



# The Equal Rights Review

*Promoting equality as a fundamental human right  
and a basic principle of social justice*

- In this issue:
- Special: Detention and discrimination
  - Gender identity jurisprudence in Europe
  - The work of the South African Equality Courts
  - Homophobic discourses in Serbia
  - Testimony from Malaysian *mak nyahs*





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# Detained But Equal

Human rights are universal, but human rights violations are not. Some people are at higher risk of having their rights violated. When the higher risk is associated with more or less stable personal characteristics such as race, sex, religion, disability, sexual orientation, etc., and materialises in a less favourable treatment or a particular disadvantage, the result may amount to discrimination: a violation of the fundamental right to equality.

Most situations and settings in a person's life can be the context in which discrimination occurs. However, discrimination in some contexts may be more damaging than in other. When we are sitting peacefully among our loved ones at the dinner table at home, we feel safe, and less exposed to discrimination. But when we have been detained and are sitting in an unfamiliar cell in some detention centre, we may feel that our life as we know it has ended. Indeed, anyone who has spent time in detention would agree that few life experiences make us more vulnerable.

Now, if we combine the higher risk of being a victim of discrimination due to possessing a certain personal characteristic with the higher risk arising from being in detention, the result is a risk on a different scale, and in any case much greater than its two components. For example, the *mak nyahs* in Malaysia – the transgender persons who frequently find themselves in detention – have

suffered degrading abuse while in custody. In this issue, the Testimony section reveals disgraceful conduct of law enforcement officers, such as making the *mak nyahs* remove their clothes, sexual assault, humiliating ridicule, and beatings. The *mak nyahs* in detention are more vulnerable and have a stronger protection need than other Malaysians in detention, as well as compared to trans persons outside detention.

Furthermore, there is one important sense in which, if one is discriminated against in the context of detention, one can experience more damage and despair than if they are discriminated against in other very dangerous contexts, such as being a victim of a hate crime at the hands of some vigilante group, or being a member of a disadvantaged group during armed conflict. In these latter situations, one can at least hope that the state – the duty bearer against whom we claim our rights – might step in to protect us, or deliver justice and provide remedy to us at some future point. In principle, the state is on our side. But the discrimination that occurs in the context of detention is an act done by the very agency that should be our rights protector. While there are a number of other contexts in which the state is the discriminator, e.g. in public sector workplaces, detention is a case in which the state has more control over more aspects of a person's life. Hence, the protection needs of members of disadvantaged groups in detention should be a very high priority in both

domestic judicial and international scrutiny over the enjoyment of human rights, as well as, of course, a constant preoccupation of civil society watchdogs. The interview with Mads Andenas and Wilder Tayler in this issue provides an expert stocktaking on the issue of discriminatory detention in international human rights.

Of all categories of persons who are at higher risk of discrimination in the context of detention, non-citizens should be further singled out: compared to nationals, they face additional problems arising from being an alien – poorer or non-existent support networks, language problems, xenophobia, etc. There are different types of detention – criminal, immigration, or security; however, aliens are at higher risk of discrimination in all detention settings.

Does it get any worse than that? Or rather, are all aliens equally at risk of discrimination in the context of detention? While it is difficult to make general assertions as to which countries' nationals fare worst at the hands of which other countries' detaining authorities, it is clear that there is one category of persons on behalf of whom no state would step in as a rights guarantor: the stateless. Being stateless while in detention may be the bottom of a vortex of rights denial.

At this point, some readers will object this line of thought: there is no hierarchy of human rights, there is no hierarchy of victims of human rights abuses! Really? How do we then reconcile the holistic doctrine of “no hierarchy” with the need to be pragmatic and make strategic choices? And is it even correct to interpret the universality, indivisibility and inter-connectedness of human rights as a lack of hierarchy, be that a hierarchy of rights or of rights violations? This is

in my view a somewhat academic question on which there may be legitimate differences of opinion among human rights theorists.

Nonetheless, prioritising human rights work is an inescapable task in view of the limited capabilities of the human rights movement compared with the enormity of human rights violations around the world. And in prioritising work from the point of view of the equality of rights, ERT followed a certain logical path – sketched above – in arriving at the conclusion that the detention of stateless persons should be an issue central to its thematic choices.

Here is the important question: Why is it then that after decades of functioning of an international system of human rights protection, this issue had received so little attention that when ERT published, in July 2010, its report *Unravelling Anomaly: Detention, Discrimination, and the Protection Needs of Stateless Persons*, it was greeted as the first comprehensive report on the issue? The report itself posed and answered this question: the answer was the very history of constructing the anomaly of “statelessness”, taken together with states' propensity to keep undesirable immigrants out of their borders, whereby detention has increasingly become a tool of migration management. The report confirmed – through the evidence it relied on and exposed – that the potential for discrimination which I deduced above from the basic axioms of human rights had materialised in a massive tragedy of broken lives, scattered throughout the world.

In the Special section, in a crisp and clear background article Stefanie Grant frames the more general issue of discriminatory detention in the context of international human rights law. She looks at discrimina-

tion in respect to the decision to detain, and then to discrimination in respect to a number of conditions of detention. Following this, ERT makes one more step in the search for solutions to the problems discussed in *Unravelling Anomaly*. Absent states' championship on the issue of protecting stateless persons from discrimination in the context of detention, and in view of the low awareness on this issue, ERT decided to switch to a DIY mode, and act on one of its own recommendations: undertake the drafting of guidelines on the detention of stateless persons. The purpose of the guidelines is to minimise the risk of discrimination and other human rights abuses of stateless persons in detention. As Amal de Chickera explains in his introductory comments, the guidelines mainly reflect established principles of international human rights law, while a few reflect international good practice. The guidelines are necessary as immigration regimes are getting stricter, immigration detention is becoming more common and stateless persons are disproportionately affected by arbitrary and unlawful detention.

This standard-setting exercise was not performed in isolation from critical players: on the contrary, ERT consulted UNHCR, as well as detention and statelessness (including refugee) experts and advocates from a number of organisations. To ensure that it has been exposed to as much constructive

critique as possible, ERT is intent on reaching out to a broader circle of interested persons, and publication of the draft guidelines in this issue is one way of doing so.

The messages are simple: there should be a presumption against detention of stateless persons; detention should be non-discriminatory in every respect; there should be a time limit regarding its length; alternatives to detention exist and should be applied. In her article on alternatives to detention, Alice Edwards compares several models of alternatives and shows their "workability", even if the criteria for that are not primarily concerned with human rights but with implementing governmental migration policies.

The broader theme, however, is the relationship between the right to equality and detention. The principles on equality should apply in detention settings as they do in all other areas of life regulated by law. To date, detailed equality legislation and policies have been better in addressing discrimination in other contexts: employment, provision of goods and services, education, etc. But detention has been frequently the realm of exemptions, in law or in practice, and governed by other principles, such as fighting crime, ensuring public safety and national security, or migration management. The need now is for stakeholders to take a fresh look at detention from a unified human rights framework on equality.

Dimitrina Petrova



# ARTICLES

*"Positive obligations of states to protect and fulfil human rights may necessitate reasonable accommodation to enable individuals to live in dignity and enjoy human rights on an equal basis with others. In such situations, identical treatment for everybody would result in the blindness of formal equality to recognise people's actual diversity. Here the unity of human rights and equality approaches is evident, highlighting the pertinence of the notion of transformative equality..."*

*Lauri Sivonen*



# Gender Identity Discrimination in European Judicial Discourse

Lauri Sivonen<sup>1</sup>

## Introduction: Gender Identity

Gender identity is receiving increasing recognition as a prohibited ground of discrimination at international and national levels. The UN system and the Council of Europe have highlighted its pertinence in the implementation of international and European human rights standards.<sup>2</sup> Explicit references to gender identity can also be found in recent national equal treatment legislation in a growing number of countries.<sup>3</sup>

One focal point for these developments was the publication, by a group of international human rights experts in 2007, of *Principles on the application of international human rights law in relation to sexual orientation and gender identity*, usually referred to as the Yogyakarta Principles. The definitions of sexual orientation and gender identity given in the Yogyakarta Principles have acquired a considerable degree of authority although they have also received critical attention.<sup>4</sup> The principles define gender identity in a broad manner, also incorporating elements of the notion of “gender expression”:

“Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”<sup>5</sup>

Critics of the concept, drawing on queer theory, have pointed out that such a definition privileges essentialist identity above gender blurring while acknowledging that trans activists did agree to the definition as a strategic choice.<sup>6</sup>

This broad definition of gender identity is applicable to practically everyone. However, the group of people usually identified as facing discrimination on grounds of gender identity are trans persons. This heterogeneous group of people encompasses persons who have a gender identity which is different from the sex assigned to them at birth and people who wish to portray their gender identity in a different way to the sex assigned at birth. It includes people who feel they have to, prefer to, or choose to, for example by clothing, accessories, mannerisms, speech patterns, cosmetics or body modification, present themselves differently from the expectations of the gender role associated with the sex assigned to them at birth. Among trans people, transsexuals in particular may wish to undergo hormonal and surgical gender reassignment or affirming treatment to permanently modify their bodily appearance and function. Other trans persons may choose different means to express their gender identity.<sup>7</sup>

Recent European studies have demonstrated that trans persons experience discrimination in many areas of life including employment, healthcare and education.<sup>8</sup> A particular chal-

lenge for transsexuals is the legal recognition of preferred gender, which may involve complicated administrative and medical procedures. The frequent requirement of infertility, i.e. sterilisation, is a case in point. The fact that trans persons are often subjected to medical diagnoses, and need trans-specific healthcare highlights healthcare as the context of potential discrimination.

This article will discuss the ways European jurisprudence has viewed and ruled on gender identity discrimination. In this context, European judicial discourse is understood to encompass the supranational judgments and decisions taken by the European Court of Human Rights (the ECtHR), the former European Commission of Human Rights (the Commission) which functioned as the ECtHR's ante-chamber until the late 1990s, and the Court of Justice of the European Union (previously known as the European Court of Justice). This view from above is naturally limited in many respects and covers only partially the wide range of discrimination encountered by trans persons on grounds of their gender identity. Yet it can offer valuable insights into the treatment of trans people in society as the cases discussed pose fundamental questions about the nature of obstacles trans persons experience to the full and effective enjoyment of human rights.

In fact, "gender identity" as such is only rarely mentioned in European jurisprudence. The currently more ambiguous term "sexual identity" has been, since the 1970s, the preferred term used in European jurisprudence, to cover some of the ground coming under today's notion of gender identity.<sup>9</sup> Owing to the closed lists of prohibited grounds under EU law, the Court of Justice of the European Union in Luxembourg (the Court of Justice) has approached gender identity discrimination through the "sex" ground.<sup>10</sup> The ECtHR and the Commission in Strasbourg have had no such imperative need to identify gender identity discrimination with the sex ground since the European Convention on Human

Rights (the ECHR) operates on an open-ended list of discrimination grounds. European jurisprudence on the subject has, nevertheless, been relatively clear in distinguishing gender identity and sexual identity from sexual orientation in this context.

In reality, the ECtHR has hardly ever ruled explicitly under Article 14 (Prohibition of Discrimination) of the ECHR in cases related to trans persons.<sup>11</sup> Both the ECtHR and the Commission have usually preferred to decide such cases with reference to the substantial Articles (e.g. 3 (Prohibition of Torture), 6 (Right to a Fair Trial), 8 (Right to Respect for Private and Family Life) and 12 (Right to Marry)) alone, following by now somewhat dated judicial practice. However, this has been followed by the occasional acknowledgement that the discrimination alleged by the applicant under Article 14 had been at the heart of the complaints related to the substantial articles as well.<sup>12</sup> Still, in these cases, the ECtHR and the Commission have not applied a discourse which fully elaborates the non-discrimination angle. The ECtHR's doctrine on differential treatment is rarely referred to explicitly. This is in contrast with the Court of Justice where the non-discrimination approach is explicit, as the EU equal treatment directives provide the basis for the rulings.

Naturally, the approach taken by the ECtHR and the Commission could be primarily described as human rights-based. The difference between a rights-based and an equal treatment approach is, however, somewhat academic. Both approaches can be ultimately grounded on the fundamental principles enunciated in the Universal Declaration of Human Rights which, at the outset (Article 1), highlights equality in dignity and rights. Non-discrimination and equality are transversal principles underpinning human rights. The insight of the ECtHR and, even more so, of the Commission, that the individual's right to self-determination of gender identity – with reference to Article 8 of the

ECHR – is the fundamental aspect of the complaints brought forward by trans persons under the ECHR, is perfectly relevant to both approaches.<sup>13</sup>

European jurisprudence on gender identity discrimination is also intimately connected with the development of the doctrine of states' positive duties under the ECHR and the necessity to provide differential treatment to trans persons when the treatment afforded to the majority would be clearly discriminatory in their case. The need to build on the concept of reasonable accommodation in this context is evident. This demonstrates the evolution from formal equality towards substantive and transformative equality as the doctrine underpinning equal treatment legislation.<sup>14</sup>

This article will focus on three specific elements of European judicial discourse on gender identity. It will first discuss the scope given to the ground of gender identity in the jurisprudence, with reference to the notion of sexual identity and the prevailing medical classifications which frame the discourse. The article will then turn to the development of the doctrine on positive duties and the pertinence of reasonable accommodation to the subject. An analysis of the limits and lacunae of the protection afforded which follows highlights certain troubling images conveyed by the discourse. The conclusion will build on the general observations outlined in the introduction.

## 1. Sexual Identity and Medical Discourse

In European judicial discourse, gender identity is most often referred to as sexual identity, even though gender identity has also been specifically mentioned in more recent jurisprudence. As early as the 1970s, the Commission referred to sexual identity as an essential element of personality, which in the case of a "post-operative" transsexual resulted "from his changed physical form, his psychical make-up and his social role".<sup>15</sup>

Transformation from one sexual identity to another characterised the use of the concept in the judicial discourse often referred to as "new sexual identity" in the context of "the legal recognition of the change in the applicant's sexual identity".<sup>16</sup> In this manner, sexual identity was clearly differentiated from the notion of sexual orientation<sup>17</sup> and was applied in ways coming relatively close to the current concept of gender identity.

Gender identity, in its rare appearances in the jurisprudence, is applied in an analogous fashion. In 2002-2003, the ECtHR stressed that "gender identity is one of the most intimate areas of a person's private life" and discussed the significance of the chromosomal element of sex for "the purposes of legal attribution of gender identity for transsexuals".<sup>18</sup> Gender identity is also referred to in the context of medical classifications due to the existence of "gender identity disorder" in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (DSM-IV) and the WHO International Classification of Diseases (ICD-10).<sup>19</sup>

The jurisprudence is in fact heavily penetrated by medical discourse. As the case law is almost exclusively related to transsexuals, "transsexualism", a medical diagnosis which preceded that of gender identity disorder in the DSM, is often the subject of deliberations. In 1979, the Commission defined transsexualism as:

"[A]n illness characterised by dual personality – one physical and the other mental. The patient is deeply convinced of belonging to the other sex resulting in the demand that one's body is rectified accordingly."<sup>20</sup>

In 1986, the ECtHR noted that transsexualism was not a new condition and stated that the:

"[T]erm 'transsexual' is usually applied to those who, whilst belonging physi-

cally to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature". It also underlined that "post-operative" transsexuals formed a fairly well-defined and identifiable group.<sup>21</sup>

Later on, the condition of "gender dysphoria" became associated with transsexualism in the case law.<sup>22</sup> In fact, the ECtHR has explicitly confirmed that "transsexuality", with reference to gender dysphoria, is a protected ground of discrimination under Article 14 of the ECHR, which includes an open-ended list of prohibited grounds of discrimination.<sup>23</sup> This underscores the close interplay of the medical and legal discourses in delimiting the scope of gender identity as a discrimination ground in European jurisprudence. For the ECtHR, this discrimination ground would principally apply in cases of unequal treatment experienced by transsexual persons who have undergone gender reassignment treatment.

Accordingly, medical discourse has played an important part in affording rights protection to transsexuals in the first place. Instead of using gender identity as a broader discrimination ground, transsexualism, defined as a medical condition, has been applied in European jurisprudence. Medical and scientific developments related to transsexualism and to its possible etiology were often discussed in the rulings of the ECtHR.<sup>24</sup> This was partly due to the fact that national jurisprudence had occasionally arrived at the conclusion that transsexualism had been willingly caused by the applicants themselves and that they thereby did not merit specific legal protection or recognition.<sup>25</sup> The legal definition of sex, from an overwhelmingly biological point of view, laid down in the English case of *Corbett v Corbett* [1971] P83 played an important part in early jurisprudence as well.<sup>26</sup> Only as late as in 2002, the ECtHR brushed

aside the pertinence of arguments regarding medical etiology as well as the predominance of a biological definition of sex and recognised that medical science did not provide any determining argument as regards the legal recognition of transsexuals.<sup>27</sup> The Commission had arrived at a similar position in 1979.<sup>28</sup> However, this did not change the underlying assumption that transsexuality or gender dysphoria as a medical condition was the applicable discrimination ground as such.

It is also significant to note that the ECtHR has made an attempt to differentiate between the applicable medical and legal discourses. In two judgments from 2003 and 2009, the ECtHR castigated the judicial authorities in Germany and Switzerland for substituting themselves for medical experts by stressing that determining the medical necessity of gender reassignment measures was not a matter of legal definition.<sup>29</sup> By doing so, the ECtHR not only highlighted the autonomy of medical expertise over legal discourse but also the right to self-determination by transsexuals who were no longer expected to prove the medical necessity of gender reassignment treatment. In the *Christine Goodwin v The United Kingdom* judgment of 2002, the ECtHR had already stated that it was illogical for a State not to afford full legal recognition for the transsexual's preferred gender if gender reassignment treatment had already been authorised and financed by the state on the basis of a medical diagnosis and treatment operated by a national health service.<sup>30</sup>

The jurisprudence of the Court of Justice related to trans persons is also framed by medical discourse. Definitions of transsexuality or transsexualism, as well as the legality of gender reassignment treatment, play an important part in the deliberations. The medical conditions of gender dysphoria and gender identity disorder are also specifically mentioned.<sup>31</sup> Yet there is a more conscious emphasis on discrimination than in the rulings

of the ECtHR. In fact, in these cases the Court of Justice has applied the ground of sex in its judgments with reference to the principle of equality as laid out in EU directives on the equal treatment for men and women.<sup>32</sup> The Court of Justice has affirmed that discrimination arising from gender reassignment, i.e. the intention of a person to undergo or having undergone gender reassignment, is covered by the principle of equality between men and women.<sup>33</sup> In addition, the jurisprudence has made it clear that discrimination based on gender reassignment should not be confused with discrimination related to sexual orientation.<sup>34</sup>

Since the equal treatment directives of the European Union operate with closed lists of discrimination grounds, the sex ground was simply the only applicable ground in this instance in the absence of a specific ground of transsexuality or gender identity in EU law. The Advocate General has also pointed out that transsexuals do not constitute a third sex and do therefore fall under the scope of equal treatment directives.<sup>35</sup> In a case concerning a dismissal from a job, the Court of Justice applied as a comparator persons of the sex to which the applicant had been deemed to belong before undergoing gender reassignment.<sup>36</sup>

In conclusion, it should be stressed that the ground of gender identity in European jurisprudence is clearly related to medical classifications and the medical condition of gender dysphoria or gender identity disorder. In fact, the origins of the notion of gender identity itself can also be found in medical and psychological discourse.<sup>37</sup> It should be highlighted that European jurisprudence has rather exclusively concerned transsexuals. Transsexuality and gender reassignment, the latter with reference to the ground of sex, rather than gender identity in a broader sense, are the prohibited discrimination grounds applied by the ECtHR and the Court of Justice. This naturally has implications in terms of the scope of protection afforded and it is

unclear whether other trans persons than transsexuals would be able to profit from the European non-discrimination guarantees to a similar extent as transsexuals.

## 2. Positive Obligations and Reasonable Accommodation

European jurisprudence on gender identity discrimination coincided with the development of the doctrine of positive obligations by the ECtHR and the Commission. Positive obligations, in turn, are intricately related to the notion of substantive equality when applied in the field of non-discrimination.<sup>38</sup> This is particularly significant to trans persons whose full enjoyment of human rights often requires differential treatment or reasonable accommodation in a more contemporary sense.

The development of positive obligations by the European Court of Human Rights is usually traced to the judgment *Marckx v Belgium* of 13 June 1979 dealing with the difference of treatment made between “illegitimate” and legitimate children under Belgian law with reference to Articles 8 and 14 of the ECHR. In this case, the ECtHR noted that “there may be positive obligations inherent in an effective ‘respect’ for family life” and that states had an obligation to ensure the coherence of their national law by making necessary reforms following rulings by the ECtHR.<sup>39</sup> In the judgment *Airey v Ireland* of 9 October 1979, concerning an effective right of access to the courts and the availability of legal aid with reference to Articles 6-1 and 8 of the ECHR, the ECtHR already stated clearly that the “fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive”.<sup>40</sup> The doctrine of positive obligations is built upon the realisation that the state should not only abstain from interfering with the rights of individuals (a “negative obligation”) but also take positive measures, when necessary, to protect and fulfil such

rights. This is in line with the Court's often repeated dictum that "[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".<sup>41</sup>

In the first Opinion of the Commission on a case related to gender identity – *D. van Oostervijck v Belgium* of 1 March 1979 – predating the ECtHR's *Marckx* judgment, the Commission still stated that Article 8 of the ECHR predominantly implied only negative obligations on the part of the State. In reality, however, the Commission's finding of a violation of Article 8 in this case implied a positive obligation even if this was not spelled out in an explicit manner. With reference to the failure of the applicant to obtain recognition of his preferred gender, the Commission stated:

"In the Commission's opinion, the failure of Belgium to contemplate measures which would make it possible to take account in the applicant's civil status of the changes which have lawfully occurred, amounts not to an interference in the applicant's exercise of his right to respect for private life, but a veritable failure to recognise the respect due to his private life within the meaning of paragraph 1 of Article 8 of the Convention."<sup>42</sup>

Such a "veritable failure" to "contemplate measures" which would result in due respect being given to the private life of the applicant does in practice amount to a failure to observe positive obligations inherent in a proactive reading of Article 8 of the ECHR. It is therefore not surprising that in a separate opinion appended to the report, one member of the Commission concluded that the ECHR indeed imposed positive obligations on states under Article 8.<sup>43</sup> In fact, this statement was made with reference to the Commission's earlier Opinion in the case of *Marckx*, in which the Commission had already argued that the right to respect for family life under Article 8 implied the right to the legal recognition by the state of the parental affiliation between the mother and an

"illegitimate" child.<sup>44</sup> Subsequently, the extent of the state's positive obligations under Article 8 as to the right to respect for private life of transsexuals in terms of the state's recognition of their preferred gender became a major point of contention, for two decades, between the ECtHR and the Commission.<sup>45</sup>

With the exception of the case of *C. against United Kingdom*,<sup>46</sup> the Commission always upheld its initial position that states violated the positive obligations inherent in Article 8 of the ECHR when they did not grant official recognition to transsexuals' preferred gender. Its Opinion in the case of *Mark Rees against United Kingdom* from 1984 referred directly to the positive obligations of states<sup>47</sup> and couched its arguments in terms which come close to acknowledging the right of transsexuals to self-determination:

"The Commission accepts the applicant's view that sex is one of the essential elements of human personality. If modern medical research into specific problems of transsexualism and surgery as effected in the present case has made possible a change of sex as far as the normal appearance of a person is concerned Art 8 must be understood as protecting such an individual against the non-recognition of his/her changed sex as part of his/her personality. This does not mean that the legal recognition of a change of sex must be extended to the period prior to the specific moment of change. However, it must be possible for the individual after the change has been effected, to confirm his/her normal appearance by the necessary documents."<sup>48</sup>

Furthermore, the Commission pointed out that gender reassignment treatment had assisted the applicant in realising his identity and "[i]n refusing to consider an entry in the birth register reflecting the applicant's change of sex the respondent Government treats the applicant as an ambiguous being".<sup>49</sup> It also noted that several member states of the Council of Europe, including Sweden, Germany, Italy, Switzerland and Norway, had

already adopted procedures to recognise transsexuals' preferred gender.

The ECtHR, on the other hand, held a different position until its ruling in the case of *Christine Goodwin v The United Kingdom* of 2002,<sup>50</sup> with the exception of the case of *B. v France* in 1992<sup>51</sup> in relation to which both the ECtHR and the Commission were in rare agreement. In the case of *Rees v The United Kingdom* from 1986, the ECtHR acknowledged the positive obligations inherent in an effective respect for private life but stressed that they were subject to the state's margin of appreciation. It also pointed out that the notion of "respect" was not clear-cut in terms of positive obligations: the diversity of national practices and situations had to be taken into account when considering the issue. Furthermore, in determining the existence of a positive obligation, a fair balance had to be struck between the general interest of the community and the interests of the individual.<sup>52</sup>

In the *Rees* case, the ECtHR departed from the opinion of the Commission and ruled that the respondent state had acted within its margin of appreciation. It stated that:

"While the requirement of striking a fair balance (...) may possibly, in the interests of persons in the applicant's situation, call for incidental adjustments to the existing system, it cannot give rise to any direct obligation on the United Kingdom to alter the very basis thereof."<sup>53</sup>

Accordingly, the Court deemed that the positive obligations inherent in Article 8 of the ECHR did not extend as far as to require the United Kingdom to change its birth registration system to recognise transsexuals' preferred gender. The ECtHR did acknowledge, nevertheless, that transsexuals encountered serious problems and highlighted the need for appropriate legal measures to be kept under review with reference to scientific and societal developments.<sup>54</sup>

Until 2002, the ECtHR maintained that scientific and societal developments had not tipped the balance of the state's margin of appreciation to oblige the United Kingdom to change its birth registration system in this respect. This remained so even when an overwhelming majority of member states had already adopted measures to grant full legal recognition to gender reassignment. In 1998, the ECtHR still pointed out that there was not "yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law".<sup>55</sup> This position, which was clearly refuted by the *Christine Goodwin* judgment of 2002, is quite contradictory since the ECtHR has usually highlighted the margin of appreciation of states to choose the exact measures aimed at fulfilling their positive obligations.<sup>56</sup> The existence of any "common approach" in a detailed sense would appear unrealistic from this perspective.

However, in the case of *B. v France* from 1992, the ECtHR did find a violation of Article 8 owing to the failure of the French civil register system to recognise the gender reassignment of the applicant. The ECtHR argued that the situation in France was different from that prevailing in the United Kingdom and found that the applicant's daily situation, taken as a whole, was not compatible with the respect due to her private life. It deemed that the French civil register system was adaptable to meet the needs of transsexuals and that the discrimination experienced by them in France had reached a sufficient level of seriousness to be taken into account for the purposes of Article 8. The ECtHR also considered more generally that attitudes had changed, science progressed and the importance attached to the "problem of transsexualism" increased. It nevertheless stated that a sufficiently broad consensus had not yet been reached between member states regarding the etiology of transsexualism and the related legal situations and their consequences so as to change the Court's general

appraisal of the situation in Europe from that of its earlier judgments.<sup>57</sup>

The simultaneous ECtHR Grand Chamber judgments in *Christine Goodwin v The United Kingdom* and *I. v The United Kingdom*<sup>58</sup> from 2002 constituted a watershed in European jurisprudence on gender identity.<sup>59</sup> There is irony in the fact that when the newly reorganised ECtHR issued these rulings, which finally vindicated the position adopted by the Commission in 1979, the Commission itself had ceased to exist as a consequence of the ECtHR's reform. The extent of the positive obligations of states to respect the private life of transsexuals through the legal recognition of their gender reassignment was made manifestly clear through these rulings which took a further step towards recognising the transsexuals' right to self-determination:

“[T]he very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (...) In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.”<sup>60</sup>

The ECtHR was fully aware of the significant changes the respondent state had to carry out in order to fulfil its positive obligations in the fields of birth registration, access to records, family law, affiliation, inheritance, criminal justice, employment, social security

and insurance. Nevertheless, the ECtHR declared that:

“No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”<sup>61</sup>

The ECtHR concluded “that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant” and found a violation of Article 8.<sup>62</sup>

It should be noted that the Court of Justice has also considered its cases related to gender identity with reference to human dignity and substantial equality. The Advocate General has clearly stated that the principle of non-discrimination on grounds of sex, which was applied in these cases, is aimed at attaining substantive and actual equality between persons.<sup>63</sup> The dignity and freedom to which transsexuals are entitled have been highlighted in terms of human dignity and the fundamental right to free personal development as also elaborated by the German Constitutional Court.<sup>64</sup>

The rulings of the ECtHR from 2002 open the way for considering the importance of the notion of reasonable accommodation for trans persons. As the ECtHR has demonstrated, the effective enjoyment of human rights by transsexuals requires clearly differential treatment as that afforded to the majority.<sup>65</sup> Important changes to procedures and practices in many fields of societal activity were foreseen by the ECtHR in order to accommodate the specific needs of transsexuals. Differential treatment is necessary to ensure the equality of outcomes. While the original birth registration system in the United

Kingdom did not pose a problem to the overwhelming majority of the population, it was clearly not adapted to gender reassignment and constituted an obstacle against the effective enjoyment of human rights by transsexuals. Here the parallels with many people with disabilities are striking and it is not surprising that the concept of reasonable accommodation has been developed, in the first place although not exclusively, in the context of the rights of persons with disabilities.<sup>66</sup>

The UN Convention on the Rights of Persons with Disabilities defines the notion of reasonable accommodation in its Article 2:

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

Reasonable accommodation does not constitute a temporary special measure or exception to the rule of equal treatment but is part of the general obligation of non-discrimination as is the related notion of accessibility.<sup>67</sup>

For trans persons, reasonable accommodation could include, for example, differential procedures for civil registration, special facilities for changing name and sex in identity documents and educational diplomas, and adaptations to the working environment in terms of unisex toilets and the availability of time for treatment related to gender reassignment. It could also encompass the possibility to continue an existing marriage after gender reassignment when it is not normally authorised for same-sex couples. There is a need for further research and practice in order to explore the possibilities for implementing reasonable accommodation with reference to gender identity and other prohibited grounds of discrimination in addition to disability.

### 3. Disturbing Images

While the role of European jurisprudence in protecting the human rights of trans persons has been considerable, it also contains disturbing features which pose fundamental questions as to the limits of the afforded protection. In fact, the image of the trans person shaped by the medico-legal discourse of the jurisprudence is quite extraordinary and one-sided. We appear to envision only transsexuals who have almost always undergone hormonal and surgical gender reassignment treatment – “post-operative transsexual” is one of the omnipresent markers. Medical diagnoses of gender dysphoria, gender identity disorder and transsexualism accompany the applicants who are portrayed, almost heroically, as exercising their right to self-determination by choosing to undergo dangerous medical treatment to ensure the “stability” of their gender identity.

It is this image of suffering individuals, who through their extraordinary efforts become “deserving” of legal and societal recognition, which is embedded in the European jurisprudence of all the judicial instances covered in this article. In its judgment in *van Kück v Germany*, the ECtHR pointed out that:

“[G]iven the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment”.<sup>68</sup>

In the case of *K. B. v The National Health Service Pensions Agency and the Secretary of State for Health*, the Advocate General of the Court of Justice of the European Union made a similar statement:

“Transsexuals suffer the anguish of being convinced that they are victims of an

error on the part of nature. Many have chosen suicide. At the end of a long and painful process, in which hormone treatment is followed by delicate surgery, medical science can offer them partial relief by making their external physical features correspond as far as possible to those of the sex to which they feel they belong. To my mind it is wrong that the law should take refuge in purely technical expedients in order to deny full recognition of an assimilation which has been so painfully won.”<sup>69</sup>

The portrayal takes place against a background of daily discrimination experienced by transgender persons that is amply illustrated in the rulings.<sup>70</sup> The treatment of transsexuals as “ambiguous beings” by the state through its previous non-recognition of gender reassignment plays an important role and it should be noted that several applicants have also claimed, albeit unsuccessfully so far, violations of Article 3 on the prohibition of torture of the ECHR as well.<sup>71</sup> In the rulings, the judicial bodies offer their sympathy for the persons concerned even when they are unable to uphold the applicants’ human rights claims.<sup>72</sup> Even those judges who clearly state their scepticism towards the full recognition of the human rights of trans persons in opinions appended to the judgments do not fail to express concern over the human suffering involved.<sup>73</sup>

However, there is an open space which remains unexplored by the European jurisprudence. While the judicial discourse demonstrates a desire for stability in terms of gender identity and stress that transsexuals do not represent a third sex,<sup>74</sup> it is exactly this space between two binaries that the rulings fail to shed light into. Not that it is totally absent either. Transsexuals’ personal histories of transition are usually recited at the beginning of the judgments among “the facts”. What is especially striking in these miniature CVs is that they repeatedly demonstrate the long period of time – several years if not decades – which it has taken for the applicants

to “transition” to their “true gender identity”.<sup>75</sup> Indeed, the jurisprudence and some appended opinions suggest that the official recognition of gender reassignment constitutes an integral part of a long process, perhaps providing the ultimate closure to the “transition”.<sup>76</sup> Yet, while we must highlight the fact that not all trans persons actually intend to undergo gender reassignment at all, even among transsexuals who wish to do so, the continuity or coherence of any binary gender identity may not be as evident as we may think initially, simply because of the temporal dimension involved.

This raises two inter-related issues. One is the availability of protection against discrimination for those trans persons who do not intend to undergo gender reassignment and those transsexuals who are in the process of undergoing gender reassignment treatment – not simply “intending or having undergone” it. Another is the conditions required for the legal recognition of the preferred gender of trans persons. Although both of these issues may still fall into the cracks of the doctrines of subsidiarity and the states’ margin of appreciation, they are worth exploring for a moment.

The fact that the European judicial instances have almost exclusively dealt with claims originating from “post-operative” transsexuals among trans people demonstrates a tendency that irreversible gender reassignment treatment is viewed as a necessary condition for acquiring legal recognition for a trans person’s preferred gender. While such a requirement is not universal among European countries, it does exist in a great number of them.<sup>77</sup> Yet sterilisation as a condition for the legal recognition of a person’s gender identity, even with reference to a medical condition, appears strange from a human rights perspective. Principle 3 of the Yogyakarta Principles advocates an end to such requirements. The Commissioner for Human Rights of the Council of Europe has made a similar recommendation.<sup>78</sup> The Eu-

European Court of Human Rights has not yet ruled directly on this issue.

There is, however, jurisprudence on another usual condition for the recognition of gender reassignment, i.e. the requirement of being unmarried. On this issue, the ECtHR has decided that a divorce requirement can fall within the margin of appreciation of member states. The ECtHR did so with the full knowledge of the consequences of the requirement on the family life of the applicants:

“The legislation clearly puts the applicants in a quandary – the first applicant must, invidiously, sacrifice her gender or their marriage. In those terms, there is a direct and invasive effect on the applicants’ enjoyment of their right to respect for their private and family life.”<sup>79</sup>

The specificity of Article 12 of the ECHR, on the right to marry, which in the main defers to national legislation on marriage, was referred to by the ECtHR as a reason for finding the application manifestly ill-founded. It is of interest to note that in some member states, the highest courts have ruled that a divorce requirement would not be proportionate for recognising gender reassignment.<sup>80</sup> The proportionality test may ultimately depend on the specific conditions related to divorce and partnership legislation in each member state.

If we take the view that compulsory sterilisation or divorce requirements are too high a price to pay for maintaining heteronormative gender binaries, we may then pose the question as to the alternatives for recognising gender variance and protecting trans persons more broadly against discrimination to ensure their substantive equality. Perhaps surprisingly, earlier European jurisprudence on gender identity discrimination may shed some alternative light for viewing the question. In the 1970s, the Belgian government argued in the case of *D. van Oosterwijck* before the Commission that the state only rare-

ly had to differentiate between women and men. For example, the Belgian identity cards and passports at the time did not indicate the sex of the person concerned.<sup>81</sup> The French government developed this line of argument vigorously in the case of *B. v France* and stressed that there usually was no need to make the sex of a person explicit when carrying out public or private business.<sup>82</sup> This would demonstrate that the authorities of member states have been able to imagine a society where explicit distinctions based on gender are only made when considered necessary following a proportionality test.

Such imaginative capacity can also be found at the national level currently as regards conditions for recognising gender reassignment. As already noted, the divorce requirement is by no means universal. Such a requirement does not make sense either in those countries where there is access to marriage by same-sex couples more broadly.<sup>83</sup> The sterilisation requirement is not universal either and there is recent jurisprudence from the German and Austrian constitutional courts declaring it contrary to fundamental rights guarantees.<sup>84</sup> Current gender recognition legislation in the United Kingdom, Spain and Portugal does not require sterilisation.<sup>85</sup>

When such practices are followed by more member states we may ultimately witness more affirmative European jurisprudence regarding the issue. This would open up the possibility for European jurisprudence on gender identity discrimination which would not simply protect “post-operative” transsexuals but trans persons in a wider sense. Jurisprudence of this kind could also recognise the existence of gender variance which cannot simply be confined into binary categorisations but may indeed occupy “ambivalent” or “intermediate zone” positions previously eschewed by the ECtHR.<sup>86</sup> The observance of proportionality in determining the necessity of making explicit distinctions as to the sex or gender of a person as well as the implementation of reasonable accommodation for

gender variance could then be applied as operative principles for ensuring that all trans persons can effectively enjoy their universal human rights.

## Conclusion

European judicial discourse on gender identity clearly demonstrates the fact that differential treatment can be essential for achieving substantive equality for certain minorities in particular. Positive obligations of states to protect and fulfil human rights may necessitate reasonable accommodation to enable individuals to live in dignity and enjoy human rights on an equal basis with others. In such situations, identical treatment for everybody would result in the blindness of formal equality to recognise people's actual diversity. Here the unity of human rights and equality approaches is evident, highlighting the pertinence of the notion of transformative equality,<sup>87</sup> which is underpinned by the need to take proactive measures, by a great variety of institutions, to ensure equality. The implementation of reasonable accommodation for other groups than people with disabilities will have to be developed further.

However, discourse on gender identity discrimination also provides pointers beyond minority concerns. The need to apply proportionality in the distinctions made in relation to sex or gender has a broader relevance. Gender variance is by no means

limited to trans persons alone: a wide range of differences in gendered roles and expressions can be found among the population at large. After all, the notion of gender identity as defined in the Yogyakarta Principles is applicable to practically everybody. A broad understanding of gender identity, which may also reach further than the definition given in the Yogyakarta Principles, should have the potential to question essentialist gender binaries and accommodate the full scope of existing gender diversity. This underscores the pertinence of gender identity to the ground of sex or gender as well as gender equality more generally. In the case of trans persons, the European jurisprudence already demonstrates that both grounds can be used to afford protection against discrimination.

It would be worthwhile to explore further the interconnections between these two grounds in an effort to grasp the broader relevance of the notion of gender identity that would also temper the inherent binary essentialism present in the sex ground. While both grounds can be viewed separately, the fruitfulness of their inter-relationship should not be underestimated. Although it may be necessary to highlight the usefulness of the ground of gender identity in ensuring specific and effective protection against the discrimination encountered by trans persons, the strategic use of both grounds and their cross-fertilisation hold even greater potential for implementing equality for the population at large.

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<sup>1</sup> Lauri Sivonen is adviser to the Commissioner for Human Rights of the Council of Europe. The views and opinions expressed in this article are those of the author.

<sup>2</sup> See, for example, UN Human Rights Council, *Resolution on Human Rights, Sexual Orientation and Gender Identity*, A/HRC/17/19, 17 June 2011; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para 2)*, UN Doc. E/C.12/GC/20, 2 July 2009, Para 32; and Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*, 31 March 2010. The non-discrimination provision (Article 4) of the new Council of Europe Convention on preventing and combating violence against women and domestic violence, (CM(2011)49 final), adopted by the Committee of Ministers on 7 April 2011, includes gender identity explicitly among the prohibited grounds of discrimination.

<sup>3</sup> In Europe, this is the case in Albania, Croatia, the Czech Republic, Germany, Hungary, Montenegro, Serbia, Sweden and the United Kingdom, although there is significant variation in the precise wording used. See also Commissioner for Human Rights of the Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe*, Council of Europe Publishing, 2011, pp. 41-42.

<sup>4</sup> Ettelbrick, P. L. and Zeràn, A. T., *The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007 – June 2010: Final Report*, 10 September 2010; Waites, M., "Critique of 'sexual orientation' and 'gender identity' in human rights discourse: global queer politics beyond the Yogyakarta Principles", *Contemporary Politics*, Vol. 15(1), 2009, pp. 137-156.

<sup>5</sup> See Footnote 2 to the Introduction to the Yogyakarta Principles.

<sup>6</sup> Waites, above note 4, pp. 147-148.

<sup>7</sup> In addition to transsexuals, trans persons can include, among others, transgender people, transvestites, cross-dressers, no gender, multigender, genderqueer people, intersex and other gender variant persons. The definitions used, which can overlap, are adapted from the descriptions given by TransgenderEurope. For more information, see the organisation's website, available at: [www.tgeu.org](http://www.tgeu.org). "Transgender persons" is also used by some people and organisations as an umbrella term to refer to all trans persons.

<sup>8</sup> Whittle, S., Turner, L., and Al-Alami, M., *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*, The Equalities Review, 2007; Motmans, J., *Being Transgender in Belgium: Mapping the Social and Legal Situation of Transgender People*, Institute for the Equality of Women and Men, 2009; Franzen, J. and Sauer, A., *Benachteiligung von Trans\*Personen, insbesondere im Arbeitsleben*, Antidiskriminierungsstelle des Bundes, 2010; see also Commissioner for Human Rights of the Council of Europe, above note 3.

<sup>9</sup> An interesting interpretation of the differences between the notions of sexual identity and gender identity can be found in Diamond, M., "Sex and Gender are Different: Sexual Identity and Gender Identity are Different", *Clinical Child Psychology and Psychiatry*, Vol. 9(3), July 2002, pp. 320-334.

<sup>10</sup> The EU equal treatment directives (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services) operate with reference to closed lists of discrimination grounds. However, the Charter of Fundamental Rights of the European Union, which entered into force in 2009, includes a non-exhaustive list of discrimination grounds in Article 21.

<sup>11</sup> The most notable exception is *P. V. v Spain*, Appl. no. 35159/09, ECHR, 30 November 2010.

<sup>12</sup> See, for example, *Christine Goodwin v The United Kingdom*, Appl. No. 28957/95, ECHR, 11 July 2002, Para 108.

<sup>13</sup> See also Reed, R., "Transsexuals and European Human Rights Law", *Journal of Homosexuality*, Vol. 48(3), 2005, pp. 64-65.

<sup>14</sup> On the evolution of equal treatment legislation see Hepple, B., "The New Single Equality Act in Britain", *The Equal Rights Review*, Vol. 5, 2010, pp. 11-23.

<sup>15</sup> *D. van Oosterwijck against Belgium*, Appl. No. 7654/76, Report of the European Commission on Human Rights, adopted on 1 March 1979, Para 52.

<sup>16</sup> *Mark Rees against The United Kingdom*, Appl. No. 9532/81, Report of the European Commission on Human Rights, adopted on 12 December 1984, Paras 31 and 48; *Sheffield and Horsham v The United Kingdom*, Appl. No. 31-32/1997/815-816/1018-1019, ECHR, 30 July 1998, Para 60; *P. v S. and Cornwall County Council*, Case C-13/94, Opinion of the Advocate General, 14 December 1995, Para 10.

<sup>17</sup> See above, note 11, Para 30.

<sup>18</sup> See above, note 12, Para 82; and *van Kück v Germany*, Appl. No. 35968/97, ECHR, 12 June 2003, Para 56.

<sup>19</sup> See above, note 12, Para 81.

<sup>20</sup> See above, note 15, Para 16.

<sup>21</sup> *Rees v The United Kingdom*, Appl. No. 9532/81, ECHR, 17 October 1986, Para 38; cf. *P. v S. and Cornwall County Council*, above note 16, Para 8.

<sup>22</sup> See above, note 12, Para 78.

<sup>23</sup> See above, note 11, Para 30.

<sup>24</sup> See, for example, *B. v France*, Appl. No. 13343/87, ECHR, 25 March 1992, Paras 46-48; and *Sheffield and Horsham v The United Kingdom*, above note 16, Para 56.

<sup>25</sup> *B. v France*, above note 24, Paras 14-15; *van Kück v Germany*, above note 18, Para 23; cf. the government's position in *D. van Oosterwijck against Belgium*, above note 15, Para 36.

<sup>26</sup> See *Mark Rees against United Kingdom*, above note 16, Para 21; *Rees v The United Kingdom*, above note 21, Paras 27 and 29; *Sheffield and Horsham v The United Kingdom*, above note 16, Para 27; and above note 13, pp. 57-58.

<sup>27</sup> See above, note 12, Paras 81-83.

<sup>28</sup> See above, note 15, Para 16.

<sup>29</sup> The ECtHR found a violation of Article 6(1) of the ECHR in both cases. (See above, *van Kück v Germany*, note 18, Paras 53-57 and 64-65; and *Schlumpf v Switzerland*, Appl. No. 29002/06, ECHR, 8 January 2009, Paras 51-58; cf. above, note 15, Para 16.)

<sup>30</sup> See above, note 12, Para 78.

<sup>31</sup> *P. v S. and Cornwall County Council*, above note 16, Paras 8-13 and 24; *ibid.*, Judgment, 30 April 1996, Para 16; *K. B. v The National Health Service Pensions Agency and the Secretary of State for Health*, Case C-117/01, Opinion of the Advocate General, 10 June 2003, Paras 25, 79 and footnote 15; *Sarah Margaret Richards v Secretary of State for Work and Pensions*, Case C-423/04, Opinion of the Advocate General, 15 December 2005, Para 1.

<sup>32</sup> The rulings refer to Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

<sup>33</sup> *P. v S. and Cornwall County Council*, above note 16, Judgment, Paras 20-21.

<sup>34</sup> *K. B. v The National Health Service Pensions Agency and the Secretary of State for Health*, above note 31, Paras 25 and 73.

<sup>35</sup> *P. v S. and Cornwall County Council*, above note 16, Para 22; see also above, note 10, on closed lists of discrimination grounds.

<sup>36</sup> *P. v S. and Cornwall County Council*, above note 16, Judgment, Para 21.

<sup>37</sup> See Franzen, J. and Sauer, A., above note 8, pp. 13-15.

<sup>38</sup> Goldschmidt, J. E., "Reasonable Accommodation in EU Equality Law in a Broader Perspective", *ERA Forum*, Vol. 8(1), 2007, pp. 39-48.

<sup>39</sup> *Marckx v Belgium*, Appl. No. 00006833/74, ECHR, 13 June 1979, Paras 31 and 42.

<sup>40</sup> *Airey v Ireland*, Appl. No. 6289/73, ECHR, 9 October 1979, Para 25.

<sup>41</sup> *Ibid.*, Para 24.

<sup>42</sup> See above, note 15, Para 52.

<sup>43</sup> *Ibid.*, Separate Opinion by Mr Sperduti, p. 24.

<sup>44</sup> *Paula and Alexandra Marckx v Belgium*, Appl. No. 6833/74, Report of the European Commission on Human Rights, adopted on 10 December 1977, Para 72.

<sup>45</sup> See also Helfer, R., "Consensus, Coherence and the European Convention on Human Rights", *Cornel International Law Journal*, Vol. 133, 1993, pp. 146-154.

<sup>46</sup> *C. against United Kingdom*, Appl. No. 10843/84, Report of the European Commission on Human Rights, adopted on 9 May 1989.

<sup>47</sup> See above, note 16, *Mark Rees against United Kingdom*, Para 40.

<sup>48</sup> *Ibid.*, Para 43.

<sup>49</sup> *Ibid.*, Para 48.

<sup>50</sup> See above, note 12.

<sup>51</sup> *B. v France*, above note 24.

<sup>52</sup> *Rees v The United Kingdom*, above note 21, Paras 35 and 37.

<sup>53</sup> *Ibid.*, Paras 42 and 44.

<sup>54</sup> *Ibid.*, Paras 42-44 and 47.

<sup>55</sup> See *Sheffield and Horsham v The United Kingdom*, above note 16, especially Paras 35, 57 and 61. Of 37 countries analysed by Liberty in their submission to the ECtHR, only four had not provided for procedures for the official

recognition of gender reassignment. (Cf. Joint Concurring Opinion of Judges de Meyer, Valticos and Morenilla appended to the judgment. This Opinion appears to suggest that for the judges concerned, scientific, legal or societal developments as well as the doctrine of margin of appreciation held little relevance in cases related to trans persons.)

<sup>56</sup> See, for example, above note 39, Paras 42 and 58; above note 40, Para 26; and *B. v France*, above note 24, Para 63; cf. above note 12, Para 85.

<sup>57</sup> *B. v France*, above note 24, Paras 51-63.

<sup>58</sup> *I. v The United Kingdom*, Appl. No. 25690/94, ECHR, 11 July 2002.

<sup>59</sup> Of course this watershed was already anticipated by several dissenting opinions appended to the earlier rulings of the Court. See, for example, *Cossey v The United Kingdom*, Appl. No. 10843/84, ECHR, 27 September 1990, Dissenting Opinion of Judge Martens; and *Sheffield and Horsham v The United Kingdom*, above note 16, Joint Partly Dissenting Opinion of Judges Bernhardt, Thor Vilhjalmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu, and Dissenting Opinion of Judge van Dijk.

<sup>60</sup> See above, note 12, Paras 71 and 90.

<sup>61</sup> *Ibid.*, Para 91.

<sup>62</sup> *Ibid.*, Para 93.

<sup>63</sup> *P. v S. and Cornwall County Council*, above note 16, Para 19.

<sup>64</sup> *P. v S. and Cornwall County Council*, above note 31, Judgment, Para 22; *K. B. v The National Health Service Pensions Agency and the Secretary of State for Health*, above note 31, Para 77. On the jurisprudence of the German Constitutional Court, see above, note 13, pp. 60-61.

<sup>65</sup> On the approach of the ECtHR regarding differential treatment in the prevention of discrimination, see *Thlimmenos v Greece*, Appl. No. 34369/97, ECHR, 6 April 2000, Paras 39-49.

<sup>66</sup> See above, note 38, pp. 44-48.

<sup>67</sup> *Ibid.*, pp. 45-46. The obligations related to the concept of accessibility are described in Article 9 of the UN Convention on the Rights of Persons with Disabilities, A/RES/61/106, 13 December 2006.

<sup>68</sup> *Van Kück v Germany*, above note 18, Paras 14 and 59; cf. above, note 15, Paras 14-15 and 52.

<sup>69</sup> *K. B. v The National Health Service Pensions Agency and the Secretary of State for Health*, above note 31, Para 79.

<sup>70</sup> For example, *B. v France*, above note 24, Paras 59-60 and 63; and above note 12, Paras 15-19, 60-62, and 92.

<sup>71</sup> For example, the cases of *van Oosterwijck v Belgium*, Appl. No. 7654/76, ECHR, 6 November 1980; *Mark Rees v United Kingdom*, Appl. No. 9532/81; *B. v France*, above note 24; and *L. v Lithuania*, Appl. No. 27527/03, ECHR, 11 September 2007.

<sup>72</sup> *Rees v The United Kingdom*, above note 21, Para 47.

<sup>73</sup> See, for example, *B. v France*, above note 24, Dissenting Opinion of Judge Valticos, joined by Judge Loizou.

<sup>74</sup> See above, note 12, Para 71; and *P. v S. and Cornwall County Council*, above note 16, Para 22.

<sup>75</sup> For example, see above, note 12, Para 13; cf. Rooke, A., "Telling Trans Stories: (Un)doing the Science of Sex", in Hines, S. and Sanger, T. (eds.), *Transgender Identities: Towards a Social Analysis of Gender Diversity*, New York, Routledge, 2010, pp. 64-83.

<sup>76</sup> *Mark Rees against United Kingdom*, above note 16, Para 43; above note 12, Para 78; *Cossey v The United Kingdom*, above note 59, Dissenting Opinion of Judge Martens.

<sup>77</sup> Commissioner for Human Rights of the Council of Europe, above note 3, pp. 86-87; see also European Union Agency for Fundamental Rights, *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis*, 2010, Table 1.

<sup>78</sup> Commissioner for Human Rights of the Council of Europe, above note 3, p. 13.

<sup>79</sup> *Parry v The United Kingdom*, Appl. No. 42971/05, ECHR, 28 November 2006, p. 10; cf. *R. and F. v The United Kingdom*, Appl. No. 35748/05, ECHR, 28 November 2006, p.12.

<sup>80</sup> Constitutional Court of Austria (V 4/06, 8 June 2006) and Federal Constitutional Court of Germany (1 BvL 10/05, 27 May 2008).

<sup>81</sup> See above, note 15, Paras 21-23.

<sup>82</sup> *B. v. France*, above note 24, Para 61.

<sup>83</sup> In Europe, access to marriage by same-sex couples is currently available in Belgium, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden. The divorce requirement for the recognition of gender reassignment, how-

ever, is still in the statute books in Sweden. (See Commissioner for Human Rights of the Council of Europe, above note 3, pp. 87-88 and 91.)

<sup>84</sup> *Ibid.*, pp. 86-87; see also Constitutional Court of Austria (V 4/06, 8 June 2006) and Federal Constitutional Court of Germany (1 BvR 3295/07, 11 January 2011).

<sup>85</sup> Commissioner for Human Rights of the Council of Europe, above note 3, pp. 86-87.

<sup>86</sup> Cf. Hines, S., "Recognising Diversity? – The Gender Recognition Act and Transgender Citizenship", in Hines, S. and Sanger, T. (eds.), *Transgender Identities: Towards a Social Analysis of Gender Diversity*, New York: Routledge, 2010, pp. 87-105.

<sup>87</sup> See above, note 14, pp. 11-24, in which the notion of transformative equality is developed.

# Small Steps to Equal Dignity: The Work of the South African Equality Courts

Rosaan Krüger<sup>1</sup>

## Introduction

“The South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution’s focus and organising principle.”<sup>2</sup>

Given the foundational role of equality in the South African constitutional framework, the drafters of the South African Constitution (the Constitution) directed the South African Parliament (Parliament) to enact legislation to “prevent or prohibit unfair discrimination” between individuals within three years of the enactment of the Constitution.<sup>3</sup> Under great pressure, Parliament finalised and passed the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act) within two days of the constitutional deadline.<sup>4</sup> The Equality Act, as the title indicates, addresses the promotion of equality on the one hand, and provides for reactive measures where the equality right is breached, on the other. The reactive provisions include the prohibition of unfair discrimination and related infringements of the equality right. The Equality Act expressly provides for the enforcement of its provisions in specifically created equality courts. The majority of the reactive provisions of the Equality Act have been operational since 16 June 2003. More

than a decade after the enactment of the legislation, the promotional aspects of the Equality Act are yet to come into operation.

This article focuses on the reactive provisions of the Equality Act by providing a snapshot of the work of selected South African equality courts for the period from June 2003 to December 2007 insofar as complaints of racism are concerned. In order to contextualise the application of the Equality Act, the article provides a brief overview of the reactive provisions of the Equality Act and the mechanisms for its enforcement.

## 1. The Reactive Provisions of the Equality Act

### 1.1 Prohibited Behaviour

In the few years of constitutional democracy preceding the enactment of the Equality Act, the equality jurisprudence of the Constitutional Court of South Africa (the Constitutional Court) firmly established human dignity as the interest protected by the equality right, and therefore as the interest at the core of the prohibition of unfair discrimination.<sup>5</sup> The Constitutional Court takes a substantive view of equality, focusing on the impact of the discrimination on the complainant.<sup>6</sup> Unfair discrimination, in the view of the Constitutional Court, is differential treatment of a person on the basis of his or her membership

of a group which impairs his or her fundamental human dignity.<sup>7</sup>

The Equality Act confirms the link between the dignity interest and the right to equality in its prohibition of unfair discrimination,<sup>8</sup> hate speech,<sup>9</sup> harassment<sup>10</sup> and “dissemination and publication of information that unfairly discriminates”.<sup>11</sup> Each of these is prohibited in relation to an extensive list of “prohibited grounds”, which include race, gender, sex, marital status, disability, ethnic and social origin and sexual orientation, as well as unlisted analogous grounds, the manipulation of which may lead to systemic disadvantage, impairment of dignity or the undermining of a person’s equal enjoyment of rights.<sup>12</sup> The provisions of the Equality Act bind the state and all persons,<sup>13</sup> but do not apply in the context of employment where the specific provisions of the Employment Equity Act regulate behaviour.<sup>14</sup>

The provisions of the Equality Act regarding the prohibition of unfair discrimination are elaborate. The Equality Act prohibits unfair discrimination on any of the “prohibited grounds” generally,<sup>15</sup> and then goes further to prohibit unfair discrimination on the basis of race,<sup>16</sup> gender<sup>17</sup> and disability<sup>18</sup> separately by providing examples of each of these which could give rise to a complaint under the Equality Act. The Equality Act further defines both “equality” and “discrimination”. The former is defined to include “the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes”.<sup>19</sup> “Discrimination” refers to any positive act or omission which imposes burdens, obligations or disadvantage on a person, or withholds benefits, opportunities or advantages from a person, whether directly or indirectly on the basis of one or more of the prohibited grounds.<sup>20</sup> In

line with the constitutional formulation, the Equality Act also prohibits “unfair” discrimination. In each instance, therefore, it has to be determined whether the imposition of burdens or withholding of benefits meets the “unfairness” threshold set by Section 14 (Determination of Fairness or Unfairness) of the Equality Act. This section stipulates that affirmative action programmes do not amount to unfair discrimination and continues in less clear terms,<sup>21</sup> to set out the factors to be used to determine fairness.<sup>22</sup> In the absence of an amendment to clarify the fairness test under the Equality Act, or a declaration of its invalidity, the test for unfairness as set out in the Equality Act must be applied. It is suggested that the determination of fairness should hinge on a consideration of the impact of the discrimination on the fundamental dignity of the complainant as set out in the jurisprudence of the Constitutional Court. Where that fundamental dignity of the complainant is impaired by the actions of the respondent, the discrimination is unfair.

The second violation of the equality right prohibited by the Equality Act is hate speech.<sup>23</sup> The Equality Act defines hate speech very broadly. Section 10 prohibits the publication, propagation, advocating or communication of words based on the prohibited grounds which “could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred”. *Bona fide* artistic creativity, academic enquiry and accurate reporting in the public interest do not amount to hate speech.<sup>24</sup> It is evident that mere offensive speech based on one of the prohibited grounds that hurts the feelings of a complainant may be held to constitute hate speech under this broad definition. This formulation of hate speech arguably limits the right to freedom of expression protected by Section 16 of the Constitution beyond that

which is constitutionally acceptable.<sup>25</sup> In the absence of a declaration of constitutional invalidity, however, this broad formulation stands and must be applied.

Section 12 of the Equality Act prohibits the dissemination, broadcasting, publication or display of any information, notice or advertisement that “could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person”. *Bona fide* artistic creativity, academic enquiry and accurate reporting in the public interest are valid defences to a complaint under this section. It is unclear exactly what behaviour this section is targeting.<sup>26</sup>

The last indignity prohibited by the Equality Act is harassment.<sup>27</sup> Section 1 defines “harassment” as:

“[U]nwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which relate to:

- (a) sex, gender or sexual orientation; or
- (b) a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such a group”.

With this enactment, the legislature determined that harassment also constituted a wrong outside the workplace<sup>28</sup> and is independent from the common law of delict (tort) which allows any person who suffered an *iniuria*, that is an impairment of his or her personality interests in the body, good name and dignity, as a result of the wrongful and intentional actions of another, to institute a claim for damages against the wrongdoer.<sup>29</sup>

The legislature identified different ways in which the dignity interest at the core of the equality right can be harmed. The elimination of unfair discrimination, hate speech and harassment would certainly contribute to social change in an egalitarian direction in South Africa. The success or failure of legislative prohibitions such as these depends on the mechanisms of enforcement and actual enforcement of the prohibitions. The next two sections address each of these aspects in turn.

## 1.2 The Enforcement Mechanisms under the Equality Act

A contravention of the Equality Act entitles a complainant to institute proceedings against the respondent in specially created equality courts. The Equality Act designates all high courts in South Africa to be equality courts for their areas of jurisdiction.<sup>30</sup> Additionally, magistrates’ courts may be designated to sit as equality courts for their areas of jurisdiction.<sup>31</sup> As of 28 August 2009, all magistrates’ courts in South Africa have been designated as equality courts.<sup>32</sup> These arrangements seem to suggest that equality courts are readily accessible. However, the Equality Act further stipulates that matters under the Equality Act may only be heard by presiding officers who have completed a training course equipping them to be equality court presiding officers.<sup>33</sup> It is not clear how many presiding officers have been trained.<sup>34</sup> The Equality Act also specifies that each equality court is to have its own specially trained clerk to assist the court in the performance of its functions.<sup>35</sup>

The standing provisions under the Equality Act are generous. Proceedings may be instituted by: (i) a person acting in his or her own interest; (ii) a person acting on behalf of someone who cannot act in his or her

own name; or (iii) a person acting on behalf of or in the interests of a group or association.<sup>36</sup> The South African Human Rights Commission or the Commission for Gender Equality may also institute equality court proceedings.<sup>37</sup>

The procedural rules applicable in the equality courts are aimed at informal and speedy processing of complaints. The complainant brings his or her complaint to the attention of the court by completing a complaint form, which sets out the particulars of the complainant and that of the respondent and the complaint, while also indicating the remedy requested.<sup>38</sup> No fees are payable for the institution of proceedings.<sup>39</sup> The clerk of the equality court is expected to provide assistance to complainants by providing them with information regarding the Equality Act and the procedure of the equality courts. It is thus evident why training of clerks is important: if the clerk is unsure as to the meaning and application of the provisions of the Equality Act, potentially deserving complaints may fall by the wayside.

