CHAPTER 8: RECOMMENDATIONS AND CONCLUSIONS

Looking at the practices highlighted in Chapter 7, be they the Spanish statelessness determination procedure, the post-\textit{Zadvydas} policy of the USA or the exploration of community alternatives to detention in Australia, it becomes evident that extensive resources are not required to address the statelessness problem in an effective manner. What is needed is awareness of the statelessness challenge, sensitivity to the human cost of statelessness, a keen sense of justice, a commitment to promoting equality and non-discrimination and some creative legal thinking. It is in this spirit, that ERT makes recommendations which it believes will contribute towards better, fairer, less discriminatory and more comprehensive protection for the stateless around the world. The following recommendations are general in nature. While some are specifically targeted at states, the UNHCR or the human rights treaty bodies, there is scope for all actors including civil society organisations, the judiciary, law and policy makers, international organisations, academics and the media to take action on each of them. It is only when the problem is approached from different perspectives and by different players that real momentum for change can be achieved.

ERT’s key recommendations are listed below, and then followed by further elaboration of each.

1. **Strengthening the International Statelessness Regime** – A global commitment is needed to eradicate statelessness and protect the stateless, not only through increased ratification of the two statelessness conventions, but also through a serious commitment by states to fulfil their obligations under the treaties. The UN treaty bodies, the UN Human Rights Council’s Special Rapporteurs and local and international NGOs all have a role to play in recommending and lobbying states to ratify the conventions. States are also urged to go beyond those clauses in the 1954 Convention which limit protection, such as the “lawful stay” clause. States are urged, in this regard, to devise criteria based on which they grant lawful stay to stateless persons who are illegally within their territory, and accordingly extend all the rights under the 1954 Convention in a non-discriminatory manner.
2. **Reaffirming the Centrality of Human Rights Principles in Protecting the Stateless** – States, the UNHCR, the UN treaty bodies, the UN Human Rights Council’s Special Rapporteurs, national, regional and international courts and organisations working on behalf of the stateless must recognise that the protection of stateless persons is primarily a human rights issue, which must be addressed through the application of human rights law, as well as through the statelessness treaty regime. A comprehensive body of jurisprudence and authoritative interpretation should be developed.

3. **Equality and Non-Discrimination** – Principles of equality and non-discrimination are of particular relevance to the stateless, and must be central to all laws, policies and practices which have an impact on them. The most desirable way of ensuring this is for states to adopt a holistic understanding of equality and non-discrimination,\(^{573}\) and incorporate it into national law through comprehensive equality legislation.

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

5. **Implementing National Statelessness Determination Procedures** – Effective and fair statelessness determination procedures must be put in place. Such procedures must not be limited to identifying only the *de jure* stateless, but should identify all persons who have no effective nation-

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Unravelling Anomaly

This would ensure that statelessness is identified in the course of immigration procedures, or when an application for political asylum is refused, thus establishing situations where an individual has no effective nationality, cannot be removed to another country, and should not therefore be detained “pending removal”. This will enable detention to be used as a last, rather than first resort. Steps must also be taken to determine whether those already in detention awaiting deportation are stateless.

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

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

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

9. The Non-Refoulement Dilemma – States must consistently and comprehensively fulfil their obligations of non-refoulement in a manner which does not undermine the liberty of those who have a right not to be refouled. Stateless persons who cannot be removed to their countries of habitual residence for fear of persecution, torture or acute discrimination, must not be kept in lengthy detention (if any detention at all is necessary and non-arbitrary).

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

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

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

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

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

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

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

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

Each of these recommendations is further elaborated upon below:

1. Strengthening the International Statelessness Regime

As was argued in Part One of this report and demonstrated in Part Two, the international statelessness regime does not adequately protect this particularly vulnerable group. Two reasons for this are the low ratification of the two statelessness conventions on the one hand, and the significant limitations in terms of the protection they afford to the stateless on the other.
Poor ratification highlights a lack of political will on the part of states to address the issue of statelessness, and reflects the fact that few states take the issue seriously enough to change national law and policy to protect stateless persons. In order to achieve wider ratification, the protection of stateless persons must be given higher priority by both international and national human rights institutions. The UNHCR’s accession drive for the statelessness conventions has borne important results but more remains to be done. The UN human rights treaty bodies and relevant special rapporteurs must urge states to ratify the conventions. Similarly, civil society actors including national and international NGOs must lobby the governments of the countries they work in to ratify the statelessness conventions.

