

THE EQUAL RIGHTS TRUST GUIDELINES TO PROTECT STATELESS PERSONS FROM ARBITRARY DETENTION

Commentary by Amal de Chickera*

This commentary to The Equal Rights Trust *Guidelines to Protect Stateless Persons from Arbitrary Detention* (The *Guidelines*) has been written with the objective of informing the reader who would like to learn more about the substance, rationale and legal principle behind each guideline. As stated in the Preamble to the *Guidelines*:

The Guidelines do not attempt to develop new legal principle. They reflect and apply the existing human rights obligations of states towards stateless persons within their territory and subject to their jurisdiction. The Guidelines also draw from international good practice, and recommend actions which go beyond the minimum obligations of international human rights law. Such recommendations provide guidance on how states could offer better protection to stateless persons within their territory and subject to their jurisdiction.

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This commentary presents the human rights principles - international, regional and national law and jurisprudence - that inform each *Guideline*. Where the *Guidelines* reflect good practice, the commentary elaborates on this.

The commentary on *Guideline 12* below lists the primary sources of law that the *Guidelines* and this commentary draw from. In researching both for the purposes of drafting the *Guidelines* and the commentary, we drew heavily from a few select texts – UN and NGO guidelines and reports – that provide insightful and authoritative analysis and interpretation of these sources of law, and are particularly relevant to the subjects of statelessness, detention and equality. While this commentary provides a reasonably comprehensive overview of the legal principle behind each *Guideline*, the reader is therefore encouraged to directly refer these other texts as well, which offer a wealth of information and guidance on the subject matter:

- The Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, (**Unravelling Anomaly**).¹
- UN High Commissioner for Refugees, *Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, (**UNHCR Definition Guidelines**).²

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

2 UN High Commissioner for Refugees, *Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, 20 February 2012, HCR/GS/12/01, available at: <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

- UN High Commissioner for Refugees, *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, (UNHCR Procedure Guidelines)*.³
- UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, (UNHCR Detention Guidelines)*.⁴
- International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention, (IDC Handbook)*.⁵
- UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau*.⁶
- The Equal Rights Trust, *Declaration of Principles on Equality*.⁷
- UN Human Rights Council, *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council, 13th Session, A/HRC/13/30/2010*.⁸

3 UN High Commissioner for Refugees, *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person*, 5 April 2012, HCR/GS/12/02, available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html>.

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

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

6 UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau*, 20th Session, A/HRC/20/24/2012.

7 The Equal Rights Trust, *Declaration of Principles on Equality*, 2008, available at: <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>.

8 UN Human Rights Council, *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council, 13th Session, A/HRC/13/30/2010*.

- International Commission of Jurists, *Migration and International Human Rights Law: Practitioner's Guide No. 6, (ICJ Practitioner's Guide)*.⁹

There are sixty-two *Guidelines* in total – arranged in four parts. Part One focuses on definitions, the scope and interpretation of the *Guidelines* and the basic principles they espouse. Part Two focuses on the identification of stateless persons and Part Three on the detention of stateless persons. Part Four is a series of additional *Guidelines*.

This commentary follows the same structure as the *Guidelines*, and for ease of reference, each *Guideline* is presented directly above the commentary related to it. There are some *Guidelines* which do not require commentary – as they are self-explanatory – but these *Guidelines* are presented in the text as well.

PART I – DEFINITIONS, SCOPE, INTERPRETATION AND BASIC PRINCIPLES

1.1. DEFINITIONS

There are six *Guidelines* in this section, which define the key terms utilised in the *Guidelines*. Standard legal definitions should be utilised for other technical terms found in the *Guidelines*.

⁹ International Commission of Jurists, *Migration and International Human Rights Law: Practitioner's Guide No. 6*, 2011, available at: <http://www.icj.org/dwn/database/PGNo6-ElectronicDistribution.pdf>.

Guideline 1: *A stateless person is defined under international law as a person “who is not considered as a national by any state under the operation of its law”.¹⁰ A person who cannot acquire and/or prove his or her nationality due to legal, administrative, procedural and/or practical barriers may be considered stateless under international law. A migrant whose nationality is undetermined should be protected as stateless until proven otherwise.*

The *Guidelines* utilise the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) definition of a stateless person, i.e. a person “*who is not considered as a national by any State under the operation of its law*”.¹¹ The International Law Commission has stated that this definition is part of customary international law.¹² Furthermore, the 1954 Convention does not allow reservations to Article 1(1). Therefore the definition is binding on all state parties to the Convention.

The UNHCR has recently provided authoritative and detailed guidance on how the Article 1(1) definition of

10 Convention Relating to the Status of Stateless Persons, ECOSOC RES/526 A(XVII) (1954), Article 1(1). For authoritative guidance on the interpretation of Article 1(1), see above, note 2.

11 *Ibid.*

12 International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, p. 49.

statelessness should be interpreted.¹³ The *UNHCR Definition Guidelines* are a welcome resource which provides clarity and substance to a hitherto inadequately understood legal concept. Drawing from the preamble to the 1954 Convention and the *Travaux Préparatoires*, UNHCR states that “*the object and purpose of the 1954 Convention is to ensure that stateless persons enjoy the widest possible exercise of their human rights,*”¹⁴ and that the definition should be interpreted “*in line with the ordinary meaning of the text, read in context and bearing in mind the **treaty’s object and purpose.***”¹⁵ (*Emphasis added*)

ERT endorses this position and continues to strongly advocate that statelessness must be viewed from a protection perspective and that the human rights of stateless persons must be respected, protected and fulfilled at all times.¹⁶

The *UNHCR Definition Guidelines* are essential reading for persons engaged on the issue of statelessness. Below, are some of the key messages of these Guidelines:

- Article 1(1) of the 1954 Convention applies in both migration and non-migration contexts.

13 See above, note 2. These Guidelines resulted from a series of expert consultations conducted by UNHCR, and build in particular on the UN High Commissioner for Refugees, *Expert Meeting - The Concept of Stateless Persons under International Law*, 2010 in Prato, Italy, that ERT participated in. The *Summary Conclusions* of this meeting are available at: <http://www.unhcr.org/refworld/docid/4ca1ae002.html>.

14 *Ibid.*, Para 6.

15 *Ibid.*

16 See above, note 1.

- Some stateless persons may also be refugees entitled to protection under the 1951 Convention Relating to the Status of Refugees or persons eligible for complementary protection under another instrument.
- Those who qualify as stateless persons under Article 1(1) must not mistakenly be categorised as *de facto* stateless persons.
- An individual is stateless from the moment the conditions in Article 1(1) are met.
- Article 1(1) can be analysed by breaking the definition down into two constituent elements - “*not considered as a national...under the operation of its law*” and “*by any State*”.
- An enquiry into whether someone is stateless should be limited to the states with which the person enjoys a relevant link such as birth, descent, marriage or habitual residence.¹⁷

The *UNHCR Definition Guidelines* avoid usage of the term “*de jure* stateless”. As stated in the Guidelines, “[p]ersons who fall within the scope of Article 1(1) of the 1954 Convention are sometimes referred to as “*de jure*” stateless persons even though the term is not used in the Convention itself”.¹⁸ Prior to the publication of the UNHCR Guidelines, the term “*de jure* stateless” was widely used – including by the UNHCR. However, the use of this term does not necessarily add anything, other than to qualify this category from the *de facto* stateless. ERT therefore has avoided using the term “*de jure* stateless” in the *Guidelines*.

¹⁷ See above, note 2, Para 7 – 11.

¹⁸ *Ibid.*, Para 8.

Guideline 2: A de facto stateless person has a legal nationality which is ineffective. For example, a person who does not benefit from consular or diplomatic protection from his or her country of evident nationality, or a person who with valid reason renounces the protection of his or her country, is considered to be de facto stateless.

The term *de facto* statelessness and its definition have recently become somewhat contentious.¹⁹ However, ERT believes that it remains the most appropriate term to encapsulate this vulnerable population that has similar protection needs to stateless persons, and must benefit from the protection of international human rights law on an equal basis.

While reference is made to *de facto* statelessness in the Final Act of the 1961 Convention on the Reduction of Statelessness, the term is not defined in that treaty or in any other international instrument. Therefore, the definition used in the *Guidelines* does not reflect international law.

Over the years, the UN and UNHCR have provided a few – at times contradictory – definitions of *de facto* statelessness, many of which have been expertly presented and

19 For example, in a recent joint research publication by the UNHCR and Asylum Aid on mapping statelessness in the UK, the term *de facto* statelessness was avoided, and the term “unreturnable persons” was used to define a group with similar characteristics. See UN High Commissioner for Refugees and Asylum Aid, *Mapping Statelessness in The United Kingdom*, 22 November 2011, available at: <http://www.unhcr.org/refworld/docid/4ecb6a192.html>.

analysed in a thought provoking paper by Hugh Massey.²⁰ Massey concludes by proposing that *de facto* stateless persons be defined as “*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*”²¹ The summary conclusions of the UNHCR *Expert Meeting on The Concept of Stateless Persons under International Law*, further expand on this definition,²² which is reiterated by the UNHCR in its recent *Procedure Guidelines*.²³

ERT sees this definition as articulating the minimum core content of *de facto* statelessness, but not necessarily as an all-encompassing definition. We believe that it may be imprudent to provide a closed definition to this category of persons. ERT approaches the issue from a protection perspective, and our priority is therefore to ensure that any definition does not have the undesired consequence of inadvertently excluding those who require international protection due to being in a circumstance comparable to stateless persons.²⁴ Consequently, the definition used in the *Guidelines* is more open ended.

20 UN High Commissioner for Refugees, *UNHCR and De Facto Statelessness*, April 2010, LPPR/2010/01, available at: <http://www.unhcr.org/refworld/docid/4bbf387d2.html>.

21 *Ibid.*, p. 61.

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

23 See above, note 3.

24 See above, note 1, pp. 52 – 84 for ERT’s position on the definition of statelessness and *de facto* statelessness.

Guideline 3: Detention is understood to mean deprivation of liberty in a confined place. When considering whether a stateless person is in detention, the cumulative impact of multiple restrictions as well as the degree and intensity of each of them should be assessed.²⁵

The *UNHCR Detention Guidelines* define detention as:

[C]onfinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory. There is a qualitative difference between detention and other restrictions on freedom of movement... When considering whether an asylum-seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.²⁶

Many of the experts who contributed to the drafting of the *Guidelines* were of the view that this definition is unduly restrictive – particularly due to the link drawn between release from detention and leaving the territory.²⁷

25 See above, note 4, adapted from Guideline 1.

26 *Ibid.*, Guideline 1.

27 Please note that the UNHCR is in the process of reviewing and amending its *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, including the definition of detention contained therein.

Therefore, while the *Guidelines* retain the final section of the definition used in the *UNHCR Detention Guidelines*, the definition of detention in the ERT *Guidelines* is on the whole, less restrictive.

Guideline 4: Immigration detention is a form of administrative detention used as a last resort when necessary for the sole purpose of achieving a legitimate administrative objective such as removal or the prevention of unlawful entry.

This definition reflects the fact that immigration detention is administrative in nature and must have a legitimate administrative objective in order to be lawful. What constitutes a legitimate administrative objective is elaborated on in *Guidelines 27* and *28*.

Persons deprived of their liberty and held in immigration detention are protected by Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR), which states that *“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”*²⁸

Guideline 5: An alternative to detention is any legislation, policy or practice that imposes a less coercive or intrusive deprivation of liberty or restriction on movement than detention.

28 International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI) (1966). Article 10(1).

There is no established international law definition of an alternative to detention. The definition utilised in the *Guidelines* therefore draws from the International Detention Coalition (IDC) definition of an alternative to detention as “any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement...”²⁹ The definition adopted by the *Guidelines* is not as narrow as the IDC definition, according to which, freedom of movement is an essential characteristic of an alternative to detention. It must be noted that the IDC also uses the term “alternative **form** of detention” to encapsulate “any form of management that is designed to substantially curtail or completely deny freedom of movement”.³⁰ The *ERT Guidelines* do not distinguish between “alternatives to detention” and “alternative **forms** of detention”, and this is one reason as to why the definition utilised in the *Guidelines* is broader than the definition used by IDC. Additionally, ERT is of the view that many alternatives to detention for the purpose of immigration control would restrict freedom of movement in some way or other, even if for a few hours at a time when the individual is required to report to relevant authorities. Therefore, we feel it is more useful to define alternatives to detention in relation to the deprivation of liberty imposed by detention – i.e. alternatives are lesser forms of deprivation of liberty and/or restriction of movement than detention; and not in relation to complete liberty or freedom of movement (which remain the most desirable forms of alternative to detention).

29 See above, note 5, p.2.

30 *Ibid.*

It is important to note however, that

Alternatives to detention which impose restrictions on the liberty of movement need to be in compliance with article 12 of the International Covenant on Civil and Political Rights, which provides for the right to liberty of movement for everyone lawfully within the territory of a State.³¹

Guideline 6: Protected characteristics are those characteristics which, according to international human rights law, must not be the basis of discrimination. Protected characteristics include “race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness”³²

There is extensive jurisprudence and legislation on what constitutes a protected characteristic. This Guideline draws from the *Declaration of Principles on Equality*, which “reflects a moral and professional consensus among human rights and equality experts (...) [and is] based on concepts and jurisprudence de-

31 See above, note 6, Para 54.

32 See above, note 7, Principle 5.

veloped in international, regional and national legal contexts".³³ The definition of protected characteristics in the *Guidelines*, reflects Principle 5 of the *Declaration of Principles on Equality*,³⁴ which adds to the grounds listed in Article 2 of the Universal Declaration on Human Rights, according to which:

*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*³⁵

It must be noted that the list of protected characteristics referred to in this definition is not an exhaustive one. Additionally,

*Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds.*³⁶

33 *Ibid.*, p. 2.

34 *Ibid.*, Principle 5.

35 Universal Declaration of Human Rights, UNGA RES/217A (III) 1948. Article 2.

36 See above, note 7, Principle 5.

For a detailed analysis of the definition of discrimination and protected characteristics, see the Commentary to the *Declaration of Principles on Equality*.³⁷

1.2. SCOPE

There are two *Guidelines* in this section.

Guideline 7: *The Guidelines generally apply to stateless and de facto stateless persons. Unless the Guidelines state otherwise, they should be understood to be equally applicable to both groups. Consequently, hereafter in the Guidelines, the term ‘stateless’ is generally intended to include the de facto stateless as well.*

The *Guidelines* apply to both stateless and *de facto* stateless persons. ERT’s advocacy position, as articulated in *Unravelling Anomaly*, is that ideally there should be no distinction in the level of protection afforded to stateless and *de facto* stateless persons, as both groups largely have the same protection needs.³⁸

Historically, *de facto* stateless persons have not benefited from the international protection to which stateless persons are entitled. Such an approach is not consistent with international human rights law and the rights to equality

37 The Equal Rights Trust, *Declaration of Principles on Equality: Commentary by Dimitrina Petrova*, 2008, available at: <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20cropped%2016%20Oct%20dimitrina%20comment.pdf>.

