

# Draft Guidelines on the Detention of Stateless Persons: An Introductory Note

Amal de Chickera<sup>1</sup>

In July 2010, The Equal Rights Trust (ERT) published its report, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons (Unravelling Anomaly)*.<sup>2</sup> This report, which was based on field research carried out by ERT in nine countries, provided a critique and analysis of the protection status of stateless persons in the world today, with a particular focus on detention.<sup>3</sup> The report made 17 recommendations, the implementation of which ERT believes is a necessary pre-requisite to ensuring greater protection for stateless persons, including those in detention. **Recommendation 11 called for the adopting of international standards on the detention of stateless persons.**

ERT has now acted on this recommendation, and a consultation draft of ERT's *Guidelines on the Detention of Stateless Persons* (the Draft Guidelines) is ready for review and is published in this edition of the Equal Rights Review.<sup>4</sup> This consultation draft provides detailed guidance on how states should treat stateless persons in the context of immigration detention in order to comply with their obligations under international human rights law, in particular, the rights to equality and non-discrimination and the right to be free from arbitrary detention. The Draft Guidelines mainly reflect established principles of international human rights law, while a few reflect international good practice. We believe that these Draft Guidelines are neces-

sary in a world in which immigration regimes are getting stricter, immigration detention is becoming more common and stateless persons are disproportionately impacted by arbitrary and unlawful detention.

The Draft Guidelines primarily address the detention of stateless persons, but also recommend that states implement national statelessness determination procedures (Recommendation 6 of *Unravelling Anomaly*), and provide guidance on the standards and protections that should be applicable to the implementation of such procedures. Identifying stateless persons who may be subject to immigration detention is a necessary prerequisite to acknowledging their specific needs and protecting them accordingly.

The Draft Guidelines are not a final text and we invite you – the reader – to comment on them and provide us with your feedback. The Draft Guidelines have also been sent to leading experts in the fields of equality and non-discrimination, immigration detention, human rights, refugees and statelessness for their review and comment. ERT will then itself review the Draft Guidelines in light of these comments, after which they will be published and proposed for adoption by key intergovernmental and governmental institutions, and by human rights and other civil society organisations. They will also be disseminated widely. The Draft Guidelines will

be the standard that ERT promotes in its advocacy on the detention of stateless persons both nationally and internationally.

The Draft Guidelines comprise four parts. Part One focuses on definitions, the scope and interpretation of the Draft Guidelines and the basic principles they espouse. Part Two focuses on the identification of stateless persons and Part Three on the detention of stateless persons. Part Four is a series of miscellaneous concluding Guidelines.

**In the text below, we explain each part of the Draft Guidelines, providing commentary on some of the more important or more complex Guidelines, raising issues of concern and asking specific questions for your consideration. While we would particularly welcome responses to the questions we raise, we also look forward to receiving further feedback on the text and substance of the Draft Guidelines**

**We would be most grateful if all feedback is sent by Friday 7 October to Amal de Chickera via email – [amal.dechickera@equalrightstrust.org](mailto:amal.dechickera@equalrightstrust.org)**

## **1. Part I – Definitions, Scope, Interpretation and Basic Principles**

### **1.1. Definitions**

There are four Draft Guidelines in this section. The Draft Guidelines utilise the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) definition of a *de jure* stateless person, i.e. a woman, man or child “who is not considered as a national by any State under the operation of its law”.<sup>5</sup> ERT interprets this definition in the broad manner recommended by the delegates of the UNHCR Expert Meeting on the Concept of Stateless Persons under

International Law (UNHCR Prato Expert Meeting), and this interpretation thus encompasses some categories of persons who were hitherto identified as *de facto* stateless persons.<sup>6</sup>

The definition of *de facto* stateless persons adopted by the Draft Guidelines is that of “[a] person who has a legal nationality which is ineffective; for example, a person who does not benefit from consular protection from his or her country of evident nationality is considered to be *de facto* stateless. A person may be *de facto* stateless their entire life, for a limited period of time, or only in a specific country or context”.<sup>7</sup> Since there continues to be debate around the definition of *de facto* statelessness, ERT has intentionally adopted a definition which is open-ended and can be interpreted in a flexible manner, while staying true to the core meaning of the concept. ERT’s position, as articulated in *Unravelling Anomaly*, is that there should be no distinction in the level of protection afforded to *de jure* and *de facto* stateless persons, as both groups largely have the same protection needs.<sup>8</sup> ERT argues that all persons who do not enjoy an effective nationality should be protected as stateless persons and has developed a five-step test to determine whether a person has an effective nationality or not. Accordingly, the factors to be taken into consideration are:

- “(i) **Recognition as a national** – Does the person concerned enjoy a legal nationality, i.e. is he or she *de jure* stateless?
- (ii) **Protection by the state** – Does the person enjoy the protection of his/her state, particularly when outside that state?
- (iii) **Ability to establish nationality** – Does the person concerned have access to documentation (either held by the state, or which is issued by the state) to establish national-

ity? This access may be through a consulate, or through state officials within the country of presumed nationality.

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

(v) **Enjoyment of human rights** – Does an individual’s lack of documentation, nationality or recognition as a national have a significant negative impact on the enjoyment of her or his human rights?<sup>9</sup>

We acknowledge that this approach goes beyond international consensus on the concept of *de facto* statelessness. As we intend the Draft Guidelines to be relevant and applicable universally, the definition utilised by the Draft Guidelines is more restrictive, represents international understanding of the concept of *de facto* statelessness and is consistent with the summary conclusions of the UNHCR Prato Expert Meeting.<sup>10</sup>

The Draft Guidelines also define “detention” and “administrative detention”. The definition of detention is taken from the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (UNHCR Guidelines).<sup>11</sup>

**Questions for reviewers: Are the two definitions of statelessness adopted by the Draft Guidelines appropriate? Is the definition of *de facto* statelessness too open-ended or vague? Are there any other terms which the Draft Guidelines should define?**

## 1.2. Scope

There are four Draft Guidelines in this section. The Draft Guidelines apply to both *de jure* and *de facto* stateless persons.<sup>12</sup> Histori-

cally, *de facto* stateless persons have not benefited from the international protection to which *de jure* stateless persons are entitled. Such an approach is not consistent with international human rights law and the rights to equality and non-discrimination.<sup>13</sup> The UN Secretary General has emphasised that:

“[I]t is also important to note that *de facto* stateless persons face many of the same protection risks faced by stateless persons. Their situation is akin to that of stateless persons in that there is no State that will provide them with protection. Consequently, it is recommended that the States in which they find themselves extend protection to them until such time as they are able to avail themselves of the protection of their State of nationality.”<sup>14</sup>

Recommendation 4 of *Unravelling Anomaly* calls for the abolition of hierarchies within statelessness,<sup>15</sup> and ERT has tried to ensure that the Draft Guidelines are applicable to both groups, but also address the specific needs of each.

