A rights-based approach to statelessness

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7 Prioritizing empowerment through a rights-based approach to statelessness

7.1 Rights-based approach as empowerment, agency, and representation through rights

The phrase 'rights-based approach' is not used everywhere in literature and policy documents with the same meaning. It is a good-sounding label to attach to a policy project, which may in practice not mean more than that human rights play some role in the policy measures.[436] In this thesis, however, the rights-based approach is defined as an approach that aims specifically at empowering persons affected by the policies by means of legal rights. The emphasis on rights, as opposed to needs, charity, or objective welfare indicators, leads to shifts in the power-balance between policy-makers and the affected persons, as affected persons become empowered through the rights-based policy to choose whether, when and how to invoke their rights, often in the context of claims against the policy makers. A rights-based approach 'enables those whose lives are affected the most to articulate their priorities and claim genuine accountability from [policy makers]'.[437] Policy makers applying a rights-based approach are 'critically self-aware and address inherent power inequalities in their interaction with [affected] people'.[438]

Under the rights-based approach, the empowerment of affected persons is more important than achieving a certain level of objectively measurable welfare. The benefits that can result from access to rights are not the ultimate goal of a rights-based policy. Instead, the ultimate goal is the empowering and liberating nature of the phenomenon of a right, which increases the scope of individuals' possible life choices, and which enables them to exercise agency in a greater variety of circumstances. The rights promoted under the rights-based approach do not necessarily need to qualify as human rights, as long as they are relevant in addressing specific vulnerabilities that the policy focuses on.

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[436] P. Uvin, 'From the right to development to the rights-based approach: how 'human rights' entered development', *Development in Practice*, Vol. 17, No. 4–5, (2007), pp. 597-606.
[437] A. Cornwall and C. Nyamu-Musembi, 'Putting the 'rights-based approach' to development into perspective', *Third World Quarterly*, Vol. 25, No. 8 (2004), p. 1432. .
[438] A. Cornwall and C. Nyamu-Musembi, 'Putting the 'rights-based approach' to development into perspective', *Third World Quarterly*, Vol. 25, No. 8 (2004), p. 1432. .

If one subscribes to the idea that policies addressing vulnerable persons need to empower those persons, and ultimately remedy their vulnerability, as opposed to merely improving the objectively measurable quality of their life, then the rights-based approach is the only defensible one. In the words of Peter Uvin:

> To have a right to something - say, food - it not just about having enough of that: a slave can be well nourished too.[439]

Some policy makers, in particular in the context of international development, have embraced this definition of a rights based approach. The UK's Department for International Development and the Swedish International Development Cooperation Agency, for example, describe their vision of the right-based approach respectively as 'empowering people to take their own decisions, rather than being the passive objects of choices made on their behalf',[440] and 'recognizing individuals as active subjects and stakeholders'.[441]

In addition to empowering affected persons, a right-based approach leads to genuine direct participation of the affected persons in the design, implementation and effects of policies.[442] Policies that chase objective quantifiable targets as opposed to focusing on rights may of course involve affected persons in policy discussions through various communication channels, and thus achieve some level of participation. Information on the execution of the goal may also be proactively shared with interested groups. However, those forms of inclusion, participation and transparency cannot replace, or compare with, the direct participation which is achieved through recognition of rights. When rights and entitlements are recognized, affected persons become agents and owners of the change envisaged by a policy. They are not merely heard in the process of decision making, they actually decide on the implementation of policies by controlling

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[439] P. Uvin, 'From the right to development to the rights-based approach: how 'human rights' entered development', *Development in Practice*, Vol. 17, No. 4–5, (2007), p. 600.

[440] UK's Department for International Development, *Realising Human Rights for Poor People*, (October 2000), p. 7. See also C. Nyamu-Musembi and A. Cornwall, 'What is the "rights-based approach" all about? Perspectives from international development agencies', *IDS Working Paper*, No. 234, (November 2004), p. 13.

