



European  
Network on  
Statelessness

# PROTECTING STATELESS PERSONS FROM ARBITRARY DETENTION

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A REGIONAL TOOLKIT FOR PRACTITIONERS

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# FOREWORD

The immigration detention of stateless persons is one of the silent tragedies of our globalised world that plays out behind closed doors, away from the gaze of the media, but with significant, irreparable human cost. It is a tragedy that is completely preventable, but due to a lack of will and attention, continues to harm thousands of lives all around the world every year.

During the time I have served as UN Special Rapporteur on the Human Rights of Migrants, I have witnessed first-hand the deep human impact of immigration detention, particularly when carried out for unreasonably long periods and where there is no real prospect of removal. Grown men and women separated from their families and communities; left to languish with no hope of release or return; in conditions akin to those in prisons for the criminally convicted. Despite growing global consensus to the contrary, all too often, children too are subject to immigration detention that deeply scars them and robs them of their childhood. Immigration detention of this nature is a blight on our common humanity. It is cruel, inhuman and degrading treatment. It is telling people that they are not welcome, and that they will be punished until they find a way to return, even if return is impossible. Significantly, such detention does not work. It is expensive, it does not enhance the likelihood of removal – and so is not effective, and it is often in violation of international law.

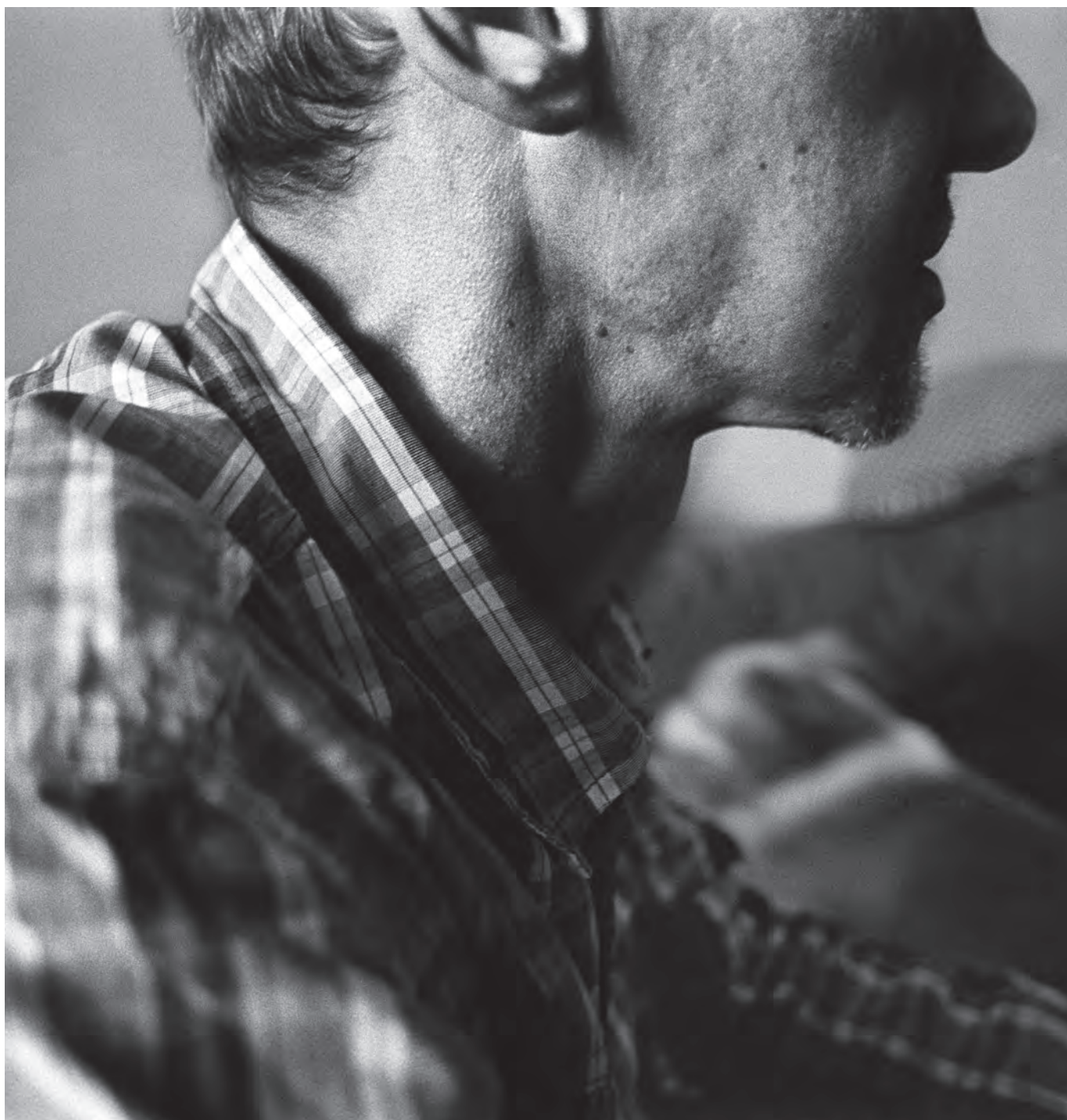
A more humane approach that assesses each case; that takes into consideration the unique situation of the individual and their vulnerabilities, including the question of whether they are stateless or at risk of statelessness; that scrutinises the decision to detain against the minimum standards of international human rights law; that always first explores alternatives to detention and only resorts to detention at the last; and that treats those who cannot be removed with dignity, providing them with stay rights; is likely to also be a

more effective, cost-efficient and lawful approach. Through my work, I have been promoting such an approach which is consistent with international law. In my 2012 report to the UN Human Rights Council, I recommended that states apply “stateless status determination procedures to stateless migrants, and provide persons recognized as being stateless with a lawful immigration status.”

This is the approach that this toolkit promotes, challenges us to pursue and empowers us to implement. This empowerment comes in the form of the many rich international and regional resources that this toolkit introduces the reader to in an easy to follow manner. These resources make this toolkit – targeted at European practitioners working on statelessness and detention – also relevant and useful to practitioners in other parts of the world, and working on behalf of non-stateless detainees. Any practitioner, be they a state authority responsible for taking decisions to remove and detain, a lawyer challenging the lawfulness of such detention or an NGO activist advocating for law and policy reform, will find in this toolkit a rich resource, that will guide them as they carry out their day-to-day duties. I hope it is widely read and used, and has the dual practical impact of inspiring law and policy reform and protecting vulnerable people from arbitrary, unlawful detention.

**François Crépeau**

UN Special Rapporteur on the human rights of migrants



## LIST OF ABBREVIATIONS

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**ATDs:** Alternatives To Detention

**CAT:** Convention Against Torture

**CoE:** Council of Europe

**CRC:** Convention on the Rights of the Child

**ECHR:** European Convention on Human Rights

**ECtHR:** European Court of Human Rights

**ECJ:** European Court of Justice

**HRC:** Human Rights Committee

**ICMW:** International Convention on Migrant Workers and Their Families

**ICCPR:** International Covenant on Civil and Political Rights

**ICESCR:** International Covenant on Social, Economic and Cultural Rights

**UNHCR:** United Nations High Commissioner for Refugees

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# I. INTRODUCTION



The increasing use of immigration detention, including for punitive purposes, and the criminalisation of irregular migration by a growing number of states, is a concerning global and European trend. This results in more people being detained for reasons that are not lawful or for longer than they should be. While arbitrary detention is a significant area of concern in general, the unique characteristics associated with stateless persons and those at risk of statelessness make them more likely to be detained arbitrarily, for unduly lengthy periods of time. As the European Court of Human Rights (ECtHR) held in *Kim v Russia*, a stateless person is highly vulnerable to be “simply left to languish for months and years... without any authority taking an active interest in his fate and well-being”.<sup>1</sup> This is largely because immigration systems and detention regimes do not have appropriate procedures in place to identify statelessness and protect stateless persons.

This reality does not sit well with the international and regional human rights frameworks that European countries have obligations under. The protection against arbitrary detention is well entrenched under international and regional law, as is the protection of stateless persons.

In this context, the European Network on Statelessness has embarked on a three year project aimed at better understanding the extent and consequences of the detention of stateless persons in Europe, creating tools for and advocating for protecting stateless persons from arbitrary detention through the application of regional and international standards. Among the outputs of this project are:

- This regional toolkit, which sets out regional and international standards that states are required to comply with. It is intended as a resource for European practitioners<sup>2</sup> (NGOs, lawyers, decision makers etc.) to

help them collectively address the protection gap between international and regional standards on the one hand, and ground reality on the other; and

- A series of country reports investigating the law, policy and practice related to the detention of stateless persons in selected European countries and its impact on stateless persons and those at risk of statelessness. These reports are meant as information resources but also as awareness raising and advocacy tools that we hope will contribute to strengthening protection frameworks in this regard. For year one of the project (2015), three such country reports have been drafted on Malta, the Netherlands and Poland. In year two, further reports will be published on other countries.<sup>3</sup>

## I.1 WHO THIS TOOLKIT IS FOR AND HOW TO USE IT

This toolkit is intended to serve as a resource to a range of European actors who collectively are well placed to enhance the protection of stateless persons, and those at risk of statelessness, from arbitrary immigration detention. Lawyers who are likely to represent stateless clients and/or those in immigration detention; NGOs that provide legal and other services to stateless persons and/or other immigration detainees; legislators and policy makers; state authorities that make and implement decisions to detain; administrative officers and judges with jurisdiction to review detention, hear appeals and order the release of detainees; border guards and private contractors who run detention centres; academics and teachers researching and teaching in this area all may find this toolkit useful and relevant to their work. Stateless persons and those at risk of statelessness may also

find in this toolkit, the reassurance they need that states are under obligation to treat them fairly and to protect them and the arguments they need to secure their rights. This toolkit, and other project outputs (such as the country reports) may thus be useful resources in efforts to challenge unlawful detention and secure release and stay-rights for detainees; to improve existing national law and policy and bring it in line with regional and international standards; and to provide guidance to make correct decisions to detain (or not), to release and to compensate those unlawfully detained.

It should be noted that the majority of European states do not have a statelessness determination procedure, despite the fact that almost all European states are party to the 1954 Convention.<sup>4</sup> As this toolkit will elaborate, arbitrary immigration detention is one of the potential consequences of the protection gap that emerges due to the non-identification of stateless persons. Thus, this toolkit is intended for use regardless of whether a country has acceded to the 1954 Convention and/or has a statelessness determination procedure in place, and indeed, encourages accession, the adoption of such procedures and their application to detention processes by all European countries.

This toolkit is not intended (or at least not required) to be read cover-to-cover. Instead, it is meant to serve as a practical tool to assist practitioners respond to specific contexts and questions. Consequently, it has been structured to make it easy for the user to dip in and out of. Also as a result, there is some overlap and repetition (though minimised) between various sections of this toolkit, as these sections are interrelated to begin with. While the key issues of concern have been selected to highlight and cater to the specific context of statelessness, some of these sections (such as on conditions of detention, vulnerable groups etc.) would equally apply to non-stateless detainees. This is because we have aimed to provide a holistic tool to protect stateless persons from arbitrary detention – a tool which addresses their unique vulnerabilities as well as those they share with all detainees in general. As a result, this toolkit may also serve as a useful resource on arbitrary detention in general, regardless of whether statelessness is a factor or not.

Information is categorised by issue (as per the table of contents) and by type of resource/jurisdiction (United Nations, Council of Europe, European Union and other resources). Depending on the country and situation in question, the user may identify which sections to look at. An extensive bibliography is included at the end of the toolkit, for users who may wish to dig deeper into a particular issue.<sup>5</sup> A table of relevant Treaty Body ratifications is also annexed to this toolkit for ease of reference. Finally, this toolkit has four checklists for practitioners:

- The advocacy checklist: for advocates pushing for law and policy reform and better practice related to the immigration detention of stateless persons in their country.
- The decision to detain checklist: for state authorities making the decision to detain, and for those challenging the legality of such decisions.

- The ongoing detention checklist: for practitioners (detaining authorities, lawyers, NGOs etc.) concerned with ongoing detention.
- The post-release checklist: for practitioners (social welfare officers, lawyers, NGOs etc.) who engage with and provide services to released detainees.

## 1.2 KEY TERMS DEFINED

### Stateless person

A stateless person is defined in the 1954 Convention Relating to the Status of Stateless Persons as someone “*who is not considered as a national by any state under the operation of its law*”.<sup>6</sup> This definition is part of customary international law and has been authoritatively interpreted by UNHCR as requiring “*a careful analysis of how a State applies its nationality laws in an individual’s case in practice and any review/appeal decisions that may have had an impact on the individual’s status. This is a mixed question of fact and law.*”<sup>7</sup> Thus, it is not always a straightforward process to identify if someone is stateless or not, and there will be people who appear to have a nationality, but actually are stateless, or whose statelessness becomes apparent over a period of time. This is one of the reasons it is so important to also protect persons at risk of statelessness.

### Person at risk of statelessness

These are people who either are not stateless, but who can over a period of time become stateless; or whose statelessness will become evident over a period of time. Immigration detention for the purpose of removal is one of the contexts which can bring hidden statelessness to light over the course of time, or indeed, motivate a state to not recognise as its national, a person who it may have recognised as a national in another context. Thus, immigration detention can increase the risk of statelessness for some, and it can unearth the statelessness of others.

Thus, in the immigration detention context in particular, the protection needs of those at risk of statelessness – which stem from their un-returnability – significantly overlap with the protection needs of the stateless. Other terms of art used to describe similar or overlapping groups include the *de facto* stateless,<sup>8</sup> unreturnable persons and those with ineffective nationality. By using the term ‘persons at risk of statelessness’ this toolkit encourages the practitioner to be mindful that the act of detention can have an impact on the status of the individual – including their (non)recognition as a national by a particular state – and can equally shed light on a previously unknown status. Thus, it is crucially important to ensure that the individual is protected at all times, and that in the event of un-returnability, the question of statelessness is revisited. In other words, this term does not box the individual in a category that is permanently separate to statelessness, but rather shows that the individual is in a place of vulnerability that can escalate into statelessness, or with time and further evidence be confirmed as statelessness. Therefore, the obligation to identify statelessness is not a one-off, but may recur.

### Detention

According to UNHCR, “detention” is “the deprivation of liberty or confinement in a closed place” which the individual “is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.”<sup>9</sup>

### Arbitrary detention

Under international law, in order for detention to not be arbitrary, certain standards and criteria must be met. While there is no one source for these criteria, they have been developed over a period of time through the jurisprudence and authoritative statements of UN, regional and national Courts and human rights bodies. Analysis of these different sources and standards brings to light that detention would 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.”<sup>10</sup>

According to UNHCR Guidelines, the term “arbitrariness” should be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability. To guard against arbitrariness, any detention needs to be necessary in the individual case, and proportionate to a legitimate purpose. Whether a deprivation of the liberty is arbitrary will depend on the reasonableness of the detention in a particular case, as the word “arbitrary” implies a lack of reasonable justification.<sup>11</sup>

## I.3 STATELESSNESS AND DETENTION IN EUROPE

All stateless persons should enjoy the rights accorded to them by international and regional human rights law. Their rights should be respected, protected and fulfilled at all times, including in the exercise of immigration control. The circumstances facing stateless persons – including their vulnerability as a result of their statelessness and the inherent difficulty of removing them – are significant factors to be taken into account in determining the lawfulness of immigration detention. The process of determining identity and nationality status of those subject to removal proceedings is often complex and burdensome. Where the person is stateless or at risk of statelessness, their lawful removal is likely to be subject to extensive delays and is often impossible. Stateless persons detained for removal purposes are therefore vulnerable to prolonged and repeated detention. In some countries such detention can even be indefinite. 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 negatively impact stateless persons.