**Questions for reviewers: Are the Draft Guidelines successful in being equally applicable to both *de facto* and *de jure* stateless persons, while also catering to the specific needs of each group? Should the Draft Guidelines apply to both groups, or should they focus more on one group?**

The Draft Guidelines draw from internationally accepted human rights norms and principles. They do not attempt to develop new legal principle, rather to elaborate how existing human rights principles relating to detention and non-discrimination, and international law on statelessness, apply to the specific challenge of the detention of stateless persons. Consequently, the Draft Guidelines reflect and state the existing human

rights obligations of states towards stateless persons in their territory and within their jurisdiction. However, they also draw from international good practice, and recommend actions which go beyond the minimum obligations of international human rights law. Such recommendations provide guidance on how states could offer better protection to stateless persons within their territory and jurisdiction.

**Questions for reviewers: Should the Draft Guidelines reflect only the requirements of existing international human rights law, or is it appropriate to also highlight international good practice? Should the Draft Guidelines go further, and be more prescriptive than they are in the present draft?**

### 1.3. Basic Principles and Assumptions

The Draft Guidelines articulate eight basic principles and assumptions. The first such principle is that states have a duty to respect, protect and fulfil the human rights of stateless persons within their jurisdiction, including the right to be free from arbitrary and unlawful detention.<sup>16</sup> The rights of stateless persons and state obligations in this regard are entrenched in many international and regional human rights treaties including:

- The Universal Declaration of Human Rights (UDHR);<sup>17</sup>
- The International Covenant on Civil and Political Rights (ICCPR);<sup>18</sup>
- The International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>19</sup>
- The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>20</sup>
- The Convention on the Elimination of all forms of Racial Discrimination (CERD);<sup>21</sup>
- The Convention on the Elimination of all

forms of Discrimination against Women (CEDAW);<sup>22</sup>

- The Convention on the Protection of the Rights of all Migrant Workers and their Families (CMW);<sup>23</sup>
- The Convention on the Rights of Persons with Disabilities (CRPD);<sup>24</sup>
- The Convention on the Rights of the Child (CRC);<sup>25</sup>
- The European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR);<sup>26</sup>
- The American Convention on Human Rights (ACHR);<sup>27</sup> and
- The African (Banjul) Charter on Human and Peoples' Rights (ACHPR).<sup>28</sup>

The Optional Protocols to these treaties, the jurisprudence of international and regional courts and the General Comments, decisions and authoritative statements of the UN treaty bodies and special procedures, as well as the 1954 Convention Relating to the Status of Stateless Persons<sup>29</sup> (the 1954 Convention) and the 1961 Convention on the Reduction of Statelessness<sup>30</sup> (the 1961 Convention) are also relevant in this regard.

Various international guidelines and principles on detention should be adhered to when detaining stateless persons, including:

- The 1955 UN Standard Minimum Rules for the Treatment of Prisoners;<sup>31</sup>
- The 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;<sup>32</sup>
- The 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty;<sup>33</sup> and
- The 1999 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers.<sup>34</sup>

Many other international, regional and national guidelines and principles on detention

provide useful guidance on the detention of immigrants, including stateless persons. Most relevant in this regard are:

- The European Committee for the Prevention of Torture Standards (CPT Standards);<sup>35</sup>
- The European Union Agency for Fundamental Rights report entitled *Detention of Third-Country Nationals in Return Procedures*;<sup>36</sup>
- The publication by the UK HM Inspector of Prisons, *Immigration Detention Expectations: Criteria for assessing the conditions for and treatment of immigration detainees*;<sup>37</sup> and
- The *Immigration Detention Centre Guidelines* of the Human Rights and Equal Opportunities Commission of Australia.<sup>38</sup>

In preparing the Draft Guidelines, ERT has reviewed and drawn from all of the above texts.

Draft Guidelines 14 to 16 articulate principles of equality and non-discrimination which apply to the treatment of stateless persons, including decisions to detain them. These Draft Guidelines draw from the Declaration of Principles on Equality,<sup>39</sup> which “reflects a moral and professional consensus among human rights and equality experts (...) [and is] based on concepts and jurisprudence developed in international, regional and national legal contexts”.<sup>40</sup>

The Draft Guidelines also provide that “States which are party to the 1954 Convention Relating to the Status of Stateless Persons have a legal obligation to treat *de jure* stateless persons within their territory or jurisdiction in accordance with the provisions of that Convention”.<sup>41</sup> It is highly desirable that states ratify the 1954 Convention and also the 1961 Convention, and while the Draft Guidelines do not call for ratification,

ERT does promote the ratification of these treaties. States which are party to these instruments should take all necessary steps to fulfil their obligations towards *de jure* stateless persons under these treaties, including the establishment of statelessness determination procedures.

The Draft Guidelines call upon states to exercise their right to protect their nationals “with due regard to their international human rights obligations as the failure or inability of consulates to provide such protection can create *de facto* statelessness”.<sup>42</sup> This Draft Guideline has been included in recognition of the fact that it is not only host states which bear a responsibility towards the stateless.

**Questions for reviewers: Should Draft Guideline 19 differentiate between those states which cannot protect their nationals abroad and states which choose not to do so? Should Draft Guideline 19 recommend that an international organisation provides consular facilities on behalf of states which cannot protect their nationals abroad?**

## 2. Part II - Identifying Stateless Persons

Part two comprises four Draft Guidelines on the identification of stateless persons. The UNHCR Analytical Framework for Prevention, Reduction and Protection (UNHCR Analytical Framework) states that the “first step towards addressing statelessness is to **identify** stateless populations, determine how they became stateless and understand how the legal, institutional and policy frameworks relate to those causes and offer possible solutions”.<sup>43</sup>

Draft Guideline 20 calls on all states to have procedures in place to identify stateless per-

sons, which is an essential prerequisite to protecting stateless persons in accordance with international law. This obligation is implicit to the 1954 Convention with regard to the *de jure* stateless, as states would not be able to fulfil their obligations under the Convention unless they first identified stateless persons within their territory and jurisdiction.<sup>44</sup> Therefore, all states parties to the 1954 Convention should have statelessness determination procedures in place. Even those states which are not party to the 1954 Convention should have procedures in place to identify *de jure* stateless persons, at least in the narrow context of immigration detention, as the failure to identify *de jure* stateless persons could result in discriminatory and arbitrary detention. In this context, it is important to note the following conclusion of the UNHCR Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons (UNHCR Geneva Expert Meeting):

“States that are not party to the 1954 Convention are nonetheless bound by provisions of international human rights law to respect the rights of stateless persons within their territory (for example, the prohibition against arbitrary detention pursuant to Article 9(1) of the ICCPR and the obligation to ensure that every child has a nationality pursuant to Article 24(3) of the ICCPR and Article 7(1) of the CRC). Statelessness is, therefore, a juridically relevant fact in this context. Moreover, non-party States may find it useful to establish statelessness determination procedures and a number have actually done so. In addition, such States may find helpful guidance in the provisions of the 1954 Convention with respect to their response to statelessness, for example, with regard to the provision of identity and travel documents to stateless persons.”<sup>45</sup>

ERT takes the position that for the very same reasons, such procedures should also be in place to determine whether a person at risk of detention is *de facto* stateless, as the failure to do so could result in discriminatory and arbitrary detention.

