Submission by the Office of the United Nations High Commissioner for Refugees
in the case of
Lakatosh and Others v. Russia

1. Introduction*

1.1. By letter of 3 December 2010, the European Court of Human Rights ("the Court") granted the Office of the United Nations High Commissioner for Refugees ("UNHCR") leave to make written submissions as a third party in the case of *Lakatosh and Others v. Russia* (Application no. 32002/10). UNHCR welcomes this opportunity, as the present case raises a number of legal issues relating to statelessness, in particular, the arbitrary detention of stateless persons.

1.2. UNHCR has been formally mandated by the UN General Assembly to prevent and reduce statelessness around the world, as well as to protect the rights of stateless people. UN General Assembly resolutions 3274 (XXIV) and 31/36 designated UNHCR as the body mandated to examine the cases of persons who claim the benefit of the 1961 Convention on the Reduction of Statelessness and to assist such persons in presenting their claims to the appropriate national authorities. In 1994, the UN General Assembly conferred upon UNHCR a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.[1] This mandate has continued to evolve as the General Assembly has endorsed the conclusions of UNHCR's Executive Committee.[2] Over time, UNHCR has developed a recognized expertise on statelessness issues.

1.3. This submission demonstrates that undocumented stateless people in the Russian Federation face significant difficulties in legalising their stay in the country. This makes them particularly vulnerable to arrest, detention and deportation. Because stateless people are not recognised as nationals of any state and may not have lawful residence in any State, their removal from the Russian Federation may be impossible. In the absence of legislative or administrative

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* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law.

[1] UNGA resolutions A/RES49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI) – 1995, *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, at: http://www.unhcr.org/refworld/docid/3ae68c443f.html.

[2] UN High Commissioner for Refugees, *Conclusion on International Protection*, 05 October 2001, No. 90 (LII) - 2001, para. (q), at: http://www.unhcr.org/refworld/docid/3bd3e3024.html; *General Conclusion on International Protection*, 10 October 2003, No. 95 (LIV) - 2003, para. (y), at: http://www.unhcr.org/refworld/docid/3f93aede7.html; *General Conclusion on International Protection*, 08 October 2004, No. 99 (LV) - 2004, para. (aa), at: http://www.unhcr.org/refworld/docid/41750ef74.html; *General Conclusion on International Protection*, 07 October 2005, No. 102 (LVI) - 2005, para. (y), at: http://www.unhcr.org/refworld/docid/43575ce3e.html; *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, 06 October 2006, No. 106 (LVII) - 2006, paras. (f), (h), (i), (j) and (t), at: http://www.unhcr.org/refworld/docid/453497302.html.

limits and safeguards pertaining to their detention, stateless people are vulnerable to prolonged, indefinite or cyclical detention.

1.4. Part 2 of this submission briefly describes the global phenomenon of statelessness and outlines the international legal framework that addresses statelessness. Part 3 provides information on statelessness and its causes in the Russian Federation and Ukraine as well as on the legal situation of stateless persons in the Russian Federation. Part 4 outlines the international legal standards prohibiting arbitrary detention, including those contained in the European Convention on Human Rights (ECHR), and sets out UNHCR's position on the detention of stateless persons.

2. General observations about statelessness

2.1. Definitions and causes of statelessness

2.1.1. In international law, a stateless person is defined as a person who is "not considered as a national by any State under the operation of its law,"[3] and is thus someone without *any* nationality or citizenship.[4]

2.1.2. Statelessness occurs for a variety of reasons, including discrimination on the basis of race, ethnicity or gender in nationality legislation, failure to include all habitual residents in the body of citizens in cases of state succession and conflicts of laws between states. Statelessness results in widespread denial of human rights. Statelessness occurs because of failures in the observance of the human right to a nationality and often limits access to birth registration, identity documentation, education, health care, legal employment, property ownership, political participation and freedom of movement, as well as other rights.

2.2. The international legal framework relating to statelessness

2.2.1. Article 15 of the Universal Declaration of Human Rights (UDHR) provides that "[e]veryone has the right to a nationality"[5]. This right, albeit with varying formulations, is included in a number of legal instruments, such as the International Covenant on Civil and Political Rights[6], the International Convention on the Elimination of All Forms of Racial Discrimination[7], the Convention on the Elimination of All Forms of Discrimination against Women[8], the Convention on the Rights of the Child[9], the International Convention on the Protection of the Rights of All Migrant Workers and Their Families[10] and the Convention on the Rights of Persons with Disabilities[11].