However, the development and practice of immigration detention throughout Europe has largely occurred without regard to the specific circumstances of stateless persons and the implications of international and regional human rights law on their detention. At present, the immigration laws, policies and practices of most European states do not sufficiently take into account the unique characteristics that set stateless persons apart from other migrants. This failure has created a protection gap, which is most evident in the context of immigration detention for the purpose of removal. Resultantly, stateless persons are doubly victimised:

- Without (adequate) legal status, unable to work, receive healthcare, and access social support systems, stateless people in Europe are often undocumented, destitute, exploited, excluded and even criminalised. Thus, they are more likely to come into contact with state authorities – often for committing a petty crime, or working without valid documents – and are likely to be detained for the purpose of removal, sometimes after first having served a prison sentence for their crime.
- In many countries, a growing and significant problem is that stateless migrants are held in immigration detention for long periods – sometimes indefinitely – simply because there is no country to return them to (or return them safely to). Thus, once detained, because of the significant barriers to their removal, their detention is likely to be arbitrary.
- Breaking this vicious and discriminatory cycle of destitution and detention requires law and policy reform as a necessary first step.
- The failure of immigration regimes to comprehend and accommodate the phenomenon of statelessness, identify stateless persons and ensure that they do not directly or indirectly discriminate against them often results in stateless persons being punished for their statelessness.
- Furthermore, despite a range of international standards, there remains an acute dearth of effective national frameworks to identify and protect the stateless. As such there currently exists a significant gulf between notional protection provided under relevant legal standards and the actual realisation of this protection in practice. The lack of protection on the one hand, and the growth of the immigration detention industry on the other have left many stateless persons vulnerable to arbitrary detention in Europe.

## I.4 THE INTERNATIONAL AND REGIONAL FRAMEWORKS PERTAINING TO STATELESSNESS AND DETENTION

For states in the European continent, there are 3 relevant regional and international frameworks: the United Nations framework, the Council of Europe framework and the European Union framework. All European states are members of the United Nations, while the majority of European states – with the exception of Belarus – are members of the Council of Europe. Finally, within the 47 Council of Europe members, 28 states are members of the European Union. Thus, depending on the country, it is easy to identify which framework applies. Within each framework, different instruments may or may not apply, depending on whether the state in question is party to them.



United Nations	Council of Europe	European Union
<p><b>Key Instruments</b></p> <ul style="list-style-type: none"> <li>• International Covenant on Civil and Political Rights (ICCPR), International Covenant on Social, Economic and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of Migrant Workers and Their Families (CRMW); and Convention on the Rights of the Child (CRC);</li> <li>• 1954 Statelessness Convention</li> <li>• Various UN Principles and guidelines</li> </ul>	<p><b>Key Instruments</b></p> <ul style="list-style-type: none"> <li>• European Convention on Human Rights (ECHR)</li> <li>• Council of Europe Twenty Guidelines on Forced Return</li> </ul>	<p><b>Key Instruments</b></p> <ul style="list-style-type: none"> <li>• EU Returns Directive</li> <li>• European Charter of Fundamental Rights</li> </ul>
<p><b>Mechanisms and UN offices and Agencies</b></p> <ul style="list-style-type: none"> <li>• Relevant Treaty Bodies including the Human Rights Committee, Committee on the Rights of the Child and Committee Against Torture.</li> <li>• Relevant Special Procedures including the Special Rapporteur on the Human Rights of Migrants and the Working Group on Arbitrary Detention</li> </ul>	<p><b>Mechanisms</b></p> <ul style="list-style-type: none"> <li>• European Court of Human Rights (ECtHR)</li> <li>• European Committee for the Prevention of Torture (CPT)</li> <li>• European Commission of Social Rights</li> </ul>	<p><b>Mechanisms</b></p> <ul style="list-style-type: none"> <li>• European Court of Justice (ECJ)</li> </ul>

### The United Nations

The promotion and protection of human rights is a key purpose and guiding principle of the UN. The Office of the High Commissioner for Human Rights has lead responsibility within the UN in this regard, and offers its support and expertise to the human rights monitoring and protection mechanisms of the UN. Such mechanisms can broadly be categorised into two:<sup>12</sup>

#### Charter Based bodies

Charter Based bodies, which derive their establishment directly from the UN Charter and have broad mandates and universal scope/jurisdiction, such as the former Commission on Human Rights, which drafted and adopted the Universal Declaration on Human Rights and most subsequent human rights treaties. Charter Based bodies also include the General Assembly, which has endorsed many “soft law” norms relevant to detention issues and the UN Human Rights Council, which has established the Universal Periodic Review and inherited the Special Procedures mandates (independent enquiry mechanisms including special rapporteurs, special representatives, independent experts and working groups with thematic or country-based mandates) from the former Commission on Human Rights, and adopted new ones since its creation in 2006. Of the Special Procedures, the Working Group on Arbitrary Detention, the Special Rapporteur on the Human Rights of Migrants and the Special Rapporteur on Torture are particularly relevant to the detention of stateless persons.

#### Treaty Based bodies

Treaty Based bodies are tasked with monitoring implementation of treaties and derive their existence from a particular treaty and thus have narrower mandates – related to the treaty, and limited jurisdiction – to parties to the treaty. Treaty bodies base decisions on consensus. All the relevant core UN human rights Treaties have monitoring bodies to oversee their implementation. Many of the treaties themselves, and the work of their monitoring bodies are

relevant to this Toolkit. These include the International Covenant on Civil and Political Rights (and the Human Rights Committee), the International Covenant on Economic, Social and Cultural Rights (and the Committee on Economic, Social and Cultural Rights), the Convention Against Torture or Cruel, Inhuman or Degrading Treatment or Punishment (and the Committee Against Torture & Sub-Committee for the Prevention of Torture), the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (and the Committee on Migrant Workers) and the Convention on the Rights of the Child (and the Committee on the Rights of the Child). While the international human rights treaties themselves are legally binding instruments, the powers of the bodies established under them are not correspondingly strong, limited to making country specific concluding observations and adopting thematic general recommendations / comments. Even where such bodies have powers of investigation and/or to hear individual complaints, they can make recommendations which – while carrying significant authority, are not binding on the state. However, over the years, the work of UN HR Treaty Bodies has become increasingly authoritative.

The various UN human rights mechanisms, as well as other UN bodies have contributed immensely to the growth of standards and principles through adopting “soft law” instruments. The instruments relevant to this toolkit include the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Standard Minimum Rules for the Treatment of Prisoners, the UN Rules for the Protection of Juveniles Deprived of their Liberty, the Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) and the Working Group on Arbitrary Detention, Deliberation No.5: Situation regarding immigrants and asylum-seekers. Soft law instruments, particularly those adopted by the UN General Assembly, are generally applicable to all UN member states, but are not legally binding.

As the UN refugee agency, the UNHCR is responsible for overseeing the implementation of the 1954 Convention Relating to the Status of Stateless Persons. The UNHCR Handbook on Protection of Stateless Persons, the UNHCR Guidelines on the Detention of Asylum Seekers as well as various conclusions adopted by its governing body, and known as “ExCom Conclusions” (i.e. “Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, Executive Committee Conclusion No. 106(LVII), 6 October 2006 (ExCom 106)) are also particularly relevant for this toolkit.

### The Council of Europe

Within the Council of Europe Framework, the most influential and relevant instrument is the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR), to which all CoE member states are party. The Council of Europe has also issued Twenty Guidelines on Forced Return, which are not legally binding.

Within this framework, the European Court of Human Rights (based in Strasbourg), which has the power to hear cases in relation to the ECHR and make binding judgments on parties, is the most significant mechanism. Another relevant mechanism is the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which has investigative powers, carries out visits to any place “where persons are deprived of their liberty by a public authority” and issues reports and standards.

### The European Union

Within the EU Framework, it is important to point out two important instruments: the EU Returns Directive and the European Charter of Fundamental Rights. The EU Returns Directive is binding on all EU member states (with the exception of Denmark, Ireland and the UK which have ‘opted out’), and four non-EU states that are part of the Schengen Area (Iceland, Liechtenstein, Norway and Switzerland).<sup>13</sup> The Directive governs the detention of migrants who are subject to removal proceedings, and includes various safeguards against arbitrariness in the decision making and implementation process. The European Charter of Fundamental Rights is a non-binding instrument that contains a wide array of rights applicable to all persons in the territory and/or subject to the jurisdiction of EU member states.

The most relevant EU mechanism is the European Court of Justice (based in Luxembourg), which has the jurisdiction to hear cases and make legally binding judgments on any question of Union Law.





## 2. KEY ISSUES OF CONCERN



This section provides an overview of what each of the three international and regional frameworks say about key issues of concern. It also contains resources by other actors. The issues have been identified through field research and point to where stateless persons are most vulnerable and/or most likely to be discriminated against.

Stateless persons will only be protected from arbitrary detention if the nexus between and convergence of two legal fields is recognised and acted on. The first area is that of the rights of stateless persons – specifically articulated in the 1954 Convention, but also generally reflected in the core body of international human rights law (most of the rights articulated in the ICCPR for example, equally apply to stateless persons).<sup>14</sup> The second, is the right to liberty and security of the person, a specific human rights principle, which is generally applicable to all – including the stateless. The failure

to acknowledge that the specific vulnerabilities associated with statelessness (and those at risk of statelessness) must be taken into account in a decision to detain, leads to arbitrary detention. Acknowledging these vulnerabilities and taking steps to identify the stateless and those at risk of statelessness, as part of the decision to detain, would allow for a fairer and more just application of the liberty and security of the person framework, protecting against arbitrary deprivation of liberty.

It is helpful therefore, to be mindful of the respective strengths and limitations of provisions protecting the right to liberty and security of the person under various mechanisms.

The table below provides a broad overview and comparison of these provisions under the UN, Council of Europe and EU mechanisms.

ICCPR – Article 9.1	ECHR – Article 5.1	Returns Directive – Article 15.1
<p><b>The Provision(s)</b></p> <p>Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.</p>	<p>Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:</p> <ul style="list-style-type: none"> <li>• 5(1)(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken</li> </ul>	<p>1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:</p> <ul style="list-style-type: none"> <li>• there is a risk of absconding or</li> <li>• the third-country national concerned avoids or hampers the preparation of return or the removal process.</li> </ul> <p>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.</p>
<p><b>Scope</b></p> <p>Broad and general in application. Arbitrariness is strictly prohibited.</p>	<p>5(1)(f) exhaustively specifies permissible grounds for immigration detention – prevention of unauthorised entry and removal.</p> <p>Arbitrariness is strictly prohibited.</p>	<p>The scope of the instrument is narrow (restricted to returns). Arbitrariness is strictly prohibited.</p>
<p><b>Some key judgments</b></p> <ul style="list-style-type: none"> <li>• <i>A v Australia</i></li> <li>• <i>Bakhtiyari v Australia</i></li> <li>• <i>C v Australia</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Auad v Bulgaria</i></li> <li>• <i>Saadi v United Kingdom</i></li> <li>• <i>Abdi v United Kingdom</i></li> <li>• <i>A and Others v UK</i></li> <li>• <i>Al-Nashif v Bulgaria</i></li> <li>• <i>Kim v Russia</i></li> <li>• <i>Mikolenko v Estonia</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Kadzoev case</i></li> <li>• <i>Mahdi case</i></li> </ul>
<p><b>Supervision and jurisdiction</b></p> <p>The Human Rights Committee examines individual complaints from countries party to the Optional Protocol to the ICCPR and makes non-binding recommendations in relation to cases heard.</p>	<p>The European Court of Human Rights is a regional Court that has the power to make binding decisions.</p>	<p>The European Court of Justice is a regional Court that has the power to make binding decisions.</p>

The following sub-sections will address in greater detail, the following nine key issues of concern regarding detention of stateless persons:

- Identification and determination of statelessness;
- Decision to detain and arbitrary detention;
- Procedural guarantees;
- Removal and re-documentation;
- Alternatives to detention;
- Children, families and vulnerable groups;
- Length of detention;
- Conditions of detention; and
- Conditions of release and protection from re-detention.

International legal instruments, case law, soft law, Handbooks, guidelines and various other relevant documents will be analysed in greater depth in the following sections.

## 2.1 IDENTIFICATION & DETERMINATION OF STATELESSNESS

The obligation of the state to identify stateless persons within its territory or subject to its jurisdiction is implicit to international human rights law. With regard to state parties to the 1954 Convention, the implicit obligation to identify stateless persons is well established.

Regarding states that are not party to the Convention, the obligation stands to the extent that it is necessary to identify stateless persons in order to fulfil other human rights obligations. For example, it may be that the obligation to not discriminate can only be fully respected and fulfilled if stateless persons are identified so as to ensure they are not directly or indirectly discriminated against. Certain contexts draw out this obligation more pointedly than others, none more so than immigration detention. Indeed, statelessness is a juridically relevant fact to **immigration detention**, as the very nature of statelessness makes stateless persons extremely difficult to remove, and detaining persons when there is no reasonably prospect of removal is most likely to render the detention arbitrary.

Thus, while few European countries have statelessness identification procedures in place, fewer make such procedures easily accessible to stateless detainees and none routinely conduct statelessness determination as part of the decision making process to detain or not. The failure to do so can be regarded as a procedural and substantive gap, particularly when it results in stateless persons or those at risk of statelessness being arbitrarily detained.

### United Nations

ICCPR Article 9(1) states that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. While the ICCPR does

not explicitly state the grounds for detention permissible in the immigration detention context, as explained under section 2.2 below, the concept of arbitrariness has been developed in a manner which prohibits detention that *inter alia* does not fulfil a legitimate purpose and is not proportionate or reasonable. The examination of whether a person is stateless or at risk of statelessness is a juridically relevant fact in making the decision to detain in a manner which complies with Article 9(1).

The UNHCR *Handbook on Protection of Stateless Persons* recognises that the 1954 Convention Relating to the Status of Stateless Persons does not “prescribe any mechanism to identify stateless persons as such.”<sup>15</sup> However, the *Handbook* makes it clear that it is implicit in the Convention that states have a duty to identify stateless persons in their territories, in order to “provide them appropriate treatment in order to comply with their Convention commitments.”<sup>16</sup> Thus, all state parties to the Convention, should have such a procedure in place. The *Handbook* also clarifies that statelessness is a juridically relevant fact in relation to the protection against arbitrary detention – under Article 9(1) ICCPR – and various other fundamental rights.<sup>17</sup> The *Handbook* emphasises that “the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention” of stateless persons, and therefore, statelessness determination procedures are an essential mechanisms to reduce “the risk of prolonged and/or arbitrary detention.”<sup>18</sup> Furthermore, the status of persons who are waiting for statelessness determination “must also reflect applicable human rights such as protection against arbitrary detention and assistance to meet basic needs.”<sup>19</sup> It is also important for any determination procedures to include “a mixed assessment of fact and law” since statelessness cannot be determined through a legal analysis of nationality laws alone. The *Handbook* points out that “the definition of a stateless person requires an evaluation of the application of these laws in practice, including the extent to which judicial decisions are respected by government officials”<sup>20</sup>

### Council of Europe

Article 5(1) ECHR entrenches the right to liberty and security of the person and prohibits deprivation of liberty. It also provides for exceptions which must be in “accordance with a procedure prescribed by law.” Accordingly, Article 5(1)(f) only allows for immigration detention in pursuit of one of two legitimate objectives; to prevent unlawful entry or to enforce removal. Immigration detention for any other purpose, or where a legitimate purpose cannot be fulfilled, will be arbitrary. Thus, the lack of nationality of stateless persons, and the ensuing difficulties associated with removal are juridically relevant facts to the decision to detain. Because of this it is important to identify stateless persons before they are detained.

The *Auad v Bulgaria* case before the ECtHR addressed an alleged violation of Article 5. Mr. Auad – a stateless Palestinian – had been detained in Bulgaria, but due to his statelessness, could not be removed.<sup>21</sup> The Court found that “the only issue is whether or not the authorities were sufficiently diligent in their efforts to deport the applicant”.<sup>22</sup> The failure of the state

to act with due diligence and recognise a link between his statelessness and impossibility to remove, resulted in a violation of the Convention. Similarly, in *Okonkwo v Austria* it was alleged that the Austrian authorities were aware of Mr. Okonkwo's statelessness. Therefore, his detention "could not possibly have served the purpose of securing his deportation."<sup>23</sup>

### European Union

Article 15 of the EU Returns Directive permits detention only when an individual is subject to being removed from the state. The Directive further requires that "Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence."<sup>24</sup> In light of these provisions it is reasonable to assert that states have a due diligence obligation to identify statelessness or risk of statelessness before deciding to detain and having detained, if removal is not possible within a reasonable period. Failure to do so would result in more people unnecessarily being arbitrarily detained for lengthy periods of time.

