationality, non-cooperation by the country of origin, inadequate transport arrangements, the principle of *non-refoulement*, etc., have delayed removal by over six months.

The stark absence of accessible data on statelessness in Australia is reflected in the fact that Australia consistently registers “nil” under the category of stateless persons in the UNHCR annual report – Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons.<sup>268</sup>

This section assesses the immigration detention regimes pertaining to the stateless in these countries through looking at the following key issues:

- (i) Detention regimes.
- (ii) Judicial responses.
- (iii) Removing stateless detainees.
- (iv) Restriction of liberty and release into destitution.

#### **4.1.1 Detention Regimes**

ERT research indicates a common trend over the past decade in these three countries towards a tightening of immigration detention regimes, to the detriment of the stateless. Although Australia has recently brought in changes to policy and practice which have ameliorated the likelihood of arbitrary detention, the risk of indefinite detention of stateless persons remains.<sup>269</sup>

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267 See UK Border Agency response to ERT Questionnaire, 1 April 2009.

268 See UN High Commissioner for Refugees. “2009 Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons”; Country data sheets, 15 June 2010. p. 24, available at: <http://www.unhcr.org/4c11f0be9.html>

269 See Section 7.3 of Part Three below for a discussion on recent policy changes in Australia.



#### 4.1.1.1 The United States<sup>270</sup>

Over the past fifteen years, U.S. immigration policy has shifted towards increasing detention of irregular migrants and of persons pending removal and deportation. Perhaps most significantly, amendments to the Immigration and Nationality Act (INA) made detention mandatory for some non-citizens during removal proceedings.<sup>271</sup> Other legal and policy developments also emphasised immigration enforcement,<sup>272</sup> and the use of detention has increased as it has become an integral aspect of immigration regulation in the USA. In January 2009, the Associated Press (AP) took a “system snapshot” of immigration detention and found that there were exactly 32,000 individuals in immigration detention in the United States.<sup>273</sup> The data indicated that 18,690 of those immigrants had no criminal conviction, and more than 400 of those with no criminal record had been detained for at least one year, while a dozen had been held for three years or more, and one man from China had been held for 5 years.<sup>274</sup> Consequently, a system of immigration detention that housed 6,785 people in 1994 has nearly quintupled, and expanded into 260 facilities across the country, the majority of which are administered under contract with local governments or private companies.<sup>275</sup>

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270 This section draws on a recent ERT report on the immigration and security detention of stateless persons in the USA entitled *From Mariel Cubans to Guantanamo Detainees: Stateless Persons Detained under U.S. Authority* (January 2010), available at [http://www.equalrightstrust.org/ertdocumentbank/Statelessness\\_in\\_USA\\_17\\_Jan.pdf](http://www.equalrightstrust.org/ertdocumentbank/Statelessness_in_USA_17_Jan.pdf).

271 In 1996, with the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) – the much criticized “1996 amendments” – the detention of immigrants who are charged with being removable because they have been convicted of certain crimes became mandatory. See 8 U.S.C.A. § 1226(c); see also *Demore v Kim*, 538 U.S. 510 (2003).

272 Section 287(g) of the Immigration and Nationality Act (INA) provides that Immigration and Citizenship Enforcement (ICE) can effectively deputise local law enforcement agencies for the purpose of enforcing immigration laws, an arrangement which advocates argue has led to a variety of abuses, and an increase in immigration detention. See Justice Strategies, *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement*, February 2009, available at: <http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf> [accessed on 10 January 2010].

273 Associated Press, *Immigrants face long detention, few rights: Many detainees spend months or years in U.S. detention centers*, March 15, 2009, available at: <http://www.msnbc.msn.com/id/29706177/> [accessed on 10 January 2010].

274 *Ibid.*

275 *Ibid.*

When a non-citizen is ordered removed from the United States,<sup>276</sup> the Department of Homeland Security (DHS) is responsible to remove the person within a period of 90 days (the “removal period”).<sup>277</sup> The Secretary of Homeland Security<sup>278</sup> cannot release an alien who has been determined to be removable because of certain criminal or terrorist activity.<sup>279</sup> Furthermore, a non-citizen may be detained beyond the removal period if he or she:

- (i) was determined to be inadmissible to the U.S.;<sup>280</sup>
- (ii) was found deportable because of a violation of his or her status or condition of entry, commission of certain criminal offences, or certain security concerns;<sup>281</sup> or
- (iii) has been determined by the Secretary to be a risk to the community or unlikely to comply with the order of removal.<sup>282</sup>

#### 4.1.1.2 The United Kingdom

The UK is a party to the 1954 Convention and has obligations under it which require action by the state. Until 1980, the provisions of the 1954 Convention were reflected in Para 56 of the UK Immigration Rules, according to which, when a person was stateless, full account was to be taken of the provisions of the relevant international agreement to which the UK was party (i.e. the 1954 and 1961 Conventions). However these provisions were then removed from the Rules which today make no reference to statelessness.

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276 See Section 1231 of Title 8 of the United States Code. In 1996, amendment to the INA renamed what were previously known as exclusion and deportation proceedings “removal proceedings”. While these two types of proceedings now have the same name, the distinction is still important because different rights attach depending upon whether a non-citizen is placed in removal proceedings at a port of entry to the United States or after gaining entry into the country.

277 8 U.S.C.A. § 1231(a)(1)(A).

278 On March 1, 2003, the DHS and its Bureau of Border Security assumed from the INS responsibility for the removal programme. See Homeland Security Act of 2002, §§ 441(2), 442(a), 116 Stat. 2192-2194, 6 U.S.C. §§ 251(2), 252(a) (2000 ed., Supp. II). Accordingly, the discretion formerly vested in the Attorney General is now vested in the Secretary of Homeland Security. See § 551(d)(2).

279 8 U.S.C.A. § 1231(a)(2).

280 See 8 U.S.C.A. § 1182, “Inadmissible Aliens”.

281 Specifically, found removable under 8 U.S.C.A. §§ 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4).

282 8 U.S.C.A. § 1231(a)(6), “Inadmissible or criminal aliens”.

UK immigration policy has also changed and tightened over the past few years, with the increased detention of irregular immigrants, including stateless persons who have no reasonable prospect of removal to another country. In 1998 the government rejected placing a limit on the maximum term of detention,<sup>283</sup> but accepted a presumption in favour of temporary admission and release.<sup>284</sup> The UK also decided against opting into the EU Return Directive, which imposes a maximum time limit of 18 months immigrations detention. However, in September 2008, new Enforcement Instructions and Guidance replaced this by a presumption in favour of detention in the case of foreign national prisoners (FNP) with a view to protecting the public from harm and reducing the risk of absconding. FNPs are non-British citizens who may or may not be legally resident within the UK, who have been convicted of a crime and are recommended for deportation from the UK after having served their prison sentence. There is a strong public policy argument for the deportation of such individuals who have a criminal record and may be a threat to the safety of individuals in the future. Under the new policy, a FNP will normally be detained, provided detention is and continues to be lawful and there is a realistic prospect of removal within a reasonable time.<sup>285</sup> Furthermore, the practical inability to return to a country of origin has no effect on the individual's immigration status in the UK. A person with no valid leave to remain must be removed. This applies equally to stateless persons and other failed asylum seekers. Significantly, the UKBA regards disputed nationality, non-cooperation of the country of origin, lack of adequate transport, and the principle of *non-refoulement* only as barriers to removal, rather than as a basis to grant leave to enter or remain.<sup>286</sup>

In a hard hitting report, the London Detainee Support Group has described the UK immigration detention regime as “ineffective”, “inefficient” and “opaque”.<sup>287</sup> According to the group:

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283 Secretary of State for the Home Department, *Fairer, faster and firmer – a modern approach to immigration and asylum*, Para 12.11, Chapter 12, available at: <http://www.archive.official-documents.co.uk/document/cm40/4018/chap-12.htm> [accessed on 21 April 2010].

284 *Ibid.*

285 Criminal Casework Directorate Cases, Enforcement and Instructions Guidance, September 2008, Para 55.1.2.

286 See above, note 267.

287 London Detainee Support Group, *Detained Lives: the real cost of indefinite immigration detention*, London, 2009, p. 5, available at: <http://www.ldsg.org.uk/files/uploads/detainedlives-web.pdf> [accessed on 15 February 2010].

*Detainees experience a lack of transparent evidence-based decision making at all stages ... Release is routinely refused by the UK Border Agency and the Asylum and Immigration Tribunal, based on what appear to be subjective assessments of risk of re-offending or absconding. Meanwhile, detainees are excluded from any meaningful dialogue with UKBA.*<sup>288</sup>

Despite being a party to the 1954 Convention, the UK does not treat stateless persons differently from others in the determination of their claim.<sup>289</sup> There is no separate status determination procedure in which statelessness can be considered, and the UKBA approach towards failed asylum seekers does not take into account the situation of stateless persons who have no realistic prospect of returning to their country of habitual residence – however much they may wish to do so.<sup>290</sup>

Significantly, the UK has not opted in to the EU Return Directive,<sup>291</sup> which imposes a six month maximum immigration detention term, which can be extended by a further 12 months in extremely limited circumstances. In 2009, 225 people had been held in immigration detention for over a year in the UK. Forty five persons had been detained for over two years.<sup>292</sup> The psychological impact of detention with no knowledge of when it will end is particularly damaging. According to Home Office statistics, 215 immigration detainees

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288 *Ibid.*

289 See above, note 267.

290 The statutory framework for deportation of foreign national prisoners is contained in Section 3(5), 3(6) and 5 of the Immigration Act 1971; it provides for the deportation of non-citizens: “where it is determined that their conduct is not conducive to the public good; where a family member is or has been ordered to be deported; or where after the age of 17 the person is convicted of an offence punishable with imprisonment and on his conviction recommended for deportation by a competent court.” Para 2 of Schedule 3 to the 1971 Act details provisions for the detention of persons with respect to whom a recommendation of deportation has been made by court, pending the making of a deportation order and where a deportation order is in force against a person, pending his removal or departure from the UK.

291 The common EU immigration policy does not apply to Denmark which has decided to opt out of Title IV of the Treaty establishing the European Community. The UK and Ireland decide on their involvement on a case-by-case basis (i.e. there is a possibility of an “opt-in”). With regard to the Return Directive, the UK has decided not to opt in.

292 *The Independent, Locked up indefinitely: the prisoners who have committed no crime*, 14 February 2010, available at: <http://www.independent.co.uk/news/uk/crime/locked-up-indefinitely-the-prisoners-who-have-committed-no-crime-1899049.html> [accessed on 25 March 2010].

needed treatment for self-inflicted injuries in 2009, a 20% increase from the year before.<sup>293</sup> Indefinite detention has also resulted in hunger strikes by immigration detainees demanding release. It is in this context that the former chief inspector of prisons has stated that there must be deadlines for immigration detention.<sup>294</sup> However, the UKBA has demonstrated insensitivity to the particular challenge of statelessness. According to the UKBA's strategic director for criminality and detention:

*People in detention are there because both the UKBA and the courts deem them to have no legal right to be here. If detention is deemed necessary, we always aim to keep it to the minimum period possible. Detainees can voluntarily leave the UK at any point, and are free to apply for bail to an independent immigration judge.*<sup>295</sup>

#### 4.1.1.3 Australia

In Australia, the Migration Act allows for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by the Act,<sup>296</sup> and requires the mandatory detention of unlawful non-citizens.<sup>297</sup> Introduced under the Keating Labour administration in 1992, the latter policy was announced as an explicitly deterrent measure: “[T]he Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.”<sup>298</sup>

One of the victims of this legislation told ERT:

*When they put us in detention I was shocked. The officers were very tough and they scared us. We didn't know where we were or what they would do to us. We were like sheep – they told us*

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293 *Ibid.*

294 *Ibid.*

295 *Ibid.*

296 See Section 4 (4) of the Migration Act of Australia (1958).

297 *Ibid.*, Sections 189, 196 and 198.

298 Cited in Amnesty International, *The impact of indefinite detention: the case to change Australia's mandatory detention regime*, Amnesty International Australia Publications (2005) Sydney, p. 28, see also footnote 95 in that report.

*go here, go there, go to your room, shut the door – and they didn't explain anything to us. It was as if we weren't humans, as if we weren't even animals. We were treated like something disgusting ... The days were really dark for me, and the nights were even worse. I visualized rain and storms even when the day was clear. I really felt like I was slowly dying, day after day. I would wake up in the morning to die that day. Go to sleep to die. Wake up in the morning to die. I thought that my life had finished. I had become just like a corpse; no hope, no dreams. Others were trying to kill themselves in there. Days, weeks, and months passed.*<sup>299</sup>

As the legislation currently stands,<sup>300</sup> the reasonableness and proportionality of detention are not considerations that can be factored within a decision to detain on mainland Australia. If a person is reasonably suspected of being an unlawful non-citizen in the Australian “migration zone”, a migration officer must detain the person under section 189 (1) of the Migration Act.<sup>301</sup>

In late 2001, the Australian Parliament passed legislation that controversially “excised” vast tracts of Australian territory – including thousands of islands and coastal ports – from the Australian migration zone.<sup>302</sup> Under the current legislation, a migration officer is authorised but not required to detain a person who is within, or seeking to enter, an “excised offshore place” and who it is reasonably suspected is an unlawful non-citizen (or would become an unlawful non-citizen upon entering the migration zone).<sup>303</sup> Notwithstanding this technical distinction, it remains policy to detain all unauthorised arrivals held at excised places. Along with “excision”, the Australian Parliament also established a regime, dubbed the “Pacific Solution”, whereby all “unlaw-

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299 ERT Interview with A. T, 12 July 2009, Sydney, Australia (ERT-SPD-AU-060). Initials have been changed to conceal the identity of the respondent.

300 Proposed amendments are before the Australian Parliament at present.

301 Under section 189(2), an officer must similarly detain a person who is in Australia but outside the migration zone, where it appears that the person is seeking to enter into the migration zone and, if successful, would be classified as an unlawful non-citizen.

302 See the Migration Amendment (Excision from Migration Zone) Act 2001 (Cth); See also Migration Amendment (Excision from Migration Zone (Consequential Provisions)) Act 2001 (Cth) under which vast tracts of Australian territory were “excised” from the Australian migration zone - see <http://www.abc.net.au/news/indepth/yir2001/politics9.htm>

303 Migration Act 1958 section 189 (3) and (4).

ful non-citizens” entering an excised area were taken to a “declared country” (agreements were established with Nauru and Papua New Guinea) to have their asylum claims assessed, without provisions for legal assistance, or access to independent merits review or the Australian courts, and with a caveat that those found to be refugees would not be resettled in Australia. The human and financial toll of the “Pacific Solution” has been notoriously high and has attracted extensive criticism.<sup>304</sup>

In February 2008, a new administration moved to end the “Pacific Solution”, by closing the detention centre on Nauru and bringing the remaining detained refugees to Australia for resettlement.<sup>305</sup> However, the policy of territorial excision - the bedrock of the “Pacific Solution” - has been retained, and all unauthorised boat arrivals continue to be taken to Australia’s remote Christmas Island for processing of their asylum claims under a non-statutory refugee status assessment system. Non-refugee stateless persons who arrive unauthorised by boat will only be able to have their claims of statelessness considered should the Minister chose to personally intervene in their case following a negative primary and merits refugee status assessment. A further Ministerial intervention would then be required, as with those assessed to be refugees, in order to allow the person to apply for a visa under the mainland system.

Section 196 of the Migration Act states that an unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is either removed from Australia voluntarily, deported, or granted a visa to reside lawfully in the community.<sup>306</sup> The provision also states that where an unlawful non-citizen is so detained, he or she must not be released (except for the purposes of removal or deportation), even by court order, unless granted a visa.<sup>307</sup> Indeed, the judicial review of most administrative decisions made

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304 See **McAdam, Jane and Garcia, Tristan**, *Submission on Refugees and Asylum Seekers to the National Human Rights Consultation*, 1 June 2009, p. 34 including footnote 130, for an extensive citation of costs associated with the “Pacific Solution”, available at: [http://www.gtcentre.unsw.edu.au/Resources/docs/cohr/Final\\_Submission\\_11June09.pdf](http://www.gtcentre.unsw.edu.au/Resources/docs/cohr/Final_Submission_11June09.pdf) [accessed on 13 May 2010]. See also UN High Commissioner for Refugees, *UNHCR welcomes close of Australia’s Pacific Solution*, 8 February 2008, available at: <http://www.unhcr.org/47ac3f9c14.html> [accessed on 13 May 2010].

305 UN High Commissioner for Refugees, *UNHCR welcomes close of Australia’s Pacific Solution*, see above, note 303.

306 See **Section 196 (1) of the Migration Act of Australia (1958)**.

307 *Ibid.*, Section 196(3).

under the Act, including the decision to detain, is precluded by a wide ranging “super” privative clause,<sup>308</sup> which was introduced in 2001 with the express intention of “*reducing manipulation of Australia’s judicial system by unlawful non-citizens seeking to delay their departure*”.<sup>309</sup> Section 198 provides that an unlawful non-citizen must be removed “*as soon as reasonably practicable*”, where the unlawful non-citizen: has asked the Minister, in writing, to be so removed; has had a valid application for a substantive visa refused and finally determined; and has not made another visa application.

## 4.1.2 Judicial Responses

The judiciary in all three countries has scrutinised, critiqued and at times reversed these increasingly harsh policies with varying degrees of success.

### 4.1.2.1 The United States

Courts in the United States have in two key decisions set important standards for the immigration detention of stateless persons. They are the cases of *Zadvydas v Davis*, and *Clark v Martinez*. *Zadvydas*, a *de jure* stateless person, was born to Lithuanian parents in a displaced persons camp in Germany in 1948, and immigrated to the USA with his family when he was eight years old, and acquired residency. As an adult, he was convicted for criminal activity and when released from prison on parole, he was detained by the INS pending deportation. However, as he is *de jure* stateless, no country accepted him and he remained in detention for many years until he challenged his detention in court. In 2001, in *Zadvydas v Davis*,<sup>310</sup> the Supreme Court held that Section 1231(a)(6) of the United States Code authorises the Secretary to detain resident non-citizens beyond the removal period because of criminal convictions, only as long as “*reasonably necessary*” to remove them from the country.<sup>311</sup> Specifically, the Court held that the two justifications for the detention at issue, preventing flight and protecting the community, were inadequate to justify prolonged and indefinite detention.<sup>312</sup> The Court

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308 *Ibid.*, Section 474.

309 Philip Ruddock (former Minister of Immigration of Australia) cited in McAdam, Jane and Garcia, Tristan, *Submission on Refugees and Asylum Seekers to the National Human Rights Consultation*, see above, note 303.

310 *Zadvydas v Davis*, 533 U.S. Para 684-85 (2001).

311 *Ibid.*, Paras 689 and 699.

312 *Ibid.*, Para 690.



construed Section 1231(a)(6) to contain an implicit “reasonable time” limitation subject to federal judicial review, rather than to authorise indefinite detention.<sup>313</sup> In so doing, the Court established a presumptively reasonable period of six months after the date of the final order of removal during which the government may detain an alien to effectuate removal.<sup>314</sup>

The Court ruled that after this six-month period, a detained non-citizen can file a habeas petition in federal court, and if he or she can “provide good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing”.<sup>315</sup> The Court also indicated that, “as the period of prior post-removal confinement grows, what counts as the “reasonably foreseeable future” conversely would have to shrink”.<sup>316</sup> Accordingly, “once removal is no longer reasonably foreseeable, continued detention is no longer authorized”.<sup>317</sup>

Just over three years later, the Supreme Court was forced to review the continued detention of inadmissible non citizens (as opposed to resident non-citizens) under Section 1231(a)(6) in the case of *Clark v Martinez*.<sup>318</sup>

In that case, Sergio Suarez Martinez and Daniel Benitez, two Cuban nationals who had arrived in the United States in 1980 as part of the Mariel boatlift and later been deemed excludable (or inadmissible) because of criminal convictions, challenged their detention beyond the removal period under Section 1231(a)(6).

The Supreme Court extended its holding in *Zadvydas v Davis*, to non-resident non-citizens found inadmissible.<sup>319</sup> It reasoned that the authority to detain each of those groups arose from the same statutory provision, i.e. Section 1231(a) (6), and because that provision did not distinguish between the two groups, the Court could not apply distinct interpretations of the same statute to one or the other.<sup>320</sup>

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313 *Ibid.*, Para 682.

314 *Ibid.*, Para 699.

315 *Ibid.*, Para 701.

316 *Ibid.*

317 *Ibid.*, Para 699.

318 *Clark v Martinez*, 543 U.S. 371 (2005).

319 *Ibid.*, Paras 386-87.

320 *Ibid.*, Para 382.

The practical effect of these two decisions is to guarantee to all non-citizens detained pursuant to Section 1231(a) (6), the right to release after six months of being deemed removable if they can demonstrate that there is “no significant likelihood of removal in the reasonably foreseeable future.”<sup>321</sup> This applies whether they are determined to be inadmissible upon arrival, deportable after gaining status, or determined by the Secretary to be a risk to the community or unlikely to comply with the order of removal.

#### 4.1.2.2 The United Kingdom

In the UK, the legal validity of the 2008 policy which made a presumption in favour of detention was successfully challenged before the High Court in the celebrated case of *R (Abdi and Others) v the Secretary of State for the Home Department*.<sup>322</sup> Justice Davis found that the published presumptive policy was not a legal option available to the State since it was in contravention of established authority on the interpretation of paragraph 2, Schedule 3 to the Immigration Act, 1971 – according to which there should not be a presumption in favour of further detention of FNP’s upon completion of the sentence.<sup>323</sup>

It emerged through the course of the litigation that this policy favouring detention which was published in September 2008, had in fact been applied and practiced by caseworkers with respect to FNP’s since April 2006. There was no justification put forward for the failure to publish the new policy which ran counter to the prevailing and published policy towards detention and release.

The relevant policy documents have since been amended to reflect the ruling of the court. However, they continue to make a strong case for the detention of FNP’s under certain circumstances. Justice Davis, in his subsequent judgment in *R (Abdi) v Secretary of State for the Home Department*<sup>324</sup> found in favour of the altered policy, stating that it is not unlawful to guide a decision towards a particular outcome as long as there was a clear reference to a

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321 See above, note 310, Para 701.

322 *R (Abdi and Others) v the Secretary of State for the Home Department* [2008] EWHC 3166 (Admin).

323 **Moses J** in *R (Sedrati) v Secretary of State for the Home Department*, [2001] EWHC Admin 410. Previously applied by Smith J in *R (Vovk) v Secretary of State for the Home Department* [2000] EWHC 3386 Admin.

324 *R (Abdi) v Secretary of State for the Home Department* [2009] EWHC 1324 Admin.

presumption in favour of release over detention. However, he warned against utilising the policy for purposes other than the removal of FNPs:

*It is to be borne in mind that immigration detention of foreign national prisoners is not to be used as a disguised form of preventive detention for the public safety. Nevertheless ... public safety remains a relevant factor in assessing the reasonableness of detention.*<sup>325</sup>

#### 4.1.2.3 Australia

Australian courts have been less willing and successful in affecting law and policy. However, high profile Australian cases in which the existing laws and policies were challenged catalysed a public debate and created the necessary momentum for these policies to be scrutinised and subjected to a reform process. Two landmark cases illustrate this:

*Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*<sup>326</sup>

The 2003 case of Mr. Akram Al Masri highlighted the issue of the indefinite detention of unlawful non-citizens where there is no reasonable prospect of removal or deportation to another country. The Full Federal Court decision in *Al Masri* was overturned by the High Court decision in *Al-Kateb*, considered below.

Mr. Al Masri was a stateless Palestinian asylum seeker, from a part of Gaza under the control of the Palestinian Authority. He arrived in Australia unlawfully, by boat in 2001. Shortly after his arrival he was transferred to the remote Woomera Immigration Detention Centre in South Australia. His claim for asylum was refused by the Department of Immigration and on appeal to the Refugee Review Tribunal (RRT).<sup>327</sup> Mr. Al Masri elected not to challenge the RRT decision and instead requested that he be returned to Gaza.<sup>328</sup> Ar-

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325 *Ibid.*, Para 41.

326 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70.

327 *Ibid.*, Para 4.

328 *Ibid.*, Para 5.

rangements were started for his return, but Israel, Egypt, Jordan and Syria refused to grant Mr. Al Masri an entry permit in order to facilitate his return to Gaza.<sup>329</sup>

At this point, Mr. Al Masri – as a Palestinian - could have been recognised as stateless, and not seen simply as a rejected asylum seeker; the cost of not having in place a statelessness determination procedure is therefore evident. With Mr. Al Masri facing the prospect of indefinite detention, the matter came before the Federal Court, which found that there was no power to continue to detain Mr. Al Masri in circumstances where there was no real likelihood or prospect of removing him from Australia in the reasonably foreseeable future. The finding was subsequently upheld on appeal to the Full Federal Court. Mr. Al Masri who had been released from detention with reporting requirements, was later removed from Australia and returned to Gaza in 2002.

In July 2008 Mr. Al Masri was shot dead at point blank range in Gaza. A departmental spokesperson was quoted in the Australian media stating that the welfare of a person removed from Australia was the “*responsibility of the country to which he has been removed. Anybody who has applied for protection from Australia is not removed if we believe that person will be persecuted*”.<sup>330</sup>

### *Al-Kateb v Godwin*

In the *Al-Kateb* case of 2004, the High Court by a slim four-to-three majority, in what it conceded was a “tragic” outcome,<sup>331</sup> held that an incontrovertibly stateless person who had no foreseeable prospect of removal to another country could lawfully be detained indefinitely, and potentially for life, at the will of the Executive.

Mr. Ahmed Al-Kateb was a stateless Palestinian who arrived in Australia without a passport or visa and was detained as an “unlawful non-citizen” pursuant to section 189 of the Migration Act. Following almost two years of immigration detention, Mr. Al-Kateb formally requested his removal “*to Ku-*

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329 *Ibid.*, Para 7.

330 *Sydney Morning Herald, Deported refugee shot dead*, 2 August 2008, available at: <http://www.smh.com.au/news/world/deported-refugee-shot-dead/2008/08/01/1217097536265.html?page=2> [accessed on 6 June 2010].

331 *Al-Kateb v Godwin* [2004] HCA 37 per McHugh J. and Para 31.

*wait, and if you cannot please send me to Gaza*.”<sup>332</sup> Attempts by the authorities, and by Mr. Al-Kateb himself, to secure his removal to Kuwait, the Palestinian Territories, Egypt, Syria and several other countries all failed.<sup>333</sup>

Following the Federal Court ruling in the case of Mr. Al Masri,<sup>334</sup> Mr. Al-Kateb sought a declaration from the Federal Court that he was unlawfully detained and an order in the nature of habeas corpus directing his release from detention.<sup>335</sup> Notwithstanding the prior *Al Masri* judgement, Mr. Al-Kateb’s application was unsuccessful.

Following the Full Federal Court *Al Masri* decision, Mr. Al-Kateb and several others in similar circumstances were released from detention. However, Al-Kateb was released without a bridging visa and into a state of probable destitution, being ineligible to work or to access any form of welfare. He was required to report to authorities daily and, under a system only recently abandoned, was some years later presented with a bill of \$83,000 for expenses incurred in relation to his immigration detention.<sup>336</sup>

The Government successfully appealed to the High Court to overturn the *Al Masri* principle, requiring the release of Al-Kateb and others. As observed by Justice McHugh in his judgment:

*[T]he justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is not for the courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.*<sup>337</sup>

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332 Loechel, Lisa, *Detention of the Stateless: a failure to consider the impact of statelessness*, University of Adelaide (November 2004), p. 2, available at: <http://digital.library.adelaide.edu.au/theses/Law/KC/kc19418255d.pdf> [accessed on 5 September 2009].

333 See above, note 331, Para 103. See also Amnesty International Australia. *Brief: Current s417 Applications of Stateless Persons*, (26 October 2006) Unpublished Brief.

334 Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri [2002] FCA 1099.

335 See [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ma1958118/s198.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s198.html)

336 Marr, David, *Ahmed Al-Kateb: Escape from a life in limbo*, Sydney Morning Herald, 27 October 2007, available at: <http://www.smh.com.au/news/national/escape-from-a-life-in-limbo/2007/10/26/1192941339538.html> [accessed on 15 September 2009].

337 See above, note 331, Para 75.

Indeed, Justice McHugh stated that it would be “heretical” to construe the Constitution in accordance with contemporary principles of international law, as this would interfere with Parliament’s capacity to legislate, and if it so wished, to override those principles.<sup>338</sup>

In *Al-Kateb*, the High Court majority found that the Migration Act authorised indefinite detention of unlawful non-citizens, even where there was no real prospect of removal, because the purpose of detention was deemed to be administrative rather than punitive.<sup>339</sup> In a literal interpretation of the statute it was held that the relevant provisions were unambiguous, requiring, under the circumstances, that Mr. Al-Kateb be detained indefinitely. Justice McHugh stated that “*the words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights*”.<sup>340</sup> Indefinite detention was held to be non-punitive as long as its purpose was to ensure the unlawful non-citizen’s availability for removal and prevent the unlawful non-citizen’s entry into the Australian community.<sup>341</sup>

Chief Justice Gleeson argued for the minority that “*indefinite, and perhaps permanent administrative detention is not one to be dealt with by implication*”.<sup>342</sup> He noted that it would be easier to find a legislative intention to allow indefinite detention if there was a discretion that allowed an officer or a court to consider factors personal to the detainee, such as whether or not the detainee posed a threat to the community if released, or was likely to abscond.<sup>343</sup>

Following the High Court decision, Mr. Al-Kateb was not re-detained, but instead left residing in the community without a bridging visa. Some months on, his status was regularised through the grant of a temporary Bridging Visa

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338 *Ibid.*, Paras 61 and 66.

339 *Ibid.*, Para 31. See also Hayne J., Paras 264 – 266.