38 See above, note 1, chapter 2.

and non-discrimination.³⁹ The UN Secretary General has emphasised that:

*[I]t is also important to note that de facto stateless persons face many of the same protection risks faced by stateless persons. Their situation is akin to that of stateless persons in that there is no State that will provide them with protection. Consequently, it is recommended that the States in which they find themselves extend protection to them until such time as they are able to avail themselves of the protection of their State of nationality.*⁴⁰

The UNHCR also encourages states to “provide protection to de facto stateless persons in addition to 1954 Convention stateless persons.”⁴¹

Recommendation 4 of *Unravelling Anomaly* calls for the abolition of hierarchies within statelessness,⁴² and ERT has tried to ensure that the *Guidelines* are equally applicable to both groups, but also address the specific needs of each.

39 *Ibid.*, see chapters 1 and 2 generally and pp. 78-80 specifically, for an analysis and critique of the inequalities between the protection available to stateless and *de facto* stateless persons.

40 UN Secretary-General, *Guidance Note of the Secretary General: The United Nations and Statelessness*, June 2011, p. 6, footnote 8, available at: <http://www.unhcr.org/refworld/docid/4e11d5092.html>.

41 See above, note 3, Para 71.

42 See above, note 1, pp. 229 – 230.

Guideline 8: *The Guidelines apply to the immigration detention of, and decisions to detain all stateless persons within the territory or subject to the jurisdiction of states. They also address the identification of stateless persons, which is a necessary pre-requisite for their adequate protection; and the treatment of persons released from detention.*

This *Guideline* is self-explanatory. However, it must be noted that while the *Guidelines* specifically address the immigration detention of stateless persons, the principles they articulate are generally applicable to protect all migrants from arbitrary detention. Therefore, the *Guidelines* may be a useful tool for those working more generally on detention issues as well.

The phrase “*within the territory or subject to the jurisdiction of states*” appears in many of the *Guidelines*. This terminology is used in Article 2(1) of the ICCPR, and has been interpreted by the Human Rights Committee (HRC) as follows:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party... the enjoyment

*of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness... This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory.*⁴³

1.3. INTERPRETATION

This section comprises three *Guidelines*.

Guideline 9: *In all circumstances, the Guidelines should be interpreted in a manner which provides the greatest protection for stateless persons; promotes their human rights and protects them from arbitrary detention. Under no circumstances should the Guidelines be interpreted in a manner which limits the enjoyment of human rights by stateless persons.*

It is common drafting practice for human rights instruments to contain provisions similar to *Guideline 9*, in order to emphasise and preserve the spirit, purpose and object of the relevant instrument from being undermined through restrictive or poor interpretation. For example, Article 5(1) of the ICCPR states that:

Nothing in the present Covenant may be interpreted as implying for any State, group

⁴³ UN Human Rights Committee, *General Comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, Para 10.

*or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.*⁴⁴

The Universal Declaration on Human Rights (UDHR), and the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) contain similar provisions.⁴⁵

Guideline 10: Any exceptions to the protections stated in the Guidelines should be interpreted in the narrowest possible manner.

This *Guideline* serves the same purpose as *Guideline 9*, of ensuring that the *Guidelines* are interpreted in a manner consistent with their spirit, purpose and object, which is that they are used as a human rights protection tool for stateless persons.

44 See above, note 28, Article 5(1).

45 See above, note 35, according to Article 30 of the Declaration, “*Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.*”

European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4 November 1950. According to Article 17 of the Convention, “*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*”

Guideline 11: *The Guidelines are primarily a reflection of the existing human rights obligations of states towards stateless persons within their territory or subject to their jurisdiction. Such Guidelines use directive language – i.e. “states should”, “states shall”, “states have a duty”, etc. Where the Guidelines contain good practice recommendations this is reflected through the use of more persuasive language – i.e. “it is desirable that” etc.*

The *Guidelines* draw from internationally accepted human rights norms and principles. They do not attempt to develop new legal principle, rather to elaborate how existing human rights principles relating to detention and non-discrimination, and the international law on statelessness apply to the specific challenge of the detention of stateless persons. Consequently, the *Guidelines* reflect the existing human rights obligations of states towards stateless persons. However, they also draw from international good practice, and recommend actions which go beyond the minimum obligations of international human rights law. Such recommendations provide guidance on how states could offer better protection to stateless persons within their territory or subject to their jurisdiction.

The *Guidelines* that reflect international legal norms use directive language and those that reflect good practice use persuasive language. Consequently the reader should be able to distinguish between the two types of *Guideline* simply by reading the text. However, this commentary provides further guidance in this regard.

1.4. BASIC PRINCIPLES AND ASSUMPTIONS

This section of the *Guidelines* contains seven basic principles and assumptions.

Guideline 12: *States have a duty to respect, protect and fulfil the human rights of all stateless persons within their territory or subject to their jurisdiction, including the right to be free from arbitrary detention. The human rights obligations of states in respect of stateless persons apply at all times, including in the exercise of immigration control.*

Statelessness is fundamentally, a human rights issue. ERT has explored this link in *Unravelling Anomaly*, in which it is stated that:

... [N]ationality is not a pre-condition to enjoying human rights. International human rights law creates a legal framework which generally requires states to protect everyone, including those without any nationality – the stateless – from human rights violations. Loss of nationality should therefore be the impetus for international human rights mechanisms to offer greater protection, instead of leading to – even being the catalyst for – further exclusion from rights... The universality of human rights is particularly relevant to the protection of the stateless, because it requires that all persons enjoy human rights regardless of their nationality (or lack of it in this context),

*and that states generally afford all persons equal protection of the law. The basic protection afforded by general human rights instruments to all human beings is thus central to the protection of the stateless.*⁴⁶

The vast majority of human rights entrenched in international, regional and even national instruments, are not linked to the nationality or lack thereof of persons. All persons have human rights by virtue of being human. Consequently, all countries are obligated to respect, protect and fulfil the human rights of everyone – including stateless persons - within their territory or subject to their jurisdiction. For example, the rights entrenched in the ICCPR are afforded to all “persons” and not limited to “citizens” or “nationals”. The HRC has stated that “*in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.*”⁴⁷ Furthermore, the HRC has also stated that

*[T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.*⁴⁸

46 See above, note 1, p. 20.

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

48 See above, note 43.

It must be noted however, that human rights and equality law does allow for states to make certain legitimate distinctions between nationals and non-nationals in strictly defined exceptions. This is particularly so in the context of immigration. For example, while nationals have the right to enter and reside in their own country, non-nationals require permission of the receiving state to enter and reside in it.⁴⁹ Furthermore, Article 25 of the ICCPR, which is the only Convention right expressly limited only to citizens, sets out that they have a right to take part in public affairs, vote and be elected and have equal access to public service.⁵⁰

The rights of stateless persons and state obligations in this regard are entrenched in many international and regional human rights instruments including:

- The Universal Declaration of Human Rights;⁵¹
- The International Covenant on Civil and Political Rights;⁵²
- The International Covenant on Economic, Social and Cultural Rights (ICESCR);⁵³
- The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);⁵⁴

49 See above, note 28, Article 12 (3). However, see also, *Ibid*.

50 See above, note 28, Article 25. However, these rights may be extended to non-citizens as well, and are also subject to the general non-discrimination provisions of the Covenant (Articles 2 and 26).

51 See above, note 35.

52 See above, note 28.

53 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (1966).

54 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (1984).

- The Convention on the Elimination of all forms of Racial Discrimination (CERD),⁵⁵
- The Convention on the Elimination of all forms of Discrimination against Women (CEDAW),⁵⁶
- The Convention on the Protection of the Rights of all Migrant Workers and their Families (CMW),⁵⁷
- The Convention on the Rights of Persons with Disabilities (CRPD),⁵⁸
- The Convention on the Rights of the Child (CRC),⁵⁹
- The European Convention for the protection of Human Rights and Fundamental Freedoms,⁶⁰
- The American Convention on Human Rights (ACHR),⁶¹ and
- The African (Banjul) Charter on Human and Peoples' Rights (ACHPR).⁶²

The Optional Protocols to these treaties, related jurisprudence of international, regional and national courts and the General Comments, decisions and authoritative statements of the UN treaty bodies and special procedures, as

55 Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX) (1965).

56 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (1979).

57 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158 (1990).

58 Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611 (2006).

59 Convention on the Rights of the Child (CRC), G.A. Res. 44/25 (1989).

60 European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4 November 1950.

61 American Convention on Human Rights, OAS Treaty Series, No. 46 (1969).

62 African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1981).

well as the 1954 Convention⁶³ and the 1961 Convention on the Reduction of Statelessness (the 1961 Convention)⁶⁴ are also relevant in this regard.

In addition to the rights entrenched in the above instruments, various international guidelines and principles on detention should be adhered to when detaining stateless persons, including:

- The 1955 UN Standard Minimum Rules for the Treatment of Prisoners;⁶⁵
- The 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;⁶⁶
- The 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty;⁶⁷
- The 1999 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers;⁶⁸ and
- The 2010 UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).⁶⁹

63 See above, note 10.

64 Convention on the Reduction of Statelessness, G.A. Res. 896 (IX) (1961).

65 United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955.

66 UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly*, A/RES/43/173, 9 December 1988.

67 UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution / adopted by the General Assembly*, A/RES/45/113, 14 December 1990.

68 See above, note 4.

69 UN Economic and Social Council (ECOSOC), *UN Economic and Social Council Resolution 2010/16: United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, 22 July 2010, E/RES/2010/16.

Many other international, regional and national guidelines, principles and reports provide useful guidance on the detention of immigrants, including stateless persons. Most relevant in this regard are:

- The European Committee for the Prevention of Torture Standards (CPT Standards);⁷⁰
- The European Union Agency for Fundamental Rights report entitled *Detention of Third-Country Nationals in Return Procedures*;⁷¹
- The publication by the UK HM Inspector of Prisons, *Immigration Detention Expectations: Criteria for assessing the conditions for and treatment of immigration detainees*;⁷² and
- The *Immigration Detention Centre Guidelines* of the Human Rights and Equal Opportunities Commission of Australia.⁷³

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

70 The Council of Europe, *The CPT Standards – ‘Substantive’ sections of the CPT’s General Reports*, CPT/Inf/E (2002) 1, Rev. 2009.

71 European Union Agency for Fundamental Rights, *Detention of Third-Country Nationals in Return Procedures*, 2010, Luxembourg, available at: http://fra.europa.eu/fraWebsite/attachments/FRA-report-detention-december-2010_EN.pdf.

72 HM Inspector of Prisons, *Immigration Detention Expectations: Criteria for assessing the conditions for and treatment of immigration detainees*, 2007, available at: <http://www.justice.gov.uk/inspectorates/hmi-prisons/docs/immigration-expectations-2007.pdf>.

73 Human Rights and Equal Opportunities Commission of Australia, *Immigration Detention Centre Guidelines*, 2000, available at: http://www.hreoc.gov.au/legal/submissions/Appendix_idc_guidelines.pdf.

Guideline 13: *States have an obligation to identify stateless persons within their territory or subject to their jurisdiction as a first step towards ensuring the protection of their human rights.*

The UNHCR Analytical Framework for Prevention, Reduction and Protection (*UNHCR Analytical Framework*) states that the

*[F]irst step towards addressing statelessness is to **identify** stateless populations, determine how they became stateless and understand how the legal, institutional and policy frameworks relate to those causes and offer possible solutions.*⁷⁴

States have an obligation to identify stateless persons within their territory or subject to their jurisdiction. This obligation is implicit to the 1954 Convention, as states would not be able to fulfil their obligations under the convention unless they first identified stateless persons within their territory or subject to their jurisdiction.⁷⁵ Therefore, all states parties to the 1954 Convention should have statelessness determination procedures in place.

⁷⁴ UN High Commissioner for Refugees, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, 2008, p. 5, available at: <http://www.unhcr.org/refworld/docid/49a28afb2.html>.

⁷⁵ UN High Commissioner for Refugees, *Expert Meeting - Statelessness Determination Procedures and the Status of Stateless Persons (Summary Conclusions)*, December 2010, Para 1, available at: <http://www.unhcr.org/refworld/docid/4d9022762.html>.

More generally, in order to ensure equal treatment and non-discrimination of stateless persons and the protection of their human rights, all states have an obligation under international law to identify stateless persons within their territory or subject to their jurisdiction. It is important to note the following conclusion of the UNHCR Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons (*UNHCR Geneva Expert Meeting*):

States that are not party to the 1954 Convention are nonetheless bound by provisions of international human rights law to respect the rights of stateless persons within their territory (for example, the prohibition against arbitrary detention pursuant to Article 9(1) of the ICCPR and the obligation to ensure that every child has a nationality pursuant to Article 24(3) of the ICCPR and Article 7(1) of the CRC). Statelessness is, therefore, a juridically relevant fact in this context. Moreover, non-party States may find it useful to establish statelessness determination procedures and a number have actually done so. In addition, such States may find helpful guidance in the provisions of the 1954 Convention with respect to their response to statelessness, for example, with regard to the provision of identity and travel documents to stateless persons.⁷⁶

⁷⁶ *Ibid.*, Para 30.

The UNHCR has also stated that

*Statelessness is a juridically relevant fact under international law. Thus, recognition of statelessness plays an important role in enhancing respect for the human rights of stateless persons, particularly through access to a secure legal status and enjoyment of rights afforded to stateless persons under the 1954 Convention.*⁷⁷

The need to identify stateless persons in order to protect them becomes more obvious and urgent in certain situations. One such situation is when a decision to detain is being made, and this is further elaborated on, in the commentary to *Guideline 22*.

Guideline 14: *All persons, including stateless persons, are equal before the law and are entitled without any discrimination to the equal benefit and protection of the law, including equal and effective access to justice.*

(i) National laws, policies and practices pertaining to immigration detention should not discriminate against stateless persons and should not be applied in a discriminatory way.

(ii) Immigration detention regimes should be designed and implemented in a manner which takes due consideration of the specific circumstances of statelessness and of the obligations of the state in

77 See above, note 3, Para 4.

respect of stateless persons. States should refrain from both direct and indirect discrimination on grounds of statelessness and should ensure that they reasonably accommodate the particular circumstances of all stateless persons.

It is highly desirable that national immigration laws, policies and practices are made compliant with the principles of equality and non-discrimination, and with national equality and non-discrimination laws and policies.

Guideline 14 articulates principles of equality and non-discrimination which apply to the treatment of stateless persons, including decisions to detain them. This *Guideline* draws from Article 26 of the ICCPR, which states that:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*⁷⁸

This fundamental principle is then applied to the particular context of national immigration regimes and their treatment of stateless persons. *Guideline 14(1)* highlights

⁷⁸ See above, note 28, Article 26.

the distinction between discriminatory law/policy on the one hand and the implementation of such law/policy in a discriminatory manner. In other words, it is not sufficient to have a non-discriminatory policy, which is not implemented, or is applied in a discriminatory manner.

Guideline 14(2) highlights three legal concepts which are central to non-discrimination law. Firstly, there should be no direct discrimination on grounds of statelessness. As stated in the *Declaration of Principles on Equality*:

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.⁷⁹

Secondly, there should be no indirect discrimination on grounds of statelessness.