This Draft Guideline highlights five situations which could render a person *de facto* stateless. This is not an exhaustive list, and states are encouraged to add more grounds to this list as their understanding of *de facto* statelessness broadens.<sup>46</sup> In order to fully comply with this Draft Guideline, states would have to maintain reliable, up-to-date information on countries which fall within these categories, the nationals of which should benefit from determination procedures before a decision to detain is made.

**Questions for reviewers: Should Draft Guideline 20 recommend different procedures for the identification of *de jure* and *de facto* stateless persons? Should it distinguish between states which are parties to the 1954 Convention and states which are not? Should the *de facto* grounds listed in Draft Guideline 20 be exhaustive? If so, should any additional grounds be included or existing grounds be removed? Should the Draft Guidelines recommend that states maintain reliable and up-to-date information on countries which are more likely to generate *de facto* statelessness?**

Draft Guideline 21 states that “[a]ll persons subject to such procedures should be allowed to remain in the country pending final decision”.<sup>47</sup> This provision draws from the UNHCR Geneva Expert Meeting Conclusion that “[w]here an individual has an application pending in a statelessness determination procedure, any removal/de-

portation proceedings must be suspended until his or her application has been finally decided upon".<sup>48</sup>

Draft Guideline 22 considers the interplay between statelessness identification procedures and refugee status determination procedures. The following UNHCR Geneva Expert Meeting conclusion is relevant in this regard:

"In all circumstances, States must ensure that confidentiality requirements for applications by refugees who may also be stateless are upheld in a statelessness determination procedure. Thus any contact with the authorities of another country to inquire about the nationality status of an individual claiming to be stateless should only take place after any refugee claim has been rejected after proper examination (including the exhaustion of any legal remedies). Every applicant in a statelessness determination procedure should be informed at the outset of the right to raise refugee-related concerns ahead of any enquiries made with foreign authorities."<sup>49</sup>

**Questions for reviewers: Does Draft Guideline 22 provide adequate guidance on the relationship between state obligations pertaining to the identification of refugees and state obligations with regard to the identification of stateless persons? Should this Draft Guideline be expanded upon, and if so, what should be added to it?**

Draft Guideline 23 lists 14 minimum procedural and substantive rights which must be ensured at all stages during a statelessness determination procedure. The UNHCR Analytical Framework sets out the questions to be asked in assessing whether states have

satisfactory procedures in place, what type of procedure is used to determine statelessness and how fair and efficient the procedure is. Pertinent questions in this regard include:

- (i) whether the procedure provides for legal advice and interpretation services;
- (ii) whether decisions are made in a timely manner with written reasons given;
- (iii) whether there is a right to appeal to an independent authority;
- (iv) whether the person is granted the right to remain in the country pending final decision;
- (v) whether the burden of proof is on the applicant or decision-maker;
- (vi) what kind of evidence is required to establish nationality or the lack of it;
- (vii) whether the specific needs of vulnerable groups such as women, children and the elderly are met;
- (viii) whether the UNHCR has an advisory, observer or operational role; and
- (ix) whether adequate training is provided to decision makers, lawyers and legal counsellors.<sup>50</sup>

The UNHCR Geneva Expert Meeting concluded that statelessness determination procedures should have the following procedural safeguards:

"In order to ensure fairness and efficiency, statelessness determination procedures must ensure basic due process guarantees, including the right to an effective remedy where an application is rejected. States should facilitate to the extent possible access to legal aid for statelessness claims. Any administrative fees levied on statelessness applications should be reasonable and not act as a deterrent to stateless persons seeking protection."<sup>51</sup>

The Draft Guidelines have been written with these questions as well as other international procedural and substantive standards and norms in mind, and it is hoped that they collectively provide adequate safeguards to ensure due process of the law. These Draft Guidelines also draw from the good practice of Hungary and Spain, two countries which through legislation have created detailed rules for dedicated statelessness determination procedures. Accordingly, the Draft Guidelines state that “[t]he standard of proof required for the establishment of statelessness should be a reasonable standard of proof.”<sup>52</sup> This is an important requirement because:

“Determination procedures should adopt an approach to evidence which takes into account the challenges inherent in establishing whether a person is stateless. The evidentiary requirements should not be so onerous as to defeat the object and purpose of the 1954 Convention by preventing stateless persons from being recognized.”<sup>53</sup>

Therefore, the standard of proof should be no more onerous than the “reasonable degree of likelihood” standard applied in refugee status determination procedures.<sup>54</sup>

The Draft Guidelines also state that “[t]he burden of proof should be shared by the state concerned and the individual.”<sup>55</sup> This is important because:

“The 1954 Convention requires proving a negative: establishing that an individual is *not* considered as a national by any State under the operation of its law. Because of the challenges individuals will often face in discharging this burden, including access to evidence and documentation, they should not bear sole responsibility for establishing the relevant facts.”<sup>56</sup>

This means that the decision-maker and the person subject to the determination procedure would be equally responsible for sourcing the necessary proof to establish whether the person has a nationality or not. The UNHCR Geneva Expert Meeting has recommended that the individual and the state share the burden of proof in the following manner:

“It is incumbent on individuals to cooperate to establish relevant facts. If an individual can demonstrate, on the basis of all reasonably available evidence, that he or she is evidently not a national, then the burden should shift to the State to prove that the individual is a national of a State.”<sup>57</sup>

**Questions for reviewers: Does Draft Guideline 23 cover the minimum procedural and substantive safeguards which should be applied in a statelessness determination procedure? Are there any safeguards which you would recommend we add to or delete from the list? Would it be more useful to distinguish between the substantive and the procedural safeguards? Do the Draft Guidelines on the burden and standard of proof require further elaboration?**

### **3. Part III – The Detention of Stateless Persons**

Part three is the most substantial part of the Draft Guidelines. It looks at the decision to detain, alternatives to detention, vulnerable groups, ongoing detention, conditions of detention and foreign national prisoners.

#### **3.1. Decision to Detain**

There are eight Draft Guidelines in this section. Draft Guideline 24 states that there should be a presumption against the detention of stateless persons. This presumption



is particularly important in relation to the administrative detention of stateless persons because of the unique circumstances which make it difficult to justify their detention for immigration purposes. It is either impossible or extremely difficult to remove stateless persons to their country of habitual residence. In such circumstances, detention would either serve no administrative purpose (where removal is impossible), or it would be a disproportionate means of achieving an administrative purpose (where removal is likely to take an unreasonable length of time).

The UDHR establishes that “no one shall be subjected to arbitrary arrest or detention.”<sup>58</sup> This principle is enshrined in a number of UN and regional standards dealing explicitly with detention<sup>59</sup> and is reflected in Draft Guideline 25. Draft Guideline 25 states that mandatory detention is unlawful under international law. This Draft Guideline reiterates an established principle of international law, as stated by the United Nations Working Group on Arbitrary Detention<sup>60</sup> and the UN Human Rights Committee.<sup>61</sup>

Draft Guideline 26 expands upon the notion of arbitrariness by linking it to the principles of legitimacy of objective, lawfulness, non-discrimination, necessity, proportionality, reasonableness and due process. These principles are the cornerstones upon which international protection against arbitrary detention rests.