340 *Ibid.*, Para 33.

341 *Ibid.*, Para 45.

342 *Ibid.*, Para 21. Chief Justice Gleeson also stated at Para 19 that “*Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment*”.

343 *Ibid.*, Para 22.

E (BVE).<sup>344</sup> While rendering him a “lawful non-citizen”, the BVE carried stringent conditions – namely, a lack of entitlement to undertake paid or voluntary employment, or formal study, or to access mainstream welfare or subsidised health care. After several months, following concerted advocacy efforts, the conditions of his visa were amended, initially to allow him to study, and eventually to allow him to work.

Upon the High Court’s handing down of its judgment, Mr. Al-Kateb submitted a request for Ministerial intervention in his matter on compassionate grounds, under Section 417 of the Migration Act.<sup>345</sup> In October 2007, over three years later, the then Minister of Immigration exercised his discretionary powers to grant Mr. Al Kateb a permanent visa.<sup>346</sup> The visa carried a two-year assurance of support requirement, meaning that a guarantor needed to underwrite any welfare or health care benefits that Mr. Al Kateb might draw upon during that period.<sup>347</sup> In early 2009, Mr. Al Kateb was granted Australian citizenship.

#### 4.1.3 Removing Stateless Detainees

One of the biggest immigration detention challenges in all three countries is the fact that it is almost impossible to remove stateless detainees. This is a problem which is particularly acute regarding the *de facto* stateless – persons who would not be classified as stateless by the countries concerned, due to the definitional limitations discussed in Part One above, but whom no other country will admit. As also discussed in Part One, there can be many factors which result in non-removability and which contribute to *de facto* statelessness including the lack of consular protection, the principle of *non-refoulement* and the non-existence of transportation.

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344 There are several classes of Bridging Visas, which are issued to make non-citizens who would otherwise be unlawful lawful in a range of circumstances, including pending: the processing of their application for a substantive visa; completion of litigation; or finalisation of their preparations to depart from Australia. The Bridging Visa E may be used for those who are unlawful and have been located by the department, and are: making arrangements to depart; applying for a substantive visa; seeking judicial review; seeking Ministerial intervention; in criminal detention; or seeking review of a decision to cancel a visa, except in cases where the visa was cancelled under sections 501, 501A or 501B of the Act. The holder must abide by any conditions placed on the visa (for example, reporting requirements). A security payment may be required. See <http://www.immi.gov.au/allforms/pdf/1024i.pdf>

345 Amnesty International Australia, *Brief: Current s417 Applications of Stateless Persons* (26 October 2006), Unpublished Brief, p. 2.

346 See above, note 336.

347 An eminent Australian citizen, Dr. Jocelyn Chey, acted as Mr. Al-Kateb’s guarantor.

Some practical examples can be found in a report by the London Detainee Support Group, which identified external barriers to removal. Persons from countries such as Zimbabwe, Somalia and Iraq cannot be removed for legal and practical reasons. Even though High Court rulings have meant that no returns have been made to Zimbabwe over the past few years, three Zimbabweans had been detained in the UK for over a year. Others face insurmountable obstacles in obtaining documents from the embassies of their countries (Iran, Algeria) to enable them to return. Still others are given deportation orders after many years of residence in the UK but can no longer prove their original nationality. All these people are nevertheless detained for future deportation that may never become possible. Release on bail or temporary admission is often denied on the ground that due to past criminal convictions, they are likely to re-offend or abscond.<sup>348</sup>

#### 4.1.3.1 The United States

In the USA, following the *Zadvydas* decision, regulations were promulgated to govern the procedure by which the Department of Homeland Security (DHS) reviews the detention of non-citizens deemed removable (the *Zadvydas* regulations).<sup>349</sup> According to these regulations, after 180 days of detention, a determination has to be made on whether detention can be continued on account of “special circumstances” beyond 180 days, even where removal is not foreseeable.<sup>350</sup> After 180 days of detention, the authority over the custody determination transfers to the DHS Headquarters Post-Order Detention Unit (HQPDU) in Washington, D.C.<sup>351</sup>

However, this system does not work efficiently. According to a 2005 report by Catholic Legal Immigration Network, Inc. (CLINIC), “*once detainees’ files are transferred to Headquarters for review, detainees have little to no access to information about their status, and lack opportunities for advocacy in favor of release*”.<sup>352</sup> The report concluded that detainees rarely receive notification of

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348 See above, note 287, p. 2.

349 See *Continued Detention of Aliens Subject to Final Orders of Removal*, 66 Federal Register 56967 (November 14, 2001) codified at 8 C.F.R. §§ 241.4, 241.13, 241.14 (2005).

350 8 C.F.R. § 241.14. See the discussion in Section 7.2.1 of Part Three below.

351 8 C.F.R. § 241.4(k)(2)(ii).

352 Glynn, Kathleen and Bronstein, Sarah, *Systematic Problems Persist in U.S. ICE Custody Reviews for ‘Indefinite’ Detainees*, CLINIC, 2005, p. 16.



HQPDU's determination with regard to their removability and the only viable option for them to contest their continued detention is a petition for habeas corpus filed in federal court.<sup>353</sup>

Indeed, most advocates interviewed by ERT in the course of 2009 felt that the only way to secure the release of detainees after six months was to file a habeas petition, and that filing the petition alone would often result in release. In some jurisdictions, the Office of the Federal Public Defender (FPD) will aid immigrant detainees in filing petitions for habeas corpus after they have been detained beyond 180 days. This should be considered a best practice, inasmuch as advocates from those jurisdictions report that excessive and abusive periods of detention are much less common than in other jurisdictions.<sup>354</sup>

### Non-Cooperation

The first issue HQPDU will consider at the 180-day review is whether a detainee has cooperated with his or her removal. As explained below, many believe that HQPDU abuses that discretion. On the one hand, there are those cases in which courts have upheld non-cooperation determinations because the removable non-citizen refused to take steps to secure travel documents, either by failing to fill out necessary forms or providing false information,<sup>355</sup> or because the non-citizen physically resisted removal.<sup>356</sup> On the other hand, there are cases in which the court has overturned non-cooperation determinations because removable non-citizens have clearly done everything that the DHS had required them to do to secure travel documents,<sup>357</sup> where they initially resisted removal but then began to cooperate,<sup>358</sup> or where they cooperated, but truthfully stated to a consular official that they intended to challenge the order of removal and did not want to return home.<sup>359</sup>

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353 *Ibid.*

354 ERT interview with advocates at the ACLU of Southern California, April 2009, who indicated that the San Diego FPD filed *Zadvyd*s habeas petitions. See also ERT interview with Bob Pauw, an immigration attorney in Seattle, Washington, April 2009.

355 See *Lema v I.N.S.*, 341 F.3d 853, 856 (9th Cir. 2003).

356 See *Gamado v Chertoff*, 2008 WL 2050842 (D.N.J.)

357 See *Tobon v Gonzales*, 2008 WL 565105 (D. Ariz. 2008).

358 See *Clark v Ashcroft*, 2003 WL 22351953 at \*3-6 (E.D. Pa. Sept. 16, 2003).

359 See *Rajigah v Conway*, 268 F. Supp. 2d 159, 165-66.

Between these two extremes, there is a vast grey area within which arbitrary non-cooperation determinations by the DHS reign. The 2005 CLINIC report highlights the following specific problems:

- (i) the DHS's "*failure to provide and utilize clear criteria for non-cooperation*";
- (ii) evidence to suggest "*that non-cooperation is used as a basis for continuing detention when there is no other reason to detain the individual, but [the DHS] is not ready to release*";
- (iii) accounts "*that non-cooperation allegations could arise from [the DHS's] ineffective mechanisms to keep track of the status of individual cases*"; and
- (iv) indications that the DHS sometimes "*conflate[s] a detainee's non-cooperation with its own inaction, or a lack of response from the detainee's consulate*".<sup>360</sup>

### *Likelihood of Removal*

The second issue that the DHS analyses is whether removal is reasonably likely in the foreseeable future. Attorneys interviewed by ERT indicated that the DHS will often release Cubans, Vietnamese, Cambodians, and Laotians when called on to determine the reasonable likelihood of removal, acknowledging that citizens of these countries will not receive travel documents. A lawyer of the National Immigration Forum explained that this is because:

- (i) the United States does not maintain diplomatic relations with Cuba;
- (ii) the United States does not have a repatriation agreement with Laos;
- (iii) while the United States recently signed a repatriation agreement with Vietnam, it does not apply to Vietnamese citizens who arrived before 1995; and
- (iv) while the United States does have a repatriation agreement with Cambodia, the terms are very limited and removal to that country rarely occurs.<sup>361</sup>

Nationals of countries to which removal is difficult generally spend much more time in detention. For example, the DHS Office of the Inspector General (OIG) has reported that of 246 Chinese persons detained in March 2006, 156 (63%) were still detained in June 2006, and 32 of them had been in detention for more than 360 days. The Report also indicated that, as of June 2006,

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<sup>360</sup> See above, note 349, pp. 24-25.

<sup>361</sup> ERT interview with National Immigration Forum attorney Brittney Nystrom, April 2009.

there were 428 total non-citizens with final orders of removal who had been in detention for more than one year.<sup>362</sup>

### Special Circumstances

The third issue that the DHS considers is whether continued detention is justified by some “special circumstances”.<sup>363</sup> The regulations define “special circumstances” as:

- (i) non-citizens with “a highly contagious disease that is a threat to public safety”;
- (ii) non-citizens detained because of “serious adverse foreign policy consequences of release”;
- (iii) non-citizens that pose “security or terrorism concerns”; and
- (iv) non-citizens who are “specially dangerous”.<sup>364</sup>

### Designation of a Country for Removal

Notably, nowhere in *Zadvydas v Davis* and its progeny is the issue of statelessness directly addressed. While *Zadvydas* himself was legally stateless, the central question addressed by the Supreme Court, and the question that is central to the *Zadvydas* regulations themselves, is whether removal from the United States is reasonably foreseeable. Neither *de jure* nor *de facto* stateless persons have any guarantee that authorities will determine that their removal is not reasonably foreseeable. This is largely because the regulatory framework grants immigration authorities broad discretion in designating countries for removal.

U.S. policy provides guidance to immigration authorities on selecting countries to which non-citizens may be removed.<sup>365</sup> The first part of that section provides the framework for the removal of arriving, inadmissible non-citizens, and indicates that such individuals should be removed to the country

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362 DHS Office of the Inspector General, *ICE's Compliance With Detention Limits for Aliens With a Final Order of Removal From the United States*, OIG07-28, February 2007, p. 10, available at: [http://www.dhs.gov/xoig/assets/mgmttrpts/OIG\\_07-28\\_Feb07.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_07-28_Feb07.pdf) [accessed on 10 January 2010].

363 8 C.F.R. § 241.14.

364 8 C.F.R. § 241.14(b), (c), (d), (f). The regulations further establish that immigration courts only have jurisdiction to review determinations with respect to the fourth category 8 C.F.R. § 241.14(a)(2).

365 8 U.S.C.A. § 1231(b).

from which they arrived, unless they arrived from a bordering territory (for example, Mexico or Canada), in which case they should be removed to the country from which they arrived to the bordering territory.<sup>366</sup> However, if travel to the latter country is not permitted, then the statute instructs immigration authorities to remove the non-citizen to his or her country of nationality, where he or she was born, has residence, or to any other country that will accept him or her.<sup>367</sup>

The second part of the relevant section pertains to non-citizens determined to be deportable, i.e. those who have already entered the United States, and permits the non-citizen to designate his or her country of removal.<sup>368</sup> However, it also outlines circumstances in which immigration authorities may disregard such designation, and in those cases, provides a long list of countries to which immigration authorities may attempt removal in the alternative.<sup>369</sup> This list includes everything from the country from which the non-citizen entered the United States to “another country whose government will accept [him or her] into that country”.<sup>370</sup>

The OIG in its report has indicated that immigration authorities generally accept that removal to countries like Cuba and Vietnam is impracticable and release the majority of nationals from those countries. The report also indicates that other countries may present challenges, either because of strained political relations with the United States, onerous requirements for attaining travel documents, or a variety of other reasons.<sup>371</sup> These observations assume that travel documents are necessary for removal. However, on the same day that it decided *Clark v Martinez*, the U.S. Supreme Court held in *Jama v Immigration and Customs Enforcement* (a case concerning the removal of a Somali national) that a target country’s permission was not always necessary to remove a non-citizen who had been deemed removable.<sup>372</sup>

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366 8 U.S.C.A. § 1231(b)(1)(A),(B).

367 8 U.S.C.A. § 1231(b)(1)(C).

368 8 U.S.C.A. § 1231(b)(2).

369 8 U.S.C.A. § 1231(b)(2)(E)(i)-(vii).

370 *Ibid.*

371 See above, note 359.

372 *Jama v Immigration and Customs Enforcement*, 543 US 335 (2005).

#### 4.1.3.2 The United Kingdom

English law previously accepted that where a stateless person had acquired habitual residence in a particular state there may be constraints on their expulsion.<sup>373</sup> However, the law has since regressed and present jurisprudence is more deferential to the executive's power to detain and deport. The most authoritative statement of principles underpinning detention under the Immigration Act is contained in the judgment of Justice Woolfe in *R v Governor of Durham Prisons, ex p. Hardial Singh*.<sup>374</sup> The *Hardial Singh* principles were later summarised in the form of four propositions:

- (i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
- (ii) the deportee may only be detained for a period that is reasonable in all the circumstances;
- (iii) if, before the expiry of the reasonable period it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period he should not seek to exercise the power of detention;
- (iv) The Secretary of State should act with reasonable diligence to effect removal.<sup>375</sup>

Under the *Hardial Singh* principles, a person may not lawfully be detained "pending removal" for longer than a reasonable period of time. Where it is evident that removal cannot be effected within a reasonable period, the detention becomes unlawful even if the reasonable period of detention has not expired.

According to the UK courts, there are a number of circumstances which may be relevant to the question of how long a person can be reasonably detained before his/her detention is deemed to be unlawful. Relevant factors include the length of the period of detention, the nature of the obstacles which stand in the path of the Secretary of State securing deportation, the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles, the conditions in which the detained person is being kept, the effect of detention on the detainee and their family, the risk of re-offending and absconding if not detained, the danger to the public if released and the detainee's willingness to accept voluntary repatriation.

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373 Macdonald, Ian, *Immigration Law and Practice*, 1<sup>st</sup> Ed., 1983, p. 250.

374 *R v Governor of Durham Prisons, ex p. Hardial Singh* [1984] 1 WLR 704.

375 *R(I) v Home Secretary* [2002] EWCA Civ.888.

### **Thirty-three Months in Detention – the Story of Omran Mohamed<sup>376</sup>**

Omran is a stateless Palestinian. He was born and spent his early childhood in Gaza; after his mother died when he was approximately five years old, he moved to Lebanon, but was not registered as a refugee as his family were considered to be “displaced”. Omran found work as a taxi driver in Lebanon. He was detained and tortured by Syrian forces after one of his passengers had photographed buildings in a high security area. He managed to escape and fled the country for Germany, where he applied for asylum. He spent two and a half years in Germany, but got frustrated with the delays in determining his asylum application and illegally entered the UK.

Omran was refused asylum in the UK. He was subsequently sentenced to four and a half years imprisonment for assault and inflicting bodily injury. He claims that he was poorly represented by his lawyer who met him only once, and that the interpreter used a dialect he did not fully understand. Omran served three years of his sentence in Risley prison, Warrington. He then gave his consent to be deported as he was told he would be released from prison if he did so. However, he was kept in prison for a further 90 days, during which he was attacked by four prisoners. His neck was slashed with a razor and his jaw and cheek bone were broken – injuries which required three surgical operations. After this attack, Omran sued for compensation but did not receive any.

Omran then spent 33 months in detention in Campsfield House, near Oxford. Omran wants to be sent back to Gaza where his

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376 ERT multiple interviews with Omran Mohammed, 2009, Campsfield House, Kidlington, United Kingdom (ERT-SPD-UK-070).

sister lives. However, this has not been possible. Several applications to be released on bail were refused as the Home Office has stated that there are “anomalies” in his documentation. The Home Office did not believe he was from Gaza, and believed he would abscond. Ironically, in the first few months when he was in Campsfield House, there was a fire and breakout. Omran had the opportunity to escape, but chose not to.

Omran was finally released on bail in December 2009. He is challenging the legality of his detention through judicial review.

### Risk of Re-Offending/Absconding

Lord Justice Dyson in *R (M) v Secretary of State for the Home Department*<sup>377</sup> concluded that the combined risk of absconding and re-offending may justify allowing the Secretary of State a substantially longer time within which to arrange for removal. The greater the risks, the longer the period for which detention may be reasonable – but there comes a time when whatever the magnitude of the risks, the period of detention can no longer be said to be reasonable.

Justice Toulson in *A v Secretary of State for the Home Department* held that the risk of re-offending was a relevant factor when assessing the reasonableness of detention and that the strength of this factor would depend on the magnitude of risk. Since the purpose of deportation was to remove from the UK a person whose presence was not conducive to the public good due to a propensity to commit serious offences, protection of the public is the purpose of the deportation order and must be a relevant consideration when detaining that person pending his removal.<sup>378</sup>

In assessing the reasonableness of the length of detention in *Abdi*, it was accepted that while detention of foreign national prisoners must not be used

<sup>377</sup> *R (M) v Secretary of State for the Home Department* [2008] EWCA Civ. 307 at [14].

<sup>378</sup> *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, Para 55.

as a disguised form of preventive detention for the protection of the public, public safety remains a valid concern when assessing the reasonableness of detention.<sup>379</sup>

### Length of Detention

In the case of *Wang*, Justice Mitting found that the claimant had been detained for 30 months, a very long period, which is at the outer limit of the period of detention which can be justified on *Hardial Singh* principles except in the case of someone who has in the past committed very serious offences and who may go on to commit further such offences or who poses a risk to national security.<sup>380</sup> Justice Mitting concluded that the applicant should be released from detention despite the significant risk of absconding and committing further low level crimes while at liberty. Even if on the facts the claimant had refused to cooperate with the authorities in obtaining travel documents, the decision to release him would remain unchanged.<sup>381</sup>

### Failure to Cooperate

Refusal to cooperate can be a relevant factor while assessing the reasonableness of detention and may also influence the court's decision regarding the likelihood of imminent removal. There is a significant amount of debate surrounding the determination as to what constitutes non-cooperation. Certainly, non-citizens who do not want to be removed may sabotage efforts to acquire travel documents, or even physically resist removal; however, as with the USA, the government has a fair amount of discretion to decide what constitutes cooperation with removal. For example, in *Abdi*, the claimant refused to cooperate with attempts to return him to Somalia by signing a disclaimer which would have served as evidence that he left the UK voluntarily and permitted the Secretary of State to order his deportation despite the human rights situation in Somalia. The government's stand was that Mr. Abdi had himself prolonged his detention by refusing to sign the disclaimer.<sup>382</sup>

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379 *R (Abdi) v Secretary of State for the Home Department* [2009] EWHC 1324 (Admin), Para 40.

380 *Mitting J in R (Wang) v Secretary of State for the Home Department* [2009] EWHC 1578 (Admin) Para 27.

381 *Ibid.*, Para 35.

382 *UN Working Group on Arbitrary Detention, Opinion No.45/2006 (UK) Concerning Mr. Mustafa Abdi*, 9<sup>th</sup> November 2006, Para 15.



*Prospect of Removal*

Under the *Hardial Singh* principles, even if the length of detention is found to be reasonable, a person may still be released if circumstances indicate that it will not be possible to deport such person within a reasonable period of time.

In *Abdi*, for example, the court found that the detention of Mr. Abdi must come to an end, because there was no realistic prospect of his removal within a reasonable time. It noted the ECHR practice of granting interim relief to all applicants who were to be removed to Mogadishu. Despite a risk of re-offending and absconding, the court found that given the length of time the claimant had already spent in detention and the fact that there was no likelihood of his imminent removal to Somalia, Mr. Abdi should be released from detention.

In the case of *MM* a young Somali national who had lived legally in the UK since he was a child and was given a deportation order following a short prison sentence, the High Court ordered his release after a period of almost two years detention on account of the impossibility of return.<sup>383</sup>

**The Iraqi Asylum Flight of 2009<sup>384</sup>**

The UK Border Agency (UKBA) has gone to extreme measures to enforce removals. A recent example is the so called Iraqi Asylum Flight of 15 October 2009, which was the first instance in over five years to take Iraqis forcibly back to Baghdad. In what has been described as an example of the UKBA's "*cavalier attitude to the law*", 44 Iraqis were taken from immigration detention and forced onto a charter flight to Baghdad on 15 October 2009.

383 *MM (Somalia) v Secretary of State for the Home Department* [2009] EWCH 2353 Admin.

384 See Refugee and Migrant Justice, *Refugee and Migrant Justice condemns 'catalogue of errors' in run-up to the Iraqi asylum flight of October 2009*, 19 February 2010, available at: <http://refugee-migrant-justice.org.uk/downloads/asylum%20flight.pdf>. See also The Guardian, *Ethnic Kurd wins high court release ruling after failed deportation*, 19 February 2010, available at: <http://www.guardian.co.uk/uk/2010/feb/19/kurd-asylum-seeker-repatriation-iraq/>

The final destination of the flight was kept secret from those being removed and the full list of deportees was only made available to Iraqi officials on 12 October, three days before removal. Upon landing in Baghdad, Iraqi authorities accepted only 10 of the deportees and returned the other 34 back to the UK, on the basis that they could not be responsible for their safety.

After being returned, the Iraqis were once again detained. A High Court decision related to one of the returned detainees - Soran Ahmed, a 22-year-old Kurd from Kirkuk. Ahmed had been in immigration detention for 21 months following the refusal of his asylum application. He had not been removed because the Kurdish Regional Government would not accept him, and it was too dangerous to return him to Baghdad. Consequently, the High Court held that since there was no likelihood of him being sent back even in the medium term, it would be unlawful to continue to detain him.

### *Non-Cooperation by the Country of Nationality*

Release may also be affected by non-cooperation by the country of nationality where, for example, a country refuses/fails to identify or readmit their national. Iran and Algeria in particular have failed to cooperate in identifying and issuing travel documentation for their nationals – rendering their nationals particularly vulnerable to indefinite administrative detention. In *A and Others*<sup>385</sup> the detention of three Algerians was found unlawful in the absence of a reasonable prospect of their removal to Algeria – due mainly to the refusal by Algerian authorities to issue travel documents to the detainees despite their cooperation with the removal process by providing their biographical data and relevant details to their Embassy.

The above discussion of the development of the law shows that despite judicial restriction of the executive's authority to indefinitely detain persons pending removal, such detention continues, mostly unhampered until successfully challenged before the courts.

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385 *A and Others v Secretary of State for the Home Department* [2008] EWHC 142 Admin.

### 4.1.3.3 Australia

Unlike the UK and the USA, in Australia it is mandatory that all non-citizens whose presence in Australia is unlawful are detained until they are removed from Australia voluntarily, deported, or granted a visa to reside lawfully in the community.<sup>386</sup> What this means is that no factor can provide justification for the release of immigration detainees unless they are removed from Australia or granted a visa to remain.

Consequently, factors such as the length of detention, the likelihood of removal, cooperation, and the reasonableness of detention, which are important in the U.S. and UK contexts, play no role in the determination of whether a detainee should be released from immigration detention in Australia. Australian Courts have held that even when removal is impossible, detention must continue. The court ruling in the case of *Al-Kateb* discussed above stands as testament to this reality.<sup>387</sup>

This inhumane system which does not take into account the realities of statelessness is a recipe for indefinite detention. Persons in the unfortunate situation of being immigration detainees with no third country to be removed to depend very much on the discretion of ministers to grant them bridging visas – which often (as in the case of *Al-Kateb*) only happens after a lengthy period of detention and a draining legal battle.

### **4.1.4 Restriction of Liberty and Release into Destitution**

Equally problematic is the continued restriction of liberty and likely destitution of those released.

In each of the above UK cases, the court imposed conditions on release which included residing at a fixed address, electronic tagging, reporting requirements, etc.<sup>388</sup> The UKBA sees such restrictions of liberty as a means

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386 See Sections 189, 196 and 198 of the Australian Migration Act of 1958. These provisions have been discussed in Section 4.1.1.3 above.

387 See Section 4.1.2.3 above.

388 See above, note 379, Para 79; see also Mitting J in *R (Wang) v Secretary of State for the Home Department* [2009] EWHC 1578 (Admin) Para 36; *R (Daq) v Secretary of State for the Home Department* [2009] EWHC 1655 (Admin), Para 40.

of conferring a degree of freedom on a person who would otherwise be detained.<sup>389</sup>

It has been argued that “*the government has ... been practising a deliberate policy of destitution of this highly vulnerable group*”.<sup>390</sup> No distinction is made between stateless persons who have applied for asylum and been refused and other rejected asylum seekers who have effective nationalities. All are expected to leave the country within 21 days (with the exception of families with children who continue to receive financial support and accommodation). Single adults and childless couples have their housing and other support cut off at this point. There is limited access to free non-emergency secondary healthcare.<sup>391</sup> There are very limited circumstances in which either group of refused asylum seekers may receive low-level support and accommodation.<sup>392</sup>

But the absence of a formal statelessness determination or regularisation procedure, combined with the near impossibility of removing such persons to any other country, leaves them particularly vulnerable to indefinite destitution.<sup>393</sup>

Australia has also imposed a regime of release into destitution, as evidenced by the following testimony:

*Our release from detention was done in such a hard way. They drove us out of the detention centre at night. They stopped on a dark street in Port Augusta – away from the shopping centre. They told us to get out of the car. They put our bags at the side of the road. They didn't say goodbye. And then they were gone. We didn't have money and we didn't have phone num-*

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389 See above, note 267.

390 Joint Committee on Human Rights, *Treatment of Asylum Seekers*, 10<sup>th</sup> Report of Session 2006-7, 30/03/07, Para 120.

391 Still Human Still Here, *Evidence on the Draft Immigration and Citizenship Bill*, p. 1; See also The Asylum Support Appeals Project, *Unreasonably Destitute*, June 2008, available at: [www.asaproject.org/web/images/PDFs/news/unreasonably\\_destitute.pdf](http://www.asaproject.org/web/images/PDFs/news/unreasonably_destitute.pdf) [accessed on 6 June 2010].

392 See Section 4, Immigration and Asylum Act, 1999; and The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 S.I. 2005 No.930.

393 See above, note 391, p. 1; See also The Asylum Support Appeals Project, *Unreasonably Destitute*, June 2008, above, note 391.

*bers. We didn't know how to use the phones. We didn't have anything. Our English ability was not strong. We didn't even know how to ask for the police station. ... I found that I was very scared walking amongst people. After being like a cat in a cage for years, suddenly being put in amongst everything was very stressful. I saw people's different moods towards us. It felt like they were all looking at us. The feelings from detention were still with me.*<sup>394</sup>

Recently, however, as discussed in Part Three below, the Australian policy has begun to change in a positive direction.

## **4.2 IMMIGRATION DETENTION OF STATELESS PERSONS IN KENYA AND EGYPT**

The UK, USA and Australia have complex, detailed and comprehensive immigration laws, which do not satisfactorily take into consideration their human rights obligations to the stateless. The situation in Kenya and Egypt is very different: both countries have porous borders and deal with irregular immigrants in an *ad hoc*, reactive manner. There is no clear, consistently implemented policy pertaining to detention pending removal. Consequently, there is an even larger element of uncertainty in how a particular person would be handled by the authorities.

### **4.2.1 Kenya**

In Kenya stateless persons may be detained on grounds of irregular residence and/or lack of identity documents. Those who were once married to Kenyans and may have divorced before they applied for naturalisation are equally susceptible to detention. The Ministry of Immigration is responsible for the administration and management of persons who are considered non-Kenyans.

Detention generally happens in cases where immigration or police officers identify persons during raids as aliens without personal documents.<sup>395</sup>

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394 See above, note 299.

395 Kenya Anti-corruption Commission, *Examination report on systems, policies, procedures and practices at the Ministry of Immigration and Registration of Persons*, April 2006, p. 31.

These persons are commonly charged with unlawful presence in Kenya.<sup>396</sup> They may be sentenced to between one month and twelve months in prison and/or a fine of up to 3,000 Kenyan shillings [approximately 37 US Dollars]. Additionally, deportation orders are also made against them.

As with the USA, UK and Australia, stateless individuals are often detained for prolonged periods, solely because they cannot be returned to their country of nationality or habitual residence. In the absence of a national legal framework to deal with stateless detainees, they often remain in detention indefinitely. Information on where detainees are held (including international zones at border points and administrative detention facilities) is difficult to come by. Reliable data on the number of detainees and reasons for detention disaggregated by gender and age is not available.

The Kenyan justice system, similarly to those of Australia, the UK and the USA, can be intimidating and difficult to access for vulnerable persons. Those who do not understand a local language are particularly predisposed to administrative delays. The slowness of immigration officers to contact the country of origin or residence and the non-cooperation of such countries are added impediments. The non-existence of legal aid for immigration detainees in Kenya is a further, often insurmountable obstacle in the paths of the stateless in immigration detention.

According to Human Rights Watch, between December 2006 and March 2007, *“Kenyan security forces arrested at least 150 individuals from some 18 different nationalities at the Liboi and Kiunga border crossing points with Somalia”*.<sup>397</sup> The Kenyan authorities transferred these individuals to Nairobi where they were detained in prisons and other detention facilities for periods that exceed the fourteen day period permitted for pre-trial detention under Kenyan law. The Kenyan police denied many of the detainees access to family, legal counsel, diplomatic representatives, and human rights groups, including the parastatal Kenyan National Human Rights Commission.

On a visit to a Nairobi detention facility in May 2009, ERT found four stateless individuals who had been in prolonged detention because they could not obtain travel documents to their home countries. One had been in detention for over five years while another had been in detention for over three. The

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396 Under Section 13(2) of the Immigration Act of Kenya.