The ECJ has not yet delved into the issue of determination of a person's statelessness in the context of detention, and therefore, there is no relevant case law on the matter. However, it could be an important question for the Court to deal with in the future in light of the Returns Directive.

### Other resources

The Equal Rights Trust *Guidelines to Protect Stateless Persons from Arbitrary Detention* (ERT Guidelines) contain a series of Guidelines on the identification of stateless persons (see Guideline 13 and 19 – 22). Guideline 13 reiterates the state 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." Guideline 19 states that immigration systems should have "efficient, effective, objective, fair and accessible procedures in place for the identification of stateless persons" and should comply with international standards. Guideline 20 states that determination procedures should take into account various factors which "can undermine the effectiveness of a person's nationality." This Guideline demonstrates that in the context of immigration detention, identifying those at risk of statelessness is equally important – and for the same reasons – as identifying stateless persons. Guideline 21 states that all statelessness determination procedures should be non-discriminatory, and should be applied without discrimination.<sup>25</sup>

A recent paper published by the European Network on Statelessness, titled 'Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?' states that Article 5 ECHR obligates states to at the very outset "identify if the person can be removed or not, in order to conduct the proceedings with due diligence."<sup>26</sup> The paper makes a connection to the freedom from torture, stating that "ignoring unidentified applicants and failing to determine their (possible) statelessness could, due to the distress and fear it might cause, therefore be considered a breach of Article 3 ECHR."<sup>27</sup>

The ENS *Good Practice Guide on Statelessness Determination and the Protection Status of Stateless Persons* provides an overview of existing statelessness determination procedures, and is a useful resource for states considering introducing such mechanism or aiming to improve their existing procedures, as well as for those advocating for their states to do so.<sup>28</sup>

## 2.2 DECISION TO DETAIN AND ARBITRARY DETENTION

The decision to detain (or not) is perhaps the most crucial element of the detention process. States have an obligation to respect the security and liberty of the person, which means that no one should be arbitrarily detained. While there are situations in which lawful detention can over a period of time transform into arbitrary detention (where for example, at the outset, there was a reasonable prospect of removal which did not materialise during the course of the detention), in many cases, arbitrariness can be traced back to the decision to detain. Thus, if more was invested in ensuring the right decision was taken initially, there would be fewer arbitrary detentions. Unfortunately, in reality, the converse appears to be happening, with decisions to detain being made as a matter of routine process, without the strict scrutiny required when restricting liberty of the person.

All of these elements need to be addressed when making a decision to detain. In section 2.1 above, the importance of identifying statelessness or the risk of statelessness, in part, to establish if a legitimate objective is being pursued and is achievable was addressed. The question of whether an individual is stateless or not would also be relevant to another component of the arbitrariness test – that detention be non-discriminatory. This is because the failure to accommodate the stateless and cater to their protection needs is discriminatory treatment. The components of necessity, proportionality and reasonableness are equally important considerations, as even where there is a legitimate objective, if this can be pursued without depriving liberty (for example, through the implementation of alternatives to detention) or if the extent of the deprivation of liberty for the pursuit of that objective is a disproportionate response, it would render the detention arbitrary. Finally, all detention must be provided for by the law and in accordance with the law (both national and international).

Based on the above, it is clear that mandatory detention or detention for purposes other than those allowed under the law (for example, for punitive purposes) would be arbitrary.

### United Nations

ICCPR Article 9(1) protects the right to liberty and security of person, prohibiting arbitrary arrest or detention. Principle 2 of the UN General Assembly's *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* states that any form of deprivation of liberty can only be carried out in accordance with the provisions found in the law and by officials of the law or other authorised persons.<sup>29</sup>

In the landmark case of *A v Australia*, the Human Rights Committee found that proportionality requires a legitimate aim, and this aim ceases to exist when removal is no longer an option. The Committee also stated that decisions to detain "should be open to review periodically so that the grounds justifying the detention can be assessed."<sup>30</sup> The absence of factors such as the risk of absconding or lack of cooperation are essential to determine whether detention is arbitrary or not. The Committee discussed the concept of arbitrariness, stating that it should "not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice." The Committee also found that detention could be arbitrary if detention is not necessary "in all the circumstances of the case, for example to prevent flight or interference with evidence"<sup>31</sup> and proportionality is essential in this context. In *FKGA v Australia*, the HRC established that "detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time."<sup>32</sup>

The Working Group on Arbitrary Detention, in its 2010 report, has stated that the principle of proportionality requires for detention to be the last resort, and there are constraints to such detention including "strict legal limitations" and judicial safeguards which must be in place. Proportionality also requires for detention to have a legitimate aim, which (in the context of removal) ceases to exist as soon as there is "no longer a real and tangible prospect of removal." Furthermore, states must provide reasons to justify detention, including "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" among others.<sup>33</sup>

In its *Handbook on Protection of Stateless Persons*, UNHCR clearly establishes that the "detention of individuals seeking protection on the grounds of statelessness is arbitrary" since the very nature of statelessness "severely restricts access to basic identity and travel documents that nationals normally possess."<sup>34</sup> Being undocumented or not being in possession of the necessary documents cannot, according to UNHCR, serve as a justification of detention. Detention should always be the last resort and can be justified only when "other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective pursued by detention."<sup>35</sup>

### Council of Europe

Article 5(1) ECHR sets out an exhaustive list of permissible grounds for detention. According to Article 5(1)(f), the detention of a person to prevent his/her entry into a

country, or the detention of a person "against whom action is being taken with a view to deportation or extradition" is permissible. But the decision to detain such persons must meet the other requirements of non-arbitrariness as well.

In *Saadi v UK*, the ECtHR stated that the list of permissible grounds for detention found under Article 5(1) ECHR is exhaustive, and "no deprivation of liberty will be lawful unless it falls within one of those grounds".<sup>36</sup> The ECtHR has developed the principle of non-arbitrariness to include various elements such as conformity with procedural and substantive requirements laid down by an already existing law;<sup>37</sup> that legal provisions which provide for the deprivation of liberty must be clear, accessible and predictable;<sup>38</sup> must not contain any element of bad faith or deception by the state;<sup>39</sup> must genuinely conform with the purpose of the exceptions permitted by the relevant sub-paragraph of Article 5(1);<sup>40</sup> and striking a balance between securing the immediate fulfilment of the objective, and the right to liberty.<sup>41</sup>

### European Union

Article 15(1) and 15(2) of the Returns Directive set the conditions for detention. Accordingly, states should detain a non-national only for the purpose of removal from the state's territory, and only as long as detention is the last available option. Furthermore, detention can only be "ordered by administrative or judicial authorities" and be ordered "in writing with reasons being given in fact and in law." Article 15(4) of the Directive provides that when "a reasonable prospect of removal no longer exists"<sup>42</sup> detention is no longer justified.

The ECJ, in its *Mahdi case*, examined the EU Returns Directive, in the context of extension of detention and stated that "detention and extension of detention are similar in nature since both deprive the third-country national concerned of his liberty in order to prepare his return and/or carry out the removal process."<sup>43</sup> The Court stated that regarding the decision to detain, to prolong the detention or to release the person, the state must first ascertain "(i) whether other sufficient but less coercive measures than detention can be applied effectively in a specific case, (ii) whether there is a risk of the third-country national absconding and (iii) whether he is avoiding or hampering the preparation of his return or the removal process."<sup>44</sup> The ECJ stated that the requirement under Article 15 of the Returns Directive, that every decision must be adopted in writing with reasons of fact and law "must be understood as necessarily covering all decisions concerning extension of detention"<sup>45</sup> and detention itself.

In *Kadzoev*, the ECJ stated that in order to consider that there is a "reasonable prospect of removal" which legitimises detention, "there must, at the time of the national Court's review of the lawfulness of detention, be a real prospect that the removal can be carried out successfully."<sup>46</sup> EU member states "must not hold a person in detention for the sole reason that he or she is an applicant for asylum."<sup>47</sup> Furthermore, the Court also held that Article 15(4) of the Returns Directive should be interpreted in a way



that assumes that only a real prospect of removal can be successful, and thus detention is permissible only under this prospect. Said prospect “does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.”<sup>148</sup>

### Other resources

According to the International Detention Coalition in its *Handbook for preventing unnecessary immigration detention*, since detention interferes with the right to liberty, it must “meet those standards that have been established in international law including, *inter alia*, that it is lawfully applied; that it is reasonable and necessary in the individual case; that it is proportionate to the reasons for the detention; and that it is applied without discrimination.” Furthermore, detention should be necessary and in proportion to the “objectives of identity and security checks; prevention of absconding; or compliance with an expulsion order.”<sup>149</sup> The Coalition makes it clear that human rights law standards require for immigration detention to be used “only as a last resort in exceptional cases after all other options have been shown to be inadequate in the individual case”<sup>150</sup> and should be avoided for vulnerable groups such as women, children, stateless persons, among others.

The International Commission of Jurists, in its *Practitioner’s Guide*, stated that detention must always be prescribed by law in an adequate manner, reflecting the human rights principle of legal certainty, in which individuals “should be able to foresee, to the greatest extent possible, the consequences which the law may have for them.”<sup>151</sup> If removal would breach the principle of *non-refoulement*, detention pending deportation is no longer justified. Furthermore, the aforementioned principles also apply when “other legal or practical obstacles impede the deportation, such as the fact that the concerned person is stateless and there is no other State willing to accept him or her.”<sup>152</sup> Finally, “the detention of stateless persons can never be justified when there is “no active or realistic progress towards transfer to another State”<sup>153</sup>

ERT Guideline 24 requires that detention should not be arbitrary, and ERT Guideline 25 outlines the requirements for detention not to be deemed arbitrary, namely: being provided for by national law, being carried out with a legitimate aim, being non-discriminatory, being necessary, being proportionate and reasonable and finally being carried out in accordance with the procedural and substantive safeguards of international law. ERT Guideline 16 states that mandatory immigration detention is always arbitrary and unlawful. Guideline 27 contains an in-exhaustive list of situations that would not constitute legitimate objectives for immigration detention, including: as a deterrent of irregular migration, as punishment for irregular migration, as a punishment for migrants who do not cooperate with their removal proceedings, for the purpose of status determination, to protect public safety or national security, and for the purpose of administrative expediency. Finally, ERT Guideline 30 outlines the considerations which should be taken into account when determining whether detention “is non-discriminatory, necessary, proportionate and

reasonable”<sup>154</sup>, namely: decisions to detain must be individually assessed, a person should not be detained solely on the basis of their statelessness, the required detention period (length of time) should be taken into consideration when making the assessment as should stateless persons’ vulnerability to prolonged detention, applications for protection should be assessed before decisions to detain, and finally a stateless persons’ inability to cooperate with removal should not be conflated with non-cooperation.

The Global Detention Project’s paper on *Immigration Detention and Proportionality* states that

“ Immigration detention is an extraordinarily diverse phenomenon whose close association to criminal incarceration raises a number of questions about whether or to what degree this form of detention adheres to the limited requirements of immigration policy. While a number of national and international entities have highlighted this problem, to date little effort has been made to propose a methodology for systematically assessing the degree to which detention regimes meet the standards of proportionality.”<sup>155</sup>

## 2.3 PROCEDURAL GUARANTEES

Stateless persons held in detention have the right to various procedural guarantees, which include: detention being ordered by a judicial authority; the detention order including grounds for detention being given to the individual in writing and in a language and terms which he/she can understand; the individual being informed of his/her rights regarding the detention order, including their right to legal counsel, to apply for bail, to seek judicial review and appeal the legality of the detention; and the individual being informed of the maximum amount of time he/she can be held in detention.

The failure to comply with such procedural standards undermines the legality of the detention. Stateless persons are at particular risk of being detained for a prolonged period of time, and therefore the strict adherence to procedural standards is of paramount importance to them.

It is also a good practice for detaining authorities to provide detainees with information – in a language the detainee can understand – with all his/her rights and entitlements, contact details of organisations which can assist them, and other bodies who can assist them in challenging the legality of their detention and the conditions of their detention. It would be good practice for such information to include guidance on how a detainee may access a dedicated statelessness determination procedure and/or any other support available that could assist with enquiries regarding ascertaining an entitlement to a nationality.

### United Nations

Articles 9(3) and (4) ICCPR outline the various procedural guarantees that persons deprived of their liberty are entitled to. Article 9(3) ICCPR provides that any person detained must be brought before a judge or other authorised official of the law and shall be entitled to a trial “within a reasonable time” or be released. Article 9(4) provides that any person deprived of his/her liberty 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”.

In *C v Australia*, the HRC stated that the exclusion of detention from judicial oversight, rendering the judiciary unable to decide if detention was in violation of Article 9(1) ICCPR, would constitute a violation of the individual’s procedural guarantees under Article 9(4) ICCPR.<sup>56</sup>

The Working Group on Arbitrary Detention, in its 2010 report, stated that any detention must be “ordered or approved by a judge” and there should be individual, “automatic, regular and judicial, not only administrative, review of detention.” This should include a review of the lawfulness of the detention. According to the Working Group, the procedural guarantee found in Article 9(4) ICCPR “requires that migrant detainees enjoy the right to challenge the legality of their detention before a Court.”<sup>57</sup> Thus, all detainees must be informed of the grounds for their detention and of their rights while detained, and must have access to legal assistance.

Principle 10 of the UN General Assembly’s *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provides that “anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.” Principle 11 requires that any person kept in detention must have “an effective opportunity to be heard promptly by a judicial or other authority” and must be given the possibility to defend him/herself or be assisted by legal counsel.<sup>58</sup>

According to the 2014 UNHCR *Handbook on Protection of Stateless Persons* “judicial oversight of detention is always necessary”<sup>59</sup> and detained stateless persons or persons awaiting the outcome of a statelessness determination procedure must have access to legal counsel.

### Council of Europe

Articles 5(2) – 5(4) of the ECHR set out the procedural guarantees that would apply when a person’s liberty has been deprived in accordance with Article 5(1). Accordingly, persons are entitled to be informed in a language they understand of the reasons for their arrest; are entitled to be brought before a judge or judicial officer and to face a trial; and are entitled to challenge the lawfulness of their detention before the Courts.

In *A and Others v UK*, the ECtHR stated that a detained person has the “right to a review of the ‘lawfulness’ of his detention in the light not only of the requirements of domestic law but also

of the Convention.” Furthermore, the review should be “wide enough to bear on those conditions which are essential for the ‘lawful’ detention of a person”<sup>60</sup> under Article 5(1) ECHR and the reviewing Court must not have only advisory functions but must be competent in deciding on the lawfulness of the detention and must have the power to order release if the detention is found to be unlawful.