The Equality Act and the Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000<sup>40</sup> set strict time limits for the processing of complaints.<sup>41</sup> It furthermore allows the court to refer a matter to an alternative forum for determination of the dispute in terms of that forum's powers.<sup>42</sup> Alternative *fora* which may be asked to deal with matters include, for example, the South African Human Rights Commission, the Advertising Standards Agency or the Broadcasting Complaints Commission. The alternative forum may also refer the matter back to the equality court.<sup>43</sup>

In order to facilitate a speedy resolution of the dispute, the Equality Act introduces a directions hearing which is to be held prior to

the inquiry.<sup>44</sup> The directions hearing allows the parties and the court to map the way forward in relation to the consideration of the complaint. This hearing is particularly significant where the parties are unrepresented, as it affords the presiding officer an opportunity to explain the process to the parties.

The Equality Act does not prescribe a particular format for the inquiry, and the ordinary rules of the high and magistrates' courts will thus be applied,<sup>45</sup> tempered with the requirements regarding informality and participation by the parties.<sup>46</sup> The requirements of informality and participation by the parties may necessitate a prior agreement between the parties and the presiding officer regarding parties' roles at each of the stages of the inquiry. It may, in particular, require the presiding officer to be more proactive in the proceedings and to descend into the arena through active questioning of the witnesses.

Section 13 of the Equality Act provides that in matters of unfair discrimination, the complainant has to make out a *prima facie* case of discrimination, whereupon a full burden of proof shifts to the respondent who then has to prove, on a balance of probabilities, that the discrimination did not take place, that it was not on one of the prohibited grounds or that it was not unfair. No equivalent shift of the burden of proof is provided for in relation to the other complaints (hate speech, harassment or the publication of information that discriminates unfairly), which means that the complainant carries a full burden of proof in relation to these complaints.

Complainants who choose to litigate under the Equality Act do so in order to obtain a remedy. To an extent, the remedies under the Equality Act<sup>47</sup> are similar to constitutional remedies in that they are aimed at vindication of the equality right and deter-

rence of further infringements of the right.<sup>48</sup> But the remedies also reflect features of ordinary civil law remedies. Different combinations of these constitutional and civil law remedies' features are reflected in the remedies provided for in the Equality Act. Some of the remedies are forward-looking, while others are backward-looking; some are community-oriented, while others are individualistic. Several of the remedies are structural, while others reflect corrective or retributive features.<sup>49</sup> So, for example, the Equality Act provides for an award of damages to an organisation<sup>50</sup> as a remedy, or an award of damages to an individual as a remedy.<sup>51</sup> The former award is clearly more forward-looking than the latter since an organisation that, for example, fights racism or sexism could put an award to work to influence members of society, whereas an award of damages to an individual assuages only the impairment suffered by the complainant. Other forward-looking, yet corrective remedies that an equality court may grant include policy or practice audit orders<sup>52</sup> and an order directing the respondent to file regular progress reports with the court or an institution such as the South African Human Rights Commission.<sup>53</sup>

More typical civil law remedies that may be granted under the Equality Act include interim relief,<sup>54</sup> declaratory orders<sup>55</sup> and making a settlement agreement an order of the court.<sup>56</sup> The Equality Act also outlines specific remedies relevant to complaints under the Equality Act. These include "an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment";<sup>57</sup> an order directing the respondent to make specific opportunities or privileges available to the complainant;<sup>58</sup> and an order directing the implementation of special measures to address the trans-

gression of the provisions of the Act.<sup>59</sup> It is evident that the facts of a particular matter will determine the scope of the remedy to be granted in each instance.

The Equality Act also introduces a "novel" remedy which is that of an unconditional apology. Unconditional apologies as remedies are not completely unknown in South Africa since the common law of delict knew the *amende honorable* as a remedy which involved a declaration by the wrongdoer acknowledging that he or she had uttered words which impaired the dignity of the plaintiff and the offer of an apology for the wrongful infringement thereof.<sup>60</sup> In recent years, and partly in response to the inclusion of this remedy in the Equality Act,<sup>61</sup> Constitutional Court judges have commented favourably on apology as a suitable remedy in matters of defamation or for the infringement of a person's dignity.<sup>62</sup> This remedy is particularly suited to instances where the impairment of the dignity of the complainant or plaintiff damaged the relationship between the parties.<sup>63</sup> An unconditional and genuine apology restores justice, creates the potential for reconciliation between the parties and affirms the equal dignity of the complainant and the respondent.

Institution of proceedings in terms of the Equality Act does not prohibit other forms of legal redress. Criminal prosecution where the conduct also meets the requirement of the criminal law is one such possibility.<sup>64</sup> The criminal sanction and the civil redress under the Equality Act may thus both be pursued in respect of a single cause of action. Furthermore, a person whose dignity has been impaired through unfair discrimination, hate speech or harassment may choose to pursue a claim in terms of the law of delict rather than lodge a complaint in terms of the Equality Act since the Equality Act did not repeal

the common law and does not prevent a person from instituting proceedings in terms of the common law.

Judgments of equality courts may be appealed or taken on review to a high court,<sup>65</sup> and they may even, with the leave of the Constitutional Court, be appealed directly to that court.<sup>66</sup>

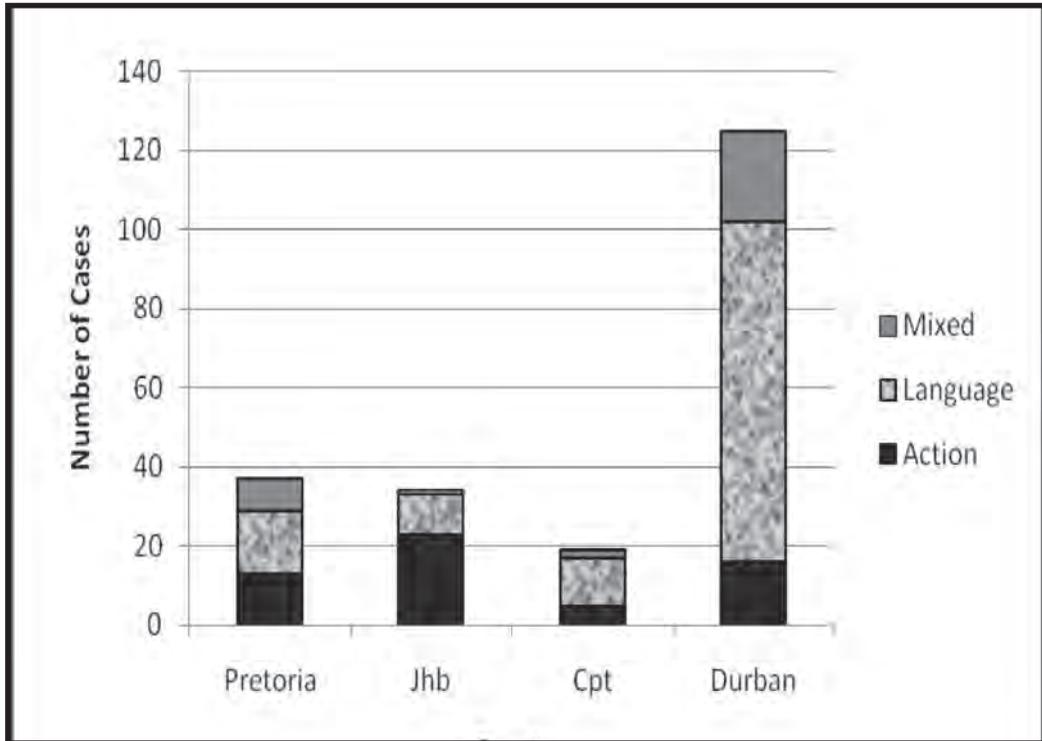
The substantive reactive provisions set out in the Equality Act and the procedural mechanisms provided for the enforcement of these provisions create the means and the framework for assertion of the equality right. Given this and the relatively high levels of intolerance still prevalent in the country,<sup>67</sup> it would be logical to conclude that the equality courts are inundated with complaints. The reality, however, is that relatively few complaints have been brought before the equality courts since their inception,<sup>68</sup> thus creating limited opportunities for engagement with the provisions of the Equality Act. The Act has, however, been put to work and the next section outlines the number, nature and outcomes of complaints made to selected equality courts operating at the magistrate's court level in relation to complaints of racism.

## **2. Putting the Act to the Test: Racism Complaints Made to Selected Equality Courts**

During 2007 and 2008, the author visited four pre-selected urban equality courts to collect information regarding the implementation of the Equality Act as part of her PhD research.<sup>69</sup> The research considered complaints made to the equality courts for the magisterial districts of Pretoria, Johannesburg, Cape Town and Durban for the time period from 16 June 2003 (the date of inception of the equality courts) to 31 December 2007. The author investigated the

implementation of the Equality Act at the level of the magistrate's court because these courts are hierarchically the closest to the people and are physically and financially more accessible than the high courts.<sup>70</sup> The research was limited to complaints of racism in view of the history of troubled racial relations in South Africa and the constitutionally mandated transformation that is required in this regard.

During the court visits, information was collected from court files regarding racism complaints received and the progress made in relation to the resolution of the matters. A very broad view of complaints of racism was adopted, and every instance in which a complainant alleged that his or her race influenced the behaviour of the respondent was considered to be a complaint of racism. The complaint form does not explicitly require a complainant to indicate whether the complaint is one of unfair discrimination, hate speech, the publication of information that discriminates unfairly or harassment. Complainants therefore provide details of their complaints in their own words, without categorising the complaint in terms of the provisions of the Equality Act. Given the fact that the complaints were set out in the complainants' own words, it was not possible to divide complaints, according to the provisions of the Equality Act, as unfair discrimination, hate speech and the publication of information that discriminates unfairly or harassment. The complaints were therefore categorised, on the version of events as set out by the complainants in the complaint forms, as: (i) complaints involving racist action; (ii) complaints involving the use of racist language; and (iii) mixed complaints which involved action and language. The findings as to the number of racism-related complaints laid at the four court sites are summarised in the graph below:



The Pretoria, Johannesburg and Cape Town equality courts received 37, 34 and 19 complaints respectively. The Durban equality court received 125 complaints for the same time period. There is no clear explanation for the discrepancy, but it may be that satisfied litigants whose matters served before the Durban equality court spread the word about the court and its work. The smaller number of complaints made to the Pretoria, Johannesburg and Cape Town courts limited the opportunities of these courts to engage with the provisions of the Equality Act.

### 2.1 Pretoria

For the time period under consideration, no judgments were delivered by the Pretoria equality court. The reasons for this are varied. In relation to the majority of com-

plaints, the respondents were never notified of the complaint against them.<sup>71</sup> The abrupt early end of several matters was the result of an additional step in the process of dealing with complaints under the Equality Act that was introduced by the presiding officers of the Pretoria equality court. As a matter of course, all complaints made to the court were screened by a presiding officer prior to notification of the respondent. No clear reason for the introduction of this step was evident from the court documents. One could speculate that it was introduced to assist clerks who were unsure as to the application of the Equality Act, which could be indicative of the need for more training for clerks. But from the directions provided by the presiding officers, one could also infer a need for further training for presiding officers. In several instances where the complaints related to hate

speech, the presiding officers instructed the clerk to advise the complainants to institute criminal proceedings against the respondents. This is quite clearly contrary to the provisions of the Equality Act which envisions its civil remedies existing alongside possible criminal convictions. In the other instances, the presiding officers of the Pretoria equality court instructed the clerk to advise the complainant to pursue a complaint that arose in the workplace in terms of labour law. There is some uncertainty in this regard.

Section 5(3) of the Equality Act provides that the Equality Act does not apply in relation to the employer/employee relationship which, insofar as unfair discrimination in the workplace is concerned, is regulated by the Employment Equity Act. The Employment Equity Act obliges employers to promote equal opportunity in the workplace through the elimination of unfair discrimination in employment policies or practices.<sup>72</sup> Unfair discrimination in employment policies or practices is consequently prohibited by the Employment Equity Act.<sup>73</sup> Disputes regarding unfair discrimination that cannot be resolved in the workplace may be referred to the Commission for Conciliation, Arbitration and Mediation for possible resolution by conciliation.<sup>74</sup> If the conciliation fails, such a dispute may be pursued in the labour court, or it may be resolved by means of arbitration if the parties agree to this.<sup>75</sup> The structures created for the resolution of unfair discrimination disputes arising in the workplace thus exist separately from the equality courts.

The definition of unfair discrimination under the Employment Equity Act includes harassment as a form of unfair discrimination,<sup>76</sup> but the Employment Equity Act is silent on the issue of hate speech in the workplace. This silence leads to a jurisdictional conundrum. It is possible to interpret the provisions of

the Employment Equity Act expansively so as to regard hate speech in the workplace as an issue to be dealt with in terms of labour law. Alternatively, one could interpret the silence to mean that hate speech complaints in the workplace fall within the jurisdiction of the equality court. The latter interpretation could mean that different forums have jurisdiction on different aspects of a complaint arising from a single incident. The intention of the legislature could not have been to allow for such duplication. It is thus suggested that a complaint of hate speech arising in the context of an employment relationship should be dealt with in terms of labour law. Legislative amendment of the Employment Equity Act or an authoritative interpretation by a higher court could provide clarity and guidance in this regard.

The jurisdictional conundrum is exacerbated by the lack of information regarding the relationship between the complainant and respondent as set out on the complaint form. Complainants often do not grasp the difference between a contract of employment and one of rendering services outside an employment relationship. If a relationship between a complainant and respondent is not one of employment as regulated by labour law, the provisions of the Equality Act regarding unfair discrimination, harassment and hate speech will apply. It is therefore important that sufficient information regarding the relationship between the parties must be provided to enable the clerk (or if the clerk is unsure, the court) to determine whether the relationship is one of employment or whether the equality court has jurisdiction to hear the matter. The complaint form in its current format does not require adequate details regarding this relationship to enable the court to make a just decision. However, a blanket refusal on the part of an equality court presiding officer to hear a matter where the complainant refers

to the respondent as “my boss” limits access to justice unjustifiably. Training of presiding officers and clerks on the issue of jurisdiction is necessary in order to ensure that this issue is addressed pertinently.

Engagement with the provisions of the Equality Act involves more than just the delivery of judgments. Complaints made to the Pretoria equality court led to the conclusion of settlement agreements in three of the matters.<sup>77</sup> In two of these matters, the agreement included an unconditional apology by the respondent,<sup>78</sup> thus ameliorating the impact of the unfairly discriminating behaviour on the complainant’s fundamental dignity. In one matter, for example, the complainant was refused a hair cut by the staff of the respondent’s salon because the stylists at the salon were unfamiliar with cutting “Indian” hair. The respondent not only apologised unconditionally, but also agreed to pay damages to a charity of the complainant’s choice and to have the staff members of his salons trained to cut different textures of hair. In this instance, it is evident that change flowed from the complaint made to the equality court, thus illustrating the transformative potential of the Equality Act.

This transformative potential is also illustrated by the settlement agreement that was concluded between a complainant, the owner of a house in a complex, and the respondent representing the body corporate managing the common affairs of the complex.<sup>79</sup> The complaint related to the differential treatment of the complainant as a black home-owner in relation to the other, predominantly white, home-owners. The parties agreed that the complainant’s rights as a home owner were worthy of respect and that meetings of the body corporate were to be conducted in a language and manner accessible to the complainant.

## 2.2 Johannesburg

The contribution of the Johannesburg equality court during the time period under consideration was similarly modest. The court delivered two judgments<sup>80</sup> and three matters were settled by agreement.<sup>81</sup> The reasons for the non-progression of the other complaints brought before the court are similar to those advanced above in relation to the Pretoria equality court. The Johannesburg equality court did not introduce a similar “vetting” step, as the Pretoria court did to assist the clerk of the court in the evaluation of complaints prior to service. This meant that service of the notice of the complaint on the respondent was at least attempted in the majority of instances. Subsequent to the service of these notices, determinations that the complaints arose in the work context or other similar technical issues (including the provision of incorrect particulars of respondents) limited progress in numerous matters. On the issue of jurisdiction of the equality court in relation to complaints arising in the workplace, the stance taken by the Johannesburg equality court was similar to that of the Pretoria equality court, thus resulting in the early conclusion of several matters without consideration of the merits of the complaints.

It is noteworthy that several of the complaints made to the Johannesburg equality court concerned commercial or business opportunities. This commercial focus from the financial centre of South Africa is illustrated well by the matter in *Manong and Associates*.<sup>82</sup> The complaint related to the procurement policies of the provincial roads department. The complainant, an engineering company, alleged that the procurement policy discriminated unfairly against it on the basis of race. In finding for the complainant, the court, in addition to awarding damages to the wholly black-owned complainant

company,<sup>83</sup> ordered an audit of the department's procurement policies thus aiming to ensure that a similar infringement of the equality right would not be repeated and thereby contributing to meaningful change in an egalitarian direction.

### 2.3 Cape Town

The Cape Town equality court was the first of the equality courts to receive a complaint under the Equality Act. The well-publicised first complaint ended with a settlement agreement between the parties. The complainant was denied access to a gay night club by the respondents, who worked as "bouncers" at the club.<sup>84</sup> The respondents admitted that the complainant was denied access to the club on the basis of race and they apologised unconditionally for the hurt caused and the impairment of the complainant's dignity. The respondents undertook to pay damages to an organisation dedicated to combating prejudice and discrimination against lesbian, gay, bisexual, transgender and intersex communities, as nominated by the complainant. The parties also agreed that the complainant would withdraw the criminal charges laid against the respondents. This settlement agreement heightened the visibility of the equality courts in South African society in the early days of their operation. One success story, however, was not enough to ensure a continued flow of complaints to this court and the contribution of the court has been limited.

### 2.4 Durban

The number of complaints relating to racism made to the Durban equality court from 2003 to 2007 afforded that court the opportunity to engage with the Equality Act more extensively. A total of 125 complaints were made, the majority of which related to the

use of racist language (86 complaints), with 16 complaints involving racist action and 23 involving elements of both.

The Durban equality court, in contrast to the other courts considered, was willing to consider complaints that arose in the work context. The jurisdictional uncertainty that led to the restrictive interpretation by the presiding officers of the other equality courts was never seen as problematic by the Durban equality court and it dealt with the complaints irrespective of whether the relationship between the complainant and the respondent was one of employment or regulated by a short-term service contract. The work context proved to be a fertile ground for complaints, with 47 arising from that context. Troubled relations between neighbours, or landlord and tenant, accounted for 45 complaints made to the Durban equality court.

The complaints involving actions motivated by racism made to the Durban equality court related mostly to landlord and tenant relations. Comparatively few matters concerning complaints of racist actions were resolved through either settlement or the delivery of judgment.<sup>85</sup> A number of these complaints were withdrawn and two matters were referred elsewhere.

The matters in which the court engaged with the Equality Act furthered the objects of the Equality Act appropriately. The settlement agreement that was concluded between the complainant and respondent in *BE Gerber v Dunmarsh Investment and another*<sup>86</sup> illustrates the importance and impact of the Equality Act. In terms of the agreement, which was made an order of court, the respondent acknowledged that the refusal to let a flat to the complainant because her husband was Indian was "un-

constitutional and therefore unlawful". The lease agreement signed by the parties prior to occupation stipulated that "the LESSEE acknowledges that he knows and understands that the premises can be let for occupation by member of the WHITE GROUP only and he hereby declares that he is a member of that GROUP in terms of ACT NO. 36 OF 1966, as amended". The respondents apologised unconditionally for their conduct and undertook to pay an amount of R10,000 (US\$1,471) to the complainant as compensation. The settlement agreement between the parties further stipulated that the offending clause was unenforceable and to be deemed deleted from all existing lease agreements. It was furthermore agreed that a public notice to this effect had to be displayed "prominently" on the building premises. This complaint to the equality court not only resulted in the vindication of the equality right of the complainant, but also had a wider impact in the particular community through the deemed deletion of the offensive clause and the public notice.

Typically, complaints regarding racist language involved the use of racial epithets such as "kaffir" or "coolie". These complaints often arose in the workplace or as a result of interactions between neighbours or landlord and tenant. The derogatory racial terms stem from the apartheid past in which the inherent dignity of black South Africans was not recognised,<sup>87</sup> and during which power relations were overtly skewed favouring whites as "bosses". Other more common complaints were that the respondent had called the complainant "a monkey" or "baboon" or some other animal.<sup>88</sup> It has been accepted by South African courts other than the equality courts, that the use of the racial slur "kaffir" causes injury to the dignity of a person and that it constitutes hate speech.<sup>89</sup> The same also rings true in the broad definition of hate

speech contained in the Equality Act. The Durban equality court has had no hesitation in finding that the use of racial epithets constitutes hate speech. In relation to the use of the terms "monkey" and "baboon", the court considered the innuendo accompanying the use of these terms and found these to constitute racial slurs, amounting to hate speech on the definition in the Equality Act.<sup>90</sup>

For the most part, the Durban equality court dealt efficiently and effectively with the numerous complaints of hate speech that it received. Several of these complaints resulted in settlement agreements and judgments in which the inherent equal dignity of the complainants was vindicated. For example, six respondents agreed to apologise unconditionally to the complainant for the use of racist language after being notified of the complaint or after attending the directions hearing.<sup>91</sup> In some cases the settlement agreement also included the payment of a small amount in damages to the complainant. In a further 11 matters, the Durban equality court granted judgment in favour of the complainants and ordered the respondents to apologise unconditionally for hate speech.<sup>92</sup> It is noteworthy that the unconditional apologies ordered in these matters were only coupled with small awards of damages in two instances.<sup>93</sup> The impairment of dignity caused by hate speech was thus not primarily addressed by means of monetary awards of damages, but rather by an acknowledgement on the part of the respondent of the impact of his or her hate speech on the dignity of the complainant, coupled with a sincere apology for this impairment. This remedy has the potential to restore the relationship between the parties, and may have an even wider impact on the complainants' interactions with other people, thus furthering the transformative ideals of the Equality Act.

However, divergent interpretations by different presiding officers of the Durban equality court regarding the burden of proof applicable in relation to complaints of hate speech proved to be problematic. It will be recalled that in relation to complaints of unfair discrimination, a full burden of proof shifts to the respondent once the complainant makes out a *prima facie* case of discrimination. This means that a respondent may discharge the burden by proving, on a balance of probabilities, that the discrimination did not take place, that it was not on one of the prohibited grounds (both listed and analogous) or that the discrimination was not unfair. Where the presiding officers interpreted the burden of proof to shift to the respondent in relation to complaints of hate speech, the respondent could only discharge the burden by proving that the words were not uttered, since unfairness does not come into play in relation to complaints of hate speech. This incorrect interpretation was followed by some presiding officers and not by others, resulting in different standards being applied.

A variety of factors impact on the ability of a court to deliver justice. A crude unfair denial of benefits or opportunities, the unfair imposition of burdens based on a prohibited ground or hate speech, can be addressed effectively through adjudication, but the indignities of inequality are sometimes subtle and they operate in ways that defy legal redress. In fact, in some instances, litigation may even intensify the inequality between the parties. In concluding this overview of the work of the equality courts, it is apt to consider a judgment of the Durban equality court which illustrates the multi-faceted nature of inequality and the limits of litigation in addressing inequality in all its guises. The complaint in the matter of *N Mqadi v S Laksi*<sup>94</sup> was that the respondent, the head of the Independent Complaints Directorate in

Durban, told the complainant off, and used racial overtones in doing so, when he enquired about the progress made in relation to an earlier complaint lodged with the Directorate. The respondent denied the allegations made by the complainant. The judgment highlighted the “inequality of arms” between the legally represented respondent and the unrepresented complainant and how that impacted on the outcome of the matter. The lack of legal representation on the part of the complainant resulted in his case being presented in “narrative form”, while that of the respondent was presented in a “legalistic” fashion. The presiding officer acknowledged the different approaches and their origins and found the “legalistic” approach to be more convincing. The complaint was thus dismissed. This matter draws attention to the limits of litigation in addressing issues of inequality. The speedy, affordable and informal process that the Equality Act envisions was overshadowed by a formal presentation of the respondent’s denial of the incident, thus highlighting further inequality between the parties. Also, the indignity of the inequality that was complained of was, according to the complainant, caused by the attitude of the respondent. The subtleties of racism or of other forms of intolerance cannot necessarily be addressed effectively through litigation.

### 3. Conclusion

The Equality Act was promulgated to address the systemic inequalities and unfair discrimination present in South African society and its institutions as these threaten “the aspirations of our constitutional democracy”. These aspirations relate to “human dignity, equality, freedom, and social justice in a united, non-racial and non-sexist society where all may flourish”.<sup>95</sup> The Equality Act complements the Constitution and its vision of

change in an egalitarian direction. By providing for causes of action based on the different kinds of violation of the equality right, and by providing remedies for these infringements, the Equality Act “validate[s] injuries and in some cases [may] deter or redress them”.<sup>96</sup>

The survey of racism complaints made to the equality courts for the districts of Pretoria, Johannesburg, Cape Town and Durban illustrates how, and in which contexts, people think it worthwhile to bring complaints of racism to the equality courts. Racist language in the workplace and in interactions between neighbours affects people’s daily lives. In order to contribute meaningfully to change through the elimination of such affronts to equal dignity, the provisions of the Equality Act in relation to jurisdiction of the equality court and labour law *fora*, and the burden of

proof in relation to hate speech complaints, must be clarified.

Relatively few complaints have been made to the equality courts since their inception. The reasons for the paucity are not clear. One could speculate that the existence of the courts has not been thoroughly publicised, or that complainants realise and accept the limits of litigation in addressing inequality in its different forms. The small number of complaints limits the opportunities of these courts to establish themselves as meaningful catalysts of social change.

Despite the challenges and the limitations of litigation on the equality right, the equality courts have contributed in a small but significant way to the affirmation of people’s inherent equal dignity.

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<sup>1</sup> Dr Rosaan Krüger is a Senior Lecturer in Law at Rhodes University, South Africa. This article is based on her PhD thesis entitled *Racism and Law: Implementing the Equality Right in Selected South African Equality Courts* (Rhodes University, South Africa, 2009). The financial assistance of the National Research Foundation Thuthuka Programme and the Rhodes University Joint Research Council made this research possible. The author wishes to acknowledge the encouragement and helpful comments of Kate O’Regan without which this work would have remained unpublished. Helen Kruuse, Meryl du Plessis and Sarah Driver also assisted the author greatly with their comments and suggestions.

<sup>2</sup> Kriegler J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), Para 74. This remark was made in relation to the provisions of the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993), but the foundational commitment to equality is also reflected in the text which replaced that constitution, namely the Constitution of the Republic of South Africa, 1996.

<sup>3</sup> Section 9(4) of the Constitution, read with Schedule 6, Item 23.

<sup>4</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act was assented to on 2 February 2000 and the constitutional deadline for its enactment was 4 February 2000.

<sup>5</sup> See in particular *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), Para 31; See also *President of the Republic of South Africa v Hugo*, above note 2, Para 49; and *Harksen v Lane NO* 1998 (1) SA 300 (CC), Para 51.

<sup>6</sup> Albertyn, C. and Kentridge, J., “Introducing the Right to Equality in the Interim Constitution”, *South African Journal on Human Rights*, Vol. 10, 1994, p. 152; Albertyn, C. and Goldblatt, B., “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality”, *South African Journal on Human Rights*, Vol. 14, 1998, p. 249ff; Freedman, W., “Formal versus Substantive Equality and the Jurisprudence of the Constitutional Court: *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC), 1999

(1) SA 6 (CC)”, *Tydskrif vir Hedendaagse Romeins-Hollanse Reg*, Vol. 63, 2000, pp. 315-316; Albertyn, C., “Substantive Equality and Transformation in South Africa”, *South African Journal on Human Rights*, Vol. 23, 2007, p. 258; and Fredman, S., “Redistribution and Recognition: Reconciling Inequalities”, *South African Journal on Human Rights*, Vol. 23, 2007, pp. 225-227. See also *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), Paras 26 and 29, where the substantive and formal notions of equality are contrasted.

<sup>7</sup> For academic analyses of the appropriateness of this designation, see Fagan, A., “Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood”, *South African Journal on Human Rights*, Vol. 14, 1998, p. 220; Davis, D. M., “Equality: the Majesty of Legoland Jurisprudence”, *South African Law Journal*, Vol. 16, 1999, p. 398; Cowen, S., “Can Dignity Guide South Africa’s Equality Jurisprudence?”, *South African Journal on Human Rights*, Vol. 17, 2001, p. 34; Botha, H., “Equality, Dignity and the Politics of Interpretation”, *South African Public Law*, Vol. 19, p. 724; Albertyn, above note 6, p. 253; Fredman, above note 6, p. 214; Pieterse, M., “Finding for the Applicant: Individual Equality Plaintiffs and Group-based Disadvantage”, *South African Journal on Human Rights*, Vol. 24, 2008, p. 397; Botha, H., “Equality, Plurality and Structural Power”, *South African Journal on Human Rights*, Vol. 25, 2009, p. 1.

<sup>8</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (4 of 2000) (the Equality Act), Sections 6, 7, 8 and 9.

<sup>9</sup> *Ibid.*, Section 10.

<sup>10</sup> *Ibid.*, Section 11.

<sup>11</sup> *Ibid.*, Section 12.

<sup>12</sup> *Ibid.*, Section 1.

<sup>13</sup> *Ibid.*, Section 5(1).

<sup>14</sup> *Ibid.*, Section 5(3). The Employment Equity Act, 55 of 1998 prohibits unfair discrimination and provides for affirmative action in the context of employment relationships. See the discussion in the following sections.

<sup>15</sup> *Ibid.*, Section 6.

<sup>16</sup> *Ibid.*, Section 7.

<sup>17</sup> *Ibid.*, Section 8.

<sup>18</sup> *Ibid.*, Section 9.

<sup>19</sup> *Ibid.*, Section 1.

<sup>20</sup> *Ibid.*

<sup>21</sup> O’ Regan J, in *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC), Para 168, notes that this poorly drafted section “is (...) not particularly helpful to a court faced with the determination of what constitutes fairness”. Section 14 of the Equality Act incorporates aspects of fairness and justification and separates the consideration of the impact of the discrimination from the impairment of dignity.

<sup>22</sup> These include, in no particular order: (i) whether the discrimination impairs or is likely to impair human dignity; (ii) the impact or likely impact of the discrimination; (iii) the position of the complainant in society; (iv) the nature and extent of the discrimination; (v) whether the discrimination is systemic; (vi) whether the discrimination serves a legitimate purpose; (vii) whether there are less restrictive means that could achieve the same purpose; and (viii) whether the respondent has taken reasonable steps to accommodate the complainant.

<sup>23</sup> See above, note 8, Section 10. On the link between hate speech and equality, see Neisser, E., “Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence”, *South African Journal on Human Rights*, Vol. 10, 1994, p. 342; Smith, S. A., “There’s Such a Thing as Free Speech and It’s a Good Thing Too”, in Whillock, R. K., and Slayden, D. (eds.), *Hate Speech*, Sage Publications, 1995, pp. 227-229; Woolman, S., “Out of Order? Out of Balance? The Limitation Clause of the Final Constitution”, *South African Journal on Human Rights*, Vol. 13, 1997, pp. 118-119; Albertyn, C., Goldblatt, B. and Roederer, C. (eds.), *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000*, Witwatersrand University Press, 2002, p. 4; Banton, M., “The Declaratory Value of Laws Against Racial Incitement”, in Coliver, S. (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*, Article 19, 1992, p. 351. See also *Strydom v Chiloane* 2008 (2) SA 247 (T), Para 16, where the court held that “racially discriminatory conduct is more serious than hate speech, but hate speech is one of the elements of discriminatory conduct”.

<sup>24</sup> See above, note 8, Section 10, read with the proviso in Section 12.

<sup>25</sup> See, in general, Teichner, S., “The Hate Speech Provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The Good, the Bad and the Ugly”, *South African Journal on Human Rights*, Vol. 19, 2003, p. 349.

<sup>26</sup> See Albertyn, C., Goldblatt, B. and Roederer, C. (eds.), above note 23, p. 100.

<sup>27</sup> See above, note 8, Section 11.

<sup>28</sup> Prior to the enactment of the Equality Act, the Employment Equity Act 55 of 1998 contained the only statutory prohibition of harassment in its Section 6 which prohibits harassment as a form of unfair discrimination in the workplace.

<sup>29</sup> On the elements of a delict and the *actio iniuriarum*, see Neethling, J., Potgieter, J. M., and Visser, P. J., *Law of Delict*, 6<sup>th</sup> edition, LexisNexis Butterworths, 2010.

<sup>30</sup> See above, note 8, Section 16(1)(a).

<sup>31</sup> *Ibid.*, Section 16(1)(c).

<sup>32</sup> GN 859 in Government Gazette 32516 of 28 August 2009 (the Notice). According to the Notice, 382 magistrates' courts have been designated.

<sup>33</sup> See above, note 8, Section 16(2). No specific designation regarding the facilitation of training has been made in terms of the Equality Act. The training of magistrates as presiding officers for the equality courts is undertaken by Justice College. The typical duration of a training course for magistrates as presiding officers of the equality courts is four days. (The Department of Justice and Constitutional Development Branch: Justice College, *Work Programme 1 April 2007 to 31 March 2008*, undated, pp. 5-6.)

<sup>34</sup> See above, note 8, Section 17(3), which provides that the director-general of the Department of Justice and Constitutional Development has to compile and keep a list of trained presiding officers. The author's attempts to contact the office of the director-general telephonically during June 2011 were unsuccessful.

<sup>35</sup> *Ibid.*, Section 17(1). The training of clerks is also facilitated by Justice College. The typical duration of a clerk's training course is four days. (The Department of Justice and Constitutional Development Branch: Justice College, above note 33, p. 21.)

<sup>36</sup> See above, note 8, Section 20(1).

<sup>37</sup> *Ibid.*

<sup>38</sup> See above, note 8, Section 20(2); and Regulation 6(1) of the Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (the Regulations) as published under GN R 764 in Government Gazette 25065 of 13 June 2003 and amended by GN 563 in Government Gazette 26316 of 3 April 2004. More details regarding the available remedies are provided below.

<sup>39</sup> See above, note 38, Regulation 12(1).

<sup>40</sup> See above, note 38.

<sup>41</sup> So, for example, must the respondent be informed of the complaint within seven days of the filing thereof.

<sup>42</sup> See above, note 8, Section 20(3) and (5). Section 20(4) sets out the various factors the presiding officer has to consider in determining whether a referral is appropriate. This includes the personal circumstances of the parties, the accessibility of the alternative forum, the needs and wishes of the parties and whether the intended proceedings in the equality court could be precedent-setting.

<sup>43</sup> See above, note 38, Regulation 6.

<sup>44</sup> See above, note 38, Regulation 10(5). This includes issues of discovery, interrogatories, admissions, limitation of disputes, joinder and intervention, amicus interventions, filing of affidavits, further particulars and dates of future hearings.

<sup>45</sup> See above, note 8, Section 19. Rule 29 of the Magistrate's Court Rules as published under GN R 740 in Government Gazette 33487 of 23 August 2010 applies *mutatis mutandis*.

<sup>46</sup> See above, note 38, Regulation 10(3).

<sup>47</sup> See above, note 8, Section 21.

<sup>48</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), Paras 94 and 96; *Sanderson v Attorney-General Eastern Cape* 1998 (2) SA 38 (CC), Para 38; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), Para 80.

<sup>49</sup> Currie, I., and De Waal, J., *The Bill of Rights Handbook*, 5th edition, Juta, 2005, pp. 195-198, in which the authors distinguish constitutional remedies from ordinary civil remedies on the basis of the former being forward-looking, community-oriented and structural, and the latter as being backward-looking, individualistic and retributive. The authors' view is that the Equality Act remedies combine features of both.

<sup>50</sup> See above, note 8, Section 21(2)(e).

<sup>51</sup> *Ibid.*, Section 21(2)(d).

<sup>52</sup> *Ibid.*, Section 21(2)(k).

<sup>53</sup> *Ibid.*, Section 21(2)(m).

<sup>54</sup> *Ibid.*, Section 21(2)(a).

<sup>55</sup> *Ibid.*, Section 21(2)(b).

<sup>56</sup> *Ibid.*, Section 21(2)(c).

<sup>57</sup> *Ibid.*, Section 21(2)(f).

<sup>58</sup> *Ibid.*, Section 21(2)(g).

<sup>59</sup> *Ibid.*, Section 21(2)(h).

<sup>60</sup> For academic discussion of the common law remedy, see Midgley, J. R., "Retraction, Apology and the Right to Reply", *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, Vol. 58, 1995, p. 288; Neethling, J., "Herlewing van die *Amende Honorable* as Remedy by Laster – *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W)", *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, Vol. 66, 2003, p. 329; Neethling, J., "Laster: die *Amende Honorable*, Apologie en die *Quantum Solatium* – *Young v Shaikh* 2004 (5) SA 46 (K)", *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, Vol. 67, 2004, p. 698; and Mukheibir, A., "Reincarnation or Hallucination? The Revival of the *Amende Honorable*", *Obiter*, Vol. 25, 2004, p. 455.

<sup>61</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), Paras 62-70 per Mokgoro J., and Paras 105, 107, 108-121 per Sachs J.

<sup>62</sup> See specifically *Le Roux v Dey* 2011 (3) SA 274 (CC), Paras 195-203, where Froneman J. and Cameron J., with concurrence on this point by the other judges of the Court, developed the common law of delict to provide for a remedy of an unconditional apology where the dignity of a person has been impaired. See also *The Citizen 1978 (Pty) Ltd v McBride* (CCT 23/10) [2011] ZACC 11 (8 April 2011), Paras 130-134.

<sup>63</sup> *Le Roux v Dey*, above note 62, Para 202.

<sup>64</sup> See above, note 8, Sections 10(2) and 21(2)(n).

<sup>65</sup> *Ibid.*, Section 23(1).

<sup>66</sup> *Ibid.*, Section 23(3).

<sup>67</sup> For example, in May 2010, around 46% of the South African population was of the view that race relations were improving, implying that the majority was of the view that race relations were deteriorating. (The Presidency, *Development Indicators*, 2010, available at: <http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/NationalPlanningCommission4/Development%20Indicators2010.pdf>, p. 56.) A survey of newspaper headlines on any given day indicates that intolerance for difference is rife.

<sup>68</sup> Department of Justice and Constitutional Development, *Annual Report 2009/2010*, p. 21. In 2008-2009, for example, a total of 447 cases were enrolled in the equality courts. This figure increased to 508 in 2009-2010.

<sup>69</sup> See above, note 1. The author recorded the information from the court files to which she was granted access. In more complex matters, copies were made of all the documents, and in less complex matters, notes were kept on the complaints and the progress of the matter. In several matters, the author obtained a sound recording of the judgment of the court which was transcribed with the permission of the presiding officer. In the majority of cases where judgment was delivered, the presiding officers prepared written judgments. The documents are on file with the author.

<sup>70</sup> See Jagwanth, S., "The Constitutional Role and Responsibilities of Lower Courts", *South African Journal on Human Rights*, Vol. 18, 2002, pp. 201-203 and 214. The important role of the lower courts in contributing to the constitutional project has also been acknowledged by the high courts. See, for example, *Qozeleni v Minister of Law and Order* 1994 (1) BCLR 75 (E) at 83J-84A; and *S v Steyn* 2001 (1) SA 1146 (CC), Para 18.

<sup>71</sup> A total of 22 matters were dismissed or referred after filing of the complaint form.

<sup>72</sup> Employment Equity Act 55 of 1998, Section 5.

<sup>73</sup> *Ibid.*, Section 6.

<sup>74</sup> *Ibid.*, Sections 10(1) and 10(5). The Commission is a statutory body created in terms of labour legislation to resolve labour disputes informally and speedily.

<sup>75</sup> *Ibid.*, Section 10(6).

<sup>76</sup> *Ibid.*, Section 6(3).

<sup>77</sup> *Narandaran Kollapen v JH du Preez* 001/03; *T Nkhwashu v Doring en Rosie Kleuterskool* 007/03; and *N Mashiane v JJ Hattingh* 07/05.

<sup>78</sup> *Narandaran Kollapen v JH du Preez* and *T Nkhwashu v Doring en Rosie Kleuterskool*, above note 77.

<sup>79</sup> *N Mashiane v JJ Hattingh*, above note 77.

<sup>80</sup> *Manong & Associates (Pty) Ltd v The MEC, Department of Public Transport, Roads and Works, The Head of Depart-*

ment, Department of Public Transport, Roads and Works, The Premier, Gauteng Province and The South African Human Rights Commission 01/04; and *MD Kaunda v Galaxy World* 16/05.

<sup>81</sup> *T Singiswa v J March (FNB Manager)* 06/04; *TM Singiswa v JN de Freitas* 07/04; and *J Jennifer (SAHRC) v Glenvista High School (Principal Mr M Robinson)* 02/07.

<sup>82</sup> *Manong & Associates*, above note 80.

<sup>83</sup> The award was made on the basis of the impairment of the dignity of the complainant company's shareholders.

<sup>84</sup> *MG Pillay v M Cronje and I Coetzee* 01/03. The complaint received media attention at the time for being the first equality court complaint. (Gophe, M., "Equality Court Orders City Night Club to Pay Up", *Cape Argus*, 11 February 2004, p. 2; Kassim, A., "Equality Court Finds Gay Club Guilty of Racism", 11 February 2004, p. 3.)

<sup>85</sup> At the time of consideration, 5 of the 16 matters were resolved through either settlement or judgment.

<sup>86</sup> *BE Gerber v Dunmarsh Investment and another* 69/07.

<sup>87</sup> Of the 86 complaints relating to racist language, 63 involved the use of racial slurs such as "kaffir" or "coolie". Of the 27 complaints involving racially motivated action and language, 16 involved the use of racial slurs in combination with some act.

<sup>88</sup> A total of 10 complaints involving reference to the complainant as some animal were made. In some instances the complaints indicated that the complainant was subjected to racial epithets and called an animal, which the complainants mostly interpreted as a denial of their humanity. On the use of the term "baboon" in the context of a claim of defamation, see *Mangope v Asmal* 1997 (4) SA 277 (T) 2861-287B: "The definition of baboon in *Chambers Twentieth Century Dictionary* is given as: 'n. large monkey of various species, with long face dog-like tusks, large lips, a tail, and buttock callosities; a clumsy, brutish person of low intelligence.' Applying that definition, it is, in my view, clear that when the epithet "baboon" is attributed to a person when he is severely criticised, as in this case, the purpose is to indicate that he is base and of extremely low intelligence. But I also think that it can be inferred from the use of the word in such circumstances that the person mentioned is of subhuman intelligence and not worthy of being described as a human being. It will depend on the circumstances and on the views of those to whom the words are addressed. It follows, I think, that the words are capable of a defamatory meaning."

<sup>89</sup> Revelas J., in *Gouws v Chairperson, Public Service Commission* (2001) 22 ILJ 174 (LC), Para 56, held: "The word 'kaffer' ['kaffir'], particularly if used by a white person referring to a black person, and if uttered directly at a black person, is possibly the most humiliating insult that can be endured by a black person. Even though I did not have the benefit of any expert evidence on this topic, I readily accept that black South Africans find this word demeaning. It directly impacts on the human dignity of black persons and has become an example of what can be termed 'hate speech.'" See also *Ciliza v Minister of Police* 1976 (4) SA 243 (N) 249G; *Mbatha v Van Staden* 1982 (2) SA 260 (N) 262G-H; *National Union of Metalworkers of SA v Siemens Ltd* (1990) 11 ILJ 610 (ARB); *Crown Chickens (Pty) Ltd t/a Rocklands Poultry Farm v Kapp* 2002 (2) BLLR 493 (LAC); and *Myers v SAPS* [2004] 3 BALR 263 (SSSBC).

<sup>90</sup> *Complainant v Respondent* 09/04.

<sup>91</sup> *FS Khuswayo v Y Moodley* 63/05; *S Boyce v L Zietsman and G Clifford* 07/06; *N Mabaso v K and M Mall* 44/06; *JL Jojo v Mr Olivier* 23/07; *B Khawula v J Auths* 38/07; and *S Kumar v W Frank* 45/07.

<sup>92</sup> *Complainant v Respondent* 09/04; *BG Maphumulo II Sheik* 16/04; *ZC Memela v T Lues* 17/04; *S Duma v JB Adam* 22/04; *M Lankie v D Gordon* 33/04; *HI Donaldo v R Haripersad* 29/05; *F Mdladla v E Smith* 40/05; *T Pretorius v R Petzer* 89/05; *P Magubane v S Smith* 01/06; *EB Sikakane and another v AR and N Petzer* 05/06; and *AJ Smith v TJ Mgagi and another* 60/07.

<sup>93</sup> *HI Donaldo v R Haripersad* 29/05; and *T Pretorius v R Petzer* 89/05.

<sup>94</sup> *N Mqadi v S Lakhi* 76/05.

<sup>95</sup> See above, note 8, Preamble.

<sup>96</sup> Grotty, P. M., "Legislating Equality", *International Journal of Law, Policy and the Family*, Vol. 10, 1996, p. 318.

# Homophobia and Hate Speech in Serbian Public Discourse: How Nationalist Myths and Stereotypes Influence Prejudices against the LGBT Minority

Isidora Stakić<sup>1</sup>

## 1. Introduction

In June 2001, almost a year after the downfall of Slobodan Milošević's authoritarian regime, Serbia's first ever Pride Parade was abandoned half-way through due to violent attacks by members of Serbian ultranationalist groups. Eight years later, in March 2009, the Serbian Parliament adopted the first comprehensive anti-discrimination law – Law on the Prohibition of Discrimination 2009 (the Anti-Discrimination Law), prohibiting discrimination on a number of grounds, including sexual orientation. Encouraged by the adoption of this law, the Serbian LGBT community announced plans to organise the second Pride Parade on 20 September 2009 in Belgrade. However, the 2009 Parade organisers were met with strong opposition, not only from far-right groups, but also from some political parties and the Serbian Orthodox Church. After a long anti-Pride campaign, the 2009 Parade was finally called off due to lack of security assurances. The police announced that they could not guarantee the safety of the marchers and urged the organisers to change venue from the main Belgrade streets to another location. The organisers found that proposal unacceptable. The cancellation, or rather banning,<sup>2</sup> of the 2009 Pride Parade was strongly criticised by both domestic

human rights NGOs and the international community, and it became evident that Serbia would not be able to make any further progress in European integration without substantial changes to its LGBT rights policy.<sup>3</sup> Therefore, when the LGBT activists announced a new attempt to hold a parade in October 2010, the Serbian political elite showed a considerably changed attitude towards LGBT issues, and a much stronger commitment to providing the necessary security. The 2010 Parade was finally held on 10 October 2010. However, during the Parade, thousands of police officers sealed off the parade venues, repeatedly clashing with far-right extremists who tried to burst through the security cordons, while chanting "Death to fags!"<sup>4</sup> Although the Serbian police managed to protect the 2010 Parade participants from the extremists' attacks, the battle between the police and the right-wing groups, in which dozens were injured, provides a strong indication of how deeply ingrained homophobia is in Serbian society.

Serbia is a party to the various international and regional human rights conventions which prohibit discrimination against minorities, and has enacted anti-discrimination and hate speech laws in accordance with its

international obligations. However, in today's Serbia, discrimination and violence against LGBT people still present a serious problem. This raises the question as to the relationship between homophobia and the general political culture, which is largely dominated by nationalist ideas.

This article responds to that question, by:

(1) analysing the portrayal of the LGBT minority in Serbian public discourse, and determining whether and how Serbian nationalist myths and stereotypes influence homophobia;<sup>5</sup>

(2) identifying whether any elements of the Serbian public discourse constitute hate speech; and

(3) examining the ways in which the presence of homophobic hate speech in public discourse represents a violation of Serbia's human rights obligations.

The analysis focuses on three mainstream public discourses: (i) the discourse of the political elite; (ii) the discourse of the Church; and (iii) the media discourse – with the aim of demonstrating that homophobia is not a characteristic of the far-right alone, but also permeates the voices that represent the majority in Serbian society in a manner which must be addressed in order for Serbia to fulfil its human rights obligations.

## 2. Conceptual Framework

Before embarking on an analysis of the particular situation in Serbia, this section provides an overview of the international legal framework for the protection of LGBT rights, and the different approaches to the conceptualisation of hate speech. It also sets out Serbia's legal obligations in this regard.

### 2.1. International Legal Framework for LGBT Rights: Right to Equality and Non-Discrimination

The rights of LGBT people have been defended from two distinct human rights positions. The first position is based on the right to privacy, guaranteed by Article 17 of the International Covenant on Civil and Political Rights (ICCPR), while the second position is grounded in the right to equality and non-discrimination, and, as such, reflects the principle that all human beings are entitled to equal protection of human rights regardless of, *inter alia*, their sexual orientation. Article 2(1) and Article 26 of the ICCPR require state parties to ensure equal enjoyment of human rights for all people regardless of their "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".<sup>6</sup> Similar protection is afforded by Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Although neither sexual orientation nor gender identity are explicitly mentioned as prohibited grounds of discrimination in the above-mentioned legal provisions, UN bodies and international human rights experts are in consensus on the need to interpret these provisions as including sexual orientation and gender identity. In the landmark decision in *Toonen v Australia*, the UN Human Rights Committee – the treaty body which has the authority to interpret the ICCPR – affirmed that sexual orientation was implicated by the treaty's anti-discrimination provisions as a protected status.<sup>7</sup> Despite the fact that this decision focuses on the State Party's violation of the right to privacy, its finding that sexual orientation is a protected ground of discrimination is of exceptional importance. Moreover, the UN Committee on Economic, Social and Cultural Rights (CESCR) –

the body authorised to interpret the ICESCR – has expressed concern over discrimination on the grounds of sexual orientation and, even more importantly, has established that Article 2(2) of the ICESCR should be interpreted as including sexual orientation.<sup>8</sup>

Serbia is also bound by obligations under the regional human rights instruments of the Council of Europe. Article 14 of the European Convention on Human Rights (ECHR) prohibits discrimination “on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.<sup>9</sup> The formulation “other status” allows the European Court of Human Rights (the Court) to extend the protection under Article 14 to other grounds not specifically mentioned in the Convention. Thus, in its decision in *Salgueiro Da Silva Mouta v Portugal*, the Court stated that “sexual orientation [is] a concept which is undoubtedly covered by Article 14 of the Convention”<sup>10</sup> and, consequently, a difference in treatment based on sexual orientation represented a violation of ECHR. Further, in *Alekseyev v Russia*, the Court reiterated that sexual orientation was implicated by Article 14 as a prohibited ground of discrimination, and also stated that the margin of appreciation afforded to member states in this regard was narrow.<sup>11</sup>

In its General Comment No. 20, CESCR has expressed its view that state obligations in respect of the right to be free from discrimination include not only the adoption of anti-discrimination laws, but also an active approach to eliminating discriminatory practices. In that sense, the CESCR has established that:

“Tackling [systemic] discrimination will usually require a comprehensive ap-

proach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance (...) Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.”<sup>12</sup>

While these recommendations were given in relation to the protection of economic, social and cultural rights, they should be understood as a reflection of state obligations under the right to be free from discrimination as it appears elsewhere.

Moreover, the Yogyakarta Principles emphasise that the obligations of states extend beyond the legislative function, encompassing the adoption of not only anti-discrimination laws, but also various policy measures, administrative procedures and programmes of education that will secure an adequate advancement of persons affected by discrimination.<sup>13</sup> The Yogyakarta Principles elaborate on how a broad range of human rights standards apply in relation to LGBT persons. Although the Principles as such are not legally binding, they reflect the provisions of international treaties and, in that way, affirm the already existing obligation of states to protect human rights.

In a similar manner, the Declaration of Principles on Equality, while not legally binding, reflects a moral and professional consensus on the right to equality, and sets out the positive obligation of states to ensure full enjoyment of the right to equality.<sup>14</sup> The Declaration also affirms that “[s]tates have a duty to

raise public awareness about equality, and to ensure that all educational establishments (...) provide suitable education on equality as a fundamental right.”<sup>15</sup>

## 2.2. Hate Speech

Hate speech, the prohibition of which is a limitation of freedom of expression, is an issue highly relevant to LGBT rights in Serbia since it is one of the fundamental ways in which LGBT rights are being violated. Freedom of expression is guaranteed by all major international, regional and national human rights legal instruments. As affirmed by the Court in *Handyside v The United Kingdom*, freedom of expression “constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man”.<sup>16</sup> On the other hand, freedom of speech can be limited to the extent necessary to protect other important values, such as human dignity and non-discrimination.<sup>17</sup> There is, however, no universal agreement on the need for limiting freedom of speech, or on the scope of the potential limitations.

One of the most prominent classical defences of freedom of speech is given by J. S. Mill in his treatise *On Liberty* in which Mill argues that the government has no right to “prescribe opinions to its citizens, and to determine what doctrines or what arguments they shall be allowed to hear”.<sup>18</sup> On the other hand, Mill introduces the so-called “harm principle”, according to which people have the right to do anything they like, but only as long as it does not cause harm to the rights of others. However, the notion of harm itself has been subject to various interpretations and, consequently, it does not provide a solid base for determining the scope of freedom of expression. Mill’s liberalism has influenced a number of 20th century authors. For in-

stance, Noam Chomsky, in his defence of the French academic Robert Faurisson, who was prosecuted and fined for Holocaust denial, argues that genuine support for free speech implies the support for free expression of the views one disagrees with and finds offensive.<sup>19</sup> Chomsky approaches freedom of speech as a value *per se*, detached and entirely independent from the actual content of speech. Thus, by employing a formalist approach, he neglects the fact that the field of human rights and social sciences, in general, cannot be seen as content-neutral. By pointing out that freedom of speech ought not to be dependent on individual preference and taste, Chomsky fails to acknowledge that there are values – such as human dignity – which should be given priority over individual preference, and which therefore deserve universal respect.

As stated in Article 19(3) of the ICCPR, freedom of expression carries with it special duties and responsibilities and, therefore, may be subject to those restrictions which are provided by law and are necessary: “(a) For respect of the rights or reputations of others; and (b) For the protection of national security or of public order, or of public health or morals”.<sup>20</sup> Further, Article 20 of the ICCPR prohibits any propaganda of war, as well as any advocacy of national, racial or religious hatred.<sup>21</sup> The ECHR also emphasises that the exercise of freedom of expression carries with it duties and responsibilities, and therefore might be subject to certain restrictions which are necessary for, *inter alia*, “the protection of the reputation or rights of others”.<sup>22</sup>

Although many states have adopted legislation prohibiting hate speech, there is no universally accepted definition of the term “hate speech”.<sup>23</sup> According to the Council of Europe’s Committee of Ministers, hate speech

covers “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance”.<sup>24</sup> Although the Court has never given a precise definition of hate speech, in order to determine if an expression constitutes hate speech, the Court will examine: (i) the purpose pursued by the speaker; (ii) the content of the expression, and (iii) the context in which it was disseminated.<sup>25</sup> When considering the first criterion, the question the Court asks is whether the speaker’s intention is to disseminate racist or other superiority ideas, or to inform the public on a public interest matter. Further, with regards to the second criterion which addresses the content of the speech, the Court insists on the distinction between statements of facts and value judgements. For instance, in *Garaudy v France*, the Court found that the denial of the Holocaust, as a clearly established historical fact, was not supported by historical and factual research and, consequently, was not protected by the ECHR.<sup>26</sup> Finally, regarding the context of the expression, the Court takes into account a variety of factors, namely: (i) the social status of the speaker; (ii) the status of the targeted person; (iii) the potential impact of the speech; and (iv) the (dis)proportionality of the interference to the freedom of expression.<sup>27</sup>

Martha Zingo focuses particularly on hate speech against LGBT people, who she describes as “sex/gender outsiders”.<sup>28</sup> She refers to the legal practice of the US Supreme Court, which has historically taken a restrictive view of hate speech, and discusses two different tests employed in freedom of expression cases. The first one is the “clear and present danger” test, according to which the government is allowed to limit freedom of expression only in cases when speech represents an immediate danger of substantive

evil, e.g. the danger of riots or any other kind of violence.<sup>29</sup> The second test – the “bad tendency” test – no longer requires danger to be imminent. The government is permitted to set limitations on free speech “if its *natural tendency and probable effect* was to bring about the substantive evil”.<sup>30</sup> Hence, the focus shifted from the effect of speech to its intended consequences.<sup>31</sup>

The targets of hate speech are individuals or groups who are considered by the speaker to be inferior on the basis of some characteristic that is constitutive to their identity and, generally, innate (e.g. race, ethnicity, sexual orientation etc.). Therefore, by being based on such characteristics, hate speech represents a specific form of discrimination. Katharine Gelber draws upon Jürgen Habermas’ “validity claims” model in order to demonstrate the force of hate speech. In Habermas’ theory of communicative action, “validity claims” are claims made by speakers, and they represent “the rules by which agreement may be reached on the meaning of a communication”.<sup>32</sup> In every utterance, three “validity claims” are simultaneously raised: (i) the claim to truth; (ii) the claim to rightness of norms and values; and (iii) the claim to the speaker’s sincerity. In hate speech, these three “validity claims” appear as: (i) the claim to inequality in the objective world; (ii) the claim to the rightness of discrimination against certain groups; and (iii) the claim of a sincere hater towards the targeted group.<sup>33</sup> Pointing out the “systemic power asymmetry” which favours the hate-speaker, Gelber concludes that a hate-speech-act is a discursive act of discrimination which propagates and perpetuates inequalities.<sup>34</sup>

Having established the legal and conceptual framework relating to the issue, the following section proceeds with an analysis of the specific characteristics of the Serbian context

– including the national legal framework, dominant political myths, and the prevalent approach to gender and homosexuality.

### 3. The Serbian Context

More than a decade after the fall of the authoritarian regime of Slobodan Milošević, Serbia is still struggling to define its political orientation and alignment. Heavily burdened by the legacy of its recent ethno-nationalist past combined with unfavourable economic circumstances, the Serbian Government is endeavouring to balance its commitment to EU integration, on the one hand, and pro-nationalist politics, on the other. In 2009, faced with the country's economic collapse and the global crisis, the Government adopted a series of legislative and policy measures that represented a step forward in the process of European integration.<sup>35</sup> However, at the same time, the anti-European block comprising nationalist parties, the Church, various right-wing groupings, a part of the scholarly elite and some media was growing stronger and gaining new supporters.<sup>36</sup>

The next three sections will seek to analyse the situation in present-day Serbia, in terms of the legal framework for LGBT rights, the political myths which dominate public discourse and, finally, the gender order and homophobia.

#### 3.1. The Prohibition of Discrimination and Hate Speech – Legal Framework for LGBT Rights

Serbia is a party to the key international and regional human rights treaties referred to above: ICCPR, ICESCR and ECHR. Therefore, Serbia has an international legal obligation to protect LGBT persons from discrimination. This obligation requires the Government to: (i) adopt legislation which incorporates

the right to equality and non-discrimination; (ii) ensure effective implementation of that legislation; and (iii) take positive measures to restrict practices which are incompatible with the right to equality (e.g. hate speech). Article 21 of the Serbian Constitution guarantees equality before the law and prohibits both direct and indirect discrimination on numerous grounds. Although the Constitution does not explicitly prohibit discrimination on the basis of sexual orientation and gender identity, the list of prohibited grounds in Article 21 is left open. Article 21 establishes, *inter alia*, that “all direct or indirect discrimination based **on any grounds**, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited”. (Emphasis added.) The inclusion of the wording “on any grounds” in Article 21 suggests that the list of prohibited grounds is not exhaustive, and that the protection could be extended to other grounds not specifically mentioned in the Constitution. The test set out in Principle 5 of the Declaration of Principles on Equality provides a solid basis for the conclusion that Article 21 of the Constitution should be interpreted as including sexual orientation, as it is a characteristic that has historically resulted in discrimination against LGBT persons which:

“(i) [C]auses or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to [the other listed grounds of] discrimination”.<sup>37</sup>

After years of preparation, in March 2009, the Ministry of Labour and Social Policy introduced the draft of the first comprehensive anti-discrimination law in Serbia, which sought to build upon the protections

provided in the Constitution. However, the draft was withdrawn from the parliamentary procedure in response to the objections raised by the Church and other religious denominations to several of its provisions including the prohibition of discrimination based on sexual orientation and gender identity. The withdrawal of the draft law sparked strong criticism by numerous national and international human rights NGOs, as well as EU representatives. Due to the fact that the adoption of a comprehensive anti-discrimination law was a necessary condition for further advancement in European integration, the Anti-Discrimination Law was finally adopted – however, not without changes to the disputed provisions. Gender identity as a prohibited ground of discrimination was omitted, and Article 21 of the Anti-Discrimination Law was adopted with the following wording:

*“Discrimination on the grounds of sexual orientation: Sexual orientation shall be a private matter, and no one may be called to publicly declare his/her sexual orientation. Everyone shall have the right to declare his/her sexual orientation, and discriminatory treatment on account of such a declaration shall be forbidden.”*<sup>38</sup>

Regarding hate speech regulations, Article 49 of the Serbian Constitution prohibits “any inciting of racial, ethnic, religious or other inequality or hatred”.<sup>39</sup> Further, Article 387 of the Criminal Code establishes that violations of human rights based on racial and other discrimination are criminal offences.<sup>40</sup> Finally, according to Article 38 of the Serbian Public Information Law of 2003:

“It is prohibited to publish ideas, information and opinions that incite discrimination, hatred or violence against a person or a group of persons on the basis of their

belonging or not belonging to a certain race, religion, nation, ethnic group, gender, or on the basis of their sexual orientation, regardless of whether the publication at stake constitutes a criminal offence or not.”<sup>41</sup>

Hence, Serbia clearly belongs to the group of countries that have thoroughly regulated hate speech. Nevertheless, hate messages in public narratives are frequent, and, as is evident in the lack of response from the authorities to the discourses discussed in section 4 below, the chances that offenders will be prosecuted are slim. It should be noted that targets of hate speech in Serbia are numerous, and sexual minorities are only one of them.