397 Human Rights Watch, *People fleeing Somalia war secretly detained*, March 2007.

other two had been in custody for two years. Despite the fact that two of the detainees had been identified by an April 2006 government report (Kenya Anti-corruption Commission) as being stateless, nothing had been done about their situation three years later. The following is the story of one of these persons:

***Pheneas Chapatula, Failing Health in Indefinite Immigration Detention***<sup>398</sup>

*I was born in Somalia in 1968 to the Chewa community, in a village called Djiboula very close to Mogadishu. I have a wife in Somalia and three brothers. In January 2007, I decided to come to Kenya to look for my elder brother who had left Somalia to live in Kenya. I entered Kenya through Wajir but was unable to trace my brother. Within a week of being in Kenya, I was arrested. I had no papers as I had lost my identity card in Somalia. After arrest I was taken to court but did not have a lawyer. I was sentenced to six months in prison for illegal presence in Kenya, after which I was to be deported.*

*After serving the prison sentence, I was transferred to the Nairobi Industrial Area Prison in April 2007. Since being transferred, no efforts have been made to deport me. I have only been visited once by a person who I think was an immigration officer.*

*I share a prison cell with eight others. They are all Kenyan remand prisoners awaiting trial. I am not allowed out of the cell, and not allowed to exercise. They give me different food, worse than what the others get. I am not given meat when the other prisoners are.*

The prison officers say that Mr. Chapatula suffers from mental health problems, which he himself is unaware of. ERT asked him what he knew about his mental health status. Mr. Chapatula stated that although he had been told that

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398 ERT Interview with Pheneas Chapatula, 23 September 2009, Nairobi Industrial Area Prison, Kenya (ERT-SPD-KN-011).

he had mental health problems the doctor only gave him tablets for a common cold. He has not been seen by a psychiatrist to-date, despite requesting to be seen by one. During the interview with ERT, Mr. Chapatula appeared to be in great anguish. He was rational and articulate, but very sad and subdued, and said that he had had no news from his wife or other family since he came to Kenya. He wanted to go back to Somalia, but due to his lack of identity papers and the indifference of the authorities, he had remained in immigration detention for more than two years.

#### 4.2.2 Egypt

As a Party to the 1951 Refugee Convention and its 1967 Protocol, and the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention),<sup>399</sup> Egypt has accepted an obligation to protect refugees and asylum seekers who are on its territory and to respect the principle of *non-refoulement*. Furthermore, unlike the other countries discussed above, Egypt has a monist legal system, meaning that enabling national legislation is not necessary to enforce international treaties ratified by the state.

Article 53 of the Constitution stipulates that Egypt shall grant “*the right of political asylum to every foreigner persecuted for defending the people’s interest, human rights, peace or justice. The extradition of political refugees shall be prohibited*”.<sup>400</sup> Despite this clear legal framework, Egypt has not established national determination procedures to recognise refugees. Egypt is not a Party to either of the Statelessness Conventions, and Egyptian law and policy do not recognise or cater to the unique challenges of statelessness. Instead, stateless persons without documentation are considered to be illegal immigrants.

Refugee status determination in Egypt is currently carried out by the UNHCR Regional Office in Cairo.<sup>401</sup> ERT was unable to establish whether any statelessness determination system existed in the UNHCR Cairo office. Those whose

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399 Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), 10 September 1969, 1001 U.N.T.S. 45.

400 Constitution of the Arab Republic of Egypt, Article 53.

401 Recently the UNHCR has been receiving requests to assess claims and establish whether an asylum seeker is a refugee or not before his/her release takes place. In case of recognition as a refugee the person is then freed and protected against deportation. In case of a negative response, the Egyptian authorities put the failed asylum seeker in contact with their embassy in order to facilitate their repatriation.



claims to refugee status are refused by UNHCR do not receive a full explanation of the reasons for rejection, and they must appeal within one month of receiving the decision. If the appeal is rejected or if the appeal submission is not filed within one month, the UNHCR considers the applicant to be a closed file, meaning that the applicant is no longer under the protection of the UNHCR and can be deported to his country of origin. Without UNHCR protection and without a country of effective nationality, some rejected asylum seekers find themselves stateless.

Similarly, asylum seekers who never registered with the UNHCR are not considered to be persons of concern to the UNHCR and are also vulnerable to deportation. This rule of registration even applies to persons who are recognised as refugees by UNHCR offices in other countries.

If arrested in a raid or convicted of a crime, recognised refugees and registered asylum seekers are usually released by the Egyptian authorities upon the fulfilment of their sentence and are protected against *refoulement*. However, unregistered asylum seekers and stateless persons (including those who did not have the opportunity to register due to being arrested at the border), have little chance of being assisted by the UNHCR as the Egyptian authorities do not allow the UNHCR to access them in detention. Often, when unregistered asylum seekers and stateless persons are arrested at the border for illegal entry they are tried by military tribunals under the authority of Egypt's Emergency Law.<sup>402</sup> After they have completed their sentences, unregistered asylum seekers are, without any respect for their asylum request, put in contact with their home embassies in order to facilitate their deportation. Consequently, stateless persons face the almost certain prospect of indefinite detention if arrested on Egyptian soil.

Statistics of stateless persons in Egypt are hard to come by, and often contradictory. It is estimated that there are 70,000 Palestinians in Egypt of whom the majority are stateless. The latest statistics of the UNHCR indicate that as of 2007, there were 74 non-Palestinian stateless persons living in Egypt.<sup>403</sup> ERT has been told that a large number of stateless persons are currently being detained in Egyptian prisons, but they are not registered with the UNHCR, and are therefore not included in the statistics.

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402 Border areas are under the control of military justice. Cf. Art. 20 of Martial Law No. 25 for year 1966.

403 UN High Commissioner for Refugees, *UNHCR Statistical Online Population Database*, available at: [www.unhcr.org/statistics/populationdatabase](http://www.unhcr.org/statistics/populationdatabase) [accessed on 4 June 2009].

Asylum seekers and stateless persons are often subjected to criminal and administrative detention in Egypt on account of illegal entry into the country or because they have remained in the country without regular residence permits. The punishment for illegal entry into Egypt is a maximum prison sentence of six months and a fine of 200 to 1000 Egyptian pounds [approximately 35 to 175 USD]. Additionally, the illegal immigrant may also be deported.<sup>404</sup> According to Human Rights Watch, the police have arrested hundreds of migrants in the past two years alone, of which the majority have been arrested at border points.<sup>405</sup>

All immigration detainees are held in regular prisons which also hold Egyptian criminals. However, generally, foreign prisoners are not held in the same cells with Egyptian citizens. They are commonly held together after their arrest in police stations, and kept in a different block within detention centres.

After completing their prison sentence, migrants, unregistered asylum seekers and stateless persons are held in administrative detention pending deportation. Detainees generally have the right to challenge the legality of their detention by:

- (i) Petitioning the investigative judge prior to referring the case to the trial court;
- (ii) Petitioning the trial court after referral;
- (iii) Filing an appeal after conviction when such an appeal is allowed.

There is a process similar to the writ of habeas corpus that allows unlimited access to the courts to challenge the legality of detention.<sup>406</sup>

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404 See Article 41 of the Foreigners Law, Decree Law No. 89/1960. In general, the sentence given by the court to a foreigner arrested and tried for illegal entry – violation of Articles 2 and 3 of the Foreigners Law – is one year imprisonment and a 1000 Egyptian Pound fine according to Article 41 of the law.

405 Human Rights Watch, *Sinai Perils*, November 12, 2008.

406 Library of Congress Habeas Corpus Rights: Egypt, Iraq, Saudi Arabia, Syria, and Yemen, available at: <http://www.loc.gov/law/help/habeas-corpus/egypt.php> [accessed on 09 July 2009].

### ***A De Facto Stateless Cameroonian's Story of Detention in Egypt***<sup>407</sup>

*I came to Egypt in order to seek asylum through the UNHCR. I reached the border on January 6<sup>th</sup>, 2007. I was stopped by the Egyptian Immigration authorities because I didn't have a passport. They searched me and collected everything from me. I was taken to a cell where I remained for 14 days, and then I was brought to a court, and I tried to tell them my life story, but they could not understand me because I could not speak Arabic, and they could not understand French. I was not given an interpreter.*

*I was sentenced to one year in prison with a fine of 1000 Egyptian pounds [approximately 175 U.S. dollars]. I was taken to prison on February 16<sup>th</sup> 2007. Life was very hard in prison. My hands and feet were handcuffed, and my skin began to rub off and I was bleeding. I went through periods without being fed.*

*I faced many problems because I am a Christian; I was assaulted by the other prisoners and the prison guards; I was forbidden to use the communal bathroom; I was treated as being impure because when they asked me to pray with them, I refused. They cut the cross that I was wearing around my neck and they poured water on my Bible. There were about 25 people held in the same room as me, and I was the only Christian.*

*I tried to complain to a guard, and I was slapped and called a pagan. My wrists and feet were handcuffed and they began to peel and bleed. I was then put into a dark room for four days. I had to drink my own urine in there because I was so thirsty, and I was not given any water. I was no longer lucid by the end of my solitary confinement. The general conditions were not good. There was no bathroom in the cell which contained 25 people, and we were fed one meal a day. I was in the same cell with criminals who had been sentenced to death, and they would hide razors in their teeth.*

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407 ERT Interview with E.G., June 2009, Detention Centre, Greater Cairo, Egypt (ERT-SPD-EG-008). The detainee was kidnapped as a child and raised in Cameroon, and has suffered very bad abuse in that country.

*At the end of my sentence, I was made to serve another 3 months because I could not pay the fine. My three months were completed on April 6, 2008.*

*I was then sent to another prison where I remain today. I was visited by someone from the Cameroon Consulate, and he asked me if I had any family who could afford to buy me a plane ticket back to Cameroon. I told him that prison is better than returning to Cameroon and Chad. I am still being detained because I have no country to be deported to.*

#### **4.3 IMMIGRATION DETENTION OF STATELESS ROHINGYA IN BANGLADESH, MALAYSIA AND THAILAND**

The Rohingya are one of the most vulnerable and abused stateless communities in the world. Legally they have been stripped of their nationality since 1982 and victimised by a host of discriminatory laws, policies and practices in their home country of Myanmar. As a result, hundreds of thousands of Rohingya have fled the country in search of a more stable, economically viable and less discriminatory future.

Under Myanmar law, the Rohingya are forbidden to leave the country (or even their village) without receiving permission to do so. However, in practice, it is easier for a Rohingya to cross the frontier to Bangladesh clandestinely than it is to obtain a pass and make the short internal journey to Sittwe – the capital of the Rakhine state which is home to the Rohingya. Those caught making the journey to or from Bangladesh, however, face jail sentences under charges of illegal entry or exit.<sup>408</sup> Consequently, the Rohingya who do leave Myanmar

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<sup>408</sup> The main legislation regulating entry and exit of persons into Myanmar is the Burma Immigration (Emergency Provisions) Act, 1947 (Act XXXI of 1947) which was amended in 1990 by the Law Amending the Myanmar Immigration (Emergency Provisions) Act, 1947, or The State Law and Order Restoration Council Law No. 2/90. According to Section 13 (1) of the Burma Immigration Act, citizens need to possess a valid passport and an exit stamp or exit permit in the form of border pass in order to re-enter the country legally. In practice, provisions of Section 13(1) of the Immigration Act are rarely applied on Myanmar citizens and the prosecution of citizens is usually politically motivated, such as in the case of political activists or rejected asylum seekers.

leave forever and their fate is in the hands of the states they travel to, often in life-threatening, hazardous sea voyages on ill-equipped boats.



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The mass exodus of Rohingya (and other minority communities) from Myanmar has created considerable immigration problems for the authorities of neighbouring Bangladesh and Thailand, as well as the economically more prosperous Malaysia.<sup>409</sup> Many first generation Rohingya immigrants should be recognised as refugees, due to the level of persecution suffered in Myanmar.<sup>410</sup> Second, third and even fourth generation Rohingya born into irregular immigrant families, and not legally integrated into the societies they are born into, remain *de jure* stateless. This reality demonstrates the overlap between the protection needs of refugees and non-refugee stateless persons, and is one of the main reasons for ERT's focus on the Rohingya problem.

409 For a more detailed report on ERT's research findings in Malaysia, see The Equal Rights Trust, *Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia*, January 2010, available at: <http://www.equalrightstrust.org/ertdocumentbank/ERTMalaysiaReportFinal.pdf>.

410 However, apart from some in Bangladesh and Malaysia, most Rohingya are not recognised as refugees.

Typically, Rohingya escaping Myanmar would illegally cross the border into Bangladesh, from where they would take a boat journey to Thailand and then cross over into Malaysia.<sup>411</sup> At each stage along this journey the Rohingya suffer exclusion, discrimination and abuse, and risk detention, trafficking and informal deportation. ERT in its field research followed this journey – focussing on Rohingya communities in Bangladesh, Thailand and Malaysia – and revealed the cyclical nature of the Rohingya flight, which has not received adequate attention from the international community.

#### **4.3.1 First Port of Call: Bangladesh**

Bangladesh is the first port of call for many Rohingya who try to escape persecution in Myanmar and hope to reach the economically less impoverished shores of Thailand and Malaysia. Bangladesh is not party to the two Statelessness Conventions. It has not ratified the 1951 Refugee Convention and its 1967 Protocol and has not enacted any domestic legislation protecting refugees or stateless persons. The Constitution of Bangladesh guarantees legal protection to Bangladeshi citizens as well as “*every other person for the time being within Bangladesh*”.<sup>412</sup>

Bangladesh has been burdened by two mass refugee exoduses of about 250,000 Rohingya refugees (about one third of the total Rohingya population in North Arakan) in 1978 and 1991-92. Each was followed by repatriation, often under coercion, despite the fact that the human rights situation in Myanmar had not shown any improvement. Consequently, many repatriated Rohingya have since fled again to Bangladesh but have no access to the official refugee camps and UNHCR protection.

At present, some 28,000 *prima facie* Rohingya refugees who first arrived in the 1991-92 mass exodus remain in Bangladesh in the two “official” refugee camps of Nayapara and Kutupalong in the Cox’s Bazar district of South-East Bangladesh. They benefit from limited protection and humanitarian assistance from the UNHCR and from some international and national NGOs. A further Rohingya population estimated at approximately 200,000 have settled outside the two official refugee camps. Most have fled to Bangladesh independently of the mass exodus, many after 1992, and have been denied access to the camps; some have fled from the camps to escape forced repatriation. ERT research indicates that perhaps as many as 50% of these unregistered

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411 See Annex B for a Rohingya Migration Map (courtesy of the Arakan Project).

412 See Article 31 of the 1972 Constitution of Bangladesh.

Rohingya were once camp refugees who had been forcibly repatriated to Myanmar and fled back to Bangladesh. Today, they are found in two unofficial sites or dispersed in villages throughout Cox's Bazar District and to a lesser extent in the Chittagong Hill Tracts. In 2002, local authorities in Teknaf, the southernmost point of Bangladesh in Cox's Bazar District, evicted without warning the Rohingya persons living there. This led to the spontaneous establishment of the unofficial "Teknaf makeshift camp" which was relocated to a new site in Leda [also in Cox's Bazar] in mid-2008 and currently houses about 10,000 Rohingya. In early 2008, insecurity related to voter registration and fear of eviction prompted the Rohingya from around Cox's Bazar District to gather beside the Kutupalong refugee camp. Today, the unofficial "Kutupalong makeshift camp" continues to grow and houses an estimated 30,000 Rohingya. New arrivals continue to trickle into Bangladesh on a regular basis.

This unregistered population is particularly vulnerable as it does not benefit from any protection. They have no legal status in Bangladesh and are labelled as illegal migrants. They are at risk of eviction, arrest and detention, and recently of deportation to Myanmar. No mechanism exists in Bangladesh for the unregistered, including new arrivals, to access UNHCR protection. Over the last two years, Bangladesh has increasingly implemented a new policy of "informal deportation" or "push-backs". Arrests of new arrivals and roundups in villages followed by informal deportations across the Myanmar border have significantly increased since 2009.

#### 4.3.1.1 Immigration Detention

When compared with the size of the unregistered Rohingya population in Bangladesh, the level of arrest, detention and/or deportation is relatively low, indicating that Bangladesh has developed a degree of tolerance towards the Rohingya. However, the legal system of Bangladesh is weakened by inefficiency, politicisation, corruption and poor enforcement, thus undermining accountability in the administration of justice, in particular at the level of lower courts and the police.<sup>413</sup>

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413 According to Amnesty International, *"for many decades the rule of law in Bangladesh has been subverted by political interference, weak institutions and disregard for human rights. The powerful and the privileged have been able to act with impunity, with no fear of being called to account. Abuse of power was the norm, marked by a growing nexus between political violence and organized crime. The poorest people have been often the most vulnerable to abuse and least able to find redress"*. Amnesty International, *One year on: human rights in Bangladesh under the state of emergency*, 10 January 2008, available at: <http://www.amnesty.org/en/for-media/press-releases/one-year-human-rights-bangladesh-under-state-emergency-20080110> [accessed on 5 May 2010].

Being amongst the poorest in Bangladesh and also being undocumented, foreign and stateless, the Rohingya have disproportionately suffered the consequences. Arrests of Rohingya are generally made by the police or occasionally by the border security forces (BDR). From time to time, the police launch crackdowns against irregular Rohingya migrants. These sporadic raids often appear to be politically motivated, usually occurring at times of elections or during local outbursts of anti-Rohingya sentiment. The Teknaf and Ukhia Sub-districts in Cox's Bazar, where there is a particularly high degree of hostility towards the Rohingya, are the main areas targeted by the police.

The most significant problem of immigration detention for the Rohingya is that of "released prisoners" (RPs) - those who continue to be detained after serving immigration related sentences, due to difficulties related to their deportation. RPs have completed their sentence and are then kept in detention pending deportation. Because the Myanmar authorities refuse to re-admit these prisoners, they remain incarcerated indefinitely, and some have died in custody. The Bangladesh Prisons Department does not have a specific budget for RPs and their presence among pre-trial detainees and convicts constitutes an additional burden to the penal system:

*In jail every prisoner feels sympathy for the "released prisoners" because they are the worst victims of the system. A prisoner usually has a country and, whenever he gets bail or completes his sentence, he can return to his family but "released prisoners" cannot return home although their sentence has been served long ago.<sup>414</sup>*

A former Rohingya prisoner released in June 2009 and interviewed by ERT spoke about one of his jail mates, a Rohingya fisherman from Sittwe who was arrested in Bangladesh on 31 May 1992. His boat was caught in a storm and drifted into Bangladeshi waters. He was charged under Section 25B of the 1974 Special Powers Act (smuggling). After four years in pre-trial detention he was sentenced to four years and six months imprisonment, of which his four years of pre-trial detention were deducted. Thirteen years later, he is still among the RPs in Cox's Bazar jail.<sup>415</sup>

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414 ERT interview with a former Rohingya detainee, 14 June 2009, Cox's Bazar, Bangladesh (ERT-SPD-BD-042).

415 ERT interview with a former Rohingya detainee, 23 June 2009, Cox's Bazar, Bangladesh (ERT-SPD-BD-045).



#### 4.3.1.2 The Impact of Public Interest Litigation

In 2001 Ain-O-Shalish Kendra (ASK), a Bangladeshi human rights and legal aid NGO, initiated a public interest litigation case on behalf of foreigners kept in administrative detention as “released prisoners”, on the grounds that detention beyond the full term of their sentence was unconstitutional, and also violated Rules 78 and 570 of the Jail Code providing for the release of prisoners who had completed their sentences. In its judgment, the Supreme Court of Bangladesh directed the Ministry of Home Affairs to:

- (i) make contact with the respective embassies of the detainees’ countries of origin with a view to expedite their repatriation;
- (ii) facilitate access to the detainees for ASK and the International Organisation for Migration; and
- (iii) take steps for providing shelter to those prisoners if their repatriation could not be arranged.<sup>416</sup>

According to a list prepared on 14 May 2007 by the Bangladesh Prisons Department, on 10 July 2001, 720 RPs were detained in Bangladesh, including 430 from Myanmar. By 14 May 2007, possibly as a result of this litigation, their numbers had decreased to 245, of whom 117 were from Myanmar, and 80 were Rohingya. Some of these RPs had been “released” as early as 1996, but remained in prison for over a decade due to their non-removability. The Cox’s Bazar jail housed 79 of the 80 Rohingya RPs. The Rohingya have been systemically excluded from the occasional exchanges of prisoners between Bangladesh and Myanmar. But in April 2009, for the first time, the Myanmar authorities accepted 43 Rohingya (39 of them listed in 2007) among 64 deported “released prisoners”. Consequently, of the 80 Rohingya detained in 2007, 41 remained in detention at the end of 2009. Collectively, they have been detained for 285 years beyond their prison terms.

#### 4.3.1.3 Detention Conditions

Bangladesh does not have separate prison facilities for immigration detainees. The Rohingya are held in medium-security jails with criminal prisoners. Pre-trial and convicted inmates are generally mixed together and juveniles are held alongside adults, even though the law forbids this.<sup>417</sup>

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<sup>416</sup> ERT interview with civil society actors, May 2009, Dhaka.

<sup>417</sup> Notes from ERT meeting with humanitarian organisations operating in Bangladesh, May 2009.

Bangladeshi prisons are very over-crowded in general. All Rohingya interviewed by ERT had been held in Cox's Bazar jail. Conditions in the old Cox's Bazar jail were particularly harsh but a new jail was constructed in the outskirts of Cox's Bazar town with some improved facilities including fans, lights and televisions in the prison wards. However, the new Cox's Bazar jail already suffers from acute overcrowding. The jail has a capacity of 440 prisoners but housed 2,868 prisoners as of 1 June 2009. On 31 July 2008, there were 339 Rohingya detainees in Cox's Bazar, of whom 79 were RPs incarcerated beyond the term of their sentence. The following statement by a Rohingya interviewed by ERT captures the dire situation in the jail:

*I faced many problems during the first 3 months when I was detained in Ward No. 1, the most overcrowded ward in the jail with a total of 165 to 170 prisoners. It was difficult to sleep during the night as it was so overcrowded that one had to bribe the jail warden and the prisoners' leader (usually a convicted prisoner) in order to secure a space to lie down. Other prisoners had to spend the entire night sitting. We were packed like sardines. This is the ward for the new arrivals where prisoners suffer the most in Cox's Bazar jail.<sup>418</sup>*

One Rohingya "released prisoner" who had spent more than 13 years in jail and had been initially detained in the old prison of Cox's Bazar, recalled:

*The old jail of Cox's Bazar could be compared to hell. The food was also terrible. In the morning we received one half-baked chapatti with a bit of molasses, in the afternoon two half-baked chapattis again with one cup of dhal and in the evening, a small amount of rice with a bit of vegetables. Every three evenings, they gave us a small piece of fish or beef. There was no plate and no glass for all prisoners. Only influential prisoners received these. Ordinary prisoners like me had to clean a spot on the cement floor to put bread or rice on.<sup>419</sup>*

In Cox's Bazar jail, the provision of water is also reported as a serious problem. Furthermore, medical items are often in short supply. Deaths of Rohingya

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418 ERT interview with a former Rohingya detainee, 11 June 2009, Cox's Bazar, Bangladesh (ERT-SPD-BD-043).

419 ERT interview with a former Rohingya detainee, 17 June 2009, Cox's Bazar, Bangladesh (ERT-SPD-BD-041).

prisoners in custody are not uncommon and are most often health-related. This is not surprising in view of the unhygienic environment, overcrowding, lack of mobility and poor medical care. A deported “released prisoner” who had spent more than 13 years in several jails recalled:

*During my years in jail, about 15 prisoners died in custody, both Bangladeshis and Burmese. I witnessed a total of five released prisoners dying - two in Comilla jail and three in Cox’s Bazar jail. All of them died of disease, no one was beaten to death.<sup>420</sup>*

***A 60-year-old Rohingya’s Account of Ill-treatment and Extortion<sup>421</sup>***

*I was first sent to the “newcomers’ ward” where new detainees are always put in order to be sold by the prisoners’ leader to another ward for a fixed amount of money which would be extorted from the new prisoner. This ward is like an auction place. The prisoners’ leader collects personal details from each new detainee, gauges how much money can be extorted from his family and then fixes the selling price for the other ward leaders. These ward leaders then buy prisoners from him and later collect the same amount from the purchased prisoner by beating him. I had to stay for two days in this ward. Then, I was sent to Ward No. 12 and the ward leader who had “bought me” told me that I had to pay him 5,000 Taka. I replied: “How can I get this money? I am just a refugee.”*

*That night, we, about 20 newcomers, were put in the “pile”. “Pile” is jail jargon. It means a small corner of the ward where a maximum of 7 or 8 people can lie down. The ward leader compels 20 or more prisoners to go into that corner. They are packed like sardines. Then the ward leader and his assistants (all of them prisoners) press and push prisoners on all sides so that they get hurt. They also kick, punch and jump on the body of the lying prisoners until*

420 *Ibid.*

421 See above, note 415.

*they agree to pay. When the prisoner can no longer tolerate this and starts crying, the ward leader says: "Can you pay us now? How much? When?" The prisoner then mentions an amount and promises to pay as soon as his relatives come to visit him. Once the prisoner promises, the ward leader allows him to go and sleep in a wider area of the same ward.*

*I had to remain in the "pile". The next day, the ward leader again asked me whether I was ready to pay but I again said no. The ward leader then slapped me and transferred me to another ward, Ward No. 4, where older prisoners were kept.*

Former prisoners also reported that drug use was widespread, gambling was encouraged by prison staff and that non-consensual homosexual activity was prevalent among inmates. Corruption, extortion and violence are prevalent as well. Detainees stated that they were subject to beatings by prison wardens but most custodial violence takes place between inmates. Every ward is under the control of a prison gang. They bully and assault inmates in order to extort protection money from their families. In particular, newcomers are targeted for ill-treatment and extortion.

#### 4.3.1.4 "Push-backs" from Bangladesh

In December 2007, 110 new Rohingya arrivals were "pushed back" – forcibly returned - by Bangladesh to Myanmar. This trend continued and increased in 2008, and about 300 were deported without any formality. Most were either new arrivals or boat people crossing into Bangladesh with the intention of travelling on to Thailand and Malaysia. In 2009, the number dramatically shot up, and included unregistered Rohingya who had been living in Bangladesh for several years. In 2009, approximately 1,500 Rohingya were arrested and pushed back to Myanmar.

Arrests usually take place on the road or at checkpoints near the border area. But over the first two weeks of October 2009, the police, aided by locals, began rounding up Rohingya from their houses in the Bandarban District.

The repatriated Rohingya are at risk of prosecution in Myanmar for illegal exit and entry.<sup>422</sup> To date, Rohingya returnees have not been re-arrested in Myanmar, but most have been unable to reinstate their names in their family lists and are thus illegally staying in their villages. At least one has fled to Bangladesh again.<sup>423</sup>

One group of 14 Rohingya, including women, children and babies, all settled in Bangladesh for several years, were rounded up and pushed back at the BDR border outpost of Chakdala in Naikongchari on 16 July 2009. Forced back into Myanmar, they encountered a paramilitary border administration force (NaSaKa) patrol and nine of them were arrested, while the rest escaped. After being detained in the NaSaKa camp of Kha Mounng Seik in North Maungdaw, three women and two men were produced to the Buthidaung court in Myanmar and, on 20 August 2009, they were sentenced to five years imprisonment. The children and babies were taken away from their mothers and handed over to grandparents in their village of origin.

One of the Rohingya men who managed to escape arrest along with his son recounted his ordeal. His wife is currently held in Buthidaung jail in Myanmar and his two other children have been handed over to his wife's parents.

*On 15 July 2009, we were arrested by the BDR. They took us to a house where there were three other Rohingya families. In the late afternoon, an Army pickup arrived and took us all to the BDR camp in Naikongchari. BDR then handcuffed the men, not the women and children. Altogether there were 14 of us, eight adults and six children. There was a newly married couple who had recently fled from Myanmar, one couple with a two-year-old baby, one family with two children and my family of five.*

*On the morning of 16 July, the BDR took our individual pictures as well as a group picture of each family. After lunch, they ordered us to get on the same pickup. The men were handcuffed again. It was raining heavily and the pickup drove to the BDR border outpost of Chakdala. We had to get off and*

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422 Section 13(1) of the 1947 Burma Immigration (Emergency Provisions) Act provides for sentence of up to 5 years imprisonment.

423 See above, note 419.

*started walking accompanied by seven BDR men. It was still raining and we walked for about 45 minutes along a hilly path in the dense jungle.*

*Then the BDR men ordered us to keep walking in the same direction and said: "Within a few minutes, you will be in your country. Don't try to come back to Bangladesh. If you do, we will shoot you." The BDR men stood there watching us as we continued to walk.*

*After a few minutes we found a temporary shed made of leaves. Our children were wet and shivering so we decided to stop there. When the rain stopped, it was almost dark. The family with one child decided to remain in the shed and said they would follow us later. The newly-married couple, the other couple with two daughters and my family started walking again. My eldest son was on my shoulder, my 3-year-old daughter on the shoulder of the newly-married man and my wife carried our nine month old baby son. The other couple with their two daughters carried their own children.*

*After a short while, we lost the path and started walking through the jungle. It was soon completely dark but we kept walking one behind the other. I was the last in the line, my wife was just ahead of me and the two other couples were in front. Suddenly we heard whispering in Burmese and we saw a torch light. Since I was at the end of the line, I managed to hide in the bushes with my son and put my hand over his mouth to keep him quiet. Four NaSaKa men surrounded our group. I did not understand what they were saying but the newly married couple did. Quietly I moved deeper into the bushes. Four torches searched around but the rain helped me as the NaSaKa men did not bother to search further. Then they took away my wife, my two children and the other two families. My son tried to cry but I kept my hand over his mouth.*

*I cannot remember how long I waited there. Then I started walking in the opposite direction and continued for a long time. I was exhausted by the time I saw an empty house. It*

*must have been a maktab because there were many mats on the floor. I realised that I was in Bangladesh again and near a village.*<sup>424</sup>

#### 4.3.1.5 Crackdown on Rohingya in Bangladesh

In January 2010, Bangladeshi authorities began an unprecedented crackdown on the unregistered Rohingya in Bangladesh. More than 500 Rohingya were arrested in January alone, up to 240 of whom have been charged and sentenced to prison terms for immigration offences, whilst the rest have been pushed back across the border to Myanmar.