[441] Swedish International Development Cooperation Agency (Sida), *Perspectives on Poverty*, (October 2002), p. 34. See also: C. Nyamu-Musembi and A. Cornwall, 'What is the "rights-based approach" all about? Perspectives from international development agencies', *IDS Working Paper*, No. 234, (November 2004), p. 13.

[442] See L. Forman, G. Ooms, and C. E. Brolan, 'Rights Language in the Sustainable Development Agenda: Has Right to Health Discourse and Norms Shaped Health Goals?', *International Journal of Health Policy Management*, Vol. 4, No. 12, (December 2015), p. 799, where the Millenium Development Goals are criticized for 'being created in a non-deliberative, non-transparent, non-inclusive top-down process' as a result of focus on agency and rights of affected persons.

whether, when and how to invoke their rights in each of their individual life circumstances. They are also not merely informed about the progress; they drive the progress and determine its speed and, to some extent, the direction. Thus, a policy which focuses on rights of affected persons rather than their needs and objective welfare targets is inherently more inclusive, participatory, deliberative, and transparent.

A rights-based approach is often counter-posed to an approach that pursues targets that are detached from the will and agency of affected persons, targets that focus on populations rather than individuals, and on easily quantifiable indicators rather than more elusive indicators of subjective individual empowerment.[443] For example, the rights-based approach to policies on health and reproductive health rights of women was counter-posed to an objective quantifiable target of reducing maternal mortality in the context of rights-based criticism of the Millennium Development Goals.[444] The objective quantifiable goal of slum eradication was counter-posed to the rights-based approach involving the 'right to the city' and the slum inhabitants' rights to participatory enhancement of living conditions.[445]

Nelson explains the difference between policies that set objective goals and those that promote rights as follows:

> *Goals and rights are associated with distinct traditions in ethics and political philosophy. Goals are distinctly utilitarian, calculated to maximize welfare gains. Rights make a normative claim, that human dignity entitles each person to certain kinds of treatment, and to protection from others.* [446]

As a consequence, the affected individuals 'own' rights-based policies, as opposed to merely 'undergoing' policies that pursue objective targets:

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[443] See, for example, the special issue of the *International Journal of Human Rights* 'Milleneum Development Goals and Human Rights', volume 13, Issue 1 (2009); P. J. Nelson, 'Human rights, the Millenium Development Goals, and the future of development cooperation', *World Development*, Vol. 35, No. 12, (2007), pp. 2041-2055.

[444] See L. Forman, G. Ooms, and C. E. Brolan, 'Rights Language in the Sustainable Development Agenda: Has Right to Health Discourse and Norms Shaped Health Goals?', *International Journal of Health Policy Management*, Vol. 4, No. 12, (December 2015), p. 799.

[445] See M. Huchzermeyer, *Cities with "Slums". From informal settlement eradication to a right to the city in Africa*', (UCT Press 2011).

[446] P. J. Nelson, 'Human rights, the Millenium Development Goals, and the future of development cooperation', *World Development*, Vol. 35, No. 12, (2007), p. 2045.

[T]he broad range of human rights [...] are rights of individuals. Goals, on the other hand, belong to states and the international organizations in which they are negotiated. They refer to the people who suffer [...], but those individuals are the objects of the goals, not their agents.[447]

While under the rights-based approach the affected persons are owners of their rights, and consequently agents of such policies, under the objective target approach the affected persons are merely objects, whose free will, agency and opinion about their own situation are ultimately not decisive for how the policies operate.

Sometimes the rights-based approach is contrasted with the needs-based approach.[448] Focus on needs often results in charity-like discourse where the 'needy' ones are not empowered in relation to those who fulfill, and often define, their needs. The 'needs', as described and framed by policy makers, are subsequently often fulfilled through pursuing objective quantifiable targets of welfare enhancement within populations. Under the needs-based approach, policy makers research and interpret what the needs of the affected persons are, and formulate targets as solutions to those needs. In contrast, under the rights-based approach, the entitlement of the affected persons to certain benefits is recognized, and the decision-making power on how and when to access those benefits remains with the affected persons, as they decide whether, when, and how to invoke their entitlements. Andrea Cornwall and Celestine Nyamu-Musembi describe the difference between needs and rights as follows:

[N]eeds can be met out of charitable intentions, but rights are based on legal [or ethical] obligations.[449]

As a result:

[447] P. J. Nelson, 'Human rights, the Millenium Development Goals, and the future of development cooperation', *World Development*, Vol. 35, No. 12, (2007), p. 2045.