### **3.2. Serbian Politics and Nationalist Myths**

Despite legislative reform which represents a strong move towards the implementation of European human rights standards, Serbian society is still deeply imbued with nationalist ideas, most obviously expressed in various political myths. One of the most dominant national myths in contemporary Serbia is the “Kosovo myth”. As Darko Gavrilović and Ana Ljubojević argue, the “Kosovo myth” is a myth about borders and sacrifice.<sup>42</sup> According to this myth, the Kosovo battle of 1389 between the Serbian and Ottoman armies was a sacrifice made by the Serbian people for the benefit of the entire Christian civilisation. Hence, the “Kosovo myth” has established Serbs as “the keepers of the gates of the civilised world”.<sup>43</sup> Further, this myth has enforced the belief that Serbs have never been rightfully rewarded for the sacrifice they made in 1389. Consequently, as Gavrilović and Ljubojević point out, the “Serbs harboured a growing feeling of injustice and bitterness towards the West, while the nationalists once again found themselves inspired by topics from ancient history”.<sup>44</sup>

Three years after the declaration of Kosovo independence, the great majority of Serbian political actors, including the ruling Democratic Party, still refuse to accept the fact that Kosovo is not a part of Serbia anymore, and commonly refer to it as the violation of Serbian sovereignty and territorial integrity. At the same time, human rights, and particularly LGBT rights, are perceived by the majority in Serbian society as something “imported” from the West and forcefully imposed on the Serbian people contrary to their tradition and cultural values. The “Kosovo myth” is, therefore, successfully used as a tool of mobilisation around the idea of Western conspiracy against Serbia, as well as the idea of the superiority and the great merit of the Serbian nation.

Captivated by the myths about the heroic past, and determined to persist in denying Kosovo independence, the Serbian political establishment needed an ally. With the rise of the EU, and Russia’s willing distance from the West,<sup>45</sup> it is perhaps not surprising that the ally was found in the government of the Russian Federation. According to Vjekoslav Perica, the Serbo-Russian “post-communist romance” signifies a revival of the once powerful “pan-Slavic myth” – the myth about the common descent of all Slavonic peoples, underlying the idea of a pan-Slavic kingdom.<sup>46</sup> However, in its new Serbo-Russian version, the “pan-Slavic myth” has been reduced to the idea of pan-Orthodoxy, i.e. to the concept of brotherhood of all Orthodox Slavs. This fact highlights a very important feature of the “special relationship between Serbia and Russia”: it was largely based on religion. Consequently, the influence of the Church has drastically increased, not only in terms of cultural domination, but also in terms of institutional and political significance, as well as economic power. Analysing the intertwining of nationalism, state politics and

religion in Serbia, Rada Drezgic points out that the “instrumental pious nationalism” of the 1990s (in which religion was a mere instrument of state politics) was replaced by a model of “religious nationalism” after 2000, characterised by the symbiotic relationship between political institutions and the Church.<sup>47</sup> Therefore, imitating the Russian model, Orthodox Christianity has in effect become the state religion, and the secularity of Serbian politics has become highly questionable in numerous instances, some of which will be discussed below.<sup>48</sup>

The myth that substantially builds on the Kosovo myth is the myth about Serbs as a warrior nation. The recent ethno-nationalist conflict in the former Yugoslavia has only fuelled the belief that constant war is Serbia’s destiny, while the subsequent trials before the International Criminal Tribunal for the former Yugoslavia (ICTY) strengthened the perception of the accused political leaders as war heroes and great martyrs.<sup>49</sup> As Ljubojević argues, “[t]he ‘swan song’ of once active national leaders, later ICTY detainees, is incentivizing new forms of nationalism practiced by young generations that never experienced the war”.<sup>50</sup> Thus, in the absence of a “real” war enemy, the new generations inspired by warrior myths and eager to affirm their patriotism started looking for the enemies of the nation in all those who do not conform to their perception of normality.

### 3.3 Gender Order and Homophobia in Serbia

Serbian society, as an unstable transitional democracy balancing between so-called “Europeanisation” and pro-nationalist politics, is still a male-dominated society which adopts a patriarchal, traditional and conservative approach to gender order. While acknowledging that religion is not inherently op-

pressive towards women, Drezgić points out that Orthodox Christianity, like other monotheistic religions, promotes a strict division between gender roles, in which the public realm is reserved for men and the private realm for women.<sup>51</sup> Similarly, Žarana Papić argues that the patriarchal system of values in Serbian society has been driven by a particularly militant type of nationalism which glorified men as warriors and heroes, whilst putting women into the submissive role of mothers and wives.<sup>52</sup>

Although same-sex sexual activity was decriminalised in Serbia in 1994, Serbian society is still deeply homophobic, and non-heterosexual orientations are socially unacceptable and treated as degeneration and sickness.<sup>53</sup> The attitude of Serbian society towards homosexuality is best illustrated by the research carried out in 2010 by the Gay Straight Alliance, a Serbian LGBT organisation, in cooperation with the Centre for Free Elections and Democracy, a Serbian NGO concerned with election monitoring and social research. According to that study, 67% of the respondents believe that homosexuality is an illness, while 53% think that the Government should take measures to combat homosexuality.<sup>54</sup> Further, 56% of the respondents see homosexuality as very dangerous to society, while 64% support the Church in its condemnation of LGBT people. Only 15% of respondents believe that LGBT people in Serbia are a vulnerable group, and only 12% think of Gay Pride Parades as legitimate means for advancing the rights of sexual minorities.<sup>55</sup> As a consequence of such a high level of homophobia, LGBT people in Serbia live in isolation, social exclusion, fear, and in a situation in which guilt and shame are constantly imposed on them.<sup>56</sup> Moreover, sexual minorities are exposed to all forms of violence, ranging from psychological and verbal violence, such

as rejection by family and friends, to institutional violence in the form of expulsion from work and harassment by superiors, to condemnations, threats and intimidation, finally resulting in physical violence.<sup>57</sup>

#### **4. Discourse Analysis**

While the previous section identified key characteristics of the Serbian context which are most relevant for this study, this section highlights three prominent public discourses in Serbia through which attitudes towards homosexuality can be more specifically examined. The section focuses on the discourses that emerged in relation to three major events, namely: (i) the adoption of the Anti-Discrimination Law in March 2009; (ii) the cancellation of the 2009 Parade in September 2009; and (iii) the 2010 Parade held in Belgrade in October 2010 – and seeks to identify developments and changes in the three prominent discourses.

##### **4.1. The Discourse of the Serbian Political Parties<sup>58</sup>**

During the parliamentary debate on the Anti-Discrimination Law in 2009, its most vocal opponents were not only the opposition parties, but also one of the parties from the ruling coalition, United Serbia. This is a right-wing populist party relying heavily on the charisma of its president, Dragan Marković Palma, who, in his public appearances, never misses the opportunity to highlight his commitment to traditional Serbian values. Explaining the reasons for being against the adoption of the Anti-Discrimination law, he pointed out: “I have nothing against homosexuals, but I will never vote for something that is sick”.<sup>59</sup> He also stated that he “could not stand” gays, and that he was disgusted by their effeminate appearance.<sup>60</sup> Further, a representative of the largest opposition party –

the Serbian Progressive Party (SNS) – made the following statement:

“The affirmation and promotion of the so-called ‘personal preferences’ under the slogan of equality and freedom is not acceptable. This will, undoubtedly, lead to a situation in which sodomy and paedophilia will be protected as personal preferences.”<sup>61</sup>

A senior official of the right-wing Serbian Radical Party (SRS) also compared homosexuality with paedophilia, stressing that the law which prohibits discrimination against LGBT people would eventually open the door for legalising paedophilia. He also pointed out that the Anti-Discrimination Law was imposed upon the Government by the powerful Western states, and was aimed at destroying the Serbian nation.<sup>62</sup> Finally, the conservative and pro-Christian Democratic Party of Serbia (DSS) argued that the law was not acceptable as it did not have the approval of the Church.<sup>63</sup>

The discourse of those Serbian parties which voted against the adoption of the Anti-Discrimination Law exemplifies the existence of strong stereotypes (and countertypes) in Serbian politics. The stereotype that represents normality is marked by Serbdom, Orthodox Christianity, tradition and unalterable gender roles, while the countertype – signifying degeneration – encompasses the pro-European orientation, secularism, equality between man and woman and, finally, homosexuality and LGBT rights. These stereotypes correspond to the ideal of manliness and its antithesis. As George Mosse argues, although the masculine stereotype is not a characteristic of right-wing ideologies alone, it is nationalism that links manliness with patriotism, traditional values and religion.<sup>64</sup> Therefore, the analysis of the stereotypes existing in the Serbian political discourse indicates

that homophobia in Serbian politics correlates with the general right-wing attitudes.

As discussed above, the European Court of Human Rights, in order to determine if an expression constitutes hate speech, examines (i) the purpose pursued by the speaker; (ii) the content of the expression; and (iii) the context in which it was disseminated. An assessment of the above statements of Serbian politicians based on these criteria demonstrates that the primary purpose of these statements has not been to inform the public on important matters, but to establish homosexuals as physically and morally inferior to heterosexuals, thereby strengthening already anchored prejudices against the LGBT minority. Regarding the content of the expression, the Court has established that “a distinction needs to be made between statements of fact and value judgments”, adding that “even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it”.<sup>65</sup> The above-mentioned statements of Serbian politicians do not represent statements of facts, nor are they supported by facts. On the contrary, the statements are in opposition to the fact that homosexuality is not a disease – established by the World Health Organisation and thus internationally recognised as scientific truth. Finally, regarding the context of the expression and the respective positions of the speaker and the targeted group, it is clear that the Serbian context is characterised by significant power asymmetry between the political class and the LGBT minority, in favor of the former. Further, the Court asserted in *Erbakan v Turkey* that “it is crucially important that politicians avoid disseminating comments in their public speeches which are likely to foster intolerance”.<sup>66</sup> It could therefore be concluded that the above discussed statements of Serbian politicians pass the test employed by the Court and, therefore, amount to hate speech.

During the preparations for the 2009 Parade, the opposition parties, as well as United Serbia, maintained the same attitude towards homosexuality, arguing that the parade would be a public demonstration of sickness and abnormality. The members of the ruling coalition, on the other hand, pointed out that the LGBT community does have the right to hold the parade; however, none of the Government officials explicitly supported the Parade, claiming that they had already demonstrated their attitude by voting in favour of the Anti-Discrimination Law adopted in March that year.<sup>67</sup> One of the most vocal opponents of the 2009 Parade from the ruling coalition was Dragan Đilas, the mayor of Belgrade, the city in which the 2009 Parade was due to take place. Đilas stated that he, personally, was against the 2009 Parade,<sup>68</sup> arguing that sexual orientation is an exclusively private matter and, therefore, there is no reason for disclosing it.<sup>69</sup> On the other hand, he also stated that he was against violence of any kind, condemning on that occasion the far-right organisations who threatened to attack the marchers and pointing out that their threats adversely affected the image of the city of Belgrade.<sup>70</sup> The fact that Đilas condemned the violence against the marchers and did not explicitly define LGBT people as morally or in any other way inferior suggests that he was only practising the freedom to publicly express his views. On this basis, his statements could arguably not be defined as hate speech. Nevertheless, the comments of the Belgrade mayor are indeed deeply homophobic, and indicate a lack of understanding of the basic human rights principles set forth in the major international conventions and affirmed by Serbian laws. Đilas failed to recognise that the 2009 Parade was intended to be a political protest against discrimination, rather than a mere demonstration of sexuality. By stating that there is no need for such an event, he implied that discrimination on

the basis of sexual orientation and gender identity is either irrelevant or non-existent. Further, the wording that Đilas used, as well as the sequence of his statements, suggests that he was equally against the violence as he was against the parade itself. Finally, by being more concerned about the image of the city than the marchers' lives and security, Đilas demonstrated his disregard for the protection of human rights. It could, therefore, be concluded that the views of the Belgrade mayor exemplify implicit hostility against homosexuals and, as such, perpetuate homophobia as a mainstream attitude.

The cancellation of the 2009 Parade prompted harsh criticism by the international community, primarily by EU officials, which consequently led to a shift in the discourse of the Serbian political elite regarding the Parade. When Serbian LGBT activists announced a new attempt to hold a parade in October 2010, the biggest opposition party, SNS, was eager to demonstrate its allegedly pro-European orientation and entirely changed its attitude towards LGBT issues. During the meeting with the Parade organisers, a senior SNS official, Aleksandar Vučić, pointed out that violence and discrimination against those who are different from the majority were unacceptable.<sup>71</sup> Even SRS – although refusing to support the 2010 Parade itself – condemned discrimination of any kind.<sup>72</sup> Government officials became more explicit in their support for the LGBT minority, and demonstrated a stronger commitment to securing the 2010 Parade.<sup>73</sup> The 2010 Parade was finally held and the police managed to prevent the far-right extremists from attacking the marchers, which, in itself, represented a step forward. However, the Serbian political discourse is still conspicuously lacking an explicit acceptance of LGBT people as non-degenerate and entirely equal with heterosexuals, as well as

an unequivocal condemnation of all those opposing their rights.

#### 4.2. The Discourse of the Serbian Orthodox Church

Over the past two decades, Serbian society has gone through a process of rapid de-secularisation.<sup>74</sup> From a society in which the Church was marginalised and thoroughly subordinated to the state, Serbia has turned into a society with high rates of religious identification and in which the popularity of the dominant religious institution, the Serbian Orthodox Church, has drastically increased.<sup>75</sup> As Drezgić argues, throughout modern history, the Church developed its authority as a national, rather than a religious, institution, which in itself indicates its political aspirations.<sup>76</sup> Despite the guarantee of secularity in Article 11 of the Constitution, the power of the Church in Serbian society is indisputable. Religious views have entered public discourse and created a new reality, imposing new perceptions of social phenomena.

The Church considers that “all uses of the human sex organs for purposes other than those ordained by creation runs contrary to the nature of things as decreed by God, interfering with the *normal* development of societal patterns”.<sup>77</sup> (Emphasis added.) Furthermore, according to Orthodox views, there appear to be two types of homosexuality – one representing a medical disorder, and the other resulting from a moral failure. In both cases, correction is called for, primarily in terms of medical and psychiatric treatment.<sup>78</sup> The general attitude of the Church towards homosexuality expressed in the above statement exemplifies the way in which a powerful actor, through discursive practice, is able to establish the notion of normality. As Michel Foucault has shown, the notion

of normality does not have a universal and unalterable meaning; on the contrary, the actual content of this notion varies widely, according to the values of those in power.<sup>79</sup> In the case of Serbia, Christianity sets the parameters for defining the scope of normality and, consequently, all those who do not live in accordance with Christian values are outside the “normal”. Thus, the above statement contradicts the right of every individual to choose their own religion or to choose not to have religion, and discriminates against those with views which differ from those of the Christian Orthodox Church.

The general attitude of the Church towards homosexuality has been expressed on numerous occasions, particularly during the past couple of years in which LGBT rights in Serbia have become a topic of increased debate. As mentioned above, the draft of the first comprehensive anti-discrimination law in Serbia was withdrawn from the parliamentary procedure in 2009 in response to the objections raised by the Church and other religious denominations. Although the objections were directed towards more than one provision of the draft law, the major stumbling block was Article 21, which, *inter alia*, expressly prohibited discrimination on the basis of sexual orientation and gender identity. In its appeal to the President of the Serbian Parliament, the Holy Assembly of Bishops of the Church pointed out that “there is no scientific evidence that sexual orientation is an inborn trait”, further adding that “a number of eminent scientists deem transsexuality to be a mental disorder”.<sup>80</sup> The appeal also asserted that the affirmation of gender identity and sexual orientation as prohibited grounds of discrimination would endanger religious freedom as well as freedom of conscience.<sup>81</sup> This statement established homosexuality and transsexuality as mental diseases threatening the societal order

which comprises a set of norms and values that in the Serbian context has a prominent religious dimension. While appealing to freedom of religion and freedom of conscience, the Holy Assembly of Bishops demonstrated hostility to sexual minorities and a complete disregard for their human rights.

During the preparations for the 2009 Parade, the Church was vocal in condemning homosexuality. Metropolitan Amfilohije Radović, at the time acting in the capacity of Patriarch, argued that the 2009 Parade would actually be a “parade of shame”, quoting the Serbian popular saying that “what the mad are proud of, ashames the smart”.<sup>82</sup> Moreover, he referred to the event as the parade of “Sodom and Gomorrah”, further adding that “the tree that does not bear fruits is to be cut and thrown into fire”.<sup>83</sup> The statements of Metropolitan Amfilohije Radović violated the dignity of the LGBT minority members in more than one way. First, he declared homosexuality to be a disgrace, which implied that LGBT people – as those unable to resist “shameful impulses” – were inferior to those who lived in accordance with the Christian morality. Secondly, the above statements expressed the view that homosexuals were not only mentally ill (“insane”), but also physically degenerate and barren, as they do not use their bodies for the purposes decreed by God. Finally, the “tree metaphor” used by Metropolitan Amfilohije represents a rather explicit call for a violent intervention, although the Serbian prelates pointed out on several occasions that the Church was against violence of any kind.

As none of the prelates who publicly condemned homosexuality and called for the cancellation of the 2009 Parade was prosecuted for either incitement to violence or hate speech, the preparations for the 2010 Parade in autumn 2010 were met with the

same attitude of the Church. The Holy Assembly of Bishops, in its official announcement before the Parade, stated that the Church was strongly against the Parade, referring on that occasion to the LGBT population as the “*so-called* sexual minorities” and to their interests as “frivolous”.<sup>84</sup> Furthermore, the announcement argued that Gay Pride Parades violate the right to family life and insult the dignity of believers.<sup>85</sup> The Church therefore denied LGBT people the status of minority, and declared them a threat to the “normal” order of things, i.e. the “family life” in accordance with Christian values. One day after the 2010 Parade, Metropolitan Amfilohije Radović gave the following statement:

“Yesterday we watched the stench poisoning and polluting the capital of Serbia, scarier than uranium.<sup>86</sup> That was the biggest stench of Sodom that the modern civilisation raised to the pedestal of the deity. You see, the violence of wrongheaded infidels caused more violence. Now they are wondering whose fault it was, and they are calling our children hooligans.”<sup>87</sup>

Metropolitan Amfilohije Radović therefore equated LGBT people with a dangerous weapon and accused them of being responsible for the violence that occurred in the streets of Belgrade during the 2010 Parade. Further, he explicitly linked homosexuality with “modern civilisation”, defining it as something imposed by modernity and invoking, in that way, the myth about a Western conspiracy against Serbia.<sup>88</sup> Finally, by implying that it is wrong to call the attackers of the 2010 Parade “hooligans”, Metropolitan Amfilohije openly sided with them, providing, therefore, a legitimation for the violence against the LGBT minority. Clearly, the above-cited statement constitutes hate speech as: (i) it is directed towards a minority group that is – in the speaker’s view – infe-

rior; (ii) it offends the human dignity of LGBT people; and (iii) its “natural tendency and probable effect” is to incite violence and/or discriminatory treatment against the targeted group.<sup>89</sup> A couple of months after the 2010 Parade, the Serbian Equality Protection Commissioner instructed Metropolitan Amfilohije Radović to publicly apologise to the participants of the Parade for hate speech. However, Metropolitan Amfilohije Radović said he “had no intention of apologising”, confirming once again his views on homosexuality.<sup>90</sup> Metropolitan Amfilohije Radović has never been indicted for hate speech. The Equality Protection Commissioner, shortly after the initial warning, asserted that the Government had “no capacity” for initiating judicial proceedings against Amfilohije Radović.<sup>91</sup>

### 4.3. The Discourse of the Serbian Media<sup>92</sup>

Despite the fact that Article 38 of the Serbian Public Information Law explicitly lists sexual orientation as one of the prohibited basis of hate propaganda, anti-gay messages frequently appear in the Serbian media, while the offenders go unpunished. The controversy surrounding the adoption of the Anti-Discrimination Law in March 2009 was given significant coverage in the Serbian media. While some of the Serbian daily newspapers were explicitly advocating for the adoption of the law and condemning its withdrawal from the parliamentary procedure, others, more or less openly, supported the views of the Church. For instance, *Večernje Novosti*, the daily newspaper which is known for its collaboration with the regime of Slobodan Milošević, published an interview with the bishop of the eparchy of Bačka, Irinej Bulović, with the title “The Church is Only Defending Morality”.<sup>93</sup> In a similar manner, *Kurir* claimed that the Government had deceived the Church by returning the law to

the parliamentary procedure. Under the title “Fraud”, *Kurir* stated the following:

“The Serbian Government deceived the dignitaries of the Church, after days of the negotiations on the amendments to the anti-discrimination law. At today’s session of the Government, the new draft of the law will be adopted, after only cosmetic changes.”<sup>94</sup>

Clearly, these newspapers saw the Church’s interference in the legislative process as perfectly acceptable, legitimate and “normal”. Hence, the discourse of the above-mentioned media reflects the process of de-secularisation of Serbian society which Drezgić and Perica analyse in their work. As Drezgić argues, the relationship between the political institutions and the Church, as a result of which, during the 1990s, religion was used primarily as an instrument of aggressive nationalist politics, has transformed after 2000 into a much tighter relationship in which the Church gained more power and influence.<sup>95</sup> Similarly, Perica points out that, during the government of Vojislav Koštunica (from 2004 to 2008), Orthodox Christianity practically became the state religion, and after the elections of 2008 which brought to power the current Serbian president Boris Tadić, the relationship between the Government and the Church remained unchanged.<sup>96</sup> Both Drezgić and Perica illustrate their arguments by pointing to the Church’s various attempts to influence the legislation. Therefore, although the Anti-Discrimination Law has finally been adopted, the controversy that it had provoked confirms the ability of the Church to interfere in matters of state politics and to stall reform processes.

*Politika*, the oldest daily newspaper in the Balkans which is partially owned by the Government, immediately after the adoption of the Anti-Discrimination Law published a col-

umn written by Slobodan Antonić, a Serbian political analyst who is known for his rightist views. In the column, Antonić explicitly supported the Church in its struggle against the Anti-Discrimination law, suggesting that the Church is a legitimate representative of the great majority of Serbian society.<sup>97</sup> Further, he expressed deep concern about the provision prohibiting the discrimination on the basis of sexual orientation and its potential consequences. Antonić wrote:

“As a next step, anti-discrimination will not be enough anymore. They<sup>98</sup> will require equality (...) After the legal equality is obtained, they will go further and request the recognition of social equivalence (...) And in a few years we will be required to officially declare homosexuality to have the equal value as heterosexual orientation.”<sup>99</sup>

It is clear from the above statement that Antonić considers homosexual orientation to be of less worth than heterosexual. Although he did not openly claim that LGBT *people* are worth less than others, his position rather implies that homosexuals could not be equal in rights with heterosexuals. Such a view strongly contradicts Article 1 of the Universal Declaration of Human Rights which proclaims the equality of all human beings and therefore entails the prohibition of discrimination in the enjoyment of human rights. Further, by openly opposing the equal rights of all human beings, Antonić implied that: (i) the inequality is an objective fact; (ii) discrimination against the LGBT minority is legitimate; and (iii) such discrimination is justified by the superiority of heterosexual over homosexual orientation. In light of the hate speech criteria employed by the Court: (i) Antonić was advocating the idea of the superiority of heterosexual people over LGBT people; (ii) his views were not supported by facts; and (iii) his social position imposed

upon him the duty not to incite intolerance and discrimination – a duty which Antonić did not respect and fulfil. The above analysis confirms his statement as hate speech against LGBT people.

After Serbian LGBT activists had announced their plans to hold the 2009 Parade, a number of Serbian newspapers joined the anti-gay campaign that finally led to the cancellation of the parade. Some daily newspapers, such as *Kurir*, *Press*, *Alo!* and *Pravda* gave considerable space to right-wing extremists, without providing any critical review of, or comment on, their views.<sup>100</sup> Referring to the pro-fascist organisations as “patriotic groups”, “football supporters” or simply “youths”, the above-mentioned Serbian newspapers were continuously publishing their hate messages and calls for violence.<sup>101</sup> For example, *Kurir* published the following statement of Mladen Obradović,<sup>102</sup> leader of *Obraz* – one of the Serbian pro-fascist organisations:

“A huge number of people will come, from all the areas where Serbs live. Our message to faggots is clear: We are waiting for you.”<sup>103</sup>

Further, at the time, sensational headlines abounded, such as:

- (i) “Gay Parade represents the imposition of a new ideology on Serbia”<sup>104</sup> – a headline suggesting that homosexuality is an ideology, not just a sexual orientation, forced upon Serbia from outside; and
- (ii) “After faggots, sodomists and necrophiliacs will want to parade”<sup>105</sup> – a title that, once again, establishes homosexuality as a sickness and a degeneration.

One article published in *Kurir* was particularly indicative of this phenomenon. It was entitled “Faggot secedes Kosovo!” and was

about a prominent LGBT activist, Predrag Azdejković, who on his blog had started an internet campaign called “De-Kosovisation of Serbia” – a satirical critique of the Serbian politics related to Kosovo and the stubborn refusal of the Serbian politicians to accept Kosovo’s independence. *Kurir* called the campaign “offensive” and referred to homosexual men as “faggots”.<sup>106</sup> Two elements of the discourse present in the above article indicate the connection between homophobic and nationalist attitudes. First, as Gavrilović and Ljubojević argue, the “Kosovo myth” which still dominates a large part of the Serbian society, including the current Government, suggests that, because of the great sacrifice made by the Serbian people in the 14<sup>th</sup> century, Kosovo will always remain a part of Serbia.<sup>107</sup> Therefore the above article, by appealing to the patriotic feelings of the readers, seeks to represent LGBT people – particularly human rights activists – as the enemies of the Serbian nation. In Mosse’s view, the representation of countertypes – in this case homosexuals – as an active threat to societal order and national unity is a prominent characteristic of right-wing ideologies.<sup>108</sup> Second, Mosse points out that fascist and nationalist regimes tend to promote the idea of collaborations and plots between the different categories of outsiders.<sup>109</sup> As the “loss” of Kosovo is generally associated with the Western conspiracy against Serbia, the above article indicates that LGBT people collaborate with Western powers in order to destroy the “healthy” Serbian nation.

During the preparations for the 2010 Parade, the above-discussed Serbian newspapers continued the anti-gay campaign in a very similar manner. After the 2010 Parade was finally held – followed by the anti-gay riots – the general attitude prevailing in the discourse of the majority of the Serbian media was that the parade had been utterly unne-

cessary and that the damage caused by it<sup>110</sup> far outweighed the benefit. *Politika*, two days after the 2010 Parade, published a column by political analyst Đorđe Vukadinović, the editor in chief of the Serbian right-wing quarterly *New Serbian Political Thought (Nova Srpska Politička Misao)*, in which he argued that the 2010 Parade had been forced upon Serbia from the West, contrary to the “historical and political logic”.<sup>111</sup> He implied that there is a sharp contrast between Serbia and the West, and that the notion of LGBT rights is highly incompatible with Serbian history and politics. Further, Vukadinović compared the far-right extremists who intended to attack the 2010 Parade participants with the participants in the anti-Milošević demonstrations who used violence against the Milošević police – primarily as a response to the violence used by the police themselves. Hence, Vukadinović suggested that the far-right violence against minorities is essentially the same as the struggle against an authoritarian regime. As such, he implicitly justified the violence that occurred during the 2010 Parade. The article by Đorđe Vukadinović exemplifies a rather dangerous relativisation of human rights, suggesting that LGBT rights are not universal but entirely dependent on political and historical circumstances. Moreover, by practically equating an authoritarian regime with the LGBT minority, Vukadinović failed to acknowledge a very important difference between those violating human rights, on the one hand, and the victims of human rights violations, on the other.

The discourses of the Serbian political elite, the Church and the daily newspapers represent varying degrees of homophobia, ranging from explicit calls for violence to a rather concealed hatred against sexual minorities. While not all the discourses discussed above reach the level of hate speech, they still represent a breach of Serbia’s legal obli-

gations. As the discussion above has shown, the state's obligation to protect minorities and marginalised groups extends beyond the adoption of anti-discrimination and hate speech legislation, to include the taking of effective action to implement that legislation. More specifically, even where the speech in question does not reach the threshold of hate speech, the state is under the obligation to tackle a culture of homophobia, by carrying out various policy measures and programmes, such as awareness-raising and human rights mainstreaming. The culture of impunity that is still present in the Serbian public arena significantly impedes the efforts towards the effective implementation of the Anti-Discrimination Law, thus showing that Serbia does not fully meet its human rights obligations.

## 5. Conclusion

Despite the declared democratic and pro-European orientation of the Government and some positive legislative reforms in the recent years, Serbian society is still deeply imbued with nationalist myths that incite and support a culture of homophobia. The analysis of the discourses of Serbian politicians, the Church and the media has shown the following:

(i) the LGBT minority is depicted through stereotypes that represent homosexuality as moral and/or physical degeneration constituting a threat to the normal societal order and the Serbian nationhood;

(ii) the stereotyping of the LGBT minority is strongly supported by the national myths;

(iii) as the above stereotypes are characteristic of right-wing ideologies and regimes, it is not surprising that homophobia is primarily (although not exclusively) a feature of the discourse of the pro-nationalist Serbi-

an parties and the media with a right-wing political alignment;

(iv) hatred against LGBT people in Serbian society has a pronounced religious dimension, which is enhanced by the fact that the Church has, over the course of the last two decades, gained a considerable political power and influence; and

(v) after the cancellation of the 2009 Parade, the discourses on homosexuality and LGBT rights have changed towards more tolerance and more respect for the rights of sexual minorities, which is primarily a consequence of the political pressure from the EU and the international community in general. Nevertheless, homophobia in Serbian public discourse is still present.

Further, the presence of hate speech in three prominent discourses undermines both the Anti-Discrimination Law and the legislation prohibiting hate speech, and reveals the failure of the Government to comply with its legal obligations. Firstly, the Government itself – i.e. certain members of the ruling coalition – violates the human rights of sexual minorities by publicly spreading hatred against homosexuals. Secondly, the Government is failing to protect LGBT people from the hate speech of private entities, such as the Church and the media, showing therefore that the right to equality is not being effectively implemented. Finally, the Government is not taking sufficient policy, administrative and educational measures to protect the rights of LGBT minority members and to tackle the culture of homophobia. It is therefore failing to fulfil its positive obligations under the international and national human rights instruments to which it is a party.

As indicated above, the gap between the legal obligations and actual practices of the

Serbian state agencies suggests that the reform processes in Serbia are yet to be completed. Despite the adoption of various “pro-European” laws, the effective enforcement of these remains elusive. The obstacles to law enforcement represent a complex issue that ought to be addressed at both the state level, and within civil society – particularly in human rights advocacy and in academia. In terms of human rights activism, the EU conditionality could be successfully used as a means of pressurising the Government to comply with its legal obligations.

Further, the analysis in this article has pointed to a concerningly prominent trend in contemporary Serbia – the trend of de-secularisation of the society and the extensive interference of the Church in state affairs. In that sense, it is of great importance to set the limits of the Church influence. The fact that the secularity of the state is guaranteed by Article 11 of the Serbian Constitution indicates that legal norms, once again, are not being adequately implemented. Government representatives and other politicians are primarily responsible for preserving the secularity of the Serbian state. They must remain independent from the Church and resist attempts by the Church to influence legislation and other state affairs.

Finally, changes at the level of popular consciousness about LGBT rights – and human rights in general – are needed. As the above analysis has shown, the legacy of the nationalist past is still very much alive in contemporary Serbia, and the national myths and stereotypes dominate society. Despite the fact that human rights language has gradually entered Serbian public discourse, general awareness of the meaning and content of human rights is low. Moreover, because of the prejudices and stereo-

types related to homosexuality, opposition to LGBT rights is even stronger than to the rights of other minorities. Therefore, human rights education – including the education on the rights of sexual minorities – is of crucial importance.<sup>112</sup> By reforming its education policies the Government would encourage different social actors to change their attitudes towards individuals and groups facing systemic discrimination. By doing this, the Government would better fulfil its positive legal obligations to realise the right to equality, as best articulated in General Comment No. 20 of CESCR, the Yogyakarta Principles, and the Declaration of Principles on Equality. Regarding LGBT rights, education policies ought to be based on several principles. First, that homosexuality is not an illness and it is neither illegal nor immoral; it is a part of personal identity that is equal in value to heterosexual orientation. Second, LGBT persons are equal in rights with other individuals and, consequently, discrimination on the basis of sexual orientation and gender identity represents a violation of human rights. Third, homosexuality does not represent a threat to the nation, and does not violate freedom of religion. Religious views and/or patriotic feelings must not be used as a justification for discrimination against LGBT people. Finally, while the EU conditionality could be a useful means for pressuring the Government to comply with its legal obligations, in the field of education, human rights must not be presented as something imported from the West and culturally alien to Serbia. On the contrary, it is important to stress that the recognition of the equal rights of all individuals, regardless of their sexual orientation or any other inborn trait, would benefit Serbian society and all its citizens. In other words, the implementation of hu-

man rights is not only a prerequisite for the European integration and a nuisance that must be endured for a better future in the EU, but also a prerequisite for societal development and the protection of the dignified life of all human beings.

<sup>1</sup> Isidora Stakić completed a six month internship with The Equal Rights Trust in July 2011. This article is based on the author's thesis for the Masters in Human Rights Practice at Roehampton University, UK, submitted in May 2011.

<sup>2</sup> Helsinki Committee for Human Rights in Serbia, *Annual Report on Human Rights: Serbia in 2009: Europeanization – Accomplishments and Limitations*, 2010, p. 276.

<sup>3</sup> According to the Copenhagen Criteria, established by the European Council at the Copenhagen European Council in 1993, a candidate country must achieve stability of institutions guaranteeing, *inter alia*, human rights and respect for and protection of minorities. The Copenhagen Criteria are available at: [http://ec.europa.eu/enlargement/enlargement\\_process/accession\\_process/criteria/index\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm).

<sup>4</sup> "Serbia Police Clash with Far-right Rioters at Gay Pride March", *guardian.co.uk*, 10 October 2010, available at: <http://www.guardian.co.uk/world/2010/oct/10/serbia-police-rioters-gay-pride>.

<sup>5</sup> See Weinberg, G., *Society and the Healthy Homosexual*, St. Martin's Press, 1972, cited in Fone, B., *Homophobia: A History*, Picador, 2000, p. 5. George Weinberg, the American psychologist who coined the term "homophobia" defined it as "the dread of being in close quarters with homosexuals". Although this definition, as well as the suffix "-phobia", suggests the irrational nature of the fear at stake, this article does not approach homophobia as an irrational fear, but primarily as a socially constructed set of prejudices against LGBT people.

<sup>6</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI) (1966), Articles 2(1) and 26. The right to non-discrimination is also enshrined in the International Covenant on Economic, Social and Cultural Rights (G.A. Res. 2200A (XXI) (1966), Article 2(2)) and the International Convention on the Rights of the Child (G.A. Res. 44/25 (1989), Article 2) as well as in the provisions of regional human rights instruments such as the European Convention of Human Rights, Article 14 and the African Charter on Human and Peoples' Rights, Article 2.

<sup>7</sup> UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992, 31 March 1994.

<sup>8</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para 2)*, UN Doc. E/C.12/GC/20, 2 July 2009, Para 27. See also UN Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/4, 1 July 2003, Para 6; and UN Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, Para 21.

<sup>9</sup> European Convention on Human Rights and Fundamental Freedoms (ECHR), 1950, Article 14.

<sup>10</sup> *Salgueiro Da Silva Mouta v Portugal*, Appl. No. 33290/96, ECHR, 21 December 1999, Para 28.

<sup>11</sup> *Alekseyev v Russia*, Appl. Nos. 4916/07, 25924/08 and 14599/09, ECHR, 21 October 2010.

<sup>12</sup> UN Committee on Economic, Social and Cultural Rights, above note 8, Para 39.

<sup>13</sup> O'Flaherty, M. and Williams, G., *Jurisprudential Annotations to the Yogyakarta Principles*, University of Nottingham Human Rights Law Centre, 2007.

<sup>14</sup> The Equal Rights Trust, *Declaration of Principles on Equality*, London, 2008, Principle 3, available at: <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>.

<sup>15</sup> *Ibid.*, Principle 17.

<sup>16</sup> Weber, A., *Manual on Hate Speech*, Council of Europe Publishing, 2009, p. 1.

<sup>17</sup> *Ibid.*, p. 2.

<sup>18</sup> Mill, J. S. (ed. Collini, S.), *On Liberty and Other Writings*, Cambridge, 1989, p.19.

<sup>19</sup> Chomsky, N., "Some Elementary Comments on the Right of Freedom of Expression", Preface to Faurisson, R., *Mémoire en défense*, 1980, available at: <http://www.chomsky.info/articles/19801011.htm>.

<sup>20</sup> ICCPR, above note 6, Article 19(3).

<sup>21</sup> *Ibid.*, Article 20.

<sup>22</sup> See above, note 9, Article 10.

<sup>23</sup> See above, note 16, p. 3.

<sup>24</sup> *Ibid.*, p. 3.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, p. 36.

<sup>27</sup> *Ibid.*

<sup>28</sup> Zingo, M. T., *Sex-Gender Outsiders, Hate Speech and Freedom of Expression: Can They Say That about Me?*, Praeger Publishers, 1998.

<sup>29</sup> *Ibid.*, p.18.

<sup>30</sup> *Ibid.* (Emphasis in original.)

<sup>31</sup> *Ibid.*

<sup>32</sup> Gelber, K., *Speaking Back: The Free Speech versus Hate Speech Debate*, John Benjamins Publishing Company, 2002, p. 61.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, , p. 87.

<sup>35</sup> See above, note 2, p. 20.

<sup>36</sup> *Ibid.*, p. 20.

<sup>37</sup> See above, note 14, Principle 5.

<sup>38</sup> National Assembly of the Republic of Serbia, The Law on the Prohibition of Discrimination, 2009, Article 21 (unofficial translation by UNDP Serbia).

<sup>39</sup> National Assembly of the Republic of Serbia, Constitution of the Republic of Serbia, 2006, Article 49.

<sup>40</sup> National Assembly of the Republic of Serbia, Criminal Code, 2005, Article 387 (translated by the author).

<sup>41</sup> National Assembly of the Republic of Serbia, Public Information Law, 2003, Article 38 (translated by the author).

<sup>42</sup> Gavrilović, D. and Ljubojević, A., "Myths about Borders", in Gavrilović, D. and Perica, V. (eds.), *Political Myths in the Former Yugoslavia and Successor States: A Shared Narrative*, The Hague, The Institute for Historical Justice and Reconciliation, 2011.

<sup>43</sup> *Ibid.*, p.45.

<sup>44</sup> *Ibid.*, p. 46.

<sup>45</sup> Perica, V., "A Post-Communist Serbo-Russian Romance: Eastern Relic of the Pan-Slavic Myth", in Gavrilović, D. and Perica, V. (eds.), above note 42.

<sup>46</sup> *Ibid.*

<sup>47</sup> Drezgić, R., "Religion, Politics and Gender in the Context of Nation-State Formation: the Case of Serbia", *Third World Quarterly*, Vol. 31(6), 2010, pp. 955-970.

<sup>48</sup> See above, note 45.

<sup>49</sup> Ljubojević, A., "We Can Be Heroes – Rise and Fall of Yugoslav Leaders", Conference paper presented at *The Association for the Study of Ethnicity and Nationalism Conference*, April 2010, London School of Economics, available at: [http://www2.lse.ac.uk/researchAndExpertise/units/ASEN/Conference/conferencepapers2010/Ana\\_Ljubojevic.pdf](http://www2.lse.ac.uk/researchAndExpertise/units/ASEN/Conference/conferencepapers2010/Ana_Ljubojevic.pdf).

<sup>50</sup> *Ibid.*, p. 2.

<sup>51</sup> See above, note 47.

<sup>52</sup> Papić, Ž., "From State Socialism to State Nationalism: The Case of Serbia in Gender Perspective", *Refuge*, Vol. 14(3), 1994, pp. 10-14.

<sup>53</sup> See above, note 2.

<sup>54</sup> Gay Straight Alliance, *Predrasude na videlo: Homofobija u Srbiji 2010*, 2010.

<sup>55</sup> *Ibid.*

<sup>56</sup> Kurepa, T., "Parada ponosa ili prilagođavanje 'političke volje", *Ebart*, 2010, available at: <http://www.arhiv.rs/parada-ponosa/>.

<sup>57</sup> *Ibid.*

<sup>58</sup> This section focuses primarily on the narratives of the Serbian political parties which were expressly opposed to the Anti-Discrimination Law adopted in March 2009, the majority of which were (and still are) in opposition. However, it also seeks to identify subtle forms of homophobia that permeate the discourse of certain politicians from the ruling coalition and, therefore, open the door for more explicit anti-gay messages. It is important to note that the aim of this section is not to scrutinise the individual political parties and their agendas, but to demonstrate the general level of homophobia in the discourse of Serbian politics, as well as the correlation between homophobic and pro-nationalist attitudes.

<sup>59</sup> "SPC i verske zajednice protiv Ustava Srbije", *Danas*, 6 March 2009 (translated by the author).

<sup>60</sup> Jevremović, J., "Palma za Press: Znam ko su homiđi u skupštini Srbije!", *Press*, 17 March 2009 (translated by the author).

<sup>61</sup> "Opozicija brani stavove Crkve", *Večernje Novosti*, 16 March 2009 (translated by the author).

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> Mosse, G., *The Image of Man: The Creation of Modern Masculinity*, Oxford University Press, 1996.

<sup>65</sup> See above, note 16, p. 36.

<sup>66</sup> *Ibid.*, p. 37.

<sup>67</sup> See above, note 56.

<sup>68</sup> Simonović, G., "Gej parada je opasna po život! Intervju: Dragan Đilas, gradonačelnik Beograda", *Alo!*, 31 August 2009, available at: [http://www.alo.rs/politika/18767/Gej\\_parada\\_je\\_opasna\\_po\\_zivot](http://www.alo.rs/politika/18767/Gej_parada_je_opasna_po_zivot).

<sup>69</sup> Dežulović, B., "Dragan Đilas Palma na otoku sreće", *Peščanik*, 4 August 2009, available at: <http://www.pescanik.net/content/view/3499/165/> (translated by author).

<sup>70</sup> *Ibid.*

<sup>71</sup> See above, note 56.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> See above, notes 45 and 47.

<sup>75</sup> See above, note 47, p. 956.

<sup>76</sup> *Ibid.*

<sup>77</sup> Spencer-Dohner, M., *LGBT Minorities as Easy Targets: A Case Study of the Specificities and Commonalities with Other Neglected Endangered Groups in the Context of Nationalism-Dominated Societies*. Graz, HUMSEC, undated.

<sup>78</sup> *Ibid.*

<sup>79</sup> See, for example, Foucault, M., "Truth and Power", in Rabinow, P. (ed.), *The Foucault Reader*, Penguin Books, 1991; Foucault, M., *Discipline and Punish: The Birth of the Prison*, Penguin Books, 1991.

<sup>80</sup> See above, note 59.

<sup>81</sup> *Ibid.*

<sup>82</sup> "SPC: Protiv parade ali i nasilja", *Politika*, 17 September 2009, available at: <http://www.politika.rs/rubrike/vesti-dana/SPC-Protiv-parade-ali-i-nasilja.lt.html>.

<sup>83</sup> Bojić, B., "Skandalozno: Amfilohiju sude zbog gej parade?!", *Press*, 24 September 2009, available at: [http://www.pressonline.rs/sr/vesti/vesti\\_dana/story/80702/Skandalozno%3A+Amfilohiju+sude+zbog+gej+parade!.html](http://www.pressonline.rs/sr/vesti/vesti_dana/story/80702/Skandalozno%3A+Amfilohiju+sude+zbog+gej+parade!.html) (translated by the author).

<sup>84</sup> The Holy Assembly of Bishops, "Saopštenje Svetog Arhijerejskog Sinoda povodom najava gej parade u Beogradu", 3 October 2010, available at: [http://www.spc.rs/sr/saopstenje\\_svetog\\_arhijerejskog\\_sinoda\\_povodom\\_najava\\_gejparade\\_u\\_beogradu](http://www.spc.rs/sr/saopstenje_svetog_arhijerejskog_sinoda_povodom_najava_gejparade_u_beogradu).

<sup>85</sup> *Ibid.*

<sup>86</sup> Metropolitan Amfilohije Radović was referring to the depleted uranium allegedly used by NATO during the military intervention in Yugoslavia in 1999.

<sup>87</sup> “Govor mržnje: Parada kao uranijum”, *B92*, 14 October 2010, available at: [http://www.b92.net/info/vesti/index.php?yyyy=2010&mm=10&dd=14&nav\\_id=465324](http://www.b92.net/info/vesti/index.php?yyyy=2010&mm=10&dd=14&nav_id=465324) (translated by the author).

<sup>88</sup> In the Serbian public discourse the term “modern civilisation” is most commonly used to mean “Western civilisation”.

<sup>89</sup> See above, note 28, p. 18.

<sup>90</sup> “Amfilohije se neće izviniti”, *Balkan Human Rights*, 9 March 2011, available at: <http://balkanshumanrights.org/2011/03/09/amfilohije-se-neece-izviniti/> (translated by the author).

<sup>91</sup> Miladinović, Z. and Živanović, K., “Neće biti suđenja Amfilohiju”, *Danas*, undated, available at: [http://www.danas.rs/danasrs/drustvo/nece\\_biti\\_sudjenja\\_amfilohiju.55.html?news\\_id=211060](http://www.danas.rs/danasrs/drustvo/nece_biti_sudjenja_amfilohiju.55.html?news_id=211060) (translated by the author).

<sup>92</sup> This section analyses the discourse of the Serbian daily newspapers, with the focus on those with a high circulation and considerable political influence.

<sup>93</sup> “Crkva samo brani moral”, *Večernje novosti*, 6 March 2009 (translated by the author).

<sup>94</sup> “Prevara”, *Kurir*, 13 March 2009 (translated by the author).

<sup>95</sup> See above, note 47.

<sup>96</sup> See above, note 45.

<sup>97</sup> Antonić, S., “Tolerancija nije dovoljna”, *Politika*, 19 March 2009, available at: <http://www.politika.rs/pogledi/Slobodan-Antonic/TOLERANCIJA-NIJE-DOVOLJNA.lt.html>.

<sup>98</sup> Antonić was referring to LGBT people and the supporters of LGBT rights in general.

<sup>99</sup> See above, note 97.

<sup>100</sup> Labris, *Godišnji izveštaj o položaju LGBTIQ populacije u Srbiji, za 2009. Godinu*, 2010.

<sup>101</sup> *Ibid.*

<sup>102</sup> After the 2010 Parade, Obradović, well-known for anti-gay hate speech, was finally arrested and convicted for organising riots and violent attacks during the 2010 Parade.

<sup>103</sup> See above, note 100 (translation by the author).

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> “Peder odstranjuje Kosovo!”, *Kurir*, 14 July 2009, available at: <http://www.kurir-info.rs/vesti/peder-odstranjuje-kosovo-25339.php>.

<sup>107</sup> See above, note 42.

<sup>108</sup> See above, note 64.

<sup>109</sup> *Ibid.*

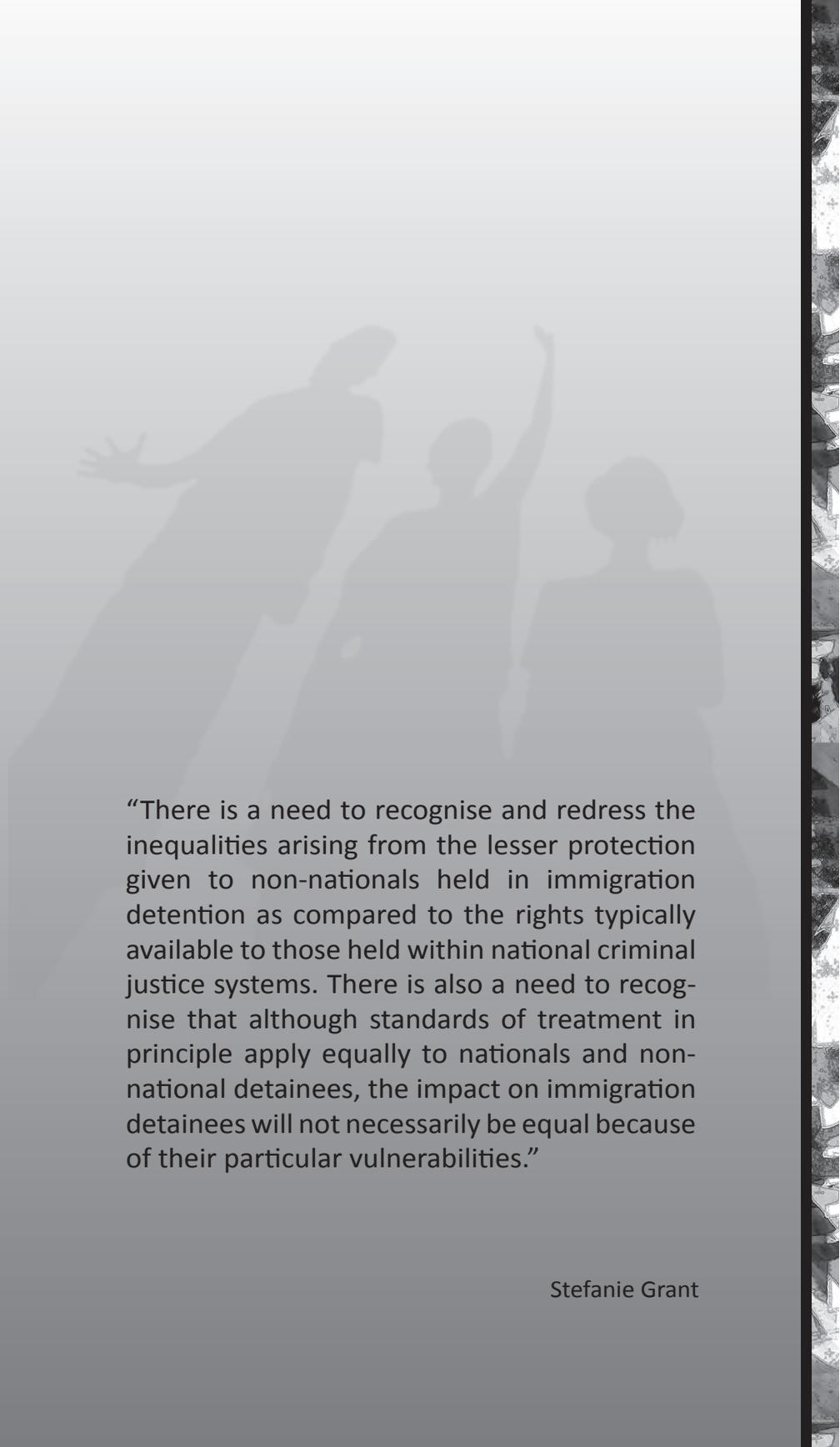
<sup>110</sup> Both the material damage caused by the rampage of the extremists, and the ruined image of Serbia as a result of the violence in the streets of Belgrade.

<sup>111</sup> Vukadinović, Đ., “Od parade do poraza”, *Politika*, 12 October 10, available at: <http://www.politika.rs/pogledi/Djordje-Vukadinovic/Od-parade-do-poraza.lt.html> (translated by author).

<sup>112</sup> The term education is used here in the widest sense, encompassing not only formal schooling, but also various forms of alternative education.



# SPECIAL

The background of the page features a light gray gradient. In the upper half, there are three faint, dark silhouettes of people. The person on the left is leaning forward with arms outstretched. The person in the middle is standing upright with one arm raised. The person on the right is standing upright with arms at their sides. The overall mood is somber and contemplative.

“There is a need to recognise and redress the inequalities arising from the lesser protection given to non-nationals held in immigration detention as compared to the rights typically available to those held within national criminal justice systems. There is also a need to recognise that although standards of treatment in principle apply equally to nationals and non-national detainees, the impact on immigration detainees will not necessarily be equal because of their particular vulnerabilities.”

Stefanie Grant



# Immigration Detention: Some Issues of Inequality

Stefanie Grant<sup>1</sup>

Immigration detention is not new, but the scale of its use by states to control borders and “manage” migration is unprecedented. Whether as an administrative practice or as a consequence of the criminalisation of migration, detention of migrants is now a global phenomenon which affects an increasing number of vulnerable migrants, for increasingly long periods of time, often in conditions which fall far below the standards set by international human rights law.

The principle of equality has a dual relevance to immigration detention. First, the decision to detain should not be discriminatory; second, non-nationals should enjoy substantive equality with nationals in the rights they enjoy in detention. This article reviews some issues of inequality which arise within immigration detention. It first examines the use and dimensions of this form of detention, the limits which human rights law places on states’ recourse to detention and the bars to detention which is arbitrary, or discriminatory. It then contrasts the rights of those in administrative detention with the greater protection often provided by criminal justice systems, and considers the special needs of non-nationals to legal access and health care. It argues that special steps are required to ensure the substantive equality of immigration detainees.

## 1. The Use of Detention

The detention of refugees, migrants and stateless persons has become a frequent – and frequently arbitrary and disproportion-

ate – response to violations of immigration law. Detention is most commonly used where migrants enter a state illegally, or overstay their leave. Although asylum-seekers, children, victims of trafficking and stateless persons are recognised as vulnerable groups under international law, and entitled to special protection, many are detained.

Immigration detention as a term refers to the deprivation of liberty of non-citizens under aliens’ legislation because of their status. Deprivation of liberty on these grounds typically takes the form of administrative detention. But there is a growing trend among states to make irregular entry or presence in a country a criminal offence, with the result that more irregular migrants are subject to detention within the criminal justice system.

The conventional object of administrative detention is to ensure that another measure such as deportation or expulsion can be implemented, but in the immigration context it is also used – and abused – for punitive and deterrent purposes. “Immigration detention” which is administrative in character is to be distinguished from “criminal detention” and “security detention” which refer respectively to detention on the grounds of having committed a criminal offence, or detention for national security or terrorism-related reasons. In some instances, non-citizens who are prosecuted for criminal offences, including immigration and documentation violations, are held in mandatory detention after their sentences have been served, pending their removal.

Under international law, states have a sovereign right to determine who may enter and stay in their territory. Many states see the removal of irregular immigrants as an integral part of border control, and in “the best interests” of the destination country.<sup>1</sup> This is especially the case for states faced with high numbers of irregular migrants, with detention playing an important role in securing irregular migrants prior to removal, on the assumption that “absconding is a significant risk and detention is one solution”.<sup>2</sup> As the number of migrants arriving irregularly has risen, so the use of detention by countries of destination has expanded.<sup>3</sup> Some countries routinely detain anyone found on or entering their territory illegally.<sup>4</sup> In the case of asylum-seekers, detention is typically used when an individual’s identity is being established or where a claim is being processed, and continues where a claim has been refused, pending expulsion from the country.<sup>5</sup>

Detention is today a common practice in Europe, in use in almost all of the Council of Europe’s 47 member states<sup>6</sup> and in the last ten years, its use in expulsion proceedings has “blossomed”.<sup>7</sup> In these years, states on the external frontiers of the European Union (EU) have responded to rising numbers of asylum-seekers and irregular migrants by imposing tighter border controls, in which detention plays a key role. After 2004, the governments of 10 new EU member states made the use of detention to control and deter illegal immigration to and through their territories a national priority.<sup>8</sup> This trend has not only affected EU member states, but has been encouraged in states which irregular migrants transit on their way to the EU.<sup>9</sup>

However, set in a wider human rights context, and viewed from the standpoint of vulnerable migrants, the position can be seen in different terms:

“Migrants arrive (...) in shaky and dangerous boats (...) or via land hidden in the back of smugglers’ trucks, travelling thousands of miles in cramped and dangerous conditions. They find ways to cross land borders in secret, or elude border controls with false documents. Some overstay their visas. (...) Seeking to protect their borders, [European countries] (...) criminalise these migrants, lock them up in prison-like conditions, and expel them as quickly as possible – even to countries where they risk persecution and torture. These foreigners are not criminals; they are guilty only of having aspired to a better life, a job or, in the saddest and most distressing cases, protection from persecution (...)”.<sup>10</sup>

## 2. The Dimensions of Detention

Another, and more radical, view is that the European detention camps “form a border between nation states (...) which is expanding into a huge borderless system (...) a corridor of exile.”<sup>11</sup>

A growing body of information on detention is published by intergovernmental organisations, and by human rights and migrant rights non-governmental organisations (NGOs); it is most extensive in its reporting on Europe.<sup>12</sup> Only the roughest estimates exist for the numbers of those in immigration detention; nonetheless, all the evidence shows they are high, and have increased sharply in the last decade. Thus, although it is known that between 2005 and 2007, around 1.4 million people were apprehended for being illegally present in EU countries, and almost 760,000 removals were undertaken,<sup>13</sup> it is not known how many were detained before removal. Some examples suggest the wider picture. In certain countries “the number of non-citizens in administrative detention exceeds the number of sentenced prisoners or detain-

ees, who have or are suspected of having committed a crime.”<sup>14</sup> It is estimated that one million children are affected worldwide by immigration detention policies.<sup>15</sup> Between 2001 and 2009, the annual number of immigration-related detentions in the US rose from some 95,000 to 380,000; and the average daily population of detained immigrants grew from about 19,000, to over 30,000.<sup>16</sup> In the UK, by 2012 there will be a 60% increase in the immigration “estate” – the holding capacity of detention centres.<sup>17</sup>

Immigration detainees are held in a range of different, and sometimes grossly unsuitable, places. In the course of its country visits, the European Committee for the Prevention of Torture (ECPT) has reported meetings with detainees in a variety of custodial settings, ranging from holding facilities at points of entry to police stations, prisons and specialised detention centres, transit and “international zones” at airports, where persons were held for days under makeshift conditions in airport lounges.<sup>18</sup> In practice, some states “misleadingly label” immigration detention centres as “transit centres” or “guest houses” and detention as “retention” in the absence of legislation authorising deprivation of liberty.<sup>19</sup> Greece, on the EU’s southern border, has been under particular pressure from migrants and refugees arriving irregularly; a policy of systematic detention has meant that many police stations have been transformed into facilities for the detention of aliens awaiting deportation.<sup>20</sup>

### **3. Legal Principles: International, Regional and National**<sup>21</sup>

There is often a considerable gap between the principles of international human rights law and national practice. The UN’s monitoring body on detention describes a global patchwork of national law and practice:

“Some states are entirely lacking a legal regime governing immigration and asylum procedures. Others have enacted immigration laws, but have omitted to provide for a legal framework of detention. (...) If there is a legal framework for detention its design differs. States allow for the detention of a-s and immigrants outside the criminal or national security context in order to establish the legal identity of illegal immigrants and rejected a-s or to secure expulsion to their countries of origin. In other states, detention is mandatory and is sometimes even used as a means of deterring future refugee or migration flows. In some countries there is legislation which provides for a maximum period of detention, whereas others are lacking such a time limit. Some national laws require that detention be ordered by a judge but most states resort to administrative detention.”<sup>22</sup>

Immigration detention is thus an area in which there are particular tensions between international and regional human rights law and state practice. Although the state has general authority to decide who enters and who should be removed from its territory, at the same time it must comply with fundamental human rights principles, including the right to liberty.

Although human rights law generally guarantees a universal right to liberty, the right is not absolute, and narrow exceptions are allowed. Under international human rights law, the International Covenant on Civil and Political Rights (ICCPR) guarantees everyone the right to liberty and security, and that no one shall be deprived of his liberty “except on such grounds and in accordance with such procedure as are established by law”.<sup>23</sup>

Two exceptions are set out in European regional human rights law. The European Convention on Human Rights (ECHR) permits detention of non-nationals to prevent unau-

thorised entry into a country, and to effect deportation or extradition.<sup>24</sup> To be lawful, detention must be in accordance with national and – where the two are inconsistent – international law; it must not be arbitrary, it must pass tests of reasonableness, necessity and proportionality, its length must not be disproportionate, it must not be imposed with discrimination, and the decision to detain must be taken in good faith and with proper purpose. The principles of reasonableness, necessity and proportionality require also that states consider alternatives to detention which would be a lesser interference with the right to liberty and security of the person.<sup>25</sup>

Through Directive 2008/115/EC (the Returns Directive),<sup>26</sup> European Union law sets a “limit” on the length of immigration detention prior to deportation, and has codified legal principles: detention must only serve the purpose of facilitating removal; it must be for the shortest possible period while removal arrangements are in process; and it must be “executed with due diligence”. Where there is no reasonable expectation that someone will be removed, detention ceases to be justified and the detainee must be released immediately.<sup>27</sup> But the Returns Directive sets an excessive outer time limit of 18 months.<sup>28</sup>

Although not bound by the Returns Directive, UK courts have derived broadly similar tests from English common law: there must be an intention to deport; detention “pending removal” may only be for a “reasonable” period of time; and where it is evident that removal cannot be effected within a reasonable period, the detention becomes unlawful.<sup>29</sup>

Thus, while the detention of irregular migrants is not prohibited, it should be used only as a last resort<sup>30</sup> and its use should be subject to rigorous tests. The issue in each case is whether the state’s action in detain-

ing an individual is in accordance with international law, as interpreted in the case law of national and international courts, and applied in the decisions of international oversight bodies such as the Human Rights Committee and the UN Working Group on Arbitrary Detention.