This crackdown has been accompanied by growing anti-Rohingya sentiment amongst the public, a development which can have particularly harsh repercussions on the Rohingya community in Bangladesh. Fearing arrest and deportation, over 5,000 unregistered Rohingya in Bangladesh fled their homes in January 2010, and flocked to the Kutupalong makeshift camp in Ukhia, swelling the population of the camp to over 30,000. The residents of the camp do not receive any assistance or welfare, and are unable to work, because they risk arrest if they leave the camp in search of employment.<sup>425</sup>

#### **4.3.2 Rohingya Boat People in Thailand**

The most common route taken by Rohingya to Malaysia is by boat from Bangladesh via Thailand, from where they travel overland to Malaysia. Smuggling and recruiting networks in North Arakan in Myanmar and Bangladesh reportedly offer two “packages” to Rohingya who wish to travel to Malaysia. The first option is sea passage to the shores of southern Thailand for less than US\$300. The second includes transport beyond Thailand to Malaysia for between \$700 and \$1,000. Most Rohingya who undertake this journey are men between 18 and 40 years of age. However,

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424 ERT interview with a Rohingya deported from Bangladesh, 25 July 2009, Cox’s Bazar, Bangladesh (ERT-SPD-BD-048).

425 For a more detailed report of the recent crackdown, see The Arakan Project, *Unregistered Rohingya Refugees in Bangladesh: Crackdown, Forced Displacement and Hunger*, 11 February 2010, available at: <http://www.burmalibrary.org/docs08/Bangladesh-Crackdown.pdf> [accessed on 10 May 2010].

children as young as eight years old have also been known to make the journey.<sup>426</sup>

The Rohingya begin their journey in North Arakan, travel through Bangladesh where they are joined by more Rohingya and some Bangladeshis, continue by boat to Thailand and then go overland to Malaysia. The sea leg of the journey lasts approximately one week. While the majority of boats depart from Bangladesh, some stop en route at Maungdaw in Myanmar to pick up more travellers, while a few begin their journey in Sittwe, Myanmar.

Many of the boats are in poor condition. Food, water and fuel are in short supply. The boat drivers are sometimes inexperienced, resulting in some boats getting lost at sea, others capsizing and still others drifting into national waters and being taken into custody by the coast guards of Myanmar, the Andaman Islands (India) and even Sri Lanka. Many boat people have disappeared at sea.

ERT research found that most of the boats which reach Thailand are intercepted at sea or apprehended when they land. The boat people are transferred to immigration detention (mostly in Ranong Detention Centre, Thailand, but also in Phangnga), sentenced to five to seven days of detention under the Thai Immigration Act, and informally deported to brokers across the Thai-Myanmar border. Brokers take over the detainees at this stage, and transport those who can pay a substantial fee from Myanmar to Malaysia via Thailand. Those who cannot afford the fee are beaten and sold as bonded labour to Thai fishing boats and plantations. At one point, the Thai authorities attempted to deport Rohingya formally into the hands of Myanmar's immigration authorities, but they were sent back into Thailand the following day. The number of people making this hazardous voyage has increased over the years. It is estimated that approximately 3,000 persons made the journey in the sailing season of 2006-07. The following year, there were approximately 6,000 departures.

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426 Lewa, Chris. "Asia's new boat people", *Forced Migration Review*, Issue 30, April 2009, pp. 40 - 42.



### ***A Young Rohingya's Account of His Boat Journey***<sup>427</sup>

*I embarked on the boat with my friend four days after Qurbani Eid (13 December 2008). The smuggler took us to Moheshkhali Island [near Cox's Bazar] and we embarked from the main jetty. It was a cargo boat used to carry salt. It had two engines of 22 HP, one old and one new. We were 83 passengers onboard. I knew the exact number because the food and water was limited and rationed. The youngest passenger was 12 and the oldest around 60. The majority were young and newcomers from Maungdaw. There were only four or five Bangladeshis.*

*The sea journey lasted 12 days because the driver lost the way. There were 2 sacks of rice and 2 drums of water on board, but we ran out of food and water on the 10<sup>th</sup> day. We went hungry for the last 2 days. We met Burmese fishermen near Tenasserim Division. They did not provide us with any food but they gave us some fuel and showed us the direction to Thailand.*

#### 4.3.2.1 Push-Backs from Thailand

Thai authorities perceive the Rohingya as a threat to national security. On 28 March 2008 the Thai Prime Minister announced that Thailand was exploring the option of detaining Rohingya boat people on a deserted island: *"To stop the influx, we have to keep them in a tough place. Those who are about to follow will have to know life here will be difficult in order that they won't sneak in".*<sup>428</sup> This statement was followed by a change in policy. Responsibility for dealing with the boat people was transferred from Thai Immigration to the Internal Security Operation Command of the Thai Military (ISOC) in December 2008. Boat people were detained on a remote island and then "pushed back" into the high seas. Between the end of November and mid-December 2008, six boats were intercepted and their passengers were detained on Sai Daeng Island by the ISOC. They reported being subject to beatings and torture on the island.

<sup>427</sup> ERT Interview with a Rohingya boat person, June 2009, undisclosed location (ERT-SPD-ML-053A).

<sup>428</sup> See [www.bangkokpost.com/290308\\_News/29Mar2008\\_news03.php](http://www.bangkokpost.com/290308_News/29Mar2008_news03.php).

***An Account of Detention on Sai Daeng Island***<sup>429</sup>

*They put us all on a big Navy boat. The boat sailed to a hilly island [Koh Sai Daeng]. The island was deserted but we saw barbed wire as well as many shoes and clothes lying around in a clearing in the jungle. These things undoubtedly belonged to our own people and we suddenly wondered whether they would kill all of us. The island was quite small. It took just a couple of hours to cross its length. There were Thai soldiers all the time – 10 to 12 soldiers remained for two or three days and then the group was replaced by another group. They wore army uniform and had automatic guns and pistols. We were detained on that island for 15 days.*

*Several boats arrived during these two weeks. Every time a new boat was brought in to this island, the Army called us and ordered us to hide in the jungle so that people could not see us. In the end, there were about 575 boat people. The Thai soldiers beat us. We did not know why, perhaps to frighten us. They also dismantled the engines of all the boats that arrived.*

The first push-backs occurred on 18 or 19 December 2008, when the military forcibly put 412 people from the six intercepted boats onto an engineless barge which had little food and water; then towed the barge out into the high seas for two days and two nights, and left them to drift. During this forced expulsion, one Rohingya child was reportedly thrown overboard. Between then and 19 January 2009, two further push-backs occurred. A total of over 1,100 boat people were cast to sea as a result. They drifted in different directions towards the Andaman Islands of India and Sabang Island and Idi Rayeuk of Indonesia, where the survivors were rescued. Over 300 people died.<sup>430</sup>

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429 See above, note 427.

430 For a detailed account of the push-backs and a critique of the Thai government's actions, see the Equal Rights Trust, *Letter to the Thai Prime Minister*, 23 January 2009, available at: <http://www.equalrightstrust.org/ertdocumentbank/Letter%20to%20Prime%20Minister%20of%20Thailand.pdf>.

One of the survivors of the second push-back from Sai Daeng Island, in which 580 persons were forced onto four boats which had been tied together and had their engines removed, related his experience to ERT:

*One night two large Thai boats and four small ferry boats arrived. They tied four of our own boats to the large boat and put tyres between them. We had to board our own boats again. The Thais said they would carry us up to Malaysian waters. Then, at 2 a.m., the large Thai vessel started towing our four boats. They had put in each of the four boats two sacks of rice, two drums of water and one carton of biscuits.*

*In the morning we realised that we had been taken to the high seas. They towed us for the entire day and the next night until about 10 a.m. on the following morning. Then they suddenly went full throttle, cut the tow ropes and disappeared into sea. At that moment, we knew that their promise to take us to Malaysian waters was false and we started crying. We found some plastic sheets, a wooden pole and ropes in the boat. We used the wooden pole as a mast and made a sail from the plastic sheets.*

*On my boat, there were about 90 people. Soon we lost the other three boats. Most people cried but three of us remained strong. We steered the boat to sail towards the east. The wind was blowing from north to south. We drifted like this for four days and hit a storm on the fifth day.<sup>431</sup>*

On 5 January 2009, the boat referred to in the above testimony with 81 people on board was rescued by a fishing trawler and brought back to Thailand. The boat people were re-arrested and re-sent to Sai Daeng Island and pushed back again, with over one hundred others in the third round of push-backs on 19 January.

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431 See above, note 427.

#### 4.3.2.2 The Aftermath

The survivors, rescued by the Indian and Indonesian authorities, were further detained.

**Indonesia** allowed the International Organisation for Migration (IOM) and UNHCR to interview 193 Rohingya and Bangladeshi boat people detained in a military base in Sabang Island (northern Aceh), and 198 boat people detained in a government compound in Idi Rayeuk (eastern Aceh). In December 2009, all rescued Rohingya boat people were released and issued UNHCR refugee certificates. They were accommodated in the local community and supported by IOM. At the time of writing most have already moved on and crossed over into Malaysia.

**India** has deported the Bangladeshi boat people rescued in the Andaman Islands, while 224 Rohingya remain in detention, with no access to them for the UNHCR. Thirty-eight of the Rohingya detainees requested the Indian authorities to deport them to Myanmar but were informed that Myanmar refused to re-admit them. The detainees are housed in an open jail in Port Blair.<sup>432</sup>

**Myanmar** repeated in the media that the Rohingya are not an ethnic group from Myanmar.<sup>433</sup> It began the construction of a border fence on the Myanmar-Bangladesh border to prevent human smuggling and trafficking. But it also renewed an agreement with the UNHCR and allowed the expansion of some humanitarian programmes in north Arakan state.

**Bangladesh** increasingly prevented Rohingya access to its territory and arrested, detained or deported Rohingya. ERT field researchers have been informed that more than 3,000 Rohingya were “pushed back” to Myanmar between January 2009 and 31 January 2010.

**Thailand’s** actions were criticised by the international community as grave violations of human rights. Amnesty International stated that:

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432 This information was obtained by ERT researchers who made contact with the detainees in India and Indonesia.

433 *New Light of Myanmar, Rohinja not included in national races of Myanmar*, 30 January 2009.

*the Rohingya's situation has reached a critical stage over the last two months. The Thai government must stop forcibly expelling Rohingyas and provide them with immediate humanitarian assistance and cease any plans to proceed with more expulsions.*<sup>434</sup>

#### 4.3.2.3 Detention in Thailand

Thailand stopped its practice of “push backs” after January 2009. But on 26 January 2009, one more boat with 79 passengers was intercepted by the Thai Navy. Twenty-nine of the boat people claimed to be Bangladeshi, whilst fifty were confirmed as Rohingya. All of the people on board had been severely beaten by the Myanmarese Navy and were badly injured. They were not “pushed back” to sea, but taken to Ranong where medical care was provided, and several were transferred to Ranong hospital. The group, which included 12 children, was sentenced under the Immigration Act to five days imprisonment and fined. Since they could not pay the fine, they were jailed in Ranong prison for 30 days and then transferred to the Ranong Immigration Detention Centre. Thailand allowed the UNHCR to make an assessment of the situation, but not to screen the Rohingya detainees individually. Detainees reported to ERT that they were kept in cells so overcrowded they could not move, that they could not see daylight, and that their health seriously deteriorated. Two young Rohingya died. On 1 July 2009, 18-year-old Abdul Salam died of heart failure. On 13 August 2009, Hammah Tulah, 15, also died.

On 26 August 2009, four UN Special Rapporteurs and the Chairman of the UN Working Group on Arbitrary Detention sent a joint urgent appeal to the Thai Government regarding the plight of these Rohingya detainees.<sup>435</sup> The urgent appeal, referring to the two deaths, stated that “*in both cases, the rapid deterioration of their health may be due to the inadequacy and inefficiency of healthcare being provided to them during their detention period and particularly during the hours preceding their deaths.*”<sup>436</sup>

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434 Amnesty International, *Myanmar minority group in peril*, 2 February 2009.

435 The appeal was sent by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, together with the Chairperson of the Working Group on Arbitrary Detention, the Special Rapporteur on the human rights of migrants, the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

436 See UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, A/HRC/14/20/Add.1, 19 May 2010.

Following these two deaths in custody, the authorities decided to transfer the remaining 77 detainees to the Bangkok Immigration Detention Centre on 19 August 2009. Though better than Ranong, the Bangkok detention centre was extremely overcrowded. The detainees were housed in two cells – 66 persons in a large 40 x 12 foot room, and ten in a smaller 12 x 12 foot room. The emotional impact of their entire ordeal has been extremely strong. Many of the detainees were badly affected by the death of their two young fellow inmates. Some mentioned to ERT that they wanted to commit suicide. They were very anxious as to what will happen to them, how long they may remain in detention and whether they would ultimately be deported to Myanmar.

In February 2010, 28 of the Bangladeshi detainees were deported to Bangladesh. The 48 Rohingya and one Bangladeshi still remain in detention, one year after their ordeal of being pushed back to sea. It is unclear whether they will be released, and if so, when.<sup>437</sup>

#### **4.3.3 Malaysia, a Final Destination<sup>438</sup>**

Like most other countries in the region, Malaysia too has ratified relatively few international human rights treaties. It has not ratified the Refugee or Statelessness Conventions, the ICCPR, ICESCR, CAT or CERD. The CRC and the CEDAW have been ratified, but with significant reservations.

Having entered Malaysia illegally, the vast majority of Rohingya are irregular immigrants. There is also a younger generation of Rohingya who were born in Malaysia and whose parents are irregular migrants. They are stateless. The Rohingya community in Malaysia can be categorised as follows:

(i) 16,662 Rohingya had registered with the UNHCR as of 2 December 2009.<sup>439</sup>

(ii) An estimated minimum of 5,000 unregistered Rohingya also live in Malaysia. This estimate includes those who arrived after January 2006 when the UNHCR suspended the registration of Rohingya.

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437 Bangkok Post, *Fate of 48 Rohingya Unclear*, 19 February 2010.

438 For a detailed analysis, see The Equal Rights Trust, *Trapped in a Cycle of Flight: Stateless Rohingya in Malaysia*, January 2010, available at: <http://www.equalrightstrust.org/ertdocumentbank/ERTMalaysiaReportFinal.pdf>.

439 UNHCR Malaysia, *Active Caseload Breakdown*, 2 December 2009.

#### 4.3.3.1 Detention Practices

The Rohingya in Malaysia are trapped in a repeated cycle of arrest, detention and deportation. Irregular migrants - men, women and children, are arrested and taken into custody by the police or moved directly into immigration detention camps. They can legally be held for up to 14 days before being produced before a magistrate. In court, they seldom have legal representation. Many are convicted of immigration offences, which they serve in prison before being detained further in immigration detention centres pending deportation. In rare cases, Rohingya and other irregular migrants are deported directly from immigration camps without being produced before a magistrate.

Until recently, even registered refugees were detained, sentenced and deported. However, in a recent positive development, any UNHCR-registered refugees who are arrested and charged are now released and the charges withdrawn.

Crackdowns on illegal immigrants dramatically increased after 2002. However, since mid 2009, there has been a shift in policy and crackdowns are less frequent. Some raids specifically target refugees and organisations which work on their behalf. Raids are generally conducted either by the police, Immigration Department, or more frequently as a joint RELA-Immigration operation.<sup>440</sup> They do not differentiate between refugees, stateless persons and illegal migrants and generally disregard any UNHCR refugee documentation when making arrests.

#### 4.3.3.2 Deportation

Administrative immigration detention in Malaysia is an interim measure which operates until detainees can be deported across the border. Most deportations are informal “push-backs” in which detainees are removed over the Malay-Thai border and into the hands of human traffickers and smugglers. Some, however, are formal handovers to Thai Immigration officials. As far as the ERT is aware, there are no deportations of Rohingya directly to Myanmar.

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440 RELA is the Malay acronym for *Ikatan RELAwan Rakyat* - a People's Volunteer Corps.

### *Deportation into the Hands of Human Traffickers*

Once under the control of traffickers, the former detainees face two options:

- (i) To raise money to bribe officials to facilitate their illegal journey back into Malaysia; or
- (ii) To be forced into bonded labour on fishing trawlers and plantations.

Deportees reported to ERT that they were counted at handover and some witnessed an exchange of money between the traffickers and Malaysian immigration officials. The transaction allegedly costs 200 to 300 Ringgit (approximately 62 to 93 U.S. dollars) per head. The traffickers then take the former detainees to makeshift jungle camps or plantations on the Thai side of the border, where they are held under guard, sleeping in makeshift shelters, exposed to mosquitoes and other insects. Subsequently, the traffickers facilitate their contact with relatives and friends in Malaysia via mobile phone, in order to arrange for the payment of a ransom ranging between 1,600 and 2,500 Ringgit (500 - 780 U.S. dollars) as the price of their release and safe return to their homes in Malaysia. If they cannot pay within a short period of time, the deportees are first beaten and if this does not work, are then sold to labour traffickers. In many instances, a first instalment of the full amount is to be paid into a bank account in Malaysia and the rest handed over in cash when the deportee is sent home.

The abuse and violence meted out by traffickers has a devastating impact. A 21-year-old Rohingya from Buthidaung was among the 108 Rohingya boat people who sailed directly to Malaysia and were arrested near Penang on 4 March 2007. He was subsequently detained in Juru immigration depot and deported to Sungai Golok. He told ERT:

*Every month, some of us were deported to Golok at the Thai border from Juru detention camp. I was deported to Golok with 28 other detainees. We were handcuffed in the immigration bus. It started from Penang at 5.00 p.m. and reached Golok in the early morning. The immigration counted us and handed us over to agents. These agents took us to their jungle camp on the Thai side of the border. There were many makeshift tents: a space open on all sides with plastic sheeting for a roof. The agents had walkie-talkies, mobile phones and guns. Twenty guards working for them were also present. They demanded 1,650 Ringgit [approximately 515 U.S. dollars] to*



*release me. We could use a mobile phone and call whoever we wanted. I rang my village people in Malaysia and begged them to rescue me from there. They gathered money for me. But those who failed to pay the ransom within six days were beaten by the agents' men. In total, there were 45 deportees detained there. I stayed about five days in the agents' camp. We got released, except for 15 of us. I don't know what happened to them. These agents have contacts with Thai fishing trawlers. If detainees cannot secure the money, they are sold to work on boats.<sup>441</sup>*

### *Return Journey from the Thai Border*

When deportees manage to raise money to pay their ransom, the traffickers arrange the return journey to Malaysia. This journey can be hazardous. The deportees are transferred from agent to agent over the various legs of the journey, often using different means of transport at each stage. It usually includes a journey by truck, a long walk or run through thick jungle, followed sometimes by a motorbike ride, and a journey squashed in the boot of a car or almost frozen in a refrigerated meat trailer. There are instances when these vehicles are stopped at checkpoints and the deportees are re-arrested, detained and deported again. A 53-year-old Rohingya described his journey back to his home in Kuala Lumpur after buying his freedom from the border traffickers:

*On the fourth night at the camp, a truck arrived and they had a list of the names of all those who had paid the ransom. At about 5.00 p.m., 47 of us – six Rohingya and the rest Chin [an ethnic group of Myanmar who also face acute discrimination; most Chin are Christian] – were put on the truck and we were covered with a plastic sheet. They transported us for about 20 miles and then ordered us to get down and run across the border into Malaysia. We ran for about three hours in the jungle, led by the agents' guide.*

*They took us to an oil-palm plantation close to a road and ordered us to lie down. The agents had mobile phones. Cars*

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441 ERT interview with a former Rohingya detainee, 9 May 2009, Butterworth, Penang State, Malaysia (ERT-SPD-ML-059).

*started arriving. They pushed eight people into each car. Each car carried a driver and an agent in the front seat, four people in the back seat and four people in the boot. I had to go into the boot; when I could not squeeze into it, the agent kicked me on my back to push me in. The car drove for about one hour to Pasir Mas [in the State of Kelatan]. I could not breathe as my nose was pressed against the roof of the boot. I heard that some people had died in car boots. Moreover, the road was bumpy and there were sparks caused by the friction of the car and the concrete surface of the road. I still do not know how I managed to survive this.*

*In Pasir Mas, a big lorry, carrying frozen beef, was waiting in the dark. All 47 people were put into that lorry and they locked the backdoor. We were hidden behind chunks of beef. The driver started the air cooler and it was freezing cold. There were checkpoints on the road and the police opened the backdoor of the lorry but they could only see beef. I spent six hours inside that lorry – from 8.00 p.m. to 2.00 a.m. Then we were brought to a place where six other cars were waiting. They again transferred eight people into each car. This time I was lucky and was put on the backseat. Three cars went to Penang and three went to Kuala Lumpur. I had to change car in Selayang [in the Klang Valley in the outskirts of Kuala Lumpur] and the agent asked me where I wanted to go. I gave him my address and at 6.00 a.m. I was dropped at my house in Kuala Lumpur.<sup>442</sup>*

### Trafficking into Labour Bondage

Men and boys who are unable to pay the traffickers are sold to other brokers in Thailand as bonded labour to work on fishing boats and in plantations. Women have reportedly been sold to brothels or into domestic servitude. The trafficked deportees who are sold to fishing trawlers are forced to work in slave-like conditions with little or no sleep, casting and mending nets and sorting fish. These long-haul fishing trawlers are on the high seas for periods of up to two years, without coming back to shore. They are serviced by supply

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442 ERT interview with a former Rohingya detainee, 3 May 2009, Kuala Lumpur, Malaysia (ERT-SPD-ML-053).

boats which provide fuel, food and new crews, and collect the catch on a regular basis. The Thai ports of Pattani and Songkhla in Southern Thailand are reportedly the main hubs for recruitment in southern Thailand, where trafficking gangs on the border sell persons from Myanmar including Rohingya deported from Malaysia. Jumping ship is often the only way to escape, but there is a risk of falling back into the hands of traffickers.<sup>443</sup>

A 48-year-old Rohingya from Sittwe who was trafficked onto a Thai fishing trawler in 2008 recounted his experience to ERT:

*The brokers took us into a jungle where four Rohingya men, whose relatives could pay them, were separated from our group. The rest of us were kept there until the next day without food. The next day two large pickup trucks took us to the fish harbour of Pattani – about a three hour drive. We were 26 Rohingya. Some Mon people from Myanmar acting as agents for the Thais bought us. They told us that we had been sold for six months. Twenty of us went to one fishing company and six to another. I was among the group of six and we were brought to a fishing trawler, which stayed in the port for two days. We were watched by armed guards and could not escape.*

*Our main work was to cast out and pull in nets from the sea. There were 35 crew onboard – mostly Thai plus eight people from Myanmar: six Rohingya and two Rakhine who had also been sold. We had to work days and nights when the catch was good. I could not sleep for seven days during the first trip. When there was less fish we could sleep a bit. We were given two yabaa tablets [methamphetamine] every day, sometimes even four, so we did not feel tired or hungry. The first trip lasted 13 days. We anchored for one day in the Pattani harbour where we had to load and unload the trawler. It was impossible to escape.*

*Then our trawler sailed to the high seas. After 15 days, another vessel arrived to collect the catch and bring food and other necessities for the crew. Our trawler did not return to*

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443 **Ismail**, Yante, "Is toleration enough?", *UNHCR, Refugees Magazine*, Issue 148, December 2007.

*shore. Every 15 days, the supply boat came and left. Nobody was beaten on my trawler but I heard that some people were beaten on other boats.*

*After 45 days I fell sick. I could no longer eat or drink. The captain watched me for 15 days. He ordered me to work but gradually I lost all my energy. One day the captain hit my head with his torchlight. I told him that I was sick. He checked with the cook who confirmed that I had been unable to eat any food for the last two days. The captain then realised I was being genuine and he became kind to me. I think he did not want to let me die. When the supply boat next arrived, he gave me the option of returning to port. I agreed instantly. I was returned to shore in Songkhla after two months at sea. I heard that some sick crew members on other boats were simply thrown overboard or shot dead. I was lucky. I was sent back to Pattani where the fishing company handed me back to the Mon broker.*

*This time, I told the broker that I had a friend in Penang. He called him and demanded 1,300 Ringgit [406 U.S. dollars] to release me and to deliver me to Penang. The man then carried me from Pattani to Golok and handed me over to the traffickers at the border who sent me to Penang.<sup>444</sup>*

#### 4.3.3.3 Positive Developments

It must be noted, however, that some recent and positive developments have taken place:

(i) The deportation of irregular immigrants including the Rohingya into the hands of traffickers at the Thai border is reported to have stopped, and the UNHCR has not received a single confirmed report of deportation since July 2009. However, this drop in deportations has led to severe overcrowding in detention centres which must be addressed as a matter of grave urgency.

(ii) After the publication of the U.S. Department of State 2009 Annual Report on Trafficking in Persons, in which Malaysia is ranked very poorly, the Malay-

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<sup>444</sup> ERT interview with a former Rohingya detainee, 10 May 2009, Butterworth, Penang State, Malaysia (ERT-SPD-ML-051A).

sian police made nine arrests, including five immigration officials, for their alleged involvement with a trafficking syndicate which sells Rohingya into forced labour.

(iii) Since March 2009, the Malaysian government has requested the UNHCR to screen Myanmar nationals, including Rohingya detained in immigration camps, in order to verify or determine their status. However, while this development has rendered those detained in immigration camps more accessible, the UNHCR continues to have at best an *ad hoc* access to Malaysian prisons.

While it is premature to read a lasting shift in Malaysian policy, it is hoped that the Malaysian government will build on these developments to establish a more progressive, rights-respecting immigration regime.

**Chapter 4 has reviewed practices of immigration detention in Australia, Bangladesh, Egypt, Kenya, Malaysia, Myanmar, Thailand, the UK and USA. These countries were grouped into three types, based on both geographic and thematic closeness of the specific issues and challenges faced. Firstly, we looked at the well developed immigration detention regimes of the United States, the United Kingdom and Australia. Both Australia and the UK have ratified the 1954 Convention, but none of the three countries have recognised the statelessness challenge in their immigration policies. Analysis of the three countries shows that their law, policy and jurisprudence has been mainly conservative, but there have been occasional progressive leaps, particularly at the courts. The U.S. cases of *Zadvydas* and *Martinez*, which established the principle that non-citizens in detention pending removal have a right to challenge their detention if deportation has not been possible for six months, are a strong example in this regard.**

**Kenya and Egypt – two countries with large, porous borders – face significant irregular immigration related problems.**

Many who enter these countries irregularly have ineffective nationality. Neither Kenya nor Egypt have developed clear policies and practices pertaining to immigration detention, which consequently occurs in a haphazard manner with immigration detainees often being held in regular prisons. The failure of these governments to recognise statelessness as a significant issue has resulted in many individuals being detained indefinitely.

The Rohingya crisis has created immigration problems for most neighbouring countries in the region including Malaysia, Thailand and Bangladesh. None of these countries have ratified the 1954 Convention or the 1951 Refugee Convention. Some stateless Rohingya in Bangladesh and Malaysia are recognised as refugees, but the vast majority lead a life of irregularity and uncertainty. Raids, push-backs, deportations, arbitrary arrest and detention as well as human trafficking and smuggling are common problems in all three countries.

### **Key Findings:**

- 1. ERT research found a clear connection between immigration detention and statelessness. This has not been fully understood, either by national immigration regimes or by NGOs and lawyers working on behalf of the rights of detainees. The stateless (*de jure* and *de facto*) often form a significant percentage of immigration detainees because in many instances they do not have documentation and they cannot be removed. Immigration detention regimes which are not sensitive to statelessness are likely to discriminate against the stateless by failing to recognise their special status.**
- 2. Mandatory immigration detention (particularly for Foreign National Prisoners), and policies which carry a presumption in favour of detention, often lengthy, are becoming increasingly attractive to policy makers.**

3. **There have however been some positive steps, through jurisprudence and progressive policies, which have drawn from international human rights standards relating to detention and created stronger safeguards for immigration detainees.**
4. **No states looked at by ERT maintain comprehensive statistics on the stateless, or record those who have no legal nationality or no effective nationality. Nor do they record the reasons why detained individuals cannot be removed in such a way that statelessness as an underlying element can be identified.**
5. **Very few countries have statelessness determination procedures in place, with the result that individuals who cannot be removed because they have no right to enter another country are detained under immigration laws “pending removal”, although removal is practically impossible.**
6. **Particularly in the UK, stateless detainees who are released from detention, continue to face restrictions on their liberty (through electronic tagging for example) and are often pushed into destitution in breach of their social and economic rights. This is because they are not allowed to work after release, nor are they entitled to social welfare benefits.**
7. **The inaction and indifference of state authorities both in the country of detention and in the country of nationality or habitual residence of stateless detainees is often a major factor contributing to non-removability, and consequent indefinite detention. There have been such cases in all countries researched, but this is particularly true of Kenya and Egypt.**

## CHAPTER 5: SECURITY DETENTION

Detention for the purposes of national security is a practice which sharply increased in importance since September 2001. One consequence has been that national governments found it increasingly difficult, if not impossible, to protect those of their citizens detained as terrorist suspects in other countries, notably in the U.S. detention facility at Guantanamo Bay, against human rights abuses. In these situations, stateless persons are even more vulnerable to abuse than citizens, because they have no state of nationality to intercede on their behalf:

*As a result of counter-terrorism measures undertaken by certain States, including the United States of America, individuals have been captured, detained, including being held in unacknowledged locations, and subjected to extraordinary rendition involving practices of proxy detention in unacceptable and non-monitored conditions. This may have even resulted in long-term situations of detention, particularly for persons apprehended in Afghanistan and Iraq.*<sup>445</sup>

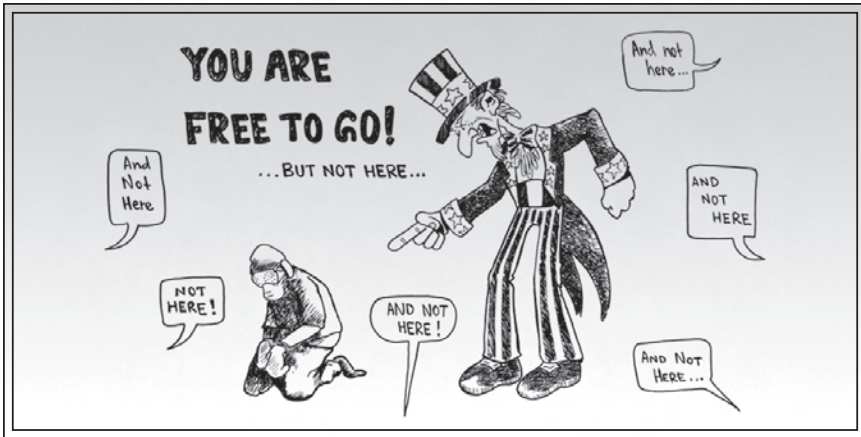
In some of the countries researched by ERT, human rights violations in the context of security detention have had a particularly harsh impact on the stateless. **The human rights violations at Guantanamo Bay have included indefinite detention of those without an effective nationality, and have been the focus of intense press and civil liberties coverage.** In the UK, the indefinite detention of non-national security detainees was struck down by the courts in the *Belmarsh* judgment [discussed in section 1.2.2.3. above] when judges found that keeping non-nationals (including stateless persons), but not nationals, in indefinite security detention was a breach of the right to liberty.<sup>446</sup> Australia has also imposed a strong regime of security detention and other forms of restriction of liberty including the imposition of control orders on terror suspects.