[448] See, for example, T. Collins, L. Pearson, and C. Delany, *Rights-Based Approach*, Discussion Paper, (April 2002). A. Cornwall and C. Nyamu-Musembi, 'Putting the 'rights-based approach' to development into perspective', *Third World Quarterly*, Vol. 25, No. 8 (2004), pp. 1415–1437; P. Uvin, 'From the right to development to the rights-based approach: how 'human rights' entered development', *Development in Practice*, Vol. 17, No. 4–5, (2007), p. 602.

[449] A. Cornwall and C. Nyamu-Musembi, 'Putting the 'rights-based approach' to development into perspective', *Third World Quarterly*, Vol. 25, No. 8 (2004), p. 1417.

> *[A] rights-based approach can also serve as an opportunity to reflect more broadly on the power dynamics inherent in the practice of international development and on questions of ethics.*[450]

That is not to say that charity, welfare enhancement, or fulfilment of basic needs have no place in public policies. On the contrary, numerous policies are and should be focused on other issues, such as redistributing scarce resources, ensuring public safety, balancing conflicting valid societal interests, relieving immediate suffering, increasing welfare indicators by means other than individual rights, and so on. However, justifiable as such policies may be in their own context, it is important to clearly distinguish them from rights-based policies which aim specifically at empowering vulnerable individuals through rights. Charity, for example, may be urgently needed by persons affected through charity-based policies and highly preferable in specific contexts and timelines to rights-based policies. Yet it is important not to create an impression that charity has the same empowering effects on affected persons as recognition of their legal entitlements. Charity in itself does not entail any long-lasting right to the distributed resources, charitable institutions do not retain any long-lasting duties to remedy the relevant vulnerabilities, and affected persons are not necessarily able to control on an individual basis how the charity affects them specifically. Policies that are not rooted in rights can be justified by aims other than empowerment of the individuals they affect, for example by an aim to fairly distribute scarce resources, to reduce social unrest, or to stabilize a financial market. Not every policy aims, or should aim, at empowering the individuals it affects; other benefits to society, individuals, animals or environment may justify various policies. A rights-based analysis therefore does not aim to re-frame every policy as a rights-based one. It merely requires that only rights-based policies invoke rights-based justification, and that other policies are evaluated within the frameworks of the values they pursue.

It may be tempting for policy makers to justify policies on the basis of rights-related values, while not fully embracing a rights-based approach. A rights-based approach can be confronting

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[450] A. Cornwall and C. Nyamu-Musembi, 'Putting the 'rights-based approach' to development into perspective', *Third World Quarterly*, Vol. 25, No. 8 (2004), p. 1418.

for institutions that design and implement policies.[451] The main challenge is that the approach requires the policy institutions to raise the vulnerable to the position of entitled rights-holders, and place themselves, or sometimes other powerful institutions, in the position of entities with obligations towards the rights-holders. Promoting such a power-shift requires policy institutions to problematize the lack of power of the vulnerable, and use their own resources to empower those whose lives they aim to improve. That might be a difficult choice to make, especially since other approaches, such as the goal-oriented approach, needs-based and charity-like approaches offer to use the said resources to perpetuate and reproduce the power position of policy makers. Such approaches allow the role of policy makers to be framed as charitable entities dispensing benefits out of generosity, as achievers who can be praised for reaching demonstrable quantifiable targets, as providers who take care of human needs. The alternatives to a rights-based approach can leave relevant institutions without owing any duties to the vulnerable, retaining full control over how the benefits are dispensed, while maintaining the position of high moral ground within a charity frame.