But increased ratifications are not enough. As has been demonstrated in this report, states which are party to the statelessness conventions such as the UK and Australia have fallen short of their protection obligations. Ratification of the conventions must therefore be accompanied by a genuine commitment to protect the stateless, through identifying them, treating them equally and integrating them into national societies.

In this regard, it is essential that governments ensure protection to stateless persons who may be in the country illegally. The fact that many of the protections offered by the 1954 Convention only apply to stateless persons who are lawfully staying in the territory of a third country is cause for grave concern. This further limits the scope of application of the 1954 Convention, leaving more vulnerable persons outside its protection. Ideally, a similar provision to Article 31 of the Refugee Convention should have been incorporated into the statelessness conventions in order to ensure that the illegal entry and stay of stateless persons who have no means of obtaining the necessary travel documents to travel legally is not criminalised. In the absence of such a provision, and to fill the resulting protection gap, the UNHCR and the UN human rights system should develop standards to protect such groups, which should be implemented by states in their immigration policies.

2. Reaffirming the Centrality of Human Rights Principles in Protecting the Stateless

As was argued in Part One, the “statelessness world” and the “human rights world” have not complemented each other as they ideally should, to the detriment of stateless persons. This compartmentalisation has negatively affected how international human rights principles are typically applied. As human
beings, the stateless must be afforded the equal protection of international human rights law in a non-discriminatory manner. Speaking on World Human Rights Day, the UN High Commissioner for Human Rights said:

*Twenty-six of the Universal Declaration’s 30 Articles begin with the words “Everyone...” or “No one ...” Everyone should enjoy all human rights. No one should be excluded. All human beings are born free and equal in dignity and rights. Non-discrimination must prevail.*

The human rights treaty bodies, national, regional and international courts, states, and NGOs working on behalf of the stateless, should see statelessness as a human rights issue, which must be addressed through the prism of well established human rights principle. There have been positive developments in this regard.

On the one hand, the UNHCR has recently emphasised in a statement to the UN Human Rights Council the centrality of human rights to its entire mandate, and stated that the Human Rights Council and the UNHCR share the same fundamental objective of *“promoting and protecting the safety and dignity of the individual”*. The UNHCR further confirmed that it *“promotes a rights based approach to the protection of persons under its mandate”*, which includes the stateless; and that it recognises that:

*Human rights are applicable to all, everywhere ... Yet, refugees and stateless persons are often perceived to have fewer rights than nationals. Persons in need of international protection often face discrimination, intolerance and xenophobia, affecting their access to safety.”*

This statement pledges to integrate human rights into all aspects of UNHCR work, and to promote the protection of persons of concern through relevant human rights mechanisms as well. In this regard, the UNHCR states that:

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576 Ibid.
The resolutions and decisions of the Council, including the recommendations adopted at the outcome of the Universal Periodic Reviews are contributing to the strengthening of the protection of persons under UNHCR’s mandate ... [and UNHCR] is looking forward to a continued and close coordination with the Human Rights Council.\textsuperscript{577}

On the other hand, the treaty bodies now include the stateless in their general comments and country specific observations.\textsuperscript{578} This must continue to be done in a more systematic and comprehensive manner, including through greater cooperation with the UNHCR. It is of particular importance that UN Special Rapporteurs who have a mandate which is relevant to the stateless (for example, the Special Rapporteur on the Rights of Migrants) play a key role in emphasising the human rights challenge of statelessness and lobbying for greater protection.