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage

79 See above, note 7, Principle 5.

*compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*⁸⁰

Thirdly, states should reasonably accommodate the particular circumstances of all stateless persons. The term “reasonable accommodation” is primarily used in the context of protecting the rights of disabled persons and is defined under the CRPD as follows:

*“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.*⁸¹

While this term has traditionally been used in the context of disability law, it is an extremely powerful concept that resonates strongly with the issue of statelessness – as the unique situation of stateless persons must be understood and accommodated by authorities - in order to protect them. Principle 13 of the *Declaration of Principles on Equality* defines the term more broadly:

Accommodation means the necessary and appropriate modifications and adjustments,

⁸⁰ *Ibid.*

⁸¹ See above, note 58, Article 2.

*including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others.*⁸²

This *Guideline* ends with a recommendation that “national immigration laws, policies and practices are made compliant with the principles of equality and non-discrimination, and with national equality and non-discrimination laws and policies.” Such steps would enhance the equal and non-discriminatory treatment of stateless persons (and other migrants) by immigration regimes, and increase access to justice for persons who have been treated unequally and/or discriminated by such regimes. It is consequently desirable that states take steps in this direction as a demonstration of their commitment to the protection of human rights.

Guideline 15: *States party to the 1954 Convention have a legal obligation to treat stateless persons within their territory or subject to their jurisdiction in accordance with the provisions of that Convention.*

This *Guideline* does not relate to the *de facto* stateless, as the 1954 Convention does not obligate states to protect them. However, ERT urges states to do so, in accordance with the position stated above that the

⁸² See above, note 7, Principle 13.

protection needs of all stateless persons (including the *de facto* stateless) should be equally met.

It is highly desirable that states ratify the 1954 Convention and also the 1961 Convention, and while the *Guidelines* do not call for ratification, ERT promotes the ratification of these treaties. States which are party to these instruments should take all necessary steps to fulfil their obligations towards stateless persons under these treaties, including through the establishment of statelessness determination procedures.

Guideline 16: *States have the right to provide diplomatic protection and a duty to provide consular services to nationals outside their territory. States should exercise these rights and duties with due regard to their international human rights obligations; the failure to provide such protection or services can create de facto statelessness.*

The rights of states with regard to the provision of diplomatic protection are entrenched in international law. The Vienna Convention on Diplomatic Relations lists among the functions of diplomatic missions, “*Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law*.”⁸³

The duty of states to provide consular services arises from human rights law, under which every person has

83 Vienna Convention on Diplomatic Relations, Done at Vienna on 18 April 1961. Entered into force on 24 April 1964. United Nations, *Treaty Series*, vol. 500, p. 95. Article 3(b).

a right to enter his or her own country.⁸⁴ States therefore have an obligation to facilitate the enjoyment of this right, by providing consular services to their nationals in foreign countries. Additionally, under the CMW:

*Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.*⁸⁵

The provision of consular protection is also a right of states under international law. The Vienna Convention on Consular Relations states that Consular functions include “*protecting in the receiving State, the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law.*”⁸⁶

84 See above, note 28, Article 2(a) which states that “*No one shall be arbitrarily deprived of the right to enter his own country.*”

85 See above, note 57, Article 23.

86 Vienna Convention on Consular Relations, Done at Vienna on 24 April 1963. Entered into force on 19 March 1967. United Nations, *Treaty Series*, vol. 596, p. 261. Article 5(a).

It is of paramount importance that states protect their nationals abroad, and in the very least, facilitate their return home through the provision of consular services and by cooperating with host states intent on removing such persons. The failure to do so is one of the biggest causes of *de facto* statelessness and this often leads to unnecessary, lengthy and arbitrary detention.

Guideline 17: *The United Nations High Commissioner for Refugees (UNHCR) has a special mandate to prevent and reduce statelessness and to protect stateless persons. The UNHCR has an obligation to fulfil this mandate to the best of its ability and states should at all times fully cooperate with the UNHCR in the fulfilment of this mandate.*

The origins and development of the UNHCR statelessness mandate are summarised in the *UNHCR Definition Guidelines* as follows:

To undertake the functions foreseen by Articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness, UNHCR's mandate was expanded to cover persons falling under the terms of that Convention by General Assembly Resolutions 3274 (XXIX) of 1974 and 31/36 of 1976. The Office was entrusted with responsibilities for stateless persons generally under UNHCR Executive Committee Conclusion 78, which was endorsed by the General Assembly in Resolution 50/152 of 1995. Subsequently, in Resolution 61/137 of 2006, the General Assembly endorsed Ex-

*ecutive Committee Conclusion 106 which sets out four broad areas of responsibility for UNHCR: the identification, prevention and reduction of statelessness and the protection of stateless persons.*⁸⁷

It is important to note that Executive Committee Conclusion 106 does not distinguish between stateless and *de facto* stateless persons. “UNHCR has therefore tended to assume that it has a mandate for *de facto* stateless persons who are not refugees just as much as it has a mandate for *de jure* stateless persons who are not refugees.”⁸⁸

The UNHCR requires the full cooperation of states to effectively fulfil its mandate to identify and protect stateless persons and prevent and reduce statelessness. *Guideline 17* reminds states of their obligation to provide this cooperation and support to the UNHCR.

Guideline 18: *It is recommended that states review their immigration policies and immigration detention regimes and take all necessary steps to bring them into adherence with the state’s human rights obligations to protect stateless persons within their territory or subject to their jurisdiction and to reduce and prevent statelessness.*

If states are to fully comply with their international obligations as stated in the *Guidelines*, they should take im-

⁸⁷ See above, note 2, p. 1.

⁸⁸ See above, note 20, p. ii.

mediate steps to review their immigration policies and practices and bring them in line with international law. This is particularly important for dualist states, which must implement enabling legislation in order to make their treaty obligations domestically enforceable.

PART II - IDENTIFYING STATELESS PERSONS

2.1. IDENTIFYING STATELESS PERSONS

Part two comprises four *Guidelines* on the identification of stateless persons.

Guideline 19: *All immigration regimes should have efficient, effective, objective, fair and accessible procedures in place for the identification of stateless persons. It is highly desirable that such procedures comply with the standards and principles stated in relevant UNHCR Guidance.*⁸⁹

Guideline 19 calls on all states to have procedures in place to identify stateless persons, which is an essential prerequisite to protecting stateless persons in accordance with international law. The commentary to *Guideline 13* above presents the legal principle behind the obligation to identify stateless persons within the territory or subject to the jurisdiction of states.

The *UNHCR Procedure Guidelines* provide detailed and authoritative guidance on how such procedures

⁸⁹ See above, note 3.

should operate and what substantive and procedural rights should be guaranteed throughout the process.⁹⁰ One of the key messages of the *UNHCR Procedure Guidelines* is that

*Everyone in a State's territory must have access to statelessness determination procedures. There is no basis in the Convention for requiring that applicants for statelessness determination be lawfully within a State. Such a requirement is particularly inequitable given that lack of nationality denies many stateless persons the very documentation that is necessary to enter or reside in any State lawfully.*⁹¹

Furthermore, there should be no time-limits within which an individual must claim statelessness status.⁹²

The *UNHCR Procedure Guidelines* also provide important guidance on how a procedure should accommodate persons who raise both statelessness and refugee claims. Accordingly,

States must ensure that confidentiality requirements for refugees who might also be stateless are upheld in statelessness determination procedures. Every applicant in a

90 *Ibid.*, these Guidelines resulted from a series of expert consultations conducted by UNHCR, and build in particular on the UN High Commissioner for Refugees, *Expert Meeting - Statelessness Determination Procedures and the Status of Stateless Persons* 2010 in Geneva, Switzerland, that ERT participated in. (See above, note 75).

91 *Ibid.*, Para 17.

92 *Ibid.* Para 18.

*statelessness determination procedure is to be informed at the outset of the need to raise refugee-related concerns, should they exist. The identity of a refugee or an asylum-seeker must not be disclosed to the authorities of the individual's country of origin.*⁹³

Importantly, applicants for refugee status should be informed of the possibility of applying for recognition as stateless persons.⁹⁴

The *UNHCR Procedure Guidelines* are essential reading for anyone interested in the identification of stateless persons, particularly the sections on procedural guarantees (guidelines 19 – 25) and assessment of evidence (guidelines 31 – 54).

Guideline 20: *It is highly desirable that additionally, such procedures take into consideration the full range of factors which can undermine the effectiveness of a person's nationality, including:*

- (i) the failure of the state to provide diplomatic protection;*
- (ii) the failure of the state to provide consular services;*
- (iii) the lack of a practical route of return; and/or*
- (iv) the inability to guarantee safe return.*

It is recommended that states maintain reliable and up-to-date information on countries which are likely to generate de facto statelessness.

93 *Ibid.*, Para 27.

94 *Ibid.*

For the same reasons that statelessness is a juridically relevant fact in relation to international human rights law, ERT is of the position that *de facto* statelessness is as well. This is particularly evident in the context of immigration detention, where the failure to identify at the outset, those who are likely to be unreturnable, can result in lengthy, unlawful and arbitrary detention. Therefore, acting in accordance with this *Guideline* will enable states to better uphold their obligations under international law.

It is recommended that the same procedures in place to identify stateless persons are also used to determine whether a person is *de facto* stateless. The UNHCR guidance on the identification of *de facto* stateless persons is pertinent:

*States will take a variety of factors into account when deciding the type of procedure in which de facto statelessness will be determined. One consideration is that it will not be clear at the outset, even in the view of the applicant, whether he or she is stateless as per the 1954 Convention or within the de facto concept. Irrespective of where de facto statelessness is determined, the procedure must not prevent individuals from claiming protection as a refugee or as a stateless person in terms of the 1954 Convention, as recognition as such would trigger greater obligations for the State under international law than recognition as a de facto stateless person.*⁹⁵

Guideline 20 highlights four situations which could render a person *de facto* stateless. This is not an exhaustive

⁹⁵ *Ibid.*, Para 71.

list, and states are encouraged to add more grounds to this list as their understanding of *de facto* statelessness broadens.⁹⁶ The human rights impact of the failure to provide diplomatic protection and consular services including through the creation of *de facto* statelessness has been elaborated on in the commentary to *Guideline 16*. Similarly, the human rights impact and related obligations arising from barriers to removal within a reasonable period of time (including because of the lack of a practical route of return) and the inability to guarantee safe return (both in terms of obligations of *non-refoulement*, and violations of other human rights) are elaborated on in the commentary to *Guideline 28*.

In order to fully comply with *Guideline 20*, states are encouraged to maintain reliable, up-to-date information on countries which either fail to or refuse to protect their nationals on a regular basis, and are thus likely to generate *de facto* statelessness. It can be argued that obligations of due diligence would require states to subject the nationals of such countries to statelessness determination procedures before a decision to detain is made.

Guideline 21: *All statelessness identification procedures should be non-discriminatory, and be applied without discrimination, including by reasonable accommodation of the needs of persons vulnerable to discrimination such as women, children, the elderly, lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, disabled persons and persons who may have particular needs and vulnerabilities, such as victims of torture and victims of trafficking.*

⁹⁶ See above, note 1, pp. 63 – 69, for a presentation of different scenarios of *de facto* statelessness.

While the *UNHCR Procedure Guidelines* are extremely comprehensive and provide authoritative guidance on statelessness determination procedures, they do not contain adequate guidance on equality and non-discrimination within such procedures. Therefore, *Guideline 21* stands as a reminder that all statelessness determination procedures must be non-discriminatory. For more information on the content of the right to non-discrimination, please refer the commentary to *Guidelines 6* and *14* above.

Guideline 22: *Stateless persons should be identified in accordance with Guidelines 19 – 21 prior to being detained or subject to removal proceedings. All persons subject to such procedures should be allowed to remain in the country pending final decision.*

The commentary to *Guidelines 13* and *20* above has established that statelessness (including *de facto* statelessness) is a juridically relevant fact with regard to the human rights protection of the person and particularly in relation to the decision to detain an individual for the purpose of removal. *Guideline 22* therefore reflects the international legal obligation of states to establish whether a person is stateless or not, in order to ascertain whether their detention is likely to be arbitrary and in violation of international human rights law. According to the UNHCR:

For stateless persons, the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention. Statelessness determination procedures are therefore an important

*mechanism to reduce the risk of prolonged and/or arbitrary detention.*⁹⁷

The second part of this *Guideline* emphasises another important principle that persons subject to determination procedures should be allowed to remain in the country until there is a final outcome to the process. The UNHCR has stated that this is advisable to “ensure that procedures are fair and effective”.⁹⁸ The Summary Conclusions of the *UNHCR Geneva Expert Meeting* are more explicit in stating that “[w]here an individual has an application pending in a statelessness determination procedure, any removal/deportation proceedings must be suspended until his or her application has been finally decided upon”.⁹⁹

PART III – THE DETENTION OF STATELESS PERSONS

Part three is the most substantial part of the *Guidelines*. It covers the decision to detain, alternatives to detention, ongoing detention, vulnerable groups and foreign national prisoners and ex-offenders.

3.1. DECISION TO DETAIN

There are eight *Guidelines* in this section.

Guideline 23: *The immigration detention of stateless persons is undesirable and there should be a presumption against their detention.*

97 See above, note 3, Para 62.

98 *Ibid.*, Para 20.

99 See above, note 75, Para 11.

The UDHR guarantees to “*everyone*”, including stateless persons, the right to life, liberty and the security of person,¹⁰⁰ and provides that “*no one*” shall be subjected to arbitrary arrest, detention or exile.¹⁰¹ The right to liberty and security of the person is also enshrined in Article 9 of the ICCPR, according to which, “*No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*”¹⁰² The Human Rights Committee has stated that this provision is applicable to all deprivations of liberty, including as a result of immigration control.¹⁰³

ERT is of the position that the immigration detention of all persons is undesirable. The UN Working Group on Arbitrary Detention also “*considers that immigration detention should gradually be abolished.*”¹⁰⁴ Current trends of strengthening immigration detention regimes in many countries around the world are therefore worrying.

While no one should be subject to immigration detention, there are additional factors which make the immigration

100 See above, note 35, Article 3.

101 *Ibid.*, Article 9.

102 See above, note 28, Article 9(1). At the regional level, the right to liberty and security of person is protected by Article 6 of the African Charter on Human and Peoples’ Rights, Article 7 of the American Convention on Human Rights, Article 14 of the Arab Charter on Human Rights and Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

103 UN Human Rights Committee *General Comment No. 8: The right to liberty and security of persons*, 06/30/1982.

104 See above, note 8, Para 58.

detention of stateless persons particularly undesirable. As stated in the Preamble to the *Guidelines*:

The circumstances facing stateless persons are significant factors to be taken into account in determining the lawfulness of immigration detention. The process of resolving the identity of stateless persons and a stateless person's immigration status is often complex and burdensome. Lawful removal of such persons is generally subject to extensive delays and is often impossible. Stateless persons detained for these purposes are therefore vulnerable to prolonged detention. These factors in turn make stateless persons especially vulnerable to the negative impact of detention. The emotional and psychological stress of lengthy – even indefinite – periods of detention without hope of release or removal is particularly likely to affect stateless persons.