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 necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.”<sup>62</sup>

The UN Working Group on Arbitrary Detention links immigration detention directly with the principle of proportionality. Accordingly:

“If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The reasons put forward by States to justify detention, such as the necessity of identification of the migrant in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served with a removal order, must be clearly defined and exhaustively enumerated in legislation.”<sup>63</sup>

ERT has analysed the relationship between these principles of international human rights law in *Unravelling Anomaly*, and the Draft Principles are based on that analysis.<sup>64</sup> The principles are interlinked and mutually reinforcing.

Draft Guidelines 27 and 28 provide guidance on what constitutes a legitimate objective. Accordingly:

“Administrative expediency does not in itself constitute a legitimate objective of administrative detention. Nor can administrative detention be used for punitive purposes. Detention should not be used as a deterrent to irregular immigration.”<sup>65</sup>

Draft Guideline 28, drawing on the safeguards entrenched by the European Returns Directive,<sup>66</sup> highlights two situations in which removal would not constitute a legitimate objective. The first is when the state has an obligation of *non-refoulement* towards the individual concerned. This principle of human rights and refugee law prohibits states from removing non-citizens to a situ-

ation of persecution or irreparable harm.<sup>67</sup> The principle of *non-refoulement* has become a cornerstone of refugee law, and is part of international human rights law.<sup>68</sup> The second situation is when removal would violate the individual's right to respect for private and family life.

Draft Guideline 29 explains when detention will be considered lawful. It reflects the principle that the deprivation of liberty must "conform to the procedural and substantive requirements laid down by an already existing law".<sup>69</sup>

ERT believes that states have an obligation to take into account the specific circumstances of stateless persons when determining whether detention would pursue a legitimate objective, be lawful, non-arbitrary, non-discriminatory, necessary, proportionate and/or reasonable. This position reflects that of the UN Secretary General who has stated that "stateless persons are (...) uniquely vulnerable to prolonged detention and States should be sensitized to respect the rights of stateless persons to be free from arbitrary detention as a result of their stateless status".<sup>70</sup>

Draft Guideline 30 expands upon the test set out in Guidelines 26, which should be applied to ensure that the detention of stateless persons is not arbitrary. States are urged to take seven factors into consideration in determining whether the detention of stateless persons would be non-discriminatory, necessary, reasonable and proportionate. The test addresses the very specific context and challenge of statelessness and resultant barriers to identification, status determination and removal, which must be given due consideration in determining whether stateless persons can be legally detained.

**Questions for reviewers: Is Draft Guideline 28 appropriate? Do the principles of**

***non-refoulement* and respect for private and family life require further elaboration in the text? Does Draft Guideline 26 accurately reflect the elements of the test of arbitrariness? Does Draft Guideline 30 appropriately describe and analyse the factual considerations which should be taken into account in assessing whether the detention of a stateless person is arbitrary? Would you add any further considerations?**

Draft Guideline 31 provides that stateless persons subject to immigration detention should benefit from all procedural safeguards afforded to other persons. Many of these safeguards are reiterated in Draft Guideline 43. They include some of the safeguards entrenched by the European Returns Directive, including the right to be informed of decisions in writing, and the duty on the state to give reasons for decisions in a language understood by the person concerned,<sup>71</sup> the right to appeal against or seek review of removal decisions, and the right to receive free legal representation and linguistic assistance.<sup>72</sup>

**Questions for reviewers: Should Draft Guideline 30 list the procedural safeguards to which stateless persons are entitled in the detention decision-making process? If so, should it be an exhaustive list, and which safeguards should be included? Should Draft Guideline 30 state that procedural safeguards should be equivalent to those applicable to persons in the criminal justice system?**

### **3.2. Alternatives to Detention**

This section contains seven Draft Guidelines and has been heavily influenced by two recent comprehensive studies on alternatives to detention carried out by the UNHCR<sup>73</sup> and the International Detention Coalition.<sup>74</sup>

Alternatives to detention are a fast growing issue in international law. For many years, it has been established that the principles of necessity and proportionality obligate the detaining authorities to exhaust all less coercive measures before resorting to detention. For example, the UN Working Group on Arbitrary Detention recommended in 1999 that “alternative and noncustodial measures, such as reporting requirements, should always be considered before resorting to detention”.<sup>75</sup> In recent years, this principle has been increasingly put into practice and has been studied and analysed in great detail.

Draft Guidelines 32 to 35 emphasise that states have an obligation to put in place alternatives to detention, that they should have a range of alternatives in play and that they should choose the most suitable alternative, given the specific needs and circumstances of the stateless person concerned. In doing so, these Draft Guidelines reflect the UNHCR Guidelines, which recommend 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 residence in open centres (obligation to live in collective accommodation centres, where they would be allowed to leave and return during stipulated times) as viable alternatives to detention.<sup>76</sup> The list of types of alternatives to detention stipulated in Draft Guideline 35 is not an exhaustive list. It must be stated, however, that certain alternatives to detention – electronic tagging in particular – have a significantly detrimental impact on the dignity and wellbeing of the individual and should not be promoted as alternatives which fully respect human rights.

The Draft Guidelines stipulate that the application of alternatives to detention should be

subject to the same procedural and substantive safeguards as any detention regime.<sup>77</sup> Consequently, the principles of proportionality and necessity would regulate whether it is lawful to apply a particular alternative under the right to liberty. Draft Guidelines 36 and 37 provide that alternatives to detention should be subject to periodic review and should cease to be applied in cases where it is found that the administrative purpose cannot be fulfilled.

**Questions for reviewers: Should the Draft Guidelines identify and urge states not to utilise alternatives to detention which are likely to be incompatible with international human rights law? Is it accurate to imply that all alternatives to detention constitute a restriction on liberty requiring justification under Article 9 ICCPR? If not, should a distinction be made between those which constitute a restriction on liberty and those which may interfere with some other human right?**

### 3.3. Vulnerable Groups

There are four Draft Guidelines in this section, which relates to stateless persons who are particularly vulnerable to discrimination or the negative affects of detention. These Draft Guidelines do not seek to elaborate on all of the considerations which should affect a state’s dealings with such persons in the context of immigration detention, but rather to emphasise those which are most relevant. Draft Guideline 48(v) contains further considerations relevant to a state’s treatment of stateless persons belonging to vulnerable groups. Draft Guideline 39 calls on states to identify those who may belong to vulnerable groups at the initial screening stage, before detention. Draft Guideline 40 refers to “disabled persons, those with specific physical and mental health conditions and needs, victims

of trafficking, victims of torture, cruel, inhuman or degrading treatment or punishment, those belonging to minorities which are at heightened risk of discrimination in detention, children, the elderly, pregnant women and nursing mothers”,<sup>78</sup> and calls for the strongest possible presumption against their detention as well as heightened protection during detention. The UNHCR Guidelines contain recommendations on the detention of the elderly, torture or trauma victims and persons with mental or physical disability,<sup>79</sup> and women, with a particular emphasis on pregnant women and nursing mothers.<sup>80</sup> The UN Special Rapporteur on the rights of migrant workers has also made recommendations on the detention of victims of trafficking and smuggling.<sup>81</sup>

