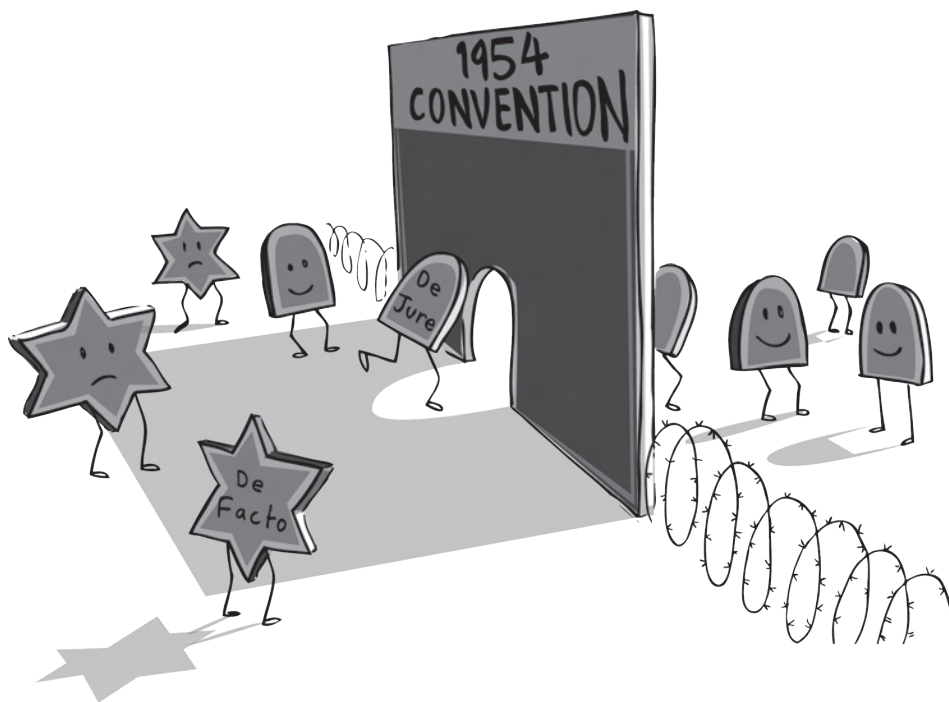


## CHAPTER 2: CRITIQUING THE CATEGORISATION OF THE STATELESS

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



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

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

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

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

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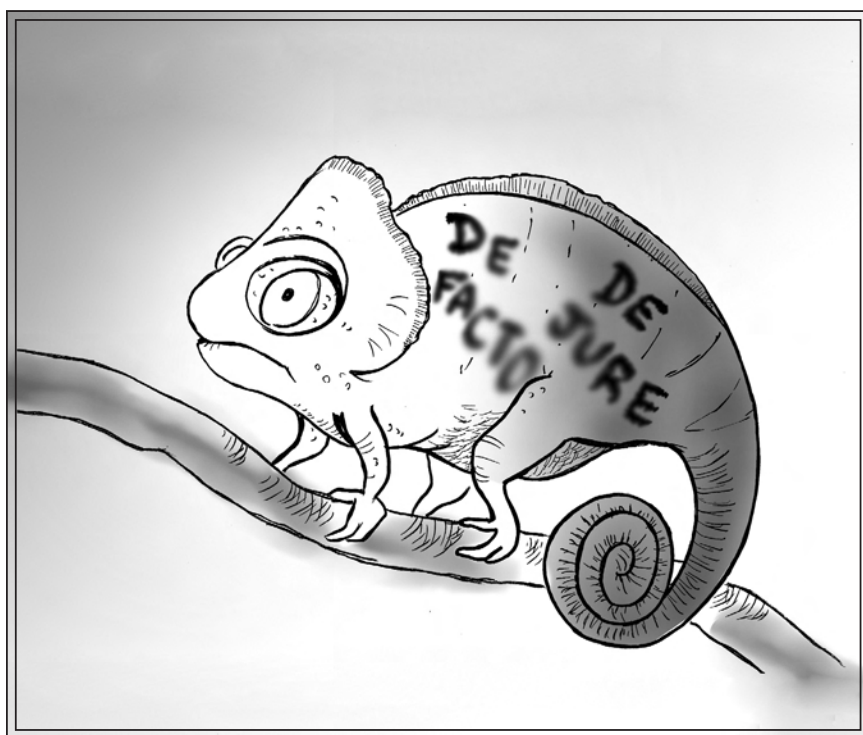
111 See above, note 3, p. 12.

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

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

## 2.1 CATEGORIES OF STATELESS PERSONS

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



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

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

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

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

**Figure 2: *De facto* Stateless Persons**

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

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

115 *Ibid.*

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

### 2.1.1 *De Jure* Statelessness

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

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

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

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

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

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

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

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

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117 CERD, Article 5(3).