In *Al-Nashif v Bulgaria*, the ECtHR made it clear that every person deprived of liberty “is entitled to a review of the lawfulness of his detention by a Court, regardless of the length of confinement.” The Court found that it is “of fundamental importance” that any deprivation of liberty should be subject to independent judicial review, since it is the “underlying purpose” of Article 5 ECHR to provide for safeguards against arbitrary deprivation of liberty.<sup>61</sup>

In *Kim v Russia*, the ECtHR clarified that the purpose of Article 5(4) ECHR is to “guarantee to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected” and there must be a remedy during the individual’s detention which can allow the person to have access to a judicial review of the lawfulness of his/her detention; said review should, when appropriate, lead to the release of the individual.<sup>62</sup> The Court also noted that the judicial review required by Article 5(4) ECHR “cannot be said to be incorporated in the initial detention order.”<sup>63</sup>

### European Union

Article 13(1) of the EU Returns Directive provides that non-nationals “shall be afforded an effective remedy to appeal against or seek review of decisions related to return” before a “competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.” Article 13(2) requires that said body must have the power to review any decisions on return; this includes the possibility of (temporarily) suspending the removal proceedings. Article 13(3) requires that the individual in question must have the possibility of obtaining legal assistance and representation and linguistic assistance as well if necessary, which as per Article 13(3), must be free of charge.<sup>64</sup>

In *Kadzoev*, the ECJ confirmed that the individual in question should be “afforded an effective remedy to appeal against or seek review of decisions related to return before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.”<sup>65</sup> Said judicial body must have the power to review any decisions relating to return, which includes the power to (temporarily) suspend the enforcement of any returns order. In *Mahdi*, the ECJ established that the “requirement that a decision be adopted in writing must be understood as necessarily covering all decisions concerning extension of detention” which includes not only the initial decision to detain but also any other decisions relating to the detention, such as a decision to extend the detention period”.<sup>66</sup>

### Other resources

According to the International Commission of Jurists *Practitioner's Guide*, "the requirement that the law governing detention must be accessible, precise and foreseeable" has important implications in the case of detained persons. The authorities are "required to take steps to ensure that sufficient information is available to detained persons in a language they understand, regarding the nature of their detention, the reasons for it, the process for reviewing or challenging the decision to detain."<sup>67</sup>

According to the International Detention Coalition, detention is "one of the strongest uses of power by a government against an individual" and therefore any decision to detain should be regulated through "automatic, prompt and regular independent judicial review." The use of Courts in order to review decisions to detain "establishes a system of independent and non-partisan oversight" and ensures transparency, which in turn ensures that the reasons for the decision to detain have been properly established by the decision-maker and that the individual is able to raise concerns regarding the decision to detain him/her. The individual should have access to legal counsel at all times.<sup>68</sup>

In a critique of the lack of guarantees available in the immigration detention context, the Global Detention Project argues that "the classification of immigration detention as administrative benefits states because it allows them to avoid providing immigration detainees with costly and time-consuming procedural guarantees that people receive during criminal proceedings." Looking at standard fair trial guarantees to which persons incarcerated under criminal law are entitled, the GDP argues that "EU directives selectively incorporate criminal justice methods, imposing the trappings of criminal punishment while failing to provide necessary safeguards. Although they are formally labelled as administrative detainees, persons deprived of their liberty for status-related reasons may in fact be subject to punitive penalties that in some respects exceed those imposed on convicted criminals."<sup>69</sup>

ERT Guideline 37 establishes that "stateless detainees should be entitled to the following minimum procedural guarantees: their detention must be ordered by and/or be subject to the prompt and effective control of a judicial authority, they shall receive their order of detention in written and in a language which they understand and this must outline the reasons for their detention"; they must be informed of their rights related to 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"; they must be informed of the maximum time limit which they can be held in detention; and they must be provided with a handbook in a language which they understand and that contains information on all their rights and entitlements during detention. ERT Guideline 41 provides that the "administrative purpose behind detention should be pursued with due diligence throughout the detention period, in order to ensure that detention does not become arbitrary at any stage." To avoid arbitrariness, detention should be "subject to automatic, regular and periodic review throughout the period of detention, before a judicial body independent of the detaining authorities."<sup>70</sup>

## 2.4 REMOVAL AND RE-DOCUMENTATION

Once a decision to remove has been made, the question of detention should come into play (removal being one of the legitimate objectives which can justify detention). The question of whether removal can be achieved in a reasonable period of time, in relation to stateless persons and those at risk of statelessness has already been addressed above. There are other elements of the decision to remove and of related re-documentation which require scrutiny nonetheless.

For example, the detaining state should have rules in place that govern the process of re-documentation and/or ascertain entitlement to nationality. Furthermore, the respective roles that the state and the individual should be expected to play and related time limits should be clearly articulated. The longer it takes to do so, detention is more likely to become unreasonable and disproportionate. Jurisprudence of the ECtHR makes it clear that states must demonstrate due diligence when making such enquiries, and UNHCR guidance confirms the need for a shared burden of proof. This is particularly important in detention contexts where individuals will likely be limited in their ability to make enquiries of foreign consulates or competent authorities in the country with which they have a strong link.

One grey area is the manner in which responses (or lack thereof) from states to which removal attempts are being made, are recorded, interpreted and acted upon by the detaining/removing state. At all stages of interaction with a stateless person or a person at risk of statelessness, states must ensure that they do not inappropriately attribute nationality based simply on the individual's country of origin/departure or other inadequate evidence, or contrary to the stated position of the country with which it is claimed that the individual has a nationality connection. It is equally incumbent on states to correct any erroneous attributions of nationality on an individual's file as soon as this comes to light.

States also owe individuals obligations following a failed attempted removal i.e. where an individual is not accepted by the receiving country. Depending on the circumstances of the case, this may impact on the question of statelessness and/or how the applicant's nationality status should be recorded thereafter.

International and regional law does not provide much guidance in terms of the above, but these are important issues, which would benefit from clarification and direction from Courts and Treaty Bodies.

### United Nations

Article 7 ICCPR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Repeated attempts to expel a person to a country where his/her well-being is not guaranteed and where he/she could be subject

to cruel, inhuman or degrading treatment or punishment or to a country that is refusing to admit the individual in question could amount to inhuman or degrading treatment.

According to UNHCR's 2014 *Handbook on Protection of Stateless Persons*, states may at times need clarification from the competent authority of another state, regarding an individual's nationality or lack thereof. These inquiries can, however, result in no response or an outright refusal to respond from the authority in question. The *Handbook* clearly requires that any conclusions should only be drawn after a reasonable amount of time – not immediately – and it should be kept in mind that if “a competent authority has a general policy of never replying to such requests, no inference can be drawn from this failure to respond based on the nonresponse alone.” On the other hand, if a state is normally responsive but fails to respond, said lack of response “will generally provide strong confirmation that the individual is not a national.”<sup>71</sup> This is admittedly a grey area in the law, as to how much time or how many refusals to cooperate count towards an assumption that the individual is stateless.<sup>72</sup> It is also important to note that:

“Where the competent authorities treat an individual as a non-national even though he or she would appear to meet the criteria for automatic acquisition of nationality under the operation of a country's laws, it is their position rather than the letter of the law that is determinative in concluding that a State does not consider such an individual as a national.”<sup>73</sup>

Regarding the burden of proof, the UNHCR *Handbook* states that while normally in other administrative or judicial proceedings the applicant bears the burden of proof, in the case of statelessness determination procedures, the burden of proof should be shared – both applicant and the examining authority should work in cooperation to establish the facts. The applicant “has a duty to be truthful, provide as full an account of his or her position as possible and to submit all evidence reasonably available. Similarly, the determination authority is required to obtain and present all relevant evidence reasonably available to it, enabling an objective determination of the applicant's status.”<sup>74</sup>

Guideline 9 of UNHCR's *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* requires detaining authorities to take the necessary steps to resolve cases within a reasonable amount of time, including taking “practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.”<sup>75</sup>

UNHCR and Asylum Aid's 2011 Mapping Study of the UK found that often, “UK Border Agency officials would attribute a nationality without sufficient or appropriate evidence” and would not appropriately “adjust the nationality categorisation of an individual” despite evidence that the individual had no nationality.<sup>76</sup> This even was the case in situations where a state's embassy or consulate expressly refused to acknowledge the individual in question as a national. Wrong categorisation can lead to prolonged periods of detention, and for this reason, it is important for states to correctly categorise an individual as a national of a state or as a stateless person.

### Council of Europe

As explained above, the ECHR only allows for immigration detention in the context of prevention of unauthorised entry or removal. Thus, the decision to remove is of significant importance. One question in this regard, is if removal is being pursued with due diligence. In *Abdi v United Kingdom*, it was claimed that Mr. Abdi was not detained as “a person against whom action was being taken with a view to deportation”<sup>77</sup> since at the time of his detention, it was not possible to remove a person to southern Somalia. Another question is whether removal is possible in compliance with other human rights standards. In *Auad v Bulgaria*, the ECtHR was concerned with whether there were effective guarantees that would protect the individual “against arbitrary *refoulement*, be it direct or indirect, to the country from which he has fled.” The Court also mentioned that “removal to an intermediary country does not affect the responsibility of the expelling State to ensure that the applicant is not exposed to treatment contrary to Article 3 as a result of the decision to expel.”<sup>78</sup> This requirement is strongly supported by the Court's case law.<sup>79</sup>

In *Amie and Others v Bulgaria*, the ECtHR stated that the expulsion of refugees – particularly stateless refugees – can be difficult and often impossible, since “there is no readily available country to which they may be removed.” Due to this challenge, authorities should, before initiating removal proceedings, “consider whether removal is a realistic prospect, and accordingly whether detention with a view to removal is from the outset, or continues to be, justified.”<sup>80</sup>

In *Kim v Russia*, the applicant argued that expulsion proceedings had not been carried out diligently, as:

“No effort had been made to contact the Uzbek authorities in the first four months and eleven days of his detention... a first reply was received more than one year and two months after the despatch of the first letter... there had been no justification for the applicant's detention after 5 February 2013, when the Russian authorities had become aware that he was not an Uzbek national and there had been no complex extradition proceedings and the only issue to be determined had been whether at least one State was willing and able to receive him.”<sup>81</sup>

The Court found that in addition to the detention ceasing to be legitimate once there is no prospect for removal, detention also ceases to be legitimate when removal proceedings are not carried out with due diligence. The four month delay was found to be in breach of the due diligence requirement, making the detention contrary to Article 5(1)(f).<sup>82</sup>

In *Harabi v Netherlands*, the applicant claimed that Dutch authorities “failed to recognise the consequences of the fact that he is a stateless person” and claimed his removal from the Netherlands to countries where he would not be admitted would amount to inhuman treatment in violation of Article 3 of the Convention. The European Commission considered that while under Dutch policy, Mr. Harabi was not entitled to a residence permit, the “repeated expulsion of an individual, whose identity was impossible to establish, to a country where his admission is not guaranteed, may raise an issue under Article 3”.<sup>83</sup>

### European Union

The EU Returns Directive recognises that EU states can return an illegally staying non-national; however, this is permissible only “provided that fair and efficient asylum systems are in place which fully respect the principle of *non-refoulement*.”<sup>84</sup> Article 8(4) of the Directive states that if a state sees the need of using coercive measures to remove a non-national, “such measures shall be proportionate and shall not exceed reasonable force” and must be implemented with respect for the dignity and physical integrity of the individual in question.

Article 19(2) of the European Charter of Fundamental Rights states that no person can be removed, expelled or extradited to a state where there “is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

In addition to the principle of *non-refoulement*, the principle of proportionality also comes into play when a foreign state is refusing to respond/re-document, or the host state is failing to make enquiries diligently, and the individual remains in detention.

### Other resources

ERT Guideline 28 states that removal does not constitute a legitimate objective (and therefore detention pending removal would be illegitimate) in situations where: removal cannot be carried out within a reasonable time period; removal violates international legal obligations pertaining to the principle of *non-refoulement*; removal violates the individual's right to remain in his/her country; removal violates the individual's right to respect for private and family life; or removal violates any other international human rights norms.<sup>85</sup>

The European Council on Refugees and Exiles (ECRE), together with other NGOs, issued a 2014 report titled “Point of No Return: The Futile Detention of Unreturnable Migrants.” This report too makes the connection between unreturnability, statelessness and arbitrary, lengthy detention. As the report points out, the consequence for stateless people can be that they are refused “legal residence in the host country yet return to their home country is impossible for reasons beyond their control.” One exception to this norm is Denmark, which grants a very small number of migrants that have been deemed unreturnable permission to stay in Denmark, on the grounds of their inability to return. Spain on the other hand, releases unreturnable detained migrants but does not issue them with any permission to stay legally in the country. The report also mentions that “The process of re-documentation can create a risk of persecution and mistreatment on return.”<sup>86</sup>

Bail for Immigration Detainees (BID) – a UK based NGO – has initiated a Travel Document Project that targets those held in immigration detention “with no immediate prospect of removal because they have no travel documents.” BID advocates for the improvement of “those aspects of the travel documentation process that are managed by the (UK) Home Office.” The Travel Document Project aims at helping individuals to apply for travel documents from the authorities of their country of origin. BID considers that helping detained individuals actively seek to obtain travel documents can be a way of showing “an individual's efforts to cooperate with the documentation process, thereby also serving as evidence that they are unlikely to abscond if released.”<sup>87</sup>

## 2.5 ALTERNATIVES TO DETENTION

Alternatives to detention (ATD) are not a legal term of art, but have traditionally been understood both in a narrow and broad sense. In the narrow sense, ATD correspond to a practice used where detention has a legitimate basis, in particular where a justified ground for detention is identified in the individual case, yet a less restrictive means of control is at the State's disposal and should therefore be used. In the broad sense, ATD are a conceptual approach to migration governance that seek to prevent and limit punitive or restrictive responses to the complex social phenomena of migration, and instead seek opportunities for positive engagement, support, and community involvement.

In relation to stateless persons, both the narrow and broad approaches to ATD are extremely relevant. The narrow one, to ensure that whenever removal is pursued for stateless persons, they are not subject to detention (which is likely to be longer than the less complex cases of removal), and the broad one to promote a more holistic, effective and rights based approach to dealing with irregular migrants who may be stateless or at risk of statelessness.

As established above, for detention to not be arbitrary, it must be necessary and it must be a proportionate means of achieving the legitimate objective. The obligations of necessity and proportionality compel the state to only use detention as a last resort. Thus, alternatives to detention must always be explored by states, and implemented at the outset. In reality though, states largely tend to think of alternatives, only after removal has not been possible within a reasonable period time (i.e. detention is the first resort and alternatives the last) or as a discretionary ‘good practice’ to be implemented in relation to vulnerable groups.

However, it is clear that implementing alternatives to detention is intrinsic to the very concept of non-arbitrariness. Therefore, states should do more to integrate and mainstream the option of alternatives to detention in all cases, before detention is considered to be necessary.

### United Nations

As established in the sections above on identification and decision to detain, ICCPR Article 9 obligates states to not detain persons in an arbitrary manner, a requirement which in turn only allows detention that is necessary and proportionate (among other criteria). Thus, the obligation to always explore alternatives to detention before considering detention, and implement them if deemed appropriate, is an important consequence of obligations under Article 9 ICCPR. In *FKGA v Australia*, the HRC stated that any decision relating to detention “must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.”<sup>88</sup>

The UN General Assembly Resolution on the protection of migrants “Calls upon all States to respect the human rights and the inherent dignity of migrants and to put an end to arbitrary arrest and detention...and to adopt, where applicable, alternative measures to detention”<sup>89</sup>

The Working Group on Arbitrary Detention mentions in its 2010 report that alternatives to detention can be greatly beneficial and can take various forms, including “reporting at regular intervals to the authorities; release on bail; or stay in open centres or at a designated place...They must however not become alternatives to release.”<sup>90</sup> The Working group in its 2014 report mentions that detention of asylum-seekers and migrants should be “a last resort and permissible only for the shortest period of time.”<sup>91</sup>

According to the UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* “alternatives to detention refers to any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement” and since they can involve restrictions on movement of liberty they are bound by human right standards.<sup>92</sup> UNHCR has published two *options papers* which are highly relevant to alternatives to detention.<sup>93</sup>

UNHCR defined case management as “a strategy for supporting and managing individuals and their asylum or other migration claims whilst their status is being resolved, with a focus on informed decision-making, timely and fair status resolution and improved coping mechanisms and well-being on the part of individuals.”<sup>94</sup> This is essential for ensuring alternatives to detention.

The Special Rapporteur on the rights of migrants, in his 2012 report, stated that it is essential to stress that “alternatives to detention should not become alternatives to unconditional release”<sup>95</sup> and those who are eligible for release should be released and not subject to alternatives to detention. In the Special Rapporteur’s view, the states “obligation to always consider alternatives to detention (non-custodial measures) before resorting to detention should be established by law.”<sup>96</sup>

### Council of Europe

As with the ICCPR, under Article 5 ECHR as well, states cannot detain persons arbitrarily, and instead, detention is only

permissible when carried out as a last resort, is necessary and proportionate. Implicit to these standards is the obligation to always explore and implement alternatives to detention.

Guideline 6(1) of the Council of Europe’s *Twenty Guidelines on Forced Return* provides that a person can be deprived of liberty – with a view to removal – if such deprivation 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”<sup>97</sup>.

In *Guzzardi v Italy*, it was stated that “the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion...”<sup>98</sup>

### European Union

Article 15(1) EU Returns Directive states that detention can be carried out, unless other “less coercive measures” can be applied. In other words, Article 15(1) of the Directive clearly establishes that detention should be the last resort, and all alternatives to detention should be considered before detention is.