In the case of three of the most vulnerable groups – asylum-seekers, children and (to some degree) stateless persons – detention should not generally be used, and they are entitled to special protection under international law.<sup>31</sup>

There is a growing jurisprudence in this area, especially by the European Court of Human Rights (ECtHR). But although the ECHR imposes clear limits on states’ use of detention generally, the ECtHR has interpreted these limits restrictively in cases involving non-nationals. Galina Cornelisse argues that the ECtHR’s review of the lawfulness of immigration detention is “fundamentally different” from the way it examines the lawfulness of other forms of detention.<sup>32</sup>

When called upon to resolve conflicts between human rights and competing public interests, judges have to reconcile the special status of these rights with the legitimate power of the state to set limits to their exercise.<sup>33</sup> *Saadi*<sup>34</sup> is one example of the priority given by the ECtHR to national sovereignty over the right to liberty in immigration cases.

Saadi was a refugee from Northern Iraq who applied for asylum upon his arrival in the United Kingdom. Although he was detained by the British authorities for reasons of mere administrative expediency, this was not held by the ECtHR to be in violation of his right to personal liberty. The ECtHR stressed the “undeniable sovereign right of states to control aliens’ entry into and residence in their territory”, and deduced from that undeniable

right of control a “necessary adjunct” – the power to detain immigrants who have applied for permission to enter. It then argued that as long as a state has not authorised the entry of an individual, his detention could be classified as being “to prevent unauthorized entry”, and thus in compliance with Article 5(1)(f) of the ECHR.

Cornelisse sees the ECtHR’s judgment in *Saadi* as exemplifying the “limits and blindspots” of the European human rights system when it comes to those who are “out of place” in the global territorial order.<sup>35</sup>

#### **4. Detention Conditions: Discrimination and Unequal Treatment**

As stated above, the principle of equality has a dual relevance to immigration detention. First, the decision to detain should not be discriminatory; second, non-nationals should enjoy substantive equality with nationals in the rights they enjoy in detention.

Under international human rights law, the rights of irregular migrants must be respected, even if their right to stay is not protected, and to this end most human rights standards apply without distinction between citizens and foreign nationals. Principles of equality and non-discrimination require that distinctions between groups must be prescribed by law, pursue a legitimate aim, and be strictly proportionate to that aim.<sup>36</sup> Detention which discriminates on one of the prohibited grounds,<sup>37</sup> including on the basis of nationality except where different treatment is strictly required by border control, is not permissible.

The general rule is that these rights must be “guaranteed without discrimination between aliens and citizens”, with only those narrow exceptions required by border control. Rights contained in human rights treat-

ties must be available to “all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons who find themselves in the territory” of a state.<sup>38</sup> Thus, the right to liberty must be enjoyed equally and without discrimination: this means, for example, that migrant workers, regular or irregular, who are detained are to enjoy the same rights as nationals in the same situation.<sup>39</sup>

The decision to detain may be arbitrary and so unlawful on the basis of discrimination. In one benchmark case, foreign nationals who had been detained in the UK on grounds of national security challenged their indefinite detention without trial, on the ground that the law applied to foreign but not to British nationals; they argued that it was not permissible for the state to discriminate between aliens and citizens as regards the right to liberty. The House of Lords, the highest UK court, agreed, ruling that a distinction between citizens and migrants in their enjoyment of the right to liberty amounted to discrimination. While the rights of citizens and aliens might differ in an immigration context, international human rights law – the ECHR and the ICCPR – did not permit discrimination between citizens and aliens in their right to liberty. A state was “not permitted to discriminate against an unpopular minority for the good of the majority”.<sup>40</sup>

Less priority has been given to challenges to conditions within detention on the grounds that they discriminate against non-nationals, and that the principle of equality requires that the special vulnerability of immigration detainees should be recognised in the rules which apply to their detention. This is an area to which more attention should be paid.

Reports by international monitoring bodies and NGOs identify a number of areas in

which conditions fall so far below international standards as to constitute grave violations of migrants' rights. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment found that conditions of immigration detention in Greece "amount to inhuman and degrading treatment, in violation of Articles 7 and 10 ICCPR".<sup>41</sup> On the basis of its review of individual cases, the UN Working Group on Arbitrary Detention has reported that in a number of countries immigration detainees are kept in custody without sufficient water, food, and bedding or any possibility of leaving their cells to go to the yard, to communicate with their relatives, lawyers, interpreters or consulates, or to challenge the legality of the deprivation of their liberty or deportation orders.<sup>42</sup> Frequently, the rights and treatment of these immigration detainees compare negatively with those of unconvicted nationals in the countries in which they are detained.

It is, of course, axiomatic that – by definition – prisons are not suitable places in which to hold someone who is neither accused nor convicted of a criminal offence.<sup>43</sup>

The ECPT has identified three of the most basic rights – and safeguards – which detained migrants should enjoy "in the same way" as other categories of detainees. These are gateway or "passport" rights, which give access to wider forms of protection. The importance of such safeguards is the greater because of the vulnerable nature of immigration detainees as a group, and because of particular needs which may arise as a result of past torture and persecution, and of the ill-treatment and deprivation many have undergone on their irregular migratory journey. These rights are: (i) to have access to a lawyer; (ii) to have access to a medical doctor; and (iii) to have contact with a relative or third party

– including a consular official. At all points, detainees should immediately be given information about these rights in a language they understand.<sup>44</sup>

Although these appear minimal rights, information from monitoring reports suggests that many detention situations fall far below even this modest threshold, with legal access and medical treatment denied in places of detention such as in the following example (which is described as "illustrative"):

"[A] disused warehouse, with limited or no sanitation, crammed with beds and mattresses on the floor, accommodating upwards of 100 persons locked in together for weeks or even months, with no activities, no access to outside exercise and poor hygiene".<sup>45</sup>

## 5. Access to a Lawyer

For all detainees, held in any type of custody, the right to prompt access to a lawyer, to information about the right and, where necessary, to free legal assistance,<sup>46</sup> are essential pre-requisites for legal protection. Denial prevents detainees from exercising their rights to challenge the legality of both detention and of its conditions.<sup>47</sup>

The UN Special Rapporteur on the Human Rights of Migrants has described states' denial of the right in practice, and the consequences of denial:

"Some national laws do not provide for judicial review of administrative detention of migrants. In other instances, the judicial review (...) is initiated only upon request of the migrant (...) lack of awareness of the right to appeal, lack of awareness of the grounds for detention, difficult access to relevant files, lack of access to free legal counsel, lack of interpreters and translation

services, and a general absence of information in a language detainees can understand on the right to instruct and retain counsel and the situation of the facilities where they are being held can prevent migrants from exercising their rights in practice.”<sup>48</sup>

Migrants and asylum-seekers are especially vulnerable when detained at airport transit zones and other points of entry, where the detention may be under no clear authority, imposed with the knowledge of government officials at the airport or simply on the instructions of airline companies, before being returned to their countries. The difficulty – or impossibility – of obtaining any outside assistance prevents the exercise of the right of the persons concerned to challenge the lawfulness of the decision to detain or remove, or for asylum-seekers to apply for asylum.

Human rights law traditionally places less stringent obligations on states in immigration proceedings than in criminal proceedings, for example as regards the right to examine evidence or call witnesses. Domestic laws and regulations governing immigration thus tend to provide fewer legal safeguards than those available to individuals facing criminal charges.<sup>49</sup> This means that immigration detainees may find themselves in a situation of legal inequality even where the individual is not charged with, or even suspected of, any offence.

In a recent review of immigration detention in the UK, Mary Bosworth notes that non-nationals detained under immigration law are often disadvantaged relative to prisoners, and are typically unable to access the same legal protections as those who break the criminal law. Legal and normative safeguards exist to prevent citizens from being taken from their homes without charge and placed in confinement without judicial over-

sight; even those accused of the most serious offences are entitled to court-appointed lawyers and, while awaiting trial, may apply for bail. But:

“Most of these protections simply do not apply to those under immigration control; thus, unless a detainee applies for bail, the government is never required to obtain permission from a judge to hold someone in immigration detention.”<sup>50</sup>

Since detainees are not routinely provided with a court-appointed lawyer, research has found that many are unaware that they have a right to apply for bail. Language barriers, confusion and trauma also make it more difficult for many to access legal aid.<sup>51</sup>

Marie-Benedicte Dembour has reviewed the obstacles which had to be overcome by children who were held in a closed detention centre in Belgium, first in the Belgian courts and then in the ECtHR.<sup>52</sup> The applicants were four Chechen children who were detained with their mother, Mrs Muskhadzhiyeva, who had sought asylum. An initial difficulty was legal access, since the prison authorities did not inform the detainees of their right to see a lawyer, nor was interpretation available when Mrs Muskhadzhiyeva met her lawyer; this obstacle was overcome with the help of civil society organisations. A second difficulty was the loss of contact between the detainees and their lawyer after the family was removed from Belgium to Poland; contact was resumed - with difficulty and with luck - through an NGO. Once the case was won, the lawyer found that the total costs awarded by both the ECtHR and the Belgian system did not cover even his minimal time costs and expenses. Then another difficulty arose: Mrs Muskhadzhiyeva’s children could not receive the compensation ordered by the ECtHR because by the time it was paid the

family had been released and their whereabouts were unknown; “they might have been for a while in France, from where they might have been deported and possibly returned once again to Poland”.<sup>53</sup>

These difficulties are not unique to the Muskhadzhiyeva case. Similar problems arise in many immigration detention proceedings, and reflect the obstacles to the exercise and enjoyment of rights which are to be found where individuals are detained outside the criminal justice system, are unfamiliar with the language and the society in which they find themselves, have no right to stay in the country of detention, and may be removed to another country during the course of the legal proceedings. For the lawyer, these obstacles mean it is more difficult, and takes more time, to represent an immigration client, and costs are higher than would be the case in acting for a national of the country.

A recent investigation in Ukraine by the Jesuit Refugee Service noted that the state’s detention centres – built under bilateral agreements with the EU, and with EU funding – are situated in such remote areas of the country that access by lawyers and interpreters is very difficult.<sup>54</sup>

## 6. Access to a Doctor

International human rights law proscribes any discrimination in access to health care, and the underlying determinants of health which has the intention or effect of impairing the equal enjoyment of the right to health. This is an essential component of the right to health, which applies:

“[T]o everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and vic-

tims of international trafficking, regardless of legal status and documentation”.<sup>55</sup>

For immigration detainees, the starting point in terms of health rights is that detention facilities should provide access to medical care, and that particular attention should be paid to the physical and psychological state of detained migrants, whether asylum-seekers who have fled persecution, or others who have travelled on irregular land or sea routes.

The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted that non-discrimination and equal treatment are among the most critical components of the right to health; even an unintended discriminatory effect may be in breach of international human rights law.<sup>56</sup> In practice, health provision can have different – and unintended – impacts on different groups, and can negatively impact on vulnerable migrants in ways which would not arise in the case of nationals. The point is developed in the CPT’s *Standards*,<sup>57</sup> which emphasise that the mental and physical health of irregular migrants may be negatively affected by previous traumatic experiences. The loss of accustomed personal and cultural surroundings and uncertainty about one’s future may lead to mental deterioration, including exacerbation of pre-existing symptoms of depression, anxiety and post-traumatic disorder.<sup>58</sup>

Differential impacts arise in two situations: (i) the impact of physical and mental health care, through treatment – or lack of treatment – in detention establishments; and (ii) the impact of detention and the detention environment on the underlying determinants of health.

Applying these general principles at a national level, the UK's Prison Inspectorate has set out standards for all places of immigration detention, which recognise the vulnerability of immigration detainees, and the special steps which should therefore be taken to respect their health needs and right to health. These standards are presented as the "expectations" to which detainees are entitled in terms of their conditions and treatment. Thus, the "expectations" state that, *inter alia*: (i) the provision of health services in an immigration detention centre should be sensitive to the possibility that a detainee may have been a victim of torture and staff should be trained to recognise and treat signs of trauma and torture; and (ii) there is a presumption against detention of any detained person whose mental or physical well-being is likely to be adversely affected by continued detention.<sup>59</sup> But these "expectations" are too often not reflected in national practice.

Recent research in the UK with detained torture survivors from countries where rape is used as a weapon of war found not only that their wellbeing had been adversely affected by detention, but also that their medical treatment was markedly inferior to that available under the National Health Service to individuals living in the same area. Many had been denied life-saving medication.<sup>60</sup>

Reporting on the impact of detention on migrants' health in Italy, Malta and Greece, Médecins Sans Frontières (MSF) has confirmed the negative impact of detention in "appalling conditions" on health.<sup>61</sup> It found that Greek detention centres provided no special care for pregnant women and children, medical personnel did not visit the cells and usually patients tried to attract their attention by shouting from behind bars. Many migrants arrived in Europe in relatively

good health, despite the difficult journey, but their health soon deteriorated during detention as a result of respiratory infections, communicable diseases such as scabies, chicken pox, fungal skin infections or gastrointestinal problems. In Malta, it found thirteen people suffering from chicken pox who were "isolated" in a room in one part of a detention centre together with 80 non-infected people; as a result there had then been an "uninterrupted chicken pox epidemic", with over 120 cases in five months, which the authorities had taken no effective steps to stop. MSF also found a direct link between the length of stay in detention and the level of desperation reported, noting that despite the obvious mental health needs, most detention centres had "a complete lack of mental health services".

Reporting on the wider impact of the detention environment on health, MSF noted that many detainees had already escaped war; hunger and harsh living conditions, and detention, added to their existing distress and psychological suffering:

"Overcrowded living conditions, often combined with inadequate sanitation facilities, substandard provision of shelter, food and non-food items and serious barriers to access to healthcare, including mental healthcare, inevitably have an impact on migrants' wellbeing."

## **7. Contact with a Relative or Third Party, Including a Consular Official**

In addition to the benefits of support and of combating isolation to anyone deprived of liberty, outside contact has particular importance for detained non-nationals who have lost their personal and cultural surroundings, and are faced with an unfamiliar social, legal and linguistic environment.

Their vulnerability gives contact with the outside world even greater importance than for a national detainee.

Historically, international law recognised the specific vulnerability of aliens by giving the diplomatic representatives of the state of nationality the right to visit their detained nationals, and the right to refugees to contact UNHCR.<sup>62</sup> For immigration detainees, confronted by legal proceedings in a language and under a legal system which they do not understand, consular assistance is a human right, and an essential part of due process and fairness.<sup>63</sup> However, the legally stateless are without consular support, as are many irregular migrants whose nationality is ineffective because the consulates of their legal nationality refuse assistance, or are unable to provide assistance because there is no diplomatic representation in the country of detention.<sup>64</sup> In these situations, as in the *Muskhadzhiyeva* case, the role of civil society is key to protection.

## **8. International Monitoring and Oversight**

States' reluctance to accept the constraints on national policies set by international human rights law has been particularly acute in the case of irregular migrants.<sup>65</sup> Some national legal systems have adopted narrow and restrictive interpretations of international human rights when detention is challenged by non-nationals.<sup>66</sup>

International oversight therefore plays an essential role in protection. As the use of immigration detention has grown, so has awareness of the challenges it presents to human rights, both within the UN, and specifically within the Human Rights Council.<sup>67</sup> A first step was taken by the Human Rights Commission<sup>68</sup> in 1997, when the mandate of the Working Group on Arbitrary Detention was

extended to cover asylum-seekers and migrants. In 1999, a special procedure to report on and monitor the human rights of migrants was created.<sup>69</sup> Other special procedures have since included violations of migrants' rights in their scrutiny. The UN human rights treaty bodies now include non-nationals in their review of states' treaty compliance, and states' detention practices are considered in the HRC's Universal Periodic Review.<sup>70</sup>

As the work of the ECPT has demonstrated in Europe, an international mandate to prevent torture, cruel, inhuman and degrading treatment or punishment can play an important role in monitoring national detention practice and conditions, complemented by human rights and migrant rights NGOs.

An international development of particular significance is therefore the establishment of a new monitoring body under the Convention against Torture. An Optional Protocol to the Convention against Torture (OPCAT) entered into force in June 2006, creating a Subcommittee on Prevention of Torture (SPT), which has a mandate to visit places of detention, including places of immigration detention. The OPCAT also requires states to establish "independent national preventive mechanisms" at the domestic level, with a mandate to inspect places of detention. Under the OPCAT, the SPT has unrestricted access to all places of detention, can make unannounced visits to police stations, prisons, detention centres (including immigration detention centres), and other places where people are deprived of their liberty, and meet in private with detainees.

One practical difficulty is that international custodial standards – notably the UN Standard Minimum Rules for the Treatment of Prisoners – apply specifically to prisons,

but immigration detainees are held in many other places.<sup>71</sup> The UN's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>72</sup> is an important global standard, but it deals with living conditions in a more limited way than the UN Standard Minimum Rules for the Minimum Treatment of Prisoners. UNHCR's Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers identify minimum conditions, but are not detailed in the standards they set.<sup>73</sup> In the context of Europe, the ECPT has therefore noted the lack of a "comprehensive instrument" setting out the minimum standards and safeguards for irregular migrants deprived of their liberty, which are in line with the specific needs of this particular group. Although the European Prison Rules apply to immigration detainees held in prisons, they do not apply to immigration detention centres, police stations, and other places of immigration detention.<sup>74</sup>

## 9. Concluding Comment

International and national courts have given considerable attention to strengthening human rights protection for asylum-seekers and migrants against arbitrariness and discrimination by states in the decision to detain. But much less attention has been paid

to the unequal treatment which migrants and asylum seekers may face within immigration detention.

There is a need to recognise and redress the inequalities arising from the lesser protection given to non-nationals held in immigration detention as compared to the rights typically available to those held within national criminal justice systems. There is also a need to recognise that although standards of treatment in principle apply equally to nationals and non-national detainees, the impact on immigration detainees will not necessarily be equal because of their particular vulnerabilities.

Equal treatment in this context is not always equivalent to identical treatment. As the UK's *Immigration Detention: Expectations* recognise – for example with regard to health – special steps, positive action and even different treatment may be required to ensure substantive equality between immigration detainees and detained nationals. To be effective in protecting rights, rules and procedures will therefore need to take account of these differences. To attain full and effective equality for vulnerable immigration detainees it will sometimes be necessary to treat them differently to reflect their different circumstances.<sup>75</sup>

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<sup>1</sup> See International Organization for Migration, *World Migration Report 2010: The Future of Migration: Building Capacities for Change*, 2010, p. 36.

<sup>2</sup> *Ibid.*, p. 36. But research on the rates of absconding casts doubt on the belief that detention is needed to ensure compliance. (See Edwards, A., *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, pp. 82-87.)

<sup>3</sup> In the case of the European Union, where large numbers of migrants are in detention, estimates suggest that there are now 5.5 million irregular migrants in member states. (See Hammarberg, T., *Human Rights in Europe: No Grounds for Complacency*, Council of Europe, Strasbourg, 2011, p. 84.)

<sup>4</sup> UN Commission on Human Rights, *Report of UN Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2004/3, 15 December 2003.

<sup>5</sup> See generally website of the Global Detention Project, available at: <http://www.globaldetentionproject.org/home.html>. In the case of children, see Children's Legal Centre, *Administrative Detention of Children: a Global Report*, 2011, p. 61.

<sup>6</sup> Hammarberg, T., *Human Rights Challenges of Migration in Europe*, Council of Europe Seminar during the Turkish Chairmanship, CommDH/Speech(2011)2, Istanbul, 17-18 February 2011.

<sup>7</sup> Hammarberg, T., *Criminalisation of Migration in Europe: Human Rights Implications*, Issue Paper, CommDH/Issue-Paper(2010)1, 4 February 2010.

<sup>8</sup> Jesuit Refugee Service, *Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union*, 2007.

<sup>9</sup> For example, Ukraine has received EU funding and technical support to build detention centres for migrants. (See Médecins Sans Frontières UK, *Focus on Ukraine*, available at: <http://www.msf.org.uk/ukraine.focus>.)

<sup>10</sup> Hammarberg, T., *Positions on the Rights of Migrants in an Irregular Situation*, Issue Paper, CommDH/PositionPaper(2010)5, 24 June 2010.

<sup>11</sup> Agier, M., "Corridors of Exile: a Worldwide Web of Camps", *metropolitiques.eu*, 25 November 2010, translated by E. Rosencrants, available at: <http://www.metropolitiques.eu/corridors-of-exile-a-worldwide-web.html>.

<sup>12</sup> See, generally, reports of: the UN Special Rapporteur on the Human Rights of Migrants; the UN Working Group on Arbitrary Detention; the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the Human Rights Commissioner of the Council of Europe; Amnesty International, and Human Rights Watch. See specifically: International Commission of Jurists, *Migration and International Law*, 2011; Children's Legal Centre, *Administrative Detention of Children: a Global Report*, 2011; Ricupero, I. and Flynn, M., *Migration and Detention: Mapping the International Legal Terrain*, Global Detention Project, 2009; and Amnesty International, *Migration-Related Detention: a Research Guide on Human Rights Standards*, POL 33/005/2007, 2007.

<sup>13</sup> See above, note 2, p. 121.

<sup>14</sup> UN Human Rights Council, *Report of the UN Working Group on Arbitrary Detention*, A/HRC/7/4, 10 January 2008, Para 45.

<sup>15</sup> Children's Legal Centre, above note 13, p. 62. The report notes a general failure by states to collect and collate data on the number of children, length of their detention and the reasons for detention.

<sup>16</sup> A "system snapshot" of US immigration detention showed that of 32,000 in immigration detention, 18,690 had had no criminal conviction, of whom over 400 had been detained for at least 1 year. (See "Immigrants Face Long Detention, Few Rights", *Associated Press*, 15 March 2009.)

<sup>17</sup> See Bosworth, M., "Human Rights and Immigration Detention in the UK", in Dembour, M-B. and Kelly, T. (eds.), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Routledge, 2011, p. 169.

<sup>18</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *CPT Standards: Safeguards for Irregular Migrants Detained under Aliens Legislation*, CPT/Inf/E (2002) 1 - Rev. 2010, available at: <http://www.cpt.coe.int/en/docsstandards.htm>, p. 53, Paras 24-26.

<sup>19</sup> UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*, A/HRC/7/12, 25 February 2008, Para 47.

<sup>20</sup> See UN Human Rights Council, *Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Greece*, A/HRC/16/52/Add. 4, 4 March 2011.

<sup>21</sup> For a detailed analysis of the international law framework, see Edwards, above note 3, pp 8 and 17 et seq; see also The Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, London, 2010, pp. 87-107.

<sup>22</sup> See above, note 21, Para 45.

<sup>23</sup> UN International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (1966), Article 9: "Everyone has the right to liberty and security. 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."

<sup>24</sup> European Convention on Human Rights, Article 5(1): "Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) (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 with a view to deportation or extradition".

<sup>25</sup> See Edwards, above note 3, p. 25.

<sup>26</sup> Council of the European Union, *Directive 2008/115/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Official Journal L 304, 20/09/2004 P. 0012-0023.

<sup>27</sup> *Ibid.*, Article 15(1) and (4).

<sup>28</sup> Baldaccini, A., “The EU Directive on Return: Principles and Protest”, *Refugee Survey Quarterly*, Vol. 28(4), 2009, pp. 114–138: “By sanctioning a prolonged pre-removal detention regime, the EU (...) has set a particularly inappropriate example for the rest of the world”, p. 137.

<sup>29</sup> *R(I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2003] INLR 196, Para 46; approved by the Supreme Court in *Lumba (WLO v Secretary of State for the Home Department)* [2011] UKSC 12.

<sup>30</sup> See, for example, Council of Europe Parliamentary Assembly, *Human Rights of Irregular Migrants*, Resolution 1509 (2006), 27 June 2006, Para 124.

<sup>31</sup> See UNHCR, *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Guidelines 2, 6 and 9; see also Edwards, above note 3; Children’s Legal Centre, above note 13; The Equal Rights Trust, above note 22.

<sup>32</sup> Cornelisse, G., “A New Articulation of Human Rights, or Why the European Court of Human Rights Should Think Beyond Westphalian Sovereignty”, in Dembour, M-B. and Kelly, T. (eds.), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Routledge, 2011, p. 106.

<sup>33</sup> *Ibid.*, p.107

<sup>34</sup> *Saadi v The United Kingdom*, Appl. No. 13229/03, ECHR, 29 January 2008.

<sup>35</sup> See above, note 33, p. 99.

<sup>36</sup> See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (Art. 2, Para 2)*, UN Doc. E/C. 12/GC/20, 2 July 2009: “The ground of nationality should not bar access to (...) rights (...) The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”

<sup>37</sup> Race, sex, colour, language, religion, political or other opinion, national or social origin, birth or other status.

<sup>38</sup> See Edwards, above note 3, p. 27; UN Human Rights Committee, *General Comment No. 15: The Position of Aliens under the Covenant*, HRI/GEN/1/Rev.9 (Vol. I), 11 April 1986, Para 2; UN Human Rights Committee, *General Comment No.31: The Nature of the Legal Obligations Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, Para 10.

<sup>39</sup> UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158 (1990), Article 17(7).

<sup>40</sup> *A(FC) and others (FC) v. Secretary of State for the Home Department* [2004] UKHL 56, Para 136.

<sup>41</sup> See above, note 21, Summary.

<sup>42</sup> See above, note 15, Para 49.

<sup>43</sup> See above, note 19, p. 59, Para 77.

<sup>44</sup> *Ibid.*, Paras 81–84.

<sup>45</sup> *Ibid.*, Para 77.

<sup>46</sup> See Amnesty International, above note 13, p. 45–48; see also International Commission of Jurists, above note 13, p. 180.

<sup>47</sup> See above, note 21, Para 40. The absence of legal aid and interpreters, combined with the systematic detention of aliens on arrival, and the lack of any automatic judicial review, made it “extremely difficult” for aliens to challenge their detention.

<sup>48</sup> UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*, A/HRC/7/12, 25 February 2008, Para 46.

<sup>49</sup> International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter Terrorism and Human Rights*, 2009, p. 93.

<sup>50</sup> See above, note 18, p. 174.

<sup>51</sup> *Ibid.*, p. 175.

<sup>52</sup> *Muskhadzhiyeva and others v Belgium*, Appl. No. 41442/07, ECHR, 19 January 2010. The European Court of Human Rights (EctHR) found that detaining four extremely vulnerable children in a closed, adult, detention centre, while awaiting deportation, was ill-suited to the children’s needs and constituted a violation of the Article 3 right

not to be subjected to inhuman or degrading treatment or punishment. The ECtHR attached importance to the worrying state of health of the children, who exhibited serious physical and psychosomatic symptoms as a consequence of trauma.

<sup>53</sup> Dembour, M-B., "What It Takes to Have a Case: the Backstage Story of *Muskhadzhiyeva v. Belgium* (illegality of children's immigration detention)", in Abdelgawad, E.L. (ed.), *Preventing and Sanctioning Hindrances to the Right of Individual Petition before the European Court of Human Rights*, Intersentia [forthcoming], pp. 75-104.

<sup>54</sup> Jesuit Refugee Service, *No Other Option: Testimonies from Asylum Seekers Living in Ukraine*, 2011, pp. 8-11. EU funding for detention facilities does not extend to operational costs such as food or medical services, which have been so inadequately funded that detainees have at times been reliant on clothing and food donated by the families of the guards.

<sup>55</sup> See above, note 37, Para 14.

<sup>56</sup> UN Commission on Human Rights, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Report of the Special Rapporteur, Paul Hunt*, E/CN.4/2004/49/Add.1., 1 March 2004, Para 25.

<sup>57</sup> See above, note 19, p. 62, Paras 90-92.

<sup>58</sup> *Ibid.*

<sup>59</sup> Her Majesty's Inspectorate of Prisons, *Immigration Detention: Expectations, Criteria for Assessing the Conditions for and Treatment of Immigration Detainees*, HMIP, 2007, pp. 57 – 58, Paras 16 and 18.

<sup>60</sup> Medical Justice, *Detained and Denied: The Clinical Care of Immigration Detainees Living with HIV*, March 2011.

<sup>61</sup> Médecins Sans Frontières, *The Impact of Detention on Migrants' Mental Health*, Briefing Paper, 2010.

<sup>62</sup> Vienna Convention on Consular Relations 1963, Article 36; see also above note 40, Article 23; above note 27; UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, 9 December 1988, Principles 15, 16 and 19.

<sup>63</sup> International Court of Justice, *Avena and Other Mexican Nationals (Mexico v United States of America)*, 31 March 2004, Para 30: "Consular notification constitutes a basic component of due process by ensuring both the procedural equality of a foreign national in the criminal process and the enforcement of other fundamental due process guarantees to which that national is entitled", and is therefore "an essential requirement for fair criminal proceedings against foreign nationals".

<sup>64</sup> See The Equal Rights Trust, above note 22.

<sup>65</sup> For example, Section 4(4) of the Migration Act of Australia (1958) requires the mandatory detention of non-citizens.

<sup>66</sup> See, for example, the growing case law of the European Court of Human Rights in response to applications by detainees, cited in International Commission of Jurists, *Migration and International Law*, 2011, pp. 147-162.

<sup>67</sup> International Detention Coalition, *The Issue of Immigration Detention at the UN Level*, January 2011.

<sup>68</sup> The UN Human Rights Commission became the UN Human Rights Council on 15 March 2006.

<sup>69</sup> UN Commission on Human Rights, *Human Rights of Migrants*, UN Doc E/CN.4/RES/1999/44, 27 April 1999. The mandate was extended in 2005, in UN Commission on Human Rights, *Human Rights of Migrants*, UN Doc E/CN.4/RES/2005/47, 19 April 2005.

<sup>70</sup> Lesser, T., "The Role of UN Special Procedures in Protecting the Human Rights of Migrants", *Refugee Survey Quarterly*, Vol. 28(4), 2009, pp. 139-164.

<sup>71</sup> See, for example, UN Economic and Social Council, *Standard Minimum Rules for the Treatment of Prisoners*, 13 May 1977.

<sup>72</sup> UN General Assembly, above note 63.

<sup>73</sup> See above, note 32, UNHCR, Guideline 10.

<sup>74</sup> See above, note 19, p. 59, Paras 77 and 78.

<sup>75</sup> See, for example, The Equal Rights Trust, *Declaration of Principles on Equality*, 2008, p. 5, Principle 2.

# Draft Guidelines on the Detention of Stateless Persons: An Introductory Note

Amal de Chickera<sup>1</sup>

In July 2010, The Equal Rights Trust (ERT) published its report, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons (Unravelling Anomaly)*.<sup>2</sup> This report, which was based on field research carried out by ERT in nine countries, provided a critique and analysis of the protection status of stateless persons in the world today, with a particular focus on detention.<sup>3</sup> The report made 17 recommendations, the implementation of which ERT believes is a necessary pre-requisite to ensuring greater protection for stateless persons, including those in detention. **Recommendation 11 called for the adopting of international standards on the detention of stateless persons.**

ERT has now acted on this recommendation, and a consultation draft of ERT's *Guidelines on the Detention of Stateless Persons* (the Draft Guidelines) is ready for review and is published in this edition of the Equal Rights Review.<sup>4</sup> This consultation draft provides detailed guidance on how states should treat stateless persons in the context of immigration detention in order to comply with their obligations under international human rights law, in particular, the rights to equality and non-discrimination and the right to be free from arbitrary detention. The Draft Guidelines mainly reflect established principles of international human rights law, while a few reflect international good practice. We believe that these Draft Guidelines are neces-

sary in a world in which immigration regimes are getting stricter, immigration detention is becoming more common and stateless persons are disproportionately impacted by arbitrary and unlawful detention.

The Draft Guidelines primarily address the detention of stateless persons, but also recommend that states implement national statelessness determination procedures (Recommendation 6 of *Unravelling Anomaly*), and provide guidance on the standards and protections that should be applicable to the implementation of such procedures. Identifying stateless persons who may be subject to immigration detention is a necessary prerequisite to acknowledging their specific needs and protecting them accordingly.

The Draft Guidelines are not a final text and we invite you – the reader – to comment on them and provide us with your feedback. The Draft Guidelines have also been sent to leading experts in the fields of equality and non-discrimination, immigration detention, human rights, refugees and statelessness for their review and comment. ERT will then itself review the Draft Guidelines in light of these comments, after which they will be published and proposed for adoption by key intergovernmental and governmental institutions, and by human rights and other civil society organisations. They will also be disseminated widely. The Draft Guidelines will

be the standard that ERT promotes in its advocacy on the detention of stateless persons both nationally and internationally.

The Draft Guidelines comprise four parts. Part One focuses on definitions, the scope and interpretation of the Draft Guidelines and the basic principles they espouse. Part Two focuses on the identification of stateless persons and Part Three on the detention of stateless persons. Part Four is a series of miscellaneous concluding Guidelines.

**In the text below, we explain each part of the Draft Guidelines, providing commentary on some of the more important or more complex Guidelines, raising issues of concern and asking specific questions for your consideration. While we would particularly welcome responses to the questions we raise, we also look forward to receiving further feedback on the text and substance of the Draft Guidelines**

**We would be most grateful if all feedback is sent by Friday 7 October to Amal de Chickera via email – [amal.dechickera@equalrightstrust.org](mailto:amal.dechickera@equalrightstrust.org)**

## **1. Part I – Definitions, Scope, Interpretation and Basic Principles**

### **1.1. Definitions**

There are four Draft Guidelines in this section. The Draft Guidelines utilise the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) definition of a *de jure* stateless person, i.e. a woman, man or child “who is not considered as a national by any State under the operation of its law”.<sup>5</sup> ERT interprets this definition in the broad manner recommended by the delegates of the UNHCR Expert Meeting on the Concept of Stateless Persons under

International Law (UNHCR Prato Expert Meeting), and this interpretation thus encompasses some categories of persons who were hitherto identified as *de facto* stateless persons.<sup>6</sup>

The definition of *de facto* stateless persons adopted by the Draft Guidelines is that of “[a] person who has a legal nationality which is ineffective; for example, a person who does not benefit from consular protection from his or her country of evident nationality is considered to be *de facto* stateless. A person may be *de facto* stateless their entire life, for a limited period of time, or only in a specific country or context”.<sup>7</sup> Since there continues to be debate around the definition of *de facto* statelessness, ERT has intentionally adopted a definition which is open-ended and can be interpreted in a flexible manner, while staying true to the core meaning of the concept. ERT’s position, as articulated in *Unravelling Anomaly*, is that there should be no distinction in the level of protection afforded to *de jure* and *de facto* stateless persons, as both groups largely have the same protection needs.<sup>8</sup> ERT argues that all persons who do not enjoy an effective nationality should be protected as stateless persons and has developed a five-step test to determine whether a person has an effective nationality or not. Accordingly, the factors to be taken into consideration are:

- “(i) **Recognition as a national** – Does the person concerned enjoy a legal nationality, i.e. is he or she *de jure* stateless?
- (ii) **Protection by the state** – Does the person enjoy the protection of his/her state, particularly when outside that state?
- (iii) **Ability to establish nationality** – Does the person concerned have access to documentation (either held by the state, or which is issued by the state) to establish national-

ity? This access may be through a consulate, or through state officials within the country of presumed nationality.

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

(v) **Enjoyment of human rights** – Does an individual’s lack of documentation, nationality or recognition as a national have a significant negative impact on the enjoyment of her or his human rights?<sup>9</sup>

We acknowledge that this approach goes beyond international consensus on the concept of *de facto* statelessness. As we intend the Draft Guidelines to be relevant and applicable universally, the definition utilised by the Draft Guidelines is more restrictive, represents international understanding of the concept of *de facto* statelessness and is consistent with the summary conclusions of the UNHCR Prato Expert Meeting.<sup>10</sup>

The Draft Guidelines also define “detention” and “administrative detention”. The definition of detention is taken from the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (UNHCR Guidelines).<sup>11</sup>

**Questions for reviewers: Are the two definitions of statelessness adopted by the Draft Guidelines appropriate? Is the definition of *de facto* statelessness too open-ended or vague? Are there any other terms which the Draft Guidelines should define?**

## 1.2. Scope

There are four Draft Guidelines in this section. The Draft Guidelines apply to both *de jure* and *de facto* stateless persons.<sup>12</sup> Histori-

cally, *de facto* stateless persons have not benefited from the international protection to which *de jure* stateless persons are entitled. Such an approach is not consistent with international human rights law and the rights to equality and non-discrimination.<sup>13</sup> The UN Secretary General has emphasised that:

“[I]t is also important to note that *de facto* stateless persons face many of the same protection risks faced by stateless persons. Their situation is akin to that of stateless persons in that there is no State that will provide them with protection. Consequently, it is recommended that the States in which they find themselves extend protection to them until such time as they are able to avail themselves of the protection of their State of nationality.”<sup>14</sup>

Recommendation 4 of *Unravelling Anomaly* calls for the abolition of hierarchies within statelessness,<sup>15</sup> and ERT has tried to ensure that the Draft Guidelines are applicable to both groups, but also address the specific needs of each.

**Questions for reviewers: Are the Draft Guidelines successful in being equally applicable to both *de facto* and *de jure* stateless persons, while also catering to the specific needs of each group? Should the Draft Guidelines apply to both groups, or should they focus more on one group?**

The Draft Guidelines draw from internationally accepted human rights norms and principles. They do not attempt to develop new legal principle, rather to elaborate how existing human rights principles relating to detention and non-discrimination, and international law on statelessness, apply to the specific challenge of the detention of stateless persons. Consequently, the Draft Guidelines reflect and state the existing human

rights obligations of states towards stateless persons in their territory and within their jurisdiction. However, they also draw from international good practice, and recommend actions which go beyond the minimum obligations of international human rights law. Such recommendations provide guidance on how states could offer better protection to stateless persons within their territory and jurisdiction.

**Questions for reviewers: Should the Draft Guidelines reflect only the requirements of existing international human rights law, or is it appropriate to also highlight international good practice? Should the Draft Guidelines go further, and be more prescriptive than they are in the present draft?**

### 1.3. Basic Principles and Assumptions

The Draft Guidelines articulate eight basic principles and assumptions. The first such principle is that states have a duty to respect, protect and fulfil the human rights of stateless persons within their jurisdiction, including the right to be free from arbitrary and unlawful detention.<sup>16</sup> The rights of stateless persons and state obligations in this regard are entrenched in many international and regional human rights treaties including:

- The Universal Declaration of Human Rights (UDHR);<sup>17</sup>
- The International Covenant on Civil and Political Rights (ICCPR);<sup>18</sup>
- The International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>19</sup>
- The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>20</sup>
- The Convention on the Elimination of all forms of Racial Discrimination (CERD);<sup>21</sup>
- The Convention on the Elimination of all

forms of Discrimination against Women (CEDAW);<sup>22</sup>

- The Convention on the Protection of the Rights of all Migrant Workers and their Families (CMW);<sup>23</sup>
- The Convention on the Rights of Persons with Disabilities (CRPD);<sup>24</sup>
- The Convention on the Rights of the Child (CRC);<sup>25</sup>
- The European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR);<sup>26</sup>
- The American Convention on Human Rights (ACHR);<sup>27</sup> and
- The African (Banjul) Charter on Human and Peoples' Rights (ACHPR).<sup>28</sup>

The Optional Protocols to these treaties, the jurisprudence of international and regional courts and the General Comments, decisions and authoritative statements of the UN treaty bodies and special procedures, as well as the 1954 Convention Relating to the Status of Stateless Persons<sup>29</sup> (the 1954 Convention) and the 1961 Convention on the Reduction of Statelessness<sup>30</sup> (the 1961 Convention) are also relevant in this regard.

Various international guidelines and principles on detention should be adhered to when detaining stateless persons, including:

- The 1955 UN Standard Minimum Rules for the Treatment of Prisoners;<sup>31</sup>
- The 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;<sup>32</sup>
- The 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty;<sup>33</sup> and
- The 1999 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers.<sup>34</sup>

Many other international, regional and national guidelines and principles on detention

provide useful guidance on the detention of immigrants, including stateless persons. Most relevant in this regard are:

- The European Committee for the Prevention of Torture Standards (CPT Standards);<sup>35</sup>
- The European Union Agency for Fundamental Rights report entitled *Detention of Third-Country Nationals in Return Procedures*;<sup>36</sup>
- The publication by the UK HM Inspector of Prisons, *Immigration Detention Expectations: Criteria for assessing the conditions for and treatment of immigration detainees*;<sup>37</sup> and
- The *Immigration Detention Centre Guidelines* of the Human Rights and Equal Opportunities Commission of Australia.<sup>38</sup>

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

Draft Guidelines 14 to 16 articulate principles of equality and non-discrimination which apply to the treatment of stateless persons, including decisions to detain them. These Draft Guidelines draw from the Declaration of Principles on Equality,<sup>39</sup> which “reflects a moral and professional consensus among human rights and equality experts (...) [and is] based on concepts and jurisprudence developed in international, regional and national legal contexts”.<sup>40</sup>

The Draft Guidelines also provide that “States which are party to the 1954 Convention Relating to the Status of Stateless Persons have a legal obligation to treat *de jure* stateless persons within their territory or jurisdiction in accordance with the provisions of that Convention”.<sup>41</sup> It is highly desirable that states ratify the 1954 Convention and also the 1961 Convention, and while the Draft Guidelines do not call for ratification,

ERT does promote the ratification of these treaties. States which are party to these instruments should take all necessary steps to fulfil their obligations towards *de jure* stateless persons under these treaties, including the establishment of statelessness determination procedures.

The Draft Guidelines call upon states to exercise their right to protect their nationals “with due regard to their international human rights obligations as the failure or inability of consulates to provide such protection can create *de facto* statelessness”.<sup>42</sup> This Draft Guideline has been included in recognition of the fact that it is not only host states which bear a responsibility towards the stateless.

**Questions for reviewers: Should Draft Guideline 19 differentiate between those states which cannot protect their nationals abroad and states which choose not to do so? Should Draft Guideline 19 recommend that an international organisation provides consular facilities on behalf of states which cannot protect their nationals abroad?**

## 2. Part II - Identifying Stateless Persons

Part two comprises four Draft Guidelines on the identification of stateless persons. The UNHCR Analytical Framework for Prevention, Reduction and Protection (UNHCR Analytical Framework) states that the “first step towards addressing statelessness is to **identify** stateless populations, determine how they became stateless and understand how the legal, institutional and policy frameworks relate to those causes and offer possible solutions”.<sup>43</sup>

Draft Guideline 20 calls on all states to have procedures in place to identify stateless per-

sons, which is an essential prerequisite to protecting stateless persons in accordance with international law. This obligation is implicit to the 1954 Convention with regard to the *de jure* stateless, as states would not be able to fulfil their obligations under the Convention unless they first identified stateless persons within their territory and jurisdiction.<sup>44</sup> Therefore, all states parties to the 1954 Convention should have statelessness determination procedures in place. Even those states which are not party to the 1954 Convention should have procedures in place to identify *de jure* stateless persons, at least in the narrow context of immigration detention, as the failure to identify *de jure* stateless persons could result in discriminatory and arbitrary detention. In this context, it is important to note the following conclusion of the UNHCR Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons (UNHCR Geneva Expert Meeting):

“States that are not party to the 1954 Convention are nonetheless bound by provisions of international human rights law to respect the rights of stateless persons within their territory (for example, the prohibition against arbitrary detention pursuant to Article 9(1) of the ICCPR and the obligation to ensure that every child has a nationality pursuant to Article 24(3) of the ICCPR and Article 7(1) of the CRC). Statelessness is, therefore, a juridically relevant fact in this context. Moreover, non-party States may find it useful to establish statelessness determination procedures and a number have actually done so. In addition, such States may find helpful guidance in the provisions of the 1954 Convention with respect to their response to statelessness, for example, with regard to the provision of identity and travel documents to stateless persons.”<sup>45</sup>

ERT takes the position that for the very same reasons, such procedures should also be in place to determine whether a person at risk of detention is *de facto* stateless, as the failure to do so could result in discriminatory and arbitrary detention.

This Draft Guideline highlights five situations which could render a person *de facto* stateless. This is not an exhaustive list, and states are encouraged to add more grounds to this list as their understanding of *de facto* statelessness broadens.<sup>46</sup> In order to fully comply with this Draft Guideline, states would have to maintain reliable, up-to-date information on countries which fall within these categories, the nationals of which should benefit from determination procedures before a decision to detain is made.

**Questions for reviewers: Should Draft Guideline 20 recommend different procedures for the identification of *de jure* and *de facto* stateless persons? Should it distinguish between states which are parties to the 1954 Convention and states which are not? Should the *de facto* grounds listed in Draft Guideline 20 be exhaustive? If so, should any additional grounds be included or existing grounds be removed? Should the Draft Guidelines recommend that states maintain reliable and up-to-date information on countries which are more likely to generate *de facto* statelessness?**

Draft Guideline 21 states that “[a]ll persons subject to such procedures should be allowed to remain in the country pending final decision”.<sup>47</sup> This provision draws from the UNHCR Geneva Expert Meeting Conclusion that “[w]here an individual has an application pending in a statelessness determination procedure, any removal/de-

portation proceedings must be suspended until his or her application has been finally decided upon".<sup>48</sup>

Draft Guideline 22 considers the interplay between statelessness identification procedures and refugee status determination procedures. The following UNHCR Geneva Expert Meeting conclusion is relevant in this regard:

"In all circumstances, States must ensure that confidentiality requirements for applications by refugees who may also be stateless are upheld in a statelessness determination procedure. Thus any contact with the authorities of another country to inquire about the nationality status of an individual claiming to be stateless should only take place after any refugee claim has been rejected after proper examination (including the exhaustion of any legal remedies). Every applicant in a statelessness determination procedure should be informed at the outset of the right to raise refugee-related concerns ahead of any enquiries made with foreign authorities."<sup>49</sup>

**Questions for reviewers: Does Draft Guideline 22 provide adequate guidance on the relationship between state obligations pertaining to the identification of refugees and state obligations with regard to the identification of stateless persons? Should this Draft Guideline be expanded upon, and if so, what should be added to it?**

Draft Guideline 23 lists 14 minimum procedural and substantive rights which must be ensured at all stages during a statelessness determination procedure. The UNHCR Analytical Framework sets out the questions to be asked in assessing whether states have

satisfactory procedures in place, what type of procedure is used to determine statelessness and how fair and efficient the procedure is. Pertinent questions in this regard include:

- (i) whether the procedure provides for legal advice and interpretation services;
- (ii) whether decisions are made in a timely manner with written reasons given;
- (iii) whether there is a right to appeal to an independent authority;
- (iv) whether the person is granted the right to remain in the country pending final decision;
- (v) whether the burden of proof is on the applicant or decision-maker;
- (vi) what kind of evidence is required to establish nationality or the lack of it;
- (vii) whether the specific needs of vulnerable groups such as women, children and the elderly are met;
- (viii) whether the UNHCR has an advisory, observer or operational role; and
- (ix) whether adequate training is provided to decision makers, lawyers and legal counsellors.<sup>50</sup>

The UNHCR Geneva Expert Meeting concluded that statelessness determination procedures should have the following procedural safeguards:

"In order to ensure fairness and efficiency, statelessness determination procedures must ensure basic due process guarantees, including the right to an effective remedy where an application is rejected. States should facilitate to the extent possible access to legal aid for statelessness claims. Any administrative fees levied on statelessness applications should be reasonable and not act as a deterrent to stateless persons seeking protection."<sup>51</sup>

The Draft Guidelines have been written with these questions as well as other international procedural and substantive standards and norms in mind, and it is hoped that they collectively provide adequate safeguards to ensure due process of the law. These Draft Guidelines also draw from the good practice of Hungary and Spain, two countries which through legislation have created detailed rules for dedicated statelessness determination procedures. Accordingly, the Draft Guidelines state that “[t]he standard of proof required for the establishment of statelessness should be a reasonable standard of proof.”<sup>52</sup> This is an important requirement because:

“Determination procedures should adopt an approach to evidence which takes into account the challenges inherent in establishing whether a person is stateless. The evidentiary requirements should not be so onerous as to defeat the object and purpose of the 1954 Convention by preventing stateless persons from being recognized.”<sup>53</sup>

Therefore, the standard of proof should be no more onerous than the “reasonable degree of likelihood” standard applied in refugee status determination procedures.<sup>54</sup>

The Draft Guidelines also state that “[t]he burden of proof should be shared by the state concerned and the individual.”<sup>55</sup> This is important because:

“The 1954 Convention requires proving a negative: establishing that an individual is *not* considered as a national by any State under the operation of its law. Because of the challenges individuals will often face in discharging this burden, including access to evidence and documentation, they should not bear sole responsibility for establishing the relevant facts.”<sup>56</sup>

This means that the decision-maker and the person subject to the determination procedure would be equally responsible for sourcing the necessary proof to establish whether the person has a nationality or not. The UNHCR Geneva Expert Meeting has recommended that the individual and the state share the burden of proof in the following manner:

“It is incumbent on individuals to cooperate to establish relevant facts. If an individual can demonstrate, on the basis of all reasonably available evidence, that he or she is evidently not a national, then the burden should shift to the State to prove that the individual is a national of a State.”<sup>57</sup>

**Questions for reviewers: Does Draft Guideline 23 cover the minimum procedural and substantive safeguards which should be applied in a statelessness determination procedure? Are there any safeguards which you would recommend we add to or delete from the list? Would it be more useful to distinguish between the substantive and the procedural safeguards? Do the Draft Guidelines on the burden and standard of proof require further elaboration?**

### **3. Part III – The Detention of Stateless Persons**

Part three is the most substantial part of the Draft Guidelines. It looks at the decision to detain, alternatives to detention, vulnerable groups, ongoing detention, conditions of detention and foreign national prisoners.

#### **3.1. Decision to Detain**

There are eight Draft Guidelines in this section. Draft Guideline 24 states that there should be a presumption against the detention of stateless persons. This presumption

is particularly important in relation to the administrative detention of stateless persons because of the unique circumstances which make it difficult to justify their detention for immigration purposes. It is either impossible or extremely difficult to remove stateless persons to their country of habitual residence. In such circumstances, detention would either serve no administrative purpose (where removal is impossible), or it would be a disproportionate means of achieving an administrative purpose (where removal is likely to take an unreasonable length of time).

The UDHR establishes that “no one shall be subjected to arbitrary arrest or detention.”<sup>58</sup> This principle is enshrined in a number of UN and regional standards dealing explicitly with detention<sup>59</sup> and is reflected in Draft Guideline 25. Draft Guideline 25 states that mandatory detention is unlawful under international law. This Draft Guideline reiterates an established principle of international law, as stated by the United Nations Working Group on Arbitrary Detention<sup>60</sup> and the UN Human Rights Committee.<sup>61</sup>

Draft Guideline 26 expands upon the notion of arbitrariness by linking it to the principles of legitimacy of objective, lawfulness, non-discrimination, necessity, proportionality, reasonableness and due process. These principles are the cornerstones upon which international protection against arbitrary detention rests.

According to the UNHCR, for administrative detention not to be arbitrary, “it must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.”<sup>62</sup>

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

“If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The reasons put forward by States to justify detention, such as the necessity of identification of the migrant in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served with a removal order, must be clearly defined and exhaustively enumerated in legislation.”<sup>63</sup>

ERT has analysed the relationship between these principles of international human rights law in *Unravelling Anomaly*, and the Draft Principles are based on that analysis.<sup>64</sup> The principles are interlinked and mutually reinforcing.

Draft Guidelines 27 and 28 provide guidance on what constitutes a legitimate objective. Accordingly:

“Administrative expediency does not in itself constitute a legitimate objective of administrative detention. Nor can administrative detention be used for punitive purposes. Detention should not be used as a deterrent to irregular immigration.”<sup>65</sup>

Draft Guideline 28, drawing on the safeguards entrenched by the European Returns Directive,<sup>66</sup> highlights two situations in which removal would not constitute a legitimate objective. The first is when the state has an obligation of *non-refoulement* towards the individual concerned. This principle of human rights and refugee law prohibits states from removing non-citizens to a situ-

ation of persecution or irreparable harm.<sup>67</sup> The principle of *non-refoulement* has become a cornerstone of refugee law, and is part of international human rights law.<sup>68</sup> The second situation is when removal would violate the individual's right to respect for private and family life.

Draft Guideline 29 explains when detention will be considered lawful. It reflects the principle that the deprivation of liberty must "conform to the procedural and substantive requirements laid down by an already existing law".<sup>69</sup>

ERT believes that states have an obligation to take into account the specific circumstances of stateless persons when determining whether detention would pursue a legitimate objective, be lawful, non-arbitrary, non-discriminatory, necessary, proportionate and/or reasonable. This position reflects that of the UN Secretary General who has stated that "stateless persons are (...) uniquely vulnerable to prolonged detention and States should be sensitized to respect the rights of stateless persons to be free from arbitrary detention as a result of their stateless status".<sup>70</sup>

Draft Guideline 30 expands upon the test set out in Guidelines 26, which should be applied to ensure that the detention of stateless persons is not arbitrary. States are urged to take seven factors into consideration in determining whether the detention of stateless persons would be non-discriminatory, necessary, reasonable and proportionate. The test addresses the very specific context and challenge of statelessness and resultant barriers to identification, status determination and removal, which must be given due consideration in determining whether stateless persons can be legally detained.

**Questions for reviewers: Is Draft Guideline 28 appropriate? Do the principles of**

***non-refoulement* and respect for private and family life require further elaboration in the text? Does Draft Guideline 26 accurately reflect the elements of the test of arbitrariness? Does Draft Guideline 30 appropriately describe and analyse the factual considerations which should be taken into account in assessing whether the detention of a stateless person is arbitrary? Would you add any further considerations?**

Draft Guideline 31 provides that stateless persons subject to immigration detention should benefit from all procedural safeguards afforded to other persons. Many of these safeguards are reiterated in Draft Guideline 43. They include some of the safeguards entrenched by the European Returns Directive, including the right to be informed of decisions in writing, and the duty on the state to give reasons for decisions in a language understood by the person concerned,<sup>71</sup> the right to appeal against or seek review of removal decisions, and the right to receive free legal representation and linguistic assistance.<sup>72</sup>

**Questions for reviewers: Should Draft Guideline 30 list the procedural safeguards to which stateless persons are entitled in the detention decision-making process? If so, should it be an exhaustive list, and which safeguards should be included? Should Draft Guideline 30 state that procedural safeguards should be equivalent to those applicable to persons in the criminal justice system?**

### **3.2. Alternatives to Detention**

This section contains seven Draft Guidelines and has been heavily influenced by two recent comprehensive studies on alternatives to detention carried out by the UNHCR<sup>73</sup> and the International Detention Coalition.<sup>74</sup>

Alternatives to detention are a fast growing issue in international law. For many years, it has been established that the principles of necessity and proportionality obligate the detaining authorities to exhaust all less coercive measures before resorting to detention. For example, the UN Working Group on Arbitrary Detention recommended in 1999 that “alternative and noncustodial measures, such as reporting requirements, should always be considered before resorting to detention”.<sup>75</sup> In recent years, this principle has been increasingly put into practice and has been studied and analysed in great detail.

Draft Guidelines 32 to 35 emphasise that states have an obligation to put in place alternatives to detention, that they should have a range of alternatives in play and that they should choose the most suitable alternative, given the specific needs and circumstances of the stateless person concerned. In doing so, these Draft Guidelines reflect the UNHCR Guidelines, which recommend reporting requirements (periodic reporting to the authorities), residency requirements (obligation to reside at a specific address or within a particular administrative district), the provision of a guarantor or surety, release on bail and residence in open centres (obligation to live in collective accommodation centres, where they would be allowed to leave and return during stipulated times) as viable alternatives to detention.<sup>76</sup> The list of types of alternatives to detention stipulated in Draft Guideline 35 is not an exhaustive list. It must be stated, however, that certain alternatives to detention – electronic tagging in particular – have a significantly detrimental impact on the dignity and wellbeing of the individual and should not be promoted as alternatives which fully respect human rights.

The Draft Guidelines stipulate that the application of alternatives to detention should be

subject to the same procedural and substantive safeguards as any detention regime.<sup>77</sup> Consequently, the principles of proportionality and necessity would regulate whether it is lawful to apply a particular alternative under the right to liberty. Draft Guidelines 36 and 37 provide that alternatives to detention should be subject to periodic review and should cease to be applied in cases where it is found that the administrative purpose cannot be fulfilled.

**Questions for reviewers: Should the Draft Guidelines identify and urge states not to utilise alternatives to detention which are likely to be incompatible with international human rights law? Is it accurate to imply that all alternatives to detention constitute a restriction on liberty requiring justification under Article 9 ICCPR? If not, should a distinction be made between those which constitute a restriction on liberty and those which may interfere with some other human right?**

### 3.3. Vulnerable Groups

There are four Draft Guidelines in this section, which relates to stateless persons who are particularly vulnerable to discrimination or the negative affects of detention. These Draft Guidelines do not seek to elaborate on all of the considerations which should affect a state’s dealings with such persons in the context of immigration detention, but rather to emphasise those which are most relevant. Draft Guideline 48(v) contains further considerations relevant to a state’s treatment of stateless persons belonging to vulnerable groups. Draft Guideline 39 calls on states to identify those who may belong to vulnerable groups at the initial screening stage, before detention. Draft Guideline 40 refers to “disabled persons, those with specific physical and mental health conditions and needs, victims

of trafficking, victims of torture, cruel, inhuman or degrading treatment or punishment, those belonging to minorities which are at heightened risk of discrimination in detention, children, the elderly, pregnant women and nursing mothers”,<sup>78</sup> and calls for the strongest possible presumption against their detention as well as heightened protection during detention. The UNHCR Guidelines contain recommendations on the detention of the elderly, torture or trauma victims and persons with mental or physical disability,<sup>79</sup> and women, with a particular emphasis on pregnant women and nursing mothers.<sup>80</sup> The UN Special Rapporteur on the rights of migrant workers has also made recommendations on the detention of victims of trafficking and smuggling.<sup>81</sup>

Draft Guideline 41 states that there should be the strongest possible presumption against the detention of children. There is strong international consensus on this principle which is articulated in the UNHCR Guidelines.<sup>82</sup> The CRC has some particularly relevant safeguards in this regard, including the obligation to protect children from discrimination;<sup>83</sup> the principle of the best interests of the child;<sup>84</sup> the principle that children should not be separated from their parents against their will;<sup>85</sup> and principles pertaining to the liberty of the child.<sup>86</sup> Furthermore, the UN Working Group on Arbitrary Detention has held that unaccompanied minors should never be detained.<sup>87</sup>

Draft Guideline 42 calls on states not to detain stateless asylum-seekers. This Draft Guideline is a reflection of international law and reiterates the UNHCR Guidelines.<sup>88</sup> It must be noted, however, that asylum-seekers may be detained in exceptional circumstances.<sup>89</sup>

**Questions for reviewers: Are there any additional groups which deserve a men-**

**tion in this section? Should the Draft Guidelines refer to further considerations which affect a state’s dealings with particular groups? In particular, should the Draft Guidelines specify that the duty to make reasonable accommodations may have implications for the lawfulness of the decision to detain a disabled person? Should the Draft Guidelines emphasise that the experience of detention often creates vulnerability?**

### 3.4. Ongoing Detention

The four Draft Guidelines in this section focus on the procedural guarantees from which stateless persons should benefit when in detention, the maximum time-limit for detention and the fact that detention must be subject to regular periodic review. This section of the Draft Guidelines replicates many of the standards articulated by the UN Working Group on Arbitrary Detention which has stated that:

“A maximum period of detention must be established by law and (...) upon expiry of this period the detainee must be automatically released. Detention must be ordered or approved by a judge and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. The procedural guarantee of article 9(4) of the International Covenant on Civil and Political Rights requires that migrant detainees enjoy the right to challenge the legality of their detention before a court (...) All detainees must be informed as to the reasons for their detention and their rights, including the right to challenge its legality, in a language they understand and must have access to lawyers”.<sup>90</sup>

Draft Guideline 44 states that detention should never be indefinite and that statelessness should never be a bar to release.<sup>91</sup> If immigration detention is indefinite, it does not fulfil a legitimate objective, it is unreasonable and disproportionate and consequently arbitrary. Furthermore, the detrimental impact of indefinite detention on the wellbeing of the individual (particularly the psychological impact) can amount to cruel, inhuman and degrading treatment or punishment. Consequently, the “deprivation of liberty should never be indefinite”.<sup>92</sup> Where statelessness is a bar to release, detention will be discriminatory.

Draft Guideline 45 states that detention should always be for the shortest time possible and that there should be a reasonable maximum time-limit for detention. This Draft Guideline draws from existing international principles including the jurisprudence of the UN Working Group on Arbitrary Detention which has stated that a maximum period of detention should be set by law and that custody may in no case be unlimited or of excessive length.<sup>93</sup> There is no international consensus on what is a reasonable maximum time-limit for immigration detention. State practice in this regard ranges from non-detention (Brazil) to 32 days (France) to six months (Hungary) to no time-limit (the UK).<sup>94</sup> Because international practice covers such a broad range, it is difficult to recommend a maximum time-limit which would be accepted as reasonable by all states. After much deliberation, the Draft Guidelines recommend a time-limit of no more than six months immigration detention, which is the period set out in the EU Returns Directive and which is applied in many countries.<sup>95</sup> The factors taken into consideration by ERT when recommending this time-limit include a balancing of the individual’s right to liberty and security of the person with

practical considerations including the likelihood of removal before the expiry of a six month period. ERT however emphasises that the shortest possible maximum time-limit for immigration detention should be implemented at all times and countries which at present have a shorter maximum time-limit, should not increase it.

This Draft Guideline does not directly address the issue of “cycles of detention”. States should not release persons from detention after the maximum time-limit has been reached, only to detain them again in a perpetual cycle.

Finally, Draft Guideline 46 calls on states to practice due diligence and to regularly review immigration detention to ensure that it remains non-arbitrary at all times. The European Returns Directive states 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>96</sup> It also obligates states to provide for a “speedy judicial review of the lawfulness of detention”,<sup>97</sup> and to review all cases of detention at reasonable intervals.<sup>98</sup> The European Returns Directive also states that detention ceases to be justified if “it appears that a reasonable prospect of removal no longer exists”.<sup>99</sup> Similarly, the Human Rights Committee has held that detention which may have initially been legal may become arbitrary if it is unduly prolonged or not subject to periodic review,<sup>100</sup> and that “detention should not continue beyond the period for which the State can provide appropriate justification”.<sup>101</sup>

**Questions for reviewers: Is it appropriate for the Draft Guidelines to recommend a maximum time-limit for detention, and if so, is six months an appropriate length of time? Should the Draft Guidelines directly**

**address the issue of cycles of detention? Should Draft Guideline 46 list the steps that states should take to comply with their due diligence obligations? Should Draft Guideline 46 provide that in reviewing the legality of detention, states should have due regard to the fact that the cumulative detrimental impact of detention can render the detention disproportionate and unreasonable and/or in breach of the right to be free from cruel, inhuman and degrading treatment or punishment?**

### 3.5. Conditions of Detention

Draft Guidelines 47-49 focus on conditions of detention. These Draft Guidelines articulate general principles relating to conditions of detention without detailing the specific needs of stateless persons. The question of whether there is an additional need for a set of guidelines on the conditions of detention which caters to their specific needs and circumstances requires further exploration. In this context, ERT has addressed conditions of detention at a general level through the Draft Guidelines.

There are many authoritative standards on conditions of detention (referred to in Draft Guideline 47) which are all relevant to stateless persons. Draft Guideline 48 emphasises some of the most important international standards on conditions of detention, which should be adhered to when detaining stateless persons. It calls on states to treat detainees with dignity, and not to subject them to torture, cruel, inhuman and degrading treatment or punishment. It also provides that stateless persons should be treated without discrimination and are entitled to the same detention conditions as other immigration detainees. The Draft Guidelines therefore articulate some of the fundamental principles of international human rights law.

One of the most important principles set out in Draft Guideline 48 is that “[s]tateless persons in detention should be subject to treatment that is appropriate to their unconvicted status”.<sup>102</sup> The CPT Standards state that “a prison establishment is by definition not a suitable place in which to hold someone who is neither accused nor convicted of a criminal offence”.<sup>103</sup> Furthermore, they declare that:

“Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. For example, detained irregular migrants should have every opportunity to remain in meaningful contact with the outside world (including frequent opportunities to make telephone calls and receive visits) and should be restricted in their freedom of movement within the detention facility as little as possible.”<sup>104</sup>

Draft Guideline 48(v) states that “[r]easonable accommodation should be provided to ensure that disabled persons in detention are treated in accordance with international human rights law”.<sup>105</sup> The Draft Guidelines also state that:

“All stateless detainees should be allowed free and frequent access to their families, friends, communities, religious and visiting groups; their legal counsel; the UNHCR, the consulate of any state in order to establish nationality or the lack thereof; and other NGOs and visitors groups”.<sup>106</sup>

This Draft Guideline is particularly important to stateless persons as they should be afforded every opportunity to obtain as much evidence as possible either to confirm that they are stateless or that they may have a nationality.

**Questions for reviewers: The Draft Guidelines on conditions of detention do not detail the specific conditions to which all immigration detainees, including stateless persons, are entitled. Is this approach appropriate, or should a more detailed list of conditions be articulated in the Draft Guidelines? Do stateless persons have specific needs pertaining to the conditions of detention to which the Draft Guidelines should refer? Are the international standards stated in Draft Guidelines 47 and 48 the most important ones, or should the Draft Guidelines refer to further international standards?**

### 3.6. Foreign National Prisoners

The final section of part three of the Draft Guidelines focuses on the detention of foreign national prisoners. Foreign national prisoners are often subject to removal proceedings upon the completion of criminal sentences. Stateless foreign national prisoners are at heightened risk of lengthy or indefinite detention because of the reluctance of states to release such persons – even if they are irremovable – on political or perceived public policy grounds. In order to reduce this discriminatory treatment, ERT has recommended that foreign national prisoners are subject to statelessness determination procedures while they are serving their criminal sentence and subject to removal proceedings at least six months before their criminal sentence expires.<sup>107</sup> ERT has further recommended that further detention which serves a non-administrative purpose should be authorised and regulated by the relevant law of the land.<sup>108</sup> These recommendations have been articulated in the Draft Guideline on foreign national prisoners.<sup>109</sup>

**Question for reviewers: Is it appropriate for the Draft Guidelines to address this is-**

**sue, given that it involves a convergence of issues relating to both criminal and administrative detention?**

## 4. Part IV – Miscellaneous and Concluding Guidelines

The final part to the Draft Guidelines comprises six sections on data and statistical information, the criminalisation of immigration offences, release, compensation, exclusion clauses and the concluding guideline.

### 4.1. Data and Statistical Information

This section contains two Draft Guidelines on the maintenance of reliable and disaggregated data on stateless persons in detention and statelessness determination procedures. The UNHCR Analytical Framework states that it is important to have reliable and disaggregated data on the number of stateless persons in detention and the reasons for their detention.<sup>110</sup> ERT too has recommended that there should be more reliable and comprehensive statistics and information on statelessness;<sup>111</sup> stating that:

“[S]tatistics should be maintained in a comprehensive manner, and be disaggregated by age, sex and country/territory of origin. Further data collection which distinguishes the stateless community into the *de jure* and *de facto*, identifies the cause of *de facto* statelessness, and registers the reasons why a (...) nationality is ineffective, is needed to develop policy based on principles of human rights and equality (...) Such an approach would enable the authorities to anticipate situations in which removal will be impossible, and so minimise detention ‘pending removal’.”<sup>112</sup>

**Questions for reviewers: Is it feasible to recommend that States gather data and**

**information in the areas specified by the Draft Guidelines? Should the Draft Guidelines also recommend data collection in other areas?**

#### **4.2. Criminalisation of Immigration Offences**

This section comprises three Draft Guidelines. Most importantly, they state that “[s]tatelessness and its direct consequences including travelling without documentation should (...) not be criminalised”.<sup>113</sup> Hannah Arendt first raised concern over the criminalisation of statelessness in 1951, stating that:

“The stateless person, without right to residence and without the right to work, had of course constantly to transgress the law. He was liable to jail sentences without ever committing a crime (...) Since he was the anomaly for which the general law did not provide, it was better for him to become an anomaly for which it did provide, that of the criminal.”<sup>114</sup>

Sixty years later, this remains a valid concern and ERT has deplored the growing international trend to criminalise irregular immigration and has noted that this has a disproportionate, discriminatory impact on the stateless. ERT has therefore recommended that “immigration laws take into account the reality of statelessness and provide for exceptions in the context of stateless persons, so as not to discriminate”.<sup>115</sup>

Draft Guideline 54 restates a well-established principle of international law, that immigration detention must solely be for administrative purposes and should not have a penal element to it.<sup>116</sup>

**Questions for reviewers: Is it appropriate for the Draft Guidelines to address**

**the criminalisation of immigration offences which in turn are likely to criminalise statelessness? Should the Draft Guidelines be more descriptive of how the criminalisation of immigration offences can result in the criminalisation of statelessness?**

#### **4.3. Release**

The six Draft Guidelines in this section focus on the treatment of stateless persons after release from detention. The primary message of these Draft Guidelines is that “State obligations towards stateless persons do not cease after release from detention”.<sup>117</sup> The Draft Guidelines set out how states should treat stateless persons after release. Most importantly, stateless persons should never be released into a state of destitution.<sup>118</sup>

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

“Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights”.<sup>119</sup>

The General Comment also states that “[t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation”.<sup>120</sup>

Draft Guideline 59 recommends that states allow released stateless persons the right to work. There is a very practical reason for the inclusion of this Draft Guideline, and this is to address the contradiction created by states which do not allow stateless persons to work and also refuse to provide them with adequate welfare, thus driving them into destitution. The Draft Guideline also draws from Article 17 of the 1954 Convention on the right to employment for stateless persons.<sup>121</sup>

The final two Draft Guidelines in this section recommend that states grant stateless persons leave to remain upon release, so as to break the cycle of irregularity in which stateless persons often find themselves<sup>122</sup> and that they expedite the naturalisation of stateless persons.<sup>123</sup> The Draft Guidelines therefore restate the 1954 Convention obligation of states to facilitate the naturalisation of stateless persons.<sup>124</sup> The integration and naturalisation of stateless persons, which has been recommended by ERT in *Unravelling Anomaly*,<sup>125</sup> must be seriously considered for implementation by states which are committed to finding durable solutions to statelessness.

**Questions for reviewers: Do the Draft Guidelines address the key issues with regard to released stateless persons? Are there any other issues which should be included? Is the approach adopted by the Draft Guidelines with regard to the provision of socio-economic rights, a realistic and sustainable one? Should the Draft Guidelines be concerned with the naturalisation of stateless persons? Do Draft Guidelines 56 to 61 accurately reflect the requirements of international law?**

#### 4.4. Compensation

The three Draft Guidelines on compensation provide that stateless persons who have been

unlawfully detained should be duly compensated and that such compensation should be paid on a same scale as is paid to nationals in similar circumstances. *Unravelling Anomaly* calls for compensation to be paid to stateless persons who have been unlawfully detained.<sup>126</sup> Both the ICCPR and the ECHR provide that compensation must be paid to those who have been subject to unlawful detention. According to the ICCPR, “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”.<sup>127</sup> Similarly, the ECHR states that “[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”.<sup>128</sup>

#### 4.5. Exclusion Clauses

This section relates to the exclusion clauses in the 1954 Convention, according to which, the Convention does not apply:

“To persons in respect to whom there are serious reasons for considering that:

- (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
- (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
- (c) They have been guilty of acts contrary to the purposes and principles of the United Nations”.<sup>129</sup>

While such persons are excluded from the protection of the 1954 Convention, they continue to benefit from the protection of international human rights law and must be protected accordingly. Furthermore, they must

be subject to lawful exclusion procedures. If such persons are subject to immigration detention, they should not cease to benefit from the protections contained in these Draft Guidelines.

**Question for reviewers: The exclusion clauses under the 1954 Convention are a relatively under-developed area of the law. Is there any guidance that reviewers could provide on whether ERT is addressing this issue in an appropriate manner?**

#### 4.6. Concluding Guideline

The final Draft Guideline calls on all states to “review their immigration policies and immigration detention regimes and take all necessary steps to bring them into adherence with states’ human rights obligations to protect stateless persons within

their jurisdiction and to reduce and prevent statelessness”.<sup>130</sup>

**Final questions for reviewers: Are there further important areas and issues pertaining to the detention of stateless persons which should be addressed in the Draft Guidelines? What else could the Draft Guidelines do to explain the statelessness problem? Are the Draft Guidelines adequately focused on the specific problem of statelessness, or are they too general in their application? Is it clear when the Draft Guidelines are restating international legal obligations with which states are obliged to comply, and when they are recommending good practice? Are the Draft Guidelines practicable for states? Do you have any further comments on the substance or drafting of the Draft Guidelines?**

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<sup>1</sup> Amal de Chickera is the Head of Statelessness and Nationality Projects at The Equal Rights Trust.

<sup>2</sup> The Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, 2010, available at: <http://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf>.

<sup>3</sup> The nine countries were Australia, Bangladesh, Burma, Egypt, Kenya, Malaysia, Thailand, the UK and the USA.

<sup>4</sup> The Equal Rights Trust, *Draft Guidelines on the Detention of Stateless Persons*, 2011 (The Draft Guidelines).

<sup>5</sup> Convention Relating to the Status of Stateless Persons, ECOSOC RES/526 A(XVII), adopted on 28 September 1954 and entered into force 6 June 1960 (1954 Convention), Article 1(1).

<sup>6</sup> See UN High Commissioner for Refugees, *Expert Meeting - The Concept of Stateless Persons under International Law (Summary Conclusions)*, 2010 (UNHCR Prato Expert Meeting), available at: <http://www.unhcr.org/refworld/docid/4ca1ae002.html>.

<sup>7</sup> See above, note 4, Draft Guideline 2.

<sup>8</sup> See above, note 2, Chapter 2.

<sup>9</sup> *Ibid.*, p. 82.

<sup>10</sup> See above, note 6.

<sup>11</sup> UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999 (UNHCR Guidelines), Guideline 1, available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html>.

<sup>12</sup> See above, note 4, Draft Guideline 5.

<sup>13</sup> See above, note 2, Chapters 1 and 2 generally and pp. 78-80 specifically, for an analysis and critique of the inequalities between the protection of *de jure* and *de facto* stateless persons.

- <sup>14</sup> UN Secretary-General, *Guidance Note of the Secretary General: The United Nations and Statelessness*, June 2011 (UNSG Guidance), p. 6, footnote 8, available at: <http://www.unhcr.org/refworld/docid/4e11d5092.html>.
- <sup>15</sup> See above, note 2, pp. 229 – 230.
- <sup>16</sup> See above, note 4, Draft Guideline 12.
- <sup>17</sup> Universal Declaration of Human Rights, UNGA RES/217A (III) 1948.
- <sup>18</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI) (1966).
- <sup>19</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (1966).
- <sup>20</sup> Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (1984).
- <sup>21</sup> Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX) (1965).
- <sup>22</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (1979).
- <sup>23</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158 (1990).
- <sup>24</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611 (2006).
- <sup>25</sup> Convention on the Rights of the Child (CRC), G.A. Res. 44/25 (1989).
- <sup>26</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4 November 1950.
- <sup>27</sup> American Convention on Human Rights, OAS Treaty Series, No. 46 (1969).
- <sup>28</sup> African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1981).
- <sup>29</sup> See above, note 5.
- <sup>30</sup> Convention on the Reduction of Statelessness, G.A. Res. 896 (IX) (1961).
- <sup>31</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955.
- <sup>32</sup> UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly*, A/RES/43/173, 9 December 1988.
- <sup>33</sup> UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution / adopted by the General Assembly*, A/RES/45/113, 14 December 1990.
- <sup>34</sup> See above, note 11.
- <sup>35</sup> The Council of Europe, *The CPT Standards – 'Substantive' sections of the CPT's General Reports*, CPT/Inf/E (2002) 1, Rev. 2009 (CPT Standards).
- <sup>36</sup> European Union Agency for Fundamental Rights, *Detention of Third-Country Nationals in Return Procedures*, 2010, Luxembourg, 2010, available at: [http://fra.europa.eu/fraWebsite/attachments/FRA-report-detention-december-2010\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA-report-detention-december-2010_EN.pdf).
- <sup>37</sup> HM Inspector of Prisons, *Immigration Detention Expectations: Criteria for assessing the conditions for and treatment of immigration detainees*, 2007, available at: <http://www.justice.gov.uk/inspectors/hmi-prisons/docs/immigration-expectations-2007.pdf>.
- <sup>38</sup> Human Rights and Equal Opportunities Commission of Australia, *Immigration Detention Centre Guidelines*, 2000, available at: [http://www.hreoc.gov.au/legal/submissions/Appendix\\_idc\\_guidelines.pdf](http://www.hreoc.gov.au/legal/submissions/Appendix_idc_guidelines.pdf).
- <sup>39</sup> The Equal Rights Trust, *Declaration of Principles on Equality*, 2008, Principle 2, p. 5, available at: <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>.
- <sup>40</sup> *Ibid.*, Introduction, p. 2.
- <sup>41</sup> See above, note 4, Draft Guideline 17.
- <sup>42</sup> *Ibid.*, Draft Guideline 19.
- <sup>43</sup> UN High Commissioner for Refugees, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, 2008, p. 5, available at: <http://www.unhcr.org/refworld/docid/49a28afb2.html>.
- <sup>44</sup> UN High Commissioner for Refugees, *Expert Meeting - Statelessness Determination Procedures and the Status of Stateless Persons (Summary Conclusions)*, December 2010, Para 1, p. 2, available at: <http://www.unhcr.org/refworld/docid/4d9022762.html>.
- <sup>45</sup> *Ibid.*, Para 30, p. 7.
- <sup>46</sup> See above, note 2, pp. 63 – 69.
- <sup>47</sup> See above, note 4, Draft Guideline 21.
- <sup>48</sup> See above, note 44, Para 11, p. 4.

<sup>49</sup> *Ibid.*, Para 9, p. 4.

<sup>50</sup> See above, note 43, pp. 20-21.

<sup>51</sup> See above, note 44, Para 10, p. 4.

<sup>52</sup> See above, note 4, Draft Guideline 23(ix).

<sup>53</sup> See above, note 44, Para 14, p. 5.

<sup>54</sup> See for example, the case UK of *Sivakumuran, R v Secretary of State for the Home Department* [1987] UKHL 1 (16 December 1987).

<sup>55</sup> See above, note 4, Draft Guideline 23(x).

<sup>56</sup> See above, note 44, Para 13, p. 4.

<sup>57</sup> *Ibid.*

<sup>58</sup> See above, note 17, Article 9.

<sup>59</sup> For example, Articles 9 and 10 of the ICCPR; Article 37(d) of the CRC; Article 5 of the ECHR; Articles 6 and 7 of the ACHPR; Article 7 of the ACHR; UN High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers*, 13 October 1986. No. 44 (XXXVII) – 1986; UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988; and the UN Standard Minimum Rules for the Treatment of Prisoners 1955.

<sup>60</sup> UN Human Rights Council, *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council*, 56<sup>th</sup> Session, E/CN.4/2000/4, 1999, Annex 2.

<sup>61</sup> See *A. v Australia*, Case No 560/1993, Views adopted on 3 April 1997, UN Doc. A/52/40, Vol. II, Annex VI Sec. L; and *C. v Australia*, Case No. 900/1999, Views adopted 28 October 2002, UN Doc. A/58/40, Vol., II, Annex VI R.

<sup>62</sup> See above, note 11, p. 2.

<sup>63</sup> UN Human Rights Council, *Report of the UN Working Group on Arbitrary Detention to the Human Rights Council*, 13<sup>th</sup> Session, A/HRC/13/30/2010, Para 59, available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30\\_AEV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30_AEV.pdf).

<sup>64</sup> See above, note 2, Chapters 3, 4 and 7.

<sup>65</sup> See above, note 4, Draft Guideline 27.

<sup>66</sup> European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 2008/115/EC, 16 December 2008, Article 5.

<sup>67</sup> See above, note 2, pp. 67 – 69.

<sup>68</sup> See above, note 20, Article 3.

<sup>69</sup> McBride, J., *Irregular Migrants and the European Convention on Human Rights*, Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Population, AS/Mig/Inf (2005), Para 59. McBride refers to ECHR cases *Agee v United Kingdom*, Appl. No. 7729/76, Report of the European Commission of Human Rights, 17 December 1976 and *Amuur v France*, Appl. No. 19776/92, ECHR, 25 June 1996.

<sup>70</sup> See above, note 14, p. 6.

<sup>71</sup> See above, note 66, Article 12.

<sup>72</sup> *Ibid.*, Article 13.

<sup>73</sup> UN High Commissioner for Refugees, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, PPLA/2011/01.Rev.1, 2011, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>.

<sup>74</sup> Sampson, R., Mitchell, G. and Bowring, L., *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, International Detention Coalition and La Trobe Refugee Research Centre, 2011.

<sup>75</sup> UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, E/CN.4/1999/63/Add.3, 18 December 1998.

<sup>76</sup> See above, note 11, Guideline 4.

<sup>77</sup> See above, note 4, Draft Guideline 36.

<sup>78</sup> *Ibid.*, Draft Guideline 40.

<sup>79</sup> See above, note 11, Guideline 7.

<sup>80</sup> *Ibid.*, Guideline 8.

<sup>81</sup> UN Commission on Human Rights, *Migrant Workers*, Report of the Special Rapporteur, Ms Gabriela Rodriguez Pizarro, UN Doc E/CN.4/2003/83, 2002.

<sup>82</sup> See above, note 11, Guideline 6.

<sup>83</sup> See above, note 25, Article 2.

<sup>84</sup> *Ibid.*, Article 3.

<sup>85</sup> *Ibid.*, Article 9.

<sup>86</sup> *Ibid.*, Article 37.

<sup>87</sup> See above, note 75, Para 37.

<sup>88</sup> See above, note 11, Guideline 2.

<sup>89</sup> *Ibid.*, Guideline 3.

<sup>90</sup> See above, note 63, Para 61.

<sup>91</sup> See above, note 11, Guideline 9.

<sup>92</sup> Office of the High Commissioner on Human Rights, *Administrative Detention of Migrants*, available at: <http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf>.

<sup>93</sup> See above, note 60.

<sup>94</sup> See above, note 2, pp. 211 – 212.

<sup>95</sup> See above, note 66. Article 15(5) of the Returns Directive states that “each member State shall set a limited period of detention which may not exceed six months”. However, the Returns Directive does allow for detention to be extended by a maximum of twelve more months in exceptional cases where “regardless of all their reasonable efforts the removal operation is likely to last longer” (Article 15(6)).

<sup>96</sup> *Ibid.*, Article 15(1).

<sup>97</sup> *Ibid.*, Article 15(2).

<sup>98</sup> *Ibid.*, Article 15(3).

<sup>99</sup> *Ibid.*, Article 15(4).

<sup>100</sup> De Zayas, A., “The Examination of Individual Complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights”, in Alfredsson, G. et al. (eds), *International Human Rights Monitoring Mechanisms*, The Hague, 2001, pp. 67-121.

<sup>101</sup> See Human Rights Committee, *C. v Australia*, Communication No. 900/1999, ICCPR/C/76/D/900/1999, 28 October 2002, Para 8.2.

<sup>102</sup> See above, note 4, Draft Guideline 48(iii).

<sup>103</sup> See above, note 35, Para 77.

<sup>104</sup> *Ibid.*, Para 79.

<sup>105</sup> See above, note 24. This requirement is compatible with Article 14.2 of the CRPD.

<sup>106</sup> See above, note 4, Draft Guideline 48(vii).

<sup>107</sup> See above, note 2, Recommendation 12, pp. 237–238.

<sup>108</sup> *Ibid.*, Recommendation 12, pp. 238-239.

<sup>109</sup> See above, note 4, Draft Guideline 50.

<sup>110</sup> See above, note 43, pp. 20-21.

<sup>111</sup> See above, note 2, Recommendation 6, pp. 231–232.

<sup>112</sup> *Ibid.*, p. 232.

<sup>113</sup> See above, note 4, Draft Guideline 53.

<sup>114</sup> Arendt, H., *The Origins of Totalitarianism*, Harcourt, Brace & World, New York, 1966, p. 286.

<sup>115</sup> See above, note 2, Recommendation 14, p. 239.

<sup>116</sup> See above, note 35, Para 77.

<sup>117</sup> See above, note 4, Draft Guideline 56.

<sup>118</sup> *Ibid.*, Draft Guideline 57. See also note 2, Recommendation 15, p. 240.

<sup>119</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, E/C.12/GC/20, 2009, Para 7.

<sup>120</sup> *Ibid.*, Para 30.

<sup>121</sup> See above, note 5, Article 17(1), which states that “[t]he Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that

accorded to aliens generally in the same circumstances, as regards the right to engage in wage-earning employment”.

<sup>122</sup> See above, note 4, Draft Guideline 60.

<sup>123</sup> *Ibid.*, Draft Guideline 61.

<sup>124</sup> See above, note 5, Article 32, which states that “[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings”.

<sup>125</sup> See above, note 2, Recommendation 8, pp. 233 – 234.

<sup>126</sup> *Ibid.*, Recommendation 17, pp. 240 – 241.

<sup>127</sup> See above, note 18, Article 9(5).

<sup>128</sup> See above, note 26, Article 5.

<sup>129</sup> See above, note 5, Article 1(2)(iii).

<sup>130</sup> See above, note 4, Draft Guideline 66.

# Guidelines on the Detention of Stateless Persons: Consultation Draft

The Equal Rights Trust

*The Guidelines on the Detention of Stateless Persons (the Guidelines) address a gap in international protection, which has made many stateless persons vulnerable to arbitrary detention.*

*States have a sovereign right to control their borders and if necessary to use administrative detention for these purposes, but should do so in compliance with international human rights law.*

*All stateless persons benefit from the protection of international human rights law. Their rights should be respected, protected, and fulfilled at all times, including in the exercise of immigration control. De jure stateless persons enjoy additional protections under the 1954 Convention Relating to the Status of Stateless Persons (the 1954 Convention).*

*Stateless persons lack the protection of a nation state. The de jure stateless are not nationals of any country. They are without any consular protection and are highly unlikely to have proper documentation. The de facto stateless do not have an effective nationality. They lack access to effective consular protection and often have difficulty in obtaining necessary documentation.*

*The need for these Guidelines has become evident in a context of increasing use of immigration detention, criminalisation of irregular immigration and use of administrative detention for punitive purposes by a growing number of states. These developments have occurred without regard to the specific circumstances of stateless persons and the implications of international human rights law for the detention of stateless persons.*

*The circumstances facing de jure and de facto stateless persons are significant factors to be taken into account in determining the lawfulness of immigration detention. The process of resolving the identity of stateless persons*

*and a stateless person's immigration status is often complex and burdensome. Lawful removal of such persons is generally subject to extensive delays and is often impossible. Stateless persons detained for these purposes are therefore vulnerable to prolonged detention. These factors in turn make stateless persons especially vulnerable to the negative impact of detention. The emotional and psychological stress of lengthy – even indefinite – periods of detention without hope of release or removal is particularly likely to affect stateless persons. These Guidelines explain how these factual circumstances should affect decisions as to the lawfulness of detaining a stateless person.*

*States are obligated by international law to treat stateless persons in a way which is appropriate in the light of their statelessness. States will be unable to comply with that obligation unless they take measures to identify whether those at risk of detention are stateless. These Guidelines set out the minimum standards which states should apply in relation to the identification of stateless persons.*

*These Guidelines draw from internationally accepted human rights norms and principles. They do not attempt to develop new legal principle; rather to elaborate how existing human rights principles relating to detention and non-discrimination, and international law on statelessness apply to the specific challenge of the detention of stateless persons. Consequently, the Guidelines reflect and formulate the existing human rights obligations of states towards stateless persons in their territory and within their jurisdiction.*

*These Guidelines also draw from international good practice, and recommend actions which go beyond the minimum obligations of international human rights law. Such recommendations provide guidance on how states could offer better protection to stateless persons within their territory and jurisdiction.*

*These Guidelines comprise four parts. Part One focuses on definitions, the scope and interpretation of the Guidelines and the basic principles which should govern all aspects of their implementation. Part Two focuses on the identification of stateless persons and Part Three on the detention of stateless persons. Part Four is a series of miscellaneous concluding guidelines.*

## Part I – Definitions, Scope, Interpretation and Basic Principles

### Definitions

1. A *de jure* stateless person is defined under international law as a woman, man or child “who is not considered as a national by any state under the operation of its law”.<sup>1</sup>

2. A person who has a legal nationality which is ineffective – for example, a person who does not benefit from consular protection from his or her country of evident nationality – is considered to be *de facto* stateless. A person may be *de facto* stateless their entire life, for a limited period of time, or only in a specific country or context.

3. Detention is understood to mean “**confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.** There is a qualitative difference between detention and other restrictions on freedom of movement”.<sup>2</sup> When considering whether a stateless person is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.<sup>3</sup>

4. Administrative detention is understood to mean detention for the sole purpose of achieving a legitimate administrative objective such as identification, status determination or removal.

### Scope

5. These Guidelines generally apply to the detention of both *de jure* and *de facto* state-

less persons. Unless the Guidelines specifically refer to either *de jure* or *de facto* stateless persons, they should be understood to be equally applicable to both groups.

6. These Guidelines apply to the detention of, and decisions to detain, all stateless persons within the territory or jurisdiction of states.

7. The need for these Guidelines arises in the context of the administrative immigration detention of stateless persons, primarily for the purpose of removal to a third country, but also for other purposes.

8. These Guidelines also address the identification of stateless persons, which is a necessary pre-requisite for the adequate protection of stateless persons.

### Interpretation

9. Any exceptions to the protections stated in these Guidelines should be interpreted in the narrowest possible manner.

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

11. These Guidelines are mainly a reflection of the existing human rights obligations of states towards stateless persons within their territory or jurisdiction. Such Guidelines use directive language – i.e. “states should”, “states shall”, “states have a duty”, etc. Where the Guidelines contain good practice recommendations this is re-

flected through the use of more persuasive language – i.e. “it is desirable that”.

### ***Basic Principles and Assumptions***

12. States have a duty to respect, protect and fulfil the human rights of stateless persons within their jurisdiction, including the right to be free from arbitrary and unlawful detention.

13. The human rights obligations of states in respect of stateless persons apply at all times, including in the exercise of immigration control.

14. All persons, including stateless persons, are equal before the law and are entitled without any discrimination to the equal protection of the law. National laws pertaining to immigration detention should not discriminate against stateless persons and should not be applied in a discriminatory way. Immigration detention regimes should be designed and implemented in a manner which takes due consideration of the challenges of statelessness and of the obligations of the state in respect of stateless persons.

15. States should refrain from both direct and indirect discrimination against stateless persons in designing and implementing laws relating to immigration detention, and should ensure that they reasonably accommodate the particular circumstances of stateless persons. Equal treatment, as an aspect of equality, is not equivalent to identical treatment. To realise full and effective equality, it is necessary to treat people differently according to their different circumstances.<sup>4</sup>

16. States should refrain from treating stateless persons less favourably than others because of their statelessness, including by deciding to detain, prolonging the detention of,

or imposing less favourable detention conditions upon a person because of that person’s statelessness. In addition, policies and practices should not unjustifiably place stateless persons at a particular disadvantage or have a particularly negative impact upon them.

17. States which are party to the 1954 Convention have a legal obligation to treat *de jure* stateless persons within their territory or jurisdiction in accordance with the provisions of that Convention.

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

19. States have the right to protect their nationals when they are abroad. States should exercise this right with due regard to their international human rights obligations, as the failure or inability of consulates to provide such protection can create *de facto* statelessness.

## **Part II - Identifying Stateless Persons**

### ***Identifying Stateless Persons***

20. All immigration regimes which impose detention for administrative purposes should have efficient, effective and fair procedures in place for the identification of stateless persons. It is highly desirable that such procedures provide that in determining whether a person is *de facto* stateless, due regard shall be had to the full range of factors which can undermine the effectiveness

of a person's nationality, including where the person concerned is from a State:

- (i) which has no diplomatic presence in the host State;
- (ii) which has strained diplomatic relations with the host State;
- (iii) to which there are no effective transport routes;
- (iv) which is incapable of protecting its nationals; and/or
- (v) which has a record of failing to cooperate with removal proceedings including through the issue of passports and travel documents.

21. Persons should be subject to statelessness determination procedures when they are at risk of immigration detention, before a decision to detain has been made. When the nationality of failed asylum-seekers is in doubt, it is highly desirable that they should be automatically subject to statelessness determination procedures. All persons subject to such procedures should be allowed to remain in the country pending final decision.

22. All persons subject to statelessness determination procedures should be informed at the very beginning of the procedure of the right to raise refugee-related concerns. In determining whether an asylum-seeker is stateless, the State should in all circumstances ensure that the asylum-seeker's confidentiality is maintained.

23. The following minimum procedural and substantive standards should be ensured in all procedures for the identification of stateless persons:

- (i) All procedures should be objective, fair and just.
- (ii) All procedures should be non-discriminatory, and applied without discrimina-

tion, including by accommodating, to the extent reasonable, the needs of persons who are vulnerable to discrimination including women, children, the elderly and disabled persons and others who may have particular needs, such as victims of torture and victims of trafficking.

(iii) All procedures should be completed within a reasonable period of time. The fairness of the procedure should not be undermined in order to complete it within a specified period of time.

(iv) All persons subject to such procedures should be provided with adequate information about the procedure and should be notified of their rights under the procedure.

(v) All persons subject to such procedures should be entitled to legal assistance. It is highly desirable that legal aid is provided to persons who do not have the means to pay for legal assistance.

(vi) Interpretation and translation facilities should be provided free of charge to all persons who require such facilities within such procedures.

(vii) All data and information collected during such procedures should be kept confidential in compliance with data protection laws.

(viii) All persons subject to such procedures should be given free and regular access to the UNHCR and to NGOs that are able to assist. It is highly desirable that the UNHCR plays a formal advisory role in such procedures.

(ix) The standard of proof required for the establishment of statelessness should be a reasonable standard of proof.

(x) The burden of proof should be shared by the State concerned and the individual.

(xi) Evidence of the lack of nationality should only be required in respect of those States with which the person has clear ties, including through long-term residence, descent and birth.

(xii) All persons subject to such procedures

should be kept informed of the process at all stages and should be informed of the results of the process in writing, with reasons given. (xiii) All decision-makers and persons who play a role in the procedure (including lawyers) should be adequately qualified and given training on the identification of stateless persons.

(xiv) All decisions should be subject to independent review – either judicial or administrative – and accompanied by a right of appeal.

### **Part III – The Detention of Stateless Persons**

#### ***Decision to Detain***

24. The detention of stateless persons for purposes of identification, status determination or removal is inherently undesirable and there should be a presumption against their detention.

25. The detention of stateless persons should never be arbitrary. Mandatory immigration detention is arbitrary and therefore unlawful under international human rights law.

26. Detention will be arbitrary unless it is *inter alia*:

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

27. Administrative expediency does not in itself constitute a legitimate objective of ad-

ministrative detention, nor can administrative detention be used for punitive purposes. Detention should not be used as a deterrent to irregular immigration.

28. Removal will not be a legitimate objective in instances where it:

- (i) violates international law obligations of *non-refoulement*; and
- (ii) violates the individual's right to respect for private and family life. The age of the individual when they first arrived in the host state, as well as their family and other ties both within the host state and the state to which removal is sought, are relevant factors for consideration in this regard.

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

30. There is some overlap in the application of the principles of non-discrimination, necessity, proportionality and reasonableness to the decision to detain stateless persons. The following considerations should be taken into account in determining whether detention is non-discriminatory, necessary, proportionate and reasonable:

- (i) A person should not be detained solely by reason of his or her statelessness.
- (ii) Detention should only be used as a measure of last resort. Before a decision to detain has been taken, all other less coercive and restrictive ways of achieving the administrative objective at hand should first have been explored and exhausted. Guidelines 32 – 38 elaborate on alternatives to detention.
- (iii) In order to meet these criteria, deten-

tion should be a necessary, proportionate and effective means of achieving the administrative objective pursued. In the case of a stateless person who is likely to be impossible to remove, detention for the purpose of removal is likely to be arbitrary, as it would not achieve that purpose.

(iv) The length of time it is likely to be necessary to detain a person in order to achieve the objective pursued will be an important factor in the assessment of the proportionality and reasonableness of detention. Given the difficulty of establishing the immigration status of a stateless person and/or of removing a stateless person, detention of a stateless person for these purposes is rarely likely to be proportionate and reasonable.

(v) Before any stateless person is detained for purposes of removal, the likelihood of removal should first be assessed with due diligence. If there is no reasonable expectation of removal within a specific period of time that is no longer than six months, the person should not be detained.

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

(vii) The inability of a stateless person to cooperate with removal proceedings should not be treated as non-cooperation, and should not be grounds for detention.

31. All persons at risk of immigration detention, including stateless persons, should enjoy the procedural safeguards prescribed by international human rights law during the detention decision-making process.

### ***Alternatives to Detention***

32. States have an obligation at all times to implement viable alternatives to detention

that are less coercive and that better protect the human rights of stateless persons.

33. Alternatives to detention should be given due consideration and used whenever a person would otherwise be detained, and not only once initial attempts to achieve the administrative objective sought, such as removal, have failed.

34. There are many alternatives to detention. It is preferable that states have a range of alternatives available so that the best alternative for a particular individual and/or context can be applied in keeping with the principle of proportionality and the right to equal treatment before the law.

35. 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.<sup>5</sup> The most desirable alternative to detention is “liberty”. Other alternatives include:

- (i) community-based supervised non-detention or case management;
- (ii) monitoring and reporting requirements; and
- (iii) bail, bond, surety or guarantor.

36. The imposition of alternatives to detention which restrict a stateless person’s liberty should be subject to the same procedural and substantive safeguards as a detention regime. States should, therefore, apply all the relevant standards specified in these Guidelines and under international law to ensure that alternatives to detention pursue a legitimate objective, are lawful, non-discriminatory, necessary, proportionate and reasonable.

37. Where a stateless person is subject to one or more such alternatives to detention

they should be subject to regular, periodic review to ensure that they continue to pursue a legitimate objective, be lawful, non-discriminatory, necessary, proportionate and reasonable. In particular, alternatives to detention should be applied for the shortest possible time within which the purpose of removal or other legitimate administrative purpose can be achieved.

38. If there is evidence to demonstrate that the administrative objective pursued, such as removal, cannot be achieved within a reasonable period of time, the person concerned should not be subject to such alternatives to detention.

### ***Vulnerable Groups***

39. The initial screening of all stateless persons should identify whether any stateless person belongs to a group which is particularly vulnerable to discrimination or the negative effects of detention.

40. Certain stateless persons are of heightened vulnerability due to their specific characteristics, context and/or experience. Such persons include disabled persons, those with specific physical and mental health conditions and needs, victims of trafficking, victims of torture, cruel, inhuman or degrading treatment or punishment, those belonging to minorities which are at heightened risk of discrimination in detention, children, the elderly, pregnant women and nursing mothers. The strongest possible presumption against detention should apply to such persons, and detention should only be allowed (in addition to fulfilling all other criteria stated in these Guidelines) after it has been medically certified that the experience of detention would not adversely impact their health and wellbeing. Furthermore, such persons

should also have regular access to all appropriate services, such as hospitalisation, medication and counselling.

41. The strongest possible presumption against the detention of stateless children should be applied. Stateless children should at all times be treated in accordance with the principle of the best interest 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.

42. As a general rule, stateless asylum-seekers should not be detained. The detention of asylum-seekers may exceptionally be resorted to for limited purposes as set out by the UNHCR, as long as detention is clearly prescribed by national law and conforms to general norms and principles of international human rights law.<sup>6</sup>

### ***Ongoing Detention***

43. In instances where stateless persons are nonetheless detained, they should be entitled to the following minimum procedural guarantees:

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

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

(iii) The individual should be informed of their rights in connection with the detention order, including the right to legal counsel and

their right to seek judicial review and/or appeal the legality of their detention. Where appropriate, they should receive free legal assistance.

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

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

44. Detention should never be indefinite. Statelessness should never lead to indefinite detention and statelessness should never be a bar to release.

45. Detention should always be for the shortest time possible. There should always be a reasonable maximum time-limit for detention. There is no accepted international standard with regard to a maximum time-limit on detention; however, many countries do not detain immigrants for more than six months. It is therefore highly desirable that all states detain stateless persons for no more than six months. States which have a lower maximum time-limit to detention should not increase it. Upon the expiry of the maximum period for detention, a stateless detainee should be released.

46. The administrative purpose behind the detention should be pursued with due diligence throughout the detention period for the purpose of ensuring that detention does not become arbitrary at any stage. Detention should be subject to automatic, regular and periodic review throughout the period of detention before a judicial or administrative

body independent of the detaining authorities. As soon as it becomes evident that the administrative purpose cannot be achieved within a reasonable period of time, or that the detention otherwise becomes incompatible with the tests set out in Guidelines 24 to 30, the detainee should be released.

### *Conditions of Detention*

47. Conditions of detention should be prescribed by law and should comply with international standards. Of particular relevance are the 1955 UN Standard Minimum Rules for the Treatment of Prisoners,<sup>7</sup> the 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>8</sup> the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty,<sup>9</sup> and the 1999 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers.<sup>10</sup>

48. While all international standards on conditions of detention should be complied with, the following are emphasised in particular:

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

(ii) Stateless persons should be treated without discrimination and should be entitled to the same detention conditions as other immigration detainees.

(iii) Stateless persons in detention should be subject to treatment that is appropriate to their unconvicted status. Under no circumstances should stateless detainees be housed in the same facilities as prisoners. Immigration detention facilities should be designed and built in compliance with the principle

that there is no punitive element to immigration detention. As such, detention centres should facilitate the living of a normal life to the greatest extent possible.

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

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

(vi) Stateless persons in detention should be protected from discrimination and harassment.

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

(viii) Due consideration and care should be taken to provide for all human rights of stateless persons in detention; in particular, the rights to respect for private and family life, freedom of thought, conscience and religion, freedom of expression and the rights to health, education, shelter and food, in accordance with international legal standards.

49. All detention centres should be regularly monitored by independent authorities mandated to inspect detention centres to ensure that they comply with national and international legal requirements.

### ***Foreign National Prisoners***

50. In many States, non-citizens who have been convicted of criminal offences are subject to mandatory removal proceedings after serving their criminal sentences. States are urged to follow the safeguards below, to ensure that stateless foreign national prisoners are not subject to unlawful detention:

(i) All foreign national prisoners should be subject to a statelessness determination procedure at the beginning of their prison sentence. Where there is evidence to suggest that a foreign national prisoner is stateless, any further detention after the completion of their sentence is likely to be unnecessary, disproportionate and arbitrary as, save in relation to very short sentences, the authorities were in a position to determine whether removal was reasonably possible during the imprisonment of the person concerned.

(ii) Removal proceedings against foreign national prisoners should begin a minimum of six months prior to the completion of their prison sentence. Where there is no reasonable expectation that the individual can be removed at the time their sentence is complete, foreign national prisoners should not be automatically subject to further detention pending removal.

(iii) If foreign national prisoners are considered to be a threat to the general public or to national security after they have served their sentences, they should be tried and sentenced under the criminal law. In such circumstances, they should not be held in immigration detention.

## **Part IV – Miscellaneous and Concluding Guidelines**

### ***Data and Statistical Information***

51. It is highly desirable that all States maintain reliable data, disaggregated by protected characteristic, showing:

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

52. It is highly desirable that States maintain reliable data, disaggregated by protected characteristic, showing :

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

### ***Criminalisation of Immigration Offences***

53. The position of stateless persons differs fundamentally from that of other migrants in that they may not be able to comply with the legal formalities of entry to a third country. Statelessness and its direct consequences, including travelling without documentation, should therefore not be criminalised.

54. Immigration detention should under no circumstances have a penal element to it. Immigration detention should solely be for administrative purposes.

55. Immigration detention should not be used as a punishment for those who do not cooperate with removal proceedings.

### ***Release***

56. State obligations towards stateless persons do not cease after release from detention.

57. Stateless persons who are released from detention should never be released into a state of vulnerability or destitution in breach of their human rights.

58. Released stateless detainees should have equal access to healthcare and social welfare as nationals. It is highly desirable that they are given adequate housing and access to education.

59. It is highly desirable that released stateless detainees are allowed to work.

60. It is highly desirable that released stateless detainees are given legal leave to remain in the country concerned.

61. It is most desirable that durable solutions are found for statelessness, including the naturalisation of stateless persons in third countries where they live.

### ***Compensation***

62. All stateless persons who have been subject to unlawful and arbitrary detention should be duly compensated.

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

64. Compensation should be paid at the same scale that compensation is paid to nationals in similar circumstances.

### ***Exclusion Clauses***

65. All stateless persons who are excluded from the protection of the 1954 Convention because “there are serious reasons for considering that:

(a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

(b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

(c) They have been guilty of acts contrary to the purposes and principles of the United Nations”,<sup>11</sup>

should be subject to lawful exclusion procedures – as developed under international refugee law – and should not be held in immigration detention. Such persons continue to benefit from the protection of international human rights law. If necessary, such persons should be charged, tried and if found guilty, convicted under the criminal or anti-terrorism laws of the country concerned, with strict regard to and application of rules of due process and equality before the law.

### ***Concluding Guideline***

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

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<sup>1</sup> Convention Relating to the Status of Stateless Persons, ECOSOC RES/526 A(XVII) (1954), Article 1(1).

<sup>2</sup> UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html> [accessed on 13 July 2011], Guideline 1.

<sup>3</sup> *Ibid.*, adapted from Guideline 1.

<sup>4</sup> The Equal Rights Trust, *Declaration of Principles on Equality*, 2008, p. 5, available at: <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>.

<sup>5</sup> See above, note 2, adapted from Guideline 4.

<sup>6</sup> *Ibid.*, adapted from Guidelines 2 and 3.

<sup>7</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955.

<sup>8</sup> UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly*, A/RES/43/173, 9 December 1988.

<sup>9</sup> UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution / adopted by the General Assembly*, A/RES/45/113, 14 December 1990.

<sup>10</sup> See above, note 2.

<sup>11</sup> See above, note 1, Article 1(2)(iii).

# Measures of First Resort: Alternatives to Immigration Detention in Comparative Perspective

Alice Edwards<sup>1</sup>

## 1. Introduction

Many states have indicated an interest in non-custodial alternatives to immigration detention.<sup>2</sup> “Alternatives to immigration detention” (or A2Ds) is the generic term for “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>3</sup> The label is not a legal one, but rather refers to the range of measures employed by states that fall short of full deprivation of liberty or confinement in a closed space, although some still involve some form of restriction on movement, such as reporting requirements or designated residence. The ultimate alternative to detention is no detention at all, or release without conditions.

Notwithstanding the interest in and success of many alternative programmes, the rate at which asylum-seekers and immigrants are being detained is increasing in many countries. The Parliamentary Assembly of the Council of Europe recently noted that member states had “significantly expanded their use of detention as a response to the arrival of asylum seekers and irregular migrants”.<sup>4</sup> Incarceration rates of migrants in the USA have also increased exponentially over the last decade: the average daily population in

detention in 1997 was 9,011, yet by 2007, it was 30,295.<sup>5</sup> Growing xenophobia and racism in many parts of the world have led to a surge in intolerance, violence, hate crimes and related tensions against refugees and other non-nationals.<sup>6</sup> Fuelled by populist politics, these trends are also the context in which hardening policies in the area of detention take place and also in which such policies are justified, regardless of the evidence. Pragmatically, however, there is no empirical evidence that the prospect of being detained deters irregular migration, or discourages persons from seeking asylum.<sup>7</sup> In fact, as the detention of migrants and asylum-seekers has increased in many countries, the number of individuals seeking to enter such territories has also risen, or has remained constant.<sup>8</sup> Globally, irregular migration has been increasing regardless of governmental policies on detention.<sup>9</sup>

Except in specific individual cases, detention is generally an extremely blunt instrument of government policy-making on immigration. This may be explained by the complexity of choices and the mixed motivations of many migrants, which likely have little to do with the final destination country’s migration policies.<sup>10</sup> Statistics call into question any deterrence effect of detention. Regardless of any such effect, detention policies aimed at

deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain.<sup>11</sup>

Apart from noting the current political climate in some parts of the world in which asylum is being sought, not least an atmosphere of increasing hostility towards foreigners, the many political reasons why detention is an increasing phenomenon is not examined in this article in detail. However, the article does outline briefly the non-discrimination framework in which the right to liberty is situated and which is, in many contexts, the backdrop for increasingly harsh detention as well as asylum regimes. This article will examine the actual evidence that suggests that many alternatives to migration management. “Workability” for the purposes of this article is largely taken to mean cooperation of beneficiaries with the programmes in question. There is considerable evidence that shows, for example, that less than 10% of asylum applicants, as well as persons awaiting deportation,<sup>12</sup> disappear when they are released to proper supervision and facilities. In other words, 90% or more of such persons comply with all legal requirements relating to their conditions of release. In addition, alternative options present significant cost savings to governments,<sup>13</sup> whereas some governments have paid out millions of dollars in compensation or face unpredictable compensation bills for their unlawful detention policies.<sup>14</sup> Counter-intuitively, alternative programmes that offer advice on the full spectrum of possible legal avenues to remain also enjoy higher voluntary return rates than those that do not.

The material presented in this article is drawn from empirical research conducted into a number of alternative to detention

programmes between May and September 2010 in five countries, namely Australia, Belgium, Canada, Hong Kong, and Scotland. Field visits were made to each of the locations, and with the exception of Scotland, the author witnessed the schemes on site. Interviews were conducted with governments, non-governmental organisations (NGOs) and lawyers in each of the locations.<sup>15</sup> This article looks at three types of alternatives: government-funded community-based supervision models (Australia and Hong Kong) in section 3; government-run return models (Belgium and Scotland) in section 4; and a hybrid model of government-funded bail with community supervision (Canada) in section 5. The material presented contradicts many of the general assumptions made by governments about migrant behaviour and the related arguments about the need for detention. In particular, it concludes that treating persons with dignity and humanity throughout the asylum and returns processes, and setting out clear guidelines on rights and responsibilities, can lead to improved compliance rates and cooperation, lower costs, better and more effective asylum systems and, at times, higher voluntary return rates. Not only is there a legal case that governments need to consider less intrusive measures other than detention to respect the right to liberty and the prohibition on arbitrary detention under international law on a non-discriminatory basis,<sup>16</sup> but there are also pragmatic reasons for doing so. This article is focused primarily on the latter.

## 2. Non-discrimination and Detention

As a matter of international law, the right to liberty of person applies regardless of immigration status.<sup>17</sup> Detention decisions are subject to guarantees against discrimination, including in the context of derogation in

situations of a threat to the national security of the country. Even in relation to the latter, states must be able to demonstrate that there was an objective and reasonable basis for distinguishing between nationals and non-nationals. It has been held by the UK House of Lords, for example, that the application of forms of indefinite detention to “foreign” terror suspects and not to nationals was not only discriminatory, but the discrimination in question contributed to the characterisation of the detention as disproportionate.<sup>18</sup> Similarly, non-nationals cannot be deprived of their rights to challenge their detention before civil courts, irrespective of the legislation purporting to deny them this right and/or their location outside the physical territory of the state.<sup>19</sup> The Inter-American Court of Human Rights has also confirmed that even in times of emergency, the rule against non-discrimination applies in the context of *habeas corpus* guarantees.<sup>20</sup>

The United Nations Human Rights Committee has stated that the “general rule of [international human rights law] is that each one of the rights (...) must be guaranteed without discrimination between aliens and citizens”,<sup>21</sup> and it also confirms that such rights “apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness”.<sup>22</sup>

The freedom of movement provisions contained in the 1951 Convention relating to the Status of Refugees (1951 Convention) must also be applied in a non-discriminatory manner.<sup>23</sup> Detention policies may be discriminatory in purpose or effect.

States that impose detention on persons of a “particular nationality” may also be liable to charges of racial discrimination, including under the International Convention on

the Elimination of All Forms of Racial Discrimination 1965 (ICERD).<sup>24</sup> Discrimination under the ICERD includes direct as well as indirect discrimination.<sup>25</sup> If a particular measure applies disproportionately to a particular ethnic, racial or religious group, for example, without a reasonable and objective justification, the measure would be discriminatory under the ICERD.<sup>26</sup> Where the effects are discriminatory, the question of intent is no longer relevant to international law on discrimination.<sup>27</sup> Questions could also be raised around the legality of detention for the purposes of “fast-track procedures” used to determine the cases of individuals from so-called “safe countries of origin”, as these accelerated procedures apply to persons from particular countries or regions and thus may discriminate against particular nationalities. At a minimum, an individual has the right to challenge his or her detention on such grounds; and the state must show that there was an objective and reasonable basis for distinguishing between nationals and non-nationals in this regard.<sup>28</sup> The Committee on the Elimination of Racial Discrimination has called in particular for states to respect the security of non-citizens, in particular in the context of arbitrary detention, and to ensure that conditions in centres for refugees and asylum-seekers meet international standards.<sup>29</sup>

A decision to detain “actuated by bad faith or an improper purpose” may also render the detention arbitrary.<sup>30</sup> Discrimination against a particular group, for example, would be an improper purpose. Using detention to deter irregular migration in general may amount to an improper purpose, as it is not tailored to an individual case. It may also amount to collective punishment.<sup>31</sup> Furthermore, being stateless cannot be a bar to release, and using the lack of any na-

tionality as an automatic ground for detention would run afoul of non-discrimination principles.<sup>32</sup>

### **3. Australia and Hong Kong: Government-funded Community-based Supervision**

#### **3.1 Impetus to Act and Legal Frameworks**

Both Australia and Hong Kong operate community release schemes, with varying restrictions that can be imposed on release – such as reporting requirements, payment of a bond, or designated residence – but ultimately individuals and their families are released into the community. Hong Kong was forced to release many immigration detainees owing to successful litigation that showed that it did not have an adequate detention policy, in particular because it failed to provide guidance to decision-makers and immigration officials on how to assess whether someone should be subject to detention. Several cases found a violation of Article 5 of the Hong Kong Bill of Rights, which mandates legal certainty and accessibility in connection with detention. A violation of both these legal principles was found because there was no policy statement setting out how the power of detention was to be exercised.<sup>33</sup> Despite the Hong Kong government subsequently adopting policy documents as directed by the courts, a later case found that these were also inadequate.<sup>34</sup>

It is the author's view that its current policy is also challengeable,<sup>35</sup> albeit an improvement on previous versions. The Hong Kong government has produced a list of factors to consider in decisions to detain or release an individual. As it contains 15 reasons "for detention" and only six "against detention", it could be argued that the policy amounts to a presumption in favour of detention, which would be unlawful, and is not a balancing test at all.<sup>36</sup> Under this new policy, however,

the majority of asylum-seekers and torture claimants have been and are released from detention; and while there is no set maximum limit in detention, the average length appears to be around 14 days.<sup>37</sup>

The Australian government did not have the same legal impetus to act as did the government of Hong Kong. Despite a number of international decisions castigating Australia's detention policy,<sup>38</sup> Australia's High Court decision in *Al-Kateb v Godwin* found that the government's policy of mandatory and non-reviewable detention was not unconstitutional.<sup>39</sup> Nonetheless, in the mid-2000s, there was growing disapproval among the Australian public and among some government backbenchers that persons were being held in long-term and indefinite detention, including those wishing to return to their countries of origin (such as Al-Kateb) but who could not do so for reasons beyond their control or influence. Under the Australian immigration system, detention of an unlawful non-citizen is mandatory until the person obtains a visa (this could be refugee status or a bridging visa, for example) or is removed.<sup>40</sup> There is thus no consideration of the necessity of detention, or any other factors, in individual cases. Under this system, the only possibility of release from immigration detention is to provide a lawful status. This is achieved through a substantive visa (such as refugee status) or through a discretionary "bridging" visa.<sup>41</sup> A "bridging" visa is a temporary visa granted at the discretion of the competent Minister to persons who are in the process of applying for a substantive visa or making arrangements to leave Australia. The Department of Immigration and Citizenship (DIAC) website adds that the visa can be granted "at other times when the 'non-citizen' does not have a visa (for example, when seeking judicial review) and it is not necessary for the person to be kept in immigration

detention.”<sup>42</sup> The visa is granted for a specific period of time, or until a specified event occurs.<sup>43</sup> While on the bridging visa, the person is entitled to live in the community.

Bridging visas might be considered equivalent to “bail” in other jurisdictions – as various conditions on release may be attached.<sup>44</sup> However, unlike bail, there is no independent administrative or judicial process or automatic right to apply; rather it is entirely an exercise of executive discretion. It is also distinct from normal bail in so far as the visa provides a “lawful status”, albeit temporary; in many other countries, persons who are granted bail may still be considered unlawfully in the territory under domestic legal provisions.<sup>45</sup> The discretionary nature of these visas is one of the weakest elements of the Australian system, and in other jurisdictions, it would be unlikely to survive human rights scrutiny. Another human rights concern with bridging visas is that they are an uncertain legal status, which can be revoked at any time by the competent Minister – and they can become a prolonged temporary legal status. The average length of time on a bridging visa between July and December 2008 was 79 days prior to departure from Australia. However, approximately 40% had been on the visa for more than two years and around 20% had been in Australia for more than five years at the relevant date.<sup>46</sup> As yet, there are no complementary forms of protection available in Australia, although there is a draft bill under consideration.<sup>47</sup>

At any one time, there are an estimated 56,000 persons on bridging visas,<sup>48</sup> the majority of whom are persons who had entered Australia lawfully on a tourist, student, temporary visitor or other visa and who initiated an immigration case while on that visa.<sup>49</sup> That is, the main beneficiaries of this visa (and associated alternative to detention

programmes) are persons who were already living in the community and who have “overstayed” or otherwise breached a condition of their visa. Bridging visas may also be granted to persons in immigration detention, allowing them release into the community. The latter have typically been granted only to persons who cannot be removed from Australia and not to the wider group of detained asylum-seekers.

The Australian system is structured in such a way that it creates a two-tier system of treatment. Those who enter Australia lawfully but who later overstay their visa and subsequently submit an immigration case are generally not detained, whereas persons attempting to enter Australia in an unauthorised manner (i.e. irregular boat and air arrivals) are routinely detained. It is arguable that this system of mandatory detention of asylum-seekers arriving in Australia in an unauthorised manner could constitute indirect discrimination, as the unauthorised entrants originate predominantly from a particular region.<sup>50</sup> As at May 2011, 6,730 persons were being held in immigration detention centres, the large majority of whom are irregular maritime or air arrivals (97%).<sup>51</sup>

In Hong Kong, in comparison, no legal status is provided to persons released from immigration detention. Persons remain “pending deportation”. Like Australia, Hong Kong also operates a two-tiered system, but its system is not based on mode of arrival. Rather, as a non-signatory to the 1951 Convention and 1967 Protocol, Hong Kong has two parallel protection processes. Persons can apply for asylum directly to UNHCR, and/or they can apply to the government not to be returned owing to a fear of torture. Hong Kong is a party to the UN Convention against Torture and is thus responsible for processing the latter claims.<sup>52</sup> It is still uncertain what legal

status persons obtain after it is found that they cannot be returned on torture grounds. At the time of writing, only one torture case had been decided.<sup>53</sup>

One of the issues in Hong Kong has been the slow processing of torture claims. In fact, at the time of writing, there were 6,600 pending cases with an estimate of an additional 120 new cases every month in 2010 (this has been reduced from around 300 per month in 2009).<sup>54</sup> The government has recently established what it calls “enhanced administrative screening”, in which it now operates a “duty lawyer” service, provides legal aid to those without means, and has imposed some procedural regulations.<sup>55</sup> Despite this, it is speculated that even with 300 duty lawyers, it will take between eight to ten years to clear the backlog. The duration of asylum procedures is also lengthy, with the average processing time ranging from eight to twelve months,<sup>56</sup> while unaccompanied minors may wait five to six months for a decision.<sup>57</sup> The question of whether Hong Kong has responsibility over asylum-seekers by virtue of the customary international law principle of *non-refoulement* is currently before the courts.<sup>58</sup> No rights to work are granted.

### 3.2 Operational Context

Both the Australian and Hong Kong alternative to detention schemes introduce a “case management model” in which individuals are given immigration and other advice or directed to various services, and social security or other subsistence is provided by community-based organisations or NGOs directly funded by the government. In Hong Kong, the project is run through the International Social Service (ISS); in Australia, through the Australian Red Cross (ARC). Under both schemes, persons are housed in the community – using the private sector – rather than

being housed in government reception centres. There are some distinctions. The Australian programme is focused on vulnerability, whereas the Hong Kong project applies across the board.

The Australian “Asylum Seeker Assistance Scheme” (ASAP) is targeted at a specific group of “vulnerable” persons applying for refugee status in Australia. The scheme provides a living allowance, basic health care, pharmaceutical subsidies, and torture and trauma counselling. It is not as comprehensive as the hybrid government-NGO run Community Assistance Support Programme (CASP) (discussed briefly next), and it is means-tested. Ineligible applicants include those who are not in financial hardship and who are entitled to other government support or in a relationship with a permanent resident (either spouse, de facto or sponsored fiancé) or who have been waiting for less than six months for a primary decision. In other words, this scheme only starts after a six-month delay in an initial asylum determination. There are some exemptions to these criteria, such as unaccompanied minors, elderly persons, families with children under 18 years, or persons unable to work owing to disability, illness or the effects of torture and/or trauma.<sup>59</sup> In fact, 95% of the programme’s beneficiaries have been waiting less than six months for a decision, but are eligible by virtue of the exemptions.<sup>60</sup> The support ceases upon grant of refugee status, or after 28 days of notification of refusal of status.<sup>61</sup> Extensions are available for those appealing to the Refugee Review Tribunal, but the support ceases after a decision of that body; and no extensions are available to those seeking judicial review of their decision, or the favourable exercise of ministerial discretion. It is at these latter stages that charities and other NGOs have stepped in to fill the gaps in support and to protect against destitution.<sup>62</sup>

Referrals to the programme are made by the DIAC, from other organisations, or self-referrals (every asylum-seeker is informed of the programme by letter).<sup>63</sup> In the financial year of 2009-2010, there were 1,797 new cases entering the programme, and another 1,464 cases that closed during the same period.<sup>64</sup>

In comparison to Australia, both asylum and torture claimants in Hong Kong are provided with a “recognizance” document, which may be subject to a number of conditions, such as reporting to the nearest immigration office or payment of a bond. The “recognizance” document is issued only for six to eight weeks, on a renewable basis, so there is a need to report regularly to obtain an extension. Although the Hong Kong government disputes its responsibility over asylum-seekers, they are absorbed within the ISS project. These services include assistance with finding accommodation, the distribution of food and other material goods, transport costs, and counselling. The assistance is “in-kind” and no money is passed over except reimbursement for travel expenses. The ISS supports around 5,500 clients, and this is arguably the most expansive A2D programme worldwide. The ISS is an extremely well-organised NGO, with staff specialised in the various aspects of the case files. The ISS, for example: (i) runs an accommodation and a food department; (ii) conducts home visits and spot checks; and, through individual case managers, assesses and determines the needs of each individual. The ISS aims to operate on the basis of one caseworker to every 135 clients (it has a total of 38 caseworkers). At present however the rate is one caseworker to 200 clients.<sup>65</sup> The ISS operates out of three different offices (two in Kowloon and one in the New Territories). Like some of the other case management models studied (see Toronto Bail Program below), a contract is signed between ISS and the individual on their rights

and responsibilities, and the contract is renewed every month. Failure to appear for two food collections will result in the agreement being terminated. Should persons fail to appear, there is no formal reporting between ISS and the government, although monthly statistics would reveal that food or other collection is down.

In both countries, absconding rates were said to be negligible (see Table 1). Both implementing organisations indicated that persons have to keep appearing in order to receive their weekly allowances or food and non-food items, and without the right to work, this is incentive enough. The costs are also far lower than incarceration costs (see Table 2).

### 3.3 Australia’s Hybrid Government-NGO Alternative

In addition to the specific asylum-seeker programme outlined above, Australia also has a hybrid government-NGO alternative for the broader group of migrants. Sharing the “vulnerability” basis of the ASAP, the CASP (formerly Community Care Pilot or CCP) was set up in 2005 to provide health and welfare support and assistance to persons with particular needs or complex cases.<sup>66</sup> Non-vulnerable asylum-seekers benefit from the Community Status Resolution Service, which is also a case management service but without the additional welfare component. The rationale behind the CCP pilot was that if you treat persons fairly, they are more likely to engage with the immigration process and the resolution of their cases will be more efficient.<sup>67</sup> There are four “guiding principles” to the various programmes running in Australia: (i) fair and reasonable dealings with clients; (ii) duty of care to individuals; (iii) informed departmental and client decisions; and (iv) timely immigration outcomes.<sup>68</sup> The

emphasis of the CASP is on “case management”. In this programme, this means the assignment of a DIAC “case manager” for each individual case who is responsible for the person’s file, including advice and preparation for all possible immigration outcomes as well as welfare issues.<sup>69</sup> This might include referral to one of the other three actors in the programme, namely: (i) the ARC, which has delegated responsibility for health and welfare; (ii) a legal provider where eligible; and/or (iii) the International Organization for Migration (IOM) for counselling on assisted voluntary return (AVR).

Participation in the programme is based on eligibility criteria centred around “vulnerability”.<sup>70</sup> Non-vulnerable persons are eligible instead for the CASP and the Community Status Resolution Service, which essentially provides the case management component without the welfare support.<sup>71</sup> The programme also applies to recognised refugees meeting the criteria to be released from immigration detention, as a form of transition support to aid their integration into the community.<sup>72</sup> Importantly, the ARC and other actors do not have a role in approving or rejecting cases. The ARC stated that it does report on persons who consistently fail to appear, but it does not “chase them” (that is considered the role for the government enforcement agency).<sup>73</sup> The pilot operated in Victoria, New South Wales and Queensland,<sup>74</sup> and has now been accepted as a programme.

Participation in the programme is “voluntary”.<sup>75</sup> The programme consists of an assessment of the individual’s needs and circumstances, and a tailored level of support, which might include any or all of the following: (i) help with basic living expenses and finding suitable accommodation; (ii) essential healthcare and medical expenses;

(iii) counselling; and (iv) other assistance to meet basic health and welfare needs.<sup>76</sup>

Between May 2006 and 30 June 2008, the pilot assisted 746 persons in various ways. The most common nationalities in the pilot were Chinese, Sri Lankan, Fijian, Indonesian, Indian and Lebanese.<sup>77</sup> Evidence suggests that many more persons are in need of this assistance than are currently eligible under the programme. In the financial year 2009-2010, the programme dealt with 184 cases, of which 102 were closed during the same reporting period. Of the closed cases, 38% were granted visas, 8% departed voluntarily and one client was involuntarily removed.<sup>78</sup>

The CASP yielded a 94% compliance rate over a three-year period.<sup>79</sup> For all those on “bridging visas” of any kind, including those not being directly assisted by any of these programmes, the compliance rate was “about 90 per cent” in 2009-2010.<sup>80</sup> In addition, 67% of those found ineligible for a visa voluntarily departed Australia without recourse to detention.<sup>81</sup>

According to the International Detention Coalition (IDC), the two essential ingredients of the Australian “case management” programmes are early intervention and individual assessment of needs.<sup>82</sup> The Australian government has moved from a “one-size-fits-all” enforcement model to an “individual case and risk management model” and the success is obvious.<sup>83</sup> The IDC describes the “case management model” as follows:

“Case management is a comprehensive and coordinated service delivery approach widely used in the human services sector as a way of achieving continuity of care for clients with varied complex needs. It ensures that service provision is ‘client’ rather than ‘organization’ driven and involves an

individualized, flexible and strengths-based model of care. Case managers are often social workers and welfare professionals, but are also people who are skilled and experienced in the particular sector where the case management approach is being used.”<sup>84</sup>

It identifies three stages in this process: the initial needs assessment; the development of a plan to meet those needs; and continual monitoring and engagement.<sup>85</sup> From the government’s perspective, case management is a means of managing migration within the community. It facilitates voluntary returns, while treating persons with dignity and a minimum level of assistance and support. The programme is based on early intervention, and all possible outcomes are on the table, not only return, which has been found to assist with voluntary return. This is not dissimilar to the Belgium experience described below. Unfortunately, the Australian alternatives have not been extended systematically to asylum-seekers who reach Australia by boat or plane without prior clearance, who continue to be mandatorily detained. “Community detention” is being investigated as a way to release children and families from detention centres. “Community detention” is for all intents and purposes an A2D in practice, even if in law those within the programme remain under a detention order. It is similar in this way to the Belgium “return houses” as far as they operate in favour of asylum-seekers arriving at the border, which is described in the following section.

#### **4. Belgium and Scotland (Glasgow): Government-run Return Models**

##### **4.1 Impetus to Act and Legal Frameworks**

Both the Belgian and Scottish/Glasgow models focus on returns, so in this way they are slightly differently oriented to the Austral-

ian and Hong Kong programmes, which may include potential returnees but are respectively focused on a range of over-stayers or mostly focused on asylum (or torture) applicants. The other main distinction from Australia and Hong Kong is that the Belgium and Scottish/Glasgow pilots are run directly by the government, with individuals being channelled into normal, albeit enhanced, government services.

While the majority of asylum applicants are not detained in the UK, many are detained during the initial stages for identity or security checks,<sup>86</sup> or during accelerated procedures. Until mid-2010, there were an estimated 2,000 children in detention for immigration purposes each year.<sup>87</sup> Most children have now been released from detention under the Coalition Government’s pledge to end the detention of children.<sup>88</sup> Detention has also formed a regular part of return operations in the UK<sup>89</sup> although a recent study indicates that the majority of long-term detained immigrants are not deported, thus raising questions of indefinite and therefore arbitrary detention.<sup>90</sup> According to the UK Border Agency’s (UKBA) *Operational Enforcement Manual* (OEM), there are three “alternatives to detention” in the UK: (i) temporary admission; (ii) release on restrictions; or (iii) bail. The distinction between these three options is that temporary admission and release on restrictions may be ordered prior to any detention being imposed, whereas bail is granted only after one has already been detained.<sup>91</sup> The latter is not well utilised. These are not discussed in this article. The OEM specifies that A2Ds should be used wherever possible so that detention is used only as a measure of last resort and, further, that there should be a presumption in favour of temporary release.<sup>92</sup> Despite this guidance to the UKBA, the UN Human Rights Committee has observed that, in practice, A2Ds are ap-

plied only when detention space is unavailable, and that detention is frequently used for mere administrative convenience.<sup>93</sup> Moreover, there is no statutory limit on periods in detention in the UK, leading to regular and costly judicial review of detention.

There have also been a number of projects piloted in the UK, of which the Glasgow “family return project” is but one example.<sup>94</sup> The Glasgow project was introduced in June 2009 as an alternative to detention aimed at encouraging refused asylum-seekers to return voluntarily to their countries of origin by providing “intensive family support focused on helping families make sense of their stay in Scotland, confronting issues delaying a return and building up skills and preparedness for a voluntary return”.<sup>95</sup> The project is for families only and makes provision for four to five families to be accommodated at any one time in self-contained, open flats. The project notes that many more families are eligible than can be accommodated within it. The central feature of the pilot was described as “intervention”.<sup>96</sup>

The legal framework in Belgium provides that foreign nationals may be detained when they are either refused entry or when they request asylum at the border.<sup>97</sup> Also subject to detention are foreign nationals who: (i) are staying in the country irregularly; (ii) pose a threat to public order and security; (iii) present false information regarding their situation to the authorities; (iv) have asylum claims being processed; or (v) who are awaiting the fulfilment of a removal order and are considered likely to impede the fulfilment of that order.<sup>98</sup> Asylum-seekers are, in principle, housed in non-secure reception centres or provided with private accommodation. However, asylum-seekers intercepted at Brussels airport, who are not considered to have formally entered Belgian territory, are system-

atically detained in “Transit Centre 127” until their claims have been processed.<sup>99</sup> Faced with a number of adverse European Court of Human Rights judgments,<sup>100</sup> especially in relation to its detention of children, the Belgian government sought to introduce an alternative to detention programme for families. The programme initially focused on families in the returns phase, but more recently, it has been expanded to include Dublin transfers and families at the border. There remains no legal interdiction on detention, but rather the decision rests in the realm of policy. This has been criticised by activists as being subject to political will.

## 4.2 Operational Context

In both Belgium and Glasgow projects, the programmes are oriented around the idea that in order to facilitate return you need to move persons from their existing accommodation to act as a “break” with reality so they can prepare for their return. As described by a Belgian caseworker, “they know we are serious about their removal”.<sup>101</sup> The Glasgow pilot did not bear this out. One of the problems identified that potentially undermines the “break with reality” concept in the Glasgow pilot is that the general community knew the whereabouts of the return houses as they were located very close to the social services centre and to where families had previously resided. In addition, children remained in the same schools - and so the “break” with the community did not operate as intended. In its first year in operation, not a single family voluntarily returned and the pilot has since been closed. Social workers suggest that the lack of cooperation in returns can be attributed to the fact that persons feel that they have not been fairly treated in the asylum procedure in the first place, and so they are not ready to cooperate in their return.

Both pilots operate case management arrangements: “coaching” in the Belgian context; and “caseworkers” in the Glasgow pilot. These are government employees, recruited from social services in the case of Glasgow, and from both immigration and social services in the case of Belgium. The main aim of such a separation is to maintain a distinction between the two entities in the eyes of the participants. Social workers in Glasgow, however, felt conflicted about being involved in the enforcement or reporting arm of immigration and believed this clashed with their “social work” principles.

Freedom of movement is enjoyed in both locations. Families are free to come and go, although in Belgium the families are subject to rules of the houses. They sign a “*contrat de confiance*”, and they are supposed to observe a curfew between 10 p.m. and 8 a.m., although the apartments are not guarded and there are no morning checks. Both apartments have very small capacity, with just six flats in one location and three houses in another in Belgium. Belgium has plans for its expansion however. In Scotland, the pilot has one house with four apartments.

The Belgian model has a full case management system. The “coaches” re-examine each family’s right to remain in Belgium. The focus was initially only on return, which made families feel as though they were not being listened to, and reportedly a higher rate of absconding occurred. Scotland retains the singular focus on returns, but so far in its one-year period, not a single family has returned voluntarily. The average period of stay in the Belgian return houses is 21.4 days. This may increase as more asylum applicants at the border are moved to the return houses, although such persons have been processed more quickly than normal asylum applications. Families remain “in detention” as a

legal status, but are free to come and go as they please. In comparison, families in Scotland spend up to three months in the houses, which arguably is too long to suggest any urgency to the process.

Over an almost two-year period (from 1 October 2008 to 2 September 2010), 106 families, with 189 minor children, have stayed in the Belgian family units. Of the 99 families over the same period who have departed the units, 46 families have returned to their countries of origin or been transferred to a third country (46%);<sup>102</sup> 19 families absconded (19%); 33 families were released into the community for various reasons (33%);<sup>103</sup> and one child was released to an open centre for minors.<sup>104</sup> The Glasgow pilot has closed since this study was carried out. An independent report on the future of the family return project recommended its closure following the roll out of the UKBA’s new family returns process.<sup>105</sup> The evaluation made the following observations on the main barriers to return, which this research also bore out:

- the length of stay of the family in the UK – some had lived in the UK for many years;
- stories from their home country supporting the view that return was not safe;
- families being in a state of denial over their asylum decision;
- families protecting their children from worrying about return (and associated lack of access to children);
- continual legal appeals and representations; and
- “word of mouth” giving encouragement not to leave, as there may be the opportunity of a change in the policy in the future, or of another “legacy” decision (i.e. regularisation).<sup>106</sup>

The Glasgow pilot aimed to achieve the dual purposes of increasing rates of voluntary

returns while keeping families out of detention. It achieved the latter, but not the former.

Both the Belgium and Glasgow projects raise questions about whether the “case management” ethos could (and should) be applied early in the asylum process, rather than at the tail end of that process. Moreover, they also question whether guidance on legal stay and return could not have been carried out within the community or in their existing accommodation – rather than moving families temporarily to a separate facility to facilitate their return. In the later stages of the Glasgow pilot, the UKBA began to operate an “out-reach” service in existing accommodation, although rates of voluntary return hardly improved – there were no departures, although there were some agreements to leave.<sup>107</sup> It could be argued that, at least in the Glasgow pilot, moving families to different accommodation in the same neighbourhood could be conceived as an abuse of power. Why not offer a programme similar to Australia or Hong Kong, which allows most persons to remain in their existing accommodation while providing advice and services alongside?

## **5. Canada’s Toronto Bail Program: Automatic Bail Hearings and Government-funded Bail System**

### **5.1 Legal Framework**

In Canada, there is a right to automatic and periodic review of immigration detention under the Immigration and Refugee Protection Act (IRPA), which permits release with or without conditions.<sup>108</sup> Canada operates a regular bail system, which is supplemented by a government-funded professional bail programme (the Toronto Bail Program or TBP). The TBP has been in operation since 1996. Immigration detention – in either a correctional facility or an immigration hold-

ing centre – is permitted in Canada if “they [the individual] pose a danger to the public, if their identity is in question or if there is reason to believe they will not appear for immigration proceedings”.<sup>109</sup> Immigration officials are required to review the reasons for detention and have the power to order release with or without conditions within the first 48 hours. Automatic and periodic reviews of detention also occur after 48 hours or without delay thereafter and then again after seven days, and then every 30 days.<sup>110</sup> This is perhaps the most compatible with human rights guarantees of any of the systems examined. For example, Australia does not permit bail, whereas the UK does not operate automatic bail although they did consider it at one time. Detention reviews are conducted by a member of the Immigration Division of the Immigration and Refugee Board (IRB).<sup>111</sup> Judicial review is also available. The Canadian Border Services Agency (CBSA) represents the government in the detention reviews and admissibility hearings, while the detainee has the right to legal counsel and legal aid, subject to a means and merits test. The aim of the system is to release persons from detention as soon as possible if there is no necessity to detain them, and where other conditions could satisfy the authorities to ensure appearance. In many ways, Canada operates a presumption against detention.

The CBSA indicates that 90 to 95% of asylum applicants are released into the community.<sup>112</sup> The 2002 Immigration and Refugee Protection Regulations stipulate explicitly that “alternatives to detention” must be explored. The Canadian Supreme Court has also held that the “availability, effectiveness and appropriateness of alternatives to detention must be considered”.<sup>113</sup> The same regulations apply to asylum-seekers as well as those facing removal. Conditions of release may include depositing a sum of money (a usual

minimum amount is \$2,000 CAD with regular amounts being \$5,000 CAD) or signing an agreement guaranteeing a specified amount (a guarantee of compliance), together with or separately from other “performance” conditions, such as reporting, registering one’s address, appearance at immigration procedures, etc. A third party is able to post bail in these circumstances.

## 5.2 Operational Context

The Canadian immigration bail system is supplemented by the TBP, which aims to eliminate the “financial discrimination” inherent in the immigration bail system,<sup>114</sup> which is particularly likely to disadvantage asylum-seekers or other migrants who have no or limited resources and/or community or family ties. It is described by its director as “professional bail” in contrast to the more *ad hoc* community models in which diaspora groups or community organisations post bail or offer their names as guarantors for particular individuals (discussed below). The TBP operates differently to normal bond/bail systems in so far as no money is paid over to the authorities to secure the release of any migrants from detention under the programme, and no guarantee is signed.<sup>115</sup> Instead, the TBP, under a separate agreement with the CBSA, acts as the bondsperson for particular individuals who could not otherwise be released (at least in theory). The TBP accepts both asylum applicants as well as persons pending deportation. The TBP conducts an intensive selection interview with the individuals concerned to assess their suitability for supervision. The cooperation agreement between TBP and the CBSA means that, unlike normal bail proceedings, the CBSA relies on the judgment of the TBP in selecting its clients, and the system becomes streamlined as there is rarely an objection raised to their release of particular individuals by the gov-

ernment. The individual and/or family are then released to the “supervision” of TBP on particular conditions (described below).

## 5.3 Compliance Rates

The TBP has achieved considerable success in terms of its compliance rates. In the financial year 2009-2010, of the 250 to 275 clients released to the TBP, only 3.65% absconded, which equals 12 “lost” clients. The so-called “lost client” ratio has even improved over recent years.<sup>116</sup> There is minimal distinction between the “lost client” ratio of asylum applicants versus persons pending removal.<sup>117</sup> Many of these persons have been previously convicted of criminal offences, and hence would appear to be in the basket of hard cases, yet it is still possible to achieve very high compliance rates.

## 5.4 Essential Ingredients

According to the programme’s director, a number of fundamental ingredients are the basis for the success of the programme.<sup>118</sup> The first is the concept of “voluntary compliance”, in which persons “agree” to be supervised by TBP.<sup>119</sup> This is not dissimilar to the concepts employed in the Australian and Hong Kong programmes. This is held to create a sense of dignity and responsibility in the individuals released to the programme, of which one part is the signing of an agreement between the individual and TBP on the duties of each party. Like the “*contrat de confiance*” in Belgium, the TBP contract notifies the individual that should they fail to appear for any appointments or otherwise breach the terms of the agreement, they will be reported to the CBSA (who will then issue a Canada-wide arrest warrant).<sup>120</sup> This is one of the points of difference between the TBP and some other non-government-run services. NGOs in Australia, for example, did not

see a problem with reporting on non-compliant migrants, whereas one of the reasons the TBP has not been able to expand in Canada and operate, for example, in other provinces, is because Canadian NGOs do not want to be part of or be seen to be associated with the enforcement arm of the government. The TBP, for their part of the contract, agrees to provide information and advice relating to a range of services.

The second fundamental ingredient is the aspect of “community supervision”, which TBP believes makes compliance more likely because asylum-seekers and others benefit from their engagement with the programme. That is, there is an incentive to comply. Individuals released to TBP are provided with assistance and advice on how to navigate the Canadian asylum, immigration and social services systems. The TBP assists individuals to find housing, and to access healthcare, social welfare, and work (where permitted), or to file necessary paperwork, including applications for asylum and work permits.

Persons released to TBP are initially required to report twice weekly to the offices of TBP in downtown Toronto. Reporting requirements are softened as trust develops between the two parties and there are no reporting lapses. Phone reporting can be later instituted, rather than reporting in person. The TBP requires proof that an individual has participated in any assigned programmes, such as receipts from English language courses, or pay stubs if working, or agreement to a treatment plan, if required, etc. Clients are also required to reside at an address approved by TBP, and must inform TBP if they change address. TBP assists with the finding of accommodation, often in conjunction with local shelters, and conducts spot checks. Furthermore, individuals must be doing “something productive” that

is permitted under the IRPA (e.g. some are not permitted to work). There is also a requirement that they cooperate with the TBP and with any immigration procedures, including, for example, the attainment of documents to facilitate their removal. Failure to report or otherwise comply with conditions of release will lead to TBP informing the authorities, which in turn sets in enforcement action.

## 5.5 Concerns

Despite its high rates of release and compliance with release conditions, the TBP still faces a number of complaints. First, some NGO advocates complain that the TBP and the CBSA are too closely associated, with the TBP being “too selective” in its clients, thereby leaving a tranche of persons who cannot be released but for whom the programme was intended. One NGO described the vetting system of the TBP to be “akin to immigration interrogation” and thus, it was asserted, it has not expanded the pool of persons released to it. A second criticism is that many persons released to TBP ought to have been released on minimal conditions, and that the IRB relies on it too heavily (that is, it is over-used). For example, around 99% of TBP requests for release to their care were granted.<sup>121</sup> A final concern is the length of the selection or vetting process. The vetting process takes around one month, and can last longer. One reason for the delay is because the director of TBP personally vets every application.<sup>122</sup> Nonetheless, the TBP’s response is that they sometimes delay their involvement in an individual case in order to ensure that they accept only those cases that have not been released on their own recognisance or under conditions that they can fulfil themselves. Getting the balance right seems to be one of the challenges of this process.

Other NGO advocates called for the programme to be replicated in the rest of Canada (currently it only operates in Toronto<sup>123</sup>); and there was criticism that the numbers released to the programme remain too small. In financial year 2009-2010, 250 to 275 people were released to TBP, of which 113 (or 37%) were “new” releases (of which 42 were in the refugee category, and the remainder were existing cases). TBP received a total number of 412 requests over the same period, which amounts to 67% of requests to TBP which are accepted as clients (33% are not accepted). In comparison, Ontario detains an average of 377 new individuals per month (average per year is approximately 4,524).<sup>124</sup> While some referrals to the TBP derive from lawyers or refugee and immigrant communities, the majority come directly from CBSA.

Essentially, the TBP acts as the bondsperson for individuals and families who do not otherwise have sufficient resources, or family or other ties, to put up bail. It is therefore an A2D, but it can also act as an alternative to traditional forms of release where, for example, the authorities rely on it too heavily or if the IRB sees it as a precondition to release. The TBP states that it does not accept cases, for example, where the individual cannot be removed (e.g. Cubans) as these persons should be released on minimal conditions. The TBP indicates that it does accept, on the other hand, high flight risk and criminality-related clients.<sup>125</sup>

## 5.6 Other Forms of Bail

There are other groups in Canada that perform a similar function to the TBP, although they are not government-funded. Many community groups and shelters will put forward their address or name as the relevant bondsperson/surety/guarantor in order to facilitate the release of an individual or fam-

ily. These might include diaspora groups or registered NGOs or other charities. There appears to be no distinction in the absconding rates between release to these groups and the more formal TBP,<sup>126</sup> although this is disputed by the TBP as it is the only programme that monitors clients until departure. Immigration lawyers mentioned some unease with bail release to individuals from diaspora groups who put their names forward to act as bondspersons, but where there are no pre-existing or real links. As this side of the bail system is unregulated and unmonitored, it can lead to exploitation and abuse of those released to the care of individuals or groups. Cases were reported in which migrants were being forced to pay over their social welfare cheques to the bondsperson and others were found to be living in poor, squalid and overcrowded conditions. In other words, the system can operate as a repayment system, even verging on extortion in individual cases, with some individual bondspersons having five or more “clients”. Other cases had surfaced of women being sexually and physically assaulted, or forced into prostitution, by their bondspersons. Lawyers indicated that in these circumstances, clients were reluctant to report the exploitation or abuse because in doing so, they risked being returned to detention. However, arguably these cases would be suitable to be transferred to supervision via TBP. Ironically, there is no automatic or systematic right to challenge the conditions of one’s release in Canada. This highlights further reasons why a managed bond system has its merits, especially for those who have no “real” connections to the community.<sup>127</sup>

## 6. Review of Findings

The research found a number of good alternative to detention programmes, which have reduced the need for detention and have treated persons humanely throughout asy-

lum and other immigration processes. The examples largely achieved an over 90% com-

pliance or cooperation rate, which is significant. None fell below 80% in this regard.

Table 1: Compliance rates

Country/Programme	Compliance or cooperation rates (%) <sup>128</sup>	Absconding rates (%)
Australia ASAP (asylum-seekers)	99	Negligible
Australia CASP (mixed <sup>129</sup> )	94	6
Belgium (mixed)	80	20
Hong Kong (mixed)	97	3
Toronto Bail Program (mixed)	96.35	3.65
Scotland (Glasgow)	84	16 <sup>130</sup>

The study also bore out some evidence, albeit still small and somewhat piecemeal, that failed asylum-seekers and other migrants are more likely to opt for voluntary return within A2D processes than outside them. Treatment within asylum and other legal procedures seems to be one of the biggest factors contributing to positive engagement with the system. Where individuals are disgruntled with the system, or feel they have been dealt with unfairly, as in the Glasgow pilot, their ability to cooperate with the same system towards the end of the process and to make decisions about return is less likely. Five common factors can be distilled from the research, which should be used to guide the design and implementation of A2D programmes:

- the treatment of refugees, asylum-seekers, stateless persons and other migrants

with dignity, humanity and respect throughout the relevant immigration procedure;

- the provision of clear and concise information about rights and duties and consequences of non-compliance with any conditions;
- referral to legal advice, including advice on all legal avenues to stay, especially at an early state in the relevant procedure;
- access to adequate material support, accommodation and other reception conditions; and
- individualised “coaching” or case management services.

A second observable factor is that of cost. It is a simple one: detention costs considerably more than most A2Ds (see Table 2). More research is needed into this area, not least on how to quantify the long-term consequences of detention and the long-

term advantages of alternatives. Financial savings may not however be a sufficient motivator where political and/or electoral considerations override them; but they

do provide at least one incentive to consider alternative options and have become more attractive in the current economic environment.

Table 2: Crude cost comparisons

Country/programme	Detention per person per day <sup>131</sup>	A2D per person per day	Saving per person per day
Australia	\$339 AUD (US \$364); <sup>132</sup> \$124 AUD (US \$133) for “community detention”	\$7 AUD <sup>133</sup> (US \$7.5) - \$39 AUD <sup>134</sup> (US \$42)	Between \$333 AUD (US \$358) and \$117 AUD (US \$126)
Belgium	Not available	Not available	Not available
Canada: Toronto Bail Program	\$179 CAD (US \$189)	\$10-12 CAD (US \$10.6–2.7)	\$167 CAD (US \$176)
Hong Kong	\$108 HKD (US \$13.9)	Not available	Not available
Scotland/Glasgow pilot	£130 GBP <sup>135</sup> (US \$210)	£3.29 GBP <sup>136</sup> (US\$5.3)	-

In relation to case management specifically, it is recommended that:

- case management should be introduced from the very start of an asylum procedure, and should include referrals to adequate legal advice, social and health services, and other needed services;
- it should be tailored to each individual based on three stages: (i) needs assessment; (ii) planning; and (iii) delivery;
- if desirable, contracts can be entered into between the individual and the delivery or-

ganisation or case managers to ensure that both parties are aware of their rights and responsibilities, and any consequences of non-compliance;

- as far as possible, principles of “voluntary engagement” should be promoted;
- participants may need to be carefully selected, especially in the returns phase and there is therefore a need for good screening tools (e.g. are the persons willing to engage with the process and to cooperate – if not, why not?);
- safeguards need to be in place in law and

in practice to ensure that alternatives to detention do not become alternative forms of detention or alternatives to release;

- subject to the particular partner agreement, any official immigration reporting requirements that lead to sanctions and enforcement should be separated from the case management and service delivery component of the programme in order to build trust and improve cooperation in the process;
- the selection and referral of persons to the alternatives should be done by immigration officials and not by the service delivery organisation (although an exception might be the TBP which carries out its own screening);
- individuals should be informed about the full range of legal options to stay as well as the consequences of non-compliance with stay permits;
- the risks of A2Ds, such as risks of exploitation or other abuse, need to be acknowledged and addressed;
- contracts with delivery organisations that incentivise more restrictive measures than necessary need to be avoided;<sup>137</sup> and
- the primary and secondary purposes for an A2D need to be acknowledged (e.g. return versus liberty), which may have an effect on whether it is perceived as being a success and its longer-term survival.<sup>138</sup>

## 7. Conclusion

The research presented in this article is only a partial picture. The way the various alternatives described herein are implemented is far more complex and nuanced than I have been able to indicate. More particularly, most countries studied are Janus-faced – while they explore non-custodial A2Ds, many have harsh detention policies and laws or are increasing rates of detention elsewhere or for particular groups. The political context also varies, and growing xenophobia and rac-

ism in some countries prevents open and frank dialogue on these issues and frames the detention debate around unproven assumptions. Nonetheless, a key problem for research in this area is how to explain why particular models work and what it actually means to say that a programme “works”. This study only examined the workability from the state perspective, with a particular focus on compliance rates and costs. Nonetheless, against these indicators, there is ample evidence to show that programmes can work and that they can meet governmental objectives while respecting the rights and dignity of asylum-seekers and other migrants.

The models studied share an element of case management or supervision – including a good information flow to individuals about their rights and responsibilities and engagement with them as human beings with autonomy, and not as passive victims of the system. The exception appears to be Scotland, where disgruntlement with the asylum system was said to create resistance and hostility in the returns process. Good separation between the service arms and the enforcement arms was praised in some, while being less relevant in others. This appeared to depend on the governing ideologies of the engaged non-governmental partners. Some of the systems were tailored to families, while others engaged the full spectrum of individuals, yet differences in results between the two groups were not evident. There was also no discernible distinction between types of migrants.

Further research in this area is to be encouraged. Specifically, the research presented in this article did not conduct interviews with beneficiaries of the particular schemes. The study cannot therefore speak for the participants as to why they complied or what motivated them to cooperate or not, or what they found to be particularly beneficial. Had such

interviews been possible, it would certainly have added an important dimension to the research.

While it is clear that states have the right to control the entry or stay of persons on their territories, there are limits to its discretion in this regard – not least the right to liberty and security of person which applies regardless of immigration or other status, or in other words, on the basis of non-discrimination principles; the right to seek and enjoy asylum from persecution, which makes the irregular entry to the territory for such per-

sons not an unlawful act; and the obligation on states to consider less intrusive means of achieving the same objectives to meet proportionality requirements of detention. In other words, alternatives to detention, including no detention at all or release without conditions, should become measures of first resort. While the legal basis for implementing non-custodial alternatives to detention is clear, the empirical evidence is beginning to look convincing too. The political question for states remains however – whether they wish to regulate migration in a humane way, or otherwise.

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<sup>1</sup> Dr Alice Edwards is the Senior Legal Coordinator and Chief of the Protection Policy and Legal Advice Section, Division of International Protection, at the United Nations High Commissioner for Refugees (UNHCR), Geneva. Dr Edwards was previously on the law faculties at the universities of Oxford and Nottingham and she remains a Research Associate of the Refugee Studies Centre, University of Oxford, a Research Fellow of St Anne's College, Oxford and a Fellow of Nottingham's Human Rights Law Centre. This chapter is based on an expert background paper prepared for UNHCR for the first Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons, held in May 2011 in Geneva (see report available at: <http://www.unhcr.org/3e5f78bc4.html>), as well as a presentation entitled "Rethinking the Detention of Asylum-Seekers and Other Migrants: Exploring the Alternatives – A Comparative Perspective" which was delivered as part of the speaker series for the 60<sup>th</sup> anniversary of UNHCR and the 1951 Refugee Convention, organised by the University of London's Institute of Commonwealth Studies, London in October 2010 (further information available at: [http://commonwealth.sas.ac.uk/fileadmin/documents/Seminar\\_Series\\_Flyers/IRLSeminarProgramme\\_final2.pdf](http://commonwealth.sas.ac.uk/fileadmin/documents/Seminar_Series_Flyers/IRLSeminarProgramme_final2.pdf)). The views expressed herein are those of the author and do not necessarily reflect those of the UN or UNHCR. The author would like to thank the anonymous reviewers for the helpful comments and very keen eye for detail, which have improved the text.

<sup>2</sup> These include, for example, Australia, Belgium, Canada, the Hong Kong Special Administrative Region of the Peoples' Republic of China, Japan, the Netherlands, the USA and the UK. The European Union Agency for Fundamental Rights (EU-FRA) reports that most of the 27 member states of the EU have in law alternatives to detention, but they are not always applied in practice. (EU-FRA, *Detention of Third Country Nationals in Return Procedures*, 10 November 2010, conference edition.)

<sup>3</sup> Sampson, R., Mitchell, G. and Bowring, L., *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, International Detention Coalition, Melbourne, 2011, p. 2, available at: <http://www.unhcr.org/4dde23d49.html>.

<sup>4</sup> Parliamentary Assembly, Council of Europe, *The Detention of Asylum Seekers and Irregular Migrants in Europe*, Doc. 12105, 11 January 2010, Para 1 (referring in particular to the UK, France and Italy).

<sup>5</sup> Siskiini, A., *CRS Report for Congress, Immigration-Related Detention: Current Legislative Issues*, updated 30 January 2008, pp. 13-14.

<sup>6</sup> UNHCR, *Note on International Protection*, EC/62/SC/CRP.12, 31 May 2011, Para 48.

<sup>7</sup> Any reduction in global asylum numbers can be associated instead with *non-entrée* policies, including containment in regions of origin and interception/interdiction, or can be attributed to large-scale repatriation programmes.

<sup>8</sup> For example, as Council of Europe member states have expanded their use of detention (see above, note 4, Para 1), migration into Europe has also surged: European migration figures have increased from an estimated 49 million in 1990 to 58 million in 2000 to 70 million in 2010. (See United Nations, Department of Economic and Social Affairs, Population Division, *Trends in International Migrant Stock: The 2008 Revision*, POP/DB/MIG/Stock/Rev.2008, July 2009, available at: [http://www.un.org/esa/population/migration/UN\\_MigStock\\_2008.pdf](http://www.un.org/esa/population/migration/UN_MigStock_2008.pdf)). Australian asylum figures after the introduction of mandatory detention in 1997 dropped only with the institution of comprehensive interception measures in the post-Tampa era from 2002-2008. (See Refugee Council of Australia, *Australian Immigration Detention and Trends in the Settlement of Former Detainees*, available at: [http://www.refugeecouncil.org.au/docs/current/110407\\_background\\_stats.pdf](http://www.refugeecouncil.org.au/docs/current/110407_background_stats.pdf)).

<sup>9</sup> United Nations, Department of Economic and Social Affairs, see above, note 8. According to the UN, the global migration “stock” has been increasing as follows: between 1990-1995 (+1.3%); 1995-2000 (+1.5%); 2000-2005 (+1.8%); and 2005-2010 (+1.8%); in 1990, there was an estimated global migrant “stock” of 155 million; in 2000, it was estimated to be 178 million; and in 2010, this is estimated to be 214 million, constituting 3.1% of the global population.

<sup>10</sup> See, for example, Castles, S., “Towards a Sociology of Forced Migration and Social Transformation” *Sociology*, Vol. 37(1), 2003, p. 26, available at: <http://club.fom.ru/books/castels.pdf>. “Migration policies fail because policy makers refuse to see migration as a dynamic social process linked to broader patterns of social transformation. Ministers and bureaucrats still see migration as something that [can] be turned on and off like a tap through laws and policies.”

<sup>11</sup> On the legal framework, see Edwards, A., *Back to Basics: The Right to Liberty and Security of Person and Alternatives to Detention of Asylum-Seekers, Refugees, Stateless Persons and Other Migrants*, UNHCR, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, available at: <http://www.unhcr.org/4dc949c49.html>; and *idem*, “Less Coercive Means: The Legal Case for Alternatives to Detention of Refugees, Asylum-Seekers and Other Migrants”, in Juss, S. (ed.), *Ashgate Research Companion on Migration Theory and Policy*, Ashgate, forthcoming 2012.

<sup>12</sup> The term “deportation” is used synonymously with “removal” and “expulsion” for the purposes of this article, unless otherwise indicated. It is noted that the terms may have different usages and meanings in various national and international laws.

<sup>13</sup> See Table 2.

<sup>14</sup> The UK, for example, has paid out at least £2 million to 112 individuals over the last three years where it has been proved that immigrants have been wrongly held. (See Medical Justice, *Review into ending the detention of children for immigration purposes: Response by Medical Justice*, July 2010). According to Medical Justice, the £2 million does not include the costs of legal advice, court costs, etc. Successful litigation in Hong Kong that forced the Hong Kong government to change its detention policy (discussed *infra*) has, for example, given rise to over 200 pending compensation claims. (Interview with Barnes and Daly, Lawyers, Hong Kong, 15 September 2010). South Africa’s Lawyers for Human Rights (LHR) has also lodged 90 separate reviews of detention in South Africa. (Information provided by K. Ramjatham-Keogh, Head, Refugee and Migrants Rights Programme, LHR, 17 November 2010). For some of the cases, see Lawyers for Human Rights, *Monitoring Immigration Detention in South Africa*, Annex, September 2010.

<sup>15</sup> Edwards, A., *Back to Basics*, above note 11. The full list of interviews can be found in the original report. The research was governed by the University of Oxford’s ethics principles.

<sup>16</sup> *Ibid.*

<sup>17</sup> UN Human Rights Committee, *General Comment No. 15: The Position of Aliens under the Covenant*, CCPR/C/21/Rev. 1, 11 April 1986, Para 2; UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-Citizens*, UN Doc. A/59/18, 10 January 2004, Para 19.

<sup>18</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56 (“Belmarsh Detainees” case).

<sup>19</sup> See *Rasul v Bush*, 542 U.S. 466 (2004); 124 S. Ct. 2868 (US Supreme Court) (non-citizens have a statutory right to challenge their detention in USA courts); *Hamden v Rumsfeld*, 548 U.S. 557 (2006); 126 S. Ct. 2749 (despite legislative amendments introduced to deprive Guantanamo Bay detainees of the benefit of the decision in *Rasul*, the court held that detainees were entitled to continue with *habeas corpus* applications already pending); and finally, *Boumediene v Bush*, 553 U.S. 723 (2008); 128 S. Ct. 2229, where the majority held, *inter alia*, that the detainees had a constitutional right to *habeas corpus* and that the legislation purporting to deny it was unconstitutional.

<sup>20</sup> Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, 30 January 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987), Para 19.

<sup>21</sup> See above, note 17, Para 2.

<sup>22</sup> *Ibid.*, Para 1. See also UN Human Rights Committee, *General Comment No. 31: Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 21 April 2004, Para 10.

<sup>23</sup> See Article 3 of the 1951 Convention Relating to the Status of Refugees in conjunction with Articles 26 and 31(2).

<sup>24</sup> International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX) (1965), Article 1(3).

<sup>25</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 14: Definition of Discrimination*, UN Doc. A/48/19, 22 March 1993, Para 1.

<sup>26</sup> Edwards, A., "Tampering with Refugee Protection: The Case of Australia", *International Journal of Refugee Law*, Vol. 15, 2003, pp. 192-211. The Australian policy of mandatory detention, which applies only to persons arriving in an unauthorised manner, has been criticised for indirectly discriminating against particular nationalities. Those more likely to arrive in an unauthorised fashion originate from Afghanistan, Iran, Iraq and Sri Lanka. The policy does not apply to those who arrive in an authorised manner, such as via a student, tourist or other lawful visa, and who later apply for asylum. This is to be compared with the most common beneficiaries of bridging visas, who were from the People's Republic of China, India, the UK, the Republic of Korea and Malaysia. (See The Parliament of the Commonwealth of Australia, Joint Standing Committee on Migration, *Immigration Detention in Australia: Community-based Alternatives to Detention*, Second Report of the inquiry into immigration detention in Australia, May 2009, Canberra, p. 29.)

<sup>27</sup> See, for example, above note 25, Paras 1-3.

<sup>28</sup> For example, in deportation proceedings there may be a justified distinction drawn between nationals and non-nationals, in the sense that the national has a right of abode in their own country and cannot be expelled from it. (See *Moustaquim v Belgium*, Appl. No. 26/1989/186/246, ECHR, 25 February 1991. See also *Agee v The United Kingdom*, Appl. No. 7729/76, ECHR, 17 December 1976.)

<sup>29</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-Citizens*, see above, note 17, Para 19.

<sup>30</sup> See *Bozano v France; Shamsa v Poland*, Appl. Nos. 45355/99 and 45357/99, ECHR, 27 November 2003; *Gonzalez v Spain*, Appl. No. 43544/98, ECHR, 29 June 1999 and *Amuur v France*, Appl. No. 19776/92, ECHR, 25 June 1996.

<sup>31</sup> See Helton, A.C., "The Detention of Refugees and Asylum-Seekers: A Misguided Threat to Refugee Protection", in Loescher, G. and Monahan, L. (eds.), *Refugees and International Relations*, Oxford: Oxford University Press, 1989, p. 135: "Detention for the purposes of deterrence is a form of punishment, in that it deprives a person of their liberty for no other reason than their having been forced into exile." Guy Goodwin-Gill also concludes that: "[t]he use of detention for the purposes of deterrence is (...) impermissible" (p. 225) and "[d]etention is never a solution to the movements of refugees and asylum seekers" (p. 234, bullet point 20). (See Goodwin-Gill, G., "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection", in Feller, E., Türk, V. and Nicholson, F. (eds.), *Refugee Protection in International Law*, Cambridge University Press, 2003, pp. 185-253).

<sup>32</sup> For more on detention, discrimination and statelessness, see The Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, London, July 2010.

<sup>33</sup> See *Shum Kwok-sheer v Hong Kong SAR* [2002] 5 HKCFAR 318 and *'A' v Director of Immigration* [2008] HKCU 1109, 18 July 2008 (HK Court of Appeal). Earlier cases include *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97 (PC), which involved the detention of Vietnamese asylum seekers of Chinese ethnic origin who had been refused refugee status but who could not be removed to Vietnam since the Vietnamese Government would not readmit those it did not consider to be Vietnamese nationals. The Privy Council held that if such removal could not be accomplished within a reasonable time period, then further detention was unlawful. In 1996, the Privy Council reversed a decision by the Court of Appeal and determined, in *Nguyen Tuan Cuong and Others and Director of Immigration and Others* ([1996] 423 HKCU 1), that the Director of Immigration did not uphold his statutory duty under Part IIIA of the Immigration Ordinance by refusing to screen Vietnamese migrants who had arrived in Hong Kong from southern China. (See Loper, K., "Human Rights, Non-Refoulement, and the Protection of Refugees in Hong Kong", *International Journal of Refugee Law*, Vol. 22(3), 2010, pp. 404-39.)

<sup>34</sup> See *Hashimi Habib Halim v Director of Immigration* [2008] HKCU 1576 (HK Court of First Instance).

<sup>35</sup> Hong Kong Special Administrative Region Government, Security Bureau, *Notice on Detention Authority Section 29 of the Immigration Ordinance*, Cap. 115, January 2009 (on file with the author).

<sup>36</sup> See, for example, position in comparative jurisdictions: *N (Kenya) v Secretary for State for Home Department* [2004] INLR 612 (Court of Appeal for England and Wales) and *Ulde v Minister of Home Affairs* (320/2008 [2009] ZASCA 34 (31 March 2009) (The Supreme Court of Appeal, South Africa)).

<sup>37</sup> Interview with UNHCR Hong Kong, September 2010. Many individuals are still subject to detention for criminal offences as well as some immigration offences, although the latter has been challenged. (See also *Mohammad Rahman v HKSAR*, (2010) 13 HKCFAR 20, FACC 9/20009, 11 February 2010.) For more on the Hong Kong detention system, see Hong Kong Immigration Department, *Annual Report 2008-2009*, available at: [http://www.immd.gov.hk/a\\_report\\_08-09/eng/ch4/index.htm](http://www.immd.gov.hk/a_report_08-09/eng/ch4/index.htm).)

<sup>38</sup> See, in particular, Human Rights Committee, *A v Australia*, Communication No. 560/1993, 3 April 1997 and Human Rights Committee, *C v Australia*, Communication No. 900/2000, 13 November 2002.

<sup>39</sup> *Al-Kateb v Godwin*, [2004] HCA 37.

<sup>40</sup> Migration Act 1958, Section 189(1). Curiously, persons entering Australia via an “excised territory” are regulated by Section 189(3) of the Migration Act, which provides that “[i]f an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer *may* detain the person.” It might appear that they are exempt from the mandatory detention policy that applies elsewhere, and could open up possibilities for litigation if no individual assessment is made. This has not been challenged however and in a recent High Court challenge in relation to procedural guarantees on Christmas Island, an “offshore excised place”, both parties accepted the lawfulness of the detention itself. (See *Plaintiff M61/2010E v Commonwealth of Australia & Ors* and *Plaintiff M69 of 2010 v Commonwealth of Australia & Ors* [2010] HCA 41, 11 November 2010.)

<sup>41</sup> Although their use has expanded in recent years, bridging visas have always been available under the Migration Act. (Interview with Department of Immigration and Citizenship, Melbourne, September 2010.)

<sup>42</sup> Australian Government, Department of Immigration and Citizenship website, <http://www.immi.gov.au/all-forms/bridging.htm>.

<sup>43</sup> *Ibid.* For example, a bridging visa may cease when a substantial one is granted; or, for example, 28 days after withdrawal of a visa application, notification of a visa decision or notification of a merits review or judicial appeal outcome.

<sup>44</sup> These conditions may include: (i) a requirement to live at a specific address and to notify the authorities of a change of address; (ii) a requirement to lodge a security bond, generally between \$5,000 and \$50,000 AUD; (iii) a no work condition, or a restriction on working hours; (iv) a no study condition, or restrictions on study; and (v) restrictions on overseas travel. (See above, note 26, The Parliament of the Commonwealth of Australia, Para 2.49.) In 2010, an agreement was reached that individuals on bridging visas may work, subject to an individual assessment, including whether they are cooperating with the authorities. This replaced the previous 45-day rule under which an individual was not entitled to work if they had not registered their intention to apply for a lawful visa within 45 days of their arrival. Difficulties in exercising this right to work remain, including language barriers, the temporary (4-6 weeks) nature of bridging visas, etc.

<sup>45</sup> They could be compared to “temporary admission” visas in the UK, which are granted at the discretion of the Minister; however, persons on temporary admission visas are not considered to have entered the territory of the UK and so continue to be unlawfully present.

<sup>46</sup> See above, note 26, The Parliament of the Commonwealth of Australia, p. 34.

<sup>47</sup> See Migration Amendment (Complementary Protection) Bill 2011, available at: <http://www.austlii.edu.au/au/legis/cth/bill/mapb2011480/>.

<sup>48</sup> See above, note 26, The Parliament of the Commonwealth of Australia, p. 25.

<sup>49</sup> The Australian government confirms that only 10% of “over-stayers” were detained in 2009-2010. (See Department of Immigration and Citizenship, *Annual Report 2009-10*, p. 171, available at: <http://www.immi.gov.au/about/reports/annual/2009-10/pdf/diac-annual-report-2009-10-full-version.pdf>.)

<sup>50</sup> See Edwards, above note 26.

<sup>51</sup> Department of Immigration and Citizenship, *Immigration Detention Statistics Summary*, 13 May 2011.

<sup>52</sup> On the Hong Kong system, see Loper, above note 33.

<sup>53</sup> Interview with UNHCR Hong Kong, September 2010.

<sup>54</sup> *Ibid.*

<sup>55</sup> See *FB v Director of Immigration* [2007] HCAL 51/2007, 5 December 2008.

<sup>56</sup> Information supplied by UNHCR Hong Kong, 18 November 2010.

<sup>57</sup> Interviews with non-governmental organisations, Hong Kong, September 2010.

<sup>58</sup> *C v Director of Immigration* [2008] HKCU 256 on appeal.

<sup>59</sup> Australian Government, Department of Immigration and Citizenship, *Fact Sheet 62 – Assistance for Asylum Seekers in Australia*, 17 November 2010.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> For more information about these programmes, such as Hotham Mission, see Edwards, A., *Back to Basics*, above note 11.

<sup>63</sup> Interview with the Australian Red Cross, Melbourne, September 2010.

<sup>64</sup> Australian Red Cross, Migration Support Programs, *Annual Program Analysis FY2009-2010*, November 2010. There was no breakdown of how the closed cases had been resolved.

<sup>65</sup> Interview with the International Social Service, September 2010.

<sup>66</sup> Australian Government, Department of Immigration and Citizenship, *Fact Sheet 64 – Community Assistance Support Program*, 30 September 2009.

<sup>67</sup> Interview with Department of Immigration and Citizenship, Melbourne, September 2010.

<sup>68</sup> International Detention Coalition, *Care Management as an Alternative to Immigration Detention: The Australian Experience*, June 2009, p. 1, available at: <http://idcoalition.org/wp-content/uploads/2009/06/casemanagement-inaustralia.pdf>.

<sup>69</sup> In some ways, the assignment of a “case manager” is not unlike the UK’s “new asylum model” (NAM) in which the Home Office assigns a “case owner” who is responsible for dealing with all aspects of their case from initial interview to final integration or removal. The NAM was introduced in 2007. The difference is that the “case manager” in the UK has been limited to the refugee status determination process and later integration or removal, rather than related necessarily to other needs or services. Furthermore, case owners are assigned for those inside and outside detention. (See Immigration Law Practitioners’ Association, *Information Sheet: New Asylum Model*, 5 March 2007.)

<sup>70</sup> See above, note 66. Eligible persons will generally indicate one or more of the following “vulnerabilities”: (i) living with the effects of torture and trauma; (ii) experiencing significant mental health issues; (iii) living with serious medical conditions; (iii) lack of capability to independently support themselves in the community (for example, if elderly, frail, mentally ill, disabled); (iv) facing serious family difficulties, including child abuse, domestic violence, serious relationship issues, child behavioural problems; or (v) suicidal.

<sup>71</sup> For more on this, see Edwards, A., *Back to Basics*, above note 11.

<sup>72</sup> *Ibid.*

<sup>73</sup> Interview with the Australian Red Cross, Melbourne, September 2010. According to the Australian Red Cross, this has caused some concerns relating to one of its key founding principles - confidentiality, but has overall been seen as a necessary component of the programme.

<sup>74</sup> The Parliament of the Commonwealth of Australia, above note 26, p. 36.

<sup>75</sup> See above, note 66.

<sup>76</sup> *Ibid.*

<sup>77</sup> The Parliament of the Commonwealth of Australia, above note 26, p. 37.

<sup>78</sup> See above, note 64, p. 13. There was no further explanation of what happened to the remaining closed cases.

<sup>79</sup> See above, note 68.

<sup>80</sup> See above, note 49, p. 171.

<sup>81</sup> See above, note 68.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, p. 4.

<sup>85</sup> *Ibid.*

<sup>86</sup> See, for example, *Saadi v UK*, Appl. No. 13229/03, ECHR, 29 January 2008.

<sup>87</sup> Edwards, A., *Thematic National Legal Study on Rights of Irregular Migrants in Voluntary and Involuntary Return Procedures: The United Kingdom*, prepared for the European Union Agency for Fundamental Rights, September 2009 (unpublished paper, on file with the author).

<sup>88</sup> According to the UK Border Agency, approximately 12 children are still entering detention each month. However, these children are not asylum-seekers and are said to be awaiting return or are in transit zones at the airport awaiting immediate return to their countries of origin. (Information supplied to the author by the UK Border Agency, London, November 2010.)

<sup>89</sup> The UK also has a system of assisted voluntary return options, which it implements in conjunction with the International Organisation on Migration. (See above, note 87)

<sup>90</sup> London Detainee Support Group, *No Return, No Release, No Reason: Challenging Indefinite Detention*, September 2010, available at: <http://www.ldsg.org.uk/files/uploads/NoReasonReport0910.pdf>.

<sup>91</sup> UK Border Agency, *Operational Enforcement Manual*, 2008, Chapter 55.20. For more on the UK detention pending return process, see above, note 87.

<sup>92</sup> *Ibid.*, Chapters 55.1.1 and 55.20; UK Secretary of State for the Home Department, *Fairer, Faster, Firmer: A Modern Approach to Immigration and Asylum*, 1998.

<sup>93</sup> UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/CO/73/UK and CPR/CO/73/UKOT, 6 December 2001, available at:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.73.UK;CCPR.CO.73.UKOT.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.73.UK;CCPR.CO.73.UKOT.En?Opendocument).

<sup>94</sup> The Glasgow pilot has been closed since the study was conducted. However, for the purposes of this comparison, it will be described in the present tense to reflect how it operated at the time of writing. Other pilots included the Millbank Project in Kent (2007-2008) and the Liverpool Key Worker pilot (April 2009-March 2010).

<sup>95</sup> Glasgow City Council, UK Border Agency and the Scottish Government, *Memorandum of Understanding – Family Return Project*, May 2009 (on file with the author).

<sup>96</sup> *Ibid.*

<sup>97</sup> Aliens Act 1980, Article 74/5, Para 1. For more on Belgium's legal system, see Global Detention Project, *Belgium Detention Profile*, last updated February 2010, available at: <http://www.globaldetentionproject.org/countries/europe/belgium/introduction.html>.

<sup>98</sup> Aliens Act 1980, Article 74/6.

<sup>99</sup> *Mitunga v Belgium*, Appl. No. 13178/03, ECHR, 12 October 2006, Para 42.

<sup>100</sup> *Ibid.*, and *Muskhadzhieva et autres v Belgique*, Appl. No. 41442/07, ECHR, 19 January 2010.

<sup>101</sup> Interview with coaching staff, Tubize, Belgium, 7 June 2010.

<sup>102</sup> Of these, 15 returned with the support of the International Organisation for Migration; 18 were Dublin II cases; 1 transferred on the basis of a bilateral agreement; 5 were "forced" removals; and 7 were border refusals. (See Verbauwheide, *Alternatives to Detention for Families with Minor Children – The Belgian Approach*, 2010, p. 3.)

<sup>103</sup> *Ibid.* The reasons included regularisation, medical grounds, new asylum claim, temporary non-removable status, court decision, refugee/subsidiary status.

<sup>104</sup> *Ibid.* This was because it was established that the child was not related to the adult who was accompanying the child.

<sup>105</sup> ODS Consulting, *Evaluation of the Family Return Pilot: Glasgow City Council, UKBA and the Scottish Government: Final Report*, May 2011, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/296503/evaluation-family-return-project>.

<sup>106</sup> *Ibid.*, p. iv.

<sup>107</sup> *Ibid.*, p. iii.

<sup>108</sup> Note that there is currently a bill before Parliament that may alter the legal landscape in relation to detention for those arriving as part of a "human smuggling event". (See Bill C-4, Preventing Human Smugglers from Abusing Canada's Immigration System Act.)

<sup>109</sup> Canadian Border Service Agency, *Fact Sheet: Arrests and Detention*, July 2009, available at: <http://www.cbsa-asfc.gc.ca/media/facts-faits/007-eng.html>; Part 14 of the 2002 Immigration and Refugee Protection Regulations, SOR/2002-227 (available at: <http://laws-lois.justice.gc.ca/eng/regulations/sor-2002-227/page-75.html#h-107>) sets out relevant factors to consider, including whether the person has (i) past criminal convictions; (ii) a history of non-compliance with immigration regulations; (iii) ties with the community; (iv) shown a willingness to cooperate with the authorities; (v) any links to organised crime, including smuggling and trafficking; and (vi) raised any public order and national security considerations.

<sup>110</sup> Immigration and Refugee Protection Act, Section 57.

<sup>111</sup> Please note that the information presented herein was legally valid as at May 2010, although there have been a range of proposed changes to the asylum system in Canada on-going during the period of the research and throughout the subsequent period.

<sup>112</sup> Interview with CBSA, Toronto, May 2010.

<sup>113</sup> See, for example, *Sahin v Canada (Minister of Citizenship and Immigration)* [1995] 1 FC 214, as cited in Immigration and Refugee Board of Canada, *Guidelines on Detention*, Guideline 2, Ottawa, Canada, 12 March 1998, p. 4.

<sup>114</sup> Field, O. and Edwards, A., *Study on Alternatives to Detention*, UNHCR, Legal and Protection Policy Research Series, POLAS/2006/03, 2006, p. 86.

<sup>115</sup> The Field and Edwards' study, *ibid.*, wrongly stated that there were financial incentives directly linked to the payment of bond for individuals over to the immigration authorities. Rather, a set sum of money is paid for the service by the CBSA to TBP on an annual basis and no "bond" is handed over by TBP to the authorities for the release of any specific persons. Should an individual abscond from the programme, there are no penalties and no money is lost as none has been handed over. Nonetheless, the TBP does have an incentive to ensure that persons comply with the requirements of the programme in order to ensure that it remains effective and is funded in subsequent years. This has led to some charges by NGOs that the TBP is "too selective" in who it agrees to supervise; charges are denied by the TBP.

<sup>116</sup> For example, in the financial year 2002-2003, the total lost client ratio of all immigration applicants was 5.65%. (See above, note 114, p. 88.)

<sup>117</sup> Interview with Dave Scott, Executive Director, TBP, May 2010.

<sup>118</sup> *Ibid.*

<sup>119</sup> Although there is a notion of “voluntary compliance” in so far as individuals agree to be released to the supervision of TBP, where no other release options are available, it is hardly an entirely voluntary process of equality of arms.

<sup>120</sup> The reporting by the TBP of non-compliance is considered by the programme itself to be one of its strengths as it is an important incentive to participate; however, it is this factor that has prevented Canadian NGOs from adopting a similar system with the government. The TBP stated that their interest in the programme is to ensure compliance, whereas the interest of the CBSA is to secure release of persons (largely owing to the cost factors involved in detention). Cf. the Australian model, where the NGO community appeared far less concerned about reporting on individuals that fail to comply with the terms of their release. An alternative option that may bridge the gap between these two viewpoints is that any reporting obligations are made to the immigration authorities, while the NGO sector provides assistance and other services without any duty to report on non-compliant clients. That is, the NGOs become the services delivery agency without enforcement responsibility, which remains with the immigration authorities.

<sup>121</sup> Interview with Dave Scott, above note 117. This would indicate that it is very rare that an immigration official of the IRB would release a detainee on minimal conditions where the TBP offers to provide “bail”, even if such extensive supervision is not needed.

<sup>122</sup> *Ibid.*

<sup>123</sup> The reason behind its focus on Ontario is that the province receives the lion’s share of asylum applicants and other irregular migrants entering Canada and has the largest number of immigration detainees. In February 2010, for example, the total number of detained persons in Canada was 1180, of which 709 were in Ontario. Of the 574 asylum claimants detained, 344 were located in Ontario. (CBSA, National Detention Statistics, February 2010, on file with the author.)

<sup>124</sup> This figure is drawn from three months of statistics, so may not be entirely accurate for any year: 410 new detainees in December 2009, 340 in January 2010, and 380 in February 2010. This amounts to 58% of the total received into Canada (total 1,945 over the same three month period). Annual statistics were not readily available.

<sup>125</sup> See above, note 117.

<sup>126</sup> See above, note 114, p. 26. Hamilton House, for example, reported that 99% of its residents have complied with the full asylum procedure; Matthew House reported that only 3 out of 300 residents (or 1%) disappeared over a five-year period; Sojourn House reported statistics of 3 asylum applicants out of 3,600 over a six-year period had disappeared from its premises and the asylum procedure.

<sup>127</sup> Many bail/bond systems operate on the basis that having community links is an indicator in favour of appearance, yet it is not clear that there is evidence to support this assumption. The more crucial factor may be whether the individual has reached his or her preferred destination, which may or may not be related to family or pre-existing community ties; whether s/he is within a procedure for asylum or is otherwise cooperating with the authorities regarding return; and is otherwise treated with dignity and humanity while these procedures are ongoing.

<sup>128</sup> These rates do not take into account whether an individual at the end of a process returns voluntarily, but rather whether they comply with the various requirements while released to one of the alternatives.

<sup>129</sup> Mixed caseload means that the programme/pilot accepted both asylum-seekers, other migrants and/or return cases.

<sup>130</sup> This represents 4 families out of 25 entering the project. (See above, note 105, p. 22.)

<sup>131</sup> Costs may vary depending on the number of detainees, as specially built immigration facilities bear a cost regardless of number of detainees.

<sup>132</sup> Figures for financial year 2005-2006. (See above, note 26, The Parliament of the Commonwealth of Australia, Para 4.99.)

<sup>133</sup> \$7 AUD (US\$7.5) per person per day (pppd) under the Asylum Seeker Assistance Scheme in 2007-2008 is based on 1,867 persons at a total cost of \$4.79 million AUD (US\$5.15 million). (See above, note 26, The Parliament of the Commonwealth of Australia, Para 4.120.) Comparative data in the corrections field: parole \$5.39 AUD (US\$5.79) pppd; probation \$3.94 AUD (US\$4.24) pppd and home detention \$58.83 AUD (US\$63.24) pppd. (*Ibid.*, Para 4.125.)

<sup>134</sup> This is the figure for the CASP programme, which involves a more comprehensive approach.

<sup>135</sup> See above, note 105, pp. 23-24.

<sup>136</sup> Note that this figure takes account of the full staff and running costs of the pilot (£120,000) but it does not

include the accommodation costs, which were not available. The evaluation of the pilot indicated that the accommodation costs were absorbed as those participating in the community would have had these costs met whether they were in the pilot or not. (See above, note 105, pp. 23-24.) The costs per person per day were calculated as: £120,000 (total cost) divided by 365 days divided by 25 families divided by 4 (average family size).

<sup>137</sup> For example, the USA government's contract with Behaviour Inc. included payments for how many ankle bracelets were employed and thus was seen as encouraging the unnecessary tagging of many persons. (Interview with USA NGOs, July 2010.)

<sup>138</sup> For example, the Scotland pilot is primarily about facilitating voluntary return, rather than necessarily keeping persons out of detention, although this is a secondary outcome/objective.

# TESTIMONY

*"I very much hope that as a result of our legal challenge, the situation facing trans-women in Malaysia will change. I am prepared to die for this cause, because there is such a lot of discrimination against us. I found it so difficult to find a job when I was younger. The Malaysian people do not allow trans-women to be anything other than sex workers. This really is the only work that we can do because when we look for work elsewhere, we are ridiculed. But we also have people to feed, and responsibilities to manage."*

*"Zura", Malaysian mak nyah*





## The *Mak Nyahs* of Malaysia: Testimony of Four Transgender Women

*Mak nyah* is the name given to male-to-female transgender women in Malaysia. It derives from *mak*, meaning “mother”.<sup>1</sup> The term arose in the late 1980s, as an attempt by male-to-female transgender women to distinguish themselves from other minorities. As Khartini Slamah explains, this arose:

“[F]irst, [as] a desire to differentiate ourselves from gay men, transvestites, cross dressers, drag queens, and other ‘sexual minorities’ with whom all those who are not heterosexual are automati-

cally lumped, and second, because we also wanted to define ourselves from a vantage point of dignity rather than from the position of derogation in which Malaysian society had located us”.<sup>2</sup>

Slamah goes onto explain that in order to be identified as a *mak nyah*, an individual does not need to have undergone gender reassignment surgery:

“[M]ak Nyahs define themselves in various ways along the continuums of gender and sexuality: as men who look like women and are soft and feminine, as the third gender, as men who dress up as women, as men who like to do women’s work, as men who like me, etc.”<sup>3</sup>

The *mak nyah* community in Malaysia faces many forms of discrimination in all areas of life, including employment, housing and health care.<sup>4</sup> In 2010, both the UK and Australia recognised Malaysian transgender asylum-seekers as refugees, in response to the persecution and discrimination which they face in their country of origin.<sup>5</sup> Malaysian law contains several provisions which are used to discriminate against individuals of the *mak nyah* community. In 1983, the Malaysian Conference of Rulers issued a



fatwa which prohibited sex-reassignment surgery, except for intersex people, on the basis that such surgery was against Islamic religion. Whilst sex-reassignment surgery remains legal for non-Muslims, the Malaysian courts have sent ambiguous messages as to whether an individual who has undergone such a procedure is entitled to have their acquired gender officially recognised through an amendment to their identity card (or

*My Kad*). In the *Wong's case*,<sup>6</sup> the judge of the High Court of Ipoh upheld the refusal of the national Registration Department to amend or correct the Birth Certificate and National Registration Identity Card of the claimant who was a transsexual man. However, in *J.G.'s case*,<sup>7</sup> a judge of the High Court of Kuala Lumpur, in dealing with very similar facts to those in the *Wong's case*, decided that the claimant's identity card should be amended to acknowledge her acquired gender.

Photo credit: The Equal Rights Trust



Performer at Fundraising Concert for Justice for Sisters Campaign, Kuala Lumpur, February 2011.

On 27 June 2011, ERT met with four *mak nyahs* in Seremban, Malaysia, to discuss their experiences of discrimination.

As part of its EU-funded project in Malaysia, entitled “Empowering Civil Society to Combat Discrimination through Collective Advocacy and Litigation”, ERT has been made aware of the discrimination faced by the Malaysian *mak nyah* community. ERT is currently providing international and comparative law research in support of a judicial review case in which four *mak nyahs* are challenging the constitutionality of the Syariah (Shari’a) law prohibition on cross-dressing. The claimants agreed to talk with ERT about their experiences of discrimination, particularly at the hands of the Malaysian religious authorities, and the testimony set out below is a record of the conversation.

For the individuals whose testimony is presented below, the most significant discrimination issue arises from the fact that most *mak nyahs* are Malay Muslims, and are therefore subject to the provisions of the Syariah criminal legislation. Syariah law is enacted at the state and not the federal level, and most of the state criminal law enactments contain a prohibition of “cross-dressing”. For example, Section 28 of the Syariah Criminal Offences (Federal Territories) Act 1997 prohibits any male person from wearing a woman’s attire in a public place and posing as a woman for immoral purposes. Such provisions have been used by the Malaysian religious authorities (the *Jabatan Hal Ehwal Agama Islam Negeri Sembilan*) to oppress the *mak nyah* community, through the use of raids, interrogation, violence and detention.

ERT is currently providing support to the lawyers representing the interviewees in their judicial review claim. The claim is founded on the argument that Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 (Enactment 4 of 1992) (Section 66), which criminalises any male person who “wears women’s attire” or “poses as a woman”, is inconsistent with various fundamental liberties guaranteed by the Federal Constitution of Malaysia, including: (i) Article 5(1) which protects the right to live with dignity, the right to work and livelihood and the right to privacy; (ii) 8(1) which guarantees the right to equal protection of the law; (iii) Article 8(2) which prohibits discrimination on a number of grounds, including “gender”; (iv) Article 9(2) which protects the right to freedom of movement; and (v) Article 10(1)(a) which protects the right to freedom of expression.

All four of the claimants are *mak nyahs*, who have each been arrested, detained and charged for offences under Section 66. Due to concerns for their safety, they have assumed alternative names.

**Kay:** I am a 27 year old Malay Muslim. I was born in Pahang and moved to Seremban about eight years ago. When I was about 10 years old, I began to feel confused about my identity. I began to dress as a woman whilst I was at high school, when I was probably about 15 years old. I also started to take hormone pills at that same time. I would use my pocket money to buy birth control pills from the pharmacy, or otherwise I would ask my mother for her pills. My family had no problem with the decisions I made because they understood me. I currently work in various jobs. I work as an administrative assistant in a Chinese herbal tea shop. I also assist my friend in her bridal make-up shop and I work as a part-time model. I also work as a sex worker in Seremban when I need extra money.

**Zura:** I am a 24 year old Malay Muslim. I was born in Kelantan, but I moved to Seremban ten years ago. I moved to Seremban when I was only 14 years old because I had been orphaned when I was seven, and I was forced to remove myself from my remaining family seven years later because no-one accepted me. From the age of 12, I realised that I liked



to wear female clothes and to do the jobs which are traditionally done by women, like cooking and cleaning, and I enjoyed wearing make-up. I had been living with my foster father and my brother in Terengganu but this was no longer possible for me. I came to Seremban because this is where my mother was from, and I therefore felt a connection to this place. I wanted to start a new life here.

I felt responsible for providing financial support to my foster father and my younger brother, so I needed to earn money as soon as possible. My family was so poor, and my foster father was also sick and in need of medication which we were struggling to afford, so I was forced to finish school and start work. I tried working in other jobs first, but I faced too many problems. For example, when I worked in a restaurant, they told me that with a face like mine, I could only work at the back of the restaurant and only deserved five ringgit a day whilst the other workers were earning 50 ringgit a day. I did not want to continue living with this injustice so I decided it would be better for me to be a sex worker, and I have remained in that work since I was 15 years old.

**Linda:** I am a 25 year old Malay Muslim. I was born in Ipoh but I have lived in Seremban for the last seven years. Since I was 16 years old, I started to identify as a woman. I started to take hormones which I bought from the pharmacy. My siblings had no problem with me dressing as a woman, but my father did not like it. He used to scold me and beat me, so I was forced to run away on two occasions to the house of a friend. After I completed my high school education, I moved to Seremban in order to study architecture at the college here.

**Fifi:** I am a 25 year old Malay Muslim. I was born in Seremban and I have been working

as a sex worker for two years. I have been dressing as a woman, and taking hormones, for only three years. I have known that I was different since I was 13 or 14, and I have always been sexually attracted to men, but I did not start to identify as a woman until I was 22. I became a sex worker because I am not from a very well-off family, and I am able to make good and easy money in this job.

**Kay:** I have faced many problems as a result of being a transgender woman. I have found it very difficult to get jobs since I started to wear trans clothing because people have very negative perceptions. I once applied for a job in a factory in Sunway City which is not far from Kuala Lumpur. I attended an interview for a job as an Operator, but they never called me back and I am sure it was because of who I was. I know this because of the way they looked at me during the interview. I have also found it very difficult to find places to rent. When I first arrived in Seremban, I was urgently looking for a house. I picked up a flier advertising accommodation for rent. I contacted the person, but when we met up, he told me that he could not rent the place to me because he had decided to sell the house instead. I know that this was not true, as two months later I found out that someone else was renting the place. This same experience has happened to me many times. Eventually I was able to find someone who did understand me. She is happy for me to rent her property as long as I pay the rent on time.

I also experienced problems in the hospital in Seremban. I was there recently, and although I am a trans-woman, I was put into a male ward. I was unconscious for five days after a car accident in which I hurt my head very badly. When I woke up, I was surrounded by men, and I freaked out. Eventually, the doctor agreed to put me in a different room so that I had a room to myself, but I should have

been there from the beginning of my stay. I also found that many of the hospital workers shouted “*pondan*” at me, which is a very disrespectful name used interchangeably for homosexuals and transgender people.

Women like me regularly face trouble from other people in the community. I often meet people who are not happy with the way that I live, and they choose to pick a fight with me. I have been in fist fights with people who try to cause trouble for me. Often it is women who are the worst in this respect.

**Linda:** I found it incredibly difficult to study at college as a trans-woman. Firstly, I had no other trans-women friends on the campus. Secondly, I was forced to share a room (as were all of the other students) with a member of the same sex as me. Because my identify card says that I am male, I was made to share a room with a guy. I asked the Principal of the college if he could make an exception for me. I felt that they should demonstrate some flexibility in my situation. I should have been allowed either to share a room with other female friends, or to rent accommodation outside of the campus. As the college rules did not permit students to rent elsewhere, I was forced to stay on campus. I also found the studying very difficult as there was a tendency to separate the college classes according to gender. This did not work out at all for me, and I found being forced to study alongside only men very uncomfortable. I also faced dilemmas every day, such as which toilet I should use on campus. Eventually, the campus environment became so uncomfortable for me that I was no longer able to continue with my studies. I had completed two years of the three year course, but I could not face it any more.

Very soon after I left college, I met new trans-friends, and became a sex worker. I have

been doing that work for four or five years now. I was very much influenced by the choices which my trans friends had made. If you look around other places of employment, like shops or restaurants, you do not see any trans-women working there. Being a sex worker is the only job which gives me freedom – I am able to wear what I like and I can do what I like. Apart from when the representatives of the Religious Department cause problems for me.

**Fifi:** I am treated very differently during the day time to how I am treated at night. During the day, people make fun of me. People talk down to me and ridicule me. They just do not understand what it is like to be a trans-woman. They do not understand it at all. My family seems to accept me dressing as a woman, but if they knew the line of work I am in, they would probably kill me.

**Kay:** The biggest challenge which we face is from the religious authorities in Malaysia. They arrested me once. On that particular night, I was not working, so I went to my friend’s bridal boutique. I was just sitting on the steps outside, waiting for my friend to come with me to get some food. A group of guys on motorbikes suddenly appeared and took me by surprise. They came up to me and grabbed me – I thought they were robbers trying to steal from me, so I tried to shut the outside gate of the shop. They stopped me, and pushed me against the wall. I asked why they were doing this, and what was happening to me. I asked them who they were and what they wanted, but they just told me to be quiet. They started to grope me, and I tried to push them away but I did not manage because they were too big. I looked across the road and saw another friend of mine being beaten up by some other guys. At that point, the men holding me identified themselves as representatives of the Religious Department.

I was then told that I must wait for a van to arrive. While I was waiting, they continued to beat up my friend. It was very bad – I saw it all. While I was sitting waiting for the van, one of the men sat next to me and started to grope me once again. The van finally arrived and took me to the Religious Department in Seremban. When we got there, I was put in a room, and they told me to take off my clothes which they wanted as “evidence”. I did not want to do this because I had nothing else to wear. Other staff from the Religious Department kept coming into the room. They touched my face and commented on my breasts. Eventually I was given the opportunity to telephone a friend to come and offer bail for me. She arrived with a spare set of clothes for me to change into. My friend gave a verbal assurance for me, and I was then allowed to leave.

**Zura:** Last year, I was arrested on four separate occasions by representatives from the Religious Department. On the first occasion, I was not working, but I was in AST, the area where we usually work. I was just hanging around, wearing a nightgown. I was picked up by the religious officers who charged me for wearing a nightgown. Apparently, as no man in their right mind would wear a nightgown, I was accused of impersonating a woman. I was taken to the offices of the Religious Department and forced to undress. Even though the officers were not in the room with me, I know that they were watching me through a one-way mirror. I was only just recovering from my breast augmentation surgery, so it was very embarrassing for me to have to change whilst they could see me. My friend brought spare clothes for me, as the officers wanted to keep my nightgown as evidence against me. I was kept in the office overnight, and then taken to court at 2p.m. the following day. I was fined 700 ringgit and then released.

On the second occasion, I was subjected to severe violence during the arrest. Once again, I was in AST. I had driven there to give some make-up to a friend of mine. As I was just about to give her the make-up, a raid began during which representatives from the Religious Department were rounding people up. Everyone was running everywhere. I was very shocked so I began to run as well. I was chased into a hotel. I was wearing a nightgown again, but I had no make-up on my face. I took refuge in a small store in the hotel. It was a karaoke lounge. After I ran in, I managed to lock the door behind me and I hid behind the counter. Three men began to pound on the door. They told the bouncer that if he did not open the door, they would break it down and he would have to pay for it to be fixed. They identified themselves as representatives from the Religious Department so the bouncer immediately opened the door. They came after me. I resisted at first, but eventually surrendered. At first, they held me by my neck against the wall, and then they punched me in the nose until I was defenceless. I was slipping in and out of consciousness. They then threw me to the floor, stepped on my chest and kicked me. There was a real danger that they could have hit the silicone implants in my chest which could have been very dangerous. After being physically abused in the karaoke-lounge, I was taken to the Religious Department with a few other people. This was the most violent raid I had ever experienced. Almost all of the people who were taken there with me had been beaten. I was asked to remove my clothes as evidence, but they did not take a photo of me because I was not wearing make-up this time. The following day, I was taken to court again. I was forced to plead guilty to an offence under Section 66, saying that if I did not, I would prolong the situation and I would have to go to jail. I therefore followed their advice and also paid a 1000 ringgit fine.

On the third occasion, I was picked up once again by the same man from the Religious Department who had punched and kicked me on the previous occasion. I was just standing in AST, wearing a nightgown and waiting for friends to go for food. A man standing behind me grabbed my hair, and without showing me any form of identification, told me to follow him. I was taken to the offices of the Religious Department once again, and the following day I went to court. On this occasion, I did not plead guilty, and as a result, I was given a date for trial. There is a three strike rule, and as this was the third time I was arrested, I was forced to have a full trial. I paid a bond and was then released.

On the fourth occasion, I was arrested at the same time as Miss Kay. She was picked up in the first batch, and I was in a second batch. On that evening, I was wearing a big t-shirt and football clothes. These were not female clothes! The representatives from the Religious Department, however, said that my physical appearance was that of a woman. They lifted up my shirt without my consent, and I asked them why they had done that because I was not wearing a bra. We do not wear bras, as this would be very obvious evidence to be used against us by the Religious Department. As they did not find the evidence they were looking for, they took my flip flops and my hair band as evidence. I was taken to the office, and again in court the following day, I did not plead guilty but I was told that there would have to be a trial in relation to this incident, in addition to the trial relating to my third arrest.

By this time, I was in communication with KRYSS (an NGO working with the LGBTI community in Malaysia) having met them only a few days earlier. They found a Syariah lawyer to represent me at the trial relating to the third arrest. The Syariah lawyer con-

vinced the court to combine the trials for the third and fourth arrests, and then sought a postponement. Our strategy is to postpone my trial in the Syariah court until after the leave hearing for the judicial review case has taken place.

**Linda:** I have been arrested twice. The first time was in 2005. It was night-time in the AST area and I was caught by three men. I was with another friend and they started to chase both of us. I tripped, but my friend managed to run. I fell down, but instead of helping me up, they stepped on me to keep me on the ground. They acted like they are above God. In Islam, there should be no compulsion. You should only provide advice, but not force people to do things. I was taken to the office of the Religious Department. They did not take a statement from me straight away, but they kept me and another three of my friends in overnight. Only in the morning did they take our statements. It seemed that they were not carrying out the proper process, but rather they were just making fun of us and ridiculing us. They did not seem to want to teach us a lesson, but rather to mock us.

On the second occasion, I was picked up by three religious officers in a white van. They just picked me up from the street and took me on a joyride, asking me questions the whole time. They asked me to remove my clothes and they tried to grope my breasts. After some time, they dropped me off at the top of a hill and I was forced to walk home alone in the dark. The officers who picked me up were not actually on duty, which was why they did not arrest me. They just took me for a ride to mock me and to take advantage of their position of authority.

**Fifi:** The first time I was arrested was in 2009. I was picked up on the street and taken to the

offices of the Religious Department. I was asked to take off my clothes, which I did, and they then asked me to wash off my make-up. I was interviewed by a female religious leader, who told me that I am a very handsome boy. They did not press any charges against me. Whilst they were not violent towards me, I did feel very uncomfortable because they made me remove all of my clothes.

The second time I was arrested was in November 2010. I was on the pavement in the AST area. I was wearing leggings, a white singlet top and I was holding a clutch bag. I was wearing my hair down, and I had only eye make-up on. Two men came out of the pub near where I live, and one of them approached me and started to flirt with me. He asked my name, and seemed to want to get to know me. Things progressed quite quickly, and I was swept away by this guy. Eventually I touched him, and I thought that if he was from the Religious Department, he would not have let me do that. After I did that, however, he took my arm and told me not to resist because he was from the Religious Department. After five minutes, a van arrived and I was taken to their office. I was put into a detention room, and they told me to call someone who could provide bail on my behalf and bring some spare clothes for me. They asked me to remove my clothes, which I did. They confiscated them. They did not take a statement from me, but just took my clothes as evidence. They then told me that I would be taken to court the following morning.

The following morning, they took me to court, but then realised that they did not have a statement from me, so they had to postpone my hearing so that we could go back to the office and I could give them a statement. The hearing was delayed until after Friday prayers. The officers were scolded by the judge because my case should have

been heard between ten and eleven o'clock in the morning. I was not treated well during my time in detention at the Religious Department. I was arrested at 10p.m. in the evening, and by the time I was released after my court hearing at 3p.m., I had still not been given any food. In court, I was charged with an offence under Section 66, and I was made to pay a fine of 1,000 ringgit.

**Kay:** I have chosen to take the legal case against Section 66 because I do not agree with the law and I want to change the perception of transgender women in Malaysia. As it stands, the law means that I can be arrested for simply being myself in public. I want to be free to go outside during the day time without feeling scared. I am not doing all of this for a show – this is who I am for real.

Members of the Religious Department continue to hunt us down. They continue to search for trans women in Seremban. They know who we are, and they have now recruited the police officers to assist them. So we now face problems from both the Syariah authorities and the civil police as well.

I want to live a good life. I want to find a good job through legal channels. I am prevented from doing the jobs I would like to do – like being a model or a singer – because I am a trans-woman in a Muslim country where there are laws which stop me from being who I want to be.

**Zura:** I very much hope that as a result of our legal challenge, the situation facing trans-women in Malaysia will change. I am prepared to die for this cause, because there is such a lot of discrimination against us. I found it so difficult to find a job when I was younger. The Malaysian people do not allow trans-women to be anything other than sex workers. This really is the only work that

we can do because when we look for work elsewhere, we are ridiculed. But we also have people to feed, and responsibilities to manage. We should be able to make money safely, and take care of our people like everyone else.

**Linda:** I have become involved in the legal case because having been arrested on two separate occasions I believe that it is wrong that it should be a criminal offence for me to wear whatever I want to wear. I want to fight

for my rights, and the rights of my friends. These people arrest us, beat us up and break into our properties. They hunt us down as if we are the biggest murderers, when the only “offence” we are “guilty” of is wearing female attire.

**Fifi:** I have become involved in this legal case against Section 66 because I want to change the law. The religious authorities are the biggest problem facing trans-women like myself and I want this to stop.



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<sup>1</sup> Tan Lay Ean, H., “Jeffrey Jessie: Recognising Transsexuals”, *The Malaysian Bar*, 17 November 2005.

<sup>2</sup> Slamah, K., “The Struggle to Be Ourselves, Neither Men Nor Women: Mak Nyahs in Malaysia”, in Misra, G. and Chandiramani, R. (eds.), *Sexuality, Gender and Rights: Exploring Theory and Practice in South and South East Asia*, SAGE, 2005, p. 99.

<sup>3</sup> *Ibid.*, p. 100.

<sup>4</sup> Koon, T.Y., *The Mak Nyahs: Malaysian Male to Female Transsexuals*, Eastern Universities Press, 2002, Chapter 4.

<sup>5</sup> See International Lesbian, Gay, Bisexual, Trans and Intersex Association, “Trans Woman wins Asylum Claim”, 27 July 2010, available at: <http://ilga.org/ilga/en/article/mxBoTUg1vy>; and Fridae, “Malaysian transsexual given refugee status in Australia”, 2 May 2010, available at: <http://www.fridae.asia/newsfeatures/2010/05/04/9889.malaysian-transsexual-given-refugee-status-in-australia>.

<sup>6</sup> *Wong Chiou Yong v Pendaftar Besar/Ketua Pengarah Jabata Pendaftaran Negara* [2005] 1 CLJ 622.

<sup>7</sup> *J. G. v Pengarah Jabatan Pendaftaran* [2005] 4 CLJ 710.



# INTERVIEW

*"In the context of detention, anti-discrimination policies and their enforcement have an importance that exceeds their importance in any other context."*

*Mads Andenas*



# Equality and Detention: Experts' Perspectives

*Detention is increasingly used by states not only in the context of their criminal justice system, but also to serve other governmental objectives, including immigration control and national security purposes. The act of detention is always a restriction on the liberty of the individual – a human right – and it must comply with established principles of international law for it to be lawful. Two of the fundamental and well established principles in this regard are the principle that detention should not be arbitrary, and that detention should not amount to torture, cruel, inhuman or degrading treatment or punishment. A third, equally fundamental principle is that detention should not be discriminatory. Though recognised under international law, the particular issue of discrimination against members of vulnerable groups – both within the processes leading to detention, and within places of detention themselves – has yet to attract the level of attention it deserves. Inequality and discrimination remain prevalent and largely unaddressed across a wide range of detention regimes.*

*ERT spoke with Wilder Tayler, Secretary-General of the International Commission of Jurists and an expert on the UN Sub-Committee on the Prevention of Torture, and with Professor Mads Andenas, Professor of Law at the University of Oslo and a member of the UN Working Group on Arbitrary Detention about their perspectives on patterns of discrimination in the detention context, based on their own first-hand experiences of monitoring places of detention, and their thoughts on how the right to equality of detainees can best be protected.*

**ERT: Mr Andenas, you are widely recognised as an expert on detention related issues. Can you tell us a little more about what led you to getting involved in this area?**

**Mads Andenas:** That is a very generous way to put the question, many thanks. Anyone involved with rights, law, history, or, for that matter, the human condition, has to be concerned with arbitrary detention and with how prisoners are treated. Thinking back to my schooldays, political prisoners was the

one cause you could get fellow-pupils and teachers to unite on, although those on the right and those on the left would rarely agree on who were worthy of one's interest. But to me it was the issue on which you could agree with both sides at the same time and support all their motions and sign all their petitions. If you could suspect some of using human rights as a weapon to beat their enemies, and tolerating abuses by the friends as justified or something one should not take too seriously, you could limit yourself to agree with them whenever they were concerned



Mads Andenas

with the abuses. Prisons and camps were full of opposition figures in Spain, Greece, the Soviet Union, and all of the Latin-American dictatorships. There was the persecution of opponents of apartheid, and then the very German handling of the Baader – Meinhof phenomenon.<sup>1</sup> All very different, but all human rights abuses. Also in Norway, where I grew up, we had political refugees from these countries. They were heroes and saints to us, even though I do not believe they were all that much better treated than their counterparts today who still face so much vilification as a group. In the popular press, the term “asylum-seeker” is not a reference to heroes or saints. Both at school and university, sending Amnesty’s Urgent Action postcards and letters demonstrated the hopelessness of it all, but at the same time that involvement from the outside world just might save a person from torture or death. My law school professor, Torkel Opsahl, who involved me in the human rights institute he was setting up at the University of Oslo, had chaired the

European Commission on Human Rights inquiry into the internment and torture of alleged members of paramilitary groups in Northern Ireland in the 1970s.<sup>2</sup> That provided another perspective, and when I later in life met some who regarded themselves as his UK opponents, I appreciated more fully how controversial (and absolutely right) his critical approach had been. Opsahl was also a member of the UN Human Rights Committee and I learnt much about the international supervision of human rights from him.

In my years in the UK, it was Guantanamo Bay, and also the UK involvement in this and other forms of detention that made clear to me the role of arbitrary detention, with torture and prison conditions as accompanying features. The justification of detention and torture as anti-terrorism measures, with 11 September 2001 as the event “that changed everything” and provided a catch-all derogation from international law and domestic rights guarantees, provided a fundamental challenge to any thinking international lawyer or rights-oriented person. In the first years of the decade, I undertook an annual review of human rights and good governance of Rwanda for the governments of the UK, the Netherlands and Sweden, as part of a system these countries had set up for providing aid to Rwanda on a bilateral basis outside the UN system with the World Bank, etc. Rwanda had some 80,000 long-term prisoners awaiting trial for genocide and genocide-related offences. Its friends were anxious to explain and defend, but walking around the overcrowded prisons made clear what a problem arbitrary detention and prison conditions are. And also that there was the need for reliable international human rights supervision to ensure that major powers are not tempted to shield their clients, or that they do not get away with it. Here, four very different countries were involved, all of them

failing to protect rights which were clearly violated on a large scale.

The UN Working Group on Arbitrary Detention (WGAD) was the first UN body to take the US to task over Guantanamo Bay. I knew it as a body that managed to deal with politically charged issues in an impartial and judicial manner, and also much admired its initiator, the French judge Louis Joinet, and his successor Manuela Carmena Castrillo, a judge from Spain who relentlessly and not without personal sacrifice pursued the detention and torture of detainees in the “War on Terror”.

So when I was asked to stand for the appointments process for new members of the WGAD, I could only answer yes. The post takes time, our cases are rarely happy ones, and we are not paid anything. We cannot know if our involvement in a case will have much effect. But we have the assistance of a very dedicated professional staff in the Office of the UN High Commissioner of Human Rights, and the great pleasure when we see results of our work. We are five members, very different in backgrounds and outlook, but we share a feeling of a strong common purpose, and I have not had more rewarding collegiate cooperation.

I have always been involved with issues relating to political prisoners, arbitrary detention and torture. But my scholarship has had a wider European and international law orientation. You could say that I have come to human rights law as an international lawyer. Some traditionalist lawyers and politicians refer to human rights lawyers they see as too activist, or as *droits de l'hommeistes*. For an international and European lawyer, the development of the supervision of human rights in international law is an exciting and important project. It is difficult not to be ex-

cited. I have become a self-professed *droits de l'hommeiste*.

**ERT: Mr Tayler, what about you? How did you become involved in these issues?**

**Wilder Tayler:** I started defending political prisoners in Uruguay in the early 1980s. At that time there was a military dictatorship there, and most detentions were politically motivated and arbitrary. Political opponents were subjected to military justice. So that is what led me directly into this area of work. From there, once democracy was recovered, I moved to sponsor different sectors in the social movement in Uruguay. I represented Unions, student associations and civil society organisations. Because of the nature of the activities they deployed, members of those groups happened to be arrested or harassed so part of my job was to get them out of the police stations. This is how I got further involved in detention-related issues. After that I became a legal adviser for Asia and Latin



Wilder Tayler

America in Amnesty International, and issues of detention featured prominently in my brief because it was Amnesty's mandate at the time to focus on detainees.

**ERT: How important an aspect of your role is the assessment of detention conditions? Is this a neglected issue with too much focus being placed on the legality of detention?**

**Wilder Tayler:** I think that the assessment of detention conditions is a neglected issue. People do tend to focus a lot on the legality of detention, and tend to forget about the plight of those deprived of liberty. As you know, I sit on the UN Subcommittee on the Prevention of Torture (SPT) and it is very clear to me that while both issues – the legality of detention and detention conditions – may have a very significant impact on the human rights of the individual involved, most of the focus is on the legality aspects. Prison conditions unfortunately do not appear to be a major priority for governments. It's something that features low in their list of priorities and that is something that I have verified not only through my work on the SPT, but also before that when I was working for NGOs and civil society organisations.

**Mads Andenas:** The assessment of detention conditions is clearly an important aspect. The WGAD considers detention to be arbitrary if it is in breach of international human rights standards of detention conditions. We report on our work and working methods to the UN Human Rights Council and the UN General Assembly. The link between arbitrary detention and conditions of detention has been accepted for our work, but we do not have any express mandate to deal with detention conditions. Periodically, there will be attempts by some countries to limit our role here, and when the WGAD points to the

importance of this aspect of its mandate and the need to list detention conditions in the text of our mandate, this is sometimes not taken up. There is no other human rights mandate with an express covering of detention conditions. It is not as if this is a field without pressing problems of human rights violations. It is less glamorous than many of the other fields, and it also concerns most countries. If you remember the infamous response by George Bush in 2003 about the treatment of the prisoners at Guantanamo Bay in violation of international humanitarian law, it was that "the only thing I know for certain is that these are bad people."<sup>3</sup> When you have prisoners convicted of serious offences in a normal criminal trial, this kind of argument may seem even stronger. But the political process is certainly not able to safeguard the rights of the "bad people", who in ever greater numbers go to prison and remain there under criminal legislation which is incrementally extending the sentences and inventing new forms of detention.

Today much of the burden rests on national courts. In May 2011, the US Supreme Court in *Brown v Plata* held that "a prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society"<sup>4</sup> The majority opinion by Justice Kennedy criticised a prison system that produced "needless suffering and death". Justice Scalia said in his dissent that "one would think that (...) this Court would bend every effort to read the law in such a way as to avoid that outrageous result". Justice Alito in his more moderate dissent said "the majority is gambling with the safety of the people of California". The majority attached photos to the judgment that you must look up if you have not seen them. You will agree with me that Justice Kennedy did not use strong words. Can you feel anything

but shame when someone practically says he wants to bend the law to maintain such conditions - as a human being, or perhaps even more as a lawyer? The case concerned conditions in Californian prisons, and they were not better than those international bodies have condemned in the poorest of countries. Even people who do not like country and western music may agree with Johnny Cash when he sings in deep baritone: "Well, you wonder why I always dress in black" and gives as one "reason for the things that I have on": "I wear it for the prisoner who has long paid for his crime, but is there because he's a victim of the times". There is every reason, until things are brighter, to wear black.

In Europe, some of the leading judicial figures have undertaken reviews on prisons conditions. One of my judicial heroes is Guy Canivet who, while he was French Chief Justice, proposed reforms to strengthen external oversight and review of prison conditions. Also, in his judicial work, he managed to provide a corrective to the political process. In 2007, the French *Conseil d'état* established a more intense judicial review of prisons conditions as proposed by Mattias Guyomar as rapporteur public. In the UK, we all know Lord Woolf's blueprint for prison reform in 1991 following the riots at Strangeways prison in Manchester.<sup>5</sup> He has recently spoken out against the severe prison overcrowding. Dame Anne Owers as Chief Inspector of Prisons in the UK was also absolutely fearless and highly effective in providing independent scrutiny of prison conditions.

But the national systems are left with too much of an autonomous regime. Prisoners' rights are universal rights, and there should not be any margin of appreciation for domestic traditions of mistreatment and abuse. This is an area where international law, standards and review should have an important role.

There have been some important judgments by the European Court of Human Rights in this regard. It has censured France over prison conditions in a series of judgments in the last year, finding violations of the prohibition of torture and degrading and inhuman treatment in Article 3 of the European Convention on Human Rights. Germany, Russia, Ukraine, Moldova, Poland and Romania are among the other countries recently censured.

Among the UN treaty bodies, the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child all look into prison conditions. Among the Charter-based bodies, we in the WGAD and several of the rapporteurs will do so as well. But we need to have prison conditions expressly there in our mandates, and there is a need for a special rapporteur with general responsibility for conditions in prison and other forms of detention. All countries feel vulnerable here, so this will only come about if there is strong civil society pressure.

**ERT: What are the main challenges that must be addressed in ensuring that authorities do not discriminate in exercising their powers of detention, both in making decisions to detain and in the way they treat detainees? What safeguards should a good detention regime have in place to protect against such practices?**

**Mads Andenas:** The law seems to accept much structural discrimination, and perhaps most openly against foreigners. They are detained in all countries without much need of justification. There is in practice none of the proportionality review that applies to a country's own nationals or residents. Without passing judgment on any other aspect of Dominique Strauss-Kahn's case, the custodial

remand, in practice justified on grounds of nationality, illustrates this point. The less privileged are obviously not treated much better.

Law enforcement and places of detention can be used to promote agendas of insidious and invidious discrimination. The Egyptian persecution of homosexuals at the end of the previous regime served the same functions as pogroms at other times in other countries. Law enforcement and places of detention are also contexts where discrimination which takes place elsewhere can become a matter of an existential nature, and where policies and practices can become violations of the right to life or the prohibition of torture. Anti-discrimination policies and their enforcement here have an importance that exceeds their importance in any other context.

In the review on discrimination issues in its 2003 Report, the WGAD sets out that discrimination is of course a common phenomenon in the administration of criminal justice. The report states:

“[S]ince 11 September 2001, differences in treatment and discrimination, particularly with regard to foreign nationals, have greatly increased. As part of efforts to combat terrorism and transnational organized crime, countries with large migratory flows have tightened up their legislation to control illegal immigration and imposed restrictions on the right to asylum which are not always in conformity with refugee law and international humanitarian law. Some countries routinely detain anyone found on or entering their territory illegally, while others just as routinely denigrate or lock up victims of slavery or trafficking in migrants; at the same time, entire populations are rightly or wrongly assessed as potentially dangerous and, solely for that reason, risk being

subjected to lengthy administrative detention. (...) The Working Group has also been informed that, in some countries, drug addicts, prostitutes, homosexuals and people suffering from AIDS are locked up on the grounds that they represent a risk to society, and people are given prison sentences solely because of their sexual orientation.”<sup>6</sup>

In its 2002 Report,<sup>7</sup> the WGAD dealt extensively with the cases of some 55 persons prosecuted and detained on account of their homosexuality, and held that their detention was arbitrary because it violated Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR), and the guarantee of equality before the law and the right to equal legal protection against all forms of discrimination, including “sex”. The WGAD established that category II of arbitrary detention in its methods of work includes deprivation of liberty in violation of guarantees against discrimination in the ICCPR. In the 2004 Report, the WGAD addressed detention of immigrants in irregular situations.<sup>8</sup>

So what are the main challenges? Well, the provisions of the law discriminate, as do the authorities. International law and constitutional law does not allow this. To make authorities comply with the law and international obligations prohibiting discrimination is a particular challenge. The first step is to establish that no one can hide behind any form of authority, wherever they find it, to violate the law and international obligations prohibiting discrimination. Law enforcement and places of detention must just accept that they will be under particular scrutiny, which should be more intense than the scrutiny of any other sectors. Legislation, training, independent administrative scrutiny and judicial review are core elements of this. The annual reports of all these services should address

anti-discrimination in dealing with suspects and convicts as one of their first headings. It should be in their mottos.

International scrutiny has an important role to play. In particular, the reporting of the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child plays a role in domestic discussion of prison conditions in most countries, and in Europe, the judgments of the European Court of Human Rights play such a role. But this is just not enough. There is such a system's failure, or today a real break-down, in the national policies, that international scrutiny has a particularly important role to play.

**Wilder Tayler:** The main challenges, in my opinion, relate to implementation. Both questions are intertwined, so it is good that they are put together. Quite frequently, the legal framework is not as bad as we think. On the contrary, you may have an acceptable legal framework, although we do face major issues with the problem of preventive detention. Let's say that if safeguards, such as *habeas corpus* or *amparo*, are used as they should be, and put in practice as they should be, they should provide a fairly good shield against discrimination for detained individuals.

We also face some important issues during the first stages of detention – when interrogation takes place, and when most cases of torture occur. Controls such as the recording and filming of interviews and registering the conditions under which interrogation takes place are of the essence. We still do not have a widespread acceptance that a lawyer should be present from the very first moment at which the detainee enters into contact with an interrogating authority. We do not have acceptance of the value of re-

cording interrogation sessions. So these are the kind of things that we still have to work on. We have guidelines, but the law that regulates interrogation in general is not as "hard" as the law which regulates the legality of detention. For example, *habeas corpus* exists almost everywhere, whereas the right to be interrogated from the first moment with a lawyer of your choice sitting next to you is not so clear. Regimes of preventive detention suffer major loopholes.

Vulnerable groups are more at risk. They tend to be more likely to suffer from discriminatory practices. There are some groups that are particularly targeted. Street children and juveniles in trouble with the law are vulnerable, particularly when the safeguard of separation from others is not respected. They are often subjected to inter-prisoner violence. There are also very specific kinds of abuses of women in detention. LGBT minorities also need to be looked at, as they do tend to be targeted, not only in terms of being detained, but also throughout the whole detention process – when they are already imprisoned. Migrants, in my opinion, are also a group with a high degree of vulnerability. Those that can be more isolated, to a certain extent, or to whom society tends to show less interest, are those who are more targeted for discrimination practices. Above all, there tends to be one common character shared by the most vulnerable groups, and that is poverty. The poor tend to be discriminated against in general.

**ERT:** Have you come across examples of good practice in preventing discrimination in detention settings? What were the key factors that gave rise to such good practice? How important was international and/or domestic law in promoting a positive approach?

**Wilder Tayler:** Very often, good practices come together with having specialised facilities and personnel – whether they are, for example, for children, women or sexual minorities. This is why you find police stations for women, where they get arrested and are kept separated according to gender and age, both during preventive detention and during imprisonment. This is very important.

These good practices also come hand in hand with implementation of the law. International law is not necessarily perfect, rounded up and complete. After all, the standard minimum rules are minimum rules. The principles tend to be basic principles – minimum and basic principles. But when these are put in practice, they do offer a reasonable degree of protection against discrimination and other abuses. I return to my previous answer as a lot is about implementing the law. International and domestic law is important. Sometimes, one concept appears to take root, even in quite abusive contexts. For example, I remember one country I visited where people were being abused – usually beaten up or ill-treated through words – and most of all they were being arrested on bogus charges. However, everybody, including the police force, abided by the principle that detainees could not be held for more than 24 hours because this was in the law. This has taken root, and people were being released after 24 hours. The 24 hours was seen as the natural period – so people were held for 24 hours. There was no practice of keeping people beyond this period. This was a particular guarantee, established in law, which had taken root in the consciousness of the police force.

**Mads Andenas:** I do not want to be too negative but good practices are hard to find. In the treatment of children, some of the special ombudsmen or similar independent institutions have played an important role. In many coun-

tries, issues of ethnicity are discussed but as opposed to good practice, in relation to ethnicity we find only bad, and then really bad, practices. NGO involvement has had an important impact in many places. Minority groups may have active and good NGOs representing them, but this usually ends when they go to prison. Detention and discrimination should be a fertile field for solidarity among advocates of different anti-discrimination causes, but this has not materialised. I would have liked to refer to a deserving national body, but cannot in good conscience do so.

But I do believe in the force of the law. Independent review can bring out facts and influence political opinion in addition to remedying the very worst abuses. Justice Kennedy's opinion and photos in *Brown v Plata*<sup>9</sup> are the most powerful I have seen on prison conditions, perhaps with the exception of Premier président Canivet's 2000 report<sup>10</sup> in its totally different style. And the US Supreme Court could order releases that no politician could achieve.

I also believe that international human rights protection should play a more important role in promoting a positive approach.

**ERT: What challenges does the increasing presence of privately run detention institutions present for those interested in protecting detainees against discrimination and human rights abuses?**

**Mads Andenas:** Clearly, privately run detention institutions can provide another bar or obstacle. But, in relation to detention, no one can hide behind any form of authority, wherever they may find it, in order to violate law and international obligations prohibiting discrimination. The delegation of authority, or the passing of tasks on to the private sector, does not alter this. Private contractors and

their employees are as much subject to anti-discrimination law and human rights as anybody else. But we see that it may take time to establish effective systems and review mechanisms. International scrutiny and NGO activity is of paramount importance.

**Wilder Tayler:** I do not have a vast experience of monitoring privately run detention institutions. I think that keeping people in detention is a state function, to ensure that they come under the protection and responsibility of the state in conditions of vulnerability. I think that the degree of accountability must be clear-cut. There can be no place for confusion. There are other functions that can be privatised in detention institutions. For example, I see no reason why the running of a prison kitchen cannot be privatised. For me, it is not so much a question of whether they are privatised, but rather whether there is a sufficient degree of control and regulation exercised by the state authority. The responsibility for holding someone who is deprived of liberty – this should not be privatised or given to anyone else for profit. I personally do not, however, have a major experience in visiting privately run institutions to the point where I could say whether you could find more discrimination there than in other detention settings.

There are many concerns about corruption taking hold in privately run institutions. I have to say, however, that I have seen quite a lot of corruption, and this has mostly been in state-run institutions. This often comes hand in hand with human rights abuses. The SPT does have the mandate to visit all detention settings. I have encountered no apparent problems in terms of access in entering privately run institutions. Our mandate is determined by the condition of the potential victim and our preventative function. Provided

that someone is deprived of liberty against his or her will, we can go there.

**ERT: In respect to the decision to detain, is a lack of safeguards at the early stages of the criminal justice system, for example regulating police use of stop and search, contributing to the over-representation of certain groups in detainee populations?**

**Wilder Tayler:** Yes. We all know that in different societies, there are some groups that get particularly targeted, for example, through stop and search practices. Even if there is not a particular policy of profiling, such profiling arises out of the prejudice of the individuals who set the policies, or that present in the neighbourhoods in which they work. This contributes to the over-representation of certain groups. But it is not only that. It is also the lack of other safeguards that contributes to over-representation. If you cannot mount a strong or robust legal representation from the first moment, you are more likely to enter the system than come out, irrespective of what you have done. The lack of a vigorous legal representation system is therefore a factor which contributes to the over-representation of certain groups in detainee populations. This is again an example of where the issue of poverty comes into play, especially where there are weak public defence systems. Where the public defender cannot attend on the person who has been arrested, or simply does not show up, and when people are illiterate and do not understand the language of a legal document – these are contributing factors.

It is definitely young and poor males who tend to be detained more than anyone else. That is very clear. And also juveniles between

16 and 18 years of age form a particular segment of society which tends to be particularly targeted.

**Mads Andenas:** The over-representation of ethnic minorities and foreigners must be addressed in better ways, in the UK as in practically every other country, although the problems vary. This is again a universal problem that calls for international action, where the distance from domestic political pressures may facilitate qualitatively better solutions.

It can be added that the retention of DNA is closely related. It is one of the areas where the European Court of Human Rights has had a civilising influence on the UK system, through the ruling by the UK Supreme Court in *R v The Commissioner of the Police of the Metropolis* in May 2011 following the European Court's decision in *Marper v UK*, censuring the guidelines of the Association of Chief Police Officers of 2006 which state that the discretion of chief police officers to destroy DNA and fingerprints "should only be exercised in exceptional cases".<sup>11</sup> The police unions have successfully prevented the retention of their officers' DNA, regularly taken to exclude officers working at the crime scene to make it easier to identify the DNA of suspects. The unions' arguments were that it would disproportionately affect their members and give an unfair impression of them as a group if detection rates would increase more than for the population at large. When you combine this with the stop and search practices indicated in the question, you wonder why it had to take censure by the European Court of Human Rights before the UK law on retention of DNA was amended.

**ERT: What are the factors that lead to over-representation of certain groups in detainee populations? Do you agree that prison**

**populations are a reflection of patterns of discrimination in society at large? What should society's response be to this?**

**Mads Andenas:** I agree that prison populations are a "reflection of patterns of discrimination in society at large", although this phrase allows the urgency and pressing nature of these problems to be lost. The burning glass is a better way of imagining them. Discrimination, which is reprehensible elsewhere, gets an intensity in detention settings which gives a power to ignite or destroy and which it would not have outside law enforcement and places of detention.

**Wilder Tayler:** I do not have any scientific evidence to confirm that prison populations are an exact reflection, but I have no doubt whatsoever that patterns of discrimination in society at large influence the prison population. Whether they are an exact mirror – that is more difficult to say. That would require a study which I have not carried out. It happens a lot with migrants. You see it clearly – the correlation between presence of migrants in prisons and the discrimination they face inside the prison as foreigners.

What factors lead to this over-representation? The key factor is discrimination itself. Obviously, in the case of poor migrants, I would say that the main issue is the lack of legal defence and the lack of networks of social support. There is no community backing up these individuals – or at least no organised community backing them up. There are also few NGOs, and these are issues that make people more vulnerable to the harshness of the law. These are the individuals who see the blunter side of the law. For the law to function properly, you need a series of interactions and balances to be established. On the one hand, there is the part of the law

investigating you – essentially trying to identify whether there has been any wrongdoing. On the other hand, there is the part of the law which is taking care of your own interest. If the latter is lacking, you are in a very unbalanced situation and you are more likely to go to prison. It is a simple process, and it looks similar everywhere.

We attribute enormous importance to legal defence in the prevention of torture – legal defence from the very first moment. Someone who is next to the person deprived of liberty with the exclusive function of protecting their interests is absolutely key.

**ERT: What patterns of discrimination (if any) have you observed in the detention regimes you have inspected? Can you give examples from your experience of groups upon which detention has a particularly negative impact which warrants an alternative approach?**

**Wilder Tayler:** I can refer to some of the latest experiences I have. In one particular country, LGBT groups were under serious pressure in some of the prisons that I visited. Those people were trying to lock themselves up during the night because otherwise they were forced into prostitution within the prison setting at the hands of other prisoners. There was also a corrupt organisation of guards who were profiting from such activity. LGBT people were clearly a discriminated group under a lot of pressure.

In another country, which had experienced a period of riots and street protests, people (and particularly young people) who were political opponents to the government at the time would necessarily be beaten up and suffer physical assault and aggression in police stations.

These are two very different examples of discrimination. The LGBT discrimination happened in an imprisonment setting, whilst the second example, involving political opponents, took place in police stations. In both cases, however, discrimination was clearly marking the type of treatment which these vulnerable groups were suffering.

I have also witnessed other cases. I remember an example from Latin America where members of indigenous groups were particularly targeted. They were given the worst food and the heavier tasks, such as cleaning bathrooms. They were forced to do the most menial and unpleasant tasks.

**Mads Andenas:** There is no detention regime that does not discriminate. Take it as a given (which in real life you cannot) that prison officials and inmates are less prone to discriminate, and you still have a problem with law enforcement and places of detention which is greater than in society at large.

What I have said about the limited solidarity among advocates of different anti-discrimination causes has its counterpart among prison inmates. We cannot expect that belonging to a discriminated minority should equip them with a solidarity in prison which people outside do not have. And we know how ethnic and social divisions create incendiary conditions in prison. So again, extraordinary measures are called for.

Children are, first and foremost, the group on which detention has a particularly negative impact. Long before I myself was a child, the policy has been stated that children should not be in prison. I have now grown to be middle-aged, and children have not got out of the prison system, and now all the rich countries of the world are putting more and more chil-

dren behind bars and for ever longer periods. In Germany, they are adopting reforms undoing the liberalisation of the 1920s which even the Nazi regime did not undo. As a guest for some twenty years in the UK, most kindly and generously treated, it is perhaps not nice to harp on the civilising influence of European Court of Human Rights on the UK system. But this is another such area.

The mentally ill and the disabled are also disadvantaged. Have another look at the photos in Justice Kennedy's majority opinion in *Brown v Plata*<sup>12</sup> of the telephone-booth sized cages without toilets in which they kept the mentally ill detainees for prolonged periods.

**ERT: Under international law, states have an obligation to provide reasonable accommodation for persons with disabilities. From your experience, what are the particular needs of disabled people in places of detention? Can you give examples of where states have succeeded and failed to accommodate the needs of disabled people in places of detention?**

**Mads Andenas:** You are right to point out the obligations under international law, but they have to be complied with and enforced. Many countries have lost cases before international human rights courts and bodies, and there is, for the time being, much resistance to individual complaints bodies. The new Optional Protocol to the Convention on the Rights of Persons with Disabilities, which has been ratified by the UK and most other member states of the EU, is so restricted, and tilted in favour of states, that its complaints mechanism will not be as effective as it could have been. Further, my own country, Norway, and the US are among the countries that have opted not to ratify the complaints mecha-

nism. Ultimately, NGOs will pressure them to do so, and I hope that the UN Committee on the Rights of Persons with Disabilities will give prison conditions a high priority.

The particular needs of disabled people in places of detention are as they are elsewhere, only stronger; and it does not help that their rights are less complied with. Examples of failure to accommodate the needs of disabled people are something you will find in most prisons. There are, however, a few examples of NGO activity that may show the way for other NGOs in this regard.

**Wilder Tayler:** I have to say that in general, I have not found that third world prison facilities provide the kind of support that disabled people need. On the contrary, quite frequently, we see disabled people mingling with the rest of the prison population. There are some cases, for example for the mentally disabled, in which they are brought to separate pavilions, or they spend quite some time in the infirmary, but quite often you ask yourself whether they should even be there in the first place. Should they not be in a hospital, with the necessary security?

I am unable to give one example at the moment in which I could say I have identified a good practice for these people. During one particular visit, a prisoner told me that he had been accommodated on the ground floor because of the difficulties he had in climbing the stairs. Disabled people are often, however, discriminated against inside prison as these tend to be harsh environments. Disabled people are restricted even more inside prisons than they are outside. They may experience individual gestures of solidarity, from other prisoners or individual lenient guards, and the benefits of establishing small networks inside compounds. People cling to

such connections in order to survive. But I have seen very few organised systems.

**ERT: Do the specific experiences of women in detention, or the impact detention has upon them, require women to be treated differently in detention?**

**Wilder Tayler:** There is one very specific issue relating to women, and that relates to mothers in detention. They are required to be treated differently. We have seen many cases where the only different treatment is that they are kept with their infants, which poses a number of legal, practical and ethical issues. In particular, it poses the question of how long a child should be kept with his/her mother. This is a hotly debated issue. It is one of the most important features of a discussion about women in detention.

I have to say that in some places, as well, I have noticed that police stations intended specifically for women – especially when they are staffed by women – tend to be more reasonable as far as the general physical conditions are concerned than other places. That includes the condition of the cells. In some police stations where the cells are in quite deplorable condition, due to being overcrowded or extremely dirty places, women are kept outside of such cells. They are kept outside or in a particular room, and are not put behind the bars of the cell.

In one place I visited, the cells were in good condition, but where they were not, there was a practice of not keeping women in those places. Women could only be kept there for short times, before being sent to a specialised place for women. Having visited those places for women, I reported later that they were in good condition. It is notable that the places in good condition had not been given

massive resources. They were just clean, and the registering books were proper. The bath-rooms were more or less in order and there was a small section for children. I have recorded more than one case when I have seen this in Latin American countries.

Basic resources can still allow state authorities and police authorities to keep people within conditions of dignity. Indignity does not need to occur. Things can be improved with better practices. It has happened more than once when I have visited police stations that I see 25 prisoners in one very small cell and then there are two empty cells next to it. Returning to my earlier responses, it is just a simple lack of interest and discrimination against the poor or those suspected of wrongdoing. There is a natural inclination to disregard the fact that these people are under the custody of the state and therefore the state authorities are responsible for their well-being. It is this last part which is missed by the higher authorities. There is a disassociation between the fact of holding someone in custody and the corresponding responsibility to take care of that person's well-being. Intellectually, you see that many police forces do not appreciate this point.

So I am able to give examples of good practice regarding women being kept in separate facilities. When they are not in separate facilities, sometimes they are still treated differently. But women do tend to suffer abuses at the hands of men, and particularly sexual abuse. It is often in times of turmoil and upheaval that such forms of abuse take place.

**Mads Andenas:** I expect it is difficult to disagree with the charge that women have been, and are being, marginalised within a criminal justice system designed by men for men. The female prison population is on the rise, and new issues have to be addressed.

**ERT: From your experience, to what extent does the occurrence of deaths in custody reflect patterns of discrimination? How should inquest procedures be adapted in order to ensure that states comply with their positive obligations (as defined in the European Court judgment in *Nachova v Bulgaria*) to take account of discriminatory practices?**

**Mads Andenas:** The House of Lords decision in *Amin* in 2003<sup>13</sup> was only one of the stark reminders of how deaths in custody reflect patterns of discrimination. The House of Lords followed the European Court of Human Rights in *Edwards v UK*<sup>14</sup> and Lordingham said: “A systemic failure to protect the lives of persons detained in custody may well call for even more anxious consideration and raise even more intractable problems”. You mention *Nachova v Bulgaria*<sup>15</sup> where the European Court deals with ethnically motivated killings which will require “particular vigilance and an effective response from the authorities.” This duty will not be less if the killing takes place in a prison (in *Nachova* it was in a Romani settlement).

**Wilder Tayler:** I cannot tell you from my experience that discrimination plays such a significant incidence in deaths in custody. However, there is the fact that inside a prison establishment, you find the same divisions that you find in society in general. There are rich, middle-class and poor people. As is the case outside a prison, violent death is more likely to occur among poor people. That is a fact of life, especially as they are much more exposed to corruption. Detainees who are rich, and who live in the VIP cells or pavilions, have TV and air-conditioning. They also pay for security. Whereas those who do not have a place to sleep – they live in the corridors or outside – are more exposed to violence. Inter-prisoner violence is quite

common and those who suffer the most are the poorest.

In some contexts, there is one particular type of detainee who suffers the most, and that is the sex-offender against children. Those individuals are targeted by fellow prisoners more frequently than others. Because of that, they require a particular degree of security which is not always provided. Therefore, discrimination on the grounds of the crime which an individual has committed takes place amongst prisoners.

I think it should absolutely be a priority to identify discriminatory practices in deaths in custody, because discriminatory practices are a fact of life and it must be assumed that there is a serious chance that they have taken place, for example, towards women, children and foreigners.

**ERT: Immigration detention is a growing industry throughout the world. In your perspective, is this a reflection of growing intolerance and discriminatory attitudes towards migrants? What would be a just and fair social response to irregular migration?**

**Wilder Tayler:** I can answer the first part easily. Yes – there is a reflection of growing intolerance and discriminatory attitudes towards migrants in the growth of immigration detention. As for what the just and fair social response would be – one needs to write a PhD in order to answer that! Detention is not a just and fair social response, but the problem is that you cannot analyse this issue without going back to the origins of these individuals; without assessing where they have come from. The question of a just and fair social response raises issues of social justice which are perhaps too broad to address here.

**Mads Andenas:** The answer to your question regarding just and fair social response is not prison. Migrants are not criminals and should not be treated as such. The WGAD has a clear jurisprudence on putting migrants in prison. Most countries do not treat migrants as criminals: they treat them worse than criminals. You also ask if immigration detention is a reflection of growing intolerance and discriminatory attitudes towards migrants. Well yes, it is difficult to look at it in any other way. The result is that solutions other than detention must be found. The different ways of circumventing international law on *non-refoulement*, which prohibits states from pushing refugees back to places where their lives or freedoms are threatened, give rise to other questions. International law does not any longer facilitate the different ways of limiting the jurisdictional reach of human rights, and national courts are also less inclined to accept such arguments. I have my own views on the just and fair social response to irregular migration, but today I keep to the legal issue: it cannot be prison.

**ERT: Do you think it is fair to assert that immigration detention regimes are shielded from the full scrutiny of human rights law, due to immigration being widely perceived as a matter of national sovereignty and broad discretion being given to decision-makers as a result? If so, what do you think needs to be done to address inequalities and the lack of protection from discrimination that emerges as a result? In your experience, can states strike a better balance between protecting national sovereignty and protecting vulnerable persons and groups from discriminatory treatment?**

**Mads Andenas:** The answers here are yes. I have two further points. Immigration detention regimes are gradually being subjected to

domestic and international judicial review. National courts are reticent, and the questions are highly politically charged. But as you say, immigration is widely perceived as a matter of national sovereignty and broad discretion is given to decision-makers as a result. This should not include, however, the discretion to breach human rights and put people in prison or even worse forms of detention.

At the end of last year, in the case of *Diallo (Guinea v the Congo)*,<sup>16</sup> the International Court of Justice developed international customary law on arbitrary expulsion and detention, in parallel with the different international human rights bodies.

**Wilder Tayler:** I think that most immigration regimes, not just the detention aspects, are overly charged by the phenomenon of national sovereignty. National sovereignty plays such an important role, and it excuses a tremendous degree of discretion and flexibility in the treatment of migrants. These are regimes which allow for a large degree of state expedience. This is why the migrant, and the irregular migrant in particular, is usually a member of a vulnerable section of society. It is also true for some countries that immigration detention facilities are the worst. What makes it even worse is that they are supposed to be temporary, yet they are such a punishing environment which is experienced by individuals who have not been charged, or who are being held only in relation to an administrative issue. Yet the conditions in which they are kept are absolutely horrendous.

We examine immigration detention facilities during SPT visits, precisely because of the discrimination and the vulnerability faced by the detainees. It is still very early to assess the impact of the SPT, and it remains difficult

because it is still a relatively new experience. We have only conducted ten or eleven visits so far, so it is too early to draw conclusions regarding impact. I can tell you, however, that the ability to evaluate our impact is very much in our minds. We are a visiting body. If we do not manage to change or prevent difficult situations on the ground, then we have not discharged our mandate. This is something we take very much into account. I would say that the response from governments has tended to be mostly positive, including in some cases where compliance with SPT's recommendations required the allocation of financial resources to certain areas.

Immigration regimes present one of the toughest issues in the menu of trying to prevent ill-treatment, precisely because these are the regimes which are so defined by this underlying concept of national sovereignty. You realise that sovereign states can do so much, despite the fact that a border is nothing more than a line in the sand.

**ERT: Stateless persons are amongst the most vulnerable of all migrants and they are the most likely to suffer prolonged and even indefinite detention due to the inherent difficulties of removing them from a country. What should states do to change this? Have you come across any policies that can be highlighted as good practices in this regard? Do you believe that the failure to make special provisions would amount to discrimination, rendering such detention unlawful?**

**Wilder Tayler:** I have not found any good practices in this regard and this is not an area I know well. This requires more than national efforts. You need a multi-national effort to address the issue of statelessness. Again, ultimately, that will require a major standard-

setting effort to resolve this. It is amazing that the international community has not come together to create sets of possibilities for people to move out of their stateless situation. This is one of the most blatant gaps in the international regime of protection.

**Mads Andenas:** Again, prisons or camps are not the answer, neither for stateless persons nor for the wider group of migrants. It may be surprising how refugees in some of the world's poorer countries, where most refugees live, are integrated into the domestic economy. There is no other reasonable alternative with the large number of refugees in some of these poor countries. However, to keep large numbers of people in some permanent incarceration so as not to encourage other migrants (as has been done in the richer countries), is difficult to justify on any grounds. Many current regimes are not complying with international law obligations, and their position under domestic law will be equally questionable. But the international system of human rights supervision is fragile, and this is not a field where countries are going to queue up to establish enforcement mechanisms.

Stateless persons are as you say among the most vulnerable, and there is some assistance in the case law on groups in need of particular protection under international law. The European Court of Human Rights judgment in *M. S. S. v Belgium and Greece*<sup>17</sup> set out the criteria for categorising groups as a member of a particularly underprivileged and vulnerable population group in need of special protection, making the state's margin of appreciation substantially narrower and requiring very weighty reasons for restrictions, amounting to a rebuttable presumption. Refugees were classified as a vulnerable group. Both states were held in violation of Article 3 (Prohibition of Torture) of the

ECHR. Judge Rozakis, in his concurring opinion in *M. S. S.*, relied on Greece's international obligations to guarantee asylum-seekers certain material conditions. The Court concluded that the Greek authorities "must be held responsible, because of their inaction, for the situation in which [the asylum-seeker] has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs". One of the judges, Judge Sajó, was of the view that although many asylum-seekers are vulnerable persons, they cannot be unconditionally considered as a particularly vulnerable group where all members of the group, due to their adverse social categorisation, deserve special protection. He pointed out that in the context of the Dublin Convention, particularly "vulnerable persons or people" refer only to two categories within refugees – victims of torture and unaccompanied children – and did not amount to a rebuttable presumption.

So the European Court of Human Rights classified refugees as a vulnerable group. When they are in detention, there are also other factors making them more vulnerable. In my view, the reasons for extending special protection will typically obtain even more clearly and with more force in the case of stateless persons.

**ERT: How important is the principle of proportionality in the assessment of whether a person can be legally detained? In this context, how important is it for states to introduce viable alternatives to detention in order to prevent discrimination? Do/should states have a legal obligation to do so?**

**Mads Andenas:** The principle of proportionality is at the core of the international legal system. It applies when the reach of the pro-

hibition against arbitrary detention is to be determined, and in determining whether the derogations and restrictions are justified. It is not enough for the authorities to claim some public interest: a domestic court will require reasons, and want to see whether a proportionality test is satisfied, including how the relevant interests are balanced against one another. This is the same in international courts and human rights bodies.

In many of the situations we have discussed, it is simply not open to states to choose detention. There can be a duty to introduce viable alternatives to detention to prevent discrimination, and this can be a legal obligation both under domestic and international law. But again, detention can be arbitrary both on substantive and procedural grounds. The ordinary alternative to detention is of course release. As a matter of law, the consequence of a breach of the prohibition against arbitrary detention will most often just be a duty to release.

**Wilder Tayler:** Detention should in principle be a matter of last resort, and of course you have to examine the individual case. I agree that the principle of proportionality does count. This is a principle of international law, although the way it is formulated may suggest to some that this is more of a guideline, rather than a prescription. Article 9(3) of the International Covenant on Civil and Political Rights provides that individuals awaiting trial should not, as a rule, be detained in custody. This is, however, formulated in the passive voice. This is one of those legal wordings with a twist, where the duty-holder is not clear. I would say that the wording, particularly in the context in which it is, should be understood to be there to be applied to its full strength. The ICCPR is a binding instrument and its provisions are presumed to be binding. The states parties have assumed ob-

ligations under the ICCPR freely – so I would say that under no circumstances would I accept that this is just a guideline, even though it sounds suspiciously like one. I would have preferred a formulation which states that: “a person awaiting trial should not be detained in custody unless specific and well-grounded reasons have been determined by the judge”. That would have offered a better degree of protection.

Detention should not be the general rule but often it is, and it is becoming more and more so, especially in relation to particular crimes, such as drug trafficking, for which individuals are sent to prison automatically, irrespective of the seriousness of the particular offence.