But recognition of statelessness as a crucial human rights issue in itself is insufficient. Authoritative comment and jurisprudence of the treaty bodies and international and regional courts respectively must develop a strong set of principles and standards which recognise the human rights of stateless persons and the duty of states to promote, protect, respect and fulfil them. Such standards must be transposed into the laws and policies of individual states. National judiciaries, policy makers and legislators have specific responsibilities in ensuring the effective transposition of such standards. As the Human Rights Committee has observed, “Article 2 [of the ICCPR] requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.”\textsuperscript{579}

National judiciaries can play an extremely influential role, as is clear from the Spanish Supreme Court’s recent decisions on the Saharwis, which were discussed in Chapter 7 above. The more judiciaries apply international human rights norms and standards, the more universally entrenched they be-

\begin{itemize}
\item \textsuperscript{577} Ibid.
\item \textsuperscript{578} See the UN Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), E/C.12/GC/20, 25 May 2009, Para 30; See also the UN Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant (1986), Paras 1-2.
\item \textsuperscript{579} UN Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26/05/2004, Para 7.
\end{itemize}
come. Judicial attitudes and perceptions are therefore extremely relevant to the rights of the stateless.\textsuperscript{580}

Likewise, the role of policy makers and legislators is crucial. The Australian example of creating a new class of visa (The Removal Pending Bridging Visa) specifically for persons who may otherwise be indefinitely detained due to their statelessness is an example of how policy can be changed to protect the rights of stateless persons.\textsuperscript{581}

The performance of national legal systems applying international standards should be monitored, not only by the Treaty Bodies and the UNHCR, but also by international and national NGOs. A discourse on the human rights protection of stateless persons should be encouraged, through the publication and dissemination of good practices adopted by states.

\textbf{3. Equality and Non-Discrimination}

As has been argued throughout this report, principles of equality and non-discrimination are particularly relevant to statelessness and must be central to all laws, policies and practices which have an impact on the stateless.\textsuperscript{582}

The nexus between statelessness and discrimination is evident from this report. In the worst case, stateless persons are members of vulnerable and discriminated against minorities who have been rendered stateless through targeted laws and policies which are clearly discriminatory. However, even in situations where discrimination is not overt and acute, stateless persons face discrimination which is more difficult to identify, but nonetheless present. Such discrimination may be direct or indirect, deliberate or accidental; it may be the result of institutional indifference or oversight, or the failure to anticipate how a particular policy would impact on persons with ineffective

\textsuperscript{580} The UK House of Lords decision in the Belmarsh case is an example of the judicial application of the principle of non-discrimination to a situation in which non-nationals but not nationals were detained. Whilst this aspect of the judgment must be viewed as a positive development which enhances the rights of stateless persons in detention, it must be borne in mind that the judgment left room for the levelling down of rights of all persons instead on demanding the levelling up of the rights of non-nationals. See A and others v Secretary of State for the Home Department, [2004] UKHL 56.

\textsuperscript{581} However, as mentioned in Section 7.3 above, the bridging visa is not being used any more.

\textsuperscript{582} As discussed in Section 1.2.2 in Part One above, the principles of equality and non-discrimination do allow for limited exceptions in strictly defined contexts.
nationality. Whatever shape or form it takes, discrimination is a reality that shapes most stateless persons’ lives. Positive steps must therefore be taken to protect stateless persons; to ensure that laws and policies do not deliberately or inadvertently discriminate against them; to promote the equality of the stateless and ultimately to enable them to lead secure and fulfilling lives.

It may be useful to reflect on the elements of the right to equality, which were discussed in Part One of this report, and apply each of them to the stateless, as they, like all other persons, have entitlement to each element of the right:

- recognition of the equal worth and equal dignity of each human being;
- equality before the law;
- equal protection and benefit of the law;
- to be treated with the same respect and consideration as all others;
- to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.  

While principles of national sovereignty may allow some exceptions, these should be defined narrowly.

The most desirable way of ensuring that these entitlements are addressed in a non-discriminatory manner is through states adopting a unified understanding of equality and non-discrimination, as set out in the Declaration of Principles on Equality, and incorporating it into national law through comprehensive equality legislation. Such an approach would not only benefit the stateless, but all vulnerable individuals and communities within society at large. When considering the vulnerabilities of the stateless, this would invariably contain an element of positive action, which “includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality”.  

One example of how positive action could benefit the stateless at a proce-

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584 Ibid., Art. 3.
dural level is the implementation of fast track citizenship or naturalisation processes specifically catering to the stateless. At a substantive level, stateless communities which have historically suffered inequality and discrimination must be targeted by policies which aim to provide them with the skills, resources and support of which they have been consistently deprived.