2.2.2. The two global treaties which specifically address the issue of statelessness are the 1954 Convention relating to the Status of Stateless Persons (1954 Convention)[12] and the 1961

[3] As defined in article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, a definition considered by the International Law Commission to form part of customary international law (International Law Commission, Draft Articles on Diplomatic Protection with Commentaries, 2006, p. 49).
[4] In this submission, the terms nationality and citizenship are used interchangeably to describe the legal bond between an individual (the national or citizen) and a State. While these terms are often used interchangeably in international public law, on the national level, they are often given distinct meanings.
[5] Article 15(1).
[6] Article 24.
[7] Article 5.
[8] Article 9.
[9] Articles 7 and 8.
[10] Article 29.
[11] Article 18.
[12] UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, at: http://www.unhcr.org/refworld/docid/3ae6b3840.html.

Convention on the Reduction of Statelessness (1961 Convention)[13]. The 1954 Convention sets out the international legal definition of a stateless person and regulates the status and treatment of such persons. It is based on a core principle: a stateless person shall receive, at a minimum, no lower standards of treatment than any foreigner who possesses a nationality.[14] The 1954 Convention also acknowledges that stateless persons are more vulnerable than other foreigners. It therefore contains provisions which, *inter alia,* oblige states parties to extend administrative assistance to stateless persons and to issue them with identity papers (regardless of legal status)[15] and travel documents[16], as well as to facilitate their naturalisation.[17]

2.2.3. The 1961 Convention requires States Parties to establish safeguards in domestic legislation to address statelessness occurring at birth or later in life. There are four main areas in which the 1961 Convention provides measures to prevent and reduce statelessness: measures to avoid statelessness among children[18]; measures to avoid statelessness due to loss or renunciation of nationality[19]; measures to reduce statelessness due to deprivation of nationality[20]; and measures to avoid statelessness in the context of state succession.[21]

2.2.4. The 1954 and 1961 Statelessness Conventions are complemented by standards contained in regional treaties. In Europe, the 1997 European Convention on Nationality[22], the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession[23] and the 1996 European Social Charter (Revised) [24] directly address issues of nationality and statelessness.

2.3. Global statelessness statistics

The most reliable country-level data made available to UNHCR indicate that there were 6.6 million stateless persons worldwide at the end of 2009. However, because statelessness is a phenomenon which often goes unrecorded, UNHCR considers that there may actually be many more stateless

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As of 01 January 2011, sixty-five States are party to the 1954 Convention. The Russian Federation is not party to this convention.

[13] UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, at: http://www.unhcr.org/refworld/docid/3ae6b39620.html. As of 01 January 2011, thirty seven States are party to the 1961 Convention. The Russian Federation is not party to this convention.

[14] 1954 Convention, Article 7.

[15] 1954 Convention, Articles 25 and 27.

[16] 1954 Convention, Article 28.

[17] Some of these guarantees apply to all stateless persons whereas others are reserved to stateless persons 'lawfully present' or 'lawfully staying' in the territory.

[18] 1961 Convention, Articles 1 – 4.

[19] 1961 Convention, Articles 5 – 7.

[20] 1961 Convention, Articles 8 and 9.

[21] 1961 Convention, Article 10.

[22] Council of Europe, *European Convention on Nationality*, CETS No.: 166, 06 November 1997, at: http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm. Article 4 provides that everyone has the right to a nationality, statelessness shall be avoided, no one shall be deprived of his or her nationality and neither marriage nor dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other.

[23] Council of Europe, *Council of Europe Convention on the avoidance of statelessness in relation to State succession*, CETS No. 200, 19 May 2006, at: http://conventions.coe.int/Treaty/EN/Treaties/Html/200.htm.

[24] Council of Europe, *Appendix to the European Social Charter (revised),* CETS No.: 163, 03 May 1996, at: http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm. Para. 3: "Each Party will grant to stateless persons as defined in the Convention on the Status of Stateless Persons done in New York on 28 September 1954 and lawfully staying in its territory, treatment as favourable as possible and in any case not less favourable as possible and in any case not less favourable than under the said instrument and under any other existing international instruments applicable to those stateless persons."

persons worldwide. UNHCR estimates that there were around 640,000 stateless persons in Europe at the end of 2009.[25]

3. Statelessness in the Russian Federation and Ukraine

3.1. Causes of statelessness

The following are known to have caused statelessness in the Russian Federation and Ukraine:

- **State succession and conflict of nationality laws**: After the disintegration of the former USSR, persons generally obtained the citizenship of a successor state depending on where they held residence registration as of the date the successor state adopted its citizenship law. Persons could find themselves stateless in a variety of scenarios, in particular when they did not hold residence registration in any of the newly independent states on the dates required under the respective nationality laws.