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445 See UN General Assembly, *Protection of human rights and fundamental freedoms while countering terrorism: note by the Secretary-General, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 15 August 2007, A/62/263, Para 54.

446 *A and Others v Secretary of State for the Home Department* [2004] UKHL 56. However, in response to the judgment, a strong regime of Control Orders was imposed on non-national (and national) terror suspects.





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Kenya too has increased its practice of indefinite and *incommunicado* detention of terror suspects – many of whom, including the stateless, are irregular migrants. Furthermore, it is feared that some of the facilities used for such detention purposes remain secret and have not been gazetted. Particularly worrying is the report by Human Rights Watch that many of the individuals detained by the Kenyan security services were subsequently rendered by Kenya into the custody of Somali and Ethiopian authorities in Somalia.<sup>447</sup>

Myanmar, notorious for the arbitrary manner in which its law is imposed, on occasion prosecutes stateless Rohingya under national security legislation, even for offences which have no actual relevance to national security. For example, emergency security legislation<sup>448</sup> has been used to punish Rohingya religious clerics for extending mosque buildings without permission.

A discussion of security detention in the context of statelessness is shaped to a certain extent by Article 1 (2) (iii) of the 1954 Convention. Accordingly, the following are excluded from Convention protection:

*Persons with respect to whom there are serious reasons for considering that:*

447 Human Rights Watch, *Why am I still here?*, 30 September 2008.

448 See Section 5 (j) of the Burma Emergency Provisions Act of 1950 (Burma Act 17).

- a. *They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;*
- b. *They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;*
- c. *They have been guilty of acts contrary to the purposes and principles of the United Nations.*<sup>449</sup>

Whether a stateless person in security detention falls within the scope of the exclusion clauses or not is clearly a matter of fact. But persons who have been cleared for release from security detention after investigation arguably should not be excluded from Convention protection. This is an area for further research and reflection.

However, this is only relevant to *de jure* stateless persons in security detention, and not *de facto* stateless persons, because they are not eligible for such protection. Furthermore, all stateless persons in security detention, whether excluded from the protection of the 1954 Convention or not, benefit from the protection of general human rights law.

ERT recently published a report on the security and immigration detention of stateless persons in the USA.<sup>450</sup> The section below draws on this report to identify the human rights impact that security detention has on the stateless, and also the unanticipated impact statelessness has had on security detention regimes, notably that affecting detainees held at Guantanamo Bay.

## **5.1 NATIONAL SECURITY DETENTION AT GUANTANAMO BAY**

In January 2002, the first detainees were transported to the detention facility at Guantanamo Bay Naval Base, Cuba.<sup>451</sup> At its peak, the facility held more than 750 persons from over 40 countries between the ages of

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449 See Article 1 (2) (iii) of the 1954 Convention.

450 The Equal Rights Trust, *From Mariel Cubans to Guantanamo Detainees: Stateless Persons Detained under U.S. Authority*, January 2010, available at: [http://www.equalrightstrust.org/ertdocumentbank/Statelessness\\_in\\_USA\\_17\\_Jan.pdf](http://www.equalrightstrust.org/ertdocumentbank/Statelessness_in_USA_17_Jan.pdf).

451 See “Guantanamo Bay Timeline”, *Washington Post*, available at: <http://projects.washingtonpost.com/guantanamo/timeline/> [accessed on 6 June 2010].

10 and 80.<sup>452</sup> After seven years in operation, during which many fierce legal battles were fought on behalf of the detainees in the U.S. courts, President Barack Obama signed an Executive Order in January 2009 requiring: (1) the closure of detention facilities at Guantanamo; and (2) the immediate review of all Guantanamo detentions.<sup>453</sup> An Inter-Agency Review Team (IART) was given a mandate to carry out this review process.<sup>454</sup>

The Order acknowledged that more than 500 of the approximately 800 detainees held in the Guantanamo Bay detention facility had already been transferred to their country of nationality or a third country, and that “*a number of the individuals currently detained at Guantanamo are eligible for such transfer or release*”.<sup>455</sup> When the IART finished its first reviews in September 2009, it had cleared for release 75 of the 223 men still detained.<sup>456</sup> Of the 75, six Chinese Uyghurs have been temporarily resettled in Palau. In December 2009, Defence Secretary Robert Gates informed the Senate that 116 men had been cleared for release, of which a Kuwaiti, six Yemenis, four Afghans, two Somalis and two more Uyghurs have been released at the time of writing.<sup>457</sup> In January 2010, the population at Guantanamo Bay was accordingly 196 prisoners, of which 101 had been cleared for release, 40 were to be tried and 55 cases were still being reviewed. The prisoners cleared for release included persons from Algeria, Azerbaijan, China, Egypt, Kuwait, Libya, Saudi Arabia, Syria, Tajikistan, Tunisia, Uzbekistan, the West Bank, and Yemen, many of whom could not return to their country of nationality or last habitual residence, due to the likelihood of torture, a threat which is connected to their detention in Guantanamo as terrorist suspects. This means that in law and practice many of these men had no effective nationality and were *de facto* stateless. But they have not been recognised – by the U.S. or internationally – as a protected group, and they remain in severe conditions of detention with no immediate hope of release.

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452 Centre for Constitutional Rights, *Guantanamo Bay Six Years Later*, 2008.

453 President of the United States of America, *Executive Order: Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, 22 January, 2009, Sections 3 – 4, available at: [http://www.whitehouse.gov/the\\_press\\_office/ClosureOfGuantanamoDetentionFacilities/](http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/) [accessed on 5 June 2009].

454 *Ibid.*, Section 4(c)(2).

455 *Ibid.*, Section 2(a).

456 Reuters, *Obama team clears 75 at Guantanamo for release*, 28 September 2009.

457 Worthington, A., *116 Guantanamo prisoners cleared for release; 171 still in limbo*, 7 December 2009, available at: <http://www.andyworthington.co.uk/2009/12/page/3/> [accessed on 15 January 2010].

### 5.1.1 *Non-Refoulement* and *De Facto* Stateless Detainees

A few of the remaining detainees at Guantanamo Bay, including three Palestinians, are legally stateless. Most of the men who have now been cleared for release do have a legal nationality, but while in most cases the countries of nationality have expressed a willingness to receive the men, their interest appears to be less in protecting the rights of their citizens than in interrogating them as former Guantanamo detainees; moreover, a number of these countries are known to use torture. This means that the detainees, while not *de jure* stateless, have been rendered *de facto* stateless by their detention at Guantanamo Bay because they cannot safely return to their country of nationality. Furthermore, in most cases, no third country has stepped forward to offer these men refuge.

#### **The *De Facto* Stateless in Guantanamo Bay**

Ahmed Belbacha is Algerian. He fled to Britain in 1999 after his life was threatened by Islamist extremists.<sup>458</sup> In December 2001, Belbacha, who said he was in Pakistan studying religion, was apprehended by villagers in northwest Pakistan, and sold to the United States military forces for a bounty. Belbacha was transferred to Guantanamo in March 2002, detained for five years and received official notice that he was “approved to leave” in February 2007. Because he feared return to Algeria, he asked U.S. federal courts to block his return. In March 2008, the D.C. Circuit reversed a refusal by the district court to do so, and remanded the case for further consideration. In the meantime, Belbacha remains housed in Camp 6, where he has been since it opened in December 2006. In December 2007 he reportedly tried to commit suicide and was moved to the mental health unit, where he was held for two months. Put on suicide watch, he was stripped naked and given a green plastic rip-proof suicide smock and

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458 See Human Rights Watch, *Locked Up Alone: Detention Conditions and Mental Health at Guantanamo*, June 2008, pp. 33 – 34.

placed alone under constant monitoring. He says he was allowed absolutely nothing else in his cell: no toothbrush, soap, or books. In November 2009, despite being cleared for release by the USA (and thereby being exonerated of allegations of involvement in terrorist activity) Belbacha was sentenced *in absentia* by an Algerian court to twenty years imprisonment for belonging to an “overseas terrorist group”.<sup>459</sup>

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stated that when attempting to return security detainees who have been cleared for release to their home countries, states must carefully assess the individual situation of each detainee, to establish whether they have a well founded claim to international protection. If so, states must:

*Fully comply with the standards set in international law, including full respect of the principle of non-refoulement. This includes respect for the threshold set out, primarily by Article 7 of the International Covenant on Civil and Political Rights, that no return must take place to a country where a “real risk” of torture or any form of cruel, inhuman or degrading treatment or punishment exists.*<sup>460</sup>

Furthermore, since the freedom from torture or cruel, inhuman or degrading treatment or punishment is an absolute and non-derogable right,<sup>461</sup> “*suspicions of a person’s involvement in terrorist activities ... do not alter the detaining State’s obligations under the principle of non-refoulement.*”<sup>462</sup>

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459 AFP, *Algiers court jails Guantanamo inmate who won’t go home*, 29 November 2009, available at: [http://www.google.com/hostednews/afp/Article/ALeqM5hBRpCfZG\\_9FsNOKFUiF6-ymldfXg](http://www.google.com/hostednews/afp/Article/ALeqM5hBRpCfZG_9FsNOKFUiF6-ymldfXg) [accessed on 10 January 2010].

460 See above, note 445, Para 55.

461 See Article 7 of the ICCPR, and Article 3 of the CAT.

462 See above, note 445, Para 56.

Chinese Uyghurs - a Turkic Muslim minority whose members reside largely in the Xinjiang province of far-west China and suffer discrimination and persecution by the Chinese government – are one of the significant *de facto* stateless populations in Guantanamo Bay. Despite being cleared for release, they cannot be returned to China where there is a strong risk of them being further detained. Consequently, since the USA has consistently refused to release these detainees within U.S. territory, friendly third countries which will accept them remain the only option for their release. Of the 22 Uyghurs who were initially detained in Guantanamo Bay, five were released to Albania in May 2006.<sup>463</sup> In June 2009, four Uyghurs were transferred to Bermuda.<sup>464</sup> Soon thereafter, the Pacific Island nation of Palau made public its intention to resettle the remaining Uyghur detainees,<sup>465</sup> and in October 2009 the United States transferred six of the remaining Uyghurs to Palau. In February 2010, Switzerland agreed to resettle two more Uyghurs on humanitarian grounds.<sup>466</sup> This was a welcome development, particularly in light of an earlier call by the Council of Europe’s Commissioner for Human Rights for Europe to open its doors to Guantanamo Detainees. In his statement, the Commissioner said:

*While the United States has created the Guantanamo problem and has the primary responsibility for correcting the injustices, there are cogent arguments for European assistance in closing the centre as soon as possible. To achieve this goal, Council of Europe member states should stand ready to accept a few of the small number of remaining detainees cleared for release and currently stuck in limbo.*<sup>467</sup>

In addition to the Uyghurs, Guantanamo detainees who have expressed fear of returning to their countries of nationality come from Algeria, Azerbaijan,

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463 BBC News, *Albania takes Guantanamo Uighurs*, 6 May 2006.

464 CNN, *Chinese Muslim detainees take case to Supreme Court*, 6 April 2009.

465 BBC News, *Palau to take Guantanamo Uighurs*, 10 June 2009.

466 Human Rights Watch, *EU: Follow Swiss example of accepting Guantanamo detainees*, 3 February 2010.

467 Thomas Hammarberg, *Europe must open its doors to Guantanamo Bay detainees cleared for release*, 19 January 2009, available at: [http://www.coe.int/t/commissioner/Viewpoints/090119\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/090119_en.asp) [accessed on 10 January 2010].

Egypt, Libya, Russia, Syria, Tajikistan, Tunisia and Uzbekistan.<sup>468</sup> Many, like the Uyghurs, were cleared for release even before the IART began its work, but the U.S. government has either been unable to secure diplomatic assurances that the detainees will not be persecuted or tortured upon their return to their countries of nationality, or such diplomatic assurances have been rejected as unreliable. Advocates have identified other countries of concern, where there is evidence that government representatives sent to interview detainees at Guantanamo have threatened abuse when detainees are returned. For example, Russian detainees at Guantanamo were reportedly threatened with coercive interrogations in Russian prisons,<sup>469</sup> and seven former Guantanamo prisoners released to Russia in 2004 were kept in detention and suffered torture and abuse at the hands of Russian authorities despite the Russian government's prior assurances of humane treatment. Similarly, ten Tunisian detainees are currently being held in Guantanamo, eight of whom have been convicted *in absentia* and sentenced to 10 to 40 years in prison, and others have been threatened during their time at Guantanamo, and are thus at risk of torture if repatriated.

### 5.1.2 The Failed Promise of the Obama Administration

The Obama administration has significantly altered some aspects of U.S. detention policy, ordering the closure of Guantanamo and CIA operated "black sites". But it remains unclear what this means in practice for the *de jure* and *de facto* stateless detainees currently being held in Guantanamo. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stated that "*the United States has the primary responsibility to resettle any individuals among those detained in Guantánamo Bay who are in need of international protection*".<sup>470</sup> However, the U.S. Congress has barred the use of federal funds "*to release [a detainee] into the . . . United States*".<sup>471</sup> The release of detainees who have been

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468 Center for Constitutional Rights, *Ten Profiles of Those Abandoned at Guantanamo in Need of Humanitarian Assistance*, November 2008. See in particular Profiles of Adel Noori, Ali Mohammed, and Abdul Sabour.

469 *Ibid.* See profile of Ravil Mingazov.

470 United Nations, *Preliminary findings on visit to United States by UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Press Release, May 2007, available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/15B4F3535CE9EB5FC12572E600569287?opendocument> [accessed on 15 June 2009].

471 H.R. 2892, Title V, Section 552(a).

“cleared” for release into the United States seems unlikely, and in the face of the U.S. refusal to release any of these detainees onto U.S. soil, other countries are deterred from accepting them.

This means that those individuals who have been determined not to pose a threat to the United States, but who cannot safely return to their countries of nationality, and who are not admitted by third states continue to be detained in Guantanamo without an effective nationality, and in a legal limbo.

In its January 2010 report, ERT called on the U.S. government to fulfil its obligations to the stateless detainees who have been cleared for release but are still held in detention in Guantanamo Bay, by:

- Observing its obligations under the ICCPR and CAT not to return any persons to countries where they are likely to face severe harm including torture.
- Resettling all *de jure* stateless detainees cleared to be released from Guantanamo Bay and any other security detention centres including CIA “black sites” in its national territory and offering them the possibility to regularise their situation legally under U.S. immigration laws.
- Resettling all cleared to be released detainees at Guantanamo Bay and any other security detention centres including CIA “black sites” who are *de facto* stateless because they cannot be resettled in their country of nationality for various reasons, and offering them the possibility to regularise their situation legally under U.S. immigration laws.
- Providing due compensation to all persons illegally held in detention in Guantanamo Bay without being charged.<sup>472</sup>

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472 See above, note 450, Paras 134 – 138.



Chapter 5 has looked at the impact of security detention on stateless persons. States have a right and indeed a duty to act in the interest of national security and take preventive action in this regard (within the bounds of internationally accepted principles). However, ill-thought out security detention policies which do not recognise the human rights of stateless persons create significant problems for the release of detainees found not to be a threat. While security detention has traditionally impacted on nationals, the post 9/11 world of international terrorism has seen a rapid rise of facilities dedicated to the detention of non-national terror suspects. Guantanamo Bay is the most notorious of these. A principal reason behind the U.S. government's failure to close down Guantanamo Bay on schedule has been the difficulty of removing "cleared for release" detainees who do not have an effective nationality, coupled with the refusal of U.S. authorities to release such persons into the USA.

### Key Findings:

1. Security detention is an increasing global phenomenon with negative implications for stateless persons. But its precise effect on statelessness is largely unknown, mainly due to the covert nature of security detention regimes, the difficulties of obtaining information and statistics about detainees and the barriers to removal of those who are cleared for release. The Guantanamo Bay facility offers an insight into this otherwise opaque practice, thanks to the heightened scrutiny by human rights organisations, lawyers, and lengthy court battles.
2. *De jure* stateless persons who are detained for security purposes and later cleared for release are often non-removable because there is no country of nationality to which they can be deported. *De facto* stateless persons may also be non-removable because return to their country of nationality or habitual residence is barred under human rights law, if there is a risk that they would be tortured or seriously harmed.

**3. Persons who were not stateless before being detained for security purposes may become *de facto* stateless as a result of their security detention. This may occur if the stigma of having been labelled a “terror suspect” renders such persons susceptible to torture and other serious human rights abuses if returned to their home countries. The principle of *non-refoulement* bars return under such circumstances, leaving such individuals not safely deportable to their own country.**

## CHAPTER 6: CRIMINAL DETENTION

This section looks at the criminal detention of stateless persons. Information on the criminal detention of stateless persons has never been systematically collected, and because information on detention generally is rarely – if ever – disaggregated to consider statelessness, it is not easily accessible or discernible. However, ERT’s research suggests that this form of detention primarily raises human rights concerns in two contexts.



First, *de jure* and *de facto* stateless persons, particularly if they form a distinct ethnic group, may face discrimination within their country of habitual residence, either as a result of state policies, or because they are vulnerable to corrupt officials, including law enforcement officers, who may abuse their irregular status and extort money from them. One example is the arrest and imprisonment of stateless persons under criminal law because they lack identity and other documents.

Second, outside their countries of habitual residence, breaches of immigration law, such as illegal entry and overstay and the use of false documents, are increasingly criminalised and carry criminal sentences. This is particularly

harsh on stateless individuals whose inability to comply with immigration requirements is a direct outcome of the fact that they have no nationality:

*[U]nder the legislation of a considerable number of countries violations of the immigration law constitute a criminal offence. Undocumented and irregular migrants therefore become particularly vulnerable to criminal detention, which is punitive in nature, for such infractions as irregularly crossing the State border, using false documents, leaving their residence without authorization, irregular stay, overstaying their visa or breaching conditions of stay. The ... criminalization of irregular migration is increasingly being used by Governments...<sup>473</sup>*

## **6.1 DISCRIMINATORY CRIMINAL DETENTION IN COUNTRY OF HABITUAL RESIDENCE**

Insofar as there is often a correlation between stateless communities and ethnic, religious or cultural difference, discriminatory laws and policies may result in disproportionate percentages of these groups being arrested and convicted. Yet again, the Rohingya of Myanmar are perhaps the quintessential example. Rohingya sentenced either under the Burmese Immigration Act for illegal crossing of the border or under Section 493 of the Penal Code for unauthorised marriages constitute the largest prison population in North Arakan.

### **6.1.1 Arbitrary Arrest, Extortion and Torture**

The arbitrary arrest of Rohingya is common practice in the North Arakan province of Myanmar, and it is essentially a method of extortion. Arrested persons often evade prosecution and secure their release in exchange for large sums of money. In Myanmar, the NaSaKa (the Myanmar border agency), the police and the military regularly arrest Rohingya on various charges.

Detention in NaSaKa premises invariably puts the detainee at risk of torture. If allegations against the detainee are perceived as a threat to security, interrogation sessions involve severe physical as well as psychological torture

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473 UN Commission on Human Rights, *Report of the Special Rapporteur on the Human Rights of Migrants: Migrant Workers*, 30 December 2002, E/CN.4/2003/85, Paras 17 – 18.

ranging from beatings, electric shocks, deprivation of sleep, deprivation of food and water and other cruel treatment. Detainees are blindfolded, handcuffed and often put in wooden stocks. In some cases, torture results in death.

When the Rohingya are arrested for minor offences such as breaching marriage rules, the NaSaKa beat the detainees and generally extort bribes from them with a promise of release. Women are particularly at risk of rape in NaSaKa custody. Detainees who are unable to raise the required bribe from their relatives are referred to the judicial system, transferred into pre-trial custody in the police detention centres of Maungdaw or Buthidaung town and produced before the courts for sentencing. Detention in a NaSaKa camp can last between a few days to one month, during which time the detainees have to do forced labour. Detainees who do manage to pay the bribe continue to be vulnerable to future arrest.

***Detained, Extorted and Beaten for Marrying – A Rohingya Woman’s Story***<sup>474</sup>

*We married secretly, only in the presence of our parents and the maulvi [Muslim Cleric]. After marriage we started seeing each other frequently but secretly. This came to the notice of villagers who informed the NaSaKa. Soon after, a NaSaKa patrol arrived at my house at night but we were sleeping in a farm hut. The NaSaKa told our parents that we should go to their camp the next morning, claiming that our marriage permission was ready.*

*The following day, we all went to the NaSaKa camp at Inn Din. But, instead of delivering the marriage permission, the NaSaKa detained my husband and me in two separate cells and interrogated us: “How long have you lived together? Are you pregnant? Did you have an abortion?” They did not hit me but they beat up my husband.*

474 ERT Interview with a former Rohingya Detainee, 22 June 2009, Cox’s Bazar, Bangladesh (ERT-SPD-BD-048).

*I denied the allegations about our marriage and cohabitation. They did not believe us and they fined us 200,000 Kyat [approximately 31,000 U.S. dollars according to official exchange rate and 200 U.S. dollars according to unofficial (street) exchange rate]. Our fathers paid the amount and we were released after one night.*

*There was no further disturbance for some time since the NaSaKa had received a lot of money from our families. Then, again, an informer told the NaSaKa that we were still living together and that I was pregnant. The first accusation was true but I was not pregnant. The NaSaKa again came to our parents' houses but did not find us. They then arrested my father and my father-in-law and took them to their camp. They beat them up and demanded 1 million Kyat for their release. My father-in-law was beaten so severely that one of his eyes was damaged and he had a serious head injury. My mother-in-law sold all their cattle and a piece of land to raise the money. She bargained and finally the Village Peace and Development Council Chairman and NaSaKa agreed to release them for 500,000 Kyat. As soon as they were released, we all fled to Bangladesh. But, within a month, my father-in-law died of his injuries while undergoing treatment in Cox's Bazar government hospital.*

### **6.1.2 Imprisonment, Hard Labour and Shackles**

Most convicted Rohingya serve their sentence in Buthidaung jail, the only prison located in North Arakan. Buthidaung jail is a large compound with four long blocks housing the detainees: one for female and three for male prisoners. One of the three blocks for male prisoners is a two-storey wooden building. The compound also includes vegetable gardens and paddy fields. Most adult male detainees have to perform hard labour regardless of their sentence. Only prisoners serving short-term criminal sentences or those who are about to complete a longer sentence are sent to do hard labour outside prison walls. Hard labour outside the prison premises usually entails cultivation or plantation work, hill and jungle clearing, road repair or construction, dam building, brick-baking, logging and bamboo-cutting in forested areas. Detainees reported that every day, hundreds of shackled prisoners go to work outside Buthidaung jail and return at night.

According to one Rohingya interviewed by ERT:

*During my stay in Buthidaung jail I had to work almost every day outside the jail. The jail police took us in shackles to the worksite. We were divided into three groups guarded by five or six jail police. Each group included 30 to 50 prisoners depending on the work to be done. I had to work with other prisoners in the jail paddy fields or vegetable garden. Every year, as soon as the monsoon ended, we had to build a dam on the stream to preserve water for irrigation, to be used for summer paddy cultivation and vegetable gardening. We also had to look after the jail cattle. Sometimes we had to rebuild roads destroyed by landslides during the monsoon or repair roads around Buthidaung after the monsoon. The routine work we had to do was clearing the hills around the jail and collecting firewood for the cooking needs of the jail. At the worksite the jail police often hit prisoners on their back with a heavy baton when they took a rest. I was beaten many times.<sup>475</sup>*

Prisoners are also at risk of being sent to hard labour camps in rugged areas without returning to the prison or being conscripted as porters for army battalions in conflict zones. The living conditions in hard labour camps are worse than in prisons. Prisoners have to endure backbreaking labour and beatings and often work in chain-gangs. Deaths in labour camps are common due to disease, lack of food and health care, ill-treatment and sometimes work accidents.<sup>476</sup> To prevent prisoners from escaping, shackles are still used in Myanmar, particularly in labour camps. This 28-year-old Rohingya man from Taung Bazar in North Buthidaung was sentenced to 3 years imprisonment under the Immigration Act and endured hard labour in shackles. He managed to escape in late 2007:

*I followed all orders from the jail officers for the first two years of my sentence but I could no longer bear this during*

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475 ERT interview with former Rohingya detainee, 22 June 2009, Cox's Bazar, Bangladesh (ERT-SPD-BD-047).

476 Assistance Association for Political Prisoners (Burma), *Burma's Prisons and Labour Camps: Silent Killing Fields*, 2009, available at: [http://www.burmalibrary.org/docs07/Burma%27s\\_prisons\\_and\\_labour\\_camps-silent\\_killing\\_fields.pdf](http://www.burmalibrary.org/docs07/Burma%27s_prisons_and_labour_camps-silent_killing_fields.pdf) [accessed on 15 March 2010].

*the third year. My mind became unstable. One day, about nine months before the end of my term, the jail police brought a group of ten prisoners, including me, to the hills to collect firewood. I wore shackles as always. At one point our group had dispersed in the forest and the guards were out of my sight. I quietly slipped inside the jungle and walked deeper and deeper. I put leaves around the leg irons so that it would not make any noise. I reached my village in the dark of the night. That is how I ran away.<sup>477</sup>*

## **6.2 CRIMINAL DETENTION LINKED WITH STATELESSNESS, THE LACK OF DOCUMENTATION AND CORRUPT PRACTICES**

Stateless persons outside their country of habitual residence may also be criminally detained. In some instances, such detention may be brought about by virtue of their statelessness. The Rohingya in Bangladesh have been at the receiving end of policies and practices which have rendered them vulnerable to criminal detention due to lack of documentation, extortion and/or corruption. Research conducted by ERT in Bangladesh suggests that arrests by police occur in a variety of circumstances, which could be classified into three categories:

Firstly, the police apprehend Rohingya following formal complaints lodged by third parties, usually local Bangladeshis or sometimes even other Rohingya. Filing false allegations is common in Bangladesh as a form of revenge or to discard a rival.

The second scenario is that of police arresting Rohingya for real offences they have committed, or because of their lack of personal documents. While there was no discernible pattern of police specifically targeting Rohingya, in some areas, Rohingya pay protection money to the police.

Finally, there are occasions in which the police intentionally arrest Rohingya using them as scapegoats to cover up their own involvement in corruption. A 44-year-old Rohingya was arrested with two others by the police on a bus. According to him:

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<sup>477</sup> The Arakan Project Interview with former Rohingya detainee, 19 September 2008, Cox's Bazar, Bangladesh. (Ref. 08/30).



*The Ukhia police needed some scapegoats like us because, the previous day, they had seized Burmese liquor from some smugglers but they had released the smugglers against a good bribe. However, the news became public and the police needed to show that they had arrested the smugglers together with the liquor seizure. Unfortunately we became the victims. The police lodged 2 cases against us: one under the Special Powers Act Section 25(b) (smuggling) and the other under the Foreigners Act Section 14. We did not even see the type of bottles that the police claimed to have found in our possession.<sup>478</sup>*

The main blockage in the Bangladesh legal system which results in grossly overcrowded conditions in prisons is the excessive pre-trial detention period. Arrested Rohingya persons remain between three months and five years in pre-trial detention, the average being three years. Pre-trial detainees, convicted inmates and “released prisoners” often share the same wards.

It is not uncommon that lawyers take advantage of the Rohingyas’ vulnerability as corruption prevails at all levels in the judicial system. The wives of a 44-year-old Rohingya man and his friend who were arrested on fabricated charges of carrying liquor under the Special Powers Act were cheated by a lawyer who demanded 10,000 Taka [approximately 143 U.S. dollars] to apply for bail but did not act:

*During the second year of our detention, my wife and Abdus Salam’s wife hired a lawyer named M. He promised that he would secure our bail for 10,000 Taka. They deposited 6,000 Taka with him but he did nothing to release us on bail. Our second year in jail passed and we all understood that Advocate M. had not even submitted our bail plea to the court and that he had simply eaten up our money. It is shameful that a learned lawyer eats up all the money of two poor Rohingya women with the false promise that he would bail out their husbands!*

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478 ERT Interview with a former Rohingya detainee, 14 June 2009, Cox’s Bazar, Bangladesh (ERT-SPD-BD-042).