The EU Reception Conditions Directive requires that “in order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined.” Alternatives to detention must meet the standard of respect for the fundamental rights of the individual in question. Article 8(2) of the Directive requires that when necessary, member states can detain the applicant if alternatives to detention “cannot be applied effectively.”<sup>99</sup> Commenting on this Directive, UNHCR has stated that “reception in open facilities should be the norm; that alternatives to detention should be applied first and detention should only be used as a last resort.”<sup>100</sup>

### Other resources

The International Detention Coalition, in its *Handbook*, defined alternatives 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 while their migration status is being resolved or while awaiting deportation or removal from the country.”<sup>101</sup> Furthermore, the coalition’s CAP model, which can be found within its *Handbook*, mentions that alternatives to detention can at times “involve residence at a particular facility but the focus is on mechanisms to monitor the progress of the case including compliance with specific conditions.”<sup>102</sup> The Coalition also mentions that “a presumption against detention can be strengthened when alternatives to detention are also established in law”<sup>103</sup> and that alternatives to detention provided by law create options for immigration officials when deciding on an individual’s case.

The academic Odysseus Network report titled *Alternatives to Immigration and Asylum Detention in the EU -Time for Implementation* states that “Despite the growing interest of States in implementing alternatives, there is no single legal definition of ‘alternative to detention’ and therefore in practice there are different understandings of the concept”. The authors come forth with a comprehensive “understanding of what constitutes an alternative to detention, informed by the positions advanced by other organisations and scholars as well as by recent developments in the EU legal framework [that] ... takes into account the particular EU legal framework.” According to the report “for a scheme to be characterised as an alternative it must “fall short” of deprivation of liberty and constitute a non-custodial measure, or it would be an alternative form of detention. Alternative forms of detention could be authorised only in the same circumstances as detention and following the same guarantees. The fact that a person is not held at a detention facility does not necessarily mean that she is not deprived of her liberty. In addition, the characterisation or understanding by national authorities that a scheme constitutes an alternative to detention is not in itself enough to conclude that it is non-custodial.”<sup>104</sup>

ERT’s Detention Guidelines 31 – 36 relate to alternatives to detention. Guideline 31 reiterates that “detention should only be used as a measure of last resort” and that “ 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.” Guideline 32 encourages states to “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,” and Guideline 33 establishes that 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” as well as special circumstances of the individual, including factors that can make said individual vulnerable. Significantly, Guideline 34 establishes that “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 ... to ensure that alternatives to detention pursue a legitimate objective, and are lawful, non-discriminatory, necessary, proportionate and reasonable.”<sup>105</sup>



## 2.6 CHILDREN, FAMILIES AND VULNERABLE GROUPS

As this Toolkit has put forward, arbitrary and disproportionately lengthy detention can ensue when the particular vulnerabilities of stateless persons are not understood and addressed. Thus, the stateless are a vulnerable group that deserve special attention and protection. There are various other experiences, characteristics and circumstances which also make people vulnerable in different ways, and which consequently also demand special consideration and protection. Such vulnerable groups include children, women, the elderly, disabled persons, ethnic minorities, religious minorities, asylum seekers, victims of human trafficking, and victims of torture. Multiple vulnerabilities (for example, a stateless ethnic-minority girl who has been tortured and trafficked) demand particular protection and care.

This section focuses its attention on stateless persons or those at risk of statelessness who have an added vulnerability, which serves as a further reason to not detain, but to protect instead.

With children for example, all efforts should be made to avoid detention. Alternative measures should be sought and detention should only be the absolute last resort. In case detention is the only option, care should be taken to protect all of the rights of the minor. Cases in which minors are involved should be a priority. A key principle is that the child should never be held in detention together with adults, unless they belong to the same family. Stateless children, should be subject to the same measures and have access to the same procedural guarantees as nationals, should be able to communicate with family and should have access to legal counsel. Finally, families should be kept together and should not be separated by for example, detaining the parents and not the children. If the detention of the child is not necessary, the parents should not be detained either.

The elderly should, like children, be detained only as a last resort, and should be treated with special care. Special attention and care should be provided for any health and medical issues they may have. Their cases should also be prioritised, and they should not be kept in isolation and prevented from contacting family and other close relations.

It is essential that asylum seekers obtain the necessary assistance in order to receive protection as refugees. The principle of *non-refoulement* should be taken into consideration in any decision regarding their repatriation. An individual's position as an asylum seeker should under no circumstances be used as justification for holding the asylum seeker in detention.

Likewise, victims of human trafficking must be protected in accordance with international, regional and national laws. It is crucial that such victims have a safe place to be able to get away from traffickers. It is equally important that they are not removed back to the place they were trafficked from, if this places them at danger of being re-trafficked or harmed in any other way. Given the often traumatic experiences endured by victims of trafficking, they should never be detained. The same would apply to victims of torture, who should also not be *refouled*.

When an individual belonging to a vulnerable group is detained, it is necessary for all precautions to be taken to ensure their mental and physical well-being and to avoid any further victimisation or trauma.

### United Nations

#### Children and families

Article 10(2)(b) ICCPR states that children must be separated from adults when held in detention. In its General Comment number 21, the Committee expressed concern that not all states pay the necessary attention to this obligation.

Article 10(3) ICCPR states that children must be “accorded treatment appropriate to their age and legal status.”

Article 37(b) CRC states that no child may be deprived of his/her liberty unlawfully or arbitrarily; therefore, if a child is detained, this 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”. Article 37(c) CRC states that any detained child must 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” which includes being separated from other detained

adults, and allowing the child to be in contact with his/her family through correspondence and visits. Article 37(d) CRC states that detained children “shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty” and any decisions on such an action must be taken as soon as possible. Additionally, the principle of the best interest of the child (art 3 CRC) must be taken into consideration at all times.

In *Bakhtiyari v Australia*, the HRC found that the lengthy detention of a mother (Bakhtiyari) and her children had not been properly justified by Australia, and had not demonstrated that other “less intrusive, measures could not have achieved ... in compliance with the State party’s immigration policies.”<sup>106</sup> Therefore, the Committee found that the detention of the family had been arbitrary and in violation of Article 9(1) ICCPR. Furthermore, the Committee found that separating a spouse and children who



arrived to a country illegally from a spouse who was in the country legally “may give rise to issues under Articles 17 and 23 of the Covenant,” and the young age of the children and the traumatic experiences of mother and the children while in detention, brought Australia into breach of Article 9 ICCPR.<sup>107</sup>

In its 2010 report, the Working Group on Arbitrary Detention mentioned that given the existence of alternatives to detention, the detention of a minor – particularly of an unaccompanied minor – is unacceptable and incompatible with Article 37(b) CRC.<sup>108</sup>

According to the UN *Rules for the Protection of Juveniles Deprived of their Liberty*, detention should be “limited to exceptional circumstances,”<sup>109</sup> and subject to certain procedural guarantees, which include access to free legal aid and communications with legal advisors and family members.<sup>110</sup>

The 2014 UNHCR *Handbook on Protection of Stateless Persons* emphasises that children should, as a rule, not be detained under any circumstances.<sup>111</sup> Furthermore, in relation to families, the *Handbook* states that even though the 1954 Convention does not contain any provisions on family unity, “States parties are nevertheless encouraged to facilitate the reunion of those with recognised statelessness status in their territory with their spouses and dependents.”<sup>112</sup>

### Victims of human trafficking

OHCHR, in its *Recommended Principles and Guidelines on Human Rights and Human Trafficking* recommends under principle 2(6) that trafficking victims should under no circumstances be ever held in detention.<sup>113</sup> This principle is reinforced throughout the Palermo Protocol as well.

However, international law does allow for the removal of victims of trafficking, as long as this does not make them vulnerable to being re-trafficked or harmed in any other way. Indeed, state parties to the Palermo Protocol are obligated to “facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.”<sup>114</sup> Thus, it is possible for victims of trafficking to be subject to removal proceedings, in which case, alternatives to detention must be utilised.

### Asylum seekers

It is a fundamental principle of refugee law that asylum seekers should not be penalised with “immigration or criminal offences relating to the seeking of asylum, or being arbitrarily detained purely on the basis of seeking asylum.”<sup>115</sup>

UNHCR's *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, under Guideline 2 state that asylum seekers should not be detained for seeking asylum. Guideline 3 provides for detention of asylum seekers only under exceptional grounds: “as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law.” Guideline 7 deals with the detention of vulnerable groups and advocates for alternatives to “precede any order to detain asylum-seekers falling within the following

vulnerable categories: Unaccompanied elderly persons. Torture or trauma victims. Persons with a mental or physical disability.” Guideline 9 addresses the detention of stateless persons in the context of asylum seekers. It states that statelessness should not result in indefinite detention, and statelessness should not be a bar to release from detention.<sup>116</sup>

### Victims of torture or cruel, inhuman or degrading treatment or punishment

The Practical Manual issued by Association for the Prevention of Torture (APT), International Detention Coalition (IDC) and UNHCR on monitoring immigration detention states that any monitoring mechanism needs to be “aware that asylum seeker and migrant detainees may have been subjected to various forms of ill-treatment before their departure from their home country and/or before detention, during arrest or transfer.” This makes them vulnerable to further victimisation, and requires “special care and attention from the authorities but also from monitors in the course of their interaction with them.”<sup>117</sup> Re-victimisation – such as further torture while in detention – and secondary victimisation – such as being aggressively interrogated about their previous torture – of these vulnerable individuals should be avoided at all costs.

### Council of Europe Children and families

Article 8 ECHR protects the right to private and family life. In *Al-Nashif v Bulgaria*, the ECtHR stated that the “removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life”<sup>118</sup> The Court found that deportation will violate the ECHR if said deportation “does not meet the requirements of paragraph 2 of Article 8” (which provides a list of exceptions).<sup>119</sup>

In *Kanagaratnam and Others v Belgium*, the ECtHR found that Belgium violated Article 3 ECHR, since it detained alien minors in a closed detention centre; the Court found that the family was detained for almost four months in a centre that the Court had on a previous occasion already deemed inappropriate for detaining children. The Court emphasised the vulnerability of the detained children, who had been traumatised prior to their arrival in Belgium due to the war in their country of origin; had increased upon arrival in Belgium, since they were arrested and detained shortly after arrival.<sup>120</sup>

### Victims of human trafficking

Article 10(1) of the Council of Europe Convention on Action against Trafficking in Human Beings provides that states should train the competent authorities in preventing and combating human trafficking, and identifying victims. It also requires states to ensure that relevant authorities collaborate among themselves and with “relevant support organisations so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.” Article 16(4) requires the state of which the individual is a national or resident to facilitate

the return of an undocumented trafficking victim by issuing travel documentation or authorisation. Finally, Article 16(7) prohibits the return of a child victim to a state where he/she would be at risk or in case where said return would not be in his/her best interest.<sup>121</sup>

### Victims of torture or cruel, inhuman or degrading treatment or punishment

Article 1 of the European Convention on Torture states that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment “shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.”<sup>122</sup>

### European Union

Article 3 of the EU Returns Directive defines the following groups as vulnerable:

“minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

Article 14(1)(d) of the EU Returns Directive mentions that removal proceedings should take into account the “special needs of vulnerable persons.”

### Children and families

Article 16(3) of the Returns Directive requires that “particular attention shall be paid to the situation of vulnerable persons.” Article 5 requires member states to take into account “(a) the best interests of the child; (b) family life” when implementing the Directive. Furthermore, Article 10(1) which addresses the return and removal of unaccompanied minors, states that before making any decisions relating to an unaccompanied minor, “assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.” Article 10(2) of the Directive states that before removing an unaccompanied minor, the authorities “shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.”<sup>123</sup>

Article 11(2) of the EU *Reception Conditions Directive* requires children to be detained

“Only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.”<sup>124</sup>

### Victims of human trafficking

The purpose of *Council Directive 2004/81/EC of 29 April 2004* is to set the standards for granting residence permits (of

limited duration) to trafficking victims who cooperate with the authorities in criminal proceedings against human traffickers for the duration of the proceedings.<sup>125</sup> However, such residence permits are conditional upon cooperation with the authorities in criminal proceedings and are valid only for the duration of the proceedings, leaving victims without any assurance regarding their residence in the country hosting them.

### Asylum seekers

According to the EU Returns Directive, it is permitted for Member States to “return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of *non-refoulement*.”<sup>126</sup> A non-national who has applied for asylum in an EU Member State “should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.”<sup>127</sup>

*EU Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status* provides under Article 7(1) that asylum seekers “shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision” on their status as refugees or not; however, said right to remain does not constitute any form of entitlement to a (permanent) residence permit. Article 18(1) of the Directive prohibits Member States from holding an individual in detention simply because he or she is an asylum seeker. Article 18(2) of the Directive requires a speedy judicial review in cases where an asylum seeker is being held in detention. Finally, Article 21 of the Directive requires Member States to allow UNHCR to access all applicants for asylum, including those that are being held in detention.<sup>128</sup>

### Other resources

According to the International Detention Coalition, children should never be detained. If detained, their best interests should be paramount, they “should not be separated from their caregivers and if they are unaccompanied, care arrangements must be made.” Furthermore, age assessments should be undertaken as a last resort and with the child’s consent by professionals in a way that “is culturally sensitive and gender appropriate.”<sup>129</sup>

According to ERT Detention 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.

ERT Guideline 50 further recommends that there 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 46 states that “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 wellbeing.”<sup>130</sup>

## 2.7 LENGTH OF DETENTION

As stated above, stateless persons are vulnerable to lengthy, even indefinite detention, which has a significant psychological and emotional impact on the individual. In fact, indefinite and/or unreasonable lengthy detention may in some cases be tantamount to cruel, inhuman or degrading treatment. Thus, when establishing whether removal is feasible, it is important to assess if it is feasible within a reasonable period of time. Detention for unreasonable periods of time would be arbitrary.

However, there is no international standard that specifies what the maximum time limit for detention should be. The closest to such a standard, is the Returns Directive which stipulates a time limit of 6 months. However, this time limit can be extended in exceptional circumstances to 18 months.

While many states have a legal time limit for detention, some adopt a more flexible approach. It is desirable that states clearly specify a reasonable maximum time limit. Under no circumstances should indefinite detention be tolerated.

### United Nations

In *A v Australia*, a case challenging the legality of over four years of detention, the HRC found that detention “should not continue beyond the period for which the State can provide appropriate justification” and if it does, said detention is arbitrary and in violation of Article 9 ICCPR, even if entry into the state’s territory was illegal.<sup>131</sup> This position was upheld in the latter case of *C v Australia*.<sup>132</sup> In *FKGA v Australia*, the HRC established that “individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion”<sup>133</sup>

The Working Group on Arbitrary Detention, in its 2010 report, stated that the procedural guarantees all detainees should have include “the fact that a maximum period of detention must be established by law and that upon expiry of this period the detainee must be automatically released.”<sup>134</sup> The report also mentioned that “the inability of the authorities to carry out the expulsion of an individual can never justify indefinite detention.”<sup>135</sup>

OHCHR, in its publication titled *Administrative Detention of Migrants*, mentions that detention “should last only for the time necessary for the deportation/expulsion to become effective”<sup>136</sup> and should never become indefinite. The OHCHR expresses concern that a person’s statelessness can lead to indefinite detention,<sup>137</sup> since states are unable to find a country that will receive them and many states refuse to release detainees who have been detained with a view to being removed.