4. Abolishing Hierarchies within Statelessness

As this report has emphasised, the 1954 and 1961 Conventions only apply to *de jure* stateless persons. Even though the final act of the 1961 Convention recommends that as far as possible protection should also be offered to *de facto* stateless persons, there is no legal obligation on state parties to do so. In reality, the human rights vulnerabilities of stateless persons, particularly those who cross international borders, are not defined by whether the person’s statelessness is *de jure* or *de facto*. Consequently, the international statelessness regime should offer equal protection to both groups.

The *de jure* – *de facto* dichotomy, which creates a hierarchy within statelessness and results in discrimination, must be replaced by a more comprehensive, inclusive and fair definition of statelessness, which promotes equal and effective protection for all. Statelessness is a violation of the right to a nationality; which in order to be meaningful, must be interpreted as the right to an “effective” nationality, which can be enjoyed by the individual both within their country of habitual residence and outside it. This is why ERT has argued that the definition of statelessness should ideally be based on the notion of ineffective nationality. Through approaching statelessness in such a manner, the existent hierarchy between *de jure* and *de facto* stateless persons will be deleted and all stateless persons will be eligible for international protection.

While promoting an “ineffective nationality” test, ERT is aware of the limitations of this approach. It must be precise in its limits and contours. The concept is in its infancy and must be developed into a robust principle through an incremental process of consultation, authoritative opinion and jurisprudence. In Part One of this report, a six-pronged ineffective nationality test which can be utilised to identify cases of statelessness (*de jure* or *de facto*) both within the country of habitual residence and in other countries, was offered as a starting point.

This is a long-term goal. In the interim, greater protection must be provided for the *de facto* stateless through progressive policies and practices such as
the Mexican process for identifying and protecting *de facto* stateless. Furthermore, organisations which work on behalf of refugees and the stateless must include the *de facto* stateless within their mandates.

In a welcome development, the UNHCR has begun reviewing the definitions of *de jure* and *de facto* statelessness. ERT argues that a short-term solution to the present protection gap can be achieved by progressively broadening the scope of the present *de jure* statelessness definition, so that groups which are generally identified as *de facto* stateless are brought within its scope. The task should be approached incrementally, through the identification of actual situations in which nationality is ineffective, and protection is consequently required.

5. Implementing National Statelessness Determination Procedures

The 1954 Statelessness Convention does not explicitly obligate states to put statelessness determination procedures in place. However, this requirement is implicit in the text, for if states are to fulfil their convention obligations to stateless persons who are within their territory, they must first be able to identify who they are. Consequently, it is surprising that Hungary and Spain are the only countries to have legislated to create statelessness determination procedures.

Until June 2011, the presidency of the European Union will be held by Belgium, Hungary and Spain. Given the progressive attitudes in the last two countries towards statelessness, and Belgium’s good practices pertaining to the administrative detention of immigrants, these three countries should lead in a process of developing EU policy and legislation, to mandate statelessness determination procedures throughout the Union.585

If the stateless are to be afforded the protection they require, it is essential that stateless persons are identified as such, as early as possible. This means that states must implement effective and fair statelessness determination procedures, not only where protection is actively sought on grounds of statelessness, but also where an immigration application is refused and when an application for recognition as a refugee is rejected. Furthermore, the status

of persons already in detention pending deportation must be assessed as a matter of priority.

As this report has shown, the lack of such procedures may result in unnecessary and lengthy detention. An additional problem is that without an opportunity to apply for protection as stateless persons, they are often diverted into general asylum procedures, even where they have no well founded fear of persecution. This can result in the refusal of an asylum application, loss of any legal immigration status, and long-term detention “pending removal”. It is therefore essential that the stateless are identified as a distinct category with special immigration and protection needs.

Under Article 11 of the 1961 Convention, the UNHCR is mandated with the role of examining the claims of persons seeking the benefit of the Convention and assisting them to bring their applications before the relevant authorities. The implementation of this mandate must be strengthened.

Ideally, statelessness determination procedures should contain clear, protection-oriented rules and well-defined responsibilities for the authorities; have a limited time period, to preclude long delays when multiple states are asked to confirm that an individual is not their national. Only states with which the individual has clear ties in terms of past habitual residence, birth or descent should be asked to confirm or deny nationality, and if they do not respond within a reasonable timeframe, the applicant should be presumed to have no nationality and be recognised as stateless.