It is either impossible or extremely difficult to remove stateless persons. Therefore, detention would either serve no administrative purpose (where removal is impossible), or it would be a disproportionate means of achieving an administrative purpose (where removal is likely to take an unreasonable length of time). According to the UN Special Rapporteur on the Human Rights of Migrants:

Stateless persons do not benefit from the consular or diplomatic protection of a State, often do not possess identity docu-

*ments and do not have a country to which to be returned. Stateless persons are especially vulnerable to prolonged detention. Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention, and statelessness cannot be a bar to release.*¹⁰⁵

The UNHCR in similar vein has stated that

*Statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess. Moreover, stateless persons are often without a legal residence in any country. Thus, being undocumented or lacking the necessary immigration permits cannot be used as a general justification for detention of such persons.*¹⁰⁶

In order to minimise instances of detention of all persons and particularly the stateless, it is strongly recommended that the Community Assessment and Placement (CAP) Model designed by the International Detention Coalition is followed. Under this model, states should follow the five steps of (1) presuming detention is not necessary; (2) screening and assessing the individual case; (3) assessing the community setting; (4) applying conditions in the community if necessary; and (5) detaining only as a last resort in exceptional cases.¹⁰⁷

105 See above, note 6, Para 47.

106 See above, note 3, Para 59.

107 See above, note 5, pp. 20 – 49, for more details on the CAP Model.

Guideline 24: *The detention of stateless persons should never be arbitrary.*

The UDHR establishes that “no one shall be subjected to arbitrary arrest or detention”.¹⁰⁸ This principle is enshrined in a number of UN and regional standards dealing explicitly with detention¹⁰⁹ and is reflected in *Guideline 24*. With regard to stateless persons in particular, it must be noted that the Committee on the Elimination of Racial Discrimination has stated that the “security of non-citizens – including the stateless – must be ensured with regard to arbitrary detention.”¹¹⁰

Guideline 25: *Detention will be arbitrary unless it is inter alia:*

- (i) provided for by national law;*
- (ii) carried out in pursuit of a legitimate objective;*
- (iii) non-discriminatory;*
- (iv) necessary;*
- (v) proportionate and reasonable; and*
- (vi) carried out in accordance with the procedural and substantive safeguards of international law.*

108 See above, note 35, Article 9.

109 For example, see Articles 9 and 10 of the ICCPR; Article 37(d) of the CRC; Article 5 of the ECHR; Articles 6 and 7 of the ACHPR; Article 7 of the ACHR; UN High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers*, 13 October 1986. No. 44 (XXXVII) – 1986; UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988; and the UN Standard Minimum Rules for the Treatment of Prisoners 1955.

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

Guideline 25 reflects the international legal principles which must be adhered to in order to prevent arbitrariness. The grounds listed in this *Guideline*, i.e. legitimacy of objective, lawfulness, non-discrimination, necessity, proportionality, reasonableness and due process are not an exhaustive list. Other factors such as predictability are also relevant, but less central to the notion. These principles are the cornerstones upon which international protection against arbitrary detention has been constructed.

States have an obligation to take into account the specific circumstances of stateless persons when determining whether detention would pursue a legitimate objective, be lawful, non-arbitrary, non-discriminatory, necessary, proportionate and/or reasonable. As has been stated by the UN Secretary General, “*stateless persons are (...) uniquely vulnerable to prolonged detention and States should be sensitized to respect the rights of stateless persons to be free from arbitrary detention as a result of their stateless status*”.¹¹¹

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

*[I]t must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.*¹¹²

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

111 See above, note 40, p. 6.

112 See above, note 4, p. 2.

*If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The reasons put forward by States to justify detention, such as the necessity of identification of the migrant in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served with a removal order, must be clearly defined and exhaustively enumerated in legislation.*¹¹³

The HRC has approached the notion of arbitrariness in a broad and progressive manner. Arbitrary actions can either be those which contravene existing laws,¹¹⁴ or those which are *prima facie* legal, but are in fact inappropriate, unjust and unpredictable.¹¹⁵ In a landmark opinion the Committee held *inter alia* that the failure of immigration authorities to consider factors including the likelihood of absconding and lack of co-operation with the immigration authorities, and the failure of the authorities to examine the availability of other less intrusive means of achieving the same ends to be relevant in determining arbitrariness:

113 See above, note 8, Para 59.

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

115 See *Van Alphen v the Netherlands*, CCPR/C/39/D/305/1988, UN Human Rights Committee, (1990).

[T]he notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context ... every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.¹¹⁶

Article 5(1) of the ECHR enshrines the right to liberty of the person, but Article 5(1)(f) allows for “*the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*”¹¹⁷ The application of this provision is limited

116 *A. v Australia* CCPR/C/59/D/560/1993, UN Human Rights Committee, (1997) Para 9.2 – 9.4.

117 See above, note 60, Article 5(1)(f).

by the principle of arbitrariness. ERT has analysed the European Court's treatment of the concept in *Unravelling Anomaly*, according to which it is evident that

(i) The deprivation of liberty must “conform to the procedural and substantive requirements laid down by an already existing law”.¹¹⁸ Furthermore, the legal provisions which provide for the deprivation of liberty must be clear and accessible and enable the person concerned to foresee the consequences of his or her acts.¹¹⁹

(ii) Detention which complies with national law will be arbitrary if there has been an element of bad faith or deception on the part of the authorities.¹²⁰

(iii) Both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1).¹²¹

(iv) The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty.¹²²

118 McBride, Jeremy, *Irregular migrants and the European Convention on Human Rights*, Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Population, AS/Mig/Inf (2005), Para 59. McBride refers to *Agee v United Kingdom* (7729/76) *Amuur v France* (19776/92).

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

120 See, for example, *Bozano v France* (9990/82), 18 December 1986, and *Čonka v Belgium*, (51564/99), 2002.

121 *Winterwerp v the Netherlands* (6301/73), 24 October 1979; *Bouamar v Belgium*, (9106/80), 29 February 1988, Para 50.

122 *Vasileva v Denmark*, (52792/99), 25 September 2003, Para 37.

(v) The duration of the detention is a relevant factor in striking such a balance.¹²³

Unravelling Anomaly, provides further analysis of these principles and their interconnected nature under international human rights law.¹²⁴ See also in this regard, the analysis presented in the *ICJ Practitioner's Guide*.¹²⁵

Guideline 26: *The mandatory immigration detention of irregular migrants is arbitrary and therefore unlawful under international human rights law.*

Mandatory detention is the blanket policy to detain all irregular migrants, regardless of the specific facts and circumstances of individual cases. Such detention is a disproportionate response to irregular migration. This *Guideline* reiterates an established principle of international law that has been elaborated on by the United Nations Working Group on Arbitrary Detention¹²⁶ and the UN Human Rights Committee.¹²⁷ Furthermore, the Inter-American Court of Human Rights has held that:

123 *Ibid.* See also *McVeigh and Others v the United Kingdom*, (8022/77, 8025/77, 8027/77), 18 March 1981, pp. 37-38 and 42.

124 See above, note 1, chapters 3, 4 and 7.

125 See above, note 9, chapter 4.

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

127 See above, note 116; and *C. v Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee, (2002).

*[T]hose migratory policies whose central focus is the mandatory detention of irregular migrants, without ordering the competent authorities to verify in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures of achieving the same ends, are arbitrary.*¹²⁸

Guideline 27: *Immigration detention should solely be for the administrative purposes of preventing unlawful entry or removal. The following do not constitute legitimate objectives for immigration detention:*

(i) The imposition of detention as a deterrent against irregular migration is not lawful under international law.

(ii) The imposition of detention as a direct or indirect punishment for irregular immigration is not lawful under international law.

(iii) The imposition of detention as a direct or indirect punishment for those who do not cooperate with immigration proceedings is not lawful under international law.

(iv) The imposition of detention for the purpose of status determination is not lawful under international law.

(v) The imposition of detention solely to protect public safety or national security is not lawful un-

128 *Vélez Loor v. Panama*, Inter-American Court of Human Rights, 23 November 2010.

der international law.

(vi) The imposition of detention solely for the purpose of administrative expediency is not lawful under international law.

Under international law, there are only two administrative objectives which legitimate immigration detention. These are the prevention of unlawful entry and removal.¹²⁹ The European Court of Human Rights has held that the list of exceptions to the right to liberty under Article 5(1) of the ECHR “is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his liberty”.¹³⁰ Detention for any other purpose is therefore unlawful. *Guideline 27* reflects this principle and elaborates on six administrative purposes which therefore do not constitute legitimate objectives for detention, but which nonetheless are increasingly being used as the basis for such detention.

It must be noted that the detention of stateless persons awaiting stateless determination may occur and the UNHCR recognises this as a valid exception to the general presumption against detention. Other exceptions recognised by the UNHCR in the context of asylum seekers (and therefore relevant to stateless persons) are when detention is for the purpose of the verification of identity, in instances where the individual has destroyed documents and/or used fraudulent documents and in

129 See above, note 60, Article 5(1)(f).

130 See above, note 122, Para 37.

order to protect national security or public order.¹³¹ ERT is of the position that such grounds are not legitimate objectives for detention in their own right, but in cases where one of the two legitimate objectives recognised under international law is the primary reason for detention, these grounds are juridically relevant facts to be considered when assessing the proportionality of the detention. For example, an individual against whom removal proceedings have been initiated maybe detained because his use of fraudulent documents increases the likelihood of him absconding. In such a situation, the primary purpose for his detention is removal. If removal ceases to be a legitimate objective (see *Guideline 28*) the individual should not continue to be detained because he had used fraudulent documents.

Guidelines 27 (ii) and (iii) state that immigration detention should not be used to directly or indirectly punish irregular migration or non-cooperation in removal proceedings. It is a well-established principle of international law that immigration detention must solely be for administrative purposes and should not have a penal element to it.¹³² As stated by the UN High Commissioner for Human Rights, “[t]he great majority of immigrants, refugees and asylum seekers are not criminals and therefore should not be confined in detention centres like criminals”.¹³³ Furthermore, the UN Working Group on arbitrary Detention has stated that “*Migrants in an irregular situation have not commit-*

131 See above, note 4, Guideline 3.

132 See above, note 70, Para 77.

133 Pillay, Navanethem, UN High Commissioner for Human Rights, *Immigrants among millions unlawfully detained*, 2 October 2008, available at: <http://www.alertnet.org/thenews/newsdesk/L2538064.htm>.

*ted any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.*¹³⁴

In instances where irregular migration is criminalised, stateless persons are likely to be disproportionately impacted due to the likelihood that they do not possess the requisite documentation to travel. Hannah Arendt first raised concern over the criminalisation of statelessness in 1951:

*The stateless person, without right to residence and without the right to work, had of course constantly to transgress the law. He was liable to jail sentences without ever committing a crime (...) Since he was the anomaly for which the general law did not provide, it was better for him to become an anomaly for which it did provide, that of the criminal.*¹³⁵

Sixty years later, this remains a valid concern amidst the growing international trend to criminalise irregular migration. ERT has therefore recommended that *“immigration laws take into account the reality of statelessness and provide for exceptions in the context of stateless persons, so as not to discriminate”*.¹³⁶

Guideline 28: *Removal will not be a legitimate objective and detention pending removal will therefore be arbitrary in instances where removal:*

134 See above, note 8, Para 58.

135 Arendt, H., *The Origins of Totalitarianism*, Harcourt, Brace & World, New York, 1966, p. 286.

136 See above, note 1, Recommendation 14, p. 239.

- (i) is not practicable within a reasonable period of time;*
- (ii) violates international law obligations of non-refoulement;*
- (iii) violates the individual's right to remain in his or her own country;*
- (iv) violates the individual's right to respect for private and family life; or*
- (v) violates other international human rights law standards.*

As is the case with detention, removal too can only be pursued for legitimate purposes. According to the UN Working Group on Arbitrary Detention:

[T]here are situations in which a removal order cannot be executed because, for example, the consular representation of the country of origin of the migrant does not cooperate or there is simply no means of transportation available to the home country. An example of a legal limitation for removal is the principle of non-refoulement. In such cases, where the obstacle to the removal of the detained migrants does not lie within their sphere of responsibility, the detainee should be released to avoid potentially indefinite detention from occurring, which would be arbitrary... The principle of proportionality requires that detention always has a legitimate aim, which would not exist if there were no longer a real and tangible prospect of removal.¹³⁷

137 See above, note 8, Para 62.

Guideline 28, drawing on the above authoritative statement of the UN Working Group and also on the safeguards entrenched by the European Return Directive,¹³⁸ highlights five situations in which removal would not constitute a legitimate objective. The first is when removal is not practicable within a reasonable period of time,¹³⁹ which is particularly likely in the context of statelessness. Under the European Return Directive:

*When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.*¹⁴⁰

The second situation is when removal would violate the state obligation of *non-refoulement*. This principle of human rights and refugee law prohibits states from removing non-citizens to a situation of persecution or irreparable harm.¹⁴¹ The principle of *non-refoulement* has become a cornerstone of refugee law, and is part of international human rights law.¹⁴²

The third situation addresses the person's right to live in his or her own country. This situation is particularly rel-

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

139 See above, note 123.

140 See above, note 138, Article 15(4).

141 See above, note 1, pp. 67 – 69.

142 See above, note 54, Article 3.

evant to stateless persons who face discrimination and human rights abuse in their countries of habitual residence, and where attempts may be made to remove such persons. Any such attempts would be in contravention of international law.

Fourthly, removal should not violate the individual's right to respect for private and family life.¹⁴³ According to the HRC,

*[I]n cases where one part of a family must leave the territory of the State Party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State Party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.*¹⁴⁴

The *ICJ Practitioner's Guide* provides detailed analysis of the right to private and family life in relation to removal, including a presentation of the factors that the European Court considers relevant in this regard.¹⁴⁵

143 The Right to family and private life is protected under many human rights instruments. See for example, Articles 17 and 23 ICCPR; Article 9 CRC; Article 8 ECHR; Article 11 ACHR; Article 18 ACHPR.

144 *Jonny Rubin Byahuranga v. Denmark*, CCPR/C/82/D/1222/2003, UN Human Rights Committee, (2004).

145 See above, note 9, pp. 119 - 121.

Finally, this *Guideline* states that removal should not violate other human rights law standards. Such standards include the freedom of religion or belief and the freedom of expression.¹⁴⁶

Guideline 29: *In order for detention to be lawful, domestic law should prescribe the substantive and procedural safeguards which must be satisfied in order to detain a person and the detention must be carried out strictly in accordance with both national and international law by persons legally authorised for that purpose.*

According to the ICCPR, “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹⁴⁷ This is one of the most important safeguards against arbitrary detention. The principle of “prescription by law” requires both that detention be in accordance with national law and procedures and that such procedures are sufficient to protect the individual from arbitrary detention.¹⁴⁸

Guideline 29 reflects this international legal principle that the deprivation of liberty must “conform to the procedural and substantive requirements laid down by an already existing law”.¹⁴⁹ For a detailed analysis of international

146 *Ibid.*, see pp. 122 – 123 for a detailed analysis.

147 See above, note 28, Article 9(1).

148 See *Čonka v Belgium*, (51564/99), 2002, Para 39.

149 See above, note 118, Para 59.

law obligations with regard to the principle of prescription by law, see the *ICJ Practitioner's Guide*.¹⁵⁰

Guideline 30: *The following considerations should be taken into account in determining whether detention is non-discriminatory, necessary, proportionate and reasonable:*

(i) Any decision to detain must be based on an individual assessment.

(ii) A person should not be detained solely by reason of his or her statelessness.

(iii) The length of time it is likely to be necessary to detain a person in order to achieve the objective pursued will be an important factor in the assessment of the proportionality and reasonableness of detention.

(iv) Stateless persons are particularly vulnerable to the negative impact of detention, including the psychological impact, owing to their unique vulnerability to prolonged and indefinite detention. This could render their detention discriminatory, disproportionate and unreasonable.

(v) Any outstanding applications for protection should be exhausted before any decision to detain a stateless person is taken.

(vi) The inability of a stateless person to cooperate with removal proceedings should not be treated as non-cooperation.

150 See above, note 9, pp. 150 – 151.

Guideline 30 lists some further considerations in determining whether detention would be arbitrary or not.

Guideline 30(i) stipulates that for detention to be in compliance with the principles articulated in *Guideline 25*, it must be based on an individual assessment that takes account of the specificities of the particular case.

Guideline 30(ii) articulates a particularly important principle. These *Guidelines* aim to draw attention to the specific circumstances related to statelessness which increase the likelihood of any detention of stateless persons being arbitrary, and to provide guidance to protect stateless persons from such arbitrary detention. The detention of persons solely because they are stateless is consequently an act of direct discrimination in violation of the right to liberty and security of the person, that is diametrically opposed to the purpose and spirit of the *Guidelines* and the human rights principles that inform them. It is unsurprising therefore, that the UNHCR Executive Committee has called on states “*not to detain stateless persons on the sole basis of their being stateless and to treat them in accordance with international human rights law...*”¹⁵¹

Guideline 30(iii) stipulates that the “*length of time it is likely to be necessary to detain a person... (is an) important factor in the assessment of the proportionality and reasonableness of the detention.*” The commentary to *Guideline 28(1)* explores this issue. Similarly, the commentary to *Guidelines 47* and *48* on vulnerable groups should be referred to in relation to *Guideline 30(iv)*.

151 UN High Commissioner for Refugees, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, 6 October 2006, No. 106 (LVII) – 2006.

Guideline 30(v) stipulates that a person should not be detained before outstanding applications for protection have been exhausted. It is highly desirable that persons subject to statelessness determination procedures, or appealing the decisions of such procedures, should not be detained until a final decision has been made.

Finally, *Guideline 30(vi)* states that the “*inability of stateless persons to cooperate with removal proceedings should not be treated as non-cooperation.*” ERT research has found that *de facto* stateless persons in particular are often seen as being as difficult and non-cooperative by immigration authorities and decision makers. This prejudice often blinds the authorities to the reality that stateless persons cannot cooperate with removal for reasons which arise from their ineffective nationality and are beyond their control.¹⁵² Being considered to be uncooperative can have significant repercussions on the individual’s right to be free from arbitrary detention, including in extreme cases, the refusal of bail. Therefore, it is extremely important that authorities are sensitised to the particular circumstances of statelessness.

It must be noted that as per *Guideline 27(iii)*, even in instances where stateless persons are being uncooperative, this alone does not legitimise their immigration detention.

3.2. ALTERNATIVES TO DETENTION

This section contains seven *Guidelines* and has been primarily influenced by two comprehensive studies on

152 See above, note 1, pp. 127 – 139.

alternatives to detention carried out by the UNHCR¹⁵³ and the International Detention Coalition.¹⁵⁴ For a more comprehensive overview of alternatives to detention, the reader is encouraged to refer these two reports.

Guideline 31: *Detention should only be used as a measure of last resort. Whenever a restriction of liberty is deemed necessary to fulfil a legitimate administrative objective, states have an obligation in the first instance to consider and apply appropriate and viable alternatives to immigration detention that are less coercive and intrusive than detention, ensure the greatest possible freedom of movement and that respect the human rights of the individual.*

Alternatives to detention are a fast growing area of international law. The commentary to *Guideline 25* above establishes that the principles of proportionality and necessity require detention to only be used as a measure of last resort. It logically follows that the detaining authorities are obligated to exhaust all less coercive measures before resorting to detention. In this regard, the UN Working Group on Arbitrary Detention has recommended that *“alternative and noncustodial measures, such as reporting requirements, should always be considered before resorting*

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

154 See above, note 5.

to detention".¹⁵⁵ The UNHCR has stated that "[a]lternatives to detention – from reporting requirements or bail/bond systems to structured community supervision and/or case management programmes – are part of any assessment of the necessity and proportionality of detention."¹⁵⁶

Also relevant in this regard is the UN General Assembly resolution which has called on all states to

*[R]espect the human rights and the inherent dignity of migrants and to put an end to arbitrary arrest and detention and, where necessary, to review detention periods in order to avoid excessive detention of irregular migrants, and to adopt, where applicable, alternative measures to detention.*¹⁵⁷

The European Return Directive obligates states to only resort to detention if no "other sufficient but less coercive measures can be applied effectively in the concrete case".¹⁵⁸ Furthermore, as stated by the Council of Europe Committee of Ministers:

A person may only be deprived of his/her liberty, with a view to ensuring that a re-

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

156 See above, note 3, Para 60.

157 UN General Assembly, *Protection of migrants: resolution / adopted by the General Assembly*, 17 March 2009, A/RES/63/184, Para 9.

158 See above, note 138, Article 15(1).

*removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.*¹⁵⁹

The UN Special Rapporteur on the Human Rights of Migrants makes important recommendations on the steps that need to be taken to ensure that alternatives to detention are more systematically and widely implemented:

*[T]he obligation to always consider alternatives to detention (non-custodial measures) before resorting to detention should be established by law. Detailed guidelines and proper training should be developed for judges and other State officials, such as police, border and immigration officers, in order to ensure a systematic application of non-custodial measures instead of detention.*¹⁶⁰

He also emphasises why alternatives to detention must increasingly replace detention in the context of migration control:

159 Council of Europe: Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, Guideline 6.

160 See above, note 6, Para 53.

There are many reasons why detention of migrants should be avoided and alternatives be sought. Immigration detention remains far less regulated and monitored than criminal detention, leaving migrants at risk of, inter alia, prolonged detention, inadequate conditions and mistreatment. Migrants in detention often do not benefit from their right to legal review and due process, sometimes due to the lack of access to legal counsel or interpretation services. Detention systematically deteriorates the physical and mental condition of nearly everyone who experiences it. Symptoms related to depression, anxiety and post-traumatic stress disorder are common. Prolonged detention deepens the severity of these symptoms, which are already noticeable in the first weeks of detention. Research has found that over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and assistance. The alternatives have also proved to be considerably less expensive than detention, not only in direct costs but also when it comes to longer-term costs associated with detention, such as the impact on health services, integration problems and other social challenges.¹⁶¹

The vulnerabilities of migrants identified by the Special Rapporteur, are heightened when the migrants are stateless, thus increasing the need for alternatives to be applied.

161 *Ibid.*, Para 48.

Guideline 32: *It is preferable that states have a range of alternatives available, so that the best alternative for a particular individual and/or context can be applied in keeping with the principle of proportionality and the right to equal treatment before the law.*

The principles of proportionality and equal treatment before the law require states to have a range of alternatives available, so that the most suitable alternative which allows for the greatest possible enjoyment of rights can be applied in any given case.

The *UNHCR Detention Guidelines* recommend reporting requirements (periodic reporting to the authorities), residency requirements (obligation to reside at a specific address or within a particular administrative district), the provision of a guarantor or surety, release on bail and residence in open centres (obligation to live in collective accommodation centres, where they would be allowed to leave and return during stipulated times) as viable alternatives to detention.¹⁶² Other alternatives include registration requirements, the deposit of documents, case management/supervised release and electronic monitoring. Importantly, any such measures must conform to international law, including the principles of proportionality, necessity and non-discrimination. Furthermore, they should not prevent individuals from enjoying their other human rights.¹⁶³

162 See above, note 4, Guideline 4.

163 See above, note 6, Para 54.

ERT is of the position that certain alternatives to detention – electronic tagging in particular – have a significantly detrimental impact on the dignity and wellbeing of the individual and should not be promoted as alternatives which fully respect human rights. In this regard, the UN Special Rapporteur on the Human Rights of Migrants has stated that:

This measure can be particularly intrusive, and may violate the right to freedom of movement provided by article 12 of the International Covenant on Civil and Political Rights. Furthermore, the stigmatizing and negative psychological effects of the electronic monitoring are likely to be disproportionate to the benefits of such monitoring... Another problem with electronic monitoring is that it is difficult, if not impossible, for migrants without a permanent residence to benefit from this alternative to detention. If those who cannot comply with electronic monitoring requirements end up being detained, this measure could be discriminatory. If electronic monitoring is linked to other restrictions, such as a requirement to remain at home for most of the day, such restrictions might amount to house arrest, which could be seen as equivalent to detention.¹⁶⁴

164 *Ibid.*, Para 63.

Guideline 33: *The choice of an alternative should be influenced by an individual assessment of the needs and circumstances of the stateless person concerned and prevailing local conditions.¹⁶⁵ In designing and applying alternatives to detention, states should observe the principle of minimum intervention.*

If there are various alternatives available, the most appropriate alternative for the individual case – taking into consideration all factors, including the specific circumstances, vulnerabilities and human rights of the individual – must be implemented. In doing so, states are also urged to observe the principle of minimum intervention, which requires the use of the least coercive and severe method possible in order to achieve the administrative purpose at hand. According to the UN Special Rapporteur on the Human Rights of Migrants:

When considering alternatives to detention, States must take full account of individual circumstances and those with particular vulnerabilities, including pregnant women, children, victims of trafficking, victims of torture, older persons and persons with disabilities. The least intrusive and restrictive measure possible in the individual case should be applied. Legislation should establish a sliding scale of measures from least to most restrictive, allowing for an analy-

¹⁶⁵ See above, note 4, Guideline 4.

sis of proportionality and necessity for every measure. Some non-custodial measures may be so restrictive, either by themselves or in combination with other measures, that they amount to alternative forms of detention, instead of alternatives to detention. When considering whether the measures applied amount to detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.¹⁶⁶

It is therefore essential, that an individual assessment of the needs and circumstances of the person and prevailing conditions is carried out.¹⁶⁷

Guideline 34: *The imposition of alternatives to detention which restrict a stateless person's human rights including the right to liberty should be subject to the same procedural and substantive safeguards as detention. States should therefore, apply all the relevant standards specified in the Guidelines and under international law to ensure that alternatives to detention pursue a legitimate objective, are lawful, non-discriminatory, necessary, proportionate and reasonable.*

When alternatives to detention restrict human rights – in particular the right to liberty of a person – such alterna-

166 See above, note 6, Para 53.

167 See above, note 4, Guideline 4.

tives must be subject to the same procedural and substantive safeguards that protect persons from arbitrary detention. The commentary to *Guideline 37* elaborates on the safeguards that apply to detention and is therefore relevant to this *Guideline* as well. Additionally, the following comments by the UN Special Rapporteur on the Human Rights of Migrants are relevant:

In order to ensure the success of alternatives to detention, all persons subject to non-custodial measures should receive clear and concise information about their rights and duties in relation to the measures in place, and on the consequences of non-compliance. They should also be treated with dignity, humanity and respect for their human rights throughout the relevant immigration procedure. Migrants subject to non-custodial measures should have access to legal advice, including on regularisation procedures and how to explore regular migration channels. The issuing of identification documents for those who do not have any is also a necessary feature of alternatives to detention, in order to avoid (re-)detention and facilitate the ability to find accommodation and work and to access health care, education and other services. Migrants who are subject to non-custodial measures also have a right, in accordance with the Covenant on Economic, Social and Cultural Rights, to an adequate standard of living (food and water, clothing, housing) (art. 11) and to the enjoyment of the highest attainable standard of physical and mental health (art. 12).¹⁶⁸

168 See above, note 6, Para 66.

Guideline 35: *Where stateless persons are subject to alternatives to detention which restrict their human rights including the right to liberty, they should be subject to automatic, regular, periodic review before an independent judicial body to ensure that they continue at all times to pursue a legitimate objective, be lawful, non-discriminatory, necessary, proportionate and reasonable.*

Guideline 35 provides that alternatives to detention should be subject to periodic review and should cease to be applied in cases where it is found that the administrative purpose cannot be fulfilled. The non-custodial measures should be subject to legal review, and migrants subject to such measures should have access to legal counsel.¹⁶⁹ The commentary to *Guideline 41* on the periodic review of detention elaborates on the human rights standards that are relevant to this *Guideline*.

Although they relate to non-custodial measures in the criminal justice system, the UN Standard Minimum Rules for Non-Custodial Measures provide important guidance on the procedural and substantive safeguards that should be applied in the context of alternatives to detention.¹⁷⁰

169 *Ibid.*, Para 53.

170 United Nations General Assembly, *Standard Minimum Rules for Non-custodial Measures*, A/RES/45/110, 14 December 1990.

Guideline 36: *Alternatives to detention should be applied for the shortest time necessary within which the administrative objective can be achieved. If there is evidence to demonstrate that the administrative objective pursued cannot be achieved within a reasonable period of time, the person concerned should not be subject to such alternatives to detention and should instead be released in conformity with Guidelines 55 – 60 below.*

This final *Guideline* on alternatives to detention should be followed in order to ensure compliance with the international law principles of necessity, proportionality and arbitrariness explored above. The commentary to *Guideline 42* on release from detention further elaborates on the principles relevant to this *Guideline* as well. The reader should also refer the commentary to *Guidelines 55 – 60*, in order to be informed of the full spectrum of considerations and rights with regard to release.

It is important to also echo the concern of the Special Rapporteur on the Human Rights of Migrants that “*alternatives to detention should not become alternatives to unconditional release. Persons who are eligible for release without conditions should not be diverted into alternatives.*”¹⁷¹

3.3. ONGOING DETENTION

The eight *Guidelines* in this section focus on the procedural guarantees that stateless persons are entitled to

171 See above, note 6, Para 52.

when in detention, the maximum time-limit for detention, the regular periodic review of detention and conditions of detention.

Guideline 37: *In instances where the detention of stateless persons complies with the safeguards and procedures established in Guidelines 23 - 30 above, stateless detainees should be entitled to the following minimum procedural guarantees:*

(i) Detention shall be ordered by and/or be subject to the prompt and effective control of a judicial authority.

(ii) The individual shall receive prompt and full written communication in a language and in terms that they understand, of any order of detention, together with the reasons for their deprivation of liberty.

(iii) The individual shall be informed of their rights in connection with the detention order, including the right to legal advice, the right to apply for bail, seek judicial review and/or appeal the legality of the detention. Where appropriate, they should receive free legal assistance.

(iv) The individual should be informed of the maximum time-limit of their detention.

(v) All detaining authorities are urged to provide stateless detainees with a handbook in a language and terms they understand, containing information on all their rights and entitlements, contact details of organisations which are mandated to protect them, NGOs and visiting groups and advice on how to challenge the legality of their detention and their treatment as detainees.

The procedural guarantees listed in *Guideline 37* are all well established under international law, many of which have been articulated by the UN Working Group on Arbitrary Detention:

*Detention must be ordered or approved by a judge and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. The procedural guarantee of article 9(4) of the International Covenant on Civil and Political Rights requires that migrant detainees enjoy the right to challenge the legality of their detention before a court (...) All detainees must be informed as to the reasons for their detention and their rights, including the right to challenge its legality, in a language they understand and must have access to lawyers.*¹⁷²

This *Guideline* lists five procedural guarantees that stateless persons in detention are entitled to. The 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (*UN Body of Principles*) contains a series of procedural and substantive guarantees in this regard, and should be read as a complementary text to the *Guidelines*.¹⁷³ The *ICJ Practitioner's Guide* also provides an overview of many of the procedural guarantees not included in the *Guidelines*.¹⁷⁴

172 See above, note 8, Para 61.

173 See above, note 66.

174 See above, note 9, pp. 178 – 184 for more detail on the relevant Guarantees.

The first procedural guarantee in *Guideline 37(1)* is that detention should be ordered and subject to the control of a judicial authority. In this regard see Article 5(3) of the ECHR:

Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

See also Principle 4 of the *UN Body of Principles*, according to which:

*Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.*¹⁷⁵

Principle 9 of the same instrument states that

*The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.*¹⁷⁶

175 See above, note 66, Principle 4.

176 *Ibid.*, Principle 9.

Secondly, this *Guideline* deals with the communication of the detention order to the individual in a language and terms that he or she understands. Under the IC-CPR, “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”¹⁷⁷ The parallel ECHR provision is more detailed - “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.”¹⁷⁸ On the issue of language, see the case of *Rahimi v. Greece*, where the provision of an Arabic brochure to a Farsi speaker was deemed inadequate.¹⁷⁹ The *UN Body of Principles* also provide detailed guidance on the provision of information to the detainee in a language that he or she understands.¹⁸⁰

Guideline 37(iii) states that individuals should be informed of their rights and where appropriate, receive free legal assistance. In this regard, see the *UN Body of Principles*:

*If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.*¹⁸¹

177 See above, note 28, Article 9(2).

178 See above, note 60, Article 5(2).

179 *Rahimi v. Greece*, (8687/08), 5 April 2011.

180 See above, note 66, Principles 13 and 14.

181 *Ibid.*, Principle 17(2).

Guideline 37(v) recommends the provision of a handbook containing relevant information in this regard. While there is no international law obligation to provide such a handbook, it is promoted as a good practice.¹⁸²

Guideline 37(iv) stipulates that individuals should be informed of the maximum time-limit of their detention. The legal requirements pertaining to maximum time limits to detention are analysed in the commentary to *Guideline 41*.

The UN Special Rapporteur on the Human Rights of Migrants has emphasised that despite the above procedural guarantees being required under international law, many national immigration detention regimes continue to deny them to detainees:

*Migrants who are detained find themselves in an especially vulnerable situation, as they may not speak the language and therefore understand why they are detained, or be aware of ways to challenge the legality of their detention. The Special Rapporteur has been made aware that migrants in detention are frequently denied key procedural safeguards, such as prompt access to a lawyer, interpretation/translation services, necessary medical care, means of contacting family or consular representatives and ways of challenging detention.*¹⁸³

182 See above, note 73.

183 See above note 6, Para 15.

This emphasises the need for more scrutiny of immigration detention regimes to ensure they are compliant with international law standards.¹⁸⁴

Guideline 38: *Detention shall never be indefinite. Statelessness should never lead to indefinite detention and statelessness should never be a bar to release.*

This *Guideline* reiterates guidance issued by the UNHCR on the detention of stateless persons.¹⁸⁵ Accordingly, where statelessness is a bar to release, detention will be discriminatory. Indefinite detention is inevitably arbitrary, as it does not fulfil a legitimate objective, is unreasonable and disproportionate. Furthermore, the detrimental impact of indefinite detention on the wellbeing of the individual (particularly the psychological impact) can amount to cruel, inhuman and degrading treatment or punishment. Consequently, the “*deprivation of liberty should never be indefinite*”.¹⁸⁶ Thus, the UN Special Rapporteur on Migrant Workers has called on states to ensure that “*the law sets a limit on detention pending deportation and that under no circumstance is detention indefinite.*”¹⁸⁷

184 See in this regard, the commentary to *Guideline 44*.

185 See above, note 4, *Guideline 9*.

186 Office of the High Commissioner on Human Rights, *Administrative Detention of Migrants*, available at: <http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf>.

187 UN Commission on Human Rights, *Migrant Workers - Report of the Special Rapporteur, Gabriela Rodriguez Pizarro*, E/CN.4/2003/85, Para 75.

Indefinite detention also undermines the rule of law, as it is based on and results in uncertainty, which in turn results in unfairness. According to the principle of legal certainty “*individuals should be able to foresee, to the greatest extent possible, the consequences which the law may have for them.*”¹⁸⁸ The European Court of Human Rights has held that the need for legal certainty is particularly important in cases where individual liberty is at stake.¹⁸⁹

Guideline 39: *Detention should always be for the shortest time possible. There should be a reasonable maximum time-limit for detention. It is highly desirable that states do not detain stateless persons for more than six months. States which at present have a lower than six month maximum time-limit for detention are urged not to increase it, and all states are urged to review and reduce their maximum time-limit for detention.*

According to the UN Working Group on Arbitrary detention, “*a maximum period of detention must be established by law and (...) upon expiry of this period the detainee must be automatically released.*”¹⁹⁰ The Working Group has also stated that custody may in no case be unlimited or of excessive length.¹⁹¹ There is no international consensus on

188 See above, note 9, p. 150.

189 *Medvedyev and Others v. France*, (3394/03), 29 March 2010, Para 80.

190 See above, note 8, Para 61.

191 See above, note 126.

what is a reasonable maximum time-limit for immigration detention. State practice in this regard ranges from non-detention (Brazil) to 45 days (France) to six months (Hungary) to no maximum time-limit (the UK).¹⁹² Because international practice covers such a broad range, it is difficult to recommend a maximum time-limit which both respects individual human rights and would be accepted as reasonable by all states. After much deliberation, the *Guidelines* recommend that the maximum time-limit should be no longer than six months, which is the period set out in the EU Return Directive and which is applied in many countries.¹⁹³ For example, the US Supreme Court has held that:

*It is unlikely that Congress believed that all reasonably foreseeable removals could be accomplished in 90 days, but there is reason to believe that it doubted the constitutionality of more than six months' detention. Thus, for the sake of uniform administration in the federal courts, six months is the appropriate period.*¹⁹⁴

The factors taken into consideration by ERT when recommending this time-limit include a balancing of the individual's right to liberty with the practical consider-

192 See above, note 1, pp. 211 – 212.

193 See above, note 138, Article 15(5) which states that “each member State shall set a limited period of detention which may not exceed six months”. However, Article 15(6) of the Directive does allow for detention to be extended by a maximum of twelve more months in exceptional cases where “regardless of all their reasonable efforts the removal operation is likely to last longer”.

194 *Zadvydas v. Davis et al*, Supreme Court of the United States, No. 99-7791, Decided June 28, 2001, p.22.

ations of states including difficulties of removing persons within a short time-span.

ERT however has always emphasised that the shortest possible maximum time-limit for immigration detention should be implemented at all times and countries which at present have a shorter maximum time-limit, should not increase it. It is important to ensure that the imposition of a general maximum time-limit does not result in the “levelling down” of human rights safeguards. One example in this regard the policy change of Italy, which after the imposition of the EU Return Directive increased its maximum time-limit for detention from 30 – 180 days. The fact that detention is undesirable (*Guideline 23*) should be the starting point for states. It is only then, that this type of “levelling down” would cease to happen.

Guideline 40: *When calculating the total time spent by an individual in detention, it is highly desirable that time spent in detention on previous occasions is taken into consideration unless the material reasons for detention have changed. Such measures would protect the individual from being a victim of cycles of detention.*

Guideline 40 addresses the issue of “cycles of detention”. States should not release persons from detention after the maximum time-limit has been reached, only to detain them again in a perpetual cycle. In order to ensure that the cycle of detention is broken, states should act in accordance with *Guidelines 55 – 60* which provide guidance on the treatment and protection of released stateless de-

tainees. If released detainees are given a legal status and integrated into society, the likelihood of them being detained in future would be minimised.

Guideline 41: *The administrative purpose behind the detention should be pursued with due diligence throughout the detention period, in order to ensure that detention does not become arbitrary at any stage. Detention should be subject to automatic, regular and periodic review throughout the period of detention, before a judicial body independent of the detaining authorities. If at any stage, it is determined that the administrative purpose can be achieved without detaining the person, the person should be released in conformity with Guidelines 55 – 60 below or subject to a suitable and proportionate alternative to detention in conformity with Guidelines 31 - 36.*

Guideline 41 calls on states to practice due diligence and to regularly review immigration detention to ensure that it remains non-arbitrary at all times. The international law basis to this position is encapsulated under the ICCPR:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.¹⁹⁵

195 See above, note 28, Article 9(4).

Furthermore, the ECHR states that:

*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*¹⁹⁶

The European Court of Human Rights has held that detainees must have the right to access judicial or administrative review of the lawfulness of detention, as well as a right to appeal against detention and deportation in cases of administrative immigration detention. In a case dealing with the *incommunicado* detention of a stateless person in Bulgaria pending deportation, with no right of review or appeal under Bulgarian law, the European Court held that Bulgaria was in violation of Article 5(4) of the ECHR and its underlying rationale of the protection of individuals against arbitrariness.¹⁹⁷

The *Guidelines* were influenced in particular by the strong protections contained in the European Return Directive. Under the Directive, “*any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence*”.¹⁹⁸ The Directive also obligates states to provide for a “*speedy judicial review of the lawfulness of*

196 See above, note 60, Article 5 (4).

197 *Al-Nashif v Bulgaria* (50963/99), 2002.

198 See above, note 138, Article 15(1).

detention”,¹⁹⁹ and to review all cases of detention at reasonable intervals.²⁰⁰ Furthermore, the Directive states that detention ceases to be justified if “*it appears that a reasonable prospect of removal no longer exists*”.²⁰¹

The *UN Body of Principles* also contains strong safeguards in this regard:

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

*2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.*²⁰²

Similarly, the HRC has held that detention which may have initially been legal may become arbitrary if it is unduly prolonged or not subject to periodic review,²⁰³ and

199 *Ibid.*, Article 15(2).

200 *Ibid.*, Article 15(3).

201 *Ibid.*, Article 15(4).

202 See above, note 66, Principle 32.

203 De Zayas, A., “The Examination of Individual Complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights”, in Alfredsson, G. et al. (eds), *International Human Rights Monitoring Mechanisms*, The Hague, 2001, pp. 67-121.

that “detention should not continue beyond the period for which the State can provide appropriate justification”.²⁰⁴

There is a large body of jurisprudence on the judicial review of detention, which details all the procedural rights and guarantees relevant to such review. For a more comprehensive analysis of the international standards in this regard, see the *ICJ Practitioner’s Guide*.²⁰⁵

Guideline 42: *As soon as it becomes evident that the administrative purpose cannot be achieved within a reasonable period of time, or that the detention otherwise becomes incompatible with the tests set out in Guidelines 23 - 30, or upon the expiration of the maximum time-limit for detention, the detainee should be released in conformity with Guidelines 55 – 60 below.*

When detention ceases to serve a legitimate administrative objective, it becomes arbitrary. As stated by the UN Working Group on Arbitrary Detention, “*where the obstacle to the removal of the detained migrants does not lie within their sphere of responsibility, the detainee should be released to avoid potentially indefinite detention from occurring, which would be arbitrary.*”²⁰⁶

204 *C. v Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee, (2002), Para 8.2.

205 See above, note 9, pp. 184-189.

206 See above, note 8, Para 63.

Consequently, all detainees must be released in accordance with *Guidelines 55 – 60*, when the conditions listed in *Guideline 42* are met.

Guideline 43: *Conditions of detention should be prescribed by law and should comply with international human rights law and standards. While all international standards on conditions of detention should be complied with, the following are emphasised in particular:*

(i) Conditions of detention for stateless persons should be humane, with respect shown at all times for the inherent dignity of the person. No detainees should be subject to torture, cruel, inhuman or degrading treatment or punishment.

(ii) Stateless persons in detention should be protected from discrimination and harassment and should be entitled to detention conditions which are not inferior to those provided to national detainees.

(iii) Stateless persons in detention should be subject to treatment that is appropriate to the administrative purpose of their detention. Under no circumstances should stateless detainees be housed in the same facilities as remand prisoners or convicted prisoners serving criminal sentences.

(iv) Immigration detention facilities should be designed and built in compliance with the principle that there is no punitive element to immigration detention. As such, detention centres should facilitate the living of a normal life to the greatest extent possible.

(v) Women and men should be detained separately unless they belong to the same family.

(vi) Reasonable accommodation should be provided to ensure that disabled persons in detention are treated in accordance with principles of international human rights law.

(vii) All stateless detainees should be allowed free and frequent access to: (i) their families, friends, communities and religious groups; (ii) their legal counsel; (iii) the UNHCR; (iv) the consulate of any state in order to establish nationality or the lack thereof; (v) medical and psychological care; and (vi) civil society organisations and visitors groups.

(viii) The human rights of stateless persons in detention – including the right to a nationality, the rights to respect for private and family life, freedom of thought, conscience and religion, freedom of expression and the rights to health, education, shelter and food - should be respected, protected and fulfilled at all times.

There are many authoritative standards with detailed guidance on conditions which must be provided to stateless persons (and other migrants) in immigration detention. These include:

- The 1955 UN Standard Minimum Rules for the Treatment of Prisoners;²⁰⁷

207 See above, note 65.

- The *UN Body of Principles*;²⁰⁸
- The 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty;²⁰⁹
- The *UNHCR Detention Guidelines*;²¹⁰ and
- The 2010 UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).²¹¹

Many other international, regional and national guidelines and principles on detention provide useful guidance on the detention of immigrants, including stateless persons. Most relevant in this regard are:

- The European Committee for the Prevention of Torture Standards;²¹²
- The European Union Agency for Fundamental Rights report entitled *Detention of Third-Country Nationals in Return Procedures*;²¹³
- The publication by the UK HM Inspector of Prisons, *Immigration Detention Expectations: Criteria for assessing the conditions for and treatment of immigration detainees*;²¹⁴ and

208 See above, note 66.

209 See above, note 67.

210 See above, note 4.

211 See above, note 69.

212 See above, note 70.

213 See above, note 71.

214 See above, note 72.

- The *Immigration Detention Centre Guidelines* of the Human Rights and Equal Opportunities Commission of Australia.²¹⁵

Guideline 43 emphasises some of the most important international standards on conditions of detention, which should be adhered to when detaining stateless persons. For a more comprehensive overview of international law requirements in this regard, the above texts should be consulted.

Guideline 43(i) calls on states to treat detainees with dignity, and not to subject them to torture, cruel, inhuman and degrading treatment or punishment. The right to be free from torture is enshrined in Article 7 ICCPR, CAT and Article 3 ECHR. The *UN Body of Principles* states that:

*No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.*²¹⁶

In the European Court of Human Rights case of *MSS v. Belgium and Greece*, the Grand Chamber held that the conditions of detention imposed on the claimant in Greece amounted to a violation of his rights under Article 3 ECHR.²¹⁷

215 See above, note 73.

216 See above, note 66, Principle 6.

217 *MSS v Belgium and Greece* (30696/09), 2011.

The ICCPR also states that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”²¹⁸ The HRC has stated that this right applies to anyone deprived of liberty, including in detention camps. Furthermore, this is a fundamental and universally applicable rule which cannot be dependent on the material resources available in the State.²¹⁹ As stated by the UN Special Rapporteur on the Human Rights of Migrants:

*[S]ubstandard detention conditions may potentially amount to inhuman or degrading treatment, and may increase the risk of further violations of economic, social and cultural rights, including the right to health, food, drinking water and sanitation.*²²⁰

Guideline 43(ii) provides that stateless persons should be treated without discrimination and that they are entitled to the same detention conditions as other detainees. Under the CMW:

*Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.*²²¹

218 See above, note 28, Article 10(1).

219 UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992.

220 See above, note 6, Para 26.

221 See above, note 57, Article 17(7).

*Guidelines 43(iii) and (iv) are based on the fact that immigration detention has no punitive element to it. The CPT Standards state that “a prison establishment is by definition not a suitable place in which to hold someone who is neither accused nor convicted of a criminal offence”.*²²² Furthermore, they declare that:

*Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. For example, detained irregular migrants should have every opportunity to remain in meaningful contact with the outside world (including frequent opportunities to make telephone calls and receive visits) and should be restricted in their freedom of movement within the detention facility as little as possible.*²²³

As stated by the UN Special Rapporteur on the Human Rights of Migrants,

Detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature. As migrants in administrative detention have not been charged with or convicted of a crime, they should not be subject to prison-like conditions and environments, such as prison uniforms, highly restricted movement, lack

222 See above, note 70, Para 77.

223 *Ibid.*, Para 79.

*of outdoor recreation and lack of contact visitation. However, the Special Rapporteur has received information indicating that detention conditions in migrant detention centres are often prison-like and, in some countries, the conditions may be worse in migrant detention centres than in prisons. Some migrant detention centres only allow monitored visits, and have dividing screens in the visitation areas, preventing physical contact with visiting family and friends. Detained migrants do not always have access to telephones, which can make communication with their lawyers difficult. The Special Rapporteur has also been made aware of the absence of interpreters in some detention centres, which makes communication with the migrant detainees difficult and subjects them to misinformation.*²²⁴

Guideline 43(v) requires that women and men are not detained together unless they belong to the same facility. The *UNHCR Detention Guidelines* contain a long list of conditions that must be met by detaining authorities, including this requirement.²²⁵

Guideline 43(vi) states that “Reasonable accommodation should be provided to ensure that disabled persons in detention are treated in accordance with principles of international human rights law.” This requirement is compatible with state obligations under the CRPD.²²⁶

224 See above, note 6, Para 31.

225 See above, note 4, Guideline 10.

226 See above, note 58, Article 14(2).

Guideline 43 (vii) requires that stateless detainees are allowed free and frequent access to

“(i) [T]heir families, friends, communities and religious groups; (ii) their legal counsel; (iii) the UNHCR; (iv) the consulate of any state in order to establish nationality or the lack thereof; (v) medical and psychological care; and (vi) civil society organisations and visitors groups.”

The *UN Basic Principles* contain similar provisions with regard to access to families and legal counsel²²⁷ and medical care.²²⁸ Furthermore, the UN Working Group on Arbitrary Detention has stated that the UNHCR, International Committee of the Red Cross, and where appropriate, NGO's must be allowed access to detainees.²²⁹

The right to access consular authorities is particularly important, both to protect persons from *de facto* statelessness and its implications, and to enable individuals to establish whether they are *stateless* or not. Under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations:

if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of

227 See above, note 66, Principle 15.

228 *Ibid.*, Principle 24.

229 See above, note 126.

*that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.*²³⁰

Article 36 of the Vienna Convention has been interpreted by the International Court of Justice as follows:

The Court notes that Article 36, paragraph 1 (b), spells out the obligations the receiving State has towards the detained person and the sending State. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual's detention 'without delay'. It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State 'without delay'. Significantly, this subparagraph ends with the following language: "The said authorities shall inform the person concerned without delay of/ his rights under this subparagraph" Moreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained

230 See above, note 86, Article 36(1)(b).

*person may not be exercised “if he expressly opposes such action”. The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions that the Court must apply these as they stand. Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person.*²³¹

Finally, *Guideline 43(viii)* requires that the human rights of stateless detainees are protected at all times.

Guideline 44: *There should be effective and open access to, and independent and regular monitoring of detention centres, by National Human Rights Institutions, civil society organisations and UN bodies, to ensure that they comply with national and international legal requirements. States are urged to ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).*

Preventative detention monitoring is one of the most effective ways of combating human rights violations in detention facilities. *Guideline 44* lists out key institutions which should have access to detention facilities in order

231 International Court of Justice, Reports of Judgments: Advisory Opinions and Orders, *LaGrand Case (Germany v. United States of America)*, 27 June 2001, Para 77.

to ensure that they are being operated in a manner that is compliant with international human rights law standards. According to the UN Special Rapporteur on the Human Rights of Migrants,

In order to monitor the conditions of detention of migrants, the Special Rapporteur believes that independent visits are crucial. OHCHR, UNHCR, the International Committee of the Red Cross (ICRC), national human rights institutions and non-governmental organizations (NGOs) should be allowed access to all places of detention. In addition to allowing for such visits, the ratification by States of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, allowing for visits by the Subcommittee on Prevention of Torture and the establishment of a national preventive mechanism, is of utmost importance to ensure proper monitoring of places where migrants are detained.²³²

Significantly, *Guideline 43* recommends that states ratify OPCAT, the objective of which is to

[E]stablish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.²³³

²³² See above, note 6, Para 32.

²³³ Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. Res. 57/199 (2002).

3.4. VULNERABLE GROUPS

There are seven *Guidelines* in this section. These *Guidelines* do not seek to elaborate on all of the considerations which should influence a state's dealings with vulnerable persons in the context of immigration detention, but rather to emphasise those which are most relevant.

Guideline 45: *Stateless persons are vulnerable and should be protected at all times. It is highly desirable that "statelessness" is recognised as a protected characteristic.*

The need for these *Guidelines* arises from that fact that stateless persons are a vulnerable group who are not adequately recognised as such, or accordingly accommodated by immigration regimes. *Guideline 45* reiterates that stateless persons are themselves a category of vulnerable person, who should be protected at all times. Additionally, this *Guideline* recommends that "statelessness" is recognised as a protected characteristic in its own right. Under the *Declaration of Principles of Equality* definition of discrimination, while statelessness is not listed as a protected characteristic, it may be directly connected to listed protected characteristics such as race, ethnicity, descent, national or social origin and nationality, depending on the particular circumstances of the situation. Furthermore, statelessness is likely to be recognised as a ground for discrimination under the test to identify other protected characteristics.²³⁴ However,

234 See above, note 7, Principle 5.

it is still preferable that statelessness is explicitly recognised as a protected characteristic, particularly in the context of immigration detention.

Guideline 46: *It is highly desirable that individual vulnerability assessments of all stateless detainees are carried out periodically by qualified persons, to determine whether detention has had a negative impact on their health and well-being. If this is determined to be so, there should be a reassessment of the proportionality of the detention, which may result in the person being released in conformity with Guidelines 55 - 60 below or subject to a suitable and proportionate alternative to detention in conformity with Guidelines 31 - 36.*

Guideline 46 is based on the fact that stateless persons are particularly vulnerable to lengthy detention. Consequently, while the *Guidelines* establish that there should be a reasonable maximum time-limit for detention and that stateless persons should not be detained where it would not be possible to remove them within a reasonable period of time, *Guideline 46* is designed as an additional safeguard to ensure that stateless persons who are more vulnerable to the impact of lengthy detention – including the psychological impact – are identified and protected accordingly.

Guideline 47: *Statelessness identification procedures should identify persons who are additionally vulnerable to discrimination or the negative effects of detention due to their specific characteristics, context and/or experience. Such persons include disabled persons, those with specific physical and mental health conditions and needs, victims of trafficking, victims of torture, cruel, inhuman or degrading treatment or punishment, LGBTI persons, the elderly, pregnant women, nursing mothers and those belonging to minorities which are at heightened risk of discrimination in detention.*

In addition to the general vulnerabilities associated with statelessness, stateless persons who possess certain characteristics or have endured particular experiences are even more vulnerable to discrimination and the negative impact of detention. *Guideline 47* calls on states to identify those who may belong to vulnerable groups at the initial screening stage, before detention.

Guideline 48: *Vulnerable persons should not be detained. In exceptional circumstances where a decision to detain vulnerable persons fulfils all criteria stated in the Guidelines:*

- (i) detention should only be permitted after the completion of a welfare assessment;*
- (ii) detention should only be permitted after it has been medically certified that the experience*

of detention would not adversely impact their health and wellbeing;
(iii) special steps should be taken to ensure that such persons are not subject to discrimination, harassment or abuse at the hands of other detainees or officers; and
(iv) such persons should have regular and timely access to all appropriate services, such as hospitalisation, medication and counselling to ensure that continuous care is provided.

Having identified additionally vulnerable stateless persons according to *Guideline 47, Guideline 48* recommends that such migrants should not be detained.

The *UNHCR Detention Guidelines* contain recommendations relating to the detention of the elderly, victims of torture and/or trauma, persons with mental or physical disability,²³⁵ and women, with a particular emphasis on pregnant women and nursing mothers.²³⁶

With regard to victims of trafficking, it must be noted that *“trafficked persons should not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination.”*²³⁷ The Office of the High Commissioner for Human Rights has also stated that trafficked persons should not under any

235 ²³⁵ See above, note 4, Guideline 7.

236 *Ibid.*, Guideline 8.

237 See above, note 6, Para 42.

circumstances be held in immigration detention.²³⁸ The UN General Assembly has also called upon states to ensure that the victims of trafficking are not penalised for being trafficked.²³⁹

The UN Special Rapporteur on the Human Rights of Migrants stated that “[v]ictims of torture are already psychologically vulnerable due to the trauma they have experienced and detention of victims of torture may in itself amount to inhuman and degrading treatment.”²⁴⁰

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, which supplement the Standard Minimum Rules for the Treatment of Prisoners, provide specific guidance with regard to vulnerable women.²⁴¹

The rights of disabled persons in this regard are protected under the CRPD, according to which:

State Parties shall ensure that persons with disabilities, on an equal basis with others:

- a. Enjoy the right to liberty and security of person;*
- b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation*

238 Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1, Guideline 2(6), available at: [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/caf3deb2b05d4f35c1256bf30051a003/\\$FILE/N0240168.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/caf3deb2b05d4f35c1256bf30051a003/$FILE/N0240168.pdf).

239 UN General Assembly, *Trafficking in women and girls: resolution/ adopted by the General Assembly*, 30 January 2003, A/RES/57/176, available at: <http://www.unhcr.org/refworld/docid/3f4352044.html>.

240 See above, note 6, Para 43.

241 See above, note 69.

*of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.*²⁴²

In exceptional circumstances where the detention of such migrants is deemed to be lawful – and consequently not arbitrary, disproportionate, unnecessary or discriminatory - extra safeguards should be put in place to protect such persons. In this regard it must be noted that under the CRPD,

*State Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.*²⁴³

As stated by the UN Special Rapporteur on the Human Rights of Migrants,

In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well-being. In addition, there must be regular follow up and sup-

242 See above, note 58, Article 14(1).

243 *Ibid.*, Article 14(2).

*port by skilled personnel. They must also have access to adequate health services, medication and counselling.*²⁴⁴

The *ICJ Practitioner's Guide* analyses in some detail the standards pertaining to the detention of vulnerable persons, and is recommended reading for those who wish to further explore this area.²⁴⁵

Guideline 49: *Stateless children should not be detained. Stateless children should at all times be treated in accordance with the UN Convention on the Rights of the Child, including the principle of the best interests of the child. Children should not be detained because they or their parents, families or guardians do not have legal status in the country concerned. Families with stateless children should not be detained and the parents of stateless children should not be separated from their children for purposes of detention. In exceptional circumstances where children are detained because it is in their best interest, they should not be detained with adults unless it is in their best interest to do so.*

Guideline 49 states that children should not be detained. There is strong international consensus on this principle which is articulated in the *UNHCR Detention*

244 See above, note 6, Para 44.

245 See above, note 9, pp. 172 – 176.

*Guidelines.*²⁴⁶ The CRC has some particularly relevant safeguards in this regard, including the obligation to protect children from discrimination,²⁴⁷ the principle of the best interests of the child,²⁴⁸ the principle that children should not be separated from their parents against their will,²⁴⁹ and principles pertaining to the liberty of the child.²⁵⁰ According to the CRC:

*No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*²⁵¹

Furthermore, The UN Working Group on Arbitrary Detention has held that unaccompanied minors should never be detained.²⁵²

This *Guideline* does acknowledge that in certain exceptional circumstances it may be deemed in the best interest of the child for her or him to be detained. This ex-

246 See above, note 4, Guideline 6.

247 See above, note 59, Article 2.

248 *Ibid.*, Article 3.

249 *Ibid.*, Article 9.

250 *Ibid.*, Article 37.

251 *Ibid.*, Article 37(b).

252 UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, E/CN.4/1999/63/Add.3, 18 December 1998. Para 37.

ception has extremely limited application and must not be used as justification for policies that allow children to be detained. As stated by the UN Special Rapporteur on the Human Rights of Migrants, “[c]hildren in immigration detention will often be traumatized and have difficulty understanding why they are being “punished” despite having committed no crime.”²⁵³ In such exceptional circumstances when children are detained, it must be in accordance with safeguards entrenched in the CRC:

*Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*²⁵⁴

Children deprived of their liberty also have a right to appropriate medical treatment,²⁵⁵ education²⁵⁶ and recreation and play.²⁵⁷

253 See above, note 6, Para 38.

254 See above, note 59, Article 37(c).

255 *Ibid.*, Article 24.

256 *Ibid.*, Article 28.

257 *Ibid.*, Article 31.

The UN Special Rapporteur on the Human Rights of Migrants has observed the disturbing practice of migrant children sometimes being detained with their parents when the latter are found to be in an irregular situation. Such practices are justified on the basis that they maintain family unity. “[N]ot only may this violate the principle of the best interests of the child and the right of the child to be detained only as a measure of last resort, but it may also violate their right not be punished for the acts of their parents”.²⁵⁸ As the Special Rapporteur concludes,

*This does not mean that the best interests of the child are served through splitting up the family by detaining the parents and transferring their children to the alternative-care system. The detention of their parents has a detrimental effect on children, and may violate children’s right not to be separated from their parents against their will, as well as the right to protection of the family set forward in article 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights. A decision to detain migrants who are accompanied by their children should therefore only be taken in very exceptional circumstances. States must carefully evaluate the need for detention in these cases, and rather preserve the family unit by applying alternatives to detention to the entire family.*²⁵⁹

258 See above, note 6, Para 40. The right not to be punished for the acts of their parents is enshrined in Article 2(2) of the CRC.

259 *Ibid.*

Guideline 50: *There should be a presumption of release of children born in detention. Such children should have their births registered and their right to a nationality respected and protected in accordance with the provisions of international law.*

Guideline 50 draws from the international law principle which provides the basis for *Guideline 49* above. It is logical to apply the same principles which protect children from being detained to ensure that children born into detention are released.

This *Guideline* also states that “*such children should have their births registered and their right to a nationality respected and protected in accordance with the provisions of international law.*” According to the CRC:

- 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.*
- 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*²⁶⁰

260 See above, note 59, Article 7.

Therefore, there is a strong legal basis to support the assertion that stateless children born in detention should be provided with the nationality of the detaining state.²⁶¹

Guideline 51: *As a general rule, stateless asylum-seekers should not be detained. The detention of asylum-seekers may exceptionally be resorted to for limited purposes as set out by the UNHCR, as long as detention is clearly prescribed by national law and conforms to general norms and principles of international human rights law.*²⁶²

Under to the 1951 Convention Relating to the Status of Refugees:

*The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*²⁶³

261 For more detailed guidance on this issue, see UN High Commissioner for Refugees, *Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children: Summary Conclusions*, September 2011, available at: <http://www.unhcr.org/refworld/docid/4e8423a72.html>.

262 See above, note 4, adapted from Guidelines 2 & 3.

263 Convention Relating to the Status of Refugees, G.A. Res. 429 (V) (1951).

This *Guideline* is therefore a reflection of international law and reiterates the UNHCR *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, which state that as a general principle, asylum seekers should not be detained.²⁶⁴

It must be noted, however, that according to the UNHCR, asylum-seekers may be detained in exceptional circumstances.²⁶⁵

3.5. FOREIGN NATIONAL PRISONERS AND EX-OFFENDERS

Guideline 52: *Non-national prisoners and ex-offenders shall benefit from all rights, procedural and substantive, stated in the Guidelines.*

(i) It is highly desirable that non-national prisoners who may be stateless or who are at risk of statelessness are subject to statelessness determination procedures before completing their prison sentence. Where there is evidence to suggest that a non-national prisoner is stateless, any further detention after the completion of their sentence for purposes of removal is likely to be unnecessary, disproportionate and arbitrary.

(ii) It is highly desirable that removal proceedings against non-national prisoners who are to be removed from the country, begin a minimum of six months prior to the completion of their

264 See above, note 4, Guideline 2.

265 *Ibid.*, Guideline 3.

prison sentence, or at the beginning of their prison sentence if it is six months or shorter. Where there is no reasonable likelihood of removal at the time their sentence is complete, non-national ex-offenders should not be automatically subject to further detention pending removal.

(iii) Protecting public safety and national security do not constitute legitimate objectives for the imposition of immigration detention. Under no circumstances should non-national ex-offenders be held in immigration detention solely for these reasons.

Guideline 52 focuses on the detention of foreign national prisoners and ex-offenders. Foreign national prisoners are often subject to removal proceedings upon the completion of criminal sentences. Stateless foreign national prisoners and ex-offenders are at heightened risk of lengthy or indefinite detention because of the reluctance of states to release them – even if they are irremovable – on public policy grounds.

In order to reduce this discriminatory treatment, ERT has recommended that foreign national prisoners are subject to statelessness determination procedures while they are serving their criminal sentence and if necessary, subject to removal proceedings at least six months before their criminal sentence expires.²⁶⁶ ERT has also recommended that further detention which serves a non-administrative purpose (such as the protection of public safety and national security) should be authorised and

²⁶⁶ See above, note 1, pp. 237–238.

regulated by an appropriate legal framework and that immigration detention should not be implemented for these purposes.²⁶⁷

As stated in the commentary to *Guideline 27*, the protection of public safety and national security does not in itself constitute a legitimate objective for immigration detention. Consequently, stateless non-national ex-offenders who cannot be removed within the maximum time-limit of immigration detention should not be detained under immigration powers.

While the recommendations contained in *Guidelines 52(i)* and *(ii)* are not obligatory under international law, acting in accordance with these recommendations will enable states to fulfil their international law obligations relating to arbitrary detention. These *Guidelines* therefore provide practical guidance on how states can improve the protection of human rights in this regard.

PART IV – ADDITIONAL GUIDELINES

The final part to the *Guidelines* comprises three sections on data and statistical information, release and compensation.

4.1. DATA AND STATISTICAL INFORMATION

Guideline 53: *It is highly desirable that states maintain reliable data, disaggregated by protected characteristic and by type of statelessness, showing:*

²⁶⁷ *Ibid.*, pp. 238–239.

- (i) *the number of persons who have been subject to statelessness identification procedures; and*
- (ii) *the number of persons who have been recognised as stateless.*

Guideline 54: *It is highly desirable that states maintain reliable data, disaggregated by protected characteristic and by type of statelessness, showing:*

- (i) *the number of stateless detainees;*
- (ii) *the reasons for their detention;*
- (iii) *the length of their detention; and*
- (iv) *the outcomes of their detention.*

The failure of states to maintain accurate and comprehensive statistics related to statelessness is an indication of the degree to which national immigration regimes prioritise the identification and protection of stateless persons. For example, a recent attempt to survey the stateless population in the UK was significantly hindered by the lack of comprehensive statistics on the population on the one hand, and the existence of contradictory and overlapping statistics on the other.²⁶⁸

In order to effectively protect stateless persons, it is essential to build a sound knowledge base of the size and nature of the population. The *UNHCR Analytical Framework* states that it is important to have reliable and disaggregated data on the number of stateless persons in

268 See above, note 19.

detention and the reasons for their detention.²⁶⁹ ERT has also recommended that,

*[S]tatistics should be maintained in a comprehensive manner, and be disaggregated by age, sex and country/territory of origin. Further data collection which distinguishes the stateless community into the de jure and de facto, identifies the cause of de facto statelessness, and registers the reasons why a (...) nationality is ineffective, is needed to develop policy based on principles of human rights and equality (...) Such an approach would enable the authorities to anticipate situations in which removal will be impossible, and so minimise detention 'pending removal.'*²⁷⁰

Guidelines 53 and *54* recommend that states maintain statistical information that is disaggregated by protected characteristic and by type of statelessness (i.e. stateless and *de facto* stateless) on statelessness determination procedures and on stateless populations in detention. While these two *Guidelines* do not reiterate any international legal obligation, they propose a practical way for states to better protect stateless persons within their territory or subject to their jurisdiction, and also to better understand the extent of statelessness in their countries.

4.2 RELEASE

The seven *Guidelines* in this section focus on the treatment of stateless persons after release from detention.

269 See above, note 74, pp. 20-21.

270 See above, note 1, p. 232.

Guideline 55: *State obligations towards stateless persons do not cease after release from detention or alternatives to detention. Special care should be taken to address the vulnerabilities of stateless persons who are released from detention and to ensure that they enjoy all human rights which they are entitled to under international law.*

Guideline 12 provides that:

States have a duty to respect, protect and fulfil the human rights of all stateless persons within their territory or subject to their jurisdiction... The human rights obligations of states in respect of stateless persons apply at all times, including in the exercise of immigration control.

The commentary to *Guideline 12* provides an overview of the legal basis for this *Guideline*, and is relevant to *Guideline 55* as well. The obligations of states towards stateless persons do not cease when they are released from detention or alternatives to detention. Instead, they continue as long as such persons are within their territory or subject to their jurisdiction. In fact, it may be argued that the obligations of states towards stateless persons are heightened when they are released from detention as in this context there is clear awareness of the individual's situation, and consequently a more tangible responsibility to ensure that their human rights are respected and protected. It can be contended therefore that states have a positive obligation to ensure that released detainees are able to fully enjoy their human rights. State policy

and practice which acts as a bar to the enjoyment of such rights (such as the non-provision of appropriate stay rights or the prohibition of the right to work) is contrary to the spirit of the obligation to respect, protect and fulfil the rights of stateless persons.

Guidelines 56 to 60 elaborate on some of the key human rights obligations of states towards released stateless detainees.

Guideline 56: *Released stateless detainees should be provided with appropriate documentation and stay rights suitable to their situation.*

The lack of documentation is a common problem for stateless persons. For those who do not possess documentation, accessing the most basic rights and services that most people take for granted such as travel, banking, education and employment are difficult, complex and often impossible tasks. Without documentation it is not possible to fully integrate into mainstream society and live a secure life. Furthermore, the lack of documentation increases the risk of being re-detained in future.

The 1954 Convention obligates states to “*issue identity papers to any stateless person in their territory who does not possess a valid travel document.*”²⁷¹ Importantly, this provision applies to all stateless persons including those not lawfully in the territory of the state. The Convention also obligates states to issue travel documents,

271 See above, note 10, Article 27.

to those lawfully staying in the territory, and provides that all other stateless persons may also be provided with travel documents.²⁷²

Furthermore, under the Convention:

*The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.*²⁷³

Consequently state parties to the 1954 Convention have a clear obligation to provide stay rights to released stateless detainees.

It can be argued that states which are not party to the 1954 Convention also have an obligation to provide adequate stay rights to released stateless detainees. The term “*lawfully within the territory*” found in the ICCPR²⁷⁴ has been interpreted by the HRC to apply to persons who are allowed to remain in a country because the host State is unable to remove them.²⁷⁵ Released stateless detainees fall into this category, and therefore should be provided with appropriate stay rights.

272 *Ibid.*, Article 28. Under this provision, states may not provide travel documents if there are “*compelling reasons of national security or public order*”.

273 *Ibid.*, Article 32.

274 See above, note 28, Articles 12(1) and 13.

275 *Celepli v. Sweden*, CCPR/C/51/D/456/1991, UN Human Rights Committee, (1994).

Guideline 57: Released stateless detainees should be protected from destitution.

The ICESCR enshrines the right of everyone to an adequate standard of living, including adequate food, clothing and housing and the fundamental right to be free from hunger.²⁷⁶ States that have sufficient resources but allow stateless released detainees to go hungry and live without adequate shelter and clothing act in violation of this most fundamental of rights.

In *Unravelling Anomaly*, ERT stated that “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.”²⁷⁷ The practice of releasing stateless persons from detention into a state of enforced destitution where they are not allowed to work and do not have access to adequate social welfare is extremely disturbing.

Enforced destitution can also amount to cruel, inhuman or degrading treatment if it meets a particular threshold. *Guideline 57* therefore establishes that released stateless detainees should be protected from destitution.

Guideline 58: Released stateless detainees should have access to healthcare, social welfare, shelter and primary education on an equal basis with nationals.

276 See above, note 53, Article 11(1) and (2).

277 See above, note 1, p. 240.

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

*Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights.*²⁷⁸

Furthermore,

*The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.*²⁷⁹

All of the rights referred to in *Guideline 58* are enshrined in the ICESCR, and apply without discrimination to all persons (including stateless persons and regardless of their legal status):

- Article 12 of the ICESCR enshrines the right of every

²⁷⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, E/C.12/GC/20, 2009, Para 7.

²⁷⁹ *Ibid.*, Para 30.

person to the highest attainable standard of physical and mental health.

- Article 9 of the ICESCR enshrines the right of everyone to social security, including social insurance.
- Everyone's right to housing is enshrined in ICESCR Article 11(1).
- Article 13(2)(a) of the ICESCR enshrines the right to education and states that "*Primary education shall be compulsory and available free to all*".

For an in-depth analysis of the socio-economic rights of migrants including stateless persons, please refer the *ICJ Practitioner's Guide*.²⁸⁰

Guideline 59: *It is highly desirable that released stateless detainees are allowed to work. Such persons are entitled to equal work place rights as nationals.*

Guideline 59 recommends that states allow released stateless persons the right to work. This *Guideline* addresses the contradiction created by states which do not allow released stateless persons to work and also fail to provide them with adequate welfare, thus driving them into destitution.

The ICESCR provides that:

The States Parties to the present Covenant recognize the right to work, which includes

280 See above, note 9, for a detailed analysis of the housing rights of migrants including stateless persons.

*the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*²⁸¹

Importantly, the Covenant does not limit the right to work to citizens or to persons lawfully in the territory of a state. Furthermore, Article 17 of the 1954 Convention obligates states to

*[A]ccord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage in wage-earning employment... (and) give sympathetic consideration to assimilating the rights of all stateless persons with regard to wage-earning employment to those of nationals.*²⁸²

Guideline 59 reflects the position under international human rights law that while the provision of the right to work to non-nationals is discretionary, all persons who do have the right to work (including non-nationals) must be entitled to equal work place rights. In this regard, please see Article 7 of the ICESR, according to which:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of

281 See above, note 53, Article 6(1)

282 See above, note 10, Articles 17(1) and 17(2).

work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.²⁸³

For a detailed analysis of the rights to work of migrants including stateless migrants, please see the *ICJ Practitioner's Guide*.²⁸⁴

Guideline 60: *It is most desirable that durable solutions are found for statelessness, including the facilitated naturalisation of stateless migrants.*

283 See above, note 53, Article 7.

284 See above, note 9, pp. 236-248.

The final *Guideline* in this section recommends that states expedite the naturalisation of stateless persons. *Guideline 60* therefore restates the 1954 Convention obligation of states to facilitate the naturalisation of stateless persons.²⁸⁵ The implementation of policies to facilitate the integration and naturalisation of stateless persons must be seriously considered by states which are committed to finding durable solutions to statelessness.²⁸⁶

4.3. COMPENSATION

Guideline 61: All stateless persons who have been subject to arbitrary detention should be compensated in a fair and non-discriminatory manner.

Guideline 62: Such compensation should take into account the length of detention, the impact of detention on the individual and the nature of treatment to which the detainee was subject.

The final two *Guidelines* are pursuant to recommendation made by ERT in *Unravelling Anomaly*, which calls for compensation to be paid to stateless persons who have been unlawfully detained.²⁸⁷

285 See above, note 10, Article 32 states that “[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings”.

286 See above, note 1, Recommendation 8, pp. 233 – 234.

287 *Ibid.*, pp. 240 – 241.

According to the ICCPR, “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”.²⁸⁸ Similarly, the ECHR states that “[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”.²⁸⁹ It is not uncommon for victims of unlawful and arbitrary detention to receive compensation. For example, in the case of *Lopko and Toure v. Hungary*, the European Court of Human Rights held that the detention of the applicants for a five month period for the purposes of removal which never materialised was disproportionate to the aim of removal pursued by the state. Both applicants were awarded compensation of 10,000 Euro each.²⁹⁰

288 See above, note 28, Article 9(5).

289 See above, note 60, Article 5.

290 *Lopko and Toure v. Hungary*, (10816/10), 20 September 2011.