UNHCR’s *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, mentions that “to guard against arbitrariness, maximum periods of detention should be set in national legislation. Without maximum periods, detention can become prolonged, and in some cases indefinite, including particularly for stateless asylum-seekers.”<sup>138</sup>

### Council of Europe

In *Awad v Bulgaria*, The ECtHR found that “the length of the detention should not exceed that reasonably required for the purpose pursued.”<sup>139</sup> The Court also mentioned that although the ECHR does not contain specific maximum time limits, the question of “whether the length of deportation proceedings could affect the lawfulness of detention under this provision thus depends solely on the particular circumstances of each case,” and can be justified only as long as “deportation or extradition proceedings are in progress” and as long as the aforementioned removal proceedings are carried out with due diligence.<sup>140</sup>

In *Mikolenko v Estonia*, the ECtHR stated that the extension of Mr. Mikolenko’s detention “had actually become a form of punishment and a means of breaking his will.”<sup>141</sup> The Court reiterated that detention is justified under Article 5(1)(f) ECHR as long as “deportation proceedings are being conducted”<sup>142</sup> and these proceedings must be carried out with due diligence. However, when expulsion becomes impossible, the continuation of detention “cannot be said to have been effected with a view to his deportation as this was no longer feasible.”<sup>143</sup>

In *Kim v Russia*, the ECtHR found that the grounds for Mr. Kim’s detention, with a view to his expulsion from Russia, “did not remain valid for the whole period of his detention due to the lack of a realistic prospect of his expulsion” and due to the failure of the authorities to “conduct the proceedings with due diligence.”<sup>144</sup>

### European Union

Article 15(5) EU Returns Directive states that detention is to be maintained for as long as the conditions found in Article 15(1) of the Directive are still fulfilled and as long as detention is necessary to ensure removal. Article 15(5) of the Directive also prescribes that “Each Member State shall set a limited period of detention, which may not exceed six months.” However, 15(6) allows for this maximum time limit to be extended by a further 12 months in the specific circumstances of the detainee refusing to cooperate with removal proceedings or delays in obtaining documentation from third countries.

In *Mahdi*, the ECJ established that “a judicial authority deciding upon an application for the extension of detention must be able to rule on all relevant matters of fact and of law in order to determine...whether an extension of detention is justified.” If the initial detention is no longer justified, extension is not justified and the authority can “order an alternative measure or the release of the third-country national concerned.”<sup>145</sup>

In *Kadzoev*, the ECJ stated that Article 15(6) “in no case authorises the maximum period defined in that provision to be exceeded.”<sup>146</sup> The ECJ considered that if “otherwise the duration of detention for the purpose of removal could vary, sometimes considerably, from case to case within a Member State or from one Member State to another” and this would be contrary to the objective of Article 15(5) and 15(6) of the Directive, since these Articles seek to establish a maximum duration of detention in all EU states.<sup>147</sup>

### Other resources

The International Detention Coalition in its *Handbook for preventing unnecessary immigration detention* stated that since detention can be traumatic and damaging on the individual who is detained, detention “must be limited to the shortest length of time possible to protect detainees’ wellbeing.” Lengthy detention periods have been shown to have long-term consequences on the former detainees, which limited “their ability to rebuild life after release”.<sup>148</sup>

ERT Guideline 38 states that detention must never be indefinite, and statelessness should never lead to indefinite detention or be a hindrance to release. Guideline 39 states that detention should be for the shortest time possible, and there should be a (reasonable) maximum time limit. Stateless persons should not be detained for longer than 6 months, and states which currently have a maximum time limit of less than 6 months should *not* raise it. ERT Guideline 40 states that “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”<sup>149</sup> since this would serve as a protection for the individual against becoming a victim of repeat cycles of detention.

The International Commission of Jurists, in its *Practitioner’s Guide*, has found that “the conditions of detention are also important when considering the maximum length possible of a detention to prevent unauthorised entry.”<sup>150</sup> The Commission also mentions that several issues can arise from the detention of stateless persons, since it is “particularly difficult to return them to their “country of origin” or to find alternative places of resettlement.” This can result in the prolonged detention of stateless persons, under the pretences of their deportation. Therefore, the “general principle... concerning the need to establish that deportation is being actively pursued, in order for detention to be justified”<sup>151</sup> is highly relevant for stateless persons in detention.

## 2.8 CONDITIONS OF DETENTION

Once a decision to detain has been made and persons have to endure detention for extensive periods, the environment they are compelled to live in can have a massive impact. Therefore it is of paramount importance that conditions of detention at the very least comply with minimum standards established under international law. Significantly, conditions of immigration detention must reflect its non-punitive nature.

The failure to comply with international standards can result in a violation of obligations to protect the person from torture or cruel, inhuman or degrading treatment or punishment. The physical and psychological state of the detainee, the facilities at the detention centre and the amount of time the detainee is detained all have an impact in this regard.

There are no special conditions of detentions that are required for stateless persons. However, as stateless persons are likely to be detained for longer periods than most, poor detention conditions can have a significant impact on the stateless. Since conditions of detention addresses the conditions in which a person is held (for example all detained persons must be held in sanitary facilities) this section will discuss generic standards for conditions of detention.

### United Nations

Article 7 ICCPR provides that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The Human Rights Committee, in its General Comment number 20 on Article 7, has stated that it is necessary for state parties to have safeguards for the protection of vulnerable persons, which includes detained persons. The Committee has also made it clear that in order to effectively protect detained persons, it is essential for states to hold detained persons in “places officially recognised as places of detention. Detained persons should not be kept in “incommunicado detention,”<sup>152</sup> which means being detained and unable to communicate with friends, family, legal advisors, and medical examiners, among others. Additionally, the Committee noted that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7 ICCPR.”<sup>153</sup>

Article 10(1) ICCPR provides that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” The Human Rights Committee, in its General Comment number 21, stated that Article 10(1) ICCPR covers “anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals – particularly psychiatric hospitals – detention camps or correctional institutions or elsewhere” and clarifies that states have the obligation to ensure that “the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held.”<sup>154</sup>

Article II CAT provides that state parties to the Convention must

“ Review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture”<sup>155</sup>

Article 4(I) of the Optional Protocol to the Convention Against Torture requires state parties to the Optional Protocol to allow visits to detention facilities or any place where individuals deprived of liberty are held in order to ensure the protection of detainees against torture or any other form of inhuman or degrading treatment while they are detained.<sup>156</sup> Article 14(I) (b) of the Protocol requires state parties to grant the sub-Committee on prevention of torture “unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention.”<sup>157</sup> Article 19, which addresses the national preventive mechanisms, requires states to examine the treatment of detainees regularly, in order to strengthen their protection against torture and other forms of cruel, inhuman or degrading treatment.<sup>158</sup>

The UN General Assembly’s *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provides some guidelines with respect to conditions of detention. Principle 6 states that no detained person “shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and such treatment is not justified under any circumstance. Principle 8 provides that “persons in detention shall be subject to treatment appropriate to their un-convicted status”<sup>159</sup> and thus should be kept separate from convicted persons.

The UN Working Group on Arbitrary Detention mentioned in its 2014 report that where detention is necessary, it “should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons.”<sup>160</sup>

The UNHCR *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* requires that the “conditions of detention for asylum-seekers should be humane with respect shown for the inherent dignity of the person”<sup>161</sup> and should be prescribed by the law.

The OHCHR’s *Administrative Detention of Migrants* expresses concern for the fact that special holding centres for the detention of migrants have often been crowded, which has contributed to the deterioration of the individuals’ health. They are often held in poor hygienic conditions, have no access to medical treatment and other services, among others.<sup>162</sup>

According to a UNHCR, IDC and Association for the Prevention of Torture Manual titled *Monitoring Immigration Detention*, any detained individual is at risk of torture or other forms of ill-treatment. Poor conditions of detention – including solitary confinement – can amount to torture or cruel, inhuman or degrading treatment. Visits are key in the

monitoring process as well as the process of improving the treatment of detainees and the conditions they are being held in. Thus, monitoring groups need to be able to assess the conditions of detention and treatment of detainees.<sup>163</sup>

### Council of Europe

Article 3 ECHR provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>164</sup> In *MSS v Belgium and Greece*, the ECtHR stated that Article 3 ECHR “requires the State to ensure that detention conditions are compatible with respect for human dignity;” detention should not subject detainees to “distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention” and that “their health and well-being are adequately secured.”<sup>165</sup> The Court found that “the feeling of arbitrariness and the feeling of inferiority and anxiety” associated with detention, and the “profound effect such conditions of detention indubitably have on a person’s dignity”<sup>166</sup> constitute degrading treatment, in violation of Article 3 ECHR.

In *A and Others v United Kingdom*, the ECtHR established that when a person is detained, the state must “ensure that he is detained under conditions which are compatible with respect for his human dignity” and that he is not subjected to “distress or hardship exceeding the unavoidable level of suffering inherent in detention”<sup>167</sup> In *Mikolenko v Estonia*, the ECtHR found that for detention not to be deemed arbitrary, certain conditions must be met, one of which is that “the place and conditions of detention should be appropriate.”<sup>168</sup>

The European Committee for the Prevention of torture, in its *Standards*, has made it clear that while detainees may have to spend time detained in police facilities, such places may be inadequate for lengthy periods of detention, and therefore the time detainees spend in such places should be minimal.<sup>169</sup>

### European Union

Article 16(1) EU Returns Directive states that detention must take place in specialised detention facilities, and if a state cannot provide specialised detention facilities and must keep detainees with convicted persons, they must be kept separately (ex. in different holding cells). Article 16(2) of the EU Returns Directive states that detainees must be allowed “contact with legal representatives, family members and competent consular authorities.” Article 16(3) of the Directive provides that attention should be paid to vulnerable persons, and emergency health care should be provided for those held in detention. Article 16(4) of the Directive requires that “competent national, international and nongovernmental organisations and bodies shall have the possibility to visit detention facilities” and Article 16(5) of the Directive requires that detainees must be provided with information which explains to them the rules applied in the facility and establishes their rights and obligations.<sup>170</sup>

### Other resources

The International Commission of Jurists, in its *Handbook for preventing unnecessary immigration detention*, states that the

conditions of a detention facility must “meet basic standards that allow detainees to live in safety and dignity for the duration of their confinement.” Said standards cover a wide range of areas, including the number of residents for the space provided, quality of the facilities, the quality of shelter based on the climate, access to outdoor recreational spaces, food which meets the dietary requirements, cultural and religious needs of detainees, proper hygiene including “bathing facilities, toiletries, clean clothes and bed linen” among others. Furthermore, detainees should never be held in facilities meant for convicts or that are currently being used to hold convicts and detainees.<sup>171</sup>

The International Commission of Jurists, in its *Practitioner’s Guide*, states that even when detention can be justified, international human rights law “imposes further constraints on the place and regime of detention, the conditions of detention, and the social and medical services available to detainees. In addition, it imposes obligations to protect detainees from violence in detention.”<sup>172</sup> The Commission also mentions that according to international guidelines, “detained migrants should be held in specifically designed centres in conditions tailored to their legal status and catering for their particular needs”<sup>173</sup> and their detention in “unsuitable

locations, including police stations or prisons, may lead or contribute to violations of freedom from torture or cruel, inhuman or degrading treatment.”

ERT Detention Guideline 43 provides that the conditions of detention must be prescribed by law and must comply with international human rights law and standards, placing emphasis on: humane detention conditions with respect for the inherent dignity of the person – no detainee can be subjected to torture, cruel, inhuman or degrading treatment or punishment; stateless persons in detention must be protected from discrimination and harassment and should not be held in worse conditions than that of national detainees; stateless detainees should be “subject to treatment that is appropriate to the administrative purpose of their detention” and should not be held together with convicted persons; detention facilities should be built in “compliance with the principle that there is no punitive element to immigration detention”; women and men should be held separately unless they are family members; accommodation should be provided for the comfort and well-being of disabled persons; detainees should be given access to visits from friends, family, legal counsel, and others.<sup>174</sup>

## 2.9 CONDITIONS OF RELEASE AND PROTECTION FROM RE-DETENTION

At any point during the detention that it becomes evident that detention is no longer non-arbitrary – perhaps because the legitimate objective is not being pursued with due diligence, or because the legitimate objective cannot be achieved within a reasonable time period, or detention is no longer necessary to pursue the legitimate objective, or the conditions of detention amount to inflicting cruel, inhuman or degrading treatment on the detainee etc., the detainee should be released. Such release may result from proceedings initiated by the detainee, or by the periodical review of detention by the state.

Once released, it is essential that stateless persons (in particular) are given the legal status and the means to provide for themselves, or at the very least are provided for adequately so they can live dignified lives. The failure to do so may also amount to cruel, inhuman or degrading treatment. Furthermore, the non-provision of legal status and related work (and other) rights increases the likelihood of offending in order to survive, thus increasing the likelihood of re-detention.

Re-detaining stateless persons who cannot be removed is emblematic of a failed system that punishes the individual for its failings. Unless material circumstances have significantly changed, such re-detention is likely at the very outset to be arbitrary, and therefore, in most circumstances, should be avoided. In order to break stateless persons out of the cycle of re-detention, they must be afforded a legal status which allows them to live their lives with dignity and within the sphere of legality.

### United Nations

Article 9(4) ICCPR provides that “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.” In *Celepli v Sweden*, the HRC stated that since the expulsion order was not enforced, and the applicant was given permission to stay in Sweden, subject to restrictions, this meant that he was lawfully in the territory of Sweden.<sup>175</sup>

Article 12 ICESCR protects the right to “the highest attainable standard of physical and mental health.” Article 9 addresses the right to social security, Article 11 ICESCR protects the right to an adequate standard of living, including adequate

food, clothing and housing, and Article 13 ICESCR the right to education for all. Upon release, states should ensure that formerly detained persons have access to these rights.

Article 27 of the 1954 Statelessness Convention requires state parties to “issue identity papers to any stateless person in their territory who does not possess a valid travel document.” This provision applies to all stateless persons, which includes those not staying legally in the state’s territory. Therefore, state parties to the 1954 Convention have an obligation to provide stay rights to stateless persons who have been released from detention.

The *Practical Manual* published by UNHCR, the Association for the Prevention of Torture (APT) and IDC on monitoring immigration detention states that unlike in the prison system, in the detention context it is not always easy to know when an individual will be released from detention. Detainees do not always know when they will be released, and whether “they will be released into the host community, or whether they will be required to return to their country of origin or former habitual residence, or indeed to return or travel to a third country.” The future is uncertain for them, and that makes it difficult for their support group – friends, family, legal advisors, civil society organisations, etc. – to plan for the post-detention phase. The Manual states that “it is therefore imperative that release, removal and deportation procedures are all managed respectfully, sensitively and humanely. Whatever the final outcome, the immigration detainee needs to be in a position to integrate into the host society or reintegrate into his/her country of origin or former habitual residence.”<sup>176</sup>

### Council of Europe

In *Amie and Others v Bulgaria*, the ECtHR stated that the authorities should “consider whether removal is a realistic prospect, and accordingly whether detention with a view to removal is from the outset, or continues to be, justified.”<sup>177</sup> When removal ceases to be a realistic prospect, release from detention is the next logical step.

In *Kim v Russia*, the ECtHR held that the procedural guarantee of judicial review of the individual’s detention should “be capable of leading, where appropriate, to release.”<sup>178</sup> The Court was concerned that upon release, Mr. Kim could be re-detained as his status in Russia had not been regularised, and therefore, the Russian government should prevent his re-detention as a result from his statelessness.<sup>179</sup>

In *Okonkwo v Austria*, the applicant contested the “necessity of the residence ban against him”<sup>180</sup> since due to his statelessness, the residence ban meant he could not have a residence permit, and he had been detained on various occasions due to his inability to produce identification documents that certified his legal residence in the country.

In *Mikolenko v Estonia*, the applicant’s expulsion became impossible, since his removal required his cooperation, and he was unwilling to cooperate. The Court found that the “applicant’s further detention cannot be said to have been effected with a view to his deportation as this was no longer feasible.”<sup>181</sup> Since removal was no longer an option, release was the only option left.

