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## The Equal Rights Trust

### Project “Stateless Persons in Detention”

#### Legal Working Paper: The Protection of Stateless Persons in Detention under International Law

January 2009

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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Company number 5559173. It is also a registered charity, number 1113288.

This is one of two working papers produced by The Equal Rights Trust in the preliminary phase of the project, "Stateless Persons in Detention". This two-year project seeks to strengthen the protection of stateless persons who are in any kind of detention or restriction of liberty due at least in part to their being stateless, and to promote their right to be free from arbitrary detention without discrimination. It pursues two interrelated objectives: to document the detention, or other forms of physical restriction, of stateless persons (*de jure* and *de facto*) around the world; and to use this information to develop detailed legal analysis as a basis for international and national advocacy against the arbitrary detention of stateless people.

Paper 1. (Legal Working Paper: The Protection of Stateless Persons in Detention under International Law), explores the protection of stateless persons under international law and the legal definitions to be adopted in the course of the project.

Paper 2. (Research Working Paper: The Protection of Stateless Persons in Detention) summarises initial research and documentation conducted by The Equal Rights Trust to highlight some trends for further research and documentation.

This paper is available at: [www.equalrightstrust.org](http://www.equalrightstrust.org)

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## Executive Summary

This legal mapping paper has been produced as part of an Equal Rights Trust (ERT) project to document the detention or restriction of stateless persons. It explores and critiques the legal protection available to stateless persons whose liberty has been unduly constrained. In doing so, it endeavours to capture some of the complexities and challenges connected with promoting, protecting and fulfilling the human rights needs of the 15 million or more stateless persons around the world, with special emphasis on those in immigration related detention or restriction of liberty. The stateless are a category of extremely vulnerable persons, who depend more on international human rights mechanisms for their protection than any other group.

Part one of this paper explores the general international human rights framework pertaining to statelessness. Part two focuses more specifically on the restriction of liberty of stateless persons and the protection afforded to stateless persons in detention, and part elaborates on the legal issues which emerge from the analysis.

### ***Statelessness Defined***

There are two categories of stateless person; namely, the *de jure* and *de facto* stateless. The internationally accepted definition of a *de jure* stateless person, is one “who is not considered as a national by any state under the operation of its law”. A primary flaw in this definition is that it requires the establishment of a negative. This stands as an obstacle which impedes the protection of the rights of the stateless, as only those who satisfy the burden of proving that they fall within the scope of this definition are entitled to benefit from the protection of the 1954 Statelessness Convention.

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”. This definition too is problematic, as there is uncertainty over what is meant by an ‘effective nationality’.

### ***The Human Rights of the Stateless***

There are various international human rights instruments which converge over the issue of statelessness. Of these, the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness directly deal with the issue of statelessness. The 1951 Refugee Convention is closely linked to the 1954 Statelessness Convention; international human rights treaties are also relevant to the rights of the stateless (as they are applicable to all persons regardless of their nationality or lack of it).

### ***The Detention and Restriction of Liberty of the Stateless***

There are various forms of detention and restriction of liberty which impact on the human rights of stateless persons. This paper closely addresses the issue of administrative immigration detention, which is most likely to impact on stateless persons outside their country of habitual residence. Other forms of detention include criminal detention and detention for the purposes of national security.

### ***Conclusions and Issues for Further Research and Analysis***

The Negative Definition of *De Jure* Statelessness – is problematic, and its impact on the rights of the stateless must be further researched. The nexus between this negative definition and the detention or restriction of liberty of the stateless is clear. The unreasonable burden of proof to establish a negative, results in long and sometimes indefinite processes of establishing the veracity of claims of statelessness, which in turn often results in persons being detained or restricted in their movement for unduly long periods of time. A more streamlined and efficient process which would minimise the need for such detention would be more possible if the definition of statelessness did not require a negative to be proved.

Perhaps one response would be to accept that this definition is unlikely to change and to strategise on how best to work with the definition through introducing and popularising streamlined and time-bound procedures to establish claims of statelessness.

The Definition of *De Facto* Statelessness – is also problematic. In terms of the current UNHCR definition, the interpretation of 'effective nationality' would directly influence the definition of *de facto* statelessness.

Perhaps attempting to find an all encompassing definition to *de facto* statelessness is the wrong way to go about things. A more pragmatic approach may be to identify different scenarios which amount to *de facto* statelessness, adding to the list with the benefit of time and experience. Such a pragmatic and dynamic approach would prevent the boxing out of persons through premature definitions which do not reflect the complexities and nuances of reality.

The International Statelessness Regime – must be strengthened. The Statelessness Conventions should offer equal protection to both *de facto* and *de jure* stateless persons. Whilst the Conventions offer protection only to *de jure* stateless persons at present, the final acts of the

Conventions recommend that state parties afford such protection to *de facto* stateless persons as well. This recommendation must be promoted.

Furthermore, stateless persons who illegally enter into a third country should also benefit from the protection of the Conventions. Article 31 of the Refugee Convention, which offers protection to asylum seekers who illegally enter into the territory of a third country, should ideally be replicated.

The Mandate of the UNHCR Pertaining to the Stateless – must be strengthened. It is not treaty based, but instead can be traced back to a UN General Assembly Resolution. Given that the UNHCR's primary mandate is the protection of refugees, and that it has an added responsibility towards IDPs, it is not surprising that the UNHCR has not been able to afford the issue of statelessness the dedication and resources demanded.

All that has been done by the UNHCR to represent the cause of the stateless must be appreciated. However, statelessness has to be given prominence as a separate and extremely challenging crisis faced by the global community, instead of being marginally accommodated in the refugee discourse.

Bringing Statelessness onto the Immigration Agenda - The immigration procedures of most countries do not treat the stateless as different in any way. In the absence of specific procedures, the stateless are often automatically diverted into general asylum procedures, where their claims are more likely to fail. Furthermore, the failure to specifically cater to the needs of stateless persons can result in their long-term detention, due to the likelihood of their claims being lost in processes which are not geared towards determining the lack of nationality. It is essential that the stateless are acknowledged and identified as a distinct category with special immigration and protection needs. More research needs to be done in this area, as statistics and information are difficult to come by – an indication in itself that immigration procedures do not consider the stateless to be a distinct group.

Consular Protection - The traditional safe-haven role of the consulate in protecting the rights of the citizens it represents in foreign nations is a reality that most people take for granted. The absence of such protection for stateless persons is an immense problem which must be rectified. The international community should act on behalf of the stateless and the UNHCR is possibly best placed to effectively do so.

Equality and Non-Discrimination - The fundamental principle of equality must positively influence the rights of stateless persons. Most of the rights entrenched in the ICCPR and other human rights instruments are guaranteed to all persons regardless of nationality (or the lack of it). National bills of rights are not always as generous in the rights they guarantee non-nationals. The country specific research to follow should compare the international human rights available to all persons with corresponding human rights articulated in national bills of rights, to gauge whether the jurisdictions which are being studied afford satisfactory human rights protections to non-nationals. The impact that this may have on the rights of the stateless, particularly in detention must be further explored.

Furthermore, the *Belmarsh* decision that maintaining two separate standards of detention for nationals and non-nationals is a violation of the principle of equality is a useful reference point in this regard. Whether this principle has been practically applied must be explored.

Transposing International Norms into National Application - there are various international and regional standards and guidelines pertaining to the detention and restriction of liberty of stateless persons. Often the problem arises in transposing such standards into the national laws and policies of states. The judiciary, policy makers and legislators of states as well as the UNHCR and other international organisations/institutions have specific responsibilities in ensuring the effective transposition of such standards.

The *Non-Refoulement* and Non-Deportability Dilemma's - The inability to deport stateless persons, either because no third country would accept them, or due to the principle of *non-refoulement*, is one of the primary reasons for their detention or the curtailment of their liberty. This is despite the existence of guidelines which explicitly state that statelessness should not lead to indefinite detention. There are also standards and guidelines which offer protection to stateless persons in detention. Unfortunately, most of these texts focus on human rights standards applicable to asylum seekers. The UNHCR, the Council of Europe and the European Union are some of the institutions which have drafted such standards and guidelines. Whilst in general these do enhance the protection available to stateless persons in detention, there is a danger that they may standardise unduly long terms of detention, which will then be seen as being the norm, and therefore viewed as being compatible with human rights standards.

Stateless Persons within their Country of Habitual Residence - Whilst this paper primarily focuses on the administrative immigration detention of stateless persons outside their countries



of habitual residence the fate of stateless persons in detention in their countries of habitual residence is a much more opaque issue which must be addressed.

Security Based Detention - Further research needs to be carried out on the issue of detention for the purpose of national security as well. The many human rights concerns articulated over the Guantanamo Bay detention facility may also be relevant to other similar facilities elsewhere in the world.

## **Introduction**

1. Statelessness is a phenomenon which affects an estimated 15 million persons across the globe.<sup>1</sup> This is perhaps a conservative figure, considering the difficulty in accurately assessing numbers, particularly as large quantities of stateless persons never attempt to cross international borders. Despite the complexity of the subject matter, its devastating impact on human rights and its widespread nature, there has been relatively little focus on the issue, particularly when compared with the vast discourse surrounding refugees and their rights. The global human rights agenda has afforded “step-motherly” treatment to the stateless; who by definition are a most vulnerable group, most in need of the protection of international human rights mechanisms.
2. The focus of this paper is narrower than statelessness as a global phenomenon. It explores and critiques the legal protection available to stateless persons whose liberty has been unduly constrained, with a particular emphasis on indefinite detention as a form of cruel, inhuman and degrading treatment. However, it is necessary initially to explore statelessness as a whole - its definition, legal construction and the protective mechanisms available to stateless persons in general.
3. In terms of scope, the key emphasis will be on the international legal protection available to stateless persons. Whilst this is a useful starting point for legal research, it is insufficient on its own, as it is national legal systems which ultimately impact on the rights of the stateless. Consequently, two parallel approaches are necessary:
  - a. The strength, comprehensiveness and effectiveness of international law mechanisms and standards for the protection of stateless persons in detention must be studied.
  - b. The transfer and application of such standards into national legal systems, so as to ensure effective protection for stateless persons must be analysed.
4. This paper is a preliminary exercise to a broader comparative study on the protection available to stateless persons whose liberty has been constrained through detention or other means. Therefore, in many ways, the purpose of this paper is limited to providing a broad overview of the rights of the stateless and identifying problematic areas and key

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<sup>1</sup> This is a recent estimate by the UNHCR. See “Statelessness: who is stateless?” available at: <http://www.unhcr.org/protect/3b8265c7a.html>, accessed on 6 January 2009.

issues for further exploration, critique and analysis through the larger research project. Whilst this paper will lay greater emphasis on the international dimension of the issue, it is envisaged that the key issues which emerge will be addressed at a more country specific level in the research to follow.

## **Structure**

5. This paper has three parts. Part one will explore the general international human rights framework pertaining to statelessness. Based on the premise of universality and interconnectedness of human rights norms, the statelessness regime and its interplay with refugee law and human rights law will be analysed. Particular emphasis will be given to key definitions, the notion of equality and the issue of national sovereignty.
6. Part two will focus more specifically on the restriction of liberty of stateless persons and the protection afforded to stateless persons in detention under the mechanisms analysed in part one. International standards and guidelines on the detention and restriction of liberty of stateless persons, particularly in relation to immigration will be explored. Judicial and policy approaches to key issues will be scrutinised, with reference to the jurisprudence of various national courts as well as regional courts such as the European Court of Human Rights and the Inter American Court of Human Rights.
7. In part three, the legal issues which emerge from the analysis will be elaborated on. The emphasis will be on the transfer of international norms into national systems – identifying key areas for further research through the wider study.

# Part One

8. Part one of this paper examines the norms and mechanisms which offer protection to the stateless and also at those which obligate the world order to work towards eradicating statelessness. Before doing so however, it is necessary to better understand why statelessness is such a problem, and to provide a 'typology' of statelessness, for the benefit of the reader.

## The Problem of Statelessness

9. The nation state has historically been the central actor in international law, the traditional role of which has been the regulation of relations between equal and sovereign states. Membership of a nation – through nationality – has therefore been a crucial prerequisite for the enjoyment of certain entitlements and rights including the rights to enter, live in, move around and work in ones country. Attitudes towards immigration and citizenship are defined by national laws and policies - an exercise of state sovereignty, which international mechanisms have had little to do with. Consequently, whilst the absence of nationality has become the basis of physical exclusion as well as rights exclusion often in breach of international human rights law, it is national laws and policies which have caused countless persons to be stateless.
10. Grant, writing about migrants, states 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>2</sup>
11. Stateless persons face all these vulnerabilities and more, for they face them on a permanent basis, wherever they may be, and they do not have the protection of a

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<sup>2</sup> 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 6 January 2009.

consulate to rely on. The landmark UN study of statelessness emotively articulated the problem of statelessness as follows:

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>3</sup>

12. Since the study was written in 1949, the development of international human rights law has somewhat reduced the centrality of the nation-state in international law, through the recognition of individuals as important stake-holders with rights and obligations of their own. International human rights law regulates the relations between states and individuals, creating a window for individuals to demand that their rights be promoted, protected and fulfilled by states, and providing a mechanism for the actions and inactions of states to be challenged in this regard. International human rights are universal, protecting all persons, regardless of nationality or the lack of it.
13. In the light of the above, it is important to ask the following two questions:
  - a. Does the notion of nationality still play an important role in the scheme of human rights?
  - b. How significantly should the lack of nationality detract from the enjoyment of rights?

These two questions seem to be two sides of the same coin, but it is argued that the answers to them should ideally be contradictory.

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<sup>3</sup> The United Nations. "A Study of Statelessness", UN Doc E/1112;E1112/Add.1, 1949, pp.8-9.

14. The answer to the first question must be that as nationality plays 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. The concept of nationality serves to ensure that states fulfil their obligation to protect and serve their citizens. Even though international human rights law has transformed the individual into a subject of international law, the enjoyment of human rights is primarily a national issue – the purview of national constitutions, courts and legislators. Attachment to a nation entitles one to enjoy such rights in a more tangible and immediate manner than international human rights mechanisms can ever provide.
15. Consequently, the obvious answer to the second question would be 'extremely'. The more integral nationality is to human rights, the more fundamentally the lack of nationality would impact on them. However, this should not be the case. Whilst nationality is integral to the extent that it is arguably a right in itself, the loss of nationality should be seen as a significant violation of human rights, the victims of which should not be further victimised in any way. The universality and interconnectedness of human rights should create a strong safety-net to protect victims of statelessness from further undue suffering. Loss of nationality should be the impetus for international human rights mechanisms to kick in and offer greater protection instead of being the catalyst for further deprivation of other human rights.
16. This is the challenge that statelessness imposes on the international human rights regime; the challenge of affirming the importance of nationality and promoting the right of everyone to a nationality, whilst ensuring that the lack of a nationality does not result in vulnerability, exploitation and the violation of human rights.

### **The Right to a Nationality**

17. Nationality has been defined by the International Court of Justice 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>4</sup>
18. The Inter-American Court of Human Rights has also defined nationality as,

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<sup>4</sup> See the International Court of Justice decision in the *Nottebohm (Lichtenstein v. Guatemala) Case*, 6 April 1955, available at: <http://www.icj-cij.org/docket/files/18/2674.pdf>, accessed on 6 January 2009.

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>5</sup>

19. These two definitions emphasise the integral role played by an effective nationality in offering security, protection and grounding to a person's life. This is why the right to a nationality has been repeatedly described as the right to have rights.<sup>6</sup>
20. Article 15 of the Universal Declaration of Human Rights (UDHR) gives substance to this right, stating 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>7</sup> Whilst it may be argued that the UDHR is now widely regarded as reflecting customary international law, it was never meant to be a binding document. The body of binding international treaties which followed the UDHR do not assert the right to a nationality in the same broad and general fashion as the UDHR does. The right of every child to acquire a nationality is asserted by both the International Covenant on Civil and Political Rights (ICCPR) as well as the Convention on the Rights of the Child (CRC).<sup>8</sup> Similarly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) asserts that women must have equal rights as men pertaining to acquiring, retaining and changing their nationality as well as the nationality of their children.<sup>9</sup>
21. Perhaps most far-reaching in scope is Article 5 (d) (iii) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which obligates state parties to the Convention to prohibit and eliminate racial discrimination in all its forms, and to guarantee the right of everyone to a nationality.<sup>10</sup>

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<sup>5</sup> *Castillo-Petruzzi et al v. Peru* Judgment of May 1999, IACHR [ser. C] No. 52, 1999.

<sup>6</sup> See for example, *Trop v Dulles*, 356 US 86, 101-102 (1958), Warren CJ; 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 6 January 2009.

<sup>7</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Article 15 (1) & (2).

<sup>8</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 24(3); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA/RES/44/25 (CRC), Article 7.

<sup>9</sup> 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), Article 9 (1) & (2).

<sup>10</sup> International 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), Article 5 (d) (iii).

22. Of the regional treaties, The American Convention on Human Rights (ACHR) strongly asserts the right to a nationality in practical terms, obligating state parties to provide citizenship to all persons born in their territory, who would otherwise be stateless.<sup>11</sup> Perhaps surprisingly, the European Convention on Human Rights and Fundamental Freedoms (ECHR) does not contain a similar clause. However, the 1997 European Convention on Nationality does set forth that everyone has a right to a nationality, that statelessness shall be avoided and that no one shall be arbitrarily deprived of their nationality.<sup>12</sup>

### **Nationality, Sovereignty and Equality**

23. Whilst it is easy to gather from the above that there is an inherent right to a nationality, the answer to the question of which nationality is not so forthcoming. "International law has traditionally afforded states broad discretion to define the contours of and delimit access to nationality".<sup>13</sup> Nationality or citizenship law and policy has therefore, always been an expression of state sovereignty. However, this sovereignty has been somewhat eroded by international human rights law, which imposes standards and principles, which nation-states must comply with.
24. Article 13 of the ICCPR 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 Human Rights Committee 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>14</sup>

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<sup>11</sup> American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series, No 36 (ACHR), Article 20.

<sup>12</sup> European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) CETS No.: 166, article 4. However, like the other Statelessness Conventions, the European Convention too suffers from poor ratification. As of 2006, only 15 countries had ratified the treaty.

<sup>13</sup> Open Society Justice Initiative. "Human Rights and Legal Identity: Approaches to Combating Statelessness and Arbitrary Deprivation of Nationality", *Thematic Conference Paper*, 2006, p.4.

<sup>14</sup> Committee on Civil and Political Rights. "General Comment No. 15: The position of aliens under the Covenant", 11/04/86, para. 5.



25. Furthermore, as the Inter-American Court of Human Rights has articulated:
- 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>15</sup>
26. Accordingly, the central principle of non-discrimination and equality is a particularly strong factor which limits state sovereignty in this regard. As the Committee on the Elimination of Racial Discrimination has stated, even though it 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 undermining the basic prohibition of discrimination".<sup>16</sup>
27. The House of Lords decision in the *Belmarsh* case further underscores this principle by holding that as international law does not discriminate between nationals and non-nationals in terms of their liberty, the state (the UK in this case) cannot do so either. 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. Justification for 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.
28. The *Belmarsh* decision reflects an equality based restriction of national sovereignty. In other words, the sovereignty of nations to do as they wish within their territory has been curtailed by international human rights law which imposes minimum standards upon nation-states. Politically, the role of international human rights law in curtailing sovereignty is not always viewed favourably. There can be national reactions to such curtailment, which may in turn form obstacles to the full enjoyment of rights by vulnerable groups such as the stateless. The notion of national sovereignty must be

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<sup>15</sup> *Dilcia Yean and Violeta Bosico v. Dominican Republic*, IACHR Case No. 12, 189 (Sep 8, 2005).

<sup>16</sup> Office of the High Commissioner for Human Rights. "CERD General Recommendation No. 30: Discrimination Against Non Citizen", 01/10/2004.

approached in a manner which reaffirms the rights of the stateless, as opposed to undermining them. One such way would be to reject the notion that international human rights law restricts sovereignty, asserting instead that the ratification of human rights treaties by States is an affirmation of national sovereignty and a commitment to utilise such sovereignty to promote and protect the basic rights of all persons.

29. 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 - can therefore be understood to be an accepted norm of international law, even if there is less agreement on its practical application. States are legally obligated to minimise statelessness and promote, 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... (and) 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>17</sup>

### **A Typology of Statelessness**

30. Despite the impact of international human rights law in controlling state sovereignty, the stateless continue to be an immensely vulnerable group. Broadly speaking, there are two distinct categories of statelessness. Namely; *de jure* and *de facto* statelessness.

#### **De Jure Statelessness**

31. A *de jure* stateless person is a person who has no legal nationality status. The 1954 Convention Relating to the Status of Stateless Persons (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>18</sup> This is a narrow, strictly legal definition which does not accommodate persons who have become stateless in effect, as a result of not enjoying the core minimum state protection linked with nationality. Therefore, it has been argued that this purely technical definition ignores the power of states to politically manipulate citizenship in both law and practice.<sup>19</sup>

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<sup>17</sup> Gyulai, Gabor. “Forgotten Without Reason: Protection of non-refugee stateless persons in Central Europe”. Hungarian Helsinki Committee, 2007, p.12.

<sup>18</sup> 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).

<sup>19</sup> See above, Open Society Justice Initiative, n.13, p.2.

32. The other problem with the definition of *de jure* statelessness, is that it requires the establishment of a negative; i.e. that there is no state in the world which considers the person concerned to be its citizen. The difficulty in proving this negative, especially in the potentially hostile environment of an immigration proceeding, cannot be underestimated. The significance of this problem lies in the fact that only those who satisfy the burden of proving that they fall within the scope of this definition are entitled to benefit from the protection of the 1954 Convention. As de Groot argues,
- Statelessness avoiding or reducing provisions in international instruments or in domestic nationality laws will only be activated, if the preliminary question that a certain person otherwise would be (or stay) stateless is answered in the affirmative.<sup>20</sup>
33. The primary concern with this definition therefore, is that it stands as an obstacle to the enjoyment of human rights, making it easier to exclude stateless persons from human rights protection as a result. The speedy determination of nationality (or lack of it) is an essential prerequisite to stronger protections for the stateless. This negative definition which hinders determination processes further victimises this already vulnerable people.
34. The difficulty in establishing the genuineness of a claim of statelessness according to the current definition is so great that states more often than not err on the side of caution, labelling claimants as having ‘undetermined’ nationality which is ‘under investigation’ for indefinite periods of time, a reality identified as early as 1949.<sup>21</sup>
35. Sadly, the negative definition of the 1954 Convention has not alleviated this situation. As will be elaborated later, the longer it takes to determine nationality, the greater the chance that those concerned will be detained or restricted of their liberty through other means. Therefore, this definition potentially has the added impact of creating an environment which is more conducive to the restriction of liberty.

### ***De Facto* Statelessness**

36. The limited scope of the 1954 Convention definition 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. In fact, the 1954 Convention was initially intended as a Protocol to the 1951 Convention Relating to the Status of Refugees (Refugee Convention). This was

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<sup>20</sup> See above, de Groot, Gerard-Rene, n.6, p.8.

<sup>21</sup> See above, The United Nations, n.3, p.9.

because, it was felt that the Refugee Convention offered protection to the *de facto* stateless, and another instrument was necessary for the protection of the *de jure* stateless. However, the reality is more complex. It may be argued that whilst all refugees are either *de facto* or *de jure* stateless persons, this narrow construction of *de jure* and *de facto* statelessness has left many persons without the special protection they deserve.

37. The early United Nations definition is a reflection of this narrow understanding of *de facto* statelessness. Accordingly, *de facto* stateless persons are those who,

having 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>22</sup>

38. This definition excluded stateless persons who never crossed international borders as well as those who did not meet the criteria necessary to be given refugee status, from the protection of either convention.<sup>23</sup> Indeed, according to the UNHCR, most stateless persons who require their assistance do not qualify to be refugees.<sup>24</sup> Consequently, the combined reach of the Refugee and Statelessness Conventions has not spread as wide as necessary to offer protection to all stateless persons. The *de facto* stateless who do not qualify for refugee status and the many stateless persons who have never cross an international border with the intention of claiming refugee status, collectively form a large population of persons who do not benefit from the protection of either the Refugee or Statelessness Conventions.

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<sup>22</sup> *Ibid.* See also Weis, P. "Nationality and Statelessness in International Law", 2<sup>nd</sup> ed, 1979, p.164.

<sup>23</sup> According to the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), Article 1. A. (2), 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". Furthermore, a person who has a well founded fear of suffering "serious harm" in his country, i.e. execution, torture or inhuman or degrading treatment or punishment or serious and individual threat to civilian life as a result of indiscriminate violence in situations of armed conflict is also deemed to be a refugee in accordance with Article 15 of 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.

<sup>24</sup> UNHCR-Inter-Parliamentary Union. "Nationality and Statelessness: A Handbook for Parliamentarians", Geneva, 2005, p.12.

39. Due to these reasons, a more inclusive and far-reaching definition of *de facto* statelessness was needed. The United Nations High Commissioner for Refugees (UNHCR) has since provided one, stating in 1961 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>25</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>26</sup>
40. Even this definition is not ideal however, and throws even more questions to be answered; what is meant by ‘effective nationality’ being the most fundamental.<sup>27</sup> At its broadest, ‘effective nationality’ may be interpreted to mean the fulfilment of a core minimum of obligations and protections by a state to its citizens. Such an understanding when transposed onto the definition of *de facto* statelessness may lead to an understanding of *de facto* statelessness as a potentially temporary and recurring state of affairs. Conceptually this is not problematic and is in fact more representative of reality. An analogy may be drawn with internal displacement, which is often both temporary and recurring. From a rights perspective though, things become more complex and difficult to monitor in such a scenario. Given that the stateless are a particularly vulnerable group with acute human rights problems, identifying them should be as easy a process as possible, as it is the first step towards ensuring better protection. Such identification becomes difficult the moment statelessness is conceptualised in fluid terms.

### **Different Contexts of Statelessness**

41. The complexity of statelessness lies in the fact that there are many types of stateless persons, suffering different degrees of vulnerability and often (but not always) overlapping with other vulnerable groups such as refugees and internally displaced persons (IDPs).
42. The following tables are intended to bring some clarity into this rather confusing prospect:

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<sup>25</sup> UN Doc A/CONF.9/11 (30 Jun. 1961), 4. As cited in Batchelor, Carol. “Stateless Persons: Some Gaps in International Protection”, 1995, 7 *International Journal of Refugee Law* 232, p.251.

<sup>26</sup> See above, UNHCR-Inter-Parliamentary Union, n.24, p.11.

<sup>27</sup> See above, *Nottebohm (Lichtenstein v. Guatemala)*, n.4.

<b>De jure Stateless Persons</b>						
Those outside their country of habitual residence				Those within their country of habitual residence		
Those who qualify as refugees and benefit from the protection of the Refugee Convention	Those who do not qualify as refugees but benefit from the protection of the 1954 Convention	Those who do not qualify as refugees and do not benefit from the protection of the 1954 Convention, but benefit from a complementary form of protection related to the impossibility of their expulsion	Those who do not qualify as refugees and do not benefit from the protection of the 1954 Convention (for example if they illegally crossed a border)	Those who have been internally displaced	Those who have not been internally displaced but suffer overt discrimination and exclusion.	Those 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.
			<i>The most vulnerable groups which are most likely to have their liberty unduly constrained and to suffer indefinite detention and other human rights violations</i>			

<b>De facto Stateless Persons</b>				
Those outside their country of habitual residence			Those within their country of habitual residence	
Those who qualify as refugees and benefit from the protection of the Refugee Convention	Those who do not qualify as refugees and by virtue of being <i>de facto</i> stateless do not benefit from the protection of the 1954 Convention either.	Those who do not qualify as refugees and by virtue of being <i>de facto</i> stateless do not benefit from the protection of the 1954 Convention, but benefit from a complementary form of protection related to the impossibility of their	Those who have been internally displaced	Those who have not been internally displaced but suffer overt discrimination and exclusion.

		expulsion		
	<i>The most vulnerable groups which are most likely to have their liberty unduly constrained and to suffer indefinite detention and other human rights violations</i>			

43. The role of international law in protecting the *de facto* and *de jure* stateless who have never crossed a border is particularly significant. The reach of international human rights law into such situations which would be viewed as being primarily for national legal systems to address, stands as a test of the efficacy of the international statelessness and human rights regimes.

#### **Reasons behind Statelessness**

44. There are many ways in which one may be rendered stateless; following is a brief description of a few.<sup>28</sup>

45. ***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 another state, may be rendered stateless as 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. Whilst this can be prevented if state laws prohibit the renunciation of nationality without having acquired an alternate nationality; it is possible in situations where the nationality laws of the state to which a person is applying to, requires the renunciation of nationality before acquiring the new one.

46. ***Policy and Law which Affects Children***

Children are often born or grow into situations where the law or policy of the land renders them stateless. The conflict of laws example above is just one such instance. Some nations do not permit women to pass on nationality to their children. This may result in children of stateless men being rendered stateless since cannot inherit the nationality of their mother. Orphaned, adopted and extra-marital children are particularly vulnerable to restrictive policies and laws, which may on occasion render them stateless.

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<sup>28</sup> For a more detailed analysis see above, UNHCR-Inter-Parliamentary Union, n.24. See also, Batchelor, Carol. "UNHCR and Issues Related to Nationality", *Refugee Survey Quarterly*, 1995; 14 (3), pp.91-112.

47. ***Policy and law which Affects Women***

Some nations 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.

48. ***Administrative Practices***

Bureaucracy and red-tape can often 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 (which may be in the possession of the offices of the former state of nationality) are all factors which have resulted in people being unable to acquire a nationality.

49. ***State Succession and Statelessness***

Changes in territory and/or sovereignty in 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.

50. ***Discrimination and Statelessness***

Whilst the CERD provides that persons shall not be deprived the right to nationality on discriminatory grounds,<sup>29</sup> there continue to be instances of racial, ethnic and religious discrimination resulting in groups of persons being denied citizenship and being rendered stateless.

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<sup>29</sup> CERD Article 5(3).



## **The Human Rights of the Stateless**

51. There are various international human rights instruments which converge over the issue of statelessness; collectively – if implicitly - articulating the core minimum standard of protection which must be afforded to stateless persons. 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>30</sup>

52. Whilst these norms should play a significant role in minimising (and ideally eradicating) statelessness, the general norms of human rights play a further role in offering protection to the many stateless persons who are yet to benefit from being afforded a nationality in keeping with the norms identified above. Following, is a brief analysis of the key instruments.

## **The International Statelessness Regime**

53. The two most important international treaties which directly address the issue of statelessness are the 1954 Convention and the 1961 Convention on the Reduction of Statelessness (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 (which has not yet come into force) directly address the issue. However, poor ratification levels (indicating lack of political will) as well as the limited scope of protection offered to stateless persons has severely undermined the effectiveness of these instruments.

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

54. The 1954 Convention is the primary instrument which regulates the legal status and treatment of *de jure* stateless persons.<sup>31</sup> According to Carol Batchelor,

The 1954 Convention relating to the Status of Stateless Persons 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

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<sup>30</sup> See above, Open Society Justice Initiative, n.13, p.3.

<sup>31</sup> Lynch, M. "Lives on Hold: The Human Cost of Statelessness, Washington", Refugees International, 2005, p.4.

legal identity, and providing, in appropriate cases, for residence which will serve as a basis for access to basic social and economic rights.<sup>32</sup>

55. Therefore, the Convention fulfils two primary purposes. Firstly, it focuses accepted international human rights norms onto the issue of statelessness. It does not create any new rights, but merely imposes a legal obligation on state parties to provide stateless persons in their territories with certain basic accepted human rights. Secondly, the Convention promotes the naturalisation of stateless persons by the countries they are in.
56. However, the scope of the Convention is unfortunately very limited. In addition to the fact that the Convention only offers protection to *de jure* stateless persons and that the definition of statelessness is negative and problematic, many of the protections offered by the Convention only apply to stateless persons who have lawfully entered into the territory of the country they are in.<sup>33</sup>
57. Furthermore, the Convention also suffers from poor ratification – a problem faced by all the statelessness related treaties, highlighting the lack of political will to effectively address the issue. As of February 2008, only 63 nations had ratified the Convention, a number greatly boosted by the recent accession drive carried out by the UNHCR.<sup>34</sup>
58. Perhaps what is most disappointing about the Convention is that it is silent on the procedure to be followed in determining whether a person is stateless or not. Particularly since the Convention does little more than guarantee rights to which arguably stateless persons - by virtue of being human - are anyway entitled to; it is disappointing that the Convention did not create procedures which would provide the stateless with a better chance of actually enjoying these rights. As will be elaborated later, it is the lack of an efficient procedure to determine statelessness which often results in the indefinite detention of stateless persons.

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<sup>32</sup> 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), available at: [http://goliath.ecnext.com/coms2/gi\\_0199-4781327/The-1954-Convention-relating-to.html](http://goliath.ecnext.com/coms2/gi_0199-4781327/The-1954-Convention-relating-to.html) accessed on 6 January 2009.

<sup>33</sup> See Articles 15 (Right of Association), 17 (Employment), 21 (Housing), 23 (Public Relief), 24 (Social Security), 26 (Freedom of Movement), 28 (Travel Documents), 30(1) (Non-Expulsion) of the 1954 Convention.

<sup>34</sup> See UNHCR. "States Parties to the 1954 Convention relating to the Status of Stateless Persons", October 2008, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bbb0abc7>, accessed on 6 January 2009.

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

59. As its name implies, the 1961 Convention obligates state parties to prevent, reduce and avoid statelessness through taking certain positive actions. The Convention is a crucial mechanism in the effort to combat statelessness. However, it does not directly offer protection to stateless persons. It's relevance to this paper is therefore minimal. The Convention has an even lower ratification rate than the 1954 Convention; only 35 countries had ratified it as of August 2008.<sup>35</sup>
60. Both the 1954 and 1961 Conventions apply to the *de jure* stateless. However, the Final Acts of both Conventions recommend that the provisions of the Conventions be extended to *de facto* stateless persons wherever possible. Given the extremely limited scope of both Conventions, these recommendations should be embraced by state parties in order to offer more meaningful and substantial protection to a wider group of vulnerable persons.

### **The Role of the UNHCR**

61. In the absence of a dedicated institution mandated by treaty to protect the stateless, the UNHCR has been awarded the role. The 1954 Convention does not include a provision for the creation of a supervisory body to ensure its proper implementation. However, Article 11 the 1961 does call for 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.<sup>36</sup>

When the Convention entered into force in 1974 the UN General Assembly passed a resolution requesting the UNHCR to temporarily fulfil this mandate,<sup>37</sup> which was further renewed and extended indefinitely in 1976.<sup>38</sup> Since then, the UNHCR has undertaken a responsibility towards both the 1954 and 1961 Conventions.

62. In the light of the poor ratification of the Conventions, in 1995 the Executive Committee of the UNHCR requested the UNHCR to promote accession to the two Statelessness

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<sup>35</sup> See UNHCR. "States Parties to the 1961 Convention on the Reduction of Statelessness", October 2008, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bbb24d54>, accessed on 6 January 2009.

<sup>36</sup> Convention on the Reduction of Statelessness (adopted on 30 August 1961, entered into force 13 December 1975) UNGA RES/896 (IX) (1961 Convention), Article 11.

<sup>37</sup> United Nations General Assembly (UNGA) Resolution 3274 (XXIX) of December 10, 1974, UN Doc. 3274 (XXIX).

<sup>38</sup> UNGA Res. 31/36 of Nov. 1976, UN Doc. A/RES/31/36.

Conventions as well as to provide technical and advisory services to states interested in amending their nationality legislation to meet the demands of the Conventions.<sup>39</sup>

63. The Executive Committee of the UNHCR 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>40</sup>
64. However, the primary mandate of the UNHCR remains the protection of refugees, and given that it also has a mandate pertaining to IDPs, the focus on statelessness has not been sufficient. More resources and dedicated officers need to be allocated to the issue, if the statelessness regime is to bear fruition.

### **International Refugee Law**

65. As noted above, there is a strong interrelation between the 1951 Refugee Convention and the 1954 Statelessness Convention. According to Article 1 A (2), The Refugee Convention affords international protection to persons who have a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, and that being outside the country of their former habitual residence, are unable or unwilling to return to it.<sup>41</sup>
66. One of the biggest strengths of the Refugee Convention is Article 31 (1) which states that 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>42</sup>
67. This provision gives substance to the UDHR assertion that “everyone has the right to seek and to enjoy in other countries asylum from persecution”.<sup>43</sup> In contrast, the 1954 Convention has a much more restrictive approach towards illegal entry, which as discussed above, limits the scope of its application to the exclusion of many.

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<sup>39</sup> UNHCR. *Executive Committee Conclusion No. 78 (XLVI)* 1995, UN Doc. A/AC.96/860.

<sup>40</sup> See above, Batchelor, n.32.

<sup>41</sup> Refugee Convention. Article 1 A (2).

<sup>42</sup> *Ibid.* Article 31 (1).

<sup>43</sup> UDHR. Article 14 (1).

68. It is argued that any persons who satisfy any of the Article 1 A (2) criteria, do not have effective nationality by virtue of the persecution they suffer in their countries of habitual residence. All refugees therefore, can be seen as *de facto* stateless persons, and some may be *de jure* stateless as well. As articulated above though, all stateless persons do not fulfil the criteria necessary to be given refugee status. Therefore, refugees can be viewed as a privileged class within the stateless community, as they enjoy stronger legal protections than those who are merely stateless.

### **International Human Rights Law**

69. The poor level of ratification, negative definition and stringent condition pertaining to lawful entry into territory are all factors which have significantly narrowed the scope of the statelessness regime, leaving many stateless persons outside its protection. Given the modest reach of the statelessness regime, the norms of general international human rights law remain particularly relevant to the stateless. Indeed, the protection of stateless persons is one of the biggest challenges faced by the international human rights regime, and its performance in this regard is a useful means of assessing the true impact of international human rights law. This is because the stateless are the only category of persons, who do not enjoy the protection of a state in addition to that of international human rights mechanisms.
70. Consequently, the universality and interconnectedness of human rights emerge as core principles which are particularly relevant to the protection of the stateless. The applicability of basic human rights to all persons regardless of their nationality (or lack of it in this context), and the obligation of states to respect the principle of universality and afford all persons equal protection of the law is extremely relevant. Similarly, the fact that human rights are closely interconnected affords greater protection to all vulnerable groups including the stateless. The domino effect of one rights violation triggering others immediately focuses more attention on a particular issue. In the context of indefinite detention of stateless persons for example, various rights including the right to equality, liberty, freedom from cruel, inhuman and degrading treatment, freedom of movement, freedom of association, freedom of expression, right to education and a livelihood may all be adversely effected.
71. The basic protection and dignity afforded by general human rights instruments to all human beings remains a relevant and useful tool for further protection of the stateless.

The core international human rights treaties including the ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR), CERD, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), CEDAW and the CRC, their optional protocols and the General Comments of UN Treaty Bodies form a comprehensive body of authority which collectively impose strong obligations on all States.

72. For example, the rights entrenched in the ICCPR are afforded to all 'persons' and not 'citizens' or 'nationals'. The Human Rights Committee has consequently 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>44</sup> Therefore, unlike some national bills of rights, the international human rights regime does not discriminate between nationals and non-nationals, and must be seen as equally applicable to stateless persons. Consequently despite the fact that the legal systems of most countries would discriminate 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>45</sup> It must be acknowledged however, that states do still retain significant authority to determine the entry and presence of non-nationals in their territory. International human rights law merely brings the rights of individuals in the picture.

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<sup>44</sup> See above, Committee on Civil and Political Rights, n.14, para.1.

<sup>45</sup> 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. Whilst in monist systems, international treaties which are ratified automatically become the law of the land, in dualist systems, enabling legislation is required post-ratification.

## Part Two

73. This section of the paper focuses specifically on the restriction of liberty of stateless persons and the protection afforded to stateless persons in detention. The section begins with a brief definition of restriction of liberty and detention. Different aspects and types of detention as well as some factors which lead to stateless persons being detained or restricted will be surveyed. Some of these factors may be unique to stateless persons, whilst others which are more general, have exaggerated impact by virtue of the fact that the persons being detained are stateless, and consequently do not benefit from the protection of a State.
74. The issues thus being introduced, this section closes with a human rights analysis of such detention and restriction of stateless persons. Detention and restriction of liberty will be measured against the yardstick of human rights standards on arbitrary arrest, equality and discrimination and cruel, inhuman and degrading treatment. Court decisions, policies, standards and guidelines which have positively enhanced the protection of stateless persons in such circumstances, as well as those which have impeded such protection through the narrow interpretation of such standards will be analysed.

### Detention

The great majority of immigrants, refugees and asylum seekers are not criminals and therefore should not be confined in detention centres like criminals<sup>46</sup>

75. In its guidelines relating to the detention of asylum seekers, the UNHCR defines detention as,

confinement 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>47</sup>

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<sup>46</sup> Pillay, Navanethem, UN High Commissioner for Human Rights. As quoted by Reuters Africa, available at: <http://africa.reuters.com/top/news/usnIOE49112F.html>, accessed on 6 January 2009.

<sup>47</sup> UNHCR. "Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers", (February 1999) Guideline 1, available at: <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>, accessed on 6 January 2009.

76. The guidelines proceed to 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>48</sup>
77. This definition is a useful point of reference. For the purpose of this paper, it is relevant to the administrative detention of stateless persons who find themselves in a similar position to asylum seekers i.e. have been detained or deprived of liberty, consequent to illegally entering/remaining in a country of which they are not a national, as well as those who are themselves seeking asylum. Such detention is imposed on persons in order to guarantee that an administrative procedure can be implemented. The predominant purpose behind administrative detention in this context is to prevent persons from absconding or disappearing during the course of a procedure which may result in their deportation. Despite the Article 31<sup>49</sup> protection against penalising asylum seekers who have illegally entered into a countries territory, the legal framework of many nations allows for the detention of such persons whilst their asylum application is being processed, or post-decision and prior to their expulsion from national territory.<sup>50</sup>
78. Administrative immigration detention described above, is the form of detention which is most likely to impact on *de jure* and *de facto* stateless persons outside their country of birth or habitual residence. It is this form of detention which will be the main focus of this paper. Whilst there are strong human rights concerns with administrative detention in general; the administrative detention of stateless persons including those refused asylum, is particularly problematic as states often wrongly resort to indefinite detention due to the non-existence of a nation to deport such persons to.
79. Other forms of detention include the pre and post-trial elements of criminal detention as well as detention for purposes of national security.
80. Information on the criminal detention of stateless persons is not easily accessible or discernible; it may be speculated however, that this form of detention primarily raises

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<sup>48</sup> *Ibid.*

<sup>49</sup> Refugee Convention. Article 3, see part one above.

<sup>50</sup> UNESCO. “People on the move: Handbook on selected terms and concepts”, The Hague/Paris (2008), p.24, available at: <http://www.thehagueprocess.org/upload/pdf/PDFHandbookWEBSITE.pdf>, accessed on 6 January 2009.



human rights concerns in the context of visible groups of *de jure* and *de facto* stateless persons within the land of their habitual residence, who are heavily discriminated against as a form of State policy. The laws, policies and predominant negative attitudes towards easily identifiable stateless groups (due to ethnic, religious and/or cultural differences) in certain countries may result in disproportionate percentages of these groups being arrested and convicted.

81. 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. For example, in an in-depth study of the human rights of irregular migrants under the ECHR, Professor Jeremy McBride highlights European Court of Human Rights (ECtHR) jurisprudence according to which,  
the irregular status of a migrant could be a legitimate consideration in assessing whether or not there is a risk of flight that could justify his or her detention pending trial pursuant to Article 5(3) where he or she is reasonably suspected of involvement in an offence.<sup>51</sup>
82. However, as Professor McBride elaborates, such irregular status should not be an 'automatic basis' for pre-trial detention,<sup>52</sup> less restrictive means of dealing with the risk of flight must be explored,<sup>53</sup> and under no circumstances, must pre-trial detention last for longer than is reasonable.<sup>54</sup>
83. Due to the lack of empirical information, the issue of the criminal detention of stateless persons (both within and outside their country of habitual residence) can only be flagged for possible further research in the country specific studies to follow. For the purpose of this paper, it must be emphasised that the human rights norms pertaining to detention which will be explored below are universally applicable and consequently must benefit these groups as well.
84. Detention for the purposes of national security is an issue which has re-emerged in human rights discourse following the aggressive post-9/11 policies of the USA and her

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<sup>51</sup> 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) 21, para.40. McBride refers to the case of *W v Switzerland* (14379/88), 26 January 1993 on this point.

<sup>52</sup> McBride quotes *Caballero v United Kingdom* (32819/96), 8 February 2000, on this point.

<sup>53</sup> *Wemhoff v Federal Republic of Germany* (2122/64), 27 June 1968.

<sup>54</sup> McBride refers to the cases of *Clooth v Belgium* (12718/87), 12 December 1991 and *Assenov and others v Bulgaria* (24760/94), 28 October 1998 in this regard.

allies, exemplified by the extra-judicial detention and interrogation of persons in Guantanamo Bay. The many human rights violations exposed at Guantanamo Bay highlighted the difficulty faced even by national governments in securing rights protection for their citizens who having suffered extraordinary rendition at the hands of unseen forces, were then illegally detained for indeterminate amounts of time. The plight of stateless persons in such facilities is much worse, as they do not have a sovereign state negotiating their release on their behalf. The potential impact of such detention on stateless persons is evidenced by the upcoming Inter-American Commission on Human Rights hearing on the Guantanamo Bay detention of a *de facto* stateless person originally from Algeria.<sup>55</sup> Furthermore, it is more than likely that the human rights violations and issues exposed at Guantanamo Bay through intense press and civil liberties coverage are also prevalent in similar detention centres elsewhere. Therefore, further research on this dimension of detention may be a useful exercise in the research to follow.

### **Restriction of Liberty**

85. Whilst detention may be viewed as the extreme form of restriction of liberty, other lesser forms may also cause human rights concerns. The restriction of liberty is a fluid term, for all members of civilised, structured society do consent to reasonable amounts of restriction, which benefits society at large. There is no one generally applicable tangible point at which the degree of restriction of liberty may be considered to be unreasonable and consequently illegal. Such legality must be determined on a case by case basis, according to the principle of proportionality.
86. The test of proportionality is a legal test accepted and used by courts around the world (including the ECtHR) to determine whether state actions which derogate from specific human rights are justifiable from a rights perspective.
87. In *R v Secretary of State for the Home Department ex p Daly* the House of Lords held that in deciding whether a measure is proportionate, a court should ask itself 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

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<sup>55</sup> See Centre for Constitutional Rights. "Guantanamo detainees to be heard before Inter-American Commission on Human Rights", available at: <http://ccrjustice.org/newsroom/press-releases/guant%C3%A1namo-detainees-be-heard-inter-american-commission-human-rights>, accessed on 6 January 2009).

rationally connected to it; and whether the means used to impair the right to freedom are no more than is necessary to accomplish the objective.<sup>56</sup>

88. In *Huang v Secretary of State for the Home Department*, The Court held that 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 (European) Convention.<sup>57</sup>
89. The proportionality test offers a pragmatic approach to human rights, balancing the interests of all parties concerned. An example of how utilising the proportionality principle to determine the legality of the restriction of liberty may lead to different results in different contexts can be drawn from the control orders jurisprudence of the UK.
90. The Prevention of Terrorism Act of 2005 established the regime of control orders which empower the Secretary of State to impose various restrictions on individuals when it is considered “necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity”.<sup>58</sup> In the *JJ* case, the House of Lords held that the imposition of a daily 18 hour curfew which restricted six persons to their one-bedroom home was an undue restriction of liberty amounting to a violation of Article 5 of the ECHR. But the House also offered the view that a restriction of up to 16 hours a day would be a proportionate response to the threat of terrorism and consequently would not amount to an undue restriction of liberty in the circumstances.<sup>59</sup> Whilst there is much to be critical of in this judgment, it does illustrate the flexibility of the notion of restriction of liberty, and the role played by context in determining the proportionality of a particular degree of restriction.
91. It must be noted that the proportionality principle is only applicable to derogable rights. Absolute rights which are non-derogable, cannot be compromised in any context. According to Article 4 of the ICCPR, certain rights including the right to life,<sup>60</sup> freedom

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<sup>56</sup> [2001] 2 WLR 1622.

<sup>57</sup> [2007] UKHL 11.

<sup>58</sup> Prevention of Terrorism Act (2005) c.2. Section 1(9).

<sup>59</sup> *Secretary of State for the Home Department v JJ* (2007) UKHL 45, per Lord Brown, para.105.

<sup>60</sup> ICCPR. Article 6.

from torture, cruel, inhuman and degrading treatment<sup>61</sup> and slavery,<sup>62</sup> the principle of legality in criminal law<sup>63</sup> and the freedom of thought conscience and religion<sup>64</sup> remain non-derogable at all times.<sup>65</sup> Thus, any form of detention or restriction of liberty which violates the above rights would be illegitimate to the extent that it does so.

### **The Immigration Related Detention and Restriction of Liberty of Stateless Persons**

92. The different categories of stateless persons described in part one above, would face different threats in terms of restriction of liberty and detention. The most visible form of restriction of liberty/detention 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.
93. There are two forms of administrative immigration detention and restriction of liberty. These are the detention/restriction of liberty pending decision on asylum, and the detention/restriction of liberty after a negative asylum or immigration decision, due to there being no nation to deport the person to, or on grounds of *non-refoulement*. This section primarily focuses on the second form, due to the potentially indefinite nature of such detention or restriction of liberty, and the consequent human rights implications.

### **Lack of Consular Protection**

94. A significant problem faced by stateless persons in immigration detention, is that there is no authoritative party which would exclusively represent their interests. The role of embassies and consulates – representing the needs and interests of 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>66</sup>

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<sup>61</sup> *Ibid.* Article 7.

<sup>62</sup> *Ibid.* Article 8.

<sup>63</sup> *Ibid.* Article 15.

<sup>64</sup> *Ibid.* Article 18.

<sup>65</sup> *Ibid.* Article 4 (2).

<sup>66</sup> Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, Article 36.

95. The vulnerability of stateless persons in detention is heightened by the fact that they do not benefit from such consular protection. This reality must be kept in mind, when reading the sections below.

### **Indefinite Detention due to Difficulties in Deportation**

96. Whilst UNHCR guidelines explicitly state that statelessness should not lead to indefinite detention,<sup>67</sup> the general practice in many countries does result in people being indefinitely detained or restricted of their liberty simply on the basis of them being stateless, and there being no nation willing to take them in. According to the UNHCR,

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.<sup>68</sup>

97. Whilst the position in Australia may be an extreme example, it clearly illustrates this position: the Australian High Court held in the *Al-Kateb* case that the indefinite detention of stateless persons awaiting deportation was lawful as long as the government maintained an intention to deport the person.<sup>69</sup> In this case, the High Court was faced with the question as to whether sections 189, 196 and 198 of the Australian Migration Act allowed indefinite detention. According to section 196,

An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

- (a) removed from Australia under section 198 or 199; or
- (b) deported under section 200; or
- (c) granted a visa.<sup>70</sup>

98. According to Chief Justice Gleeson's interpretation, this could mean that the appellant is to be kept in administrative detention for as long as it takes to remove him, and that, if it never becomes practicable to remove him, he must spend the rest of his life in detention ... It may [also] mean that the appellant, who is being kept in detention for the purpose of removal, which must take place as soon as reasonably

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<sup>67</sup> See the discussion below.

<sup>68</sup> UNHCR. "Brief on Statelessness and Detention Issues", para.2, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=4410638fc&skip=0&query=UNHCR%20Brief%20on%20Statelessness%20and%20Detention%20Issues>, accessed on 6 January 2009.

<sup>69</sup> *Al-Kateb v Godwin* [2004] HCA 37, para.298 per Callinan, J.

<sup>70</sup> Australian Migration Act of 1958. P.196.

practicable, is to be detained if, and so long as, removal is a practical possibility, but that if, making due allowance for changes in circumstances, removal is not a practical possibility, then the detention is to come to an end, at least for so long as that situation continues.<sup>71</sup>

99. Given the fact that Australia is party to both the 1954 and 1961 Conventions, this is an extremely disappointing conclusion for the Court to have reached, particularly when considering that this judgment overturned a previous Federal Court decision which held that a person is entitled to be released from immigration detention if and when the purpose of removal becomes incapable of fulfilment.<sup>72</sup> However, as of 11 May 2005, a new class of visa known as the Removal Pending Bridging Visa was created to reduce the harsh effect of the *Al-Kateb* decision on long-term detainees. This new visa is available at the Minister's discretion, to persons in immigration detention whose removal from Australia is not reasonably practicable. The visa affords employment, education, housing, health and counselling benefits to holders.<sup>73</sup>
100. Whilst less extreme, the judicial position in the US is not ideal either. In *Zadvydas v. Davis*, the US Supreme Court held that it is reasonable to presume that a six month period is sufficient enough to effectuate the deportation of admitted immigrants, and that such immigrants must be conditionally released after that time if they can demonstrate that there is "no significant likelihood of removal in the reasonably foreseeable future".<sup>74</sup> This same standard was extended to inadmissible non-citizens as well, in the subsequent case of *Clark v. Martinez*.<sup>75</sup> As will be highlighted later, the increasing acceptance of six months and even longer, as reasonable and just time-periods for persons to be detained whilst administrative and deportation procedures are finalised, is a point of concern. It seems disproportionately harsh that a person may be detained or restricted of their liberty for such a long period, without being criminally charged or convicted of any offence.

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<sup>71</sup> *Al-Kateb v Godwin* [2004] HCA 37, (14).

<sup>72</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Masri* [2003] 126 FCR 54 (FCA).

<sup>73</sup> See Australian Government, Department of Immigration and Citizenship. "Fact Sheet 85 – Removal Pending Bridging Visa", available at: <http://www.immi.gov.au/media/fact-sheets/85removalpending.html>, accessed on 6 January 2009. Also see Ritcher, Christopher. "Statelessness in Australian Refugee Law: The (Renewed) Case for Complimentary Protection". *University of Queensland Law Journal* (2005), 32.

<sup>74</sup> 533 US, 678 (2001) at 701.

<sup>75</sup> 543 US 371 (2005).

### The Non-Refoulement Dilemma

101. The principle of *non-refoulement* or non-return is a well established international human rights principle, which stands as an international human rights law restriction on the exercise of state sovereignty to regulate the presence of non-citizens in their territory.<sup>76</sup>
102. The Refugee Convention was the first international instrument to articulate the principle, stating that no state party
- shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>77</sup>

Whilst the principle of *non-refoulement* does not entail a right to be granted asylum in a particular state,

It does mean, however, that where states are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger...<sup>78</sup>

103. The principle has become an "essential and non-derogable"<sup>79</sup> cornerstone of refugee law, and it has even been argued that it is part of customary international law.<sup>80</sup>
104. Article 3 of the CAT also prohibits States parties from deporting persons who would be in danger of being subjected to torture in the country they are being deported to. Whilst the ICCPR does not contain any specific provisions on *non-refoulement*, the Human Rights Committee in its General Comment on Article 7 has stated that,

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<sup>76</sup> See OHCHR 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 UNHCR. "Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol", (2007), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4&page=search>, accessed on 6 January 2009, for a useful discussion on the Principle.

<sup>77</sup> Refugee Convention. Article 33 (1).

<sup>78</sup> See above, UNHCR, n.76.

<sup>79</sup> *Ibid.*

<sup>80</sup> Goodwin-Gill, Guy. "Non-refoulement and the new asylum seekers" (1986) 26 *Virginia Journal of International Law* p. 897.

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>81</sup>

This principle has since been strengthened to the extent that in *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.<sup>82</sup>

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

the 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 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>83</sup>

106. Like the Human Rights Committee, the ECtHR too has interpreted the text of the ECHR to prohibit *refoulement* in certain situations,<sup>84</sup> and has extended this jurisprudence to cases of deportation as well.<sup>85</sup> The ACHR also upholds the principle of *non-refoulement*<sup>86</sup> and like its European counterpart, the Inter-American Court of Human Rights too has the power to adopt provisional measures “in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons”.<sup>87</sup> The Court has used these powers in the past to intervene in the threatened collective expulsion of *de facto* stateless Haitians and Dominicans of Haitian origin by the Dominican Republic.<sup>88</sup>

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<sup>81</sup> General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7) : . 10/03/92. para 9.

<sup>82</sup> CCPR/C/48/D/470/1991, 5 November 1993, para.13.2.

<sup>83</sup> Committee on Civil and Political Rights. “General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, 26/05/2004. para 12.

<sup>84</sup> See for example, *Soering v. United Kingdom*, (1989) 11 EHRR. 439.

<sup>85</sup> *Vilvarajah v. United Kingdom* (1991) 14 EHRR. 248.

<sup>86</sup> ACHR. Article 22 (8).

<sup>87</sup> *Ibid.* Article 63 (2).

<sup>88</sup> Orders of the Court of 18 August 2000, 12 November 2000, and 26 May 2001, IACtHR. (Ser. E) (2000 and 2001).



107. According to the UNHCR, the Refugee Convention protection against *refoulement* is equally applicable those seeking asylum as well as to recognised refugees :

A person does not become a refugee because of recognition, but is recognized because he or she is a refugee. It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to those who have not had their status formally declared. The principle of *non-refoulement* is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status.<sup>89</sup>

108. The principle is therefore particularly relevant to stateless persons in immigration detention. 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. For example, the UN Working Group on Arbitrary Detention recently declared that a Somali national being subject to four and a half years immigration detention due to it being unsafe to deport him to his country of origin was arbitrary.<sup>90</sup> Indefinite detention has been deemed to be arbitrary as well as a form of cruel, inhuman and degrading treatment. The absurdity of a situation in which a person is indefinitely detained in conditions which amount to cruel, inhuman and degrading treatment, in order to protect him from potential torture, cruel, inhuman and degrading treatment in another part of the world is self-evident.

### **Emerging Standards and Guidelines on the Detention and Restriction of Liberty of Stateless Persons**

109. There are very few internationally recognised guidelines or standards, which refer to the detention or restriction of liberty of stateless persons in the context of immigration. Most texts focus on human rights standards applicable to asylum seekers, and may (or may not) include some references to stateless persons. This reality is symptomatic of a wider problem discussed in part one above, namely that there are no determination procedures or entry provisions which are exclusively applicable to stateless persons. This lacuna has the 'hydraulic' effect of diverting stateless persons into asylum

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<sup>89</sup> See above, UNHCR, n.76.

<sup>90</sup> 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.

procedures, for which their claims may be unfounded, often resulting in their claims being rejected and them being detained.

110. Consequently, the section below will attempt to draw from guidelines and standards which primarily offer protection to asylum seekers. As a result, the language may at times mislead one into believing that stateless persons have the same protections that refugees do. It is important therefore, to bear in mind the distinctions between the protections available to the stateless and refugees as articulated in part one, as well as the unique vulnerabilities of stateless persons which may result in their indefinite detention as identified above.

### **The UNHCR Position**

111. The UNHCR 'Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers' is one standard setting document which does explicitly refer to the detention of stateless persons. However, even in this document, only one guideline (the ninth) specifically caters to stateless persons. Accordingly, they

are 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>91</sup>

112. In addition to this, the guidelines also state that "as a general principle asylum seekers should not be detained".<sup>92</sup> The guidelines state that asylum seekers are often compelled to use illegal means to enter a country of potential refuge, and often have traumatic experiences, which must be taken into account when determining any restriction of liberty. They are therefore compatible with Article 31 of the Refugee Convention according to which illegal entry into the country shall not be the basis for penalties to be imposed on asylum seekers.<sup>93</sup>

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<sup>91</sup> See above, UNHCR, n.47. Guideline 9.

<sup>92</sup> *Ibid.* Guideline 2.

<sup>93</sup> Refugee Convention. Article 31.(1).

113. As discussed above, the 1954 Convention does not afford similar protection to stateless persons who illegally enter another country. However, a stateless person who does enter another country with the intention of seeking asylum must be afforded the protection of the UNHCR guideline and Article 31 of the Refugee Convention while their application is being processed.
114. The UNHCR guidelines proceed to spell out 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 in the interests of national security and public order.<sup>94</sup> However, certain safeguards are spelt out 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>95</sup> The Working Group on Arbitrary Detention too has recommended that “alternative and noncustodial measures, such as reporting requirements, should always be considered before resorting to detention”.<sup>96</sup>
115. 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 specific address or within a particular administrative district), the provision of a guarantor or surety, release on bail and open centres (obligation to live in collective accommodation centres, where they would be allowed to leave and return during stipulated times).<sup>97</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>98</sup> is evidence of the proportionality principle in practice.

### **The Council of Europe Position**

116. 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

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<sup>94</sup> See above, UNHCR, n.47. Guideline 3. Also see UNHCR EXCOM Conclusion No. 44 (XXXVII).

<sup>95</sup> *Ibid.*

<sup>96</sup> E/CN.4/1999/63/Add.3.

<sup>97</sup> See above, UNHCR, n.47. Guideline 4.

<sup>98</sup> *Ibid.*

time”.<sup>99</sup> The resolution proceeds to articulate certain minimum standards applicable to irregular migrants (including stateless persons) in detention. Of these, the duty to hold such detainees in special facilities and to afford them the right to contact anyone of their choice;<sup>100</sup> the requirement that such detention be judicially authorised, scrutinised and subject to judicial review;<sup>101</sup> the right of asylum and *non-refoulement*;<sup>102</sup> the entitlement of irregular migrants being deported, to a remedy before a competent, independent and impartial authority, for the purpose of which interpretation and legal aid should be made available;<sup>103</sup> and the right of all such persons to have effective access to the ECtHR<sup>104</sup> are the most relevant to stateless persons in detention.

117. The Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons of the Committee of Ministers of the European Council (CAHAR) has also issued guidelines on such detention. 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>105</sup>

118. This guideline therefore imposes a strong obligation to only use detention as a last resort. Additionally, the guidelines impose an obligation to release detainees when removal arrangements are halted,<sup>106</sup> and a duty to ensure that such detention is for as short a period as possible.<sup>107</sup> The guidelines also provide for the judicial review of the

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<sup>99</sup> Council of Europe. “Parliamentary Assembly. Resolution 1509 on the Human Rights of Irregular Migrants”. (2006). Paragraph 12 (4). Available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1509.htm>, accessed on 6 January 2009.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.* para 12.5.

<sup>102</sup> *Ibid.* para 12.8.

<sup>103</sup> *Ibid.* para 12.9.

<sup>104</sup> *Ibid.* para 12.10.

<sup>105</sup> 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).

<sup>106</sup> *Ibid.* Guideline 7.

<sup>107</sup> *Ibid.* Guideline 8.

legality of such detention,<sup>108</sup> and have strong provisions on what constitutes acceptable conditions of detention.<sup>109</sup>

119. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment too has articulated standards of detention which are applicable to stateless persons in the context of immigration.<sup>110</sup>

### **The European Union Position**

120. The draft European Return Directive does establish some standards pertaining to the detention of third-country nationals pending removal.<sup>111</sup> According to Article 15 which sets the standard for pre-deportation administrative detention:

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>112</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>113</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>114</sup>

“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

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<sup>108</sup> *Ibid.* Guideline 9.

<sup>109</sup> *Ibid.* Guideline 10.

<sup>110</sup> The standards are available at <http://www.cpt.coe.int/en/docsstandards.htm>, accessed on 6 January 2009).

<sup>111</sup> European Parliament. “Common standards and procedures in Member States for returning illegally staying third-country nationals”, (COM(2005)0391 – C6-0266/2005 – 2005/0167(COD)) (European Return Directive). Available at: [http://www.detention-in-europe.org/images/stories/final%20return%20directive\\_18.06.08\\_provisional%20version.pdf](http://www.detention-in-europe.org/images/stories/final%20return%20directive_18.06.08_provisional%20version.pdf), accessed on 6 January 2009).

<sup>112</sup> *Ibid.* Article 15 (1).

<sup>113</sup> *Ibid.* Article 15(3).

<sup>114</sup> *Ibid.* Article 15(4).

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>115</sup>

121. Whilst the draft directive does provide for judicial review of immigration detention, 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,

appears 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>116</sup>

### **Human Rights Principles Applicable to the Detention of Stateless Persons**

122. In this section, the general human rights norms applicable to detention, indefinite detention and restriction of liberty are looked at. The principal of proportionality has already been discussed above. The notions of arbitrariness, discrimination and cruel, inhuman and degrading treatment will be paid special attention.

### **General Human Rights Norms Pertaining to Detention**

123. There are well established international human rights norms – both substantive and procedural – on detention. Article 9 of the UDHR establishes that ‘no one shall be subjected to arbitrary arrest or detention’. This principle has been replicated and expanded on, through Articles 9 and 10 of the ICCPR, Article 37(d) of the CRC, Article 5 of the ECHR, Articles 6 and 7 of the African Charter on Human and People's Rights, Article 7 of the ACHR, EXCOM Conclusion no. 44 (XXXVII) 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, which all deal explicitly with detention.

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<sup>115</sup> *Ibid.* Article 15 (5) & (6).

<sup>116</sup> See above, UN High Commissioner for Human Rights, n.46.

124. According to Article 9 of the ICCPR,

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.

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>117</sup>

125. The ECHR allows for the deprivation of liberty in accordance with a procedure prescribed by law, pertaining to,

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>118</sup>

126. In an analysis of this provision, Jeremy McBride has stated that the deprivation of liberty must “conform to the procedural and substantive requirements laid down by an already existing law”.<sup>119</sup> Furthermore, the legal provisions on which the deprivation of liberty is based “must be sufficiently accessible and enable the person concerned to foresee the consequences of his or her acts”.<sup>120</sup> McBride also highlights the following factors (with reference to ECtHR jurisprudence) which would render the otherwise ‘lawful’ detention of a person, as being contrary to Article 5 ECHR:

...the detention decision must not be arbitrary in the light of the facts of the case<sup>121</sup> or actuated by bad faith<sup>122</sup> or an improper purpose such as disguised extradition in the absence of any power allowing such a measure<sup>123</sup>. It should also comply with the principle of legal certainty<sup>124</sup> and will need to be judicially authorised<sup>125</sup>. It has also been suggested by

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<sup>117</sup> ICCPR Article 10 (1); See also, Committee on Civil and Political Rights. “General Comment No. 15: The position of aliens under the Covenant”, 11/04/86. para 7.

<sup>118</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 5 (1) (f).

<sup>119</sup> See above, McBride, n.51. 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.

<sup>120</sup> See *Dougoz v Greece* (40907/98) 6 March 2001.

<sup>121</sup> See *Bozano v France* (9990/82), 18 December 1986.

<sup>122</sup> Appl 28574/95, *Ullah v United Kingdom* (1996) 87 DR 118.

<sup>123</sup> See *Bozano v France* (9990/82), 18 December 1986.

<sup>124</sup> McBride cites the cases of *Shamsa v Poland* (45355/99 and 45357/99), 27 November 2003; and *Gonzalez v Spain* (43544/98), 29 June 1999 (AD).

<sup>125</sup> See *Amuur v France* (19776/92), 25 June 1996; and *Shamsa v Poland* (45355/99 and 45357/99), 27 November 2003.

the Court that there should be procedures and time-limits for access to legal, humanitarian and social assistance.<sup>126</sup>

127. All these factors bear relevance to the administrative immigration detention of stateless persons. Additionally, such detention may also invoke other human rights standards, as analysed below.

### **Arbitrary Detention**

128. Arbitrary actions can either be those which contravene existing laws,<sup>127</sup> or those which are *prima facie* legal, but inappropriate, unjust, unpredictable and consequently arbitrary.<sup>128</sup> In keeping with this reasoning, the Court of Appeal of New Zealand has 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>129</sup>
129. The degree to which norms pertaining to arbitrary detention have been 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*<sup>130</sup> norm (or peremptory principle) of customary international law. Incidentally, other such *jus cogens* norms which are relevant to this issue are the prohibition of torture, cruel, inhuman or degrading treatment and systematic racial discrimination.<sup>131</sup>
130. According to the UNHCR, for administrative detention not to be arbitrary,  
it must be exercised in a non-discriminatory manner and must be subject  
to judicial or administrative review to ensure that it continues to be

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<sup>126</sup> See above, McBride, n.51. para 59. Regarding time limits and procedures, McBride refers to the case of *Amuur v France* (19776/92), 25 June 1996, at para 53.

<sup>127</sup> 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*, 1993; 139, p. 140.

<sup>128</sup> See the UN Human Rights Committee Communication 305/1988: *Van Alphen v the Netherlands* (23 July 1990) CCPR/39/D/305/1988.

<sup>129</sup> *Manga v. Attorney General* (2002) 2 NZLR 65, at 71.

<sup>130</sup> *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.

<sup>131</sup> 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.



necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.<sup>132</sup>

This statement links arbitrariness to four factors;

- a. Discrimination,
- b. Right to Review
- c. Duration
- d. Proportionality.

131. The connection between discrimination and detention is discussed separately below. The issue of the length of detention (indefinite detention in particular) is also discussed separately in terms of such detention violating the freedom against torture, cruel, inhuman and degrading treatment. This section therefore focuses specifically on the right to review. It must be emphasised however, that all these issues are interconnected and must be viewed holistically to understand the degree of impact they have on the human rights of stateless persons in detention.
132. According to the Office of the High Commissioner for Human Rights (OHCHR), many countries do not guarantee the right of 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. Or if they do, the detainees are not informed of their right to appeal. Lack of awareness and access to lawyers as well as language difficulties and the absence of interpreters/translation facilities are all factors which stack up against detainees in such circumstances, rendering it near impossible for them to effectively exercise their right of review or appeal.<sup>133</sup>
133. For example, the ECtHR case of *Al-Nashif v Bulgaria*, dealt with the incommunicado detention of a stateless person pending deportation, with no right of review or appeal under Bulgarian law. The Court held that this situation amounted to a violation of Article 5(4) of the ECHR and its underlying rationale of the protection of individuals against arbitrariness.<sup>134</sup>

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<sup>132</sup> See above, UNHCR, n.47, p. 2.

<sup>133</sup> Office of the High Commissioner on Human Rights, "Administrative Detention of Migrants", Pages 7 and 8. Available at: <http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf>, accessed on 6 January 2009.

<sup>134</sup> *Al-Nashif v. Bulgaria* (Appl. No. 50963/99 (2002)).

134. 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>135</sup> and the UN Human Rights Committee have deemed so.<sup>136</sup> Furthermore, as de Zayas observes,

(The) detention regimes in the United States, Canada, the United Kingdom and New Zealand indicate that a regime which authorises the mandatory detention of unlawful non-citizens may be arbitrary notwithstanding that the regime may allow for the detainee to request removal at any time.<sup>137</sup>

### **Non-Discrimination and Detention**

135. The Human Rights Committee has interpreted Article 9 of the ICCPR as being applicable to all cases of deprivation of liberty by arrest or detention including cases of immigration control.<sup>138</sup> Furthermore, the Committee on the Elimination of Racial Discrimination in its general recommendation number 30 on discrimination against non-citizens has stated that

Article 1, paragraph 2, (of CERD) 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.<sup>139</sup>

136. Consequently, the Committee stated that the security of non-citizens must be ensured with regard to arbitrary detention.<sup>140</sup> Needless to say, this statement extends to the protection of the stateless as well.

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<sup>135</sup> 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.

<sup>136</sup> 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 28 October 2002. UN Doc. A/58/40, Vol., II, Annex VI R.

<sup>137</sup> de Zayas, Alfred. "Human Rights and Indefinite Detention", *International Review of the Red Cross*, 2005; 87 (857). 15 – 38. p. 29.

<sup>138</sup> Committee on Civil and Political Rights. "General Comment No. 08: Right to liberty and security of persons (Art. 9)" 30/06/82.

<sup>139</sup> CERD. "General Recommendation No. 30", 01/10/2004, para 2. Article 1 (2) provides for the possibility of differentiating between citizens and non-citizens. Article 1 (3) declares that, the legal provisions of States parties concerning nationality, citizenship or naturalization, must not discriminate against any particular nationality.

<sup>140</sup> *Ibid.* Para 19.

137. The House of Lords decision in the *Belmarsh* case discussed in part one above is an example of the judicial application of the principle of non-discrimination into a situation of discriminatory detention of non-nationals. 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.<sup>141</sup> Therefore, the judgment can also be seen as a missed opportunity to ensure better protections against arbitrary detention for all.

**Indefinite Detention amounting to Cruel, Inhuman and Degrading Treatment**

138. There are two aspects of detention which may result in the cruel, inhuman or degrading treatment of detainees. Whilst each aspect may separately lead to this outcome, the collective impact of both will intensify it.
139. The first is the conditions prevailing in detention centres. For example, the European Committee for the Prevention of Torture (CPT) has reported on detention centres which displayed a number of negative features - a prison-like environment, a climate of tension, a quasi-total absence of activities, a lack of regular outdoor exercise, inadequate medical/psychiatric care, a lack of information for foreign nationals concerning their situation, leading to uncertainty about their future - which for many of the detainees rendered their detention unbearable. Not surprisingly, cases of self-mutilation, suicide attempts, hunger strikes, vandalism and violence were relatively common. Such a state of affairs could well be considered as amounting to inhuman treatment.<sup>142</sup>
140. The UNHCR has articulated the type of conditions which should be afforded in cases of immigration detention. Accordingly, conditions of detention 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, adults 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

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<sup>141</sup> *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56.

<sup>142</sup> European Committee for the Prevention of Torture. “CPT Report on visit to Malta”, August 2005. CPT/Inf (2005) 15, para 28.

exercise, recreation, education, vocational training and the exercise of religion; and there should be effective grievance mechanisms in place.<sup>143</sup>

141. 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 goes with it. According to the Office of the High Commissioner for Human Rights (OHCHR), the “deprivation of liberty should never be indefinite”.<sup>144</sup>
142. 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>145</sup> and that “detention should not continue beyond the period for which the State can provide appropriate justification”.<sup>146</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>147</sup>
143. The indefinite detention of stateless persons due to *non-refoulement* or the non-existence of a country to deport them to (as discussed above) is therefore cause for grave concern.

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<sup>143</sup> See above, UNHCR, n.47, Guideline 10.

<sup>144</sup> Office of the High Commissioner on Human Rights. “Administrative Detention of Migrants”, Available at: <http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf>, accessed on 6 January 2009.

<sup>145</sup> 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.

<sup>146</sup> CCPR/C/D/59/560/1993 para. 9.4 and *C. v. Australia* (900/1999), ICCPR/C/76/D/900/1999 (28 October 2002) at para. 8.2.

<sup>147</sup> E/CN.4/2000/4.

## Part Three

144. This final section of the paper draws some conclusions and raises issues for further research and analysis.

### **A Matter of Definition**

#### ***De Jure Statelessness***

145. The negative definition of statelessness articulated in the 1954 Convention and used by most countries and international mechanisms is problematic. Perhaps the research studies to follow will unearth empirical evidence as to the level of dependence of national legal systems on this definition and the extent to which it impacts on the detention of stateless persons. The nexus between this negative definition and the detention or restriction of liberty of the stateless is clear. The unreasonable burden of proof to establish a negative, results in long and sometimes indefinite processes of establishing the veracity of claims of statelessness, which in turn often results in persons being detained or restricted in their movement for unduly long periods of time. A more streamlined and efficient process which would minimise the need for such detention would be more possible if the definition of statelessness did not require a negative to be proved.
146. Perhaps one response to this problem would be to accept that this definition is a part of international law and therefore unlikely to change. Strategies to work with the definition, introducing streamlined and time-bound procedures to establish claims of statelessness would be most useful. The research to follow should identify best practices of states in this regard. One such example is the 2007 amendment of the Hungarian Aliens Act, which has created a separate stateless status determination procedure.<sup>148</sup> Accordingly, it is possible to apply for stateless status and have access to legal assistance; there is a lower burden of proof in determining statelessness (similar to that applied to refugee status determination), applicants are entitled to legal assistance and the UNHCR is granted a special position in the process.<sup>149</sup>
147. The effectiveness of UNHCR using their offices to determine statelessness and issue such persons with documentation that declares them to be stateless can also be explored. Article 11 of the 1961 Convention does impose an obligation on the UNHCR as the body

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<sup>148</sup> Hungarian Aliens Act no. II of 2007.

<sup>149</sup> See above, Gyulai, n.17, for a more detailed account.

with a mandated role pertaining to the Convention to examine the claims of persons seeking the benefit of the Convention and to assist them with their applications.<sup>150</sup> The implementation of this role must be strengthened.

### ***De Facto Statelessness***

148. As stated in part one above, in terms of the current UNHCR definition of *de facto* statelessness, one's understanding of 'effective nationality' would directly influence one's understanding of *de facto* statelessness.
149. Perhaps attempting to find an all encompassing definition to *de facto* statelessness is the wrong way to go about things. A more pragmatic approach may be to identify different scenarios which amount to *de facto* statelessness, adding to the list with the benefit of time and experience. Such a pragmatic and dynamic approach would prevent the boxing out of persons through premature definitions which do not reflect the complexities and nuances of reality.

## **Greater Protection for the Stateless**

### ***Strengthening the Statelessness Regime***

150. Part one of this paper highlighted some of the biggest problems with the international statelessness regime. These are revisited below:
- a. The 1954 Convention with the 1961 Convention only address the protection needs of *de jure* stateless persons. Even though the final acts of both Conventions recommend that as far as possible protection be offered to *de facto* stateless persons as well, there is no obligation on state parties to do so. In reality, the human rights concerns and vulnerabilities of stateless persons – particularly those who cross international borders – are the same for the *de jure* and *de facto* alike. Consequently, the international statelessness regime should offer equal protection to both groups.
  - b. The fact that many of the protections offered by the 1954 Convention only apply to stateless persons who have lawfully entered into the territory of a third country, is cause for grave concern. This further limits the already limited scope of application of the 1954 Convention, leaving more vulnerable persons outside its protection. The likelihood of stateless persons, who have illegally entered into a country being detained or restricted of their liberty, can be further explored in the research to follow. The potential positive impact that the protection of the

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<sup>150</sup> 1961 Convention. Article 11.

1954 Convention can have on the human rights of such persons must also be analysed. Ideally, a similar provision to Article 31 of the Refugee Convention should have been incorporated into the statelessness conventions, in order to ensure that illegal entry is not punished through detention. In the absence of such a provision, the UNHCR, Human Rights Committee and other such bodies should develop standards to protect such groups, and these standards must be implemented by states through their immigration policies.

- c. The poor ratification of the Conventions is another cause for concern. The accession drive promoted by the UNHCR has borne some fruit, but more needs to be done. Poor ratification highlights the lack of political will to effectively address the issue of statelessness, reflecting that many states are unlikely to take the issue of statelessness seriously enough to bring about change at a national policy and legal level. Whilst the drive for further ratification must continue, the lobby to bring the issue of statelessness onto the global and national agendas must be strengthened and sustained.

### ***Strengthening the Role/Responsibility of the UNHCR***

- 151. The role of the UNHCR pertaining to the stateless is not treaty based, but instead can be traced back to a UN General Assembly Resolution. Given that the UNHCR's primary mandate is the protection of refugees, and that it has an added responsibility towards IDPs, it is not surprising that the UNHCR has not been able to afford statelessness the dedication and resources demanded by virtue of the magnitude and complexity of the issue.
- 152. All that has been done by the UNHCR to represent the cause of the stateless must be appreciated. However, statelessness has to be given prominence as a separate and extremely challenging crisis faced by the global community, instead of being marginally accommodated in the refugee discourse. For example, the 'UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers' have within the body of their text, just one guideline pertaining to the detention of stateless persons. It is not clear to what extent the rest of the guidelines apply to stateless persons, leaving much open to conjecture and interpretation. As this paper has highlighted, there are specific challenges pertaining to stateless persons in detention, which must be directly addressed.

### ***Bringing Statelessness onto the Immigration Agenda***

153. The immigration procedures of most countries do not treat the stateless as different in any way. The United Kingdom, Ireland, Denmark and Finland for example do not have specific procedures for determining statelessness.<sup>151</sup> The same applies to Australian immigration policy as well.<sup>152</sup> In the absence of specific procedures, the stateless are often automatically diverted into general asylum procedures, where their claims are more likely to fail. Furthermore, the failure to specifically cater to the needs of stateless persons can result in their long-term detention, due to the likelihood of their claims being lost in processes which are not geared towards determining the lack of nationality. It is essential that the stateless are acknowledged and identified as a distinct category with special immigration and protection needs. More research needs to be done in this area, as statistics and information are difficult to come by – an indication in itself that immigration procedures do not consider the stateless to be a distinct group.

### ***Filling the Gap – Consular Protection***

154. The absence of consular protection for the stateless in times of detention in foreign countries is another cause for much concern. International law has been built on diplomatic exchanges between sovereign nations. The traditional safe-haven role of the consulate in protecting the rights of the citizens it represents in foreign nations is a reality that most people take for granted. The absence of such protection for one of the most vulnerable groups further victimises them.
155. In the absence of consular protection for the stateless, the international community must act on their behalf. The UNHCR is possibly the best placed to effectively do so.

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

156. The connection between equality and detention has already been explored in part two above. Two final points, tying up with the equality discussion in part one need to be made:
- a. The first point is the assessment of equality before the law – and equal enjoyment of human rights between nationals and non-nationals. As mentioned above, most of the rights entrenched in the ICCPR and other human rights instruments are guaranteed to all persons regardless of nationality (or the lack

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<sup>151</sup> See above, Batchelor, n.32.

<sup>152</sup> See above, Ritcher, n.73.



of it). National bills of rights are not always as generous in the rights they guarantee non-nationals. The country specific research to follow should compare the international human rights available to all persons with corresponding human rights articulated in national bills of rights, to gauge whether the jurisdictions which are being studied afford satisfactory human rights protections to non-nationals. The impact that this may have on the rights of the stateless, particularly in detention must be further explored.

- b. The second aspect of equality is the *Belmarsh*<sup>153</sup> principle referred to in part one above. Accordingly, having two separate standards of detention for nationals and non-nationals is a violation of the principle of equality.<sup>154</sup> Whether this principle has been practically applied must be explored in the research to follow.

## **The Stateless in Detention/Restriction of Liberty**

### ***Transposing International Norms into National Application***

157. As per the discussion in part two above, there are various international and regional standards and guidelines pertaining to the detention and restriction of liberty of stateless persons. Often the problem arises in transposing such standards into the national laws and policies of states. The judiciary, policy makers and legislators of states as well as the UNHCR and other international organisations/institutions have specific responsibilities in ensuring the effective transposition of such standards:

- a. National judiciaries can play an extremely influential role in impacting on the internationally entrenched human rights of stateless persons. The more judiciaries take international human rights norms and standards into account, the more universally entrenched they become. Judicial attitudes and perceptions are therefore extremely relevant to the rights of the stateless.
- b. Likewise, the role of policy makers and legislators is crucial. The post *al Katebi* Australian example of creating a new class of visa (The Removal Pending Bridging Visa) specifically for persons who may otherwise be indefinitely detained, is a positive example of how proactive and practical policy changes can benefit the rights of stateless persons.

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<sup>153</sup> *A and Others v. Secretary of State for the Home Department*, [2004] UKHL 56.

<sup>154</sup> *Ibid.*

- c. The UNHCR and other such international organisations have the continuing challenge of monitoring the performance of national systems, lobbying for the incorporation of international standards and publicising best practices.

### ***The Non-Refoulement and Non-Deportability Dilemma's***

158. The inability to deport stateless persons, either because no third country would accept them, or due to the principle of *non-refoulement*, is one of the primary reasons for their detention or the curtailment of their liberty. This issue must be creatively addressed in a manner which does not further victimise the stateless. The US Supreme Court decisions of *Zadvydas v. Davis*<sup>155</sup> and *Clark v. Martinez*<sup>156</sup> discussed above impose a six month time-period in which deportation must be arranged, after which the detainee must be released. Similarly, Article 15 of the European Return Directive<sup>157</sup> imposes an ultimate, non-extendable time period of 18 months for immigration detention. In both examples, human rights language has been used to authorise detention spans which may be disproportionately long. It is therefore necessary to be wary of the potentially detrimental impact of such general standards.
159. Research also needs to be done on other forms of restriction of liberty such as being housed in centres and not being permitted to work. A visa in the style of the Australian Removal Pending Bridging Visa discussed in part two above is perhaps a viable alternative to other more inhumane forms of restriction of liberty.

### ***Security Based Detention***

160. Further research needs to be carried out on the issue of detention for the purpose of national security as well. The many human rights concerns articulated over the Guantanamo Bay detention facility may also be relevant to other similar facilities elsewhere in the world.

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<sup>155</sup> 533 US, 678 (2001).

<sup>156</sup> 543 US 371 (2005)

<sup>157</sup> See above, European Parliament, n.111.

## **Conclusion**

161. This paper has endeavoured to capture some of the complexities and challenges connected with promoting, protecting and fulfilling the human rights needs of stateless persons, with special emphasis on those in immigration related detention or restriction of liberty. The stateless are a category of extremely vulnerable persons, who depend more on international human rights mechanisms for their protection than any other group of vulnerable person. This is because they often do not benefit from the added protection of national human rights systems, which are mostly better placed than their international counterparts to afford tangible relief to victims of human rights violations.
162. As a mapping exercise, this paper has been predominantly concerned with surveying the core issues and throwing out some questions and challenges for further study, research and reflection. It is by no means a finished document therefore, and must be viewed instead as a working document, which will change and develop as more information is brought to light.