Draft Guideline 41 states that there should be the strongest possible presumption against the detention of children. There is strong international consensus on this principle which is articulated in the UNHCR Guidelines.<sup>82</sup> The CRC has some particularly relevant safeguards in this regard, including the obligation to protect children from discrimination;<sup>83</sup> the principle of the best interests of the child;<sup>84</sup> the principle that children should not be separated from their parents against their will;<sup>85</sup> and principles pertaining to the liberty of the child.<sup>86</sup> Furthermore, the UN Working Group on Arbitrary Detention has held that unaccompanied minors should never be detained.<sup>87</sup>

Draft Guideline 42 calls on states not to detain stateless asylum-seekers. This Draft Guideline is a reflection of international law and reiterates the UNHCR Guidelines.<sup>88</sup> It must be noted, however, that asylum-seekers may be detained in exceptional circumstances.<sup>89</sup>

**Questions for reviewers: Are there any additional groups which deserve a men-**

**tion in this section? Should the Draft Guidelines refer to further considerations which affect a state’s dealings with particular groups? In particular, should the Draft Guidelines specify that the duty to make reasonable accommodations may have implications for the lawfulness of the decision to detain a disabled person? Should the Draft Guidelines emphasise that the experience of detention often creates vulnerability?**

### 3.4. Ongoing Detention

The four Draft Guidelines in this section focus on the procedural guarantees from which stateless persons should benefit when in detention, the maximum time-limit for detention and the fact that detention must be subject to regular periodic review. This section of the Draft Guidelines replicates many of the standards articulated by the UN Working Group on Arbitrary Detention which has stated that:

“A maximum period of detention must be established by law and (...) upon expiry of this period the detainee must be automatically released. Detention must be ordered or approved by a judge and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. The procedural guarantee of article 9(4) of the International Covenant on Civil and Political Rights requires that migrant detainees enjoy the right to challenge the legality of their detention before a court (...) All detainees must be informed as to the reasons for their detention and their rights, including the right to challenge its legality, in a language they understand and must have access to lawyers”.<sup>90</sup>

Draft Guideline 44 states that detention should never be indefinite and that statelessness should never be a bar to release.<sup>91</sup> If immigration detention is indefinite, it does not fulfil a legitimate objective, it is unreasonable and disproportionate and consequently arbitrary. Furthermore, the detrimental impact of indefinite detention on the wellbeing of the individual (particularly the psychological impact) can amount to cruel, inhuman and degrading treatment or punishment. Consequently, the “deprivation of liberty should never be indefinite”.<sup>92</sup> Where statelessness is a bar to release, detention will be discriminatory.

Draft Guideline 45 states that detention should always be for the shortest time possible and that there should be a reasonable maximum time-limit for detention. This Draft Guideline draws from existing international principles including the jurisprudence of the UN Working Group on Arbitrary Detention which 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>93</sup> There is no international consensus on what is a reasonable maximum time-limit for immigration detention. State practice in this regard ranges from non-detention (Brazil) to 32 days (France) to six months (Hungary) to no time-limit (the UK).<sup>94</sup> Because international practice covers such a broad range, it is difficult to recommend a maximum time-limit which would be accepted as reasonable by all states. After much deliberation, the Draft Guidelines recommend a time-limit of no more than six months immigration detention, which is the period set out in the EU Returns Directive and which is applied in many countries.<sup>95</sup> The factors taken into consideration by ERT when recommending this time-limit include a balancing of the individual’s right to liberty and security of the person with

practical considerations including the likelihood of removal before the expiry of a six month period. ERT however emphasises that the shortest possible maximum time-limit for immigration detention should be implemented at all times and countries which at present have a shorter maximum time-limit, should not increase it.

This Draft Guideline does not directly address the issue of “cycles of detention”. States should not release persons from detention after the maximum time-limit has been reached, only to detain them again in a perpetual cycle.

Finally, Draft Guideline 46 calls on states to practice due diligence and to regularly review immigration detention to ensure that it remains non-arbitrary at all times. The European Returns Directive states that “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>96</sup> It also obligates states to provide for a “speedy judicial review of the lawfulness of detention”,<sup>97</sup> and to review all cases of detention at reasonable intervals.<sup>98</sup> The European Returns Directive also states that detention ceases to be justified if “it appears that a reasonable prospect of removal no longer exists”.<sup>99</sup> Similarly, 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>100</sup> and that “detention should not continue beyond the period for which the State can provide appropriate justification”.<sup>101</sup>

**Questions for reviewers: Is it appropriate for the Draft Guidelines to recommend a maximum time-limit for detention, and if so, is six months an appropriate length of time? Should the Draft Guidelines directly**

**address the issue of cycles of detention? Should Draft Guideline 46 list the steps that states should take to comply with their due diligence obligations? Should Draft Guideline 46 provide that in reviewing the legality of detention, states should have due regard to the fact that the cumulative detrimental impact of detention can render the detention disproportionate and unreasonable and/or in breach of the right to be free from cruel, inhuman and degrading treatment or punishment?**

### 3.5. Conditions of Detention

Draft Guidelines 47-49 focus on conditions of detention. These Draft Guidelines articulate general principles relating to conditions of detention without detailing the specific needs of stateless persons. The question of whether there is an additional need for a set of guidelines on the conditions of detention which caters to their specific needs and circumstances requires further exploration. In this context, ERT has addressed conditions of detention at a general level through the Draft Guidelines.

There are many authoritative standards on conditions of detention (referred to in Draft Guideline 47) which are all relevant to stateless persons. Draft Guideline 48 emphasises some of the most important international standards on conditions of detention, which should be adhered to when detaining stateless persons. It calls on states to treat detainees with dignity, and not to subject them to torture, cruel, inhuman and degrading treatment or punishment. It also provides that stateless persons should be treated without discrimination and are entitled to the same detention conditions as other immigration detainees. The Draft Guidelines therefore articulate some of the fundamental principles of international human rights law.

One of the most important principles set out in Draft Guideline 48 is that “[s]tateless persons in detention should be subject to treatment that is appropriate to their unconvicted status”.<sup>102</sup> The CPT Standards state that “a prison establishment is by definition not a suitable place in which to hold someone who is neither accused nor convicted of a criminal offence”.<sup>103</sup> Furthermore, they declare that:

“Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. For example, detained irregular migrants should have every opportunity to remain in meaningful contact with the outside world (including frequent opportunities to make telephone calls and receive visits) and should be restricted in their freedom of movement within the detention facility as little as possible.”<sup>104</sup>

Draft Guideline 48(v) states that “[r]easonable accommodation should be provided to ensure that disabled persons in detention are treated in accordance with international human rights law”.<sup>105</sup> The Draft Guidelines also state that:

“All stateless detainees should be allowed free and frequent access to their families, friends, communities, religious and visiting groups; their legal counsel; the UNHCR, the consulate of any state in order to establish nationality or the lack thereof; and other NGOs and visitors groups”.<sup>106</sup>

This Draft Guideline is particularly important to stateless persons as they should be afforded every opportunity to obtain as much evidence as possible either to confirm that they are stateless or that they may have a nationality.

