PART I

The issue

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Statelessness in the European Union

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In June 2008 the Council of Europe's High Commissioner for Human Rights, Thomas Hammarberg, made the bold statement that 'no one should be stateless in today's Europe'.[1] His comments called attention to a problem which, although noted by the Council of Europe, has persisted in several European states, including both 'old' and 'new' members of the European Union. The solution is still elusive. Yet the problem of statelessness is not new – indeed the rights to nationality and the prohibition against the arbitrary deprivation of nationality were included in the 1948 Universal Declaration of Human Rights (UDHR).[2] Over the past fifty years, both the Council of Europe and European Union have introduced enforceable human rights instruments, which are among the most far-reaching of the developed world, but they often offer little to Europe's stateless people. In practice, human rights do not cover everyone.

'Statelessness' in the legal sense describes people who are not nationals of any state. Although statelessness is decried in international law, and the UDHR proclaimed a right to a nationality,[3] the United Nations High Commissioner for Refugees (UNHCR) estimated that there were over half a million stateless people in the European region,[4] and perhaps 12 million stateless people worldwide.[5]

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[1] T. Hammarberg, 'No One Should Have to be Stateless in Today's Europe', *Viewpoint* (9 June 2008), www.coe.int/t/commissioner/Viewpoints/080609_en.asp/, accessed 10 June 2008.

[2] United Nations General Assembly, *Universal Declaration of Human Rights*, (10 December 1948), 217A (III), www.unhcr.org/refworld/docid/3ae6b3712c.html.

[3] *Ibid.*, Article 15(1).

[4] United Nations High Commissioner for Refugees (UNHCR), *Statistical Online Population Database* (2009), http://apps.who.int/globalatlas/dataQuery/reportData.asp?rptType=1, accessed 27 November 2009.

[5] UNHCR, 'Addressing Situations of Statelessness', *UNHCR Global Appeal 2009 Update*, (1 December 2008), 45, www.unhcr.org/publ/PUBL/4922d4370.pdf.

Table 1.1 is based on data provided by UNHCR and provides an indication of the number of stateless people in the European region.

The figures in table 1.1 illustrate that the scale of statelessness is most pronounced in the Baltic states. That is not to say that non-citizens living in Estonia, Latvia and Lithuania enjoy few rights, on the contrary, unlike stateless populations in the developing world, they have considerably more rights; however, they are included in table 1.1 because they are not considered as nationals by any state under the operation of its law and in that sense are stateless.

The existence of stateless populations challenges some of the central tenets of international law and the human rights discourse that has developed over the past sixty years.

For the *de jure* stateless, the international statelessness conventions might offer either practical rights[6] or a route to a nationality.[7] Few states have, however, ratified the statelessness conventions, and while individual countries may nevertheless implement similar provisions in their domestic laws, nevertheless, the problem of disenfranchised minorities being left without nationality remains.[8] The denial and deprivation of nationality raises several important policy questions because it undermines human security since, in practice, people face difficulties accessing and exercising many basic rights, and their daily life itself may become precarious.[9] All too often, the births, marriages and deaths of stateless people are not certified and, as a result, many stateless persons lack even basic documentation, leaving them outside any social systems of protection or redress for wrongs.

The position of the *de facto* stateless is closely allied to that of the *de jure* stateless. Hannah Arendt herself formally linked the two concepts in 1951 in the ninth chapter of *The Origins of Totalitarianism* (1951), where she examined the practical position of those without any effective state

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[6] United Nations, *United Nations Convention Relating to the Status of Stateless Persons*, 1954 Convention, UN Treaty Series, (1960), www.unhcr.org/protect/PROTECTION/3bbb25729.pdf.

[7] United Nations, *United Nations Convention on the Reduction of Statelessness*, 1961 Convention, UN Treaty Series, vol. 989, (1975), 175, www.unhcr.org/protect/PROTECTION/3bbb286d8.pdf.