6. Information and Statistics on Stateless Populations

The failure of all the states of ERT’s research to maintain statistics related to stateless persons, including those in detention within their jurisdiction, indicates the degree to which the issue of statelessness is ignored at national levels. For example, the UKBA told ERT that no comprehensive statistics are maintained on the reasons why immigration detainees could not be removed, even in the case of those who had been detained for over six months.


587 See UK Border Agency response to The Equal Rights Trust Questionnaire, 1 April 2009.
These statistics should be maintained in a comprehensive manner, and be disaggregated by age, sex and country/territory of origin. Further data collection which distinguishes the stateless community into the *de jure* and *de facto*, identifies the cause of *de facto* statelessness, and registers the reasons why a theoretical nationality is ineffective, is needed to develop policy based on principles of human rights and equality. The reasons for ineffective nationality will range from the lack of diplomatic ties between states and absence of consular protection to bars to *refoulement*. Such an approach would enable the authorities to anticipate situations in which removal will be impossible, and so minimise detention “pending removal”. For example, if the statistics reveal that all nationals from Algeria or Iran face major barriers to obtaining travel documents from their consulates in the UK, such persons should not be detained while they are waiting for documents that are unlikely to be issued.

7. The Stateless and Refugees

As was argued in Part One of this report, there is a strong link between refugees and the stateless. Some refugees are *de jure* stateless. Others may have a legal nationality, but because they have a well founded fear of persecution at the hands of their states, they do not benefit from their protection, and therefore are *de facto* stateless. This connection was the basis on which the 1951 and 1954 Conventions were drafted, and the subsequent divergent routes taken by the two conventions – i.e. the considerable development of the refugee mechanism and the stagnation of the statelessness mechanism, has been detrimental to stateless populations.

It has also been detrimental to refugees. As immigration regimes have become more restrictive, more asylum seekers with strong refugee claims have been refused protection under the 1951 Convention. Once their claims are rejected, they are often required, under national immigration laws, to leave the country. Thus they become removable but may have no country to which they may safely, legally or practically be returned. The lack of a statelessness determination mechanism which would work as a safety net for such persons is cause for grave concern.

The UNHCR has a vital role in this regard. As a protection agency to both the stateless and refugees, the UNHCR has to give more prominence to statelessness as a major protection issue for the international community, instead of one which can be marginally accommodated at the margin of refugee protection. UNHCR country offices must also begin prioritising statelessness and
doing more protection work on behalf of stateless persons through taking up individual cases. The UNHCR Executive Committee has noted

[T]he close connection between the problems of refugees and of stateless persons and invited States actively to explore and promote measures favourable to stateless persons, including accession to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, as well as the adoption of legislation to protect the basic rights of stateless persons and to eliminate sources of statelessness...588

States too must recognise the strong link between refugees and the stateless, and establish institutions with a common mandate towards both vulnerable groups. The Belgian Commissioner General for Refugees and Stateless Persons, the French Office for the Protection of Refugees and Stateless Persons and the Spanish Office of Asylum and Refuge (which also conducts statelessness determination procedures) are all positive examples in this regard.589

8. The Integration and Naturalisation of Stateless Persons

Statelessness is a problem which should be resolved through the formal, legal and practical integration of the stateless into existing societies. The Spanish and Mexican procedures discussed above are examples of how stateless persons can be given the legal opportunity to integrate themselves into society, with the ultimate possibility of naturalisation.

The 1954 Convention contains a number of provisions which assist integration, for example by obligating state parties to extend administrative assistance to the stateless and issue them with identity papers (regardless of legal

588 See UNHCR Executive Committee Conclusion 50 of 1988.

status)\textsuperscript{590} and travel documents,\textsuperscript{591} as well as to facilitate their naturalisation.\textsuperscript{592} It also requires the treatment of stateless persons to be at least as favourable as that accorded to nationals in respect to the freedom of religion, artistic rights and industrial property, access to courts, rationing, elementary public education, public relief and assistance, labour legislation and social security (subject to state discretion in the case of non-contribution benefits).\textsuperscript{593}

In Belgium, there is a fast-track naturalisation process for refugees and stateless persons. Accordingly, after residence in the country for 2 years, a refugee or stateless person may be naturalised.\textsuperscript{594} Whilst enabling the stateless person to acquire a nationality through naturalisation should be the ultimate objective, interim measures to ensure that stateless persons can live in, benefit from and contribute to society before naturalisation are also needed. The stateless must be allowed access to education, work, healthcare and to open bank accounts etc. The Australian solution of the Bridging Visa is a useful interim measure along the road to integrating the stateless.