- **Lack of birth registration:** Persons who lack birth registration may have difficulty proving their ties to the state, since birth registration provides evidence both of parentage (a child becomes a Ukrainian/Russian citizen if one parent is a citizen) and location of birth (subject to some conditions, persons born in Ukraine/the Russian Federation acquire Ukrainian/Russian citizenship if no other citizenship is conferred). Access to birth registration is generally available in both countries; however, obstacles may arise in cases where the parents lack identity documents.

- **Lack of residence registration**: Persons who have lacked residence registration for a prolonged period may have difficulty proving their ties to the state.

- **Discrimination against minorities**: Direct and indirect discrimination against certain ethnic minority groups, including Roma, has been historically entrenched in the Russian Federation and other former Soviet Republics. Roma often do not have personal documents and are thus unable to legalise their personal or residential status, perpetuating statelessness.[26]

3.2. Statelessness statistics in the Russian Federation and Ukraine

Statelessness in the Russian Federation is of serious concern. In the Russian Federation, the Federal Migration Service ("FMS") is the competent authority for migration and citizenship applications and related procedures. It only keeps a record of those stateless persons whose presence on the territory of the Russian Federation is registered with the territorial subdivision of the federal executive power body and/or documented through an official residence permit or permit for temporary residence.[27] In the absence of an official Government estimate and pending the results of the 2010 population census in the Russian Federation, which is expected to indicate the total

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[25] Stateless population statistics from UNHCR, *2009 Global Trends, Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, 15 June 2010, p. 24 – 30, at http://www.unhcr.org/4c11f0be9.html.

[26] For example, in the Ukraine, the Ministry of Interior's internal statistics from 2006 reveal that 838 Roma were lacking residence registration, while 630 Roma adults and 339 children had no documents at all (including passports). These persons may be stateless, if they are unable to prove their ties of parentage, birthplace and/or residence in Ukraine or any other country with which they have a connection.

[27] Articles 20 and 21 of the Federal Law (No. 115 – FZ of 25 July 2002) on the Legal Position of Foreign Citizens in the Russian Federation.

number of persons identifying themselves as stateless in the Russian Federation[28], UNHCR estimates that there are 50,000 stateless persons currently in the country.[29]

3.3. The legislative framework regulating the status and residence of stateless persons in the Russian Federation

3.3.1. Article 62.3 of the Russian Federation's Constitution establishes that the rights and obligations of foreign citizens and stateless persons on the territory of the Russian Federation are equal to those of the citizens of the Russian Federation, unless otherwise stipulated by federal legislation or international treaties binding the Russian Federation. This provision is mirrored[30] in the 2002 Federal Law on the Legal Position of Foreign Citizens in the Russian Federation (No. 115 – FZ of 25 July 2002) ("Federal Law"). In practice, only stateless persons holding a permit for temporary residence ("PTR") or a permit for permanent residence ("PPR") are given equal rights to those of the citizens of the Russian Federation. Stateless persons must also be in possession of a valid PTR or PPR to be considered "lawfully residing" in the country.[31]

3.3.2. The Federal Law recognises a stateless person as "a natural person, who is not a citizen of the Russian Federation and who has no proof of his possession of the citizenship (of his being a subject) of a foreign State".[32] Stateless persons may apply for and be issued with a PTR pursuant to Article 6 of the Federal Law (the procedure is described below). According to the Federal Law, a PTR confirms the right of a stateless person to reside in the Russian Federation until he or she receives a PPR. The Federal Law also stipulates that the PTR acts as an identity document for stateless persons without identity documents.[33] Aside from these legal provisions, there are no effective mechanisms established by the authorities, such as legal advice, to assist such persons to apply for a PTR or to obtain required documentation.