**Questions for reviewers: The Draft Guidelines on conditions of detention do not detail the specific conditions to which all immigration detainees, including stateless persons, are entitled. Is this approach appropriate, or should a more detailed list of conditions be articulated in the Draft Guidelines? Do stateless persons have specific needs pertaining to the conditions of detention to which the Draft Guidelines should refer? Are the international standards stated in Draft Guidelines 47 and 48 the most important ones, or should the Draft Guidelines refer to further international standards?**

### 3.6. Foreign National Prisoners

The final section of part three of the Draft Guidelines focuses on the detention of foreign national prisoners. Foreign national prisoners are often subject to removal proceedings upon the completion of criminal sentences. Stateless foreign national prisoners are at heightened risk of lengthy or indefinite detention because of the reluctance of states to release such persons – even if they are irremovable – on political or perceived public policy grounds. In order to reduce this discriminatory treatment, ERT has recommended that foreign national prisoners are subject to statelessness determination procedures while they are serving their criminal sentence and subject to removal proceedings at least six months before their criminal sentence expires.<sup>107</sup> ERT has further recommended that further detention which serves a non-administrative purpose should be authorised and regulated by the relevant law of the land.<sup>108</sup> These recommendations have been articulated in the Draft Guideline on foreign national prisoners.<sup>109</sup>

**Question for reviewers: Is it appropriate for the Draft Guidelines to address this is-**

**sue, given that it involves a convergence of issues relating to both criminal and administrative detention?**

## 4. Part IV – Miscellaneous and Concluding Guidelines

The final part to the Draft Guidelines comprises six sections on data and statistical information, the criminalisation of immigration offences, release, compensation, exclusion clauses and the concluding guideline.

### 4.1. Data and Statistical Information

This section contains two Draft Guidelines on the maintenance of reliable and disaggregated data on stateless persons in detention and statelessness determination procedures. The UNHCR Analytical Framework states that it is important to have reliable and disaggregated data on the number of stateless persons in detention and the reasons for their detention.<sup>110</sup> ERT too has recommended that there should be more reliable and comprehensive statistics and information on statelessness;<sup>111</sup> stating that:

“[S]tatistics should be maintained in a comprehensive manner, and be disaggregated by age, sex and country/territory of origin. Further data collection which distinguishes the stateless community into the *de jure* and *de facto*, identifies the cause of *de facto* statelessness, and registers the reasons why a (...) nationality is ineffective, is needed to develop policy based on principles of human rights and equality (...) Such an approach would enable the authorities to anticipate situations in which removal will be impossible, and so minimise detention ‘pending removal’.”<sup>112</sup>

**Questions for reviewers: Is it feasible to recommend that States gather data and**

**information in the areas specified by the Draft Guidelines? Should the Draft Guidelines also recommend data collection in other areas?**

#### **4.2. Criminalisation of Immigration Offences**

This section comprises three Draft Guidelines. Most importantly, they state that “[s]tatelessness and its direct consequences including travelling without documentation should (...) not be criminalised”.<sup>113</sup> Hannah Arendt first raised concern over the criminalisation of statelessness in 1951, stating that:

“The stateless person, without right to residence and without the right to work, had of course constantly to transgress the law. He was liable to jail sentences without ever committing a crime (...) Since he was the anomaly for which the general law did not provide, it was better for him to become an anomaly for which it did provide, that of the criminal.”<sup>114</sup>

Sixty years later, this remains a valid concern and ERT has deplored the growing international trend to criminalise irregular immigration and has noted that this has a disproportionate, discriminatory impact on the stateless. ERT has therefore recommended that “immigration laws take into account the reality of statelessness and provide for exceptions in the context of stateless persons, so as not to discriminate”.<sup>115</sup>

Draft Guideline 54 restates a well-established principle of international law, that immigration detention must solely be for administrative purposes and should not have a penal element to it.<sup>116</sup>

**Questions for reviewers: Is it appropriate for the Draft Guidelines to address**

**the criminalisation of immigration offences which in turn are likely to criminalise statelessness? Should the Draft Guidelines be more descriptive of how the criminalisation of immigration offences can result in the criminalisation of statelessness?**

#### **4.3. Release**

The six Draft Guidelines in this section focus on the treatment of stateless persons after release from detention. The primary message of these Draft Guidelines is that “State obligations towards stateless persons do not cease after release from detention”.<sup>117</sup> The Draft Guidelines set out how states should treat stateless persons after release. Most importantly, stateless persons should never be released into a state of destitution.<sup>118</sup>

Draft Guideline 58 calls on states not to discriminate between stateless persons and citizens in the provision of certain socio-economic rights. This Draft Guideline draws from General Comment 20 of the Committee on Economic, Social and Cultural Rights, according to which:

“Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights”.<sup>119</sup>

The General Comment also states that “[t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation”.<sup>120</sup>



Draft Guideline 59 recommends that states allow released stateless persons the right to work. There is a very practical reason for the inclusion of this Draft Guideline, and this is to address the contradiction created by states which do not allow stateless persons to work and also refuse to provide them with adequate welfare, thus driving them into destitution. The Draft Guideline also draws from Article 17 of the 1954 Convention on the right to employment for stateless persons.<sup>121</sup>

The final two Draft Guidelines in this section recommend that states grant stateless persons leave to remain upon release, so as to break the cycle of irregularity in which stateless persons often find themselves<sup>122</sup> and that they expedite the naturalisation of stateless persons.<sup>123</sup> The Draft Guidelines therefore restate the 1954 Convention obligation of states to facilitate the naturalisation of stateless persons.<sup>124</sup> The integration and naturalisation of stateless persons, which has been recommended by ERT in *Unravelling Anomaly*,<sup>125</sup> must be seriously considered for implementation by states which are committed to finding durable solutions to statelessness.

**Questions for reviewers: Do the Draft Guidelines address the key issues with regard to released stateless persons? Are there any other issues which should be included? Is the approach adopted by the Draft Guidelines with regard to the provision of socio-economic rights, a realistic and sustainable one? Should the Draft Guidelines be concerned with the naturalisation of stateless persons? Do Draft Guidelines 56 to 61 accurately reflect the requirements of international law?**

#### 4.4. Compensation

The three Draft Guidelines on compensation provide that stateless persons who have been

unlawfully detained should be duly compensated and that such compensation should be paid on a same scale as is paid to nationals in similar circumstances. *Unravelling Anomaly* calls for compensation to be paid to stateless persons who have been unlawfully detained.<sup>126</sup> Both the ICCPR and the ECHR provide that compensation must be paid to those who have been subject to unlawful detention. According to the ICCPR, “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”.<sup>127</sup> Similarly, the ECHR states that “[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”.<sup>128</sup>

#### 4.5. Exclusion Clauses

This section relates to the exclusion clauses in the 1954 Convention, according to which, the Convention does not apply:

“To persons in respect to whom there are serious reasons for considering that:

- (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
- (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
- (c) They have been guilty of acts contrary to the purposes and principles of the United Nations”.<sup>129</sup>

While such persons are excluded from the protection of the 1954 Convention, they continue to benefit from the protection of international human rights law and must be protected accordingly. Furthermore, they must

be subject to lawful exclusion procedures. If such persons are subject to immigration detention, they should not cease to benefit from the protections contained in these Draft Guidelines.