### European Union

Article 15(2) of the EU Returns Directive requires that “The third-country national concerned shall be released immediately if the detention is not lawful.”<sup>182</sup> In *Kadzoev*, the ECJ determined that Article 15(4) and (6) of the Directive should be interpreted as requiring that after the maximum period of detention has expired, the person must be released immediately. Furthermore, the Court clarified that the individual’s lack of valid documentation, his/her inability to support him/herself or his/her “aggressive conduct” should not be deterrent to his/her

release.<sup>183</sup> In *Mahdi*, it was determined that when the prospect of removal ceases to exist and therefore the detention is no longer justified, the individual “must be released immediately”<sup>184</sup>

### Other resources

According to the International Detention Coalition, in its *Handbook for preventing unnecessary immigration detention*, it is essential for any detention system to “provide legitimate avenues for eligible detainees to be released to a community-based alternative”. “Avenues for release” provide detainees with tangible opportunities to apply and be considered for release, and are “often intertwined with the process of regular and ongoing judicial review.”<sup>185</sup>

Global Detention Project researchers have noted that legal gaps and practices in some European countries leave irregular migrants and stateless persons unprotected from re-detention as they often are released without a residence permit which leaves them in a legal limbo. There is a need for official statistics on this practice as re-detained individuals risk being detained for much longer periods than the legal limits in place. In Spain, “Because the law is not explicit about the legal status of people who have been released when they reach the 60-day detention limit, former detainees are under threat of re-detention. This would contravene another Article in the law which provides that re-detention under the same judicial order should not occur (Aliens Act, Article 62.2).”<sup>186</sup> In Ukraine, “Some observers have pointed to detention-related gaps in the new law, including its failure to prohibit the common practice of re-arresting migrants upon release and detaining them again for the maximum period allowed.”<sup>187</sup>

ERT Detention Guideline 42 provides that once it is evident that the administrative purpose of the detention – removal – cannot be achieved within a reasonable period of time; or that the grounds for detention are no longer valid; or upon the expiration of the maximum time limit for detention, the detainee should be released. ERT Detention Guideline 55 provides that the detaining State’s obligations towards the stateless detainee do not cease after his/her release, and therefore “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.” Such obligations towards released former detainees continue for as long as the person is in the state’s territory or subject to its jurisdiction. Guideline 56 requires that stateless detainees who have been released are “provided with appropriate documentation and stay rights suitable to their situation” as required by Article 27 of the 1954 Convention Relating to the Status of Stateless Persons. Guideline 57 states that released stateless detainees should be protected from destitution, and Guideline 58 provides that released detainees should “have access to healthcare, social welfare, shelter and primary education on an equal basis with nationals.” Guideline 59 states that released detainees should be allowed to work and be entitled to equal pay as nationals, and Guideline 60 establishes that “durable solutions”, including facilitated naturalisation should be found for stateless migrants.<sup>188</sup>

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## 4. TABLE OF TREATY ACCESSIONS

### EU COUNTRIES

Country	ICCPR	ICCPR OP	CAT	CAT OP	CRC	CRC OP	CMW	1954 Convention	EU returns Directive
Austria	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Belgium	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Bulgaria	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Croatia	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Cyprus	Yes	Yes	Yes	Yes	Yes	No	No	No	Yes
Czech Republic	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Denmark	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Opted out
Estonia	Yes	Yes	Yes	Yes	Yes	No	No	No	Yes
Finland	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
France	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Germany	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Greece	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Hungary	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Ireland	Yes	Yes	Yes	No	Yes	Yes	No	Yes	Opted out
Italy	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Latvia	Yes	Yes	Yes	No	Yes	No	No	Yes	Yes
Lithuania	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Luxembourg	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Malta	Yes	Yes	Yes	Yes	Yes	No	No	No	Yes
Netherlands	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Poland	Yes	Yes	Yes	Yes	Yes	No	No	No	Yes
Portugal	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Romania	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Slovakia	Yes	Yes	Yes	No	Yes	Yes	No	Yes	Yes
Slovenia	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Spain	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Sweden	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
United Kingdom	Yes	No	Yes	Yes	Yes	No	No	Yes	Opted out

## NON-EU, COE COUNTRIES

Country	ICCPR	ICCPR OP	CAT	CAT OP	CRC	CRC OP	CMW	1954 Convention	EU Returns Directive
Albania	Yes	yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A
Andorra	Yes	yes	Yes	No	Yes	Yes	No	No	N/A
Armenia	Yes	Yes	Yes	Yes	Yes	No	No	Yes	N/A
Azerbaijan	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	N/A
Bosnia and Herzegovina	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	N/A
Georgia	Yes	Yes	Yes	Yes	Yes	No	No	Yes	N/A
Iceland	Yes	Yes	Yes	No	Yes	No	No	No	Yes
Liechtenstein	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Macedonia	Yes	Yes	Yes	Yes	Yes	No	No	Yes	N/A
Moldova	Yes	Yes	Yes	Yes	Yes	No	No	Yes	N/A
Monaco	Yes	No	Yes	No	Yes	Yes	No	No	N/A
Montenegro	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	N/A
Norway	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Russia	Yes	Yes	Yes	No	Yes	No	No	No	N/A
San Marino	Yes	Yes	Yes	No	Yes	No	No	No	N/A
Serbia	Yes	Yes	Yes	Yes	Yes	No	No	Yes	N/A
Switzerland	Yes	No	Yes	Yes	Yes	No	No	Yes	Yes
Turkey	Yes	Yes	Yes	Yes	Yes	No	No	Yes	N/A
Ukraine	yes	Yes	Yes	Yes	Yes	No	No	Yes	N/A

## 5. CHECKLISTS



### 5.1 THE ADVOCACY CHECKLIST

This checklist is a resource for advocates pushing for law and policy reform and better practice related to the immigration detention of stateless persons in their country.

- ✓ Has your country acceded to the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness?
- ✓ Has your country acceded to the core UN Human Rights Treaties and their optional protocols, in particular, the Optional Protocol to the Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment?
- ✓ Does your country have a statelessness determination procedure? If yes, does the procedure comply with UNHCR Guidelines?
- ✓ Are stateless persons, and those at risk of statelessness subjected to a statelessness determination procedure as part of the decision making processes to remove and/or to detain?
- ✓ Is immigration detention only resorted to as a last resort, after all alternatives to detention have been exhausted?
- ✓ Does your country have a strong alternatives to detention programme, with a wide range of options to meet the vulnerabilities and needs of different groups?
- ✓ Is immigration detention used for purposes other than those allowed under Article 5(1)(f) of the ECHR?
- ✓ Is there a maximum time period for immigration detention? What is it?
- ✓ Are those subject to immigration detention entitled to substantive and procedural due process rights? In particular, is detention ordered by a judicial authority, is the detention order given in writing, with grounds for detention clearly given, does the individual have the right to appeal and review the decision to detain and benefit from legal aid?
- ✓ Does your country have rules in place that govern the process of re-documentation and/or ascertain entitlement to nationality, for the purposes of removal? Do these roles articulate the respective roles that the state and individual are expected to play? Are the time limits for such processes clearly set out?
- ✓ Are all detainees provided with information on their rights and entitlements, contact details of organisations which can assist them, and other bodies who can assist them in challenging the legality of their detention and the conditions of their detention? Does such information include guidance on how a detainee may access a dedicated statelessness determination procedure?
- ✓ Are individual vulnerability assessments carried out before detention and regularly during detention?
- ✓ Are children ever detained in your country?
- ✓ Are the conditions of detention centres in keeping with international standards and with the non-punitive nature of immigration detention?
- ✓ Are immigration detention centres regularly monitored by independent authorities and do detainees have regular contact with family, their lawyers, NGOs, UNHCR, their religious representatives etc.?
- ✓ Does your country pursue removal with due diligence, and are those who are deemed to be not removable within a reasonable period of time (and in accordance with international human rights standards) released without delay?
- ✓ Are released detainees provided with a legal status and basic rights, including the right to work and receive social welfare?
- ✓ Does your country re-detain former detainees? If yes, is their previous time in detention taken into consideration when calculating the maximum period of detention?

## 5.2 THE DECISION TO DETAIN CHECKLIST

This checklist relates to the decision to detain. It can be utilised both by state authorities making the decision to detain, and by those challenging the legality of such decisions.

- ✓ What is the objective of detention in the case in question?
- ✓ Is this objective legitimate under national law and under international and regional law (in particular, Article 5(1)(f) of the ECHR)?
- ✓ If the objective is removal, is removal possible within a reasonable period of time? What are the barriers to removal?
- ✓ If the objective is removal, is the person stateless, or at risk of statelessness? Is the person's nationality unclear, or is the person a national of a country that does not cooperate with removal proceedings?
- ✓ If any of the answers to the above question are unclear, has the person been subjected to statelessness determination?
- ✓ Is the decision to detain applied in a manner that respects the right of the person not to be discriminated against?
- ✓ Is the detention absolutely necessary? Can the desired outcome be achieved through less coercive means/ measures? Have all alternatives to detention properly being considered in this case? If yes, why have they been deemed unsuitable?
- ✓ Is the decision to detain proportionate and reasonable?
- ✓ Is the decision to detain being carried out in accordance with substantive and procedural safeguards?
- ✓ Is legal aid provided for under national law? If yes, has the person benefited from legal aid?
- ✓ Has the right to family and private life of the person been adequately considered? Are parents and children separated?
- ✓ Has the potential vulnerability of the person been taken into account? Have vulnerable groups been identified? Are state agents aware of the special care vulnerable groups require?

## 5.3 THE ONGOING DETENTION CHECKLIST

This checklist is for practitioners (detaining authorities, lawyers, NGOs etc.) concerned with ongoing detention.

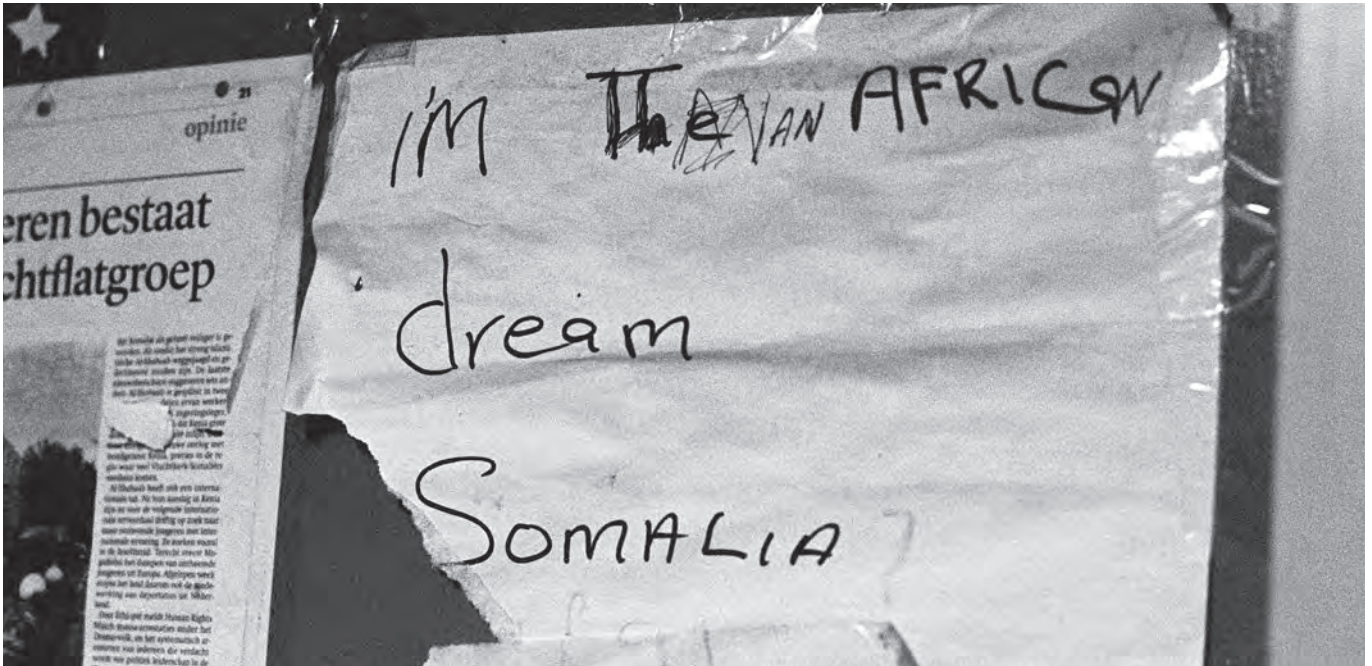
- ✓ Is there a maximum period of detention? Has this been communicated to the person in a language he/she understands?
- ✓ Are detainees made fully aware of their rights under national, regional and international law, including their rights to challenge their treatment in detention, the conditions of detention and the legality of their detention?
- ✓ Are there regular periodic reviews of the necessity for the continuation of detention before a court or an independent body, which the person and his/her representative has the right to attend?
- ✓ If detention is for the purpose of removal, is removal (including efforts of documentation) being pursued by the detaining authority with due diligence, and have all the

- necessary steps been taken to ensure a speedy removal?
- ✓ Has the individual been issued the necessary travel documents to ensure removal?
- ✓ Has the removal destination been established? Have the authorities of said destination state been informed? Have they agreed to receive or readmit the individual being removed?
- ✓ Is the prospect of removal (and consequently the legality of detention) periodically reviewed? If yes, are detainees released when it becomes evident that their removal will not be possible during a reasonable time (and within the time limit if there is one) or are they routinely kept in detention until the time limit is reached?
- ✓ Have removal efforts revealed that an individual formerly believed to have a nationality, is stateless or at risk of statelessness? If yes, has this resulted in their release?
- ✓ Are the detention facilities in keeping with the non-punitive nature of immigration detention? Can they comfortably hold the individual in question?
- ✓ Have the officers who run the detention facilities received the necessary training to ensure that they treat all detainees with dignity and in accordance with their rights? In particular, that they do not engage in torture and inhuman, degrading or cruel treatment of detainees?
- ✓ Do detention facilities allow detainees to be in regular contact with family, friends, legal advisors, and civil society organisations and to visit them?
- ✓ Are there regular / periodic individual vulnerability assessments available in detention facilities?
- ✓ Is medical assistance (including psychological assistance) available in the detention facility?

## 5.4 THE POST-RELEASE CHECKLIST

- ✓ This checklist is for practitioners (social welfare officers, lawyers, NGOs etc.) who engage with and provide services to released detainees.
- ✓ If the purpose of the detention cannot be fulfilled and the person is released, what legal status is provided to him/her under national law?
- ✓ Do released persons have the right to work or to benefit from social welfare?
- ✓ If released persons are stateless, will they be provided with necessary identity documentation and stay rights?
- ✓ Under national law, is there a possibility of re-detention?
- ✓ If yes, what steps can be taken to protect the individual from being re-detained unless due to a material change in circumstances, safe return is now possible?
- ✓ If re-detention does occur, is the cumulative time spent in detention counted?