9. The Non-Refoulement Dilemma

As stated in part one above, the principle of \textit{non-refoulement} or non-return to a situation of persecution or irreparable harm is an established part of international human rights law, which places limits on the exercise of state sovereignty to remove non-citizens from its territory.\textsuperscript{595}

The human rights law principle of \textit{non-refoulement} is particularly relevant to stateless persons in security detention who are not recognised as refugees,

\textsuperscript{590} See Article 25 and 27 respectively of the 1954 Convention.

\textsuperscript{591} See Article 28 of the 1954 Convention. Although the requirement to issue travel documents applies only to stateless persons lawfully staying within the state territory, states are encouraged to issue travel documents to all stateless persons regardless of status, and to “give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence”.

\textsuperscript{592} See Article 32 of the 1954 Convention.

\textsuperscript{593} See Article 4, 14, 16, 20, 22(1), 23, and 24 respectively of the 1954 Convention.


\textsuperscript{595} See Section 2.1.2.1 of Part One above for a more detailed discussion on \textit{non-refoulement}.
or barred by the exclusion clauses of the Refugee Convention and the 1954 Convention.\textsuperscript{596} However, the problem often faced by stateless persons is that even though they may benefit from the protection of the principle of \textit{non-refoulement}, the alternative they are often afforded is one which also violates their rights – continued and often indefinite detention.

States must therefore fulfil their obligations of \textit{non-refoulement}, in a manner which does not further victimise the “beneficiaries” of non-return, by placing them in indefinite detention. Particularly in the context of security detention which has created \textit{de facto} statelessness, there is an added responsibility on states to release such persons from detention without removing them to their countries of habitual residence where they risk torture or persecution.

\textbf{10. Protecting Those Who Do Not Have Consular Protection}

A significant problem faced by stateless persons in an immigration context, which is heightened in an immigration detention context, is that there is no authoritative party which would exclusively represent their interests. International law has been built on diplomatic exchanges between sovereign nations, and the role of embassies and consulates which represent their citizens in foreign countries is essential to the fine balance of international law. Indeed, the 1963 Vienna Convention on Consular Relations provides that if so requested, the competent authorities of the receiving state shall without delay, inform the consular post of the sending state that its national has been deprived of his or her liberty.\textsuperscript{597}

The traditional role of the national consulate in protecting the rights of its citizens in foreign nations is a reality that most people take for granted. The absence of any equivalent protection for one of the most vulnerable groups further victimises them. While the \textit{de jure} stateless with no legal nationality, have no consular protection \textit{per se}, the \textit{de facto} stateless in this context would be those whose countries do not have diplomatic ties or a consulate for the country concerned, as well as those whose consulates are indifferent to their case. Either way, the vulnerability of stateless persons in detention is heightened by the fact that they do not benefit from any protection equivalent to consular protection in their time of need.

\textsuperscript{596} See Article 1 (F) of the Refugee Convention, and Article 1 (2) (iii) of the 1954 Convention.

The position of a poor country which does not have the resources to provide consular protection to its citizens throughout the world is particularly compelling. It is a situation in which *de facto* statelessness can arise despite the best intentions of the state concerned. In the absence of consular protection for the stateless, the international community must act on their behalf. One option which should be explored is for the UNHCR or another international organisation to take on this role.

11. Adopting International Standards on the Detention of Stateless Persons

The lack of international standards pertaining to the detention of stateless persons is a significant problem which must be addressed. Such standards would apply international human rights law to their situation, and would assist policy makers, legislators and the judiciary around the world, through providing guidance on this complex and neglected field.