Another more practical challenge of the rights-based approach, as opposed to alternative approaches, is in the complexity of assessing outcomes. Measuring success of goal-based policies tends to be easier than measuring success of rights-based policies due to differences in the types of ultimate aims that they are associated with.[452] The rights-based approach has the empowerment and agency of the affected individual at the centre of its attention, and aims at ensuring that every individual is able to use a set of legal rights as they see fit. The goal-oriented approach focuses on populations rather than individuals, and pursues objective quantifiable targets that can be measured within such populations. Rights-oriented policies embrace the variety of goals that affected individuals may set for themselves, and aim to provide those individuals with legal tools and mechanisms to better be able to achieve personal goals.

While measuring outcomes and evaluating progress is important for any policy, the complexity of evaluation should not be decisive for how policies are formulated and what they ultimately

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[451] Such institutions can be governments, local authorities, international organizations or non-governmental organizations, any institution that concerns itself with questions of vulnerable individuals and pursues projects to address and remedy such vulnerability.

[452] P. J. Nelson, 'Human rights, the Millennium Development Goals, and the future of development cooperation', *World Development*, Vol. 35, No. 12, (2007), pp. 2046-2048.

aim to achieve.[453] It is, however, important to be aware of the importance of measuring outcomes for the power position of institutions that design and implement policies. Measurements may seem like an auxiliary issue, a mere tool of post factum assessment, but the measurability of targets may in fact become a central driving factor for the way in which policies are formulated and pursued. Policy makers need to account for their own policies in order to be able to maintain their funding, and sometimes their very existence.

Maintaining power and attempting to continue to exist is not something an institution should in principle be criticized for. Theorists of critical discourse analysis rightly maintain that power, and the existence of power structures, is unavoidable in human institutions,[454] and should not be viewed as something negative per se. It is, however, important to '[c]reate awareness in agents of their own needs and interests',[455] and their own power position with regard to those affected by their policies. If there is no (self-)awareness about such power within and outside relevant institutions, it is impossible to have an open discussion about the means through which the power is achieved and maintained, and the ends for which it is used. A rights-based approach does not require disempowerment of policy institutions that design and implement policies on vulnerability, or some form of apology for having power at all. It merely requires them to be aware of that power, and prioritize its use for the empowerment of the vulnerable through rights (if that is indeed what the policy claims to aim at), as opposed to prioritizing reproduction and enhancing of their own power, for example by opting for more easily measurable goals over more empowering but less easily measurable outcomes.

The rights-based approach offers an opportunity to openly discuss a multitude of motivations that can be validly involved in pursuing policies that affect vulnerable populations. While only measures that promote empowerment of the vulnerable through rights are part of the rights-based approach, other measures that pursue other motivations can also affect the vulnerable as a matter of separate policy with a different approach. Distinguishing the rights-based measures from other measures enables an honest assessment of various interests that may result in policies affecting

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[453] See on dangers of measurement opportunities influencing policy choices in A. Saith, 'From universal values to Millennium Development Goals: lost in translation', *Development and Change*, Vol. 37, No. 6, (2006), pp. 1174-1175.
[454] See more in chapter 1, section 1.2.
[455] R. Wodak and M. Meyer, 'Critical Discourse Analysis: history, agenda, theory and methodology' in *Methods for Critical Discourse Analysis* by R. Wodak and M. Meyer (eds.), (SAGE Publications 2009), p. 7.

the vulnerable. Such interests may have practical overlaps and result in cooperation, or they may diverge and compete, requiring weighing of priorities in an open honest critical discussion. Not everything that is done need necessarily to be dictated by maximizing the empowerment of the vulnerable, other competing considerations of security, order, stability, justice and fairness may be deemed to have priority in certain contexts. A coherent critical discussion weighing relevant interests is, however, only possible if the interests are clearly distinguished, and not clustered together and disguised behind the plight of affected vulnerable persons.[456]

To sum up this section, the rights-based approach is an approach to policies that addresses vulnerability where the empowerment, representation and agency of affected persons through rights are a central priority. The rights-based approach is characterized by awareness of power imbalances between the vulnerable persons who are affected by policies, and institutions who create and implement those policies; the approach aims to shift power in favour of the affected persons as a remedy for their vulnerability. The needs-based, objective target-based, and charity-based approaches, where the focus lies on externally identifying and fulfilling the needs of affected persons through the pursuit of objectively quantifiable goals, are often seen as alternatives to the rights-based approach empowerment. Such approaches may lead to an improvement of life quality of affected persons, but are problematic as they do not question the power-structures causing vulnerabilities. The rights-based approach can be challenging because it requires using the power of policy institutions to empower the vulnerable, while other approaches allow prioritizing more effectively the perpetuation of institutions' own power position. The following sections of this chapter analyse policies on statelessness in light of the rights-based approach.