[8] To date, sixty-five countries have become party to the 1954 Convention relating to the Status of Stateless Persons, and thirty-seven countries have acceded to the 1961 Convention on the Reduction of Statelessness.

[9] K. Southwick and M. Lynch, *Nationality Rights for All: A Progress Report and Global Survey on Statelessness* (Washington, DC: Refugees International, 2009), www.refintl.org/sites/default/files/RI%20Stateless%20Report_FINAL_031109.pdf.

Table 1.1 *Stateless persons in the European region, 2008[a]*

State	Numbers of stateless persons
Austria	464
Azerbaijan	2,078
Belarus	7,818
Belgium	548
Bosnia and Herzegovina	10,000
Croatia	180
Denmark	3,687
Estonia	110,315
Finland	1,397
France	1,006
Georgia	1,544
Germany	9,322
Greece	258
Hungary	241
Iceland	116
Italy	722
Latvia	365,417
Lithuania	5,900
Luxembourg	162
Montenegro	1,500
Netherlands	4,591
Norway	489
Poland	839
Portugal	273
Republic of Moldova	1,807
Romania	253
Russian Federation	50,000
Serbia	17,050
Slovakia	911
Slovenia	4,090
Spain	26
Sweden	6,239
Switzerland	75
Former Yugoslav Republic of Macedonia (FYROM)	1,051
Ukraine	56,350
United Kingdom of Great Britain and Northern Ireland	20

Source: [a] United Nations High Commissioner for Refugees (UNHCR), *Statistical Online Population Database* (2009), at http://apps.who.int/globalatlas/dataQuery/reportData.asp?rptType=1, accessed 27 November 2009.

to offer protection or support.[10] Where refugees and the *de jure* stateless may have access to travel documents equivalent to national passports issued by domestic governments voluntarily or under the terms of international treaties, and nationals themselves may have variable access to the enforcement of domestic rights, the distinction in terms of formal membership of a state is inevitably blurred. The issue of access to rights for those who are not citizens of the countries in which they have made their lives is, however, the same regardless of whether or not they hold another nationality, of a country – usually outside Europe – which they may feel no connection with and indeed may not know. All across Europe children may be non-nationals in the countries of their birth. Equally, there are thousands of 'unwanted' migrants, whether refused asylum seekers or irregular workers, whose nationality status offers little in the way of practical protection, and over time they may lose connections to their country of nationality. Effective statelessness thus remains an issue in the case of non-nationals who lack access to even basic rights.

The developing European human rights regime has not addressed the problem of effective statelessness as it has emerged since the founding of the current European institutions. The United Nations Declaration of Human Rights of 1948 lacked mechanisms for application and enforcement. The 1951 Convention on the Status of Refugees dealt with many of the *de facto* and *de jure* stateless after the Second World War, but had to be extended in the 1960s to cover subsequent refugee populations. With the advent of mass migration from the 1980s onwards, Europe started to close the borders. European states began to reinterpret their obligations under the 1951 Convention as unwanted immigration became a political issue and, by the 1980s, the application of the European Convention on Human Rights (ECHR) of 1950 had become contentious in cases of non-nationals.

Geo-political challenges as well as the development of new patterns of migration and settlement have since complicated attempts to prevent and reduce statelessness within Europe's borders. In addition to the ongoing nationality disputes that resulted from the break-up of the former Yugoslavia and former Soviet Union, thousands of former labour migrants who arrived in Europe, often during the height of Western European industrial expansion, never formally established their rights to reside and claim citizenship and, as a result, their status is a grey area. Equally, hundreds of thousands of new arrivals who applied for asylum

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[10] H. Arendt, *The Origins of Totalitarianism* (New York: Schocken, 1951).

but were refused have remained on the territory, often leading settled lives without formal status. Unable or unwilling to return to their countries of origin, whether for fear of persecution or because their country of origin refuses to readmit them, or for economic reasons, they, too, have become effectively stateless.

This study examines the way in which those – both *de jure* and effectively – stateless people manage their lives inside the European Union. It is illustrated by case studies that record the realities of daily life for these non-citizens in four different European jurisdictions, namely the United Kingdom, Slovenia, Estonia and France. The study combines normative and legal analyses on the rights of others with an investigation of the practical obstacles that prevent people from accessing essential services and asks what provisions would make people more secure.

Review of relevant literature

The conceptual framework for this study is informed by a disparate but important collection of writings which has several intellectual sources. Some of the most widely cited publications on contemporary forms of statelessness include reports and articles by human rights advocates that have promoted the notion that statelessness should be viewed as a matter of human security and one that draws greater relevance from the anti-discrimination provisions regarding the rights of non-citizens.[11] Within the world of academia, one of the most influential writers on human security, Amartya Sen, has drawn attention to the problems associated with the lack of citizenship for personal and social development. Sen

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[11] B. Aurescu, 'The 2006 Venice Commission Report on Non-Citizens and Minority Rights – Presentation and Assessment', *Helsinki Monitor*, 18(2) (2007), 150; J. Bhabha, 'Enforcing the Human Rights of Citizens and Non-Citizens in the Era of Maastricht: Some Reflections on the Importance of States' *Development & Change*, 29(4) (1998), 697; B. Frelick and M. Lynch, 'Statelessness: A Forgotten Human Rights Crisis', *Forced Migration Review*, 24, (2005), 65; J. A. Goldston, 'Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens', *Ethics & International Affairs*, 20 (2006), 321; Human Security Commission, *Human Security Now: Protecting and Empowering People* (New York: Commission on Human Security, 2003), www.humansecurity-chs. org/finalreport/English/FinalReport.pdf; M. Lynch, *Lives on Hold: The Human Cost of Statelessness* (Washington, DC: Refugees International (2005); D. Weissbrodt, *Final Report on the Rights of Non-Citizens*, UN Doc. E/CN.4/Sub.2/2003/23 (Geneva: UNHCR, 2003); C. Sokoloff and R. Lewis, 'Denial of Citizenship: A Challenge to Human Security', *European Policy Centre*, Paper 28, (1 April 2005), www.epc.eu/TEWN/pdf/724318296_ EPC%20Issue%20Paper%2028%20Denial%20of%20Citizenship.pdf; Southwick and Lynch, *Nationality Rights for All*.

argues that citizenship is integrally connected with the possible enhancement of human capabilities; hence, the granting of citizenship removes some of the 'unfreedoms' that place people at risk from want and fear.[12] Others, however, challenge Sen's claims and note that human security is often undermined by other domestic factors that operate at the subnational level. One important counter argument is that in both weak and strong states where political divisions are defined by gender, ethnonational, religious, tribal and party affiliations, there are many layers of discrimination that dilute the potency of citizenship by reinforcing discriminatory structures.[13] Thus, rather than considering citizenship to be a unifying force, one may speak of several classes of citizenship and a range of entitlements.[14]

The vast majority of writing on statelessness and related issues, however, has not introduced theoretical considerations but has taken the form of descriptive reports which have sought to set an agenda at critical times. In the late 1990s, a precursor to the discourse on statelessness – primarily a discourse on the rights of non-citizens who were not necessarily stateless – centred on issues of equality and were justified on the grounds that exclusion fosters inequality and hence, insecurity. Indeed, this was one of the central premises of the United Nations Development Programme (UNDP) 1994 *Human Development Report*[15] and the more influential Human Security Commission report entitled *Human Security Now: Protecting and Empowering People*.[16] The reasons why this discourse was important to the emergence of a new and explicit discourse on statelessness lie in the fact that through these publications the United Nations had identified a causal connection between developmental concerns such as poverty and deprivation, the protection of human rights and problems of governance – all of which directly relate to statelessness:

> In the final analysis, human security is a child who did not die, a disease that did not spread, a job that was not cut, an ethnic tension that did not explode in violence, a dissident who was not silenced. Human

[12] A. Sen, *Development as Freedom* (Oxford: Oxford University Press, 2001).
[13] R. A. Elman, 'Testing the Limits of European Citizenship: Ethnic Hatred and Male Violence', *NWSA Journal*, 13(3) (2001), 49.
[14] R. Cohen, 'Citizens, Denizens and Helots: The Politics of International Migration Flows in the Post-War World', *Hitotsubashi Journal of Social Studies*, 21(1) (1989), 153.
[15] United Nations Development Programme (UNDP), *Human Development Report* (New York: Oxford University Press, 1994).
[16] Human Security Commission, *Human Security Now*.

security is not a concern with weapons – it is a concern with human life and dignity.[17]

Over the past five years, the policy language has shifted from a development focus to a rights-based theme and, in addition to the UNHCR, a number of UN monitoring bodies and non-governmental organisations (NGOs) have drawn particular attention to the practice of denying and revoking rights to citizenship and the related problem of linking minority rights – namely, the rights to enjoy and practice one's culture, language, or religion – to citizenship status.[18] The topic of statelessness was elevated in diplomatic circles when, in 2008, the UN Independent Expert on Minorities devoted a section of her *Annual Report* to the arbitrary denial and deprivation of citizenship[19] and, shortly thereafter, the United Nations Human Rights Council (UNHRC) adopted a resolution on the human rights and arbitrary deprivation of nationality which named statelessness as a human rights issue and reaffirmed that the right to a nationality of every human person is a fundamental human right.[20]

To date, the most comprehensive studies on statelessness include the publication, *Nationality Matters: Statelessness Under International Law*, by Laura Van Waas (2008),[21] and the report by Katherine Southwick and Maureen Lynch on behalf of Refugees International, *Nationality Rights for All: A Progress Report and Global Survey on Statelessness* (2009).[22] Van Waas dissects the two statelessness conventions and related international

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[17] United Nations Development Programme (UNDP), *Human Development Report* (New York: Oxford University Press, 1994), 22, http://hdr.undp.org/en/media/hdr_1994_en_chap2.pdf.

[18] Goldston, 'Holes in the Rights Framework, 321; Open Society Institute (OSI) Justice Initiative, *Human Rights and Legal Identity: Approaches to Combating Statelessness and Arbitrary Deprivation of Nationality, Thematic Conference Paper*, (May 2006), http://dev.justiceinitiative.org/db/resource2/fs/?file_id=17050; United Nations Human Rights Council (UNHRC), 'Arbitrary Deprivation of Nationality: Report of the Secretary-General', A/HRC/10/34 (26 January 2009), www.unhcr.org/refworld/docid/49958be22.html; UNHCR, 'The Excluded: The Strange Hidden World of the Stateless', *Refugees Magazine*, 147 (Geneva: United Nations High Commissioner for Refugees, September 2007), //www.unhcr.org/publ/PUBL/46d2e8dc2.pdf.

[19] Office of the High Commissioner for Human Rights (OHCHR), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including The Right To Development: Report of the Independent Expert on Minority Issues, Gay McDougall*, A/HRC/7/23 (28 February 2008), www.unhcr.org/refworld/docid/47d685ea2.html.

[20] (UNHRC), 'Arbitrary Deprivation of Nationality'.

[21] L. Van Waas, *Nationality Matters: Statelessness Under International Law* (Antwerp: Intersentia, 2008).

[22] Southwick and Lynch, *Nationality Rights for All*.

instruments and examines the legal provisions for stateless people and the need for reform in key areas including conflict of laws, state succession and arbitrary deprivation of nationality, birth registration and migration. Her work also seeks to break down the distinction between *de jure* and *de facto* statelessness which she claims to be a false dichotomy since, in practice, those who cannot access their human rights cannot lay claim to protection. She is equally critical of the 1961 Convention which has remarkably few parties to it and is therefore of limited use under international law.

The report, *Nationality Rights for All: A Progress Report and Global Survey in Statelessness*, like the Refugees International study *Lives on Hold: The Human Cost of Statelessness* (2005),[23] provides a wide-ranging overview of the political and human rights challenges that stem from the lack of nationality and offers a useful global survey of the problem on a country-by-country basis. There is a considerable emphasis on the European region, and one of the most compelling aspects of these publications is their analysis of interview data gathered during field visits. The value added of the reports and field studies by Refugees International lies in the inclusion of historical details and micro-level descriptions of the way in which repression and the denial of human rights affects individuals on the ground.

Another influential publication is James Goldston's article in *Ethics and International Affairs* (2006).[24] Goldston acknowledges that while there is growing consensus that nationality laws and practice must be consistent with general principles of international law – above all, human rights law – there is a clear protection gap. He then illustrates how the denial of citizenship excludes people from the enjoyment of rights and pays particular attention to 'indirect discrimination' which occurs when 'a practice, rule, requirement, or condition is neutral on its face but impacts particular groups disproportionately, absent objective and reasonable justification.'[25] His conclusion that the growing divide between citizens and non-citizens in practice is 'primarily a problem of lapsed enforcement of existing norms' is especially relevant to the plight of *de facto* stateless people in Europe that need protection.[26]

In addition to the above experts, several academics have touched on the issue of statelessness in their philosophical and sociological studies; interpretations of international law; examinations of regional

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[23] Lynch, *Lives on Hold.*   [24] Goldston, 'Holes in the Rights Framework', 321.
[25] *Ibid.*, 328.   [26] *Ibid.*, 341.

conventions and treaty systems; research on children, gender issues and birth registration; and, most recently, through their investigations of the effects of the war on terror, for individuals held in detention. The most prominent area of research on statelessness and the rights of non-citizens, outside legal studies, is to be found in the fields of social and political theory. In particular, there has been a growing interest in Hannah Arendt's work and a re-examination of her brief writings on statelessness included in the ninth chapter, 'The Decline of the Nation-State and the End of the Rights of Man', in her seminal work *The Origins of Totalitarianism* (1951).[27]

In Arendt's account, statelessness was symptomatic of the hollowness of human rights that could only be guaranteed by states and which, from the very start, lacked substantive support. Arendt provides an historical snapshot of the diplomatic wrangling that confined human rights discourse to a minority of concerned elites:

> Even worse was that all societies formed for the protection of the Rights of Man, all attempts to arrive at a new bill of human rights, were sponsored by marginal figures – by a few international jurists without political experience or professional philanthropists supported by the uncertain sentiments of professional idealists. The groups they formed, the declarations they issued, showed an uncanny similarity in language and composition to that of societies for the prevention of cruelty to animals. No statesman, no political figure of any importance could possibly take them seriously; and none of the liberal or radical parties in Europe thought it necessary to incorporate into their program a new declaration of human rights.[28]

While the nature of the human rights regime has expanded in both scope and substance to include a wider body of opinion, the essential problem of ensuring respect for rights bound to the state – especially in the case of nationality – has not been comprehensively addressed by social theorists. Few scholars have developed Arendt's theses on the tension between the nation (or, rather, national groups) and their attempt to dominate the state; and on the ineffectiveness of human rights instruments to provide protection to stateless populations today.[29] One notable exception is

[27] Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace, 1968).
[28] *Ibid*., 292.
[29] M. Leibovici, 'Appartitre et visibilité: Le monde selon Hannah Arendt et Emmanuel Levinas', *Journal of Jewish Thought & Philosophy*, 14 (1–2) (2006), 55; S. Parekh, 'A Meaningful Place in the World: Hannah Arendt on the Nature of Human Rights', *Journal of Human Rights*, 31 (2004), 41; D. Tubb, 'Statelessness and Colombia: Hannah Arendt and the Failure of Human Rights', *Undercurrent*, 3(2) (2006), 39.