**Question for reviewers: The exclusion clauses under the 1954 Convention are a relatively under-developed area of the law. Is there any guidance that reviewers could provide on whether ERT is addressing this issue in an appropriate manner?**

#### 4.6. Concluding Guideline

The final Draft Guideline calls on all states to “review their immigration policies and immigration detention regimes and take all necessary steps to bring them into adherence with states’ human rights obligations to protect stateless persons within

their jurisdiction and to reduce and prevent statelessness”.<sup>130</sup>

**Final questions for reviewers: Are there further important areas and issues pertaining to the detention of stateless persons which should be addressed in the Draft Guidelines? What else could the Draft Guidelines do to explain the statelessness problem? Are the Draft Guidelines adequately focused on the specific problem of statelessness, or are they too general in their application? Is it clear when the Draft Guidelines are restating international legal obligations with which states are obliged to comply, and when they are recommending good practice? Are the Draft Guidelines practicable for states? Do you have any further comments on the substance or drafting of the Draft Guidelines?**

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<sup>1</sup> Amal de Chickera is the Head of Statelessness and Nationality Projects at The Equal Rights Trust.

<sup>2</sup> The Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, 2010, available at: <http://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf>.

<sup>3</sup> The nine countries were Australia, Bangladesh, Burma, Egypt, Kenya, Malaysia, Thailand, the UK and the USA.

<sup>4</sup> The Equal Rights Trust, *Draft Guidelines on the Detention of Stateless Persons*, 2011 (The Draft Guidelines).

<sup>5</sup> Convention Relating to the Status of Stateless Persons, ECOSOC RES/526 A(XVII), adopted on 28 September 1954 and entered into force 6 June 1960 (1954 Convention), Article 1(1).

<sup>6</sup> See UN High Commissioner for Refugees, *Expert Meeting - The Concept of Stateless Persons under International Law (Summary Conclusions)*, 2010 (UNHCR Prato Expert Meeting), available at: <http://www.unhcr.org/refworld/docid/4ca1ae002.html>.

<sup>7</sup> See above, note 4, Draft Guideline 2.

<sup>8</sup> See above, note 2, Chapter 2.

<sup>9</sup> *Ibid.*, p. 82.

<sup>10</sup> See above, note 6.

<sup>11</sup> UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999 (UNHCR Guidelines), Guideline 1, available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html>.

<sup>12</sup> See above, note 4, Draft Guideline 5.

<sup>13</sup> See above, note 2, Chapters 1 and 2 generally and pp. 78-80 specifically, for an analysis and critique of the inequalities between the protection of *de jure* and *de facto* stateless persons.

- <sup>14</sup> UN Secretary-General, *Guidance Note of the Secretary General: The United Nations and Statelessness*, June 2011 (UNSG Guidance), p. 6, footnote 8, available at: <http://www.unhcr.org/refworld/docid/4e11d5092.html>.
- <sup>15</sup> See above, note 2, pp. 229 – 230.
- <sup>16</sup> See above, note 4, Draft Guideline 12.
- <sup>17</sup> Universal Declaration of Human Rights, UNGA RES/217A (III) 1948.
- <sup>18</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI) (1966).
- <sup>19</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (1966).
- <sup>20</sup> Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (1984).
- <sup>21</sup> Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX) (1965).
- <sup>22</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (1979).
- <sup>23</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158 (1990).
- <sup>24</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611 (2006).
- <sup>25</sup> Convention on the Rights of the Child (CRC), G.A. Res. 44/25 (1989).
- <sup>26</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4 November 1950.
- <sup>27</sup> American Convention on Human Rights, OAS Treaty Series, No. 46 (1969).
- <sup>28</sup> African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1981).
- <sup>29</sup> See above, note 5.
- <sup>30</sup> Convention on the Reduction of Statelessness, G.A. Res. 896 (IX) (1961).
- <sup>31</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955.
- <sup>32</sup> UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly*, A/RES/43/173, 9 December 1988.
- <sup>33</sup> UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution / adopted by the General Assembly*, A/RES/45/113, 14 December 1990.
- <sup>34</sup> See above, note 11.
- <sup>35</sup> The Council of Europe, *The CPT Standards – 'Substantive' sections of the CPT's General Reports*, CPT/Inf/E (2002) 1, Rev. 2009 (CPT Standards).
- <sup>36</sup> European Union Agency for Fundamental Rights, *Detention of Third-Country Nationals in Return Procedures*, 2010, Luxembourg, 2010, available at: [http://fra.europa.eu/fraWebsite/attachments/FRA-report-detention-december-2010\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA-report-detention-december-2010_EN.pdf).
- <sup>37</sup> HM Inspector of Prisons, *Immigration Detention Expectations: Criteria for assessing the conditions for and treatment of immigration detainees*, 2007, available at: <http://www.justice.gov.uk/inspectores/hmi-prisons/docs/immigration-expectations-2007.pdf>.
- <sup>38</sup> Human Rights and Equal Opportunities Commission of Australia, *Immigration Detention Centre Guidelines*, 2000, available at: [http://www.hreoc.gov.au/legal/submissions/Appendix\\_idc\\_guidelines.pdf](http://www.hreoc.gov.au/legal/submissions/Appendix_idc_guidelines.pdf).
- <sup>39</sup> The Equal Rights Trust, *Declaration of Principles on Equality*, 2008, Principle 2, p. 5, available at: <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>.
- <sup>40</sup> *Ibid.*, Introduction, p. 2.
- <sup>41</sup> See above, note 4, Draft Guideline 17.
- <sup>42</sup> *Ibid.*, Draft Guideline 19.
- <sup>43</sup> UN High Commissioner for Refugees, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, 2008, p. 5, available at: <http://www.unhcr.org/refworld/docid/49a28afb2.html>.
- <sup>44</sup> UN High Commissioner for Refugees, *Expert Meeting - Statelessness Determination Procedures and the Status of Stateless Persons (Summary Conclusions)*, December 2010, Para 1, p. 2, available at: <http://www.unhcr.org/refworld/docid/4d9022762.html>.
- <sup>45</sup> *Ibid.*, Para 30, p. 7.
- <sup>46</sup> See above, note 2, pp. 63 – 69.
- <sup>47</sup> See above, note 4, Draft Guideline 21.
- <sup>48</sup> See above, note 44, Para 11, p. 4.

<sup>49</sup> *Ibid.*, Para 9, p. 4.

<sup>50</sup> See above, note 43, pp. 20-21.

<sup>51</sup> See above, note 44, Para 10, p. 4.

<sup>52</sup> See above, note 4, Draft Guideline 23(ix).

<sup>53</sup> See above, note 44, Para 14, p. 5.

<sup>54</sup> See for example, the case UK of *Sivakumuran, R v Secretary of State for the Home Department* [1987] UKHL 1 (16 December 1987).

<sup>55</sup> See above, note 4, Draft Guideline 23(x).

<sup>56</sup> See above, note 44, Para 13, p. 4.

<sup>57</sup> *Ibid.*

<sup>58</sup> See above, note 17, Article 9.

<sup>59</sup> For example, Articles 9 and 10 of the ICCPR; Article 37(d) of the CRC; Article 5 of the ECHR; Articles 6 and 7 of the ACHPR; Article 7 of the ACHR; UN High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers*, 13 October 1986. No. 44 (XXXVII) – 1986; 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.

<sup>60</sup> UN Human Rights Council, *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council*, 56<sup>th</sup> Session, E/CN.4/2000/4, 1999, Annex 2.

<sup>61</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>62</sup> See above, note 11, p. 2.

<sup>63</sup> UN Human Rights Council, *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council*, 13<sup>th</sup> Session, A/HRC/13/30/2010, Para 59, available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30\\_AEV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30_AEV.pdf).

<sup>64</sup> See above, note 2, Chapters 3, 4 and 7.

<sup>65</sup> See above, note 4, Draft Guideline 27.

<sup>66</sup> European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 2008/115/EC, 16 December 2008, Article 5.

<sup>67</sup> See above, note 2, pp. 67 – 69.

<sup>68</sup> See above, note 20, Article 3.

<sup>69</sup> McBride, J., *Irregular Migrants and the European Convention on Human Rights*, Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Population, AS/Mig/Inf (2005), Para 59. McBride refers to ECHR cases *Agee v United Kingdom*, Appl. No. 7729/76, Report of the European Commission of Human Rights, 17 December 1976 and *Amuur v France*, Appl. No. 19776/92, ECHR, 25 June 1996.

<sup>70</sup> See above, note 14, p. 6.

<sup>71</sup> See above, note 66, Article 12.

<sup>72</sup> *Ibid.*, Article 13.

<sup>73</sup> UN High Commissioner for Refugees, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, PPLA/2011/01.Rev.1, 2011, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>.

<sup>74</sup> Sampson, R., Mitchell, G. and Bowring, L., *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, International Detention Coalition and La Trobe Refugee Research Centre, 2011.

<sup>75</sup> UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, E/CN.4/1999/63/Add.3, 18 December 1998.

<sup>76</sup> See above, note 11, Guideline 4.

<sup>77</sup> See above, note 4, Draft Guideline 36.

<sup>78</sup> *Ibid.*, Draft Guideline 40.

<sup>79</sup> See above, note 11, Guideline 7.

<sup>80</sup> *Ibid.*, Guideline 8.

<sup>81</sup> UN Commission on Human Rights, *Migrant Workers*, Report of the Special Rapporteur, Ms Gabriela Rodriguez Pizarro, UN Doc E/CN.4/2003/83, 2002.

<sup>82</sup> See above, note 11, Guideline 6.

<sup>83</sup> See above, note 25, Article 2.

<sup>84</sup> *Ibid.*, Article 3.

<sup>85</sup> *Ibid.*, Article 9.

<sup>86</sup> *Ibid.*, Article 37.

<sup>87</sup> See above, note 75, Para 37.

<sup>88</sup> See above, note 11, Guideline 2.

<sup>89</sup> *Ibid.*, Guideline 3.

<sup>90</sup> See above, note 63, Para 61.

<sup>91</sup> See above, note 11, Guideline 9.

<sup>92</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>.

<sup>93</sup> See above, note 60.

<sup>94</sup> See above, note 2, pp. 211 – 212.

<sup>95</sup> See above, note 66. Article 15(5) of the Returns Directive states that “each member State shall set a limited period of detention which may not exceed six months”. However, the Returns Directive does allow for detention to be extended by a maximum of twelve more months in exceptional cases where “regardless of all their reasonable efforts the removal operation is likely to last longer” (Article 15(6)).

<sup>96</sup> *Ibid.*, Article 15(1).

<sup>97</sup> *Ibid.*, Article 15(2).

<sup>98</sup> *Ibid.*, Article 15(3).

<sup>99</sup> *Ibid.*, Article 15(4).

<sup>100</sup> De Zayas, A., “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, G. et al. (eds), *International Human Rights Monitoring Mechanisms*, The Hague, 2001, pp. 67-121.

<sup>101</sup> See Human Rights Committee, *C. v Australia*, Communication No. 900/1999, ICCPR/C/76/D/900/1999, 28 October 2002, Para 8.2.

<sup>102</sup> See above, note 4, Draft Guideline 48(iii).

<sup>103</sup> See above, note 35, Para 77.

<sup>104</sup> *Ibid.*, Para 79.

<sup>105</sup> See above, note 24. This requirement is compatible with Article 14.2 of the CRPD.

<sup>106</sup> See above, note 4, Draft Guideline 48(vii).

<sup>107</sup> See above, note 2, Recommendation 12, pp. 237–238.

<sup>108</sup> *Ibid.*, Recommendation 12, pp. 238-239.

<sup>109</sup> See above, note 4, Draft Guideline 50.

<sup>110</sup> See above, note 43, pp. 20-21.

<sup>111</sup> See above, note 2, Recommendation 6, pp. 231–232.

<sup>112</sup> *Ibid.*, p. 232.

<sup>113</sup> See above, note 4, Draft Guideline 53.

<sup>114</sup> Arendt, H., *The Origins of Totalitarianism*, Harcourt, Brace & World, New York, 1966, p. 286.

<sup>115</sup> See above, note 2, Recommendation 14, p. 239.

<sup>116</sup> See above, note 35, Para 77.

<sup>117</sup> See above, note 4, Draft Guideline 56.

<sup>118</sup> *Ibid.*, Draft Guideline 57. See also note 2, Recommendation 15, p. 240.

<sup>119</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, E/C.12/GC/20, 2009, Para 7.

<sup>120</sup> *Ibid.*, Para 30.

<sup>121</sup> See above, note 5, Article 17(1), which states that “[t]he Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that

accorded to aliens generally in the same circumstances, as regards the right to engage in wage-earning employment”.

<sup>122</sup> See above, note 4, Draft Guideline 60.

<sup>123</sup> *Ibid.*, Draft Guideline 61.

<sup>124</sup> See above, note 5, Article 32, which states that “[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings”.

<sup>125</sup> See above, note 2, Recommendation 8, pp. 233 – 234.

<sup>126</sup> *Ibid.*, Recommendation 17, pp. 240 – 241.

<sup>127</sup> See above, note 18, Article 9(5).

<sup>128</sup> See above, note 26, Article 5.

<sup>129</sup> See above, note 5, Article 1(2)(iii).

<sup>130</sup> See above, note 4, Draft Guideline 66.