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[456] See more on justifications of statelessness policy goals in chapter 5, section 5.5 above. See also See M. Huchzermeyer, '"Slum" Upgrading or "Slum" Eradication? The Mixed Message of the MDGs', in *The Millennium Development Goals and Human Rights. Past, Present and Future* by M. Langford, A. Sumner, and A. Ely Yamin (eds.), (CUP 2013), pp. 305-311; M. Huchzermeyer, 'The struggle for in situ upgrading of informal settlements: a reflection on cases in Gauteng', *Development Southern Africa*, Vol. 26, No. 1, (March 2009), pp. 59-73. In these publications the author illustrates how policies on informal settlements are used to pursue the interests of competitive urban economic development; the lack of clear distinction between the interests of landowners and of inhabitants of informal settlements leads to policies that harm the poor being disguised as policies in the interests of the poor.

In the following sections in this chapter, I evaluate policies on statelessness on the basis of the rights-based values. Section 7.2 consists of analysis of the policy goals on statelessness, and interactions among them, as identified in chapters 5 and 6 above, in light of the rights-based approach. I identify elements and aspects of the current policy that already focus on empowerment of affected persons through rights, as well as language that reflects commitment to the rights-based approach. I also highlight aspects of current statelessness policies that lack a rights-based approach, both on the level of specific rules that prioritize the achievement of objectively quantifiable goals over empowerment of affected persons, as well as harmful language that frames affected persons as recipients of charity rather than empowered rights-holders, and that emphasizes their needs as opposed to their entitlements. Section 7.3 focuses specifically on the issue of voluntary statelessness, and develops a rights-based critique of resistance towards voluntary statelessness under the current statelessness policies. Finally, section 7.4 concludes with recommendations about how the current discourse on statelessness, in policy and scholarship, would need to alter in order to become more compatible with rights-based values.

7.2   Statelessness policy in light of the rights-based approach

7.2.1   Introductory remarks

Many international policies that deal with vulnerability, in particular in the context of development aid, have received important criticism when lacking a rights-based approach.[457] In this section I explain why such criticism can benefit the statelessness discourse too. Statelessness

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[457] For example, 'reformulating' the right to health and reproductive health rights of women as a 'maternal mortality goal' in the Millennium Development Goals was criticized for not focusing on the rights of affected persons, but rather on objective quantifiers of what was formulated as a target by donors. See L. Forman, G. Ooms, and C. E. Brolan, 'Rights Language in the Sustainable Development Agenda: Has Right to Health Discourse and Norms Shaped Health Goals?', *International Journal of Health Policy Management*, Vol. 4, No. 12, (December 2015), p. 799. Similarly, Marie Huchzermeyer argues that a discourse on 'the right to the city' would empower the inhabitants of informal settlements than quantifiable targets of reducing the scope of such settlements, see M. Huchzermeyer, *Cities with "Slums". From informal settlement eradication to a right to the city in Africa'*, (UCT Press 2011). International Labour Organization, in the context of informal employment, puts a strong emphasis on empowerment of workers in the informal sector, and not on the repression of their source of income, as that would lead to 'increased poverty and vulnerability by pushing already vulnerable groups of people into even more difficult situations', see ILO, *Resolution concerning decent work and the informal economy*, No. ILC90-PR25-292-EN, (2002), para. 21.

policy discourse claims to speak on behalf of the vulnerable individuals it affects, to empower them, and act in their interest.[458] However, the overall statelessness policy discourse is severely lacking in terms of a rights-based approach. