

The Silent Stateless and the Unhearing World: Can Equality Compel Us to Listen?

Katherine Perks and Amal de Chickera¹

Kestutis Zadvydas was born to Lithuanian parents in a displaced persons' camp in Germany in 1948. When he was eight years old, he immigrated to the United States with his family, and acquired residency. When he grew up however, he became engaged in criminal activity, ranging from drug crimes to theft, for which he was imprisoned. When he was released from prison on parole, he was taken into Immigration and Naturalization Service (INS) custody and ordered to be deported to Germany in 1994. However, Germany refused to accept Zadvydas because he was not a German citizen. Shortly thereafter, Lithuania refused to accept him as he was neither a Lithuanian citizen nor a permanent resident. In 1996, the INS asked the Dominican Republic (his wife's country) to accept him, but this effort too proved unsuccessful. In 1998, Lithuania rejected, as inadequately documented, Zadvydas' effort to obtain Lithuanian citizenship based on his parents' citizenship.² With nowhere to remove him to, the INS kept Zadvydas in detention throughout this period, for over three years. In 2001, the US Supreme Court ruled that his indefinite detention "pending deportation" was unlawful.³

The *Zadvydas* case highlights the extreme vulnerability of stateless persons. There are an estimated 15 million stateless persons around the world today,⁴ many of whom do not enjoy equal rights with citizens, live in poverty without social security, any right to work, or access to education and healthcare; significant numbers suffer acute discrimination, violence, persecution and arbitrary detention. The legal protection and treatment of stateless persons can be seen as a litmus test of morality, human rights and the law in today's world. Although there is an international statelessness regime in place,⁵ although international and regional human rights law protects everyone, including the

stateless, and although national human rights laws offer useful tools, these three different strands have not been successfully unified to ensure that protection is effective.

In a just and equal world, the lack of a nationality would not lead to marginalisation, discriminatory treatment and extreme vulnerability. However, the reality is that statelessness and discrimination are intricately linked. De-nationalisation, as experienced by the Rohingya of Myanmar, the Banyamulenge of the Democratic Republic of the Congo and the "erased" persons of Slovenia, remains one of the most egregious forms of discrimination in the world today. Once stateless, the

lack of an effective nationality can render an individual highly vulnerable to discriminatory treatment in many different contexts.

The problem of statelessness lies at the core of the tension between the universality of rights on the one hand and the sovereign state's jurisdiction over its territory on the other. Without citizenship or nationality,⁶ stateless persons fall outside the traditional nation-state framework on which international law and relations rest.

This article seeks to generate debate, by identifying some of the main challenges and barriers to ensuring rights for the stateless. The article begins, in part one, by reviewing the provisions of the 1954 Convention relating to the Status of Stateless Persons (1954 Convention) – the primary international instrument adopted to address and respond to the needs of stateless persons. Despite containing important provisions to regularise the status of stateless persons and ensure their basic rights, it suffers significant weaknesses. The article argues that protection of stateless persons under the 1954 Convention, and under general international human rights law, will only become effective if they are interpreted in light of modern equality and non-discrimination standards.

Part two provides an overview of developments in international norms in this regard. It pays particular attention to the manner in which human rights norms apply to all persons, regardless of nationality or lack thereof, an issue of special relevance to stateless persons. It outlines how, although the prohibition of discrimination inherently allows for distinctions based on nationality, special consideration must be given to the unique situation that stateless persons face, when weighing the proportionality between the aim and means of a difference in treatment between nationals and non-nationals.

Parts three and four then address some of the key questions that arise from the 1954 Convention, and ask how the equality and non-discrimination principles that have developed since its adoption can inform our approach to finding solutions to the problems of stateless persons.

Part three focuses on immigration and the manner in which states continue to use national sovereignty arguments to impose limits on the rights of non-citizens, including stateless persons, even where these are unrelated to border control. It considers the “lawful stay” requirement that is attached to many provisions of the 1954 Convention, and the need for states to adopt a recognition procedure that would enable authorities to identify stateless persons and respond to their unique situation in an appropriate and timely manner.

Finally, part four raises definitional and protection issues, by questioning distinctions in protection for *de facto* and *de jure* stateless persons and reviewing the lacuna of protection available for those stateless persons not granted refugee status.

1. The Statelessness Regime

The 1954 Convention is the primary international instrument which defines the legal status of stateless persons. It “attempts to resolve the legal void in which a stateless person often exists by identifying the problem of statelessness, promoting the acquisition of a legal identity, and providing, in appropriate cases, for residence which will serve as a basis for access to basic social and economic rights.”⁷ It contains a number of key provisions to this end, in particular through states’ obligations to extend administrative assistance and issue identity papers (regardless of legal status)⁸ and travel documents.⁹

Importantly, it calls on states to facilitate the naturalisation of stateless persons.¹⁰

Whilst the Preamble to the 1954 Convention recalls the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,¹¹ the sole non-discrimination provision found in Article 3 does not prohibit discrimination on grounds of nationality or statelessness but rather stipulates that the provisions of the Convention apply to stateless persons without discrimination as to race, religion or country of origin.¹² This mirrors Article 3 of the 1951 Convention relating to the Status of Refugees (Refugee Convention), and falls short of the guarantee of non-discrimination found in later, more general treaties such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), or those adopted to address specific human rights issues.¹³

Despite the absence of a strong non-discrimination clause, the 1954 Convention contains a number of important provisions that require treatment of stateless persons to be at least as favourable as that accorded to nationals. Those provisions apply in respect to freedom of religion, artistic rights and industrial property, access to courts, rationing, elementary public education, public relief and assistance, labour legislation and social security (subject to state discretion in the case of non-contribution benefits).¹⁴ However, aside from those enumerated rights, the central point of departure for the 1954 Convention is Article 7(1) which stipulates that, except where the Convention contains more favourable provisions, States “shall accord to stateless persons the same treatment as is accorded to aliens generally.”¹⁵ Indeed, many of its provisions require treatment no more favourable than that of aliens general-

ly.¹⁶ Furthermore, many of the provisions of the Convention, including those that confer no better treatment than that afforded to aliens generally, explicitly require that the individual is lawfully staying in the territory of the state.¹⁷ This problem is further compounded because states differ in approach as to what constitutes “lawful stay” and may for example require the individual to be granted a residence permit before they are considered “lawfully staying”.¹⁸

Critically, the 1954 Convention defines a stateless person as one “who is not considered as a national by any state under the operation of its law”.¹⁹ Thus the Convention requires states to guarantee Convention provisions to *de jure* stateless persons, a group defined in a narrow, strictly legal manner which does not accommodate persons who have become *de facto* stateless, as a result of not enjoying the core minimum state protection linked with nationality. Indeed, it has been argued that this technical definition ignores the power of states to politically manipulate citizenship in both law and practice.²⁰ States are encouraged, but not obliged, by virtue of a recommendation of the Final Act, to extend the Convention provisions to *de facto* stateless persons wherever possible.

In sum, despite containing important provisions to regularise the status of stateless persons and ensure basic rights, the 1954 Convention has significant weaknesses. Many of the protections apply only to stateless persons who are considered to be lawfully staying in a particular country; many provisions require no more preferential treatment to be extended to stateless persons than to “aliens” generally and, fundamentally, it does not contain a comprehensive non-discrimination provision. Perhaps most importantly, it categorises the stateless into two groups, (*de jure* and *de facto* stateless) and affords

protection only to one, thus creating a hierarchy within statelessness, further complicating the (in)equality puzzle.

The body of human rights norms that apply to all persons subject to the jurisdiction of a state, regardless of nationality or legal status, has increased significantly since the adoption of the 1954 Convention, which – of course – predated even the ICCPR. It has thus been asserted that the general obligation found in Article 7 of the 1954 Convention to extend treatment to stateless persons as least as favourable as that enjoyed by aliens generally, encompasses basic notions of human rights which are not dependent on legal status within a given country.²¹

Affirmation therefore of the fundamental right to equality and non-discrimination as a stand-alone right as well as in conjunction with all other internationally protected human rights, is central to understanding and promoting the rights of stateless persons under international law.

2. The Equality of the Stateless: International Norms

Equality is a universal value. Expressed as a right, it is the “right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life”.²² This means that all persons subject to the jurisdiction of any state are in principle equal before the law and have equal protection of the law, regardless of their nationality or statelessness.

International human rights law generally requires the equal treatment of citizens and non-citizens. After his review of international human rights law, the UN Expert on

the Rights of Non-citizens concluded that “all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.”²³

The UN Committee on Economic, Social and Cultural Rights (CESCR) in its most recent interpretation of state obligations under the International Covenant on Economic Social and Cultural Rights (ICESCR) stated that “[t]he ground of nationality should not bar access to Covenant 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.”²⁴

This obligation to extend on an equal basis Covenant rights between citizens and non-citizens carries considerable weight in light of the fact that non-discrimination is an immediate and cross-cutting obligation in the Covenant,²⁵ and that the CESCR has established that “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party”.²⁶ Non-citizens, including refugees, asylum seekers and stateless persons therefore should benefit from the rights enshrined in the ICESCR, particularly in respect of the minimum core content of those rights.

The principle of non-discrimination in the enjoyment of human rights by nationals and non-nationals has also been applied by the Human Rights Committee (HRC) in its interpretation of state obligations under the ICCPR. Whilst nationality is not explicitly enumerated as a prohibited ground of discrimination in Article 2(1) of the ICCPR,²⁷

the Committee in its 1986 General Comment on the position of aliens under the Covenant stated that “[i]n general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness [...] the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2.”²⁸

Further, the stand-alone non-discrimination provision found in Article 26 of the ICCPR “prohibits any discrimination under the law”,²⁹ thereby extending the guarantee of non-discrimination beyond the immediate scope of the Covenant rights. This general principle of non-discrimination in the enjoyment of rights and of equal protection of the law for nationals and non-nationals is also found in other international and regional treaties and has been elaborated upon by international monitoring and judicial bodies, such as the UN Committee on the Elimination of Racial Discrimination (CERD),³⁰ the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR).³¹

Whilst the right to non-discrimination inherently permits distinctions to be made between different people according to their circumstances, distinctions must be objectively and reasonably justified, pursue a legitimate aim, and be proportionate to that aim. This reasoning, set out by the ECtHR in the landmark *Belgian Linguistics* case, has been followed by the HRC and other international and regional human rights bodies.³²

International courts and tribunals have provided guidance concerning the scope

of distinctions on grounds of nationality. The ECtHR has for example held that very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.³³ In the 2009 case of *Andrejeva v. Latvia* the ECtHR upheld the need for “very weighty reasons” to justify distinctions based on nationality, in relation to the pension rights of a stateless “permanently resident non-citizen” in Latvia.³⁴ The case concerned the transitional provisions of the Latvian State Pensions Act that created an entitlement to a retirement pension in respect of periods of employment conducted prior to 1991 in the territory of the former USSR (“outside Latvia” in the version in force before 1 January 2006). This right was reserved for Latvian citizens and so the applicant, a “permanently resident non-citizen” of Latvia was denied the pension in question solely because she did not have Latvian citizenship.

The court held that a wide margin of appreciation is usually allowed to the state under the ECHR when it comes to general measures of economic or social strategy,³⁵ and that the legislature’s policy choice will generally be respected unless it is “manifestly without reasonable foundation.” Although the court found that the difference in treatment in the present case pursued the legitimate aim of protecting the country’s economic system, there was not a reasonable relationship of proportionality between that aim and the means employed. The court distinguished the applicant in this case from its previous jurisprudence concerning discrimination on grounds of nationality, highlighting that the applicant was a stateless person. Finding that there were not sufficiently weighty reasons to justify the use of nationality as a sole criterion for the difference in treatment, the court gave special regard to the fact that

the applicant had the status of a “permanently resident non-citizen” of Latvia, that Latvia was the only State with which she had any stable legal ties, and thus the only state which, objectively, could assume responsibility for her in terms of social security.³⁶

By paying regard to the specific situation of the applicant not only as a non-citizen, but as a stateless non-citizen, the court acknowledged the unique challenges that stateless persons face in the realisation of their rights – challenges that must be given special consideration when weighing the proportionality between the aim and means of a difference in treatment between citizens and non-citizens, despite the broad margin of appreciation enjoyed by the states in respect of general measures of economic or social strategy (in this case, social security).

3. Equality and Sovereignty: Unhappy Bedfellows

Despite the repeated confirmation of the principle of equal treatment for all by international and regional human rights courts and mechanisms, there remains a large gap between the rights that international human rights law guarantees to non-citizens and the realities that they face.³⁷ Recognition of nationality continues to serve as the key to many human rights, such as education, health care, employment, and equality before the law.³⁸ Fundamentally, although international human rights law demands equality for all, states continue to use national sovereignty arguments to impose limits on the rights of non-citizens even where these are unrelated to border control.

Whilst there are some legitimate justifications for the non-application of specific rights to non-citizens, for example the right to elect political representatives of the state,³⁹ a re-

view of state practice reveals that “[i]n many countries there are institutional and endemic problems confronting non-citizens. The situation [...] has worsened as several countries have detained or otherwise violated the rights of non-citizens in response to fears of terrorism.”⁴⁰

Statelessness is at the core of this tension between universality of rights on the one hand and the sovereign state jurisdiction over territory on the other. Without citizenship or nationality, stateless persons fall outside the traditional nation-state framework which continues to determine international law and relations today.

The Immigration Dilemma

One of the key protection problems arising from the 1954 Convention concerns the requirement that individuals must be “lawfully staying” within the state before they may enjoy a number of their rights. This question must be addressed in light of developments in international human rights and equality law. As has been outlined above, while the norm of non-discrimination inherently allows distinctions between different groups of persons, its proper application precludes distinctions on the ground of a person’s nationality or legal status unless such measures are justified by a valid and legitimate state objective and applied proportionally to that objective.⁴¹

The right to non-discrimination requires that immigration legislation and policy should recognise that non-nationals acquire irregular status for a number of very different reasons and that it is therefore inappropriate to treat all in the same way.⁴² International law has developed over the years to recognise the particular needs and vulnerabilities of various sub-categories of non-nationals.

A recent example includes the increasing recognition of the particular vulnerability of migrant workers,⁴³ which led to the adoption of the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICMW). Similarly, there is an emerging consensus that special efforts must be made to identify and protect victims of human trafficking. Many states now have in place procedures for identifying and responding to the needs of victims of trafficking and there are international and regional treaties to address this issue.⁴⁴

The case of Zadvydas illustrates the rights implications of a failure to identify and take into account the specific situation of stateless persons in the immigration context. With no country willing to accept him, Zadvydas was left to languish in detention as diplomatic efforts to deport him were made in vain, until the US Supreme Court finally declared his detention unlawful. The failure of the national immigration system to identify his statelessness, and distinguish him from other irregular migrants, resulted in his arbitrary and indefinite detention.

Identifying and Responding to the Specific Needs of Stateless Persons in the Immigration Context

A survey of state practice in relation to stateless migrants in Europe in 2005 found that many member states of the European Union did not have a “tool or mechanism in place to identify and recognize stateless persons *specifically with regard to their statelessness*” and that without such a mechanism, the “provisions of the [1954] Convention will be available to stateless persons only insofar as they are available to populations generally”.⁴⁵ Although one of the primary aims of the 1954 Convention was to facilitate the identification of stateless persons and it thereby provides a

definition of statelessness, it neither requires States Parties to establish status determination procedures, nor provides guidance on how to do this.

Regardless of whether a state is party to the 1954 Convention, the right to non-discrimination logically requires at minimum a procedure that enables states to respond to the specific needs of stateless persons in a timely manner. A first step would be a formal recognition procedure for stateless persons. This draws upon a basic, central tenet of equality and non-discrimination law: that equal treatment is not equivalent to identical treatment.⁴⁶ To realise full and effective equality it is necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals.⁴⁷ It is this understanding of equality that must be applied by states when responding to statelessness, so as to ensure that their particular vulnerabilities are taken into account when dealing with them and resolving the problems specific to them.

Sadly, the situation that Zadvydas faced, and the failure to pay due regard to his statelessness, is not unique to the United States. In the UK, for example, there has been increasing concern over the indefinite detention of non-nationals pending removal from the UK under immigration regulations,⁴⁸ a practice that has a special impact on stateless persons for whom removal is often impossible for practical and legal reasons. The UK is a party to the 1954 Convention, and has thus undertaken to protect stateless persons. But neither the Immigration Rules nor applicable legislation require the Home Office to consider whether a person is stateless, either where an asylum application is refused, or before starting removal/deportation proceedings. Nor is there any provision in the Immigration Rules un-

der which a stateless person may apply for leave to enter or remain in the UK.

In the UK irregular migrants, including refused asylum seekers and ex-foreign national prisoners, can be subject to immigration detention pending removal. The absence of a procedure to identify and respond to the specific situation of stateless people has led to catastrophic results whereby certain individuals can be detained indefinitely due to an inability to expel them. In June 2009, asylum rights groups reported they were supporting 138 immigration detainees who had been detained for more than a year, sixty per cent of whom were from just five countries (Iran, Somalia, Iraq, Algeria and the Democratic Republic of Congo).⁴⁹ Whilst it is not known how many, if any, of those individuals were legally stateless, it is likely that many could reasonably be considered *de facto* stateless, because they could not obtain documentation enabling them to return to their countries of nationality or to enter another country.

4. The Issue of Definition and the Protection Gaps

De Jure vs. De Facto Statelessness

The 1954 Convention provides for two types of statelessness: *de jure* and *de facto*. The Convention requires states parties to extend protection to *de jure* stateless persons, defined as those who are “not considered as a national by any state under the operation of its law”.⁵⁰ Only in the non-binding Final Act does the 1954 Convention encourage states to extend Convention provisions to *de facto* stateless persons. Although the Final Act does not provide a definition of the latter, the UN High Commissioner for Refugees (UNHCR) has defined a *de facto* stateless person as one who is “unable to demonstrate that he/she is *de jure* stateless, yet he/she has no

effective nationality and does not enjoy national protection”.⁵¹

This has the potential to create a lottery of sorts, where stateless persons may or may not find themselves entitled to certain protections purely based on which side of the definition they are slotted in. In reality, whilst there are clear cases of *de jure* statelessness, most cases fall in a grey area of *de facto* statelessness. The result is that many persons in need of protection because they are in effect stateless, but cannot provide legal proof that they have no nationality, are excluded from protection under the 1954 Convention.

Philosophically, the notion of effective nationality is a useful starting point. When statelessness is linked to effective nationality it captures the obligations of a state towards its people and shows that a state which fails to fulfil such obligations in effect strips its people of the benefits of association to such a state, having a similar effect as stripping a person of their nationality. This line of thinking compels us to develop a more inclusive and comprehensive approach that breaks down the strict distinction between *de jure* and *de facto* statelessness.

However, whilst the concept of “effective nationality” is powerful, it is problematic as there is no common understanding of what this means in practical terms. In the broadest sense, “effective nationality” could be understood to be achieved only when the individual enjoys all human rights on an equal footing with others. Such a broad application of the concept of effective nationality, which could – for example – encompass internally displaced persons (IDPs), may cast the net too wide. It would mean for example that the civilian trapped in conflict in Sri Lanka and the torture victim detained at Guantanamo Bay with no state willing to receive him, could

both claim that their nationality is ineffective nationality in one form or another.⁵²

Individual cases of *de facto* statelessness may be seen to exist along a continuum. Although there is no strict definition of a *de facto* stateless person under international law, an equality-based approach would require that states respond adequately to the particular situation of the individual and focus on the enjoyment of core minimum rights. It is clear, however, that further development of standards is greatly needed in order to define the content of the concept of *de facto* statelessness.

Hierarchy of Inequalities: Refugees vs. Stateless Persons

The “effective nationality” approach to defining statelessness highlights the strong connection between refugees and stateless persons. Indeed, the limited scope of the 1954 Convention definition that applies only to *de jure* stateless persons is the result of an early position which equated *de facto* stateless persons with refugees. It was assumed from the outset that *de facto* stateless persons would qualify for protection under the 1951 Refugee Convention⁵³ and another instrument was needed for those *de jure* stateless persons who did not qualify for refugee status. In fact, the 1954 Convention was initially intended as a Protocol to the 1951 Refugee Convention.⁵⁴

However, the reality today is more complex. Whilst all refugees are indeed either *de facto* or *de jure* stateless persons, not all *de facto* stateless persons qualify for refugee protection. This mistake of history has plotted very different courses for the protection of refugees and stateless persons. Refugees benefit from a stronger, better ratified convention.⁵⁵ Whilst there are numerous similarities in the

two conventions, one example of the greater protection provided by the 1951 Refugee Convention is the absence of a “lawful presence” pre-requisite to enjoy convention rights.⁵⁶ Furthermore, most national systems acknowledge their obligations pertaining to refugees and have procedures in place (however problematic they may be) to process asylum claims and grant refuge to successful claimants. Additionally, there is a large professional network of lawyers, academics, activists and NGOs dedicated to the wellbeing of refugees, compared to a stark lacuna of services aimed at protecting the stateless.

As described above, the narrow construction of *de jure* and *de facto* statelessness has left many persons without the special protection they need. This gap in protection has become increasingly apparent in a number of countries where restrictive trends in refugee determination procedures mean that ever increasing numbers are refused refugee protection but cannot return home because they fear persecution and for their safety. Such trends highlight the acute need for a strong second tier of protection for *de facto* stateless persons who do not fit strict refugee criteria and yet cannot return home, and others who, whilst not at risk if returned, cannot return home for legal and practical reasons.

The right to control the entry and stay of non-nationals is inherent in the state’s sovereign claims over its territory. Consistent with the principle of state sovereignty, there is no general right of non-citizens to enter and reside in a country under international law. But, despite repeated assertions by states to this effect, the HRC has stressed that “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for

family life arise.”⁵⁷ Thus, whilst there are not sufficient grounds to claim that non-nationals as a group are disadvantaged and that to exclude them amounts to a continuation of disadvantage which could amount to *de facto* discrimination,⁵⁸ it is essential that states acknowledge that certain categories of non-nationals – in particular stateless persons – are more likely to be in a situation of vulnerability and disadvantage. To fail to identify their particular situation and exclude them on account of a lack of nationality would perpetuate their disadvantage and could amount to discrimination.

The Challenge

The challenge that statelessness imposes on the international human rights regime is the need to affirm the importance of nationality and promote the right of everyone to a nationality, whilst at the same time ensuring that the lack of a nationality does not result in vulnerability, exploitation and the violation of human rights. Despite the fact that human rights apply to all regardless of nationality or statelessness, traditional notions of territoriality, sovereignty and exclusion of the “other” continue to dominate political discourse and international relations, thereby ensuring that in practice, nationality remains the key to securing many fundamental human rights.

The stateless are the hidden victims in a world order making an uncomfortable and long transition from a system of isolated (but interdependent) sovereign nation-states to one of enforceable international law based on universal norms of human rights. Any attempt to address the issue of statelessness which fails radically to evaluate this problem, is destined to achieve little more than a reassertion of the status quo. The 1954 Convention entrenches national sovereignty interests by affording many of its protections only

to stateless persons who are lawfully staying in the country concerned. Despite this, it suffers from limited ratification, which suggests that a more progressive document with a stronger equality basis and better anti-discrimination provisions may have fared even worse in terms of ratification. Whether or not this fear is justified, it captures the difficult relationship between universal equality and state sovereignty, in which the former is too often compromised in favour of the latter.

This article has primarily focused on immigration dilemmas facing stateless persons. Migration law and policy is controversial precisely because it highlights important questions about national identity, global equity, social justice and the universality of human and equality rights.⁵⁹ However, the unique situation and vulnerability of stateless persons as compared to many other non-nationals requires a greater openness to granting more favourable rights to stateless persons than to other migrants who are not so fundamentally disadvantaged.

As the *Zadvydas* case highlights, the inequality that results from arbitrary distinctions made on grounds of nationality and which results in discrimination against non-citizens is further compounded for stateless persons, who cannot rely on the protection of any other state. The compound effects of discrimination experienced by stateless persons, and the solution required, necessitates a unified approach to equality that allows for an understanding of the multiple and interlocking factors that increase vulnerability to rights violations and lead to the unique situation of stateless persons.

Despite its shortcomings, the 1954 Convention contains important provisions to regularise the status of stateless persons and en-

sure their basic rights. Further ratifications must be encouraged. The body of human rights norms that are considered to apply to all persons subject to the jurisdiction of a state, regardless of nationality or legal status has increased significantly since the adoption of the 1954 Convention. International courts and tribunals have given content to the right to non-discrimination asserting the central tenet that to achieve full and effective equality the specific needs and situation of each individual must be taken into account.

In order to guarantee the rights of stateless persons, the provisions of the 1954 Convention and general international human rights law must be interpreted progressively, in light of modern equality and non-discrimination standards. Whilst significant progress in protecting human rights has been made since its adoption, central protection issues for both *de facto* and *de jure* stateless persons remain unresolved, leaving considerable room - and need - for standard development in this area.

¹ Katherine Perks is a Legal Researcher at The Equal Rights Trust (ERT). Amal de Chickera is a Legal Consultant. Both are working on the ongoing ERT project "Stateless Persons in Detention".

² This summary was obtained from the research of David Baluarte, who was commissioned by ERT to carry out research on stateless persons in detention in the USA; ERT research paper forthcoming.

³ See *Zadvydas v. Davis*, 533 U.S. 678 (2001). In September 1995, Zadvydas filed a petition for a writ of *habeas corpus* challenging his continued detention. In October 1997, a Federal District Court granted that writ and ordered him released under supervision. The Fifth Circuit reversed this decision (*Zadvydas v. Underdown*, 185 F.3d 279 (1999)), but stayed its mandate pending review in the Supreme Court.

⁴ UN High Commissioner for Refugees, *Statelessness: Who is stateless?* Available at: http://www.unhcr.se/en/Protect/stateless_en.html, accessed on 6 January 2009.

⁵ In the form of two UN Conventions, many regional standards and a statelessness mandate of the UNHCR.

⁶ Nationality and citizenship will be used interchangeably in this paper.

⁷ Batchelor, C., "The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation", *Refuge*, Vol. 22, No. 2 (2005).

⁸ Convention Relating to the Status of Stateless Persons (1954 Convention), adopted 28 September 1954, entered into force 6 June 1960, ECOSOC RES/526 A(XVII), Articles 25 and 27 respectively.

⁹ 1954 Convention, Article 28. Although the requirement to issue travel documents applies only to stateless persons lawfully staying within the state territory, states are encouraged to issue travel documents to all stateless persons regardless of status, and to "give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence".

¹⁰ 1954 Convention, Article 32.

¹¹ 1954 Convention, Preamble.

¹² 1954 Convention, Article 3.

¹³ Such as the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (ICERD) and the Convention on the Rights of Persons with Disabilities.

¹⁴ 1954 Convention, Articles 4, 14, 16, 20, 22(1), 23, and 24.

¹⁵ 1954 Convention, Article 7(1).

¹⁶ 1954 Convention, Articles 13 (movable and immovable property), 15 (Right of association), 17 (wage-earning employment), 21 (housing), 22(2) (public education other than elementary education) and 26 (freedom of movement).

¹⁷ 1954 Convention, Articles 15 (Right of Association), 17 (Employment), 21 (Housing), 23 (Public Relief), 24 (Social Security), 26 (Freedom of Movement), 28 (Travel Documents), 30(1) (Non-Expulsion).

¹⁸ See above, note 7. This review of EU state practice led by Carol Batchelor found that “the majority of countries in the EU do not anticipate an automatic right to residence based on recognition as a stateless person.”

¹⁹ 1954 Convention, Article 1(1).

²⁰ Open Society Justice Initiative, *Human Rights and Legal Identity: Approaches to Combating Statelessness and Arbitrary Deprivation of Nationality - Thematic Conference Paper*, 2006, p. 2.

²¹ See above, note 7.

²² *Declaration of Principles on Equality*, The Equal Rights Trust, October 2008, Principle 1: The Right to Equality.

²³ UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, *The rights of non-citizens: Final report of the Special Rapporteur, Mr. David Weissbrodt*, UN Doc E/CN.4/Sub.2/2003/23, 26 May 2003.

²⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2), E/C.12/GC/20, 25 May 2009, para. 30. However, note that despite this progressive interpretation the Committee is bound by the text of the Covenant and makes clear that this statement is “without prejudice to the application of article 2(3) of the Covenant, which states: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

²⁵ See *Ibid*, para. 7. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations* (Art. 2, par.1), 1990, para. 1.

²⁶ See above, note 24, para. 10, with respect to “minimum core obligations”.

²⁷ International Convention on Civil and Political Rights (ICCPR), Article 2(1): “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²⁸ UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986), paras. 1-2. The Human Rights Committee has also confirmed that “the provisions of Article 2 of ICESCR do not detract from the full application of Article 26 ICCPR”, see Communication No. 182/1984, *Zwaarn de Vries v. Netherlands* (1987), para. 12.1.

²⁹ UN Human Rights Committee, *General Comment No. 18: Non-discrimination* (1989), para. 1.

³⁰ The UN Committee on the Elimination of all forms of Racial Discrimination has declared in its General Comment No. 30 on the rights of non-citizens that: “Although some ... rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law...[u]nder the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” See UN Committee on the Elimination of Racial Discrimination, *General Comment No. 30: Discrimination Against Non Citizens* (2004), paras. 3-4.

³¹ Inter-American Court of Human Rights, *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03, 17 September 2003 Advisory opinion OC-18/03.

³² European Court of Human Rights, *Case «Relating to Certain Aspects of the Laws on the Use of Languages in Educa-*

tion in Belgium» v. Belgium (Belgian Linguistics Case), judgment of 23 July 1968, Series A, No. 6, para. 10. See also UN Human Rights Committee, above, note 29; UN Committee on Economic, Social and Cultural Rights, above, note 24.

³³ European Court of Human Rights, *Gaygusuz v. Austria*, case number 39/1995/545/631, judgment of 16 September 1996 and *Poirrez v. France*, application no. 40892/98, judgment of 30 September 2003.

³⁴ European Court of Human Rights, *Andrejeva v. Latvia*, application no. 55707/00, judgment of 18 February 2009.

³⁵ *Ibid*, para 83.

³⁶ *Ibid*, para 88.

³⁷ See the analysis of the former UN Special Rapporteur on the Rights of Non-citizens, David Weisbrodt, above, note 23.

³⁸ Goris, I., Harrington, J., and Köhn, S., "Statelessness: what it is and why it matters", *Forced Migration Review*, Vol. 32, pp. 4 – 6.

³⁹ See *inter alia*, International Covenant on Civil and Political Rights, Article 25.

⁴⁰ See above, note 23.

⁴¹ Cholewinski, R., "The Human And Labor Rights Of Migrants: Visions Of Equality", *Georgetown Immigration Law Journal*, Winter 2008, 22 Geo. Immigr. L.J. 177.

⁴² This view was put forward in: The Equality Authority (Ireland), *Embedding Equality in Immigration Policy*, 2006, p. 42.

⁴³ See *inter alia*, Inter-American Court of Human Rights, above, note 31; Cholewinski, R., above, note 41.

⁴⁴ *Inter alia*, adoption of the UN Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The UN Convention Against Transnational Organized Crime; Council of Europe Convention on Action against Trafficking in Human Beings (2005).

⁴⁵ See above, note 7.

⁴⁶ See for example ECtHR, *Thlimmenos v. Greece*, application no. 34369/97, judgment of 6 April 2000, para. 44, where the court held that "[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

⁴⁷ *Declaration of Principles on Equality*, The Equal Rights Trust, 2008, Principle 2: Equal Treatment.

⁴⁸ See for example, London Detainee Support Group, *Indefinite detention in the UK*, June 2009.

⁴⁹ *Ibid*.

⁵⁰ 1954 Convention, Article 1(1).

⁵¹ UNHCR-Inter-Parliamentary Union, *Nationality and Statelessness: A Handbook for Parliamentarians*, Geneva, 2005, p.11.

⁵² See Baluarte, D., "Detention at Guantanamo Bay and the Creation of a New Brand of Statelessness", in this issue of *The Equal Rights Review* (Vol.3, 2009).

⁵³ Convention relating to the Status of Refugees (1951 Refugee Convention), adopted 28 July 1951, entered into force 22 April 1954. See discussion in, Batchelor, C., "Statelessness and the Problem of Resolving Nationality Status", *International Journal of Refugee Law*, 10 Int'l J. Refugee L. 156 1998, p. 172.

⁵⁴ UN High Commissioner for Refugees, *Note on UNHCR and stateless persons*, EC/1995/SCP/CRP.2, 2 June 1995.

⁵⁵ As of February 2008, 63 states had ratified the 1954 Convention, a number greatly boosted by the recent accession drive carried out by the UNHCR. See UN High Commissioner for Refugees, *States Parties to the 1954 Conven-*

tion relating to the Status of Stateless Persons, October 2008, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3bbb0abc7>.

⁵⁶ Article 31 (1) of the 1951 Refugee Convention stipulates that “[s]tates shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization.” There is no equivalent provision in the 1954 Convention.

⁵⁷ UN Human Rights Committee, *General Comment No. 15*, above, note 28, para. 5.

⁵⁸ The Equality Authority (Ireland), *Embedding Equality in Immigration Policy*, 2006, p. 25.

⁵⁹ *Ibid*, p. 7.