*During the third year of my detention our wives again managed to gather some money and contacted another lawyer. He asked 7,000 Taka each to secure our bail. By then, our wives had learned many things about the court system. Finally, we were released on bail, after 3 years and 3 months in detention.*<sup>479</sup>

### **6.3 THE CRIMINALISATION OF IMMIGRATION OFFENCES AND CONSEQUENT DETENTION**

The criminalisation of immigration offences is another cause for detention and punishment for the stateless. The UN Working Group on Arbitrary Detention, in its latest report:

*[N]oted with concern ... a development towards tightening restrictions, including deprivation of liberty, applied to asylum-seekers, refugees and immigrants in an irregular situation, even to the extent of making the irregular entry into a State a criminal offence or qualifying the irregular stay in the country as an aggravating circumstance for any criminal offence ... Migrants in an irregular situation have not committed any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.*<sup>480</sup>

Many European countries have criminalised immigration offences which are penalised through fines and/or imprisonment. Examples in this regard include Estonia, Finland, Germany, Ireland, Italy, Lithuania, Malta, Poland, Slovenia, Sweden, and the UK.<sup>481</sup>

In the UK, for example, Section 24(1) of the Immigration Act of 1971 imposes a fine of up to £5,000 or imprisonment of up to six months for the offences of entering the UK illegally, or overstaying/breaching conditions of leave to

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479 *Ibid.*

480 See above, note 263, Paras 55 and 58.

481 For a detailed account of the relevant legislation in each country, see European Migration Network, *Ad hoc query on criminal penalties against illegally entering or staying third-country nationals*, 21 September 2009, available at: <http://emn.ypes.gr/media/16124/criminal%20penalties%20against%20illegally%20entering%20or%20staying%20thi.pdf> [accessed on 23 January 2010].

remain.<sup>482</sup> Furthermore, non-citizens including stateless persons who are deemed not to have cooperated with efforts to remove them from the country can be charged and tried under Section 35 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 and if found guilty, they can be imprisoned for two years and/or fined.<sup>483</sup> Given the inherent difficulties in securing the deportation of stateless persons and particularly in the context of the *de facto* stateless, the fact that obstacles to deportation including the indifference of the deportees' consulate can easily be seen as the non-cooperation of the individual, this section is particularly likely to impact on the stateless in a negative manner. Furthermore, even in genuine instances of non-cooperation, it is often a very real fear of persecution if returned, which is the basis of the non-cooperation.

An example is the unsuccessful prosecution of a *de facto* stateless immigration detainee, Feridon Rostami, under Section 35 of the Act. Mr. Rostami is a 25-year-old Iranian Kurd who claimed asylum in the UK in 2005. He claimed his father was killed and mother and sister mistreated for their political alliances. He was not granted asylum. However, he could not be removed as he had no documentation. Mr. Rostami refused to apply for re-documentation for fear of execution in Iran, and on several occasions attempted to commit suicide while in detention in the UK. He was prosecuted under Section 35 of the Immigration Act, but said that "*prison is better than Iran ... I will stay in detention for the rest of my life but I will not return to Iran as I will be executed*".<sup>484</sup> Mr. Rostami was held in detention for 34 months, after which the High Court ruled that his continued detention would be unlawful with no real prospect of him being returned to Iran.<sup>485</sup> The fact that the immigration authorities did not then reconsider Mr. Rostami's asylum application illustrates the link between the stateless and the failed asylum seeker communities.

Malaysia is one of many countries which have criminalised illegal immigration, rendering it punishable by fine, prison sentence and the abhorrent practice of caning. The main legislation regulating the admission into, and

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482 *Ibid.*

483 See Section 35 of the UK Asylum and Immigration (Treatment of Claimants etc.) Act 2004.

484 Gardner, Carl, "How should we tackle failed asylum seekers?", *The Guardian*, 18 August 2009.

485 *R (on the application of Feridon Rostami) v Secretary of State for the Home Department* [2009] EWHC 2094 (QB).

departure and removal from Malaysia is the Immigration Act 1959/1963 as amended in 2002.<sup>486</sup> Under the Immigration Act, any person who enters or remains in Malaysia illegally is liable to prosecution. Sentences include detention, corporal punishment in the form of caning and deportation.<sup>487</sup>

A non-citizen arrested under the Act can be held for up to 14 days before being produced before a Magistrate. A 2002 Amendment to the Immigration Act imposes stringent penalties for illegal immigration, introducing caning as a punishment for first time offenders. According to Section 6 (3) of the Act, any person who unlawfully enters or resides in Malaysia is guilty of an offence and liable to a fine not exceeding 10,000 Ringgit [approximately 3,117 U.S. dollars], imprisonment not exceeding five years and caning of up to six strokes in addition to being subject to removal proceedings.

Despite the fact that Malaysia is party to the CRC, Malaysian law<sup>488</sup> permits the caning of children, provided a lighter than normal cane is used. It must be noted that Malaysia has expressed reservations to many Articles of the CRC including Article 37 which prohibits the torture, cruel, inhuman and degrading treatment of children.

A 38-year-old Rohingya from Maungdaw who arrived by boat in 2008 was arrested in Penang shortly after reaching Malaysia. The court sentenced him to four months imprisonment and three strokes of the cane:

*After three months and 20 days, a jail warden came with a list and called my name. 31 people were called altogether. They told us to get ready for the next morning caning session. The following morning they brought us to an office inside the jail. We were called one by one. They said: "You entered Malaysia without documents and the court has sentenced you with three strokes of the cane. We will now carry out that sentence." I replied that I would take the caning. They took*

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486 Malaysia Immigration Act 1959/1963, as amended in 2002. Unofficial consolidation available at: <http://www.unhcr.org/refworld/country,LEGAL,,,MYS,4562d8cf2,3ae6b54c0,0.html> [accessed on 10 March 2010].

487 UN High Commissioner for Refugees, *Country Operations Plan Malaysia*, 2007, available at: <http://www.unhcr.org/45221ff62.html> [accessed on 10 December 2009].

488 See Section 9(1)(g) and Section 92 of the Malaysia Child Act 2001 (Act 611).

*me inside a separate room. They strapped me to an A-frame which looks like a ladder. They tied my two hands, my waist and my two legs to the frame. We had to take off all our clothes and we only kept one cloth in front of our private parts. Then, one man kept my head against the frame so that I could not see anything. The other man gave me three strokes with a cane on my buttocks: the first stroke, one minute, another stroke, one minute, and then the third stroke. The waves of the strokes went through my head. Each lash brought some blood. It was very painful. I felt excruciating pain in my chest, in my brain, throughout my whole body. I cried. Some people screamed but many remained silent during the caning. Then one guard untied my hands and legs from the frame. I could not walk after they freed me. They then took me to a place to rest and asked me to lie face down. They cleaned my wounds and put some medicine on it. It did not lessen the pain. After caning all 31 people, they allowed us to get dressed again and we were sent back to our respective prison cells.<sup>489</sup>*

**Chapter 6 looked at how criminal detention impacts on the stateless, recalling Hannah Arendt's words that the stateless are often detained under criminal law because they are an anomaly to the system "without right to residence and without the right to work" whose every act is therefore potentially in violation of some law. The general lack of statistics which shed light on whether those in prison have effective nationality or not makes it extremely difficult to estimate how many stateless persons have been imprisoned due to their lack of documentation, right to work or a related fact, rather than for a serious criminal offence. However, ERT observed three different contexts in which stateless persons are detained under criminal laws.**

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489 ERT Interview with a former Rohingya detainee, 10 May 2009, Butterworth, Penang State, Malaysia (ERT-SPD-ML-050).

Firstly, we considered the highly discriminatory laws of Myanmar which target the Rohingya community and criminalise actions which most persons take for granted (including the right to marry without obtaining a state permit). Secondly, we commented on the targeting of irregular, stateless communities in immigration contexts and the criminalisation of the lack of documentation as well as corrupt practices of law enforcement officials. This chapter concluded by drawing attention to the growing trend of criminalisation of irregular migration with prison sentences, fines and even caning attached to it.

### **Key Findings:**

- 1. There are targeted discriminatory laws in Myanmar which specifically victimise the Rohingya, prevent them from leading normal lives and render them vulnerable to arrest, extortion, torture and detention. Corrupt officials utilise such laws to elicit bribes from the Rohingya.**
- 2. ERT research indicates that there is a connection between the lack of personal documents and criminal imprisonment. Stateless persons who do not possess documents are particularly vulnerable to arrest (often by corrupt authorities) and detention for the violation of laws which are not sensitive to the statelessness challenge. More research is required to grasp the true scope of this problem.**
- 3. There is a growing international trend towards the greater criminalisation of irregular migration. This trend has an impact on all irregular migrants. However, the stateless are disproportionately affected due to the reality that many are unable to travel legitimately. The Malaysian practice of caning is of particular concern.**

# PART THREE

## POSITIVE DEVELOPMENTS, RECOMMENDATIONS AND CONCLUSIONS

PART THREE of this report comprises two chapters. CHAPTER 7: POSITIVE DEVELOPMENTS looks at ways forward in the form of good practices, recent policy changes and the progressive development of detention standards. It has three sections. The first – *Identifying the Stateless: Stateless Determination Procedures* – considers the implementation of new and progressive statelessness determination procedures in Hungary, Spain and Mexico. The Spanish case is presented through a case study. Secondly, in the section – *Standards on the Detention of Stateless Persons* – we look at some positive procedural and substantive protections in place in some countries to prevent the unnecessary and lengthy detention of stateless persons. Particular emphasis is given to the positive aspects of the European Return Directive and post-*Zadvydas* policy changes in the USA. The final section of Chapter 7 – *Recent Policy Changes in Australia* – comments on policies regarding the naturalisation of stateless persons, increasing the scope of eligibility to release immigration detainees and community alternatives to detention.

CHAPTER 8: RECOMMENDATIONS AND CONCLUSIONS sets out ERT’s recommendations and conclusions, which are based both on “good practices” identified in our research and new ideas as to how this difficult and complex issue can be addressed through a positive human rights approach that is grounded on the principles of equality and non-discrimination.

# CHAPTER 7: POSITIVE DEVELOPMENTS

## 7.1 IDENTIFYING THE STATELESS: STATELESSNESS DETERMINATION PROCEDURES

The UNHCR *Analytical Framework for Prevention, Reduction and Protection of stateless persons* urges states to be pro-active in finding out who the stateless are, so that they may be protected:

*The first step towards addressing statelessness is to **identify** stateless populations, determine how they became stateless and understand how the legal, institutional and policy frameworks relate to those causes and offer possible solutions.*<sup>490</sup>

Accordingly, it is important to ask whether states have procedures in place to assist migrants who have difficulties in establishing their identity and nationality, and whether they seek the cooperation of other countries in this regard.<sup>491</sup>

The UNHCR Analytical Framework states that individual statelessness determination procedures are in many cases “*the first step towards an effective response as it enables States, UNHCR and other actors to act to ensure the protection of stateless persons*.”<sup>492</sup> The document sets out the questions to be asked in assessing whether states have satisfactory procedures in place, what type of procedure is used to determine statelessness and how fair and efficient the procedure is. Pertinent questions in this regard include:

- whether the procedure provides for legal advice and interpretation services;
- whether decisions are made in a timely manner with written reasons given;

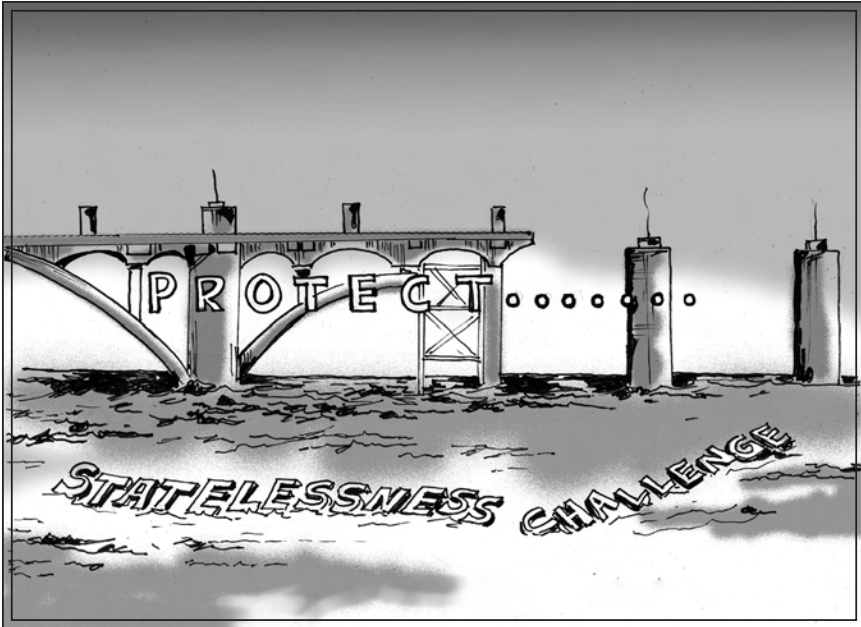
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490 UN High Commissioner for Refugees, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, 2008, available at: <http://www.unhcr.org/refworld/docid/49a28afb2.html> [accessed 12 November 2009].

491 *Ibid.*, p. 14.

492 *Ibid.*, p. 20.





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- whether there is a right to appeal to an independent authority;
- whether the person is granted the right to remain in the country pending final decision;
- whether the burden of proof is on the applicant or decision maker;
- what kind of evidence is required to establish nationality or the lack of it;
- whether the specific needs of vulnerable groups such as women, children and the elderly are met;
- whether the UNHCR has an advisory, observer or operational role; and
- whether adequate training is provided to decision makers, lawyers and legal counsellors.<sup>493</sup>

Hungary and Spain are two countries which through legislation have created detailed rules for dedicated statelessness determination procedures to provide for a separate stateless status. Mexico has a procedure in place to recognise *de facto* stateless persons. A few countries including France and Belgium

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493 *Ibid.*, pp. 20 - 21.

provide some protection to the stateless in a less regulated administrative procedure, or in the case of Italy, through a judicial process.<sup>494</sup> In Belgium, for example, a person can apply to the Tribunal of First Instance to be recognised as stateless. The Tribunal then investigates whether the person has a right to a nationality in a country with which he or she has ties and, if found to be stateless, the person can apply for regularisation under Article 9 of the Belgian Immigration Act (impossibility of return).<sup>495</sup>

Hungary created a separate stateless status determination procedure in 2007, under which it is possible to apply for stateless status.<sup>496</sup> The standard of proof in determining statelessness is similar to that applied in refugee status determination; applicants are entitled to legal assistance and the UNHCR is granted a special position in the process,<sup>497</sup> but only persons who are legally present in Hungary can apply.

In 2008, there were 47 applicants under the Hungarian mechanism. 25 of these cases proceeded to the merit stage of the decision and 20 persons were granted stateless status. In the first half of 2009, a further 15 persons applied and 11 were granted stateless status.<sup>498</sup> Despite the high percentage of positive decisions, the low number of applications is evident.<sup>499</sup> The UNHCR and the Hungarian Helsinki Committee have both expressed concern that the Hungarian procedure excludes persons who are unlawfully staying in the country from applying for stateless status.<sup>500</sup> Furthermore, *de facto* stateless persons are not recognised under the procedure.

Like Hungary, Spain has a procedure for examining an application for recognition as a stateless person.<sup>501</sup> The Minister of Interior is obligated to recog-

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494 Gyulai, Gabor, *Practices in Hungary Concerning the Granting of Non-EU-Harmonised Protection Statuses*, Budapest, September 2009, p. 24.

495 See European Migration Network, Belgian Contact Point, *The Organisation of Asylum and Migration Policies in Belgium*, April 2009, p. 34, available at: <http://www.dofi.fgov.be/nl/statistieken/belgian%20migration%20point/3.pdf> [accessed on 19 November 2009].

496 Hungarian Aliens Act No. II (2007).

497 For a more detailed account see Gyulai, Gabor, *Forgotten without Reason: Protection of non-refugee stateless persons in Central Europe*, Hungarian Helsinki Committee, 2007.

498 See above, note 494, p. 55.

499 In the same time-period, over 5,000 applications for refugee status were made.

500 See above, note 494, p. 59.

501 See UNHCR, *Refugee*, Vol. 22:2, Summer 2004, pp. 19-21.

nise that a person is stateless if the requirements of the 1954 Convention are met, and is further obligated to grant status accordingly.<sup>502</sup>

Mexico is perhaps the only country which has a procedure in place to determine *de facto* statelessness. Mexico has incorporated its international obligations under the 1954 Convention into its national law through an Administrative Order that addresses the situation of stateless persons present in its national territory.<sup>503</sup> The Order which was promulgated in 2007 provides a relatively simple process by which *de jure* or *de facto* stateless persons can petition for legal residence in Mexico.<sup>504</sup> The Order explicitly excludes refugees as well as persons whose nationality rights are recognized by another country.<sup>505</sup> Under this process, a stateless person will initially be eligible for “non-immigrant” status with authorisation to work and travel throughout the country for a period of one year, and this status will be renewable four times for the same period; at the end of that term the individual is entitled to seek a different immigration status or naturalisation.<sup>506</sup>

This is an important example of how national protection can be provided to those who are *de facto* stateless because their nationality is ineffective. The procedure provides flexibility, because where an individual’s nationality then becomes effective, the status would not be extended after the initial one year period. This is an important and progressive move by Mexico, which should be replicated by other states. The process is in its infancy, and ERT hopes that over time it will be further strengthened through the passing of legislation and the implementation of a full-scale protection regime for the *de jure* and *de facto* stateless.

Spain established a statelessness determination procedure in 2000. Following is a case study of this system.

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502 Law 4/2000 as amended by law 8/2000. The procedure is regulated by the implementing Royal Decree 865/2001 of 20 July 2001.

503 See Circular Administrativa CRM-015-07: Situación migratoria de apátridas, available at: <http://www.acnur.org/biblioteca/pdf/6013.pdf>

504 *Ibid.*, Acuerda 1.

505 *Ibid.*, Acuerda 2.

506 *Ibid.*, Acuerda 3.

### 7.1.1 Stateless Status Determination Procedures: The Case of Spain

Spain is party to the 1954 Convention since 1997, but not to the 1961 Convention. Royal Decree 865/2001 provides that stateless status, as set out in the 1954 Convention, shall be afforded to any person who is not considered a national of any state under the operation of its law, and who declares s/he has no nationality.<sup>507</sup> Only the *de jure* stateless are included in this definition, and not the *de facto* stateless. The application may be made at police stations, Offices for Foreigners, or the Office for Asylum and Refuge (OAR). The OAR may also initiate the procedure *ex officio* when it has knowledge of facts, data or information indicating that a person is stateless,<sup>508</sup> but the *ex officio* procedure has not yet been used.<sup>509</sup>

The application must include a clear and detailed explanation of the facts, and in particular the place of birth, parent's details, details of other relatives who have a nationality, place of habitual residence in another country and time spent there. Identity and travel documents must be attached, and if they are not available an explanation should be provided.<sup>510</sup> One of the main advantages of the Spanish procedure is that unlike the Hungarian procedure, it entitles those *illegally staying* within the country to make an application, as long as it is made within one month of entry into the country. According to the Decree, if there is a delay due to causes beyond the applicant's control, the one month period may be extended. When the applicant has been illegally in the country for more than one month, or when she or he is subject to an expulsion order, the application will be considered manifestly unfounded.<sup>511</sup> However, in practice, the one month time limit is not strictly applied.<sup>512</sup> In cases where the applicant is *legally* in Spain, the application must be presented before the expiration of the applicant's leave to remain.

The applicant may remain in Spain during the procedure, as long as no measure of expulsion has been adopted or initiated against him/her. Accordingly,

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507 Royal Decree 865/2001, Art. 1.

508 *Ibid.*, Art. 2.

509 ERT correspondence with A. Cores, lawyer at Comision Española de Ayuda al Refugiado, letter dated 14 September 2009.

510 Royal Decree 865/2001, Art. 3.

511 *Ibid.*, Art. 4.

512 See above, note 509.

the applicant can be granted a renewable residence and work permit valid for up to two years at a time.<sup>513</sup>

The applicant must cooperate during the procedures to assess his or her status and may be required to attend an interview. Free interpretation services are provided.<sup>514</sup> The applicant may produce relevant evidence and information, and can make any claims she or he wishes in support of her or his application. Generally, in other countries, the burden of proof is on the applicant to provide documentation from the embassy or consular authorities of the country of origin stating that he or she is not a national. Under the Spanish procedure, the burden shifts, and the OAR may request as many reports as it deems appropriate from the central administration, national and international entities, experts and language analysts.<sup>515</sup> However, in practice, the OAR has been criticised for some failures to instruct experts during the investigative phase, and for reliance on general country reports; this means that the burden of providing corroborating evidence may remain on the applicant.<sup>516</sup>

After the procedure is initiated, the applicant has 15 days within which to present his or her evidence.<sup>517</sup> When the investigative phase is concluded, OAR recommends recognition or non-recognition of stateless status to the Ministry of Interior,<sup>518</sup> which must make a decision within three months. A positive decision will result in the granting of stateless status under the 1954 Convention.<sup>519</sup> A negative decision can be appealed.<sup>520</sup> Persons who are granted stateless status will be issued with a card confirming the right to live and work in Spain.<sup>521</sup> In addition, going beyond Spain's 1954 Convention obligations, they also enjoy the right to family reunification.<sup>522</sup>

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513 Royal Decree 865/2001, Art. f.

514 *Ibid.*, Art. 7.

515 *Ibid.*, Art. 8(3); See also ERT correspondence with I. Vidal of the OAR, letter dated 18 September 2009.

516 See above, note 509.

517 Royal Decree 865/2001, Art. 9.

518 *Ibid.*, Art. 10.

519 The Decree provides that indefinite leave to remain is granted.

520 Royal Decree 865/2001, Art. 11.

521 *Ibid.*, Art. 13.

522 *Ibid.* The right to family reunification is not explicitly covered by the 1954 Convention.

Reflecting the 1954 Convention,<sup>523</sup> the Spanish procedure provides that a stateless person can be expelled on grounds of national security or public order. In such an event, however, a reasonable period within which to seek legal admission into another country will be allowed to the stateless person.<sup>524</sup> But in practice, stateless people will rarely be accepted by another country, particularly if they have a criminal background, and may remain irregularly.

<b>Year</b>	<b>Applicants</b>	<b>Recognitions</b>
2001 .....	30 .....	00
2002.....	62 .....	02
2003 .....	99 .....	10
2004 .....	107 .....	04
2005 .....	44 .....	04
2006 .....	61 .....	03
2007.....	26 .....	03
2008.....	832 .....	00
2009.....	51 .....	02
<b>Total</b> .....	<b>1312</b> .....	<b>28</b>

\*Courtesy of the Hungarian Helsinki Committee.

Very few people have yet been recognised as stateless under this procedure, despite a sharp increase in the number of applicants. Between 2001 and 2008, only 26 applicants’ claims for stateless status were considered to be well-founded.<sup>525</sup> These successful applications mainly concerned statelessness caused by the conflict of nationality laws in the context of state succession particularly in the former Soviet Union.<sup>526</sup> There has been criticism of OAR’s failure to seek international and national expertise in making a de-

523 See Art. 31.1 of the 1954 Convention, which states that “*Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order*”.

524 Royal Decree 865/2001, Art. 18.

525 See above, note 497, p. 36; See also ERT correspondence with I. Vidal of the OAR, letter dated 18 September 2009.

526 See above, note 509.

cision, coupled with a generally conservative approach in its application of Royal Decree 865/2001.<sup>527</sup>

Another criticism of the OAR concerns its failure to grant stateless status to applicants from Saharawis (persons from Western Sahara), despite decisions from the Spanish Supreme Court that Saharawis should be considered stateless.<sup>528</sup> In one landmark case,<sup>529</sup> the Supreme Court considered whether a Saharawi who was denied the right to renew his Algerian passport,<sup>530</sup> and had no Spanish, Moroccan or Algerian nationality, was entitled to stateless status. After a detailed analysis of national and international law, the Court held that since the appellant could not be considered as the national of any state, he was therefore stateless. The Court also found that the lower tribunal had made a mistake in requiring the appellant to exhaust all national remedies in Algeria before claiming to be stateless.

The Supreme Court later confirmed its position in the case of another Saharawi.<sup>531</sup> In this case, the Court held that the lower court was incorrect in holding that the appellant was excluded from Royal Decree 865/2001 because she was subject to assistance and protection from the UN.<sup>532</sup> The Supreme Court reasoned that a political solution for Western Sahara has not been reached for more than 30 years, and since MINURSO has not been able to afford protection to the Saharawis, they should not be excluded under the 1954 Convention.<sup>533</sup>

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527 Cooperantes, Apátridas, ¿De Que Tipos de Recursos Disponen Las Personas Apátridas? (29 July 2009), available at: <http://cooperantes.proyectokalu.com/apatridas-de-que-tipos-de-recursos-disponen-las-personas-apatridas/> [accessed on 14 September 2009].

528 Comision Española de Ayuda al Refugiado, Conclusions of the CEAR Year 2009 Report, p. 4.

529 Tribunal Supremo, Sala de lo Contencioso-Administrativo, Seccion Quinta, n. 10503/2007 (20 November 2007).

530 Algeria may issue passports to Saharawis who reside in Tinduff refugee camps to allow them to travel abroad for humanitarian reasons. However, by issuing this passport, Algeria does not grant Algerian nationality. The appellant in this case was issued with an Algerian passport to travel to Spain in order to receive medical care.

531 Tribunal Supremo, Sala de lo Contencioso-Administrativo, Seccion Quinta, n. 7337/2005 (19 December 2008).

532 In this instance, the UN Mission for the Organization of the Referendum in Western Sahara (MINURSO).

533 Article 1(2)(i) of the 1954 Convention states that the Convention does not apply "[t]o persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance".

## 7.2 STANDARDS ON THE DETENTION OF STATELESS PERSONS

The UNHCR *Analytical Framework* sets out the key questions which must be asked in reviewing the detention of stateless persons. Answers to these questions will indicate whether such detention is discriminatory, undermines the right to liberty, is arbitrary or amounts to cruel, inhuman or degrading treatment.

The questions include:

- whether the stateless are detained on grounds of irregular residence or lack of identity documents;
- whether persons are detained for prolonged periods solely because they cannot be returned to their country of habitual residence;
- whether there is reliable, disaggregated data on the number of stateless detainees and reasons for detention;
- whether stateless detainees are informed of the reason for arrest in a language they understand, brought before a judicial authority for review, permitted to correspond and receive visits and provided legal aid;
- whether there are legally prescribed time limits for administrative detention;
- whether detainees are subject to torture or cruel, inhuman or degrading treatment or punishment; and
- whether the UNHCR, ICRC or NGOs are given access to stateless detainees.<sup>534</sup>

The UN Working Group on Arbitrary Detention requires the administrative detention of irregular immigrants (including stateless persons) to be assessed against the principle of proportionality. Accordingly:

*If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The reasons put forward by States to justify detention, such as the necessity of identification of the migrant in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served*

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534 See above, note 490.



*with a removal order, must be clearly defined and exhaustively enumerated in legislation.*<sup>535</sup>

The Working Group further states that:

*[A] maximum period of detention must be established by law and ... upon expiry of this period the detainee must be automatically released. Detention must be ordered or approved by a judge and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. The procedural guarantee of Article 9 (4) of the International Covenant on Civil and Political Rights requires that migrant detainees enjoy the right to challenge the legality of their detention before a court. ... All detainees must be informed as to the reasons for their detention and their rights, including the right to challenge its legality, in a language they understand and must have access to lawyers.*<sup>536</sup>

The European Return Directive imposes some strong procedural safeguards pertaining to detention pending removal.<sup>537</sup> When taking a decision to deport, states are required to take due account of:

- (a) the best interest of the child,*
- (b) family life,*
- (c) the state of health of the third-country national concerned, and*
- (d) respect the principle of non-refoulement*<sup>538</sup>

The Directive imposes a number of procedural and substantive safeguards for persons who are to be removed. These include the right to be informed of decisions in writing, and the duty on the state to give reasons for deci-

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535 UN Human Rights Council, *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council*, 13<sup>th</sup> Session, A/HRC/13/30, 15 January 2010, Para 59.

536 *Ibid.*, Para 61.

537 European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 December 2008, 2008/115/EC (Return Directive).

538 *Ibid.*, Art. 5.

sions in a language understood by the person concerned,<sup>539</sup> the right to appeal against or seek review of removal decisions, and the right to receive free legal representation and linguistic assistance.<sup>540</sup>

The Directive views detention as a last resort, and states that:

*Unless other sufficient but less coercive measures can be applied effectively in the concrete case, Member States may only keep in detention a third-country national, who is subject to return procedures, in order to prepare return and/or carry out the removal process, in particular when there is a risk of absconding or the third-country national concerned avoids or hampers the preparation of return or the removal process. **Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.***<sup>541</sup> [Emphasis added]

The Directive stipulates that detention must be “*ordered by administrative or judicial authorities ... in writing with reasons in fact and in law*”.<sup>542</sup> Furthermore, when such detention has been ordered by administrative authorities, states must provide for a “*speedy judicial review of the lawfulness of detention*”<sup>543</sup> The Directive also obligates states to review all cases of detention at reasonable intervals;<sup>544</sup> detention ceases to be justified if “*it appears that a reasonable prospect of removal no longer exists*”.<sup>545</sup> The Directive also sets out standards which must be met in detention facilities.<sup>546</sup>

As mentioned in Part Two above, the Directive states that the detention period should not exceed six months.<sup>547</sup> However, one of the principle shortcom-

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539 *Ibid.*, Art. 12.

540 *Ibid.*, Art. 13.

541 *Ibid.*, Art. 15(1).

542 *Ibid.*, Art. 15(2).

543 *Ibid.*

544 *Ibid.*, Art. 15(3).

545 *Ibid.*, Art. 15(4).

546 *Ibid.*, Art. 16.

547 See Section 3.2.2.1 in Chapter 3 above.

ings of the Directive is that it allows for such detention to be extended for a further twelve months “*in cases where regardless of all their reasonable efforts the removal operation is likely to last longer, due to a lack of co-operation by the third-country national concerned, or due to delays in obtaining necessary documentation from third countries*”.<sup>548</sup>

Despite this constraint, the Directive has already been utilised to secure the release of immigration detainees in a number of EU States. One such example is the European Court of Justice case of Said Kadzoev, a refused asylum seeker who was detained for over three years in Bulgaria. Mr. Kadzoev was arrested in Bulgaria near the Turkish border in October 2006. He had no identity documents but claimed he was born in Grozny, Chechnya. The following day, a deportation order was issued and he was detained pending deportation. In subsequent court proceedings a birth certificate establishing that he was born in Moscow of a Chechen father and Georgian mother, as well as a temporary Chechen Identity Card were produced. The Russian authorities claimed that the identity card was issued by an authority unknown to them, and could not therefore be regarded as a document proving the person’s Russian nationality. Mr. Kadzoev was refused asylum during this period – the entirety of which he remained in detention. In a November 2009 decision, the European Court of Justice ruled that he should be immediately released in accordance with the Return Directive.<sup>549</sup>

### 7.2.1 National Limits on Detention

A review of immigration detention practices in Europe found that a number of states accepted six months as a reasonable upper time-limit for detention.<sup>550</sup> In Cyprus and France, the upper limit is 32 days; it is 40 days in Italy and Spain, 56 days in Ireland, 60 days in Portugal and three months in Greece and Luxembourg. These countries which enforce shorter maximum limits should be encouraged to continue doing so. Spain is seen as an example of a system which is fair and just by irregular migrants, as it does not have a harsh detention policy of illegal migrants and detention is more an exception than

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548 See above, note 537, Art. 15(5) and 15(6).

549 *Said Shamilovich Kadzoev v Direktsia ‘Migratsia’ pri Ministerstvo na vatreshnite raboti*, Case C-357/09, European Union: European Court of Justice, 30 November 2009.

550 European Council on Refugees and Exiles, *Returns Directive: EU Fails to Uphold Human Rights*, Press Release, 18 June 2008.

a rule;<sup>551</sup> a detained migrant cannot be held longer than is necessary to carry out his expulsion and in any case no longer than 40 days.<sup>552</sup>

Countries which have a maximum detention period of six months include the Czech Republic, Hungary, Romania, Slovakia, and Slovenia. Belgium (8 months), Austria (10 months), Poland (12 months), Germany and Malta (18 months) and Latvia (20 months) all have maximum time limits which exceed six months. Additionally, Bulgaria, Denmark, Estonia, Finland, Lithuania, the Netherlands, Sweden and the UK do not impose maximum time limits on their immigration detention regimes.

In the USA, following the *Zadvydas* decision, a procedure was introduced under which the Department of Homeland Security reviews the detention of non-citizens deemed removable (the *Zadvydas* regulations).<sup>553</sup> The *Zadvydas* regulations provide the procedures to determine:

- whether an individual detainee will be detained or released following the 90-day removal period;<sup>554</sup>
- whether there is a significant likelihood of removal in the reasonably foreseeable future after 180 days in detention,<sup>555</sup> and
- whether detention can be continued on account of “special circumstances” beyond 180 days, even where removal is not foreseeable.<sup>556</sup>

Statistics show that approximately 80% of foreigners with a final removal order are removed from the U.S. within 90 days.<sup>557</sup> Those who remain beyond 90 days include detainees who may be stateless. After 180 days of detention,

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551 The Equal Rights Trust correspondence with Gabor Gyulai of the Hungarian Helsinki Committee, letter dated 15 September 2009.

552 *Organic Law 4/2000*, Art. 62.2; see also Global Detention Project, Spain Country Profile (2009), available at <http://www.globaldetentionproject.org/countries/europe/spain/introduction.html#c2018> [accessed on 18 September 2009].

553 See *Continued Detention of Aliens Subject to Final Orders of Removal*, 66 Federal Register 56967 (November 14, 2001) codified at 8 C.F.R. §§ 241.4, 241.13, 241.14 (2005).

554 8 C.F.R. § 241.4.

555 8 C.F.R. § 241.13.

556 8 C.F.R. § 241.14.

557 DHS Office of Inspector General, *ICE's Compliance With Detention Limits for Aliens With a Final Order of Removal From the United States*, OIG07-28, February 2007, Page 10;. Available at: [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_07-28\\_Feb07.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-28_Feb07.pdf) [Accessed on 10 January 2010].

a determination has to be made on whether detention can be continued on account of “special circumstances” beyond 180 days, even where removal is not foreseeable.<sup>558</sup> At this point, authority over the custody determination transfers to the DHS Headquarters Post-Order Detention Unit (HQPDU) in Washington, D.C.<sup>559</sup>

According to the regulations, the HQPDU 180-day review is essentially a three-step process to determine:

- (i) whether the detainee has cooperated with efforts to apply for and obtain travel documents;<sup>560</sup>
- (ii) whether there is a significant likelihood of removal in the reasonably foreseeable future;<sup>561</sup>
- (iii) (a) if not, whether the detainee can be released under conditions of supervision, or referred for a determination as to whether the individual’s continued detention may be justified by “special circumstances”;<sup>562</sup> and
- (b) if so, an assessment of dangerousness and flight risk should take place and supervised release considered.

Given that detention should be a last resort, it is important that viable alternatives to detention are explored and implemented. Belgium, for example, launched a project in October 2008 on alternatives to detention for families with children; such families are now not detained in detention centres, but are provided housing and assisted by “return coaches” in preparation for their return to their countries of habitual residence. Belgian authorities have concluded that the risk of absconding is relatively low.<sup>563</sup> Recent policy changes in Australia also include alternatives to detention.

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558 8 C.F.R. § 241.14.

559 8 C.F.R. § 241.4(k)(2)(ii).

560 8 C.F.R. § 241.13(e)(2).

561 8 C.F.R. § 241.13(c).

562 8 C.F.R. § 241.13(c).

563 *Good practices for a Europe of Protection: A Memorandum for the Trio of Spain, Belgium and Hungary*, December 2009, p. 6, available at: [http://www.ecre.org/resources/ECRE\\_actions/1496](http://www.ecre.org/resources/ECRE_actions/1496) [accessed on 15 January 2010].

### 7.3 RECENT POLICY CHANGES IN AUSTRALIA

Australia's immigration detention practices have been found to be in breach of its international legal obligations – in particular Article 2 (freedom from discrimination) and Article 9 (right to liberty) of the ICCPR.<sup>564</sup> Since 2005, following domestic and international scrutiny of Australia's detention policies and practices, particularly after the High Court's *Al Kateb* decision and several others which demonstrated the failings and devastating impact of immigration detention, a series of measures have been introduced to better align Australia's practices with international human rights standards. The government has stated that it is "*acutely aware of past failures to resolve the status of stateless people in a timely manner*"; and that the Minister for Immigration and Citizenship "*is committed to exploring policy options that will ensure that those past failures are not repeated*".<sup>565</sup> Following are some of the key developments in this regard.

(i) Ministerial Discretion to Grant a Visa to a Detainee – In May 2005, a Removal Pending Bridging visa (RPBV) came into effect. The RPBV allows discretionary release pending removal of immigration detainees whose claims have been finally determined, and who have been cooperating with efforts to remove them but whose removal is not reasonably practical. RPBV holders are entitled to work and to receive welfare and health care benefits.<sup>566</sup> As of 30 June 2008, a total of 46 RPBVs had been granted. Of those, 20 people had subsequently been granted permanent visas, two people had voluntarily departed Australia and two people were contesting removal efforts.<sup>567</sup> However, the government has recently indicated that the RPBV is no longer considered an appropriate mechanism for managing statelessness and that no current RPBV holders are claiming or deemed to be stateless.

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564 See, for example, the Human Rights Committee decision in the case of *A v Australia* (communication No. 560/1993).

565 See the Migration Amendment (Complementary Protection) Bill 2009, Second Reading Speech, available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4197%22> [accessed on 15 April 2010].

566 Although the visa confers indefinite, temporary lawful status, visa holders are denied the right to family reunion, international travel and, where the obstacle to removal is statelessness, effective nationality.

567 Department of Immigration and Citizenship, Government of Australia, Annual Report 2007-2008, available at: <http://www.immi.gov.au/about/reports/annual/2007-08/html/output1/output1-4-3.htm>.

(ii) Community Based Alternatives to Detention – In June 2005, the Migration Amendment (Detention Arrangements) Act 2005 was passed. It contained a number of significant provisions with respect to the release of vulnerable and long-term detainees. First, it provided that children would only be held in immigration detention centres as a measure of last resort.<sup>568</sup> This was accompanied by an amended definition of “detained” under Section 5 (1) of the Act to include people directed to reside in a specified place in the community, without direct supervision. As detention is mandatory in certain cases in Australia, broadening the definition of detention now makes community alternatives a viable option. The 2005 legislative amendments also gave the Minister two new powers:

- the power to grant a detainee any visa deemed appropriate to his or her circumstances (including an RPBV or other temporary and substantive visas);<sup>569</sup> and
- the power to direct that a detainee be released into specified, unsupervised, community-based accommodation.<sup>570</sup>

(iii) New Draft Legislation – In July 2008, the Minister for Immigration and Citizenship announced an extensive package of reforms to immigration detention. The New Directions in Detention (NDID) policy does not do away with mandatory detention or territorial excision. Yet, it introduces a new conceptual framework for immigration detention which has positive features. Notable changes include a requirement on the department to “*justify a decision to detain based on established need*” with a “*presumption that persons will remain in the community while their immigration status is resolved*”; the adoption of a “*modern risk-management approach*” with the key determinant of a need to detain being a risk to the community; a clear statement of commitment to honouring Australia’s international human rights obligations, including “*ensuring the inherent dignity of the human person*”; a focus on achieving “*fair and timely*” resolution of people’s immigration status; and a repudiation of arbitrary detention. The Migration Amendment (Immigration Detention Reform) Bill 2009 sets out to enshrine the values articulated

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568 Reflecting Article 37 of the Convention on the Rights of the Child.

569 Migration Amendment (Detention Arrangements) Act 2005, Section 195 A.

570 *Ibid.*, Section 197 A. See also Department of Immigration and Citizenship, Government of Australia, “Fact sheet 85: Removal Pending Bridging Visa” for more information.

in the NDID policy.<sup>571</sup> The Bill contains a number of important provisions, including:

- a prohibition on holding children in immigration detention centres;
- introduction of provisions for discretionary detention in some instances;
- a specification that appropriate efforts must be made to conduct identity, health and security checks and resolve the immigration status of detainees;
- increased frequency of monitoring and reporting on the validity and circumstances of detention by the Commonwealth Ombudsman and senior departmental officials; and
- the introduction of discretionary mechanisms to allow for temporary unsupervised community release from detention centres for stipulated purposes.

(iv) Abolition of Detention Debts – A further development has been the abolition of the practice (unique to Australia) of charging detainees for their period of time in immigration detention. Detention fees were introduced in 1992, but failed in their stated goal of cost recovery, with debts largely not recouped, while imposing a significant psychological and in some cases financial burden upon those affected.<sup>572</sup>

(v) Work Rights Amendments – In July 1997, a “45 day rule” was introduced which stipulated that applicants for protection visas who lodged their claims after having spent 45 days or more in Australia during the previous twelve months would be ineligible to work or to access subsidised health care while awaiting an outcome on their claim. In July 2009, the Australian government amended the Migration Regulations 1994 to expand the scope for departmental officers to grant permission to work (with corresponding access to subsidised health care) to bridging visa holders who have complied with reporting requirements, can demonstrate a compelling need to work, and

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571 See *Immigration detention in Australia: A new beginning - Criteria for release from immigration detention*, December 2008, available at <http://www.aph.gov.au/House/committee/mig/detention/report/fullreport.pdf>; see also [http://www.aph.gov.au/SEnate/committee/legcon\\_ctte/migration\\_2009/info.htm](http://www.aph.gov.au/SEnate/committee/legcon_ctte/migration_2009/info.htm). The second reading speech, explanatory memorandum and bill may be viewed at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22legislation%2Fbillhome%2Fs720%22>

572 The Migration Amendment (Abolishing Detention Debt) Bill was passed in September 2009.



where relevant, can provide an acceptable reason for a deemed delay in lodging an application for protection.

Chapter 7 has looked at some good practices pertaining to statelessness, which should be replicated. We began by identifying a few systems which have statelessness determination procedures in place. In order to protect the stateless, it is essential that they are first identified as such. The UNHCR Analytical Framework sets out the most important qualities that such a procedure should have. Hungary and Spain have the most comprehensive mechanisms in place, while Mexico has a procedure for the identification of *de facto* stateless persons. The Spanish system, which was analysed at some length, allows for persons not legally staying in the country to apply for status determination.

We next looked at some of the positive aspects of progressive standards, rules and procedures pertaining to detention which are particularly relevant to the stateless. Despite being criticised for legitimising a maximum 18 month detention period, the EU Return Directive has many positive aspects. It imposes a number of procedural and substantive safeguards for persons who are to be removed, and has been the basis on which many persons have successfully challenged lengthy immigration detention in Europe.

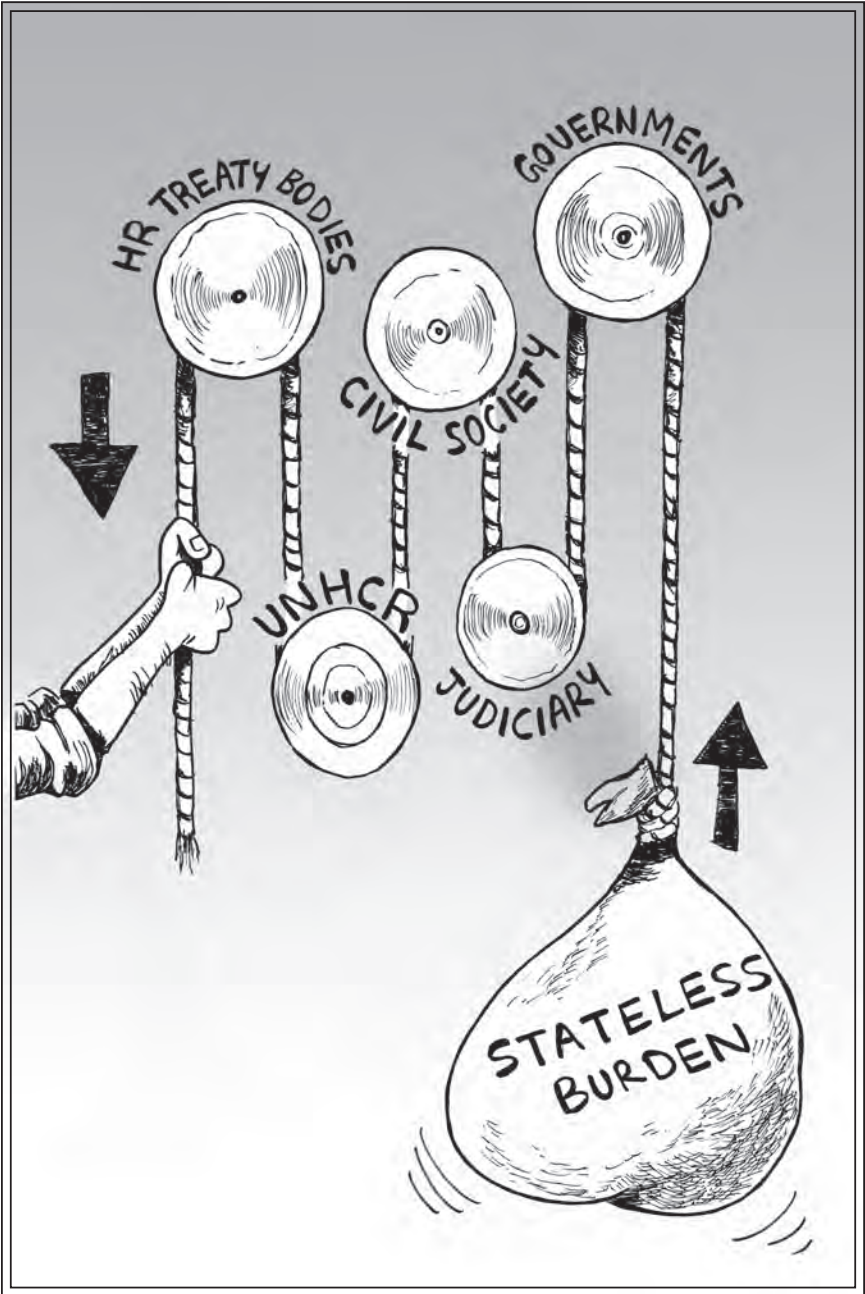
Finally, we looked at some positive Australian developments following the High Court *Al-Kateb* decision. The Australian system continues to have mandatory detention in certain circumstances; but by broadening the definition of detention, community alternatives to detention have emerged as a new priority area of Australia's immigration regime. A new draft bill also includes many positive aspects, which will strengthen Australia's adherence to its international human rights obligations if enacted.

## CHAPTER 8: RECOMMENDATIONS AND CONCLUSIONS

Looking at the practices highlighted in Chapter 7, be they the Spanish statelessness determination procedure, the post-*Zadvydas* policy of the USA or the exploration of community alternatives to detention in Australia, it becomes evident that extensive resources are not required to address the statelessness problem in an effective manner. What is needed is awareness of the statelessness challenge, sensitivity to the human cost of statelessness, a keen sense of justice, a commitment to promoting equality and non-discrimination and some creative legal thinking. It is in this spirit, that ERT makes recommendations which it believes will contribute towards better, fairer, less discriminatory and more comprehensive protection for the stateless around the world. The following recommendations are general in nature. While some are specifically targeted at states, the UNHCR or the human rights treaty bodies, there is scope for all actors including civil society organisations, the judiciary, law and policy makers, international organisations, academics and the media to take action on each of them. It is only when the problem is approached from different perspectives and by different players that real momentum for change can be achieved.

ERT's key recommendations are listed below, and then followed by further elaboration of each.

**1. Strengthening the International Statelessness Regime** – A global commitment is needed to eradicate statelessness and protect the stateless, not only through increased ratification of the two statelessness conventions, but also through a serious commitment by states to fulfil their obligations under the treaties. The UN treaty bodies, the UN Human Rights Council's Special Rapporteurs and local and international NGOs all have a role to play in recommending and lobbying states to ratify the conventions. States are also urged to go beyond those clauses in the 1954 Convention which limit protection, such as the "lawful stay" clause. States are urged, in this regard, to devise criteria based on which they grant lawful stay to stateless persons who are illegally within their territory, and accordingly extend all the rights under the 1954 Convention in a non-discriminatory manner.



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**2. Reaffirming the Centrality of Human Rights Principles in Protecting the Stateless** – States, the UNHCR, the UN treaty bodies, the UN Human Rights Council’s Special Rapporteurs, national, regional and international courts and organisations working on behalf of the stateless must recognise that the protection of stateless persons is primarily a human rights issue, which must be addressed through the application of human rights law, as well as through the statelessness treaty regime. A comprehensive body of jurisprudence and authoritative interpretation should be developed.

**3. Equality and Non-Discrimination** – Principles of equality and non-discrimination are of particular relevance to the stateless, and must be central to all laws, policies and practices which have an impact on them. The most desirable way of ensuring this is for states to adopt a holistic understanding of equality and non-discrimination,<sup>573</sup> and incorporate it into national law through comprehensive equality legislation.

**4. Abolishing Hierarchies within Statelessness** – The *de jure* – *de facto* dichotomy, which creates a hierarchy within statelessness and results in discrimination between the two groups must be replaced with a more comprehensive, inclusive and fair understanding of statelessness, which promotes equal and effective protection for all. The definition should be based on the notion of effective nationality. Until this is achieved, *de jure* statelessness should be interpreted in as broad a manner as possible, so as to bring many groups presently recognised as *de facto* stateless under the protection of the 1954 Convention. Additionally, greater protection must be provided for the *de facto* stateless through progressive policies and practices such as the Mexican process for identifying and protecting *de facto* stateless persons. Furthermore, organisations which work on behalf of refugees and the stateless must include the *de facto* stateless within their mandates. The UNHCR is now developing more comprehensive definitions of *de jure* and *de facto* statelessness. This should be an open-ended approach which has the flexibility to recognise unanticipated scenarios of statelessness in the future.

**5. Implementing National Statelessness Determination Procedures** – Effective and fair statelessness determination procedures must be put in place. Such procedures must not be limited to identifying only the *de jure* stateless, but should identify all persons who have no effective nation-

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573 For a holistic and comprehensive approach to equality, see The Equal Rights Trust, *Declaration of Principles on Equality*, London 2008.

ality. This would ensure that statelessness is identified in the course of immigration procedures, or when an application for political asylum is refused, thus establishing situations where an individual has no effective nationality, cannot be removed to another country, and should not therefore be detained “pending removal”. This will enable detention to be used as a last, rather than first resort. Steps must also be taken to determine whether those already in detention awaiting deportation are stateless.

**6. Information and Statistics on Stateless Populations** – All states should maintain information and statistics on stateless populations, particularly those in detention. *De facto* stateless persons should be included within these statistics, which should be broken down in such a manner that the reason behind genuine and ineffective nationality is clearly identified.

**7. The Stateless and Refugees** – The strong connection between statelessness and refugees must be affirmed. This was the basis on which the 1951 and 1954 Conventions were drafted. The parallel routes taken by the two conventions – i.e. the development of the refugee protection regime and until recently the near stagnation of the statelessness regime - has been detrimental to both refugee and stateless populations. By strengthening stateless mechanisms, the protection afforded to the stateless acts as a safety net for refugees, for example where they are wrongly refused recognition, in addition to being a valuable protection tool in its own right.

**8. The Integration and Naturalisation of Stateless Persons** – States should expedite the integration of all stateless immigrants into society, through the provision of documents, access to education, healthcare, employment and social welfare and ultimately through the facilitation of their naturalisation. In the short term, Bridging Visas or their equivalent should be provided to the stateless so as to regularise their status.

**9. The *Non-Refoulement* Dilemma** – States must consistently and comprehensively fulfil their obligations of *non-refoulement* in a manner which does not undermine the liberty of those who have a right not to be *refouled*. Stateless persons who cannot be removed to their countries of habitual residence for fear of persecution, torture or acute discrimination, must not be kept in lengthy detention (if any detention at all is necessary and non-arbitrary).

**10. Protecting Those Who Do Not Have Consular Protection** – The lack of consular protection is a distinctive factor with regard to ineffective na-

tionality, which can arise due to, *inter alia*, the absence of diplomatic ties between two countries, the non-existence of a consulate due to resource problems, and the failure of a consulate to co-operate with removal. Consideration is needed of how these gaps can be filled, including whether an international organisation such as the UNHCR could act as “default” consul on behalf of such persons.

**11. Adopting International Standards on the Detention of Stateless Persons** – There is a need to develop international detention standards which are specific to stateless persons; they should reflect the expertise of both the UNHCR and the UN human rights system, as well as the principles and standards developed by international, regional and national courts. The existing UNHCR guidelines on the detention of asylum seekers referred to in this report can be used as a template for the development of statelessness specific principles. Key stakeholders including the UNHCR, the UN Working Group on Arbitrary Detention and NGOs must work together to develop such a set of guidelines, and ERT is dedicated to catalysing this process.

**12. Promoting Alternatives to Detention in an Immigration Context** – The established international norms protecting persons against arbitrary detention should be applied to stateless persons. Any exceptions should be narrow. In all cases, non-detention in a non-criminal context is the solution most in keeping with international human rights principles. Positive alternatives to detention including community based alternatives must be promoted. Detention should never be mandatory. In limited cases where detention cannot be avoided, there should be a maximum limit of six months detention pending removal, after which, if removal is not possible, detainees should be released. The U.S. post-*Zadvydas* regulations are a step in the right direction in this regard. The notion of “reasonable time” employed by the UK must be discarded as this creates a situation where persons remain indefinitely in detention until they manage to successfully challenge their detention in courts. In the case of foreign nationals convicted for a crime, removal proceedings should begin at least six months before their criminal sentence ends, with the presumption that if removal cannot be secured by the time the full sentence has been served, removal is highly unlikely if not impossible and further detention should not be authorised.

**13. The Non-Deportation of Persons Who Have Been Resident in a Country since Early Childhood** – Stateless persons who have been resident within a state or territory since childhood should not be deported from these states or territories under any circumstances. In such situations, the states

in which they have spent their formative years and most of their lives should be viewed as their countries of habitual residence. Such persons should have facilitated access to naturalisation in accordance with the provisions of the 1954 Convention.

**14. Immigration Laws with Criminal Penalties Should be Reviewed**

– States should review their immigration laws and make them sensitive to the reality of statelessness and the reasons behind the lack of personal documents. Stateless persons should not be criminally penalised as a result of their status. Immigration regimes must identify the stateless and be consistent with state obligations under international human rights law.

**15. Release into Enforced Destitution** – Stateless persons should not be released from detention into destitution. Providing such persons with access to employment, welfare, education and healthcare is a basic positive obligation of states.

**16. Continued and Unfounded Security Detention Must End** – Continued security detention of persons who have been cleared for release is not acceptable. Such persons must be allowed residence in a country in which they are not a threat. Detaining states must expedite the release of such persons, and in the very least temporarily release them onto their territory with basic welfare guarantees until a suitable third country accepts them.

**17. Compensation for Stateless Detainees** – Due compensation must be provided to stateless persons who have remained in detention for unnecessarily lengthy periods, when they have been cleared for release (for example, in the context of security detention), have been sentenced wrongly (in the context of criminal detention) or when there has been no reasonable prospect of removal (in the context of immigration detention).

Each of these recommendations is further elaborated upon below:

**1. Strengthening the International Statelessness Regime**

As was argued in Part One of this report and demonstrated in Part Two, the international statelessness regime does not adequately protect this particularly vulnerable group. Two reasons for this are the low ratification of the two statelessness conventions on the one hand, and the significant limitations in terms of the protection they afford to the stateless on the other.

Poor ratification highlights a lack of political will on the part of states to address the issue of statelessness, and reflects the fact that few states take the issue seriously enough to change national law and policy to protect stateless persons. In order to achieve wider ratification, the protection of stateless persons must be given higher priority by both international and national human rights institutions. The UNHCR's accession drive for the statelessness conventions has borne important results but more remains to be done. The UN human rights treaty bodies and relevant special rapporteurs must urge states to ratify the conventions. Similarly, civil society actors including national and international NGOs must lobby the governments of the countries they work in to ratify the statelessness conventions.

But increased ratifications are not enough. As has been demonstrated in this report, states which are party to the statelessness conventions such as the UK and Australia have fallen short of their protection obligations. Ratification of the conventions must therefore be accompanied by a genuine commitment to protect the stateless, through identifying them, treating them equally and integrating them into national societies.

In this regard, it is essential that governments ensure protection to stateless persons who may be in the country illegally. The fact that many of the protections offered by the 1954 Convention only apply to stateless persons who are lawfully staying in the territory of a third country is cause for grave concern. This further limits the scope of application of the 1954 Convention, leaving more vulnerable persons outside its protection. Ideally, a similar provision to Article 31 of the Refugee Convention should have been incorporated into the statelessness conventions in order to ensure that the illegal entry and stay of stateless persons who have no means of obtaining the necessary travel documents to travel legally is not criminalised. In the absence of such a provision, and to fill the resulting protection gap, the UNHCR and the UN human rights system should develop standards to protect such groups, which should be implemented by states in their immigration policies.

## **2. Reaffirming the Centrality of Human Rights Principles in Protecting the Stateless**

As was argued in Part One, the "statelessness world" and the "human rights world" have not complemented each other as they ideally should, to the detriment of stateless persons. This compartmentalisation has negatively affected how international human rights principles are typically applied. As human



beings, the stateless must be afforded the equal protection of international human rights law in a non-discriminatory manner. Speaking on World Human Rights Day, the UN High Commissioner for Human Rights said:

*Twenty-six of the Universal Declaration's 30 Articles begin with the words "Everyone..." or "No one ..." Everyone should enjoy all human rights. No one should be excluded. All human beings are born free and equal in dignity and rights. Non-discrimination must prevail.*<sup>574</sup>

The human rights treaty bodies, national, regional and international courts, states, and NGOs working on behalf of the stateless, should see statelessness as a human rights issue, which must be addressed through the prism of well established human rights principle. There have been positive developments in this regard.

On the one hand, the UNHCR has recently emphasised in a statement to the UN Human Rights Council the centrality of human rights to its entire mandate, and stated that the Human Rights Council and the UNHCR share the same fundamental objective of "*promoting and protecting the safety and dignity of the individual*"<sup>575</sup> The UNHCR further confirmed that it "*promotes a rights based approach to the protection of persons under its mandate*", which includes the stateless; and that it recognises that:

*Human rights are applicable to all, everywhere ... Yet, refugees and stateless persons are often perceived to have fewer rights than nationals. Persons in need of international protection often face discrimination, intolerance and xenophobia, affecting their access to safety.*<sup>576</sup>

This statement pledges to integrate human rights into all aspects of UNHCR work, and to promote the protection of persons of concern through relevant human rights mechanisms as well. In this regard, the UNHCR states that:

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<sup>574</sup> Office of the High Commissioner for Human Rights, *Statement by the UN High Commissioner for Human Rights on Human Rights Day*, 10 December 2009, available at: <http://www.ohchr.org/EN/ABOUTUS/Pages/StatementHCHRDay2009.aspx> [accessed 10 April 2010].

<sup>575</sup> UN High Commissioner for Refugees, *Statement by UNHCR at the General Segment of the 13th Session of the United Nations Human Rights Council*, 3 March 2010, available at: <http://www.unhcr.org/refworld/docid/4ba887c42.html> [accessed 5 May 2010].

<sup>576</sup> *Ibid.*

*The resolutions and decisions of the Council, including the recommendations adopted at the outcome of the Universal Periodic Reviews are contributing to the strengthening of the protection of persons under UNHCR's mandate ... [and UNHCR] is looking forward to a continued and close coordination with the Human Rights Council.*<sup>577</sup>

On the other hand, the treaty bodies now include the stateless in their general comments and country specific observations.<sup>578</sup> This must continue to be done in a more systematic and comprehensive manner, including through greater cooperation with the UNHCR. It is of particular importance that UN Special Rapporteurs who have a mandate which is relevant to the stateless (for example, the Special Rapporteur on the Rights of Migrants) play a key role in emphasising the human rights challenge of statelessness and lobbying for greater protection.

But recognition of statelessness as a crucial human rights issue in itself is insufficient. Authoritative comment and jurisprudence of the treaty bodies and international and regional courts respectively must develop a strong set of principles and standards which recognise the human rights of stateless persons and the duty of states to promote, protect, respect and fulfil them. Such standards must be transposed into the laws and policies of individual states. National judiciaries, policy makers and legislators have specific responsibilities in ensuring the effective transposition of such standards. As the Human Rights Committee has observed, *“Article 2 [of the ICCPR] requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”*<sup>579</sup>

National judiciaries can play an extremely influential role, as is clear from the Spanish Supreme Court's recent decisions on the Saharwis, which were discussed in Chapter 7 above. The more judiciaries apply international human rights norms and standards, the more universally entrenched they be-

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577 *Ibid.*

578 See the UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, E/C.12/GC/20, 25 May 2009, Para 30; See also the UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986), Paras 1-2.

579 UN Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26/05/2004, Para 7.

come. Judicial attitudes and perceptions are therefore extremely relevant to the rights of the stateless.<sup>580</sup>

Likewise, the role of policy makers and legislators is crucial. The Australian example of creating a new class of visa (The Removal Pending Bridging Visa) specifically for persons who may otherwise be indefinitely detained due to their statelessness is an example of how policy can be changed to protect the rights of stateless persons.<sup>581</sup>

The performance of national legal systems applying international standards should be monitored, not only by the Treaty Bodies and the UNHCR, but also by international and national NGOs. A discourse on the human rights protection of stateless persons should be encouraged, through the publication and dissemination of good practices adopted by states.

### 3. Equality and Non-Discrimination

As has been argued throughout this report, principles of equality and non-discrimination are particularly relevant to statelessness and must be central to all laws, policies and practices which have an impact on the stateless.<sup>582</sup> The nexus between statelessness and discrimination is evident from this report. In the worst case, stateless persons are members of vulnerable and discriminated against minorities who have been rendered stateless through targeted laws and policies which are clearly discriminatory. However, even in situations where discrimination is not overt and acute, stateless persons face discrimination which is more difficult to identify, but nonetheless present. Such discrimination may be direct or indirect, deliberate or accidental; it may be the result of institutional indifference or oversight, or the failure to anticipate how a particular policy would impact on persons with ineffective

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580 The UK House of Lords decision in the *Belmarsh* case is an example of the judicial application of the principle of non-discrimination to a situation in which non-nationals but not nationals were detained. Whilst this aspect of the judgment must be viewed as a positive development which enhances the rights of stateless persons in detention, it must be borne in mind that the judgment left room for the levelling down of rights of all persons instead on demanding the levelling up of the rights of non-nationals. See *A and others v Secretary of State for the Home Department*, [2004] UKHL 56.

581 However, as mentioned in Section 7.3 above, the bridging visa is not being used any more.

582 As discussed in Section 1.2.2 in Part One above, the principles of equality and non-discrimination do allow for limited exceptions in strictly defined contexts.

nationality. Whatever shape or form it takes, discrimination is a reality that shapes most stateless persons' lives. Positive steps must therefore be taken to protect stateless persons; to ensure that laws and policies do not deliberately or inadvertently discriminate against them; to promote the equality of the stateless and ultimately to enable them to lead secure and fulfilling lives.

It may be useful to reflect on the elements of the right to equality, which were discussed in Part One of this report, and apply each of them to the stateless, as they, like all other persons, have entitlement to each element of the right:

- *recognition of the equal worth and equal dignity of each human being;*
- *equality before the law;*
- *equal protection and benefit of the law;*
- *to be treated with the same respect and consideration as all others;*
- *to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.*<sup>583</sup>

While principles of national sovereignty may allow some exceptions, these should be defined narrowly.

The most desirable way of ensuring that these entitlements are addressed in a non-discriminatory manner is through states adopting a unified understanding of equality and non-discrimination, as set out in the Declaration of Principles on Equality, and incorporating it into national law through comprehensive equality legislation. Such an approach would not only benefit the stateless, but all vulnerable individuals and communities within society at large. When considering the vulnerabilities of the stateless, this would invariably contain an element of positive action, which "*includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality*".<sup>584</sup>

One example of how positive action could benefit the stateless at a proce-

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583 The Equal Rights Trust, *Declaration of Principles on Equality*, London, October 2008, Commentary by Dimitrina Petrova, p. 30, available at: <http://www.equalrightstrust.org/ert-documentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>

584 *Ibid.*, Art. 3.

dural level is the implementation of fast track citizenship or naturalisation processes specifically catering to the stateless. At a substantive level, stateless communities which have historically suffered inequality and discrimination must be targeted by policies which aim to provide them with the skills, resources and support of which they have been consistently deprived.

#### 4. Abolishing Hierarchies within Statelessness

As this report has emphasised, the 1954 and 1961 Conventions only apply to *de jure* stateless persons. Even though the final act of the 1961 Convention recommends that as far as possible protection should also be offered to *de facto* stateless persons, there is no legal obligation on state parties to do so. In reality, the human rights vulnerabilities of stateless persons, particularly those who cross international borders, are not defined by whether the person's statelessness is *de jure* or *de facto*. Consequently, the international statelessness regime should offer equal protection to both groups.

The *de jure* – *de facto* dichotomy, which creates a hierarchy within statelessness and results in discrimination, must be replaced by a more comprehensive, inclusive and fair definition of statelessness, which promotes equal and effective protection for all. Statelessness is a violation of the right to a nationality; which in order to be meaningful, must be interpreted as the right to an “effective” nationality, which can be enjoyed by the individual both within their country of habitual residence and outside it. This is why ERT has argued that the definition of statelessness should ideally be based on the notion of ineffective nationality. Through approaching statelessness in such a manner, the existent hierarchy between *de jure* and *de facto* stateless persons will be deleted and all stateless persons will be eligible for international protection.

While promoting an “ineffective nationality” test, ERT is aware of the limitations of this approach. It must be precise in its limits and contours. The concept is in its infancy and must be developed into a robust principle through an incremental process of consultation, authoritative opinion and jurisprudence. In Part One of this report, a six-pronged ineffective nationality test which can be utilised to identify cases of statelessness (*de jure* or *de facto*) both within the country of habitual residence and in other countries, was offered as a starting point.

This is a long-term goal. In the interim, greater protection must be provided for the *de facto* stateless through progressive policies and practices such as

the Mexican process for identifying and protecting *de facto* stateless. Furthermore, organisations which work on behalf of refugees and the stateless must include the *de facto* stateless within their mandates.

In a welcome development, the UNHCR has begun reviewing the definitions of *de jure* and *de facto* statelessness. ERT argues that a short-term solution to the present protection gap can be achieved by progressively broadening the scope of the present *de jure* statelessness definition, so that groups which are generally identified as *de facto* stateless are brought within its scope. The task should be approached incrementally, through the identification of actual situations in which nationality is ineffective, and protection is consequently required.

## 5. Implementing National Statelessness Determination Procedures

The 1954 Statelessness Convention does not explicitly obligate states to put statelessness determination procedures in place. However, this requirement is implicit in the text, for if states are to fulfil their convention obligations to stateless persons who are within their territory, they must first be able to identify who they are. Consequently, it is surprising that Hungary and Spain are the only countries to have legislated to create statelessness determination procedures.

Until June 2011, the presidency of the European Union will be held by Belgium, Hungary and Spain. Given the progressive attitudes in the last two countries towards statelessness, and Belgium's good practices pertaining to the administrative detention of immigrants, these three countries should lead in a process of developing EU policy and legislation, to mandate statelessness determination procedures throughout the Union.<sup>585</sup>

If the stateless are to be afforded the protection they require, it is essential that stateless persons are identified as such, as early as possible. This means that states must implement effective and fair statelessness determination procedures, not only where protection is actively sought on grounds of statelessness, but also where an immigration application is refused and when an application for recognition as a refugee is rejected. Furthermore, the status

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585 *Good practices for a Europe of Protection: A Memorandum for the Trio of Spain, Belgium and Hungary*, December 2009, available at: [http://www.ecre.org/resources/ECRE\\_actions/1496](http://www.ecre.org/resources/ECRE_actions/1496)

of persons already in detention pending deportation must be assessed as a matter of priority.

As this report has shown, the lack of such procedures may result in unnecessary and lengthy detention. An additional problem is that without an opportunity to apply for protection as stateless persons, they are often diverted into general asylum procedures, even where they have no well founded fear of persecution. This can result in the refusal of an asylum application, loss of any legal immigration status, and long-term detention “pending removal”. It is therefore essential that the stateless are identified as a distinct category with special immigration and protection needs.

Under Article 11 of the 1961 Convention, the UNHCR is mandated with the role of examining the claims of persons seeking the benefit of the Convention and assisting them to bring their applications before the relevant authorities.<sup>586</sup> The implementation of this mandate must be strengthened.

Ideally, statelessness determination procedures should contain clear, protection-oriented rules and well-defined responsibilities for the authorities; have a limited time period, to preclude long delays when multiple states are asked to confirm that an individual is not their national. Only states with which the individual has clear ties in terms of past habitual residence, birth or descent should be asked to confirm or deny nationality, and if they do not respond within a reasonable timeframe, the applicant should be presumed to have no nationality and be recognised as stateless.

## 6. Information and Statistics on Stateless Populations

The failure of all the states of ERT’s research to maintain statistics related to stateless persons, including those in detention within their jurisdiction, indicates the degree to which the issue of statelessness is ignored at national levels. For example, the UKBA told ERT that no comprehensive statistics are maintained on the reasons why immigration detainees could not be removed, even in the case of those who had been detained for over six months.<sup>587</sup>

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586 Convention on the Reduction of Statelessness (adopted on 30 August 1961, entered into force 13 December 1975) UNGA RES/896 (IX), Art. 11.

587 See UK Border Agency response to The Equal Rights Trust Questionnaire, 1 April 2009.

These statistics should be maintained in a comprehensive manner, and be disaggregated by age, sex and country/territory of origin. Further data collection which distinguishes the stateless community into the *de jure* and *de facto*, identifies the cause of *de facto* statelessness, and registers the reasons why a theoretical nationality is ineffective, is needed to develop policy based on principles of human rights and equality. The reasons for ineffective nationality will range from the lack of diplomatic ties between states and absence of consular protection to bars to *refoulement*. Such an approach would enable the authorities to anticipate situations in which removal will be impossible, and so minimise detention “pending removal”. For example, if the statistics reveal that all nationals from Algeria or Iran face major barriers to obtaining travel documents from their consulates in the UK, such persons should not be detained while they are waiting for documents that are unlikely to be issued.

## 7. The Stateless and Refugees

As was argued in Part One of this report, there is a strong link between refugees and the stateless. Some refugees are *de jure* stateless. Others may have a legal nationality, but because they have a well founded fear of persecution at the hands of their states, they do not benefit from their protection, and therefore are *de facto* stateless. This connection was the basis on which the 1951 and 1954 Conventions were drafted, and the subsequent divergent routes taken by the two conventions – i.e. the considerable development of the refugee mechanism and the stagnation of the statelessness mechanism, has been detrimental to stateless populations.

It has also been detrimental to refugees. As immigration regimes have become more restrictive, more asylum seekers with strong refugee claims have been refused protection under the 1951 Convention. Once their claims are rejected, they are often required, under national immigration laws, to leave the country. Thus they become removable but may have no country to which they may safely, legally or practically be returned. The lack of a statelessness determination mechanism which would work as a safety net for such persons is cause for grave concern.

The UNHCR has a vital role in this regard. As a protection agency to both the stateless and refugees, the UNHCR has to give more prominence to statelessness as a major protection issue for the international community, instead of one which can be marginally accommodated at the margin of refugee protection. UNHCR country offices must also begin prioritising statelessness and



doing more protection work on behalf of stateless persons through taking up individual cases. The UNHCR Executive Committee has noted

*[T]he close connection between the problems of refugees and of stateless persons and invited States actively to explore and promote measures favourable to stateless persons, including accession to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, as well as the adoption of legislation to protect the basic rights of stateless persons and to eliminate sources of statelessness...*<sup>588</sup>

States too must recognise the strong link between refugees and the stateless, and establish institutions with a common mandate towards both vulnerable groups. The Belgian Commissioner General for Refugees and Stateless Persons, the French Office for the Protection of Refugees and Stateless Persons and the Spanish Office of Asylum and Refuge (which also conducts statelessness determination procedures) are all positive examples in this regard.<sup>589</sup>

## **8. The Integration and Naturalisation of Stateless Persons**

Statelessness is a problem which should be resolved through the formal, legal and practical integration of the stateless into existing societies. The Spanish and Mexican procedures discussed above are examples of how stateless persons can be given the legal opportunity to integrate themselves into society, with the ultimate possibility of naturalisation.

The 1954 Convention contains a number of provisions which assist integration, for example by obligating state parties to extend administrative assistance to the stateless and issue them with identity papers (regardless of legal

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588 See UNHCR Executive Committee Conclusion 50 of 1988.

589 *The Organisation of Asylum and Migration Policies in Belgium*, European Migration Network, Belgian Contact Point, April 2009, available at: <http://www.dofi.fgov.be/nl/statistieken/belgian%20migration%20point/3.pdf>.

status)<sup>590</sup> and travel documents,<sup>591</sup> as well as to facilitate their naturalisation.<sup>592</sup> It also requires the treatment of stateless persons to be at least as favourable as that accorded to nationals in respect to the freedom of religion, artistic rights and industrial property, access to courts, rationing, elementary public education, public relief and assistance, labour legislation and social security (subject to state discretion in the case of non-contribution benefits).<sup>593</sup>

In Belgium, there is a fast-track naturalisation process for refugees and stateless persons. Accordingly, after residence in the country for 2 years, a refugee or stateless person may be naturalised.<sup>594</sup> Whilst enabling the stateless person to acquire a nationality through naturalisation should be the ultimate objective, interim measures to ensure that stateless persons can live in, benefit from and contribute to society before naturalisation are also needed. The stateless must be allowed access to education, work, healthcare and to open bank accounts etc. The Australian solution of the Bridging Visa is a useful interim measure along the road to integrating the stateless.

## 9. The *Non-Refoulement* Dilemma

As stated in part one above, the principle of *non-refoulement* or non-return to a situation of persecution or irreparable harm is an established part of international human rights law, which places limits on the exercise of state sovereignty to remove non-citizens from its territory.<sup>595</sup>

The human rights law principle of *non-refoulement* is particularly relevant to stateless persons in security detention who are not recognised as refugees,

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590 See Article 25 and 27 respectively of the 1954 Convention.

591 See Article 28 of the 1954 Convention. Although the requirement to issue travel documents applies only to stateless persons lawfully staying within the state territory, states are encouraged to issue travel documents to all stateless persons regardless of status, and to “give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence”.

592 See Article 32 of the 1954 Convention.

593 See Article 4, 14, 16, 20, 22(1), 23, and 24 respectively of the 1954 Convention.

594 *The Organisation of Asylum and Migration Policies in Belgium*, European Migration Network, Belgian Contact Point, April 2009, p. 40, available at: <http://www.dofi.fgov.be/nl/statistieken/belgian%20migration%20point/3.pdf>.

595 See Section 2.1.2.1 of Part One above for a more detailed discussion on *non-refoulement*.

or barred by the exclusion clauses of the Refugee Convention and the 1954 Convention.<sup>596</sup> However, the problem often faced by stateless persons is that even though they may benefit from the protection of the principle of *non-refoulement*, the alternative they are often afforded is one which also violates their rights – continued and often indefinite detention.

States must therefore fulfil their obligations of *non-refoulement*, in a manner which does not further victimise the “beneficiaries” of non-return, by placing them in indefinite detention. Particularly in the context of security detention which has created *de facto* statelessness, there is an added responsibility on states to release such persons from detention without removing them to their countries of habitual residence where they risk torture or persecution.

## 10. Protecting Those Who Do Not Have Consular Protection

A significant problem faced by stateless persons in an immigration context, which is heightened in an immigration detention context, is that there is no authoritative party which would exclusively represent their interests. International law has been built on diplomatic exchanges between sovereign nations, and the role of embassies and consulates which represent their citizens in foreign countries is essential to the fine balance of international law. Indeed, the 1963 Vienna Convention on Consular Relations provides that if so requested, the competent authorities of the receiving state shall without delay, inform the consular post of the sending state that its national has been deprived of his or her liberty.<sup>597</sup>

The traditional role of the national consulate in protecting the rights of its citizens in foreign nations is a reality that most people take for granted. The absence of any equivalent protection for one of the most vulnerable groups further victimises them. While the *de jure* stateless with no legal nationality, have no consular protection *per se*, the *de facto* stateless in this context would be those whose countries do not have diplomatic ties or a consulate for the country concerned, as well as those whose consulates are indifferent to their case. Either way, the vulnerability of stateless persons in detention is heightened by the fact that they do not benefit from any protection equivalent to consular protection in their time of need.

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596 See Article 1 (F) of the Refugee Convention, and Article 1 (2) (iii) of the 1954 Convention.

597 Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, Art. 36.

The position of a poor country which does not have the resources to provide consular protection to its citizens throughout the world is particularly compelling. It is a situation in which *de facto* statelessness can arise despite the best intentions of the state concerned. In the absence of consular protection for the stateless, the international community must act on their behalf. One option which should be explored is for the UNHCR or another international organisation to take on this role.

## **11. Adopting International Standards on the Detention of Stateless Persons**

The lack of international standards pertaining to the detention of stateless persons is a significant problem which must be addressed. Such standards would apply international human rights law to their situation, and would assist policy makers, legislators and the judiciary around the world, through providing guidance on this complex and neglected field.

Most importantly, these standards should include the *de facto* stateless within their definition of statelessness. They should detail when detention may exceptionally be permissible, when it is not, and set out the minimum standards to which detention conditions should adhere. Any detention which is permissible, should be a last resort after all alternatives have been exhausted and should adhere to the principles of proportionality, non-discrimination, necessity and non-arbitrariness as discussed in part two above. The guidelines should impose procedural requirements on countries which detain the stateless, including the obligation to determine statelessness and verify the likelihood of removal before such detention. Finally, it must be ensured that detention conditions are of an acceptable standard, that stateless persons are not detained in criminal detention facilities, that children are not detained and that families are not split up due to detention.

The UNHCR Guidelines on the Detention of Asylum Seekers is a useful document upon which a complimentary set of guidelines on the detention of stateless persons can be modelled. Given the position and mandate of the UNHCR, it is possibly in the best position to draft an authoritative, comprehensive and progressive set of guidelines in this regard. Input from the human rights treaty bodies, UN Working Group on Arbitrary Detention and NGOs which work on behalf of the stateless and detainees would further enhance the quality and protection scope of the document.

## 12. Promoting Alternatives to Detention in an Immigration Context

While many countries in the world are strengthening their immigration detention regimes, there are some which do not detain irregular immigrants. One such example is Brazil.<sup>598</sup> The UNHCR guidelines on the detention of asylum seekers spell out exceptional circumstances in which detention of asylum seekers may be permissible.<sup>599</sup> However, even in such circumstances, provision for detention must be clearly prescribed by national law, there should be a presumption against detention and viable alternatives must be applied first.<sup>600</sup> The Working Group on Arbitrary Detention has recommended that “*alternative and noncustodial measures, such as reporting requirements, should always be considered before resorting to detention*”.<sup>601</sup> Furthermore, ERT recommends that there must be a definite upper time-limit on such detention. It is felt that the maximum time-limit for detention should in no event be more than six months; a term which should be seen as the total cumulative period of detention pending deportation – including detention in different facilities and detention whilst legal proceedings are on going.

The practice in the UK, which allows for detention for a “reasonable time” based on the *Hardial Singh* principles,<sup>602</sup> must be discarded as this enables the immigration authorities to continue detaining persons until individually challenged in court. This results in uncertainty and inequality before the law, as detainees who do not have the resources, connections or wherewithal to challenge their detention, can remain in detention for far longer periods than would be normally allowed by the courts.

The mandatory detention of stateless persons is a particularly harmful and discriminatory practice which must also be abolished. In the case of foreign

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598 See International Detention Coalition, Meeting Notes, Human Rights Council 12<sup>th</sup> Session, Migrants in Detention Meeting, 17<sup>th</sup> September 2009, available from The Equal Rights Trust.

599 See Guideline 3 of the UNHCR Guidelines. These include situations in which it is necessary to verify identity, determine the elements on which the claim to asylum is based, cases in which asylum seekers have destroyed their documents or engaged in fraud to mislead the authorities, and in the interests of national security and public order. See also UNHCR EXCOM Conclusion No. 44 (XXXVII).

600 *Ibid.*

601 UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, 18 December 1998, E/CN.4/1999/63/Add.3.

602 See discussion in Section 4.1.3.2 of Part Two above.

national prisoners, ERT submits that removal proceedings should begin at least six months before their criminal sentence ends, with the presumption that if removal cannot be secured by the time the full sentence has been served, removal is highly unlikely if not impossible and further detention should not be authorised. In such a context, if any further detention serves a different purpose in the name of national security or public order, it should be authorised by the criminal law applicable to all persons within the country. The higher procedural standards and burden of proof as well as appeal procedures in criminal law would minimise the possibility of discrimination, and provide persons so detained, a greater opportunity to benefit from due process of the law.

### **13. The Non-Deportation of Persons Who Have Been Resident in a Country since Early Childhood**

There are three compelling arguments to be made against initiating deportation proceedings against persons who first arrived in a country as minors and have spent the majority of their lives there. Firstly, they would have little or no ties with their countries of birth, and may not even speak the language. Consequently, demanding that such persons return to their countries of birth in their adult lives to start afresh is an unreasonable stance to take. Furthermore, such a drastic measure could result in the splitting up of family and may therefore constitute a violation of the right to private and family life.<sup>603</sup> The European Court of Human Rights has developed a body of principle on when the expulsion of long-term residents amounts to such a violation. Accordingly, importance is attached to the degree of social integration of the persons concerned.<sup>604</sup> In the case of *Slivenko v Latvia*, the court held that the forced removal of a 40-year-old who had been resident in Latvia since she was one month old, and her daughter who was born in the country, was in violation of their right to a private life. (It did not constitute a violation of their right to family life because the family was not split up.)<sup>605</sup>

Secondly, in many instances the persons concerned fled their country as children with their families to escape discrimination and persecution of some sort. Consequently, whilst difficult to establish due to the passage of time,

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603 See for example, Article 8(1) of the ECHR, and Article 23 of the ICCPR.

604 See, for example, *Dalia v France*, Judgment of 19 February 1998, *Reports* 1998-I, pp. 88-89, §§ 42-45.

605 *Slivenko v Latvia*, ECHR Application No. 48321/99 (2003).

removing such persons back to those countries in their adult lives may be in violation of *non-refoulement* obligations.

Thirdly, there is a strong argument to be made that those who have lived in a particular country since childhood are products of that society. Consequently, any bad qualities they picked up along the way including criminal tendencies, reflect the society of their adopted country as much if not more than their country of habitual residence. Removing such persons to third countries is not justifiable in that context.

The cumulative effect of these three arguments is that when persons who have moved to a third country as children and have proceeded to live the majority of their lives in that country, it should be considered as their country of habitual residence. Accordingly it should have heightened obligations by the individual including a duty not to deport them to countries with which they have extremely tenuous ties at best.

#### **14. Immigration Laws with Harsh Penalties Should Be Reviewed**

Many nations criminalise illegal immigrations, and sanctions often take the form of fines and/or detention. For example, the Malaysian Immigration Act provides for the caning of illegal immigrants. Under UK law, illegal entry and stay can be penalised with a fine of £5,000 or imprisonment of no more than six months.<sup>606</sup>

The growing global trend of criminalising irregular immigration is a particularly disturbing one. While many vulnerable individuals and groups are victimised as a result, the impact of such laws on the stateless is disproportionately large. This is because many stateless persons are unable to obtain the travel documents necessary to travel legitimately. Consequently, ERT recommends that such immigration laws take into account the reality of statelessness and provide for exceptions in the context of stateless persons, so as not to discriminate. Additionally, particularly harsh penalties such as caning in Malaysia should be completely abolished.

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606 See Section 24(1) of the 1971 Immigration Act, United Kingdom.

## **15. Release into Enforced Destitution**

This report has argued that stateless persons should not be subject to unnecessary, arbitrary and thus illegal detention. Equally importantly, stateless persons who are released and cannot be removed should not be denied those social and economic rights to which they are entitled: basic welfare, the right to work, education, access to healthcare, etc. Persons interviewed for this report spoke of the terrible psychological impact of being released into a situation of limbo, where you are not allowed to work, access healthcare, open a bank account or do any of the things that the society at large takes for granted.

When released, stateless detainees should be treated equally and in a non-discriminatory manner, it is of paramount importance that they are given a legal status, and enabled to live fulfilling lives.

## **16. Continued and Unfounded Security Detention Must End**

Those who have been cleared for release should not remain in detention, and should be allowed to enter and live in a country in which they are not at risk. The U.S. case of Guantanamo Bay is an example of how a security detention regime can aggravate, or even lead to, statelessness.

ERT believes that the USA is not doing enough in this regard. The commitments of small states such as Palau to take in cleared for release stateless Guantanamo Bay inmates must be applauded, but this should not camouflage the fact that it is the USA which is principally responsible for the protection of such persons. Consequently, ERT urges the U.S. Government to consider in the very least, temporary admission onto U.S. soil until safe third countries for their permanent resettlement are found.

## **17. Compensation for Stateless Detainees**

Compensation should be provided to stateless persons who have remained in detention for unnecessarily lengthy times as a result of a failure by the authorities to identify their lack of an effective nationality. Both the ICCPR and the ECHR provide that compensation must be paid to those who have been subject to unlawful detention. According to Article 9 (5) of the ICCPR, *"[a]nyone who has been the victim of unlawful arrest or detention shall have an*



*enforceable right to compensation*".<sup>607</sup> Similarly, the ECHR states that "[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this Article [Article 5 of the ECHR] shall have an enforceable right to compensation".<sup>608</sup>

The non-existence of a reasonable prospect of removal must be identified early on in any form of detention, be it criminal, security or immigration. Stateless detainees who suffer lengthy and even indefinite detention because of a failure of the authorities to do so must be compensated adequately.

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607 See Article 9 (5) of the ICCPR.

608 See Article 5 (5) of the ECHR.

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## ANNEX A

### ERT October 2008 Roundtable Discussion on Statelessness

London School of Economics<sup>609</sup>

#### List of Participants:

Adrian Arena (Oak Foundation, London)

Shahida Begum (UNHCR, London)

Dr Chaloka Beyani (London School of Economics and Political Science)

Jarlath Clifford (The Equal Rights Trust)

Amal De Chickera (The Equal Rights Trust)

Jean-Francois Durieux (Refugee Studies Centre, University of Oxford)

Ivan Fišer (The Equal Rights Trust)

Professor Guy Goodwin-Gill (University of Oxford)

Stefanie Grant (The Equal Rights Trust)

Alison Kesby (University of Cambridge)

Mark Manly (Statelessness Unit, UNHCR, Geneva)

Professor Aileen McColgan (Kings College London)

Cynthia Morel (Minority Rights Group International, London)

Nick Oakeshott (Asylum Aid, London)

Colm O’Cinneide (University College London)

Jacqueline Parlevliet (UNHCR, London)

Katherine Perks (The Equal Rights Trust)

Dr Dimitrina Petrova (The Equal Rights Trust)

Jerome Phelps (London Detainee Support Group)

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609 Institutions are mentioned for identification purposes only.

## ANNEX B ROHINGYA MIGRATION MAP\*



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# THE EQUAL RIGHTS TRUST

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The Equal Rights Trust is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

Stateless persons are those who have no nationality, or whose nationality is ineffective. This report approaches the subject through the prism of detention - a crucial issue which offers unique insight into the broader challenge of statelessness. The stateless person who cannot legally travel, reside in a country, work, study or receive health care, and whose life is a tightrope walk along the dividing line between legality and illegality is very vulnerable to detention. How a state treats stateless detainees is a reflection of how committed it is to protect those whose rights are most at risk.

In 1949, stateless persons – marginalised from society – were described as an “anomaly”. This was because legal systems were ill-equipped to deal with them. Sixty years, two international statelessness conventions, an international organisation mandated to address their situation and many human rights treaties later, the stateless remain an anomaly and continue to be marginalised.

In this report, The Equal Rights Trust attempts to unravel the anomaly. The report finds that inequality and discrimination lie at the heart of the statelessness problem, as does the eternal tug-of-war between universal human rights and national sovereignty. It also finds that many persons who are held in long term immigration detention “awaiting removal” are in reality stateless, and therefore cannot be removed. The report argues that statelessness should primarily be seen as a human rights issue, that the UNHCR and human rights treaty bodies should work in partnership to address the challenge, that all countries should implement statelessness determination procedures and that authoritative guidelines should be developed for the detention of stateless persons.