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

127 *Ibid.*

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

129 Agence France Press, *Myanmar envoy brands boat people ‘ugly as ogres’*, 10 February 2009, available at: [http://www.google.com/hostednews/afp/article/ALeqM5j\\_x2afxntqJUV3PuaTz6jY12\\_Yg](http://www.google.com/hostednews/afp/article/ALeqM5j_x2afxntqJUV3PuaTz6jY12_Yg) [accessed on 10 March 2010].

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

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

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

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

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

### 2.1.2 *De Facto* Statelessness

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

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

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

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

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

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

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

133 See above, note 3, p. 11.

134 See above, note 8.

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

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

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

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

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

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

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

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135 See above, note 110, p. 61.

136 *Ibid.*, p.32.

137 *Ibid.*, p. 60.

### 2.1.2.1 Scenarios of *De Facto* Statelessness

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

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

(i) Lack of consular protection because:

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

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

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

a. According to the immigration policy of New Zealand:

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

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

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

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

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

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

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

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

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

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

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

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

142 *Ibid.*

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

144 See Article 3 of the CAT.

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



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

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

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

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

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

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

149 See Article 22 (8) of the ACHR.

150 See Article 63 (2) of the ACHR.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

157 See above, note 155, Para 7.

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

Article 15 of the Directive defines serious harm as:

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

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

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

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

159 *Ibid.*, Art. 15.

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

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

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

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

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

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

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

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163 See above, note 160, Para 5.3.

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

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

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

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

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

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

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

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

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167 See above, note 160, Para 5.2.

168 See above, note 162, Para 31.

169 See above, note 160, Para 3.7.13.

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

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

### **2.1.3 Grey Areas**

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

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

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

### Kenyan Nubians

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

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

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

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

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

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

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



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

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

### Kenyan Somalis

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

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

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173 See above, note 170.

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

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

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

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

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

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174 *Ibid.*

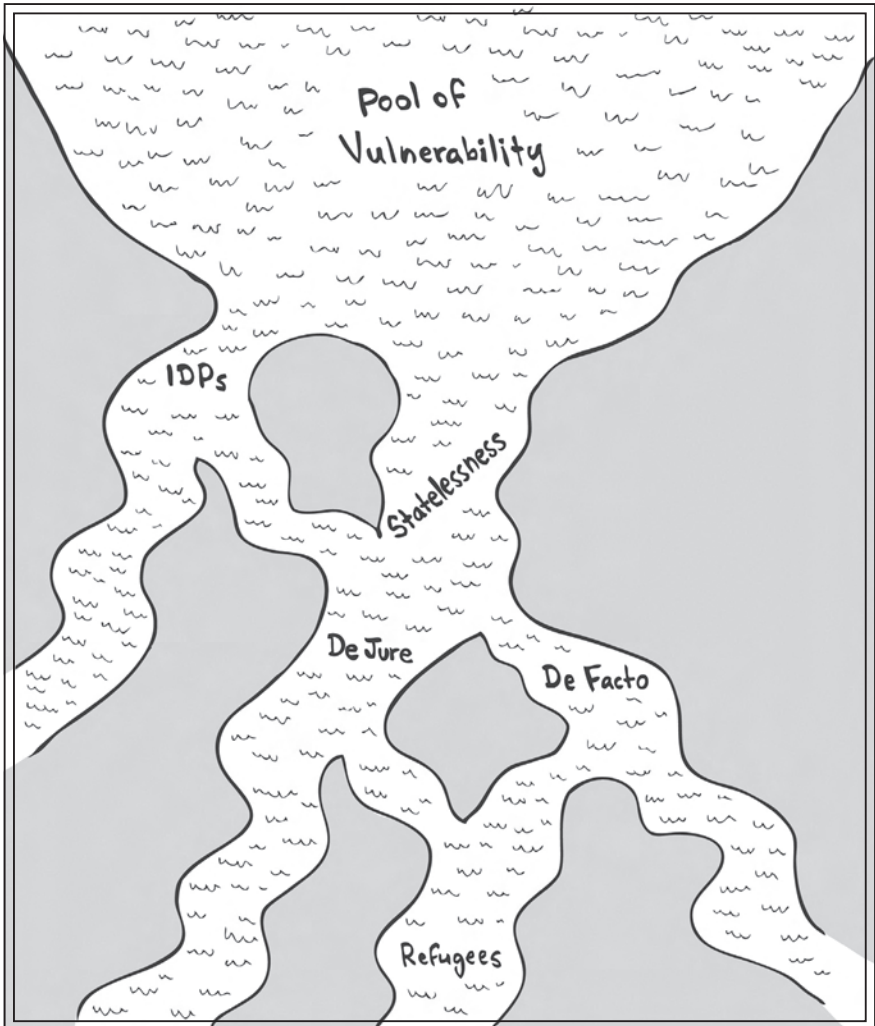
## **2.2 THE *DE JURE* - *DE FACTO* DICHOTOMY AND THE INEFFECTIVE NATIONALITY TEST**

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

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

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

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



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

### 2.2.1 The Ineffective Nationality Test

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

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

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

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

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

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

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

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175 See above, notes 8 and 9.

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

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

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

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

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

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

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

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

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

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



## Key Findings:

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