# ENDNOTES



- <sup>1</sup> *Kim v Russia* [2014] Application no 44260/13 (ECtHR), para 54
- <sup>2</sup> It is intended to also be a resource to practitioners in other parts of the world – to the extent that it draws on the universal UN framework, and given that the rulings of the European Court of Human Rights are widely read, respected and influential globally
- <sup>3</sup> Further information is available on the European Network on Statelessness website at [www.statelessness.eu](http://www.statelessness.eu)
- <sup>4</sup> See chapter 4 of this Toolkit – the Table of Treaty Ratifications – for a full list of state parties to the 1954 Convention and other key treaties
- <sup>5</sup> Readers are also encouraged to look at other resources such as the statelessness page of UNHCR's Refworld and the European Network on Statelessness site
- <sup>6</sup> Article 1(1). 1954 Convention Relating to the Status of Stateless Persons (adopted 28 September 1954) 360 UNTS
- <sup>7</sup> UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (2014), para 23
- <sup>8</sup> For a definition and explanation on the correct use of the term *de facto* statelessness see *ibid.*, p 5
- <sup>9</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), para 5
- <sup>10</sup> The Equal Rights Trust (ERT), *ERT Guidelines to Protect Stateless Persons from Arbitrary Detention* (2012) Guideline 25, p 16. For the international law basis for this definition, please see pages 76 – 81 of the Commentary to the ERT Guidelines
- <sup>11</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), Guideline 4, point 18
- <sup>12</sup> For more detailed overviews of the UN framework, see this Dag Hammarskjöld Library Research Guide and this OHCHR overview of human rights bodies
- <sup>13</sup> UN High Commissioner for Refugees (UNHCR), *The Case Law of the European Regional Courts: The Court of Justice of the European Union and the European Court of Human Rights Refugees, asylum-seekers, and stateless persons* (UNHCR, 2015), p 20
- <sup>14</sup> Some rights under the ICCPR are reserved for citizens only, such as the right to vote or to stand for election (art 15(b))
- <sup>15</sup> UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (2014), para 8
- <sup>16</sup> *Ibid.*, para 8
- <sup>17</sup> *Ibid.*, para 122
- <sup>18</sup> *Ibid.*, para 115
- <sup>19</sup> *Ibid.*, para 146
- <sup>20</sup> *Ibid.*, para 83
- <sup>21</sup> *Auad v Bulgaria* [2011] Application no 46390/10 (ECtHR)
- <sup>22</sup> *Ibid.*, para 130
- <sup>23</sup> *Okonkwo v Austria* [2001] Application no 35117/97 (ECtHR), p 3
- <sup>24</sup> European Union (EU), *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 (EU Returns Directive) L 348/98* (2008)
- <sup>25</sup> The Equal Rights Trust (ERT), *ERT Guidelines to Protect Stateless Persons from Arbitrary Detention* (2012)
- <sup>26</sup> European Network on Statelessness (ENS), 'Strategic Litigation: An Obligation for Statelessness Determination under the European Convention on Human Rights?' European Network on Statelessness Discussion Paper 09/14 (2014) p 12
- <sup>27</sup> *Ibid.*, p 4
- <sup>28</sup> See ENS *Good Practice Guide on Statelessness Determination and the Protection Status of Stateless Persons* (2013)
- <sup>29</sup> UN General Assembly (UNGA), *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988) Resolution A/RES/43/173
- <sup>30</sup> *A v Australia* [1997] Communication No 560/1993 (HRC) UN Doc CCPR/C/59/D/560/1993, para 9(4)
- <sup>31</sup> *Ibid.*, para 9(2)
- <sup>32</sup> *FKGA v Australia* [2011] Communication No 2094/2011 (HRC) UN Doc CCPR/C/108/D/2094/2011, para 9(3)
- <sup>33</sup> UN Human Rights Council (HRC), *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council, 13th Session* (2010), A/HRC/13/30, para 59
- <sup>34</sup> UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (2014), para 112
- <sup>35</sup> *Ibid.*, para 113
- <sup>36</sup> *Saadi v United Kingdom* [2008] Application no 13229/03 (ECtHR), para 43
- <sup>37</sup> *Agee v United Kingdom* [1976] application no 7729/76 (ECommHR); *Amuur v France* [1996] Application no 19776/92 (ECtHR)
- <sup>38</sup> *Dougouz v Greece* [2001] application no 40907/98 (ECtHR)
- <sup>39</sup> *Bozano v France* [1986] application no 9990/82 (ECtHR); *Conka v Belgium*, [2002] application no 51564/99 (ECtHR)
- <sup>40</sup> *Winterwerp v the Netherlands* [1979] application no 6301/73 (ECtHR); *Bouamar v Belgium*, [1988] application no 9106/80 (ECtHR), para 50
- <sup>41</sup> *Vasileva v Denmark*, [2003] application no 52792/99 (ECtHR), para 37
- <sup>42</sup> European Union (EU), *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 (EU Returns Directive) L 348/98 (2008)
- <sup>43</sup> Bashir Mohamed Ali Mahdi case [2014] Case C146/14 PPU (ECJ), para 44
- <sup>44</sup> Ibid, para 61
- <sup>45</sup> Ibid, para 44
- <sup>46</sup> Said Shamilovich Kadzoev v Direksia Migratsia' pri Ministerstvo na vatreshnite raboti [2009] Case C-357/09 (ECJ), para 60
- <sup>47</sup> Ibid, para 44
- <sup>48</sup> Ibid, para 72(5)
- <sup>49</sup> International Detention Coalition (IDC), *There are Alternatives: A Handbook for preventing unnecessary immigration detention* (2011), p 45
- <sup>50</sup> Ibid, p 9
- <sup>51</sup> International Commission of Jurists (ICJ), *Migration and International Human Rights Law, a Practitioner's Guide* (2014), p 179
- <sup>52</sup> Ibid, p 187
- <sup>53</sup> Ibid, p 192
- <sup>54</sup> The Equal Rights Trust (ERT), *ERT Guidelines to Protect Stateless Persons from Arbitrary Detention* (2012)
- <sup>55</sup> M Flynn, 'Immigration Detention and Proportionality' Global Detention Project Working Paper No. 4 (2011)
- <sup>56</sup> C v Australia [1999] Communication No 900/1999 (HRC) UN Doc CCPR/C/76/D/900/1999, para 8(3)
- <sup>57</sup> UN Human Rights Council (HRC), *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council, 13th Session* (2010), A/HRC/13/30, para 61
- <sup>58</sup> UN General Assembly (UNGA), *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988) Resolution A/RES/43/173
- <sup>59</sup> UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (2014), para 114
- <sup>60</sup> A and Others v the United Kingdom [2009] Application no 3455/05 (ECtHR), para 202
- <sup>61</sup> Al-Nashif v Bulgaria [2002] Application no 50963/99 (ECtHR), para 92
- <sup>62</sup> Kim v Russia [2014] Application no 44260/13 (ECtHR), para 41
- <sup>63</sup> Ibid, para 42
- <sup>64</sup> European Union (EU), *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 (EU Returns Directive)* L 348/98 (2008)
- <sup>65</sup> Said Shamilovich Kadzoev v Direksia Migratsia' pri Ministerstvo na vatreshnite raboti [2009] Case C-357/09 (ECJ), para 50
- <sup>66</sup> Bashir Mohamed Ali Mahdi case [2014] Case C146/14 PPU (ECJ), para 44
- <sup>67</sup> International Commission of Jurists (ICJ), *Migration and International Human Rights Law, a Practitioner's Guide* (2014), p 180
- <sup>68</sup> International Detention Coalition (IDC), *There are Alternatives: A Handbook for preventing unnecessary immigration detention* (2011), p 46
- <sup>69</sup> I Majcher, "'Crimmigration' in the European Union through the Lens of Immigration Detention' Global Detention Project Working Paper No 6 (2013)
- <sup>70</sup> The Equal Rights Trust (ERT), *ERT Guidelines to Protect Stateless Persons from Arbitrary Detention* (2012)
- <sup>71</sup> UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (2014), para 41
- <sup>72</sup> For a reflection on this difficult area, see ENS blog, A de Chickera, A question of if and when, 22 May 2014
- <sup>73</sup> UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (2014), para 83
- <sup>74</sup> Ibid, para 89
- <sup>75</sup> United Nations High Commissioner for Refugees (UNHCR), *UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012)
- <sup>76</sup> UN High Commissioner for Refugees (UNHCR), *Mapping Statelessness in the United Kingdom* (UNHCR, 2011)
- <sup>77</sup> Abdi v the United Kingdom [2013] Application no 27770/08 (ECtHR), para 55
- <sup>78</sup> Auad v Bulgaria [2011] Application no 46390/10 (ECtHR), para 106
- <sup>79</sup> See *TI v the United Kingdom* [2000] Application no 43844/98 (ECtHR); *KRS v the United Kingdom* [2008] Application no 32733/08 (ECtHR); *Abdolkhani and Karimnia v Turkey* [2009] Application no 30471/08 (ECtHR), para 88; *Babar Ahmad and Others v United Kingdom* [2012] Applications nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 (ECtHR), paras 113-116; *MSS v Belgium and Greece* [2011] Application no 30696/09 (ECtHR), paras 33861; *Abdi v the United Kingdom* [2013] Application no 27770/08 (ECtHR)
- <sup>80</sup> *Amie and Others v Bulgaria* [2013] Application no 58149/08 (ECtHR), para 77
- <sup>81</sup> *Kim v Russia* [2014] Application no 44260/13 (ECtHR), para 47
- <sup>82</sup> Ibid, para 49, 51 and 56
- <sup>83</sup> *Harabi v Netherlands* [1985] application No 10798/84 (EComHR)
- <sup>84</sup> European Union (EU), *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 (EU Returns Directive)* L 348/98 (2008), para 6
- <sup>85</sup> The Equal Rights Trust (ERT), *ERT Guidelines to Protect Stateless Persons from Arbitrary Detention* (2012)
- <sup>86</sup> Flemish Refugee Action (Belgium), Detention Action (UK), France terre d'asile (France), Menedék – Hungarian Association for Migrants, and The European Council on Refugees and Exiles (ECRE), 'Point of No Return: the Futile Detention of Unreturnable Migrants' (2014)
- <sup>87</sup> Bail for Immigration Detainees (BID), 'Travel Document Project' (2015)
- <sup>88</sup> *FKGA v Australia* [2011] Communication No 2094/2011 (HRC) UN Doc CCPR/C/108/D/2094/2011, para 9(3)
- <sup>89</sup> UN General Assembly (UNGA), Res 63/184 'Protection of migrants' (2008) A/RES/63/184, para 9
- <sup>90</sup> UN Human Rights Council (HRC), *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council, 13th Session* (2010), A/HRC/13/30, para 65
- <sup>91</sup> UN Human Rights Council (HRC), *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council, 27th Session* (2014), A/HRC/27/48, para 77
- <sup>92</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), p 10
- <sup>93</sup> UN High Commissioner for Refugees (UNHCR), 'Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families' (2015) and UN High Commissioner for Refugees (UNHCR), 'Options Paper 2: Options for governments on open reception and alternatives to detention' (2015)
- <sup>94</sup> Ibid, 'Options Paper 2'
- <sup>95</sup> Human Rights Council (HRC), *Report of the Special Rapporteur on the human rights of migrants, François Crépeau* (2012) A/HRC/20/24, para 52
- <sup>96</sup> UN Human Rights Council (HRC), *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council, 13th Session* (2010), A/HRC/13/30, para 53
- <sup>97</sup> Council of Europe (CoE), *Twenty Guidelines on Forced Return* (2005)
- <sup>98</sup> *Guzzardi v Italy* [1980] Application no 7367/76 (ECtHR), para 93
- <sup>99</sup> European Union (EU), *laying down standards for the reception of applicants for international protection (recast) (Reception Conditions Directive) 2013/33/EU* (2013), para 20
- <sup>100</sup> United Nations High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers COM (2011) 320 final* (2011), p 9
- <sup>101</sup> International Detention Coalition (IDC), *There are Alternatives: A Handbook for preventing unnecessary immigration detention* (2011), p 12
- <sup>102</sup> Ibid, p 20
- <sup>103</sup> Ibid, p 21-22
- <sup>104</sup> P De Bruycker, (Ed) A Bloomfield, E Tsooudi, and J Pétin, *Alternatives to Immigration and Asylum Detention in the EU -Time for Implementation. Odysseus Network. MADE REAL Project* (2015)
- <sup>105</sup> The Equal Rights Trust (ERT), *ERT Guidelines to Protect Stateless Persons from Arbitrary Detention* (2012)
- <sup>106</sup> *Bakhtiyari v Australia* [2003] Communication No 1069/2002 (HRC) UN Doc CCPR/C/79/D/1069/2002, para 9(3)
- <sup>107</sup> Ibid, para 9(6)
- <sup>108</sup> UN Human Rights Council (HRC), *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council, 13th Session* (2010), A/HRC/13/30, para 60
- <sup>109</sup> UN General Assembly (UNGA), *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (1990) Resolution A/RES/45/113, para 17
- <sup>110</sup> Ibid, para 18
- <sup>111</sup> UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (2014), para 113
- <sup>112</sup> Ibid, para 151
- <sup>113</sup> Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2002) E/2002/68/ Add.1
- <sup>114</sup> Article 8(1), United Nations General Assembly (UNGA), Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Palermo Protocol) (adopted 2000) A/RES/55/25

- <sup>115</sup> Introductory note, p 3. United Nations General Assembly (UNGA), 1951 Convention Relating to the Status of Refugees (adopted 1951) Resolution 2198 (XXI)
- <sup>116</sup> United Nations High Commissioner for Refugees (UNHCR), *UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012)
- <sup>117</sup> Association for the Prevention of Torture (APT), International Detention Coalition (IDC) and UN High Commissioner for Refugees (UNHCR), *Monitoring Immigration Detention, Practical Manual* (2014)
- <sup>118</sup> *Al-Nashif v Bulgaria* [2002] Application no 50963/99 (ECtHR), para 114
- <sup>119</sup> *Ibid*, para 116
- <sup>120</sup> *Kanagaratnam and others v Belgium* [2011] Application no 15297/09 (ECtHR)
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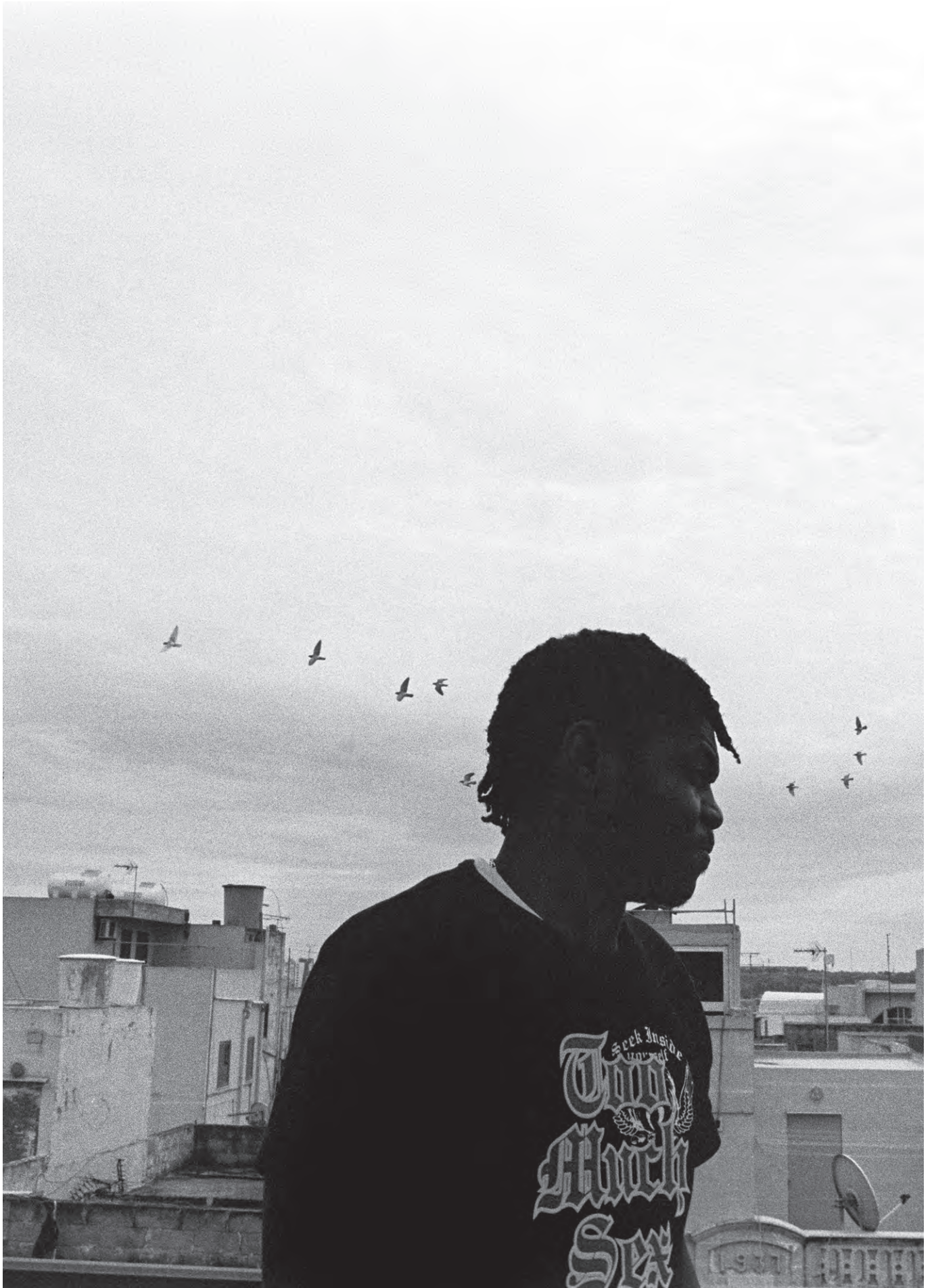
Our Network has developed rapidly since we launched in 2012, attracting 103 members in 39 European countries (see shaded area of map). Our London-based Secretariat coordinates ENS's law & policy, awareness-raising and capacity-building activities. For information about Network activities or membership enquiries contact ENS Director Chris Nash ([chris.nash@statelessness.eu](mailto:chris.nash@statelessness.eu)).



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