**ERT: Do you think that detainees or prisoners can or should be considered as a vulnerable group in the context of discrimination law? Is imprisonment or restriction of liberty a valid ground of discrimination or should it be?**

**Wilder Tayler:** This is an interesting question. I think that, in principle, I feel disinclined to say that detainees or prisoners are a vulnerable group in the context of discrimination law. I see no inherent attribute in the individual here, but rather the fact that an individual’s liberty has been restricted. The imposition of imprisonment, or restriction of liberty by law, should be in principle, by law, accompanied by protections which prevent discrimination. There is no point of contention about that. So the mere fact of imprisonment should not be a ground of discrimination, in the same way that nationality, gender, political opinion, religious creed could be.

I can give an example in support of my position. As somebody who advocates a liberal interpretation of how imprisonment should be used, I think it should only be used for the

most serious crimes, including war crimes and crimes against humanity. I would hate to reach the conclusion that those individuals are being discriminated against just because they are imprisoned.

**Mads Andenas:** I just mentioned the European Court of Human Rights judgment in *M. S. S. v Belgium and Greece*<sup>18</sup> which categorises asylum-seekers as “vulnerable” group in need of special protection. In *Oršuš* in 2010,<sup>19</sup> the European Court had held that the Roma minority, as a result of their history, had become a specific type of disadvantaged and vulnerable minority in need of special protection. In *Alajos Kiss*,<sup>20</sup> also from 2010, persons with mental disabilities were included as a particularly vulnerable group in society, which has suffered considerable discrimination in the past. It will be interesting to see where the Court develops this concept of the “vulnerable minority”. Whether you regard “imprisonment” or “restriction of liberty” as a valid ground of discrimination or not may not be so important. Those subject to such restrictions have a right to have them subjected to an intense proportionality review. That includes a vigorous review of possible discrimination.

**ERT: Following the question above, what criteria should be used to decide whether certain rights and liberties should be stripped away from prisoners and/or detainees? How does one assess, for example, whether prisoners should have the right to vote, and is the restriction of such a right an act of discrimination?**

**Mads Andenas:** Here again we have a solid body of case law emerging. *Iwańczuk v Poland* from 2001<sup>21</sup> concerned a person detained on remand exercising his voting rights. *Hirst v The United Kingdom (No. 2)*<sup>22</sup> concerned a blanket ban on convicted prisoners’ right

to vote which the European Court of Human Rights held to be in violation of the right to vote under Article 3 of Protocol No. 1 of the European Convention on Human Rights. *Frodl v Austria*<sup>23</sup> concerned a prisoner serving a life sentence for murder in Austria. The Austrian provisions on disenfranchisement were more narrowly defined than in the case of *Hirst*, but the provisions were still not in conformity with the Convention as there was no link between the offence committed and the issues relating to elections and democratic institution.

European and international human rights courts and bodies will continue to develop these criteria. They are of essence to any political system and not suited for determination on a country by country basis. Countries that want to take part in a European legal order just have to accept this.

In *Hirst*, the UK Government submitted that the ban was in fact restricted in its application as it affected only around 48,000 prisoners, and made the point that this number included those convicted of crimes serious enough to warrant a custodial sentence and not including those detained on remand, for contempt of court or default in payment of fines.

The European Court's terse reply was that 48,000 prisoners was a significant figure and that it could not be claimed that the bar was negligible in its effects. It also included a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. Also, in sentencing, the criminal courts in England and Wales made no reference to disenfranchisement and it was not apparent that there was any direct link between the facts of any individual case and the removal of the right to vote.

The UK Government also submitted that much weight had to be attached to the position adopted by the legislature and judiciary in the United Kingdom. The European Court of Human Rights could just point out that Parliament had never sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. There had been no parliamentary discussion on the justification, or even the continued justification in the light of modern day penal policy and of current human rights standards, for maintaining such a general restriction on the right of prisoners to vote. The nature of the restrictions was in general seen as a matter for Parliament and not for the national courts. The UK courts had therefore not undertaken any assessment of the proportionality of the measure itself.

This was not a good case for British democracy or rule of law. It was, however, a good case for international human rights supervision. The compliance with the judgment in *Hirst* is now turning into a major issue where the European Court of Human Rights and the European human rights system will not back down. It is a bad case for the UK government over which to pick a fight with "Europe" because it involves a matter of law and of human rights. But we all appreciate the populist appeal of succeeding with the trick of aligning "Europe", "human rights" and "prisoners" with one another.

**Wilder Taylor:** I have no doubt whatsoever that the disenfranchisement of prisoners is an act of discrimination. You send someone to prison because there is a judicial decision to restrict their liberty. In order for someone to be deprived of the right to vote, one would expect to have to confront at least an electoral offence. But any restriction of rights has to be interpreted in a restrictive

way. I know that, for example, in the US where the issue of disenfranchisement is common, it is not the actual act of discrimination that is the only cause of concern, because there is also a discriminatory effect. There are states in the US where 25% of the black male population is disenfranchised because they are in jail, or because they have been in jail and are no longer able to vote.

I appreciate that when you restrict liberty, associated rights – such as the right of peaceful assembly or public demonstration, or the right to have a family – will be impacted as a natural consequence. However, if the sentence imposed is a sentence of restriction of liberty, the idea of disenfranchising the detainee as an associated penalty is a discriminatory measure.

Interviewer on behalf of ERT:  
Libby Clarke

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<sup>1</sup> Andreas Baader and Ulrike Meinhof were members of the Red Army Faction, a German urban guerrilla group of the late 1960s and 1970s. They were imprisoned in the high security facility Stammheim in Germany. Reports that several of the Red Army Faction leaders, including Baader and Meinhof, had committed suicide in prison started a controversy which has lasted until today.

<sup>2</sup> *Ireland against the United Kingdom*, Appl. no. 5310/71, Report of the European Commission of Human Rights, 25 January 1976.

<sup>3</sup> Statement made during the Press Conference of President Bush and Tony Blair, July 17<sup>th</sup> 2003, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030717-10.html>.

<sup>4</sup> *Brown v Plata*, 563 U.S. 09-1233 (2011).

<sup>5</sup> Woolf, H., *Prison Disturbances: April 1990: Report of an Enquiry. Rt. Hon. Lord Justice Woolf (Parts I and II) and His Honour Judge Steven Tumin (Part II)*, Cm 1456, HMSO, 1991.

<sup>6</sup> UN Working Group on Arbitrary Detention, *Civil and Political Rights, including the questions of torture and detention: Report of the Working Group on Arbitrary Detention*, E/CN.4/2004/3, 15 December 2003, Para 73-74.

<sup>7</sup> UN Working Group on Arbitrary Detention, *Civil and Political Rights, including the questions of torture and detention: Report of the Working Group on Arbitrary Detention*, E/CN.4/2003/8, 16 December 2002, Paras 68-70.

<sup>8</sup> Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2005/6, 1 December 2004.

<sup>9</sup> See above, note 5.

<sup>10</sup> Canivet, G. (Chair of Commission), *Report on the improvement of external control of prison facilities*, La Documentation Française, 6 March 2000.

<sup>11</sup> *R v The Commissioner of the Police of the Metropolis*, UKSC 2010/0173, May 18 2011, Para 4.

<sup>12</sup> See above, note 5.

<sup>13</sup> *R v Secretary of State for the Home Department (Respondent) ex parte Amin* (FC) (Appellant) [2003] UKHL 51.

<sup>14</sup> *Paul and Audrey Edwards v UK*, Appl. no. 46477/99, ECHR, 14 March 2002.

<sup>15</sup> *Nachova and Others v Bulgaria*, Appl. nos. 43577/98 and 43579/98, ECHR, 6 July 2005.

<sup>16</sup> *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, General list no. 103, November 2010.

<sup>17</sup> *M. S. S. v Belgium and Greece*, Appl. no. 30696/09, ECHR, 21 January 2011.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Oršuš and Others v Croatia*, Appl. no. 15766/03, ECHR, 16 March 2010.

<sup>20</sup> *Alajos Kiss v Hungary*, Appl. no. 38832/06, ECHR, 20 May 2010.

<sup>21</sup> *Iwańczuk v Poland*, Appl. no. 25196/94, ECHR, 15 November 2001.

<sup>22</sup> *Hirst v The United Kingdom (No. 2)*, Appl. no. 74025/01, ECHR, 6 October 2005.

<sup>23</sup> *Frodl v Austria*, Appl. no. 20201/04, ECHR, 8 April 2010.

# ACTIVITIES

- **The Equal Rights Trust Advocacy**
- **Update on Current ERT Projects**
- **ERT Work Itinerary: January-June 2011**



# The Equal Rights Trust Advocacy

*In the period since the publication of ERR Volume 6 (March 2011), ERT has continued with its work to expose patterns of discrimination globally and to combat inequality and discrimination both nationally and internationally. A major component of ERT's advocacy work involved using the Declaration of Principles on Equality to advocate for the improvement, amendment or introduction of equality laws and policies. Below is a brief summary of some of the most important ERT advocacy actions.*

## Submission to the UPR on Thailand

On 14 March 2011, ERT made a stakeholder submission on Thailand to the twelfth session of the UN Office of the High Commissioner for Human Rights Working Group on the Universal Periodic Review (UPR). The submission focussed on the treatment of Rohingya “boat people” by the Thai authorities since 2008, and urged Thailand to remedy existing human rights violations against the Rohingya and review its policy with regard to the Rohingya in order to uphold its human rights obligations.

The Rohingya are an ethnic, religious and linguistic minority who live in the North Arakan state of Burma. They were rendered stateless through the 1982 Citizenship Law of Burma, and their human rights and freedoms have been systematically eroded through a series of draconian policies, arbitrary taxes and controls. Due to this acute discrimination and persecution, many Rohingya flee Burma, mainly by boat. These Rohingya “boat people” travel across the sea via Thailand to Malaysia.

In the past, Thailand has dealt with Rohingya boat people intercepted at sea or apprehended on land through immigration detention

and informal deportation back to Burma, in violation of the customary international law principle of *non-refoulement*. In 2008-2009, this policy changed to one of detention on the island of Koh Sain Daeng followed by “push-backs” into the high seas. Under this inhumane and illegal policy, Thailand cast over 1,100 “boat people” adrift in the sea, on boats with no engines and little food or water. Over 300 Rohingya died, and the rest were rescued by Indian and Indonesian authorities. Due to growing international condemnation, Thailand terminated this policy in January 2009. However, recent statements by Thai authorities regarding the deportation of Rohingya to Burma and the rescue of 91 Rohingya “boat people” – who claim they were “pushed-back” by Thai authorities – on the Andaman and Nicobar islands in February 2011, raise serious concerns that the policy has been reintroduced. Of equal concern is the plight of 54 “boat people” who have been in immigration detention in Bangkok since January 2009, and fear they will be informally deported to Burma.

ERT's submitted that Thailand's policy towards, and treatment of, Rohingya “boat people” raises serious human rights concerns.

ERT stated that Thailand's actions amounted to violations of the right to life, the rights to equality and non-discrimination, the right to freedom from torture, cruel, inhuman or degrading treatment or punishment, the right to liberty and freedom from arbitrary arrest and detention, and the right to seek and enjoy asylum. Consequently, ERT asked the Human Rights Council to urge the government of Thailand to review its past actions in light of its human rights obligations by the Rohingya, to rectify past violations, to bring to justice offenders and to ensure that future practice is in keeping with its human rights obligations. It also urged the government of Thailand to:

1. Review its existing immigration policy and establish and implement a new policy which: (i) is consistent with Thailand's international human rights obligations; (ii) does not discriminate against the Rohingya or any other stateless person, irregular migrant or asylum seeker; and (iii) ensures that everyone is provided with effective access to lawful immigration procedures conducted by civilian authorities;
2. Stop all deportations (both informal and formal) of Rohingya to Burma, and respect the customary international law principle of *non-refoulement* in this regard;
3. Immediately cease push-backs into high sea and take steps to ensure that this practice is not repeated;
4. Immediately release the 54 "boat people" still in detention in Bangkok;
5. Review its existing policy of detaining Rohingya "boat people" upon arrest, and because of their failure to pay fines;
6. Ratify the 1951 Refugee Convention and its Protocol, and in the interim, establish a

transparent system to process asylum applications and carry out status determination in cooperation with the UNHCR;

7. Ratify the 1954 Convention relating to the Status of Stateless Persons; and
8. Take steps to adopt comprehensive anti-discrimination legislation and policies which ensure equal rights to stateless persons under Thai jurisdiction or within Thai territory.

### **Submission to the UPR on Moldova**

On 21 March 2011, ERT made a stakeholder submission on the Republic of Moldova to the twelfth session of the UN Office of the High Commissioner for Human Rights Working Group on the Universal Periodic Review. The submission focussed on the issue of gender discrimination and gender-based ill-treatment in Moldova, and urged that Moldova adopt comprehensive anti-discrimination legislation and take concrete steps to ensure gender equality.

On the basis of evidence of the prevalence of gender-based discriminatory ill-treatment in Moldova and limitations in existing legal protections, ERT recommended that the Human Rights Council urge the Government of Moldova to:

1. Take steps to adopt comprehensive anti-discrimination legislation and policies. A draft anti-discrimination law is currently before Parliament and the Government should be encouraged to prioritise its finalisation and enactment.
2. Take steps to amend Law No. 5-XVI on ensuring equal opportunities for women and men in order to guarantee that women have an adequate means of legal redress for the harm they suffer as a result of widespread

discrimination, and more specifically, discriminatory ill-treatment.

3. Take steps to develop and support an information campaign on gender equality and the roles of men and women in Moldovan society, with the aim of overcoming the stereotypes and prejudices that contribute to gender discrimination.

4. Create an independent equality body which would have strong powers, including the provision of assistance to victims of discrimination, research and recommendations on improving legislation, and public education on equality, including gender equality.

5. Take steps to ensure more effective enforcement of the existing legislation intended to protect women from domestic violence. Such steps should include: (i) training of the judiciary and law enforcement officials to recognise the specific factors and challenges involved in both prosecuting in cases of domestic violence and ensuring that Protection Orders are adequately enforced; (ii) allocation of funding to provide adequate shelters for victims of domestic violence to ensure that they are not required to remain in shared accommodation with their aggressor; and (iii) training of social workers to provide immediate assistance to victims of domestic violence.

### **Urging the Governor of Lagos State to Bring into Force the Lagos State Special Peoples Bill 2010**

On 28 March 2011, ERT wrote to the Governor of Lagos State, Nigeria, urging him to bring into force the Lagos State Special Peoples Bill 2010. ERT's letter highlighted that the Special Peoples Bill implements Nigeria's international and national legal obligations, including those under UN Convention on the

Rights of Persons with Disabilities (CRPD) and the Constitution of the Federal Republic of Nigeria 1999. The letter discussed key provisions of the Special Peoples Bill, including:

1. The establishment of an Office for Disability Affairs: the Office is granted a broad range of functions and responsibilities and its establishment will meet the obligations of Lagos State under Article 33 of the CRPD.

2. The Prohibition on Discrimination: Section 21 sets out a broad prohibition of discrimination. The prohibition of discrimination in all aspects of life is vital in order to ensure the equality of persons with disability. The definition incorporates Nigeria's obligations under Article 5 of the CRPD, as well as its obligations under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights.

3. The Prohibition on Cruelty and Inhuman Treatment: Section 22 prohibits cruelty and inhuman treatment, mirroring Nigeria's obligations under Article 15 of the CRPD, Article 7 of the ICCPR and Section 34(1)(a) of the Nigerian Constitution.

Following ERT's submission, and the delivery by Legal Defence and Assistance Project (ERT's partner organisation in Lagos) of a petition signed by one million Lagosians to Mr Fashola on 14 May 2011, Mr Fashola signed and brought into force the Lagos State Special Peoples Bill 2010 on 24 June 2011.

### **Submission to Parliamentary Commissions of Moldova on the Draft Law on Preventing and Combating Discrimination**

On 29 March 2001, ERT submitted written comments to the Parliamentary Commission on Human Rights and National Minori-

ties and the Parliamentary Commission on Legal Affairs and Immunity of the Republic of Moldova on the Draft Law on Preventing and Combating Discrimination. The Draft Law aims to ensure the enjoyment of all persons' in the territory of Moldova to equal rights and equal treatment in political, economic, social and other spheres of life. ERT's submission noted that by adopting a comprehensive anti-discrimination law Moldova was taking a pivotal step towards ensuring the fundamental human rights of all those within its territory. It noted that while some provisions were encouraging, there was a need to improve a number of provisions. ERT applied the standards contained in the Declaration of Principles on Equality to provide an analysis of the Draft Law highlighting several problematic areas, including in relation to the list of protected characteristics, the definitions of prohibited behaviours and the institutional framework established by the Draft Law in order to ensure its enforcement.

ERT was disappointed to learn that as a result of pressure from Orthodox religious organisations in Moldova, the Draft Law was withdrawn from the Parliamentary process and returned to the Ministry of Justice for further consideration. ERT will continue to monitor developments in relation to the Draft Law and take further action when necessary.

### **Letter to Nigerian President on Disability Bill**

On 25 May 2011, ERT wrote to the President of Nigeria, Mr Goodluck Jonathan, to urge him to assent to the Nigerian Disability Bill prior to end of his current term as President, so as to avoid the unnecessary process of this bill being considered for a second time by the National Assembly of the Federal Republic of

Nigeria. ERT noted that the Nigeria Disability Bill is a positive development in the protection of the rights of persons with disabilities – a most vulnerable sector of Nigerian society – who face ongoing discrimination and stigmatisation. The Bill would align Nigeria with other African nations, such as South Africa and Ghana, which have already enacted similar legislation to protect persons with disabilities, and send a strong message in relation to this important and often ignored area of human rights protection.

ERT's letter highlighted that the Disability Bill implements Nigeria's international and national legal obligations, including those under the UN Convention on the Rights of Persons with Disabilities (CRPD), The African Charter of Human and Peoples' Rights, and the Constitution of the Federal Republic of Nigeria 1999. ERT went on to discuss key provisions of the Nigeria Disability Bill, including: (i) the definition of disability which reflects the drafting in Article 1 of the CRPD; (ii) the establishment of a National Commission for Persons with Disability; (iii) the prohibition of discrimination; and (iv) the prohibition of harmful practices and "exploitation, violence and abuse".

As far as ERT is aware, Mr Jonathan has yet to take any further action in relation to the Nigeria Disability Bill, but it is hoped that the passage of the Lagos State Special Peoples Bill may further encourage him to do so.

### **Urging Moldova not to Deregister Recognised Islamic Group**

On 3 June 2011 ERT wrote to the Prime Minister of Moldova to express its concern about reports that the Islamic League, the first legally recognised Muslim organisation in Moldova, may be deregistered. ERT's letter re-

ferred to the difficulties faced by members of some religious minorities in registering their organisations and the application of administrative sanctions to individual members of unregistered religious groups.

ERT welcomed the registration of the Islamic League, in March 2011, as a significant positive step in protecting the equal rights of League members to religious freedom and to freedom from discrimination. Since their registration, Muslims have been able to practice their religion more freely and openly, having previously been forced to meet in private.

ERT expressed concern at reports that the Prime Minister has pledged to review the League's registration. Its letter urges the Prime Minister to ensure that any review of the registration of the Islamic League fully respects Moldova's obligations under international human rights law, in particular, the right of members of religious minorities to equality, contained in the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

As far as ERT is aware, the Prime Minister has not taken any action with regard to de-registering the Islamic League since the date of its submission.

### **Approving Report on Declaration of Principles on Equality at Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe**

On 6 June 2011, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe approved a report entitled "The Declaration of Principles on Equality and the Activities of the Council of Europe" at its meeting in Oslo.

The report, submitted by the Rapporteur, Mr Boriss Cileviès, was approved by a majority vote, following a heated debate and objections by some members. The report contains an analysis of the current implementation of the principles of equality and non-discrimination in the member states of the Council of Europe, and discusses the central role of equality and non-discrimination in the protection of human rights as enshrined in international law. It also expresses concern at the low level of ratification of Protocol 12 to the European Convention on Human Rights, which extends the scope of the prohibition of discrimination to any right set forth by law. The report presents the Declaration of Principles on Equality and recommends that it be endorsed by the Committee of Ministers, as guidance for the development of new national equality legislation, as well as the implementation of existing equality provisions in Member States.

The preparation of the report was based on a hearing on "The Declaration of Principles on Equality and the Activities of the Council of Europe" held in Paris on 8 March 2011, at which ERT provided testimony. At the hearing, ERT Executive Director Dimitrina Petrova presented the Declaration of Principles on Equality to the Committee, focusing on its relationship to existing legal approaches to equality in the Council of Europe and the European Union frameworks, as well as explaining how the Principles could be of use in strengthening the rights to equality and non-discrimination in the member states. The Committee also heard opinions on equality standards from two other experts, Frédéric Edel, Doctor of Law at Ecole nationale d'administration (France) and Michal Gondek, representing the European Commission (DG Justice). The panel presentations were followed by a discussion in which

Committee members posed questions, made comments and engaged the experts in an exchange of views.

Now that the report has been adopted by the Committee it may progress to a plenary of the Parliamentary Assembly which may decide to consider further action as a follow-up to the report.

### **Parallel Report on Nepal to the Committee on the Elimination of Discrimination against Women (CEDAW)**

On Monday 27 June, ERT submitted a parallel report to the 4th and 5th periodic report of the Federal Democratic Republic of Nepal (Nepal) to CEDAW, calling on Nepal to strengthen its constitutional and legislative protection of the rights to equality and non-discrimination in order to meet its treaty obligations. Nepal is currently undergoing a transition – including through a process of constitutional reform – following the cessation of hostilities in the country’s civil conflict. In its parallel report, ERT argued that the reform process provides an ideal opportunity to ensure that equality is central to the new Constitution and Nepal’s efforts to secure a sustainable peace. The report went on to stress that fulfilment of Nepal’s obligations under Article 2 of CEDAW requires not only clear constitutional equality provisions, but also the adoption of comprehensive equality legislation providing women with effective protection from discrimination perpetrated by others.

Relying both on the interpretation of Article 2 of CEDAW in its General Recommendation 28 and on the guidance provided by the Declaration of Principles on Equality, ERT argued that in order to fulfil its obligations under Article 2, Nepal should:

1. Ensure that any new constitution contains provisions on the right to equality which:

a. Define the right to non-discrimination in such a way as to meet the requirements of Article 1 of the Convention;

b. Prohibit direct and indirect discrimination, multiple discrimination, discrimination by association, segregation and harassment and make provision for the achievement of substantive equality;

c. Explicitly prohibit discrimination on grounds of sex, gender, pregnancy or maternity, civil, family or carer status, age, disability, sexual orientation and gender identity;

d. Provide a test for the incorporation of new grounds of discrimination in line with that recommended in the Declaration of Principles on Equality;

e. Prohibit discrimination against all persons within the jurisdiction of Nepal, rather than solely citizens;

f. Prohibit discrimination by state and non-state actors, in all areas of life governed by law.

2. Enact comprehensive equality legislation, ensuring that it would:

a. Prohibit discrimination in all areas of life governed by law, including but not limited to: education, employment, social security (including pensions), housing, provision of goods and services (including public services), clubs and associations;

b. Prohibit direct and indirect discrimination, multiple discrimination, discrimination by association, segregation and harassment;

c. Provide measures for legal aid provision, the transfer of the burden of proof, standing for interested parties in discrimination cas-

es and other measures necessary to ensure adequate access to justice for victims of discrimination;

d. Provide sanctions which are effective, proportionate and dissuasive and which ensure appropriate remedies for those whose right has been breached; and

e. Require the state to take all necessary measures to eliminate discrimination and promote equality, including through the adoption of special measures, and set out conditions for the appropriate implementation of such measures.

### **Defending the UK Equality Act 2010 against Government's Revision Plans**

On 29 June 2011, ERT wrote to David Cameron MP, Prime Minister of the UK, calling on him not to repeal or emasculate the Equality Act 2010, stating that such a move would both damage the UK's international reputation and limit the UK's ability to meet its international law obligations to respect, protect and fulfil the rights to equality and non-discrimination. The letter was a response to the inclusion of the Act in the *Red Tape Challenge* – a consultation on the impact of regulations which are perceived to affect business performance – and focused on the

international dimensions of any decision to repeal or weaken the Act.

ERT's letter stated that the Act is the principle mechanism through which the UK meets its obligation to protect the right to non-discrimination under a range of international instruments, including the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the European Convention on Human Rights. It stressed that the Act is also the key mechanism through which the UK meets its obligations to fulfil and promote the right by taking measures to address substantive inequality, including through the adoption of equality policies and action plans and the positive action designed to accelerate progress towards equality.

ERT argued that the Act forms a key pillar of the UK's international reputation as a country which is concerned with the protection and promotion of human rights. Drawing on ERT's experience advocating the adoption of comprehensive equality legislation in a range of different states, the letter stressed the extent to which ERT's own work has drawn on the UK experience. It highlighted the increasing extent to which concepts and principles from the Act are being relied upon as an example in efforts to develop new equality legislation outside the UK.

# Update on Current ERT Projects

## **Greater Human Rights Protection for Stateless Persons in Detention**

The purpose of this project, which started in 2008, is to contribute to strengthening the protection of the equal rights of stateless persons, particularly in the context of immigration, security and criminal detention.

In the first half of 2011, ERT participated in a number of meetings in a growing network of organisations concerned with aspects of statelessness. For example, in May 2011, ERT took part in a UNHCR and OHCHR led international roundtable on alternatives to detention in Geneva, speaking on alternatives to detention in the context of statelessness. Also in May 2011, ERT conducted a session on stateless Rohingya at the University of Galway Summer School on Migrant Rights. Since March 2011, ERT has worked to finalise its draft Guidelines on the Detention of Stateless Persons (published in the Special section of this issue.) The document has also been sent out to key experts in the fields of detention, statelessness, refugees and human rights for their review of the draft. In recent months ERT has carried out a comprehensive analysis of the manner in which UN treaty bodies have addressed statelessness and related human rights challenges in their work and on the relevance of statelessness as an issue to the specific mandate of each treaty body, with the intention of lobbying them to focus more on statelessness in the future.

ERT has continued its advocacy in the UK. ERT is an active member of the UK Detention Forum. In March 2011, Amal de Chick-

era made a presentation to the Forum on alternatives to detention with a specific focus on statelessness. On 13 April 2011, ERT co-signed a letter to the Parliamentary Joint Committee on Human Rights urging a reform of immigration detention, and in June 2011, it participated in the second Parliamentary meeting on immigration detention. In February 2011 ERT met with Tom Brake MP (LibDem) and convinced him to, from time to time, ask parliamentary questions on statelessness on ERT's behalf and to champion the issue. Since then, at ERT's request, Mr. Brake has asked several parliamentary questions and tabled a few written questions on statelessness. ERT continued to act as an advisor to Asylum Aid and UNHCR in the delivery of their statelessness mapping project. On 23 June 2011, ERT participated in the second Asylum Aid Expert Meeting at which the research findings of the project were discussed in preparation for their report launch in November 2011.

Regarding advocacy at the European level, ERT has worked on a special edition on statelessness of the *European Journal of Migration and Law*. It will comprise five articles and an introduction, and will be published as the 3rd issue of the Journal in 2012. In February 2011, ERT participated in a meeting on the implementation of the European Returns Directive at the University of Nijmegen. In April 2011, ERT entered into discussions with a number of key stakeholders with a view to establishing a European Network on Statelessness. The first meeting of the Network was held in London on 20 July 2011.

In the first half of 2011, ERT has been working on creating a new website on statelessness, intended as a leading resource for NGO staff, policy makers, students and academics. The website will have the domain name [www.statelessness.net](http://www.statelessness.net) and is planned to go live later in 2011. It will have an authoritative database on statelessness, testimonies of stateless persons, an interactive world map on statelessness, toolkits and trainings for NGOs on statelessness, a description of ERT's work on statelessness, an audio-visual section and various other features. ERT is currently producing content to be uploaded on the website.

The outcomes and impact of this project so far include: (1) integrating statelessness as a key issue of the international movement to end arbitrary detention – ERT has worked in close partnership with the International Detention Coalition, UNHCR, OHCHR and other key players to highlight statelessness as an important issue which must be addressed by immigration detention regimes; (2) changing attitudes of civil society towards statelessness – as more NGOs around the world begin new projects on statelessness and/or to integrate statelessness into their existing work, the issue is being increasingly recognised as an important human rights issue which must be addressed. ERT has been one of the catalysts in this regard, and will be in a position to do more work in this area after its website on statelessness goes public; (3) filling a documentation and knowledge gap on statelessness – ERT's report *Unravelling Anomaly* has been widely acknowledged as a key text on statelessness which has filled a research gap and serves as a useful resource to academics, activists and policy makers. The focus on detention

and the highlighting of the connection between statelessness and lengthy immigration detention has resulted in many organisations addressing immigration detention from a statelessness perspective; and (4) promoting statelessness as a human rights issue – while ERT's impact in this regard is yet to be seen, it is an area in which ERT's contribution continues to grow.

### **The Unified Perspective on Equality and LGBT Rights**

In September 2009, ERT launched a project aimed at showing how the unified approach to equality can enhance LGBT rights. One aspect of this project is to explore the possibility for promoting LGBT equality in countries with Islam. In the first half of 2011, ERT prepared for publication a study focusing on the use of equality and non-discrimination law in advancing LGBT rights in countries of the Commonwealth, with a special reference to the decriminalisation of same sex conduct, and a study on LGBT equality in countries with Islam, including secular states. The study on the use of equality law will be published as a chapter in a forthcoming book, and the paper on LGBT and Islam is awaiting peer review.

The expected outcomes of this project include: (1) better understanding among civil society and other actors of the potential of using equality law principles and concepts in efforts to decriminalise same sex sexual conduct; (2) better understanding of the strategic choices for enhancing LGBT equality in countries with Islam; and (3) improved dialogue between LGBT groups, faith-based actors and civil society, particularly human rights organisations.

## **Developing Resources and Civil Society Capacities for Preventing Torture and Cruel, Inhuman and Degrading Treatment of Persons with Disabilities: India and Nigeria**

This project commenced in November 2010 with partner organisations in India (Human Rights Law Network) and Nigeria (Legal Defence and Assistance Project). Its overall objective is to reduce the incidence of torture and ill-treatment of persons with disabilities.

In January 2011, ERT travelled to Lagos and to Delhi and conducted planning meetings with its partners. The project teams in Nigeria and India have spent the first quarter of 2011 working on national baseline studies, following detailed guidelines developed by ERT, and aimed at providing an assessment of: (i) the main patterns of discriminatory ill-treatment against persons with disabilities in their respective countries; (ii) the international and domestic law obligations relevant to the discriminatory ill-treatment of persons with disabilities; and (iii) the existing capacity of civil society organisations and lawyers to identify and challenge such discriminatory ill-treatment. The teams are carrying out monitoring and documentation of discriminatory ill-treatment against persons with disabilities in different geographical areas.

## **Strengthening Human Rights Protection of the Rohingya**

In March 2011, ERT began to implement this 30-month project, the overall objective of which is to strengthen human rights protection for the Rohingya. In March-July 2011, the project was in its planning phase, including the formation and meetings of a Project Advisory Group and a Project Management

Committee; a review of existing literature on the Rohingya; meetings with experts in the field, etc. During this period, Amal de Chickera had an email discussion with Saiful Huq Omi on the Rohingya issue posted on the website of the Magnum Foundation and available at: <http://www.magnum-foundation.org/emergencyfund/projects.html?code=10EF007#START>

## **Promoting Better Implementation of Equality and Non-discrimination Law in India**

This project started in May 2009 and is being implemented in partnership with the Human Rights Law Network with the objective of developing the capacity of Indian NGOs, lawyers and judiciary to implement equality and non-discrimination law through promotion of national, regional and international standards and best practice. In the first half of 2011, ERT worked on a book-sized publication on equality and discrimination in India, which will include chapters on discrimination based on gender, disability, sexual orientation, religion, caste, etc.

The outcomes of the project so far include: (1) an increased capacity on modern equality law among civil society organisations, lawyers and judges, achieved through training of NGOs and lawyers (Mumbai, 2009) and a judicial colloquium for judges of the Supreme and High courts of India (Delhi, 2011); (2) a tangible impact on the capacity of Indian lawyers and civil society organisations to litigate equality cases in India. The participants in the 2009 training sessions have proceeded to apply international and comparative standards on equality and non-discrimination when litigating on discrimination issues before the Indian courts, including in the following cases:

- i) *Laxmi Mandal v Deen Dayal Hari Nager Hospital & Ors* W.P. 8853/2008, and *Jaitun v Maternity Home, MCD, Jangpura & Ors* W.P. No. 10700/2009, Delhi High Court;
- ii) *ICHR v Indian Railways* (April 2010), Bombay High Court;
- iii) *Special Educators Case* (2010), Delhi High Court;
- iv) *Syed Bashir-Ud-Din Qadri v Nazir Ahmed Shah & Ors* (March 2010), Supreme Court;
- v) *AICB v Indian Railways* (Feb 2010), Supreme Court;
- vi) *Naresh Gangaram Gosavi and another v Chembur Education Society* (2011), Bombay High Court;
- vii) *The National Association of the Deaf v Union of India and Ors* (WP (C) 10849/2009), Delhi High Court.

It is anticipated that the impact of the project will be further strengthened after the publication and distribution of the study on equality and non-discrimination law later in 2011, as lawyers, judges and activists will be able to use it as a useful reference for the development of international and comparative law arguments in equality cases.

### **Kenya: Empowering Disadvantaged Groups through Combating Discrimination and Promoting Equality**

In July 2009, ERT started work on this project with the purpose to enable Kenyan civil society organisations to be key players in building a national anti-discrimination regime. ERT is working with two local partner organisations – the Federation of Women Lawyers (FIDA Kenya) and the Kenya Human Rights Commission (KHRC), on a range of activities, with a view to promoting the adoption of comprehensive anti-discrimination legislation, including the development of a draft comprehensive law and the adoption of a joint advocacy strategy.

Since October 2010, ERT and its partner organisations have been engaged in sustained advocacy to build support for the adoption of a new equality Bill. Efforts have centred on the opportunity provided by the passage of the new Constitution, which requires the government to introduce legislation to establish a new Kenya National Human Rights and Equality Commission (KNHREC). ERT and its partners have taken the approach of arguing that this legislation must contain the substantive provisions for equality law included in the Legislative Map, a document of principle agreed among civil society organisations, based on the Declaration of Principles on Equality.

In late February, the project partners issued a Legislative Advisory on the content of legislation required by Article 59 of the Constitution, and sought meetings with various key ministries. In March, the partners met with the Parliamentary Committee on Equal Opportunities, the National Council for Persons with Disabilities, the Kenyan National Human Rights Commission (KNCHR) and the National Gender and Development Commission.

The project's final two one-day workshops – aimed at lawyers and the media – took place in Nairobi in February and March 2011. The lawyers' workshop was organised in partnership with the Law Society of Kenya and was accredited as part of their ongoing professional education programme. The workshop combined technical training with awareness-raising about the importance of comprehensive equality law and was highly successful at building support among 40-50 members of the Kenyan bar. The media workshop was aimed at sensitising different sections of the media to the partners' proposals for comprehensive equality law; it started with a breakfast meeting for editors and senior

correspondents, and continued with training modules for reporters.

The lawyers' workshop was delivered alongside a public debate on proposals for the adoption of comprehensive equality law. The panel for the debate included Commissioner Lawrence Mute from the KNHRC, Mumbi Ngugi from the Albinism Foundation of East Africa, Tom Kagwe from the KHRC, and Barbara Cohen, ERT consultant. The debate received excellent coverage from the national media, including a number of national TV networks.

In April 2010, ERT's partners continued to engage in discussions over the content of planned legislation to establish a new KNHREC (or its successor commissions). Different government departments and Commissions engaged in discussions on the future KNHREC: in mid-April, the Ministry of Justice published three Bills for the establishment of three separate Commissions, while the KNHRC published a Bill to establish a single Commission. ERT engaged its partners in discussions on responses to these developments, and provided commentary on the various draft Bills. A stakeholder forum was convened to discuss these options on 6 May 2011, and ERT's partners were invited to attend and to make a presentation on the need for legislation establishing any Commission(s) to incorporate substantive equality law, as contained in the partners' Legislative Map. ERT and its partners cooperated with the KNCHR on the development of a bill to establish the KNHREC, incorporating the content of the Legislative Map, and as a result, a draft Human Rights and Equality Bill 2011 was produced at the end of May 2011. The draft Bill was the subject a stakeholder discussion on 3 June 2011, and was further amended thereafter.

ERT has provided comments on both drafts; these comments have been collated with comments from Kenyan members of the project working group and fed back to the KNHRC for consideration in the production of a third draft. Although the chances for adopting substantive equality legislation in Kenya at this time (August 2011) appear slim, due to opposition by majorities in both parliament and government, it is clear that the momentum created by the current campaign will ensure that further advocacy efforts will continue over the next few years, after the establishment of a national human rights and equality body.

Overall, this project has achieved its purpose: ERT has overseen a process through which civil society has taken a leading role in defining a national anti-discrimination regime in Kenya. Civil society organisations have developed draft comprehensive equality legislation and built and implemented an advocacy strategy for its adoption. The members of a working group established under the project have assumed a role as national experts on equality law. The advocacy effort has been sufficiently successful at making the case for integration of substantive equality legislation into forthcoming legislation.

### **Kenya: Embedding Equality under Kenya's New Constitution**

This project aims to build on the project described above and is run by ERT in partnership with the Kenya Human Rights Commission (KHRC). It envisages the development of a detailed country report on discrimination in Kenya; delivery of training to judges, health and education professionals and MPs; development of six strategic litigation cases on new elements of the law intro-

duced by the new Constitution; and development and delivery of a public awareness “Your Rights” campaign about the scope of the right to non-discrimination under the new Constitution. The project commenced on 1 October 2010.

In March 2011, ERT undertook a six-day research visit to Kenya facilitated by KHRC. The team travelled to a range of locations across the country (including Central, Nyanza and Coast provinces) and interviewed a variety of groups including women, persons with disability, persons living with HIV/AIDS, men who have sex with men and persons with albinism. In addition, the team sought to investigate patterns of ethno-regional discrimination in respect of political representation and access to resources. In this respect, the team conducted focus groups with a Luo community in Nyanza province, as well as interviewing members of a Turkana community which has been the victim of discriminatory resource and planning policies. The team then travelled to Wajir, in the marginalised North East of the country to conduct further focus groups and interviews. A final draft of the report has been completed in the first week of May 2011. Plans are currently being developed for the four training workshops which will be delivered by the project partners and work is on-going on strategic litigation.

### **Kenya: Promoting LGBTI Rights in Kenya in a Unified Equality Framework**

In October 2010, ERT launched a third project in Kenya whose purpose is to utilise the unitary framework on equality in promoting LGBTI rights. It is implemented together with two project partners, Gay and Lesbian Coalition of Kenya (GALCK) and Kenyan Human Rights Commission (KHRC).

Since the beginning of 2011, ERT has continued to gather information following on extensive field research conducted in late 2010. In June-August, ERT and its partners worked toward a feasibility study on strategies to promote equality in Kenya, inclusive of sexual orientation and gender identity. This included a week-long field research, during which six focus group discussions and over 20 in-depth interviews with key individuals were conducted in Kisumu and Nairobi. The research focused on exploring strategies for institutional strengthening of the equality movement.

The project’s impact consists in creating preconditions for better protection from discrimination of the legal rights of LGBTI and other vulnerable groups. Specifically, this means: (1) stronger, more confident and better included constellations of LGBTI activists; (2) improved understanding among the target groups of equality as a right and as a value on which broader consensus is needed in present-day Kenya, and of the link between the different strands of equality and equality of sexuality; (3) increased accountability of the Kenyan government with a view to its obligation to promote equality and protect against discrimination, including on grounds of sexual orientation and gender identity; (4) better enforcement of existing equality law and policies, including in respect to LGBTI persons; and (5) contribution to the development of comprehensive national equality legislation and policies giving effect to the universal right to equality.

If the project and especially the feasibility study succeed in influencing decision-makers, it may result in a larger coordinated investment in equality in Kenya and the region, inclusive of sexual orientation and gender identity.

## Kenya: Improving Access to Justice for Victims of Gender Discrimination

This project, which commenced on 1 April 2011, has as its purpose to enable Kenyan women to secure legal remedies and enhanced protection from discrimination by adding an equality component to free community based legal services. The project is implemented with a partner organisation, the Federation of Women Lawyers Kenya (FIDA-Kenya) and its planned duration is four-and-a-half years.

In April 2011, the ERT project team met to finalise roles and planning. Members of the project team also held detailed planning discussions with the project partners. ERT appointed an Independent Selection Committee which has selected the first 10 participating community-based organisations (CBOs) to be beneficiaries of the project. In May-July 2011, ERT and FIDA have undertaken the necessary steps to establish legal advice services at the first 10 CBOs, as required by the project plan. In June 2011, the feasibility study for the project was completed. The study provided information on: Kenyan law and patterns of discrimination; potential CBOs with the capacity to provide community based legal services in discrimination matters that may be appropriate to be selected to participate in the project; and the current capacity of CBOs and lawyers to inform the training programme.

In early July, a handbook for use by participating CBOs was completed. The handbook provides information on Kenyan law as well as on how to set up, provide and administer community based legal services in discrimination matters under the project. On 18-22 July 2011, ERT provided training on equality law, and on establishing and providing community based legal services in discrimi-

nation matters to the first ten participating CBOs and ten lawyers who would be paired with the CBOs.

## Malaysia: Empowering Civil Society to Combat Discrimination through Collective Advocacy and Litigation

Launched in March 2010, this project has the general purpose to strengthen the role of Malaysian civil society in implementing equality and anti-discrimination provisions enshrined in the Federal Constitution, in line with international law. ERT has overall responsibility for the implementation of the project and its local partner is the Kuala Lumpur-based NGO Tenaganita.



Honey Tan delivering training to lawyers and human rights activists in Kuala Lumpur, June 2011.

Photo credit: The Equal Rights Trust

In 2011, Tenaganita continued to host meetings of the Equality Forum, each of which was attended by at least 30 NGO representatives. The fifth meeting of the Equality Forum took place on 22 May 2011, and focussed on the issue of discrimination against migrant workers in Malaysia. A training workshop on equality and non-discrimination law took place on 24-26 June 2011 in Kuala Lumpur. ERT and Malaysian trainers have worked together during April and May to finalise the training programme, which provided an introduction to: (i) basic concepts and overarching principles of equality law; (ii) the

main issues relevant to litigating on women's rights and gender discrimination, with a particular focus on CEDAW as one of the few international human rights conventions which Malaysia is a party to; and (iii) Malaysian equality law and the manner in which the Malaysian courts approach the issues of equality and non-discrimination. The training participants represented a broad range of interest groups, and this ensured many lively discussions and the initial formation of collaborative alliances which are one of the main objectives of this project. The participants will now be involved in developing an advocacy strategy which will be presented at a Stakeholder Roundtable in September 2011, and pursued further by the Equality Forum thereafter. In an attempt to assist the use of strategic litigation to promote equality, ERT is currently preparing a legal brief to be submitted in support of a case in which four transgender applicants are challenging, by way of judicial review, the Shari'a law which criminalises cross-dressing (see Testimony section in this issue).

### **Moldova: Strengthening Legal Protection from and Raising Awareness of Discriminatory Ill-treatment in the Republic of Moldova, Including Transnistria**

This project, in which ERT is a partner to a Moldovan NGO – Promo-Lex – has two general objectives: (1) to contribute to strengthening the legal protection from discriminatory ill-treatment; and (2) to raise awareness of stakeholders on discriminatory ill-treatment. ERT has been responsible for certain aspects of the project related to building the capacity of local stakeholders on equality law issues.

On 15 March 2011, ERT participated in an event which marked the publication of Volume 5 of *The Equal Rights Review* in Roma-

nian. The event took place in Chişinău and was attended by approximately 50 young lawyers and judges. ERT and Promo-Lex made presentations on hate crime against members of the LGBT community. This event was well-timed as during the same week, the homophobic lobby in Moldova was challenging the inclusion of sexual orientation as a prohibited ground of discrimination in the draft Anti-Discrimination Bill which was before the Moldovan Parliament. ERT subsequently sent a letter to the members of the two Parliamentary Commissions responsible for considering the draft Anti-Discrimination Law, urging them to enact the legislation with certain suggested amendments based on the Declaration of Principles on Equality.

On 7 July 2011, ERT participated in a public event which marked the publication of Volume 6 of *The Equal Rights Review* in Romanian. ERT gave an introduction to Volume 6 and then spoke, alongside Promo-Lex, on the discriminatory ill-treatment of persons with disabilities. This was the last of three public events in Chisinau under this project. These events have provided a valuable opportunity to promote the unitary perspective on equality in relation to a broad range of equality issues.

### **Solomon Islands: Empowering Disadvantaged Groups through Human Rights and Equality Training**

ERT is a partner to this project whose main implementer is the Honiara office of the Secretariat of the Pacific Community. The specific objective of the project is to build the capacity of Solomon Islands civil society organisations to provide basic and wide-reaching training on human rights and equality with a view to building and strengthening the national human rights regime.

In March 2011, ERT conducted two-week long training for human rights activists on equality and non-discrimination law, with a particular focus on gender discrimination and violence against women which has been identified as one of the most significant discrimination issues in the Solomon Islands. The first week of the training



Photo credit: The Equal Rights Trust

ERT Legal Officer Libby Clarke (centre) and SPC Legal Officer Ruby Awa (front left) with trainees during field research in Malaita, Solomon Islands, March 2011.

covered human rights and equality law concepts, gender discrimination, violence against women and monitoring and documentation skills. The second part of the training was carried out in the form of practical skills training during field work, where ERT mentored the activists in leading community focus groups and interviews with victims of discrimination. Following this training, the trainees continued to carry out similar field work in their respective regions of the Solomon Islands.

## **Sudan: Empowering Civil Society in Sudan to Combat Discrimination**

This project, which started on 4 October 2010, is aimed at developing civil society capacity through training, elaboration of a country report on discrimination, and establishment of a civil society coalition to undertake advocacy. In so doing, the project aims to increase the space available for civil society advocacy on human rights issues, in a society where civil society freedoms have been severely restricted in recent years. Given the difficult conditions in Sudan at the present time, the project's objectives have been carefully considered and the targeted outcomes have been set according to what is thought to be feasible in the country context.

In the first week of June 2011, ERT's local partners, the Sudanese Organisation for Research and Development (SORD), were informed that the Ministry of Humanitarian Affairs had refused permission for ERT trainers to enter Sudan, pursuant to an application made in March 2011. While awaiting the Ministry's response, the partners had begun to develop a contingency plan for delivery of the workshops outside Sudan.

The partners have made progress on establishing formats for research on discrimination and inequality in Sudan. In June and July 2011, SORD convened meetings in Khartoum attended by participants from different Sudanese CSOs to finalise the distribution of the research work among NGO representatives, to be carried out in different regions of Sudan (Khartoum, Kassala, White Nile, River Nile, and South Darfur).

## **Sudan: Equality and Freedom of Expression**

ERT launched this project in October 2010, with the objective of enhancing the abil-

ity of Sudanese human rights defenders and journalists to use equality and human rights law concepts in their work, and to be aware about the need to balance freedom of expression with the right to non-discrimination, including in the form of freedom from hate speech. ERT works with anonymous Sudanese consultants operating from outside and inside Sudan. With support from the project, journalists are continuing to write for Sudanese and international media on human rights issues.

### **Guyana: Empowering Civil Society to Challenge Homophobic Laws and Discrimination against LGBTI Persons**

This year-long project started in October 2010. Its objective is building the capacity of civil society to challenge discrimination against LGBTI persons, by both increasing the technical skills and capacity of LGBTI organisations and by fostering improved cooperation between LGBTI organisations and other human rights NGOs. ERT's project partner is the Society against Sexual Orientation Discrimination (SASOD) based in Georgetown.

In January 2011, ERT and SASOD engaged in the completion of the project baseline study, to serve as a basis for focusing project activities. In the last week of May 2011 ERT delivered two workshops, facilitated by a number of Caribbean co-trainers. The workshops provided an introduction to human rights law, an introduction to the key concepts in equality and non-discrimination law, an overview of the Bill of Rights in the Guyanese Constitution and an overview of Guyanese law on equality and non-discrimination. The training participants represented a range of groups vulnerable to discrimination, including women, LGBTI persons, persons with disability and

persons living with HIV and AIDS, together with a number of other interested institutions and organisations. Many of the participants came from organisations involved in service provision for vulnerable groups and had little prior knowledge of law, advocacy or human rights. Efforts were made to customise ERT's standard training materials to ensure relevance for the participants.

On 30 May, SASOD convened a second roundtable under this project, bringing together 20 different organisations to discuss the establishment of a Guyanese Equality Forum. Participants agreed to establish the Forum, and made significant progress on agreeing a mission statement, leadership structure and action plan.

### **Discrimination and Torture in Nigeria**

This project, which started in the autumn of 2010, has as its objective to provide practical and legal assistance to victims of discriminatory torture in Nigeria. Since the start of the project, ERT and its partner in Nigeria, the Legal Defence and Assistance Project (LEDAP), have delivered direct legal assistance to 20 victims of torture arising from discrimination.

From January 2011, ERT began implementing a new cycle of the project, aimed at providing direct assistance to 25 victims of torture in Nigeria (in partnership with LEDAP). Under this cycle, ERT reviewed 15 new cases identified by LEDAP. LEDAP commenced court proceedings in most of these cases and also provided medical, psychological and social assistance to the victims who were in need of such services. In addition to this, continued legal assistance was provided to eight victims of torture who had been provided with assistance under the previous cycle.

## Indonesia: Empowering Civil Society to Use Non-discrimination Law to Combat Religious Discrimination and Promote Religious Freedom

The overall objective of this project, which started on 1 November 2010, is to empower civil society in Indonesia to use non-discrimination law in combating religious discrimination and promoting religious freedom. ERT works with two Indonesian partners.

In February 2011 ERT visited Indonesia to coordinate activities with the project partners. ERT also met and interviewed representatives of two minority religious groups, the Ahmaddiya and the HKBP Christian minority, and participated in a delegation to the National Human Rights Commission (Komnas HAM). ERT and its partners have prepared a baseline study which has been instrumental in conducting three training workshops in June 2011. The workshops provided an introduction to equality law, and examined the intersection between the right to non-discrimination and the right to freedom of thought, conscience and belief, and had a focus on religious discrimination. The workshops were targeted at lawyers and paralegals from local legal aid institutes. The training participants included a large number of representatives from the Indonesian Legal Aid Foundation's (YLBHI – one of ERT's partners) network of local offices across Indonesia, together with staff from leading human rights organisations and some representatives of religious minority groups. Feedback from participants was good and evaluation forms indicated a clear increase in capacity to understand and apply the rights to equality and non-discrimination in documentation, litigation and advocacy.

While in Indonesia, ERT took part in a press conference to publicise the conviction of two

members of the Baha'i community for offences related to proselytising. At the press conference – which was also attended by members of the Indonesian Human Rights



ERT Legal Director Paola Uccellari (third from left) and ERT Advocacy and Communications Officer Jim Fitzgerald (third from right) with staff from YLBHI and ELSAM during training workshops, Bogor, Indonesia, June 2011.

Photo credit: The Equal Rights Trust

Commission and the Special Representative of the Baha'i to the United Nations – ERT expressed its concerns that the state may have failed in its duty to respect and protect the right to non-discrimination on grounds of religion of the individuals concerned.

YLBHI has selected five of its local legal aid offices to receive sub-grants to undertake field research on patterns of discrimination identified through the desk-based research for the baseline study. The second project partner, the Institute for Policy Research and Advocacy (ELSAM) is in the process of undertaking further desk research to supplement work done for the baseline study, and is liaising with YLBHI to ensure that sub-grantee research is properly directed.

## Belarus: Empowering Civil Society in Belarus to Combat Discrimination and Promote Equality

This project started in December 2010. Its objectives are to improve knowledge of discrimination law among NGOs in Belarus to enable them to monitor and report on dis-

crimination and to bring discrimination cases to courts; and to create a coalition of NGOs with a joint advocacy platform on issues of discrimination. ERT works with an informal partner based in Minsk – the Belarusian Helsinki Committee.

Photo credit: The Equal Rights Trust



ERT Legal Director Paola Uccellari (centre) delivering training workshop on equality and non-discrimination law in Minsk, June 2011.

In February 2011, ERT travelled to Minsk for the launch of the project activities. Since February, the partners have been working on a study to provide an accurate picture of NGOs and lawyers' needs, and a workshop on equality law was conducted by ERT in Minsk in June 2011. The training programme was divided into two days, with Day One providing an introduction to basic concepts and overarching principles of equality law, and Day Two consisting of an analysis of the Belarusian context and discussions around advocacy priorities and strategies. In the subsequent months, the work is focusing on documentation of cases of discrimination as well as selection of cases for legal action.

### **Jordan: Addressing Discrimination and Violence against Women in Jordan**

The objective of this project, which started in January 2011, is to contribute to the protec-

tion of women from all forms of discrimination in Jordan at the societal and legal level. ERT is implementing this project in Jordan as a partner to Mizan, a Jordanian organisation which is one of the most prominent and active human rights and legal defence NGOs in the Middle East. In February and March, ERT worked in Amman with the partner, and gave a talk to the lawyers' network of Mizan on strategic litigation. ERT also met with the Dean of the Law Faculty of the Middle East University, Professor Mohammad Alwan, who is coordinating the project's study on gender discrimination. In April ERT prepared detailed guidelines for the study and send them to the partner to guide their research and drafting.

### **Croatia: Empowering Civil Society through Training and Establishing a Croatian Equality Forum**

Work on this project began in May 2011. The project envisages the provision of training on equality and non-discrimination law, production of a toolkit on equality and non-discrimination law for Croatian CSOs and legal professionals, and the establishment of a Croatian Equality Forum bringing together a minimum of 30 civil society organisations working on issues related to equality and non-discrimination law. ERT will visit Croatia in August 2011 to undertake discussions with the project partners, the Croatian Law Centre and Association for Protection of Human Rights and Citizen's Freedoms (HOMO). The partners are currently working on a needs assessment study which will be the basis of future training and other capacity building work.

# ERT Work Itinerary: January – June 2011

**January 11, 2011:** Held one-day project development meeting with Nigerian partner Legal Defence and Assistance Project, in Lagos, Nigeria.

**January 14, 2011:** Participated in a hearing on “Education and Training: Tools for Roma Education”, organised by the European Economic and Social Committee, and spoke on: “Integration of Roma through Education and Training”, in Brussels.

**January 17, 2011:** Participated in a conference “LGBT Rights in the Commonwealth: Historical Legacies and Contemporary Reforms”, organised by Institute of Commonwealth Studies and Commonwealth Human Rights Initiative, and spoke on “The Use of Equality and Non-discrimination Law to Advance LGBT Rights in the Commonwealth”, in London.

**January 21, 2011:** Participated in a conference on the implementation of economic and social rights in the UK, organised by Just Fair, Essex University Human Rights Centre, and British Institute of Human Rights, in London.

**January 28-31, 2011:** Made a keynote presentation at a meeting of the Malaysian Equality Forum organised by Tenaganita, entitled “Trends in International Equality Law and Approaches to Race Discrimination in Europe”, and held several meetings with groups of NGOs working on discrimination issues, in Kuala-Lumpur.

**January 29-30, 2011:** Co-organised, with Human Rights Law Network, a Judicial Colloquium on Equality and Non-Discrimination Law, with participation of Indian judges and international lawyers, in New Delhi.

**January 31, 2011:** Held project development meetings with Indian partner Human Rights Law Network, in New Delhi.

**February 2-5, 2011:** Conducted a series of meetings with Belarusian NGOs in the context of a joint project of ERT and Belarusian Helsinki Committee, in Minsk.

**February 8, 2011:** Participated in a delegation to the Indonesian Human Rights Commission calling for an investigation into the killings of three Ahmadiyya individuals on 5 February 2011, in Jakarta.

**February 9-10, 2011:** Served as an Expert and presented a paper at expert workshop on the prohibition of incitement to national, racial or religious hatred (article 20 ICCPR), organised by the UN OHCHR, in Vienna.

**February 14, 2011:** Participated in expert seminar entitled “The Council Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals (2008/115/EC) - Central Themes, Problem Issues and Implementation”, hosted by the Centre for Migration Law, Radboud University, in Nijmegen, the Netherlands.

**February 15, 2011:** Co-hosted the launch of the book *Equality: A New Legal Framework* by Professor Sir Bob Hepple QC, in London.

**February 21, 2011:** Participated in UK Detention Forum Meeting, in London.

**February 24, 2011:** Delivered training on key concepts of equality law to 40 members of the Law Society of Kenya, in Nairobi.

**February 25, 2011:** Participated in a public debate on proposals for a new comprehensive equality law for Kenya, in Nairobi.

**February 27-March 3, 2011:** Conducted a working visit to Jordan to assist NGOs with their work on non-discrimination, talk to lawyers’ networks on strategic litigation, and meet with legal scholars, in Amman.

**March 8, 2011:** Served as expert witness at a hearing on “The Declaration of Principles on Equality and the Activities of the Council of Europe”, organised by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, in Paris.

**March 10, 2011:** Gave evidence to the delegation of the Council of Europe’s Advisory Committee on the Framework Convention for the Protection of National Minorities, in London.

**March 15, 2011:** Participated in a public seminar attended by Moldovan students, lawyers and judges, which launched the Romanian translation of *The Equal Rights Review*, Volume 5, in Chişinău.

**March 21-26, 2011:** Undertook field research on patterns of discrimination and inequality in Kenya, in Isiolo, Kilifi, Kisumu, Mombassa and Siaya, Kenya.

**March 21-April 2, 2011:** Delivered training on key concepts in equality law, monitoring, documentation and advocacy of discrimination to human rights and women’s activists, in Guadalcanal and Malaita provinces, Solomon Islands.

**March 24, 2011:** Made presentation to the UK Detention Forum on alternatives to detention with a specific focus on statelessness, in London.

**April 12, 2011:** Provided training to the Equal Treatment Commission of the Netherlands on the use of strategic litigation in advancing equality, in Utrecht, the Netherlands.

**May 10-12, 2011:** Contributed to “Roundtable on Alternatives to Detention” organised by UNHCR, OHCHR and the International Detention Coalition and attended by representatives of governments, international organisations and NGOs, in Geneva, Switzerland.

**May 19, 2011:** Hosted a public lecture entitled “Progressive Equality Jurisprudence? The Case of South Africa” delivered by Kate O’Regan, in London.

**May 23, 2011:** Participated in a meeting of initiative group of experts to develop guidelines on the interpretation of Article 20 ICCPR, in London.

**May 23-26, 2011:** Provided training on key concepts in equality law to 40 staff from Guyanese civil society organisations, in Georgetown.

**May 27, 2011:** Participated in UK Detention Forum Meeting, in London.

**May 28, 2011:** Participated in a civil society roundtable to establish a Guyanese Equality Forum, in Georgetown.

**June 9, 2011:** Provided training on key concepts in equality law to 20 postgraduate students from the University College London Student Human Rights Programme, in London.

**June 9-10, 2011:** Delivered training on equality law and advocacy to staff from Belarusian human rights organisations and civil society organisations, in Minsk.

**June 14-15, 2011:** Participated in First EIDHR Seminar, organised by the European Commission, and served as keynote speaker on the issue of the unified perspective on equality and how anti-discrimination projects can be improved, in Brussels.

**June 15, 2011:** Participated in the second UK Parliamentary Meeting on Immigration Detention at the House of Commons, in London.

**June 17, 2011:** Delivered a lecture on statelessness with a focus on the Rohingya problem at the University of Galway “Summer School on Minority and Indigenous Rights”, in Galway, Ireland.

**June 19-29, 2011:** Delivered training on key concepts of equality law, discrimination related to religion and belief and advocacy to staff from Indonesian human rights NGOs, organisations representing people of particular religions or beliefs and civil society organisations, in Bogor, Indonesia.

**June 23, 2011:** Participated in the second Asylum Aid/UNHCR Expert Consultative Meeting on Mapping Statelessness in the UK, in London.

**June 24-26, 2011:** Delivered training on key concepts of equality law and advocacy to 35 Malaysian human rights activists and lawyers, in Kuala Lumpur.

**June 27-28, 2011:** Undertook field research on patterns of discrimination and inequality in Malaysia, in Kuala Lumpur and Seremban, Malaysia.

**June 27- July 1, 2011:** Participated in a workshop attended by UK and African grantee organisations of Comic Relief entitled “Making Rights Real”, to share learning from ERT’s country-based projects, in Johannesburg, South Africa.

# Note to Contributors

The Equal Rights Trust invites original unpublished articles for the future issues of *The Equal Rights Review*. We welcome contributions on all aspects of equality law, policy or practice. We encourage articles that examine equality in respect to cross-cutting issues. We also encourage articles that examine equality law policy or practice from international, regional and national perspectives. Authors are particularly welcome to submit articles on the basis of their original current or past research in any discipline related to equality.

## Peer Review Process

Each article will be peer reviewed prior to being accepted for publication. We aim to carry out the peer review process and return comments to authors as quickly as possible.

## Further Information and Where to Submit

Articles must be submitted by email attachment in a Microsoft Word file to: [info@equalrightstrust.org](mailto:info@equalrightstrust.org)

For further information regarding submissions, please email: [nicola.simpson@equalrightstrust.org](mailto:nicola.simpson@equalrightstrust.org)

## Submission Guidelines

- Articles should be original, unpublished work.
- Articles must be written in United Kingdom English.
- Articles must contain footnote or endnote referencing.
- Articles should be between 5,000 and 10,000 words in length.
- Articles must adhere to the **ERT style guide**, which is available at: <http://www.equalrightstrust.org/ertdocumentbank/ERR%20STYLE%20GUIDE.pdf>





# The Equal Rights Trust

The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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