3.3.3. The PTR is formalised either as a stamp in the stateless person's identity document, or, if no such document is available, as a certificate issued by the Russian Federation permitting temporary residence.[34]

3.3.4. A quota for the issuance of PTRs to foreign citizens and stateless persons is approved annually by the Government of the Russian Federation.[35] The quota varies from year to year and depends on the migration policy in the Russian Federation. In 2010, the annual quota for the issuance of PTRs was 159,515 and in 2009 it was 200,245.[36] Only in certain limited circumstances, involving a prescribed nexus between the applicant and the Russian Federation, may a PTR be issued to a stateless person without reference to the annual quota. These limited circumstances include applicants who were born on the territory of the Russian Federation and who were citizens of the former USSR as well as persons who are married to or who have parents who are citizens of the Russian Federation.[37]

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[28] The results of the Russian Federation population census are expected to be published by mid-2012.
[29] UNHCR, *2009 Global Trends, Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, 15 June 2010, p. 25, at: http://www.unhcr.org/4c11f0be9.html.
[30] Article 4 of the Federal Law.
[31] Article 18.8 of the Administrative Offences Code of the Russian Federation.
[32] Article 2(1) of the Federal Law.
[33] Article 2(1) of the Federal Law.
[34] Article 2(1) of the Federal Law.
[35] Article 6(2) of the Federal Law.
[36] The Russian authorities provided these data and reported in the media that, in general, the trend has been for the PTR quota to decline over time.
[37] Article 6(3) of the Federal Law.

3.3.5. The procedure for the issuance of a PTR involves submitting an application to the Visa and Registration Department in the applicant's proposed place of residence within the Russian Federation. Extensive documentation is required to support a PTR application, and may vary depending on whether the person is making an application within or outside the quota.[38] For those who arrive with a visa, the requirements include: documents proving identity and nationality; documents to prove that the applicant has not been convicted of a crime in the permanent place of residence, documents to prove that the applicant is able to financially support him or herself and for children under the age of eighteen, a birth certificate or a child's passport. In addition to this, persons who apply within the quota must prove that they have somewhere to reside in the place of proposed residence. A person who arrives without a visa is required to submit a migration card with a stamp from the Border Guard Service of the Russian Federation. A migration card can only be obtained upon arrival at the border on the submission of a travel document or valid ID. However, for people without documents proving identity and nationality and/or without evidence of registration at a particular address, it is almost impossible to fulfil these requirements. Article 7 of the Federal Law sets out a number of grounds upon which a PTR may be refused.[39] A decision on the issuance of a PTR must be made within 6 months of an application being made.[40] Once issued, a PTR is valid for a period of three years.[41]

3.3.6. Once a stateless person has lived in the Russian Federation for one year on a PTR[42], he or she may apply for a PPR.[43] According to the Federal Law, a PPR confirms the right of a stateless person to permanent residence in the Russian Federation, as well as the right to enter and exit the Russian Federation. Federal Law also stipulates that the PPR acts as an identity document for stateless persons.[44] The procedure for the issuance of a PPR involves submitting an application to the Visa and Registration Department at the place of residence within the Russian Federation. The applicant must also submit the same documents as those required for a PTR, including a document to prove the person has somewhere to reside in the proposed place of residence in the Russian Federation.[45] The grounds upon which the issuance of a PPR may be refused are the same as those set out for a PTR.[46] Once issued, a PPR is valid for a 5 year renewable term. A decision on the issuance of a PPR must be made within 6 months of an application being made. Importantly, the initial issuance of a PTR followed by 5-year residence on the basis of a PPR are prerequisites for an application for citizenship of the Russian Federation.[47] Prior to the introduction of the Federal Law in 2002, residence registration requirements applicable to stateless persons, legalizing their residence in the Russian Federation, included holding a valid identity document, owning some form of accommodation and having his or her registration claim supported by a Russian citizen.

[38] Decree of the Federal Migration Service No. 40 dated 29 February 2008 "On Approval of the Administrative Regulation on providing state service by the FMS on the issue of temporary residence permits to foreign citizens and stateless persons in the Russian Federation".
[39] The grounds include: submitting forged or counterfeit documents; repeatedly (2 or more times) being found responsible for violating legislation relating to the residence of foreign citizens in the Russian Federation; is out of the boundaries of the Russian Federation for more than six months.
[40] Article 6(4) of the Federal Law.
[41] Article 6(1) of the Federal Law.
[42] But no later than 6 months before the expiry of the term of his or her PTR: Article 8 (1) of the Federal Law.
[43] Article 8(2) of the Federal Law.
[44] Article 2(1) of the Federal Law.
[45] Article 8(5) of the Federal Law.
[46] Article 9 of the Federal Law.
[47] Article 10 of the Federal Law on the Citizenship of the Russian Federation, 01 July 2002.

3.4. The limited prospects for stateless persons to obtain a PTR or PPR

3.4.1. In practice, the prospects for undocumented stateless persons in the Russian Federation being able to legalise their presence on the territory are extremely limited. First, there is no systematic or clear dissemination by the Russian Federation authorities of information about the necessity to apply for and obtain a PTR or a PPR nor about the procedures on how to do so. Second, documentation requirements still apply to stateless persons even though they may not be able to supply any. Third, foreign citizens also take up most of the PTRs on offer because they generally are more readily able to supply the documentation required in support of a PTR application.

3.4.2. Despite the explicit acknowledgement in the Federal Law that a stateless person is someone who "has no proof of the citizenship (of his being a subject) of a foreign state", and that a PTR or a PPR is also meant to act as a form of identity document for stateless persons, those who do not possess or are unable to obtain any form of personal identity document (including a migration card), are unable to meet the documentation requirements at the application stage.[48] They are therefore effectively barred from being able to obtain a PTR or PPR and cannot thereby legalise their stay in the Russian Federation. Under the law applicable to stateless persons prior to 2002, the residency registration requirements [also] included holding valid identity document, making it impossible for stateless persons without the requisite documents to legalise their residence.

3.5. The penalisation of stateless persons illegally residing in the Russian Federation

3.5.1. Article 18.8 of the Administrative Offences Code ("Code") of the Russian Federation provides that a foreign national who infringes the residence regulations of the Russian Federation, including by living on the territory without a valid residence permit or by non-compliance with the established procedure for residence registration, is liable to punishment by an administrative fine ranging from 2000 to 5000 Rubles and possible administrative removal from the Russian Federation.

3.5.2. The experience of UNHCR legal aid partners in the Russian Federation is that in most of the cases pertaining to the unlawful presence of stateless persons in the Russian Federation, the authorities impose a fine[49] for a breach of Article 18.8 of the Code. The law provides for administrative expulsion as an additional sanction, with the likelihood of detention following the order. However, the decision on whether or not to resort to expulsion is left to the discretion of the district departments of the Ministry of Interior or to the courts of first instance, and thus for stateless persons who have not been able to regularise their stay, there is an ever-present threat of being subjected to detention and expulsion.

3.5.3. The Supreme and Constitutional Courts of the Russian Federation have both subjected the legislative provisions on administrative expulsion in the Code to a number of limits. For example, the Constitutional Court held that article 18.8 of the Code stipulates a fine as the main sanction for unlawful presence in the Russian Federation, and that administrative expulsion should not be applied in addition to this main sanction.[50] The Constitutional Court also pointed out that "when

[48] European Roma Rights Centre, *In Search of Happy Gypsies: Persecution of Pariah Minorities in Russia*, May 2005. See in particular sections 8.1 and 8.2. The European Roma Rights Centre describes the difficulties that undocumented Roma people have in legalizing their residence in the Russian Federation. Where such people are stateless, difficulties in securing documentation may expose them in particular to violations of their rights.

[49] The fine can be from 2,000 to 5,000 Rubles (approximately 70 - 150 USD) depending on whether the person concerned has already been sanctioned on ground of irregular residence.

[50] Ruling of the Constitutional Court of the Russian Federation on the appeal of Todua Kahabera, Case No. 55-O, 02 March 2006.

assessing the level of violation of the residence rules as an administrative offence, which requires application of penal measures, including administrative expulsion from the Russian Federation, the competent authorities are to observe the constitutional requirements of justice and adequacy, which imply differentiation of public responsibility depending on the gravity of the misdemeanour, volume and nature of the damage caused, level of guilt of the perpetrator and other significant circumstances determining individualization when inflicting a penalty."[51] The Supreme Court of the Russian Federation has also held that the judge shall demonstrate the necessity of the administrative expulsion[52] and has, on this basis, quashed several decisions[53] of lower courts on administrative expulsion.

3.5.4. In practice, however, the limits on administrative expulsion set out by the Supreme and Constitutional Courts tend to be disregarded by the competent authorities. Although the Code stipulates administrative expulsion as a possible penalty, the Decree of the Ministry of Interior dated 12 October 2009 No. 758/240 "On the organization of activities of the Ministry of the Interior, FMS and their territorial branches on administrative expulsion and deportation" obliges territorial branches to take measures to identify a country of destination of the stateless person pending expulsion, if there is no information available on the country of habitual residence. In practice, authorities generally decide to deport the person to the country from which he or she arrived.

3.5.5. Where a person has violated residence regulations in the Russian Federation, and administrative expulsion has been ordered, the person is kept in administrative detention pending removal.[54] However, Russian law does not expressly provide for any limitation on the duration of that detention,[55] nor for periodic judicial review of the term or conditions of such administrative detention.[56] Nor do the rules make provision for what is to be done in the event that administrative removal is or has become impossible. This is pertinent in the case of stateless persons facing administrative removal as it is possible that no State will recognize them as habitual residents and be willing to admit them. Individuals whose (re)admission is refused on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as

[51] *Ibid.*

[52] Ruling of the Supreme Court of the Russian Federation, Case No. 18-ад05-13, 24 January 2006: "Administrative expulsion is stipulated by the article 18.8 of the Administrative Code as an additional penalty, therefore the necessity of its inclusion is to be motivated by the judge" (informal translation by UNHCR). The Supreme Court notes further that "the conclusion of the judge on including the administrative expulsion into the decision is to be based on the materials of the case proving the necessity of applying the additional penalty as the only way to reach a just balance between public and private interests in the framework of administrative justice" (informal translation by UNHCR) *Ibid.*

[53] Ruling of the Leninsky district court of Novorossiysk city, 12 April 2005, and Ruling of the Krasnodar regional court, 21 April 2005.

[54] Article 32.10(5) of the Administrative Offences Code.

[55] In practice, as a result of Article 31.9 of the Administrative Offences Code, which provides that if an order is not executed within 12 months it may not be enforced, administrative detention pending expulsion may last for up to 12 months.

[56] By contrast, criminal procedure law in the Russian Federation regulates more clearly and restrictively the duration of detention for persons suspected or accused of committing crimes. In criminal cases, the Criminal Procedure Code of the Russian Federation permits extension of the detention term only if there is a necessity to conduct additional investigation measures. In particular, Articles 108 and 109 of the Criminal Procedure Code permit detention for no more than two months with regard to a person being suspected or accused of committing a crime, the sanction for which is imprisonment of more than two years, unless a more lenient punishment can be applied. Article 109 of the Criminal Procedure Code provides that detention cannot last for more than two months, with a possible extension of up to six months, in exceptional cases of particular complexity for people accused of grave and particularly grave crimes.

nationals without proof of nationality, may be remain in prolonged or indefinite detention in the Russian Federation simply because the question of where to send them remains unresolved.[57] Even if the person is released, he or she may be detained again if found once more to be in violation of the residence regulations. The likelihood of undocumented stateless persons being subjected to prolonged, indefinite or cyclical detention following issuance of an expulsion order is high, because of the particular impediments they face in legalising their residency status as outlined in section 3.4 above, and because of the difficulties to implement their expulsion in a reasonable time, due to their statelessness.

4. Arbitrary detention of stateless persons

4.1. Well-established international human rights norms apply to detention generally, and have specific relevance to stateless persons. Article 9 of the Universal Declaration of Human Rights establishes that "No one shall be subjected to arbitrary arrest, detention or exile". This principle has been repeated and developed in international and regional human rights law. According to Article 9 (1) of the International Covenant on Civil and Political Rights "Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention." Interpreting this provision, the United Nations Human Rights Committee held that "the notion of arbitrariness must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context."[58] In particular, the Committee observed that:

> every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.[59]

[57] UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, February 1999, at: http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf, para. 6.
[58] *A. v. Australia,* HRC, Communication No. 560/1993, 30 April 1997, para. 9.2.
[59] *Ibid.*, para. 9.4.

4.2. In this and a number of other communications, the Committee has indicated that indefinite detention is unlawful under international law per se.[60] The detention of stateless persons who cannot prove their identity and whose expulsion cannot be carried out, may take on an arbitrary character. As highlighted in UNHCR's *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* ("Guidelines"):

> Stateless persons are entitled to benefit from the same standards of treatment as those in detention generally. Being stateless and therefore not having a country to which automatic claim might be made for the issue of an identity and/or travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through 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.[61]

4.3. The Guidelines also provide that for administrative detention not to be arbitrary:

> [I]t must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for continuation exist.[62]

4.4. In a recent report, the UN Working Group on Arbitrary Detention stated that "Strict legal limitations [on detention] must be observed and judicial safeguards provided for. The reasons put forward by States to justify detention, such as (…) facilitating the expulsion of an irregular migrant who has been served with removal order, must be clearly defined and exhaustively enumerated in legislation."[63] The Working Group has voiced serious concern over situations where there is no maximum length of detention established by law, which leads to prolonged or, in the worst case, potentially indefinite detention in cases, for example, where the expulsion of a migrant cannot be carried out for legal or practical reasons.[64] In referring explicitly to the jurisprudence of the Human Rights Committee, the Working Group concluded that the principle of proportionality requires that detention always have a legitimate aim, which would not exist if there were no longer real and

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[60] See also: *C v. Australia*, HRC Communication No. 900/00, 13 November 2002; and *R v. Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 WLR 704, in which it was held that foreign nationals who are deportable owing to being not conducive to the public good can only be detained for a reasonable time, not indefinitely. See also, *Hooman Hassani and Hootan Hassani* (10/01187) [2010] SGHC (5 February 2010) (South Gauteng High Court (Johannesburg), in which it was held that permitting continuous extensions of detention by immigration officials would amount to an unreasonable interpretation of the statutory provision in question, which set an initial 30 day limit which may be extended "for an adequate period not exceeding 90 calendar days", as it could lead to indeterminate detention and thus make it impossible for the courts to protect detainees by way of review. The limit intended was 120 days. See, further, WGAD, Mission to Angola, A/HRC/7/4/Add.4, 29 February 2008, para. 97: "It has to be recalled that detention of illegal immigrants must be the exception, not the rule, and indefinite detention is clearly in violation of applicable international human rights instruments governing deprivation of liberty."

[61] See note 57, Guideline 9.

[62] See note 57, Guideline 1.

[63] UN-WGAD, 13th Session of the UN Human Rights Council, UN Doc. A/HRC/13/30, 15 January 2010, para. 59.

[64] Ibid., paras. 62 and 63.

tangible prospect of removal.[65] The inability to return an individual may be for any reason, such as statelessness, or because the individual or country of origin refuses to cooperate in the return.[66] It would also, therefore, be disproportionate to continue to detain someone where there was no safe route home or because he or she lacked the necessary documentation.[67]

4.5. In the European context, Article 5 of the European Convention on Human Rights protects the "right to liberty and security of person". It applies to everyone irrespective of their nationality or immigration status, including to stateless persons who are within the territory of a state party. The notion of liberty includes the physical liberty of the person, which the Court has viewed, alongside Articles 2, 3 and 4 of the ECHR as "in the first rank of fundamental rights that protect the physical security of an individual".[68] The Court has affirmed the critical importance of the right to liberty in a democratic society[69], its relationship with the principle of legal certainty and the rule of law, and the overall purpose of Article 5 to ensure that no one should be dispossessed of his or her liberty in an "arbitrary fashion".[70] In keeping with those principles, any loss of liberty requires a legal basis in accordance with the grounds exhaustively set out in paragraphs (a) to (f) of Article 5(1), and which have been interpreted in a restrictive way by the Court. The Court repeatedly emphasizes the procedural and substantive lawfulness of detention.

4.6. Of relevance in the present case is Article 5(1)(f) which permits "the lawful arrest or detention … of a person against whom action is being taken with a view to deportation or extradition". For the detention to be lawful it must be prescribed by a precise, foreseeable and accessible law[71] and the individual must be protected from arbitrariness.[72] To avoid arbitrariness, detention must be carried out in good faith, it must be closely connected to the reason for detention relied on by the Government, the place and conditions of detention should be appropriate and the length of the detention should not exceed that reasonably required for the purpose pursued.[73] If proceedings for deportation are not prosecuted with "due diligence", the detention will cease to be permissible under Article 5(1)(f).[74]

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[65] Ibid., para. 64.
[66] See, e.g., ECtHR, *Mikolenko v. Estonia*, Appl. No. 10664/05, judgment of 08 October 2010. See, also, UN-WGAD, *Mr. Mustafa Abdi v. United Kingdom of Great Britain and Northern Ireland*, *Opinion 45/2006*, UN Doc. A/HRC/7/4/Add.1, para. 10.
[67] See, e.g., United Kingdom cases: *The Queen on the Application of Abdi Ahmed Abdillahi v. The Secretary of State for the Home Department* [2010] EWHC 808; *R. (Khadir) v. Secretary of State for the Home Department* [2005] UKHL 39; *Mohamad Aziz Ibrahim and Aran Omer v. Secretary of State for the Home Department* [2010] EWHC 746.
[68] ECtHR, *McKay v. the United Kingdom*, Appl. No. 543/03, Grand Chamber judgment of 03 October 2006, para. 30.
[69] ECtHR, *Winterwerp v. the Netherlands*, Appl. No. 6301/73, judgment of 24 October 1979, para. 37; ECtHR, *Storck v. Germany*, Appl. No. 61603/00, judgment of 16 June 2005, para. 102.
[70] ECtHR, *Engel and Others v. the Netherlands*, Appl. No. 5100/71 *et seq*., judgment of 08 June 1976, para. 58; ECtHR, *Bozano v. France*, Appl. No. 9990/82, judgment of 18 December 1986, para. 54; ECtHR, *Assanidze v. Georgia*, Appl. No. 71503/01, Grand Chamber judgment of 08 April 2004, para. 175.
[71] ECtHR, *Dougoz v. Greece*, Appl. No. 40907/98, judgment of 6 March 2001, paras. 55-57.
[72] ECtHR, *Amuur v. France*, Appl. No. 19776/92, judgment of 25 June 1996, para. 50.
[73] ECtHR, *Mikolenko v. Estonia*, Appl. No. 10664/05, judgment of 8 October 2009, para. 60.
[74] See, ECtHR, *Chahal v. the United Kingdom*, Appl. No. 22414/93, Grand Chamber judgment of 15 November 1996, para. 113; referring further to ECtHR, *Quinn v. France,* Appl. No. 18580/91, judgment of 22 March 1995, para. 48; and also ECtHR, *Kolompar v. Belgium,* Appl. No. 11613/85, judgment of 24 September 1992, para. 36. See, also, ECtHR, *Mikolenko v. Estonia*, Appl. No. 10664/05, judgment of 8 October 2009, paras. 59, 63 and 65.

4.7. As such, when contacting foreign authorities, States should set time-limits for a response, so that detention pending removal does not become prolonged or indefinite and thus arbitrary. This requirement is a necessary consequence of the proportionality principle. In UNHCR's view, a lack of response from a foreign authority after a prescribed reasonable period of time may be evidence, although not conclusive, that an individual is not considered a national of that country.

4.8. Moreover, where there are other non-custodial means of achieving the objective, these must be pursued. The Human Rights Committee has held that in order for detention not to be arbitrary a government must demonstrate that

> in light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions …[75]

4.9. The Court shares the view with other jurisdictions in indicating that non-custodial alternatives are relevant to the question of arbitrariness of detention, including in the context of removal.[76]

4.10. Although the Court has not yet examined the issue of the lawfulness of pre-removal detention of stateless persons, the Russian Constitutional Court has done so. In 1998, the Russian Constitutional Court adopted Ruling no. 6-P in which it held:

> "[D]etention for an indefinite period cannot be regarded as a permissible limitation on the right to liberty and personal security, and is in fact a violation of that right. Therefore the provisions… concerning detention pending expulsion should not serve as a basis for detention for an indefinite period even when the expulsion of a stateless person is delayed because no State is ready to accept that person… Otherwise detention would turn from a measure to ensure the execution of an expulsion order into a… punishment which is not provided under the Russian law…"[77]

5. Conclusion

5.1. Stateless persons in the Russian Federation are vulnerable to arbitrary arrest and subsequent detention pursuant to an expulsion order, owing to the restrictive legislative provisions and applicable documentation requirements which make it particularly difficult for them to legalise their stay. Because stateless people are not recognised as nationals and may not have lawful residence in any State, their removal from the Russian Federation may be impossible. In the absence of legislative or administrative time limits and other safeguards on their detention, stateless people who cannot be removed from the Russian Federation are vulnerable to prolonged, indefinite or cyclical detention, in violation of international law.

5.2. In UNHCR's view, once a person is recognised as stateless, he or she should be accorded a legal status to avoid a cycle of detention and re-detention. Appropriate procedures to determine the status of stateless persons should be put in place.

UNHCR, March 2011

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[75] *C v. Australia*, HRC Communication No. 900/00, 13 November 2002, para. 8.2.
[76] ECtHR, *Massoud v. Malta*, Appl. No. 24340/08, judgment of 27 July 2010, para. 68.
[77] Ruling of the Constitutional Court of the Russian Federation in connection with the appeal of Yahya Dashti Gafur, No. 6-П, 17 February 1998.