Most importantly, these standards should include the *de facto* stateless within their definition of statelessness. They should detail when detention may exceptionally be permissible, when it is not, and set out the minimum standards to which detention conditions should adhere. Any detention which is permissible, should be a last resort after all alternatives have been exhausted and should adhere to the principles of proportionality, non-discrimination, necessity and non-arbitrariness as discussed in part two above. The guidelines should impose procedural requirements on countries which detain the stateless, including the obligation to determine statelessness and verify the likelihood of removal before such detention. Finally, it must be ensured that detention conditions are of an acceptable standard, that stateless persons are not detained in criminal detention facilities, that children are not detained and that families are not split up due to detention.

The UNHCR Guidelines on the Detention of Asylum Seekers is a useful document upon which a complimentary set of guidelines on the detention of stateless persons can be modelled. Given the position and mandate of the UNHCR, it is possibly in the best position to draft an authoritative, comprehensive and progressive set of guidelines in this regard. Input from the human rights treaty bodies, UN Working Group on Arbitrary Detention and NGOs which work on behalf of the stateless and detainees would further enhance the quality and protection scope of the document.
12. Promoting Alternatives to Detention in an Immigration Context

While many countries in the world are strengthening their immigration detention regimes, there are some which do not detain irregular immigrants. One such example is Brazil.\textsuperscript{598} The UNHCR guidelines on the detention of asylum seekers spell out exceptional circumstances in which detention of asylum seekers may be permissible.\textsuperscript{599} However, even in such circumstances, provision for detention must be clearly prescribed by national law, there should be a presumption against detention and viable alternatives must be applied first.\textsuperscript{600} The Working Group on Arbitrary Detention has recommended that “alternative and noncustodial measures, such as reporting requirements, should always be considered before resorting to detention.”\textsuperscript{601} Furthermore, ERT recommends that there must be a definite upper time-limit on such detention. It is felt that the maximum time-limit for detention should in no event be more than six months; a term which should be seen as the total cumulative period of detention pending deportation – including detention in different facilities and detention whilst legal proceedings are on going.

The practice in the UK, which allows for detention for a “reasonable time” based on the \textit{Hardial Singh} principles,\textsuperscript{602} must be discarded as this enables the immigration authorities to continue detaining persons until individually challenged in court. This results in uncertainty and inequality before the law, as detainees who do not have the resources, connections or wherewithal to challenge their detention, can remain in detention for far longer periods than would be normally allowed by the courts.

The mandatory detention of stateless persons is a particularly harmful and discriminatory practice which must also be abolished. In the case of foreign

\textsuperscript{598} See International Detention Coalition, Meeting Notes, Human Rights Council 12\textsuperscript{th} Session, Migrants in Detention Meeting, 17\textsuperscript{th} September 2009, available from The Equal Rights Trust.

\textsuperscript{599} See Guideline 3 of the UNHCR Guidelines. These include situations in which it is necessary to verify identity, determine the elements on which the claim to asylum is based, cases in which asylum seekers have destroyed their documents or engaged in fraud to mislead the authorities, and in the interests of national security and public order. See also UNHCR EXCOM Conclusion No. 44 (XXXVII).

\textsuperscript{600} \textit{Ibid.}


\textsuperscript{602} See discussion in Section 4.1.3.2 of Part Two above.
national prisoners, ERT submits that removal proceedings should begin at least six months before their criminal sentence ends, with the presumption that if removal cannot be secured by the time the full sentence has been served, removal is highly unlikely if not impossible and further detention should not be authorised. In such a context, if any further detention serves a different purpose in the name of national security or public order, it should be authorised by the criminal law applicable to all persons within the country. The higher procedural standards and burden of proof as well as appeal procedures in criminal law would minimise the possibility of discrimination, and provide persons so detained, a greater opportunity to benefit from due process of the law.

13. The Non-Deportation of Persons Who Have Been Resident in a Country since Early Childhood

There are three compelling arguments to be made against initiating deportation proceedings against persons who first arrived in a country as minors and have spent the majority of their lives there. Firstly, they would have little or no ties with their countries of birth, and may not even speak the language. Consequently, demanding that such persons return to their countries of birth in their adult lives to start afresh is an unreasonable stance to take. Furthermore, such a drastic measure could result in the splitting up of family and may therefore constitute a violation of the right to private and family life. The European Court of Human Rights has developed a body of principle on when the expulsion of long-term residents amounts to such a violation. Accordingly, importance is attached to the degree of social integration of the persons concerned. In the case of Slivenko v Latvia, the court held that the forced removal of a 40-year-old who had been resident in Latvia since she was one month old, and her daughter who was born in the country, was in violation of their right to a private life. (It did not constitute a violation of their right to family life because the family was not split up.)

Secondly, in many instances the persons concerned fled their country as children with their families to escape discrimination and persecution of some sort. Consequently, whilst difficult to establish due to the passage of time,

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603 See for example, Article 8(1) of the ECHR, and Article 23 of the ICCPR.
removing such persons back to those countries in their adult lives may be in violation of *non-refoulement* obligations.

Thirdly, there is a strong argument to be made that those who have lived in a particular country since childhood are products of that society. Consequently, any bad qualities they picked up along the way including criminal tendencies, reflect the society of their adopted country as much if not more than their country of habitual residence. Removing such persons to third countries is not justifiable in that context.

The cumulative effect of these three arguments is that when persons who have moved to a third country as children and have proceeded to live the majority of their lives in that country, it should be considered as their country of habitual residence. Accordingly it should have heightened obligations by the individual including a duty not to deport them to countries with which they have extremely tenuous ties at best.

14. Immigration Laws with Harsh Penalties Should Be Reviewed

Many nations criminalise illegal immigrations, and sanctions often take the form of fines and/or detention. For example, the Malaysian Immigration Act provides for the caning of illegal immigrants. Under UK law, illegal entry and stay can be penalised with a fine of £5,000 or imprisonment of no more than six months.606

The growing global trend of criminalising irregular immigration is a particularly disturbing one. While many vulnerable individuals and groups are victimised as a result, the impact of such laws on the stateless is disproportionately large. This is because many stateless persons are unable to obtain the travel documents necessary to travel legitimately. Consequently, ERT recommends that such immigration laws take into account the reality of statelessness and provide for exceptions in the context of stateless persons, so as not to discriminate. Additionally, particularly harsh penalties such as caning in Malaysia should be completely abolished.

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606 See Section 24(1) of the 1971 Immigration Act, United Kingdom.
15. Release into Enforced Destitution

This report has argued that stateless persons should not be subject to unnecessary, arbitrary and thus illegal detention. Equally importantly, stateless persons who are released and cannot be removed should not be denied those social and economic rights to which they are entitled: basic welfare, the right to work, education, access to healthcare, etc. Persons interviewed for this report spoke of the terrible psychological impact of being released into a situation of limbo, where you are not allowed to work, access healthcare, open a bank account or do any of the things that the society at large takes for granted.

When released, stateless detainees should be treated equally and in a non-discriminatory manner; it is of paramount importance that they are given a legal status, and enabled to live fulfilling lives.

16. Continued and Unfounded Security Detention Must End

Those who have been cleared for release should not remain in detention, and should be allowed to enter and live in a country in which they are not at risk. The U.S. case of Guantanamo Bay is an example of how a security detention regime can aggravate, or even lead to, statelessness.

ERT believes that the USA is not doing enough in this regard. The commitments of small states such as Palau to take in cleared for release stateless Guantanamo Bay inmates must be applauded, but this should not camouflage the fact that it is the USA which is principally responsible for the protection of such persons. Consequently, ERT urges the U.S. Government to consider in the very least, temporary admission onto U.S. soil until safe third countries for their permanent resettlement are found.

17. Compensation for Stateless Detainees

Compensation should be provided to stateless persons who have remained in detention for unnecessarily lengthy times as a result of a failure by the authorities to identify their lack of an effective nationality. Both the ICCPR and the ECHR provide that compensation must be paid to those who have been subject to unlawful detention. According to Article 9 (5) of the ICCPR, “[a]nyone who has been the victim of unlawful arrest or detention shall have an
enforceable right to compensation”. Similarly, the ECHR states that “everyone who has been the victim of arrest or detention in contravention of the provisions of this Article [Article 5 of the ECHR] shall have an enforceable right to compensation”.

The non-existence of a reasonable prospect of removal must be identified early on in any form of detention, be it criminal, security or immigration. Stateless detainees who suffer lengthy and even indefinite detention because of a failure of the authorities to do so must be compensated adequately.

607 See Article 9 (5) of the ICCPR.
608 See Article 5 (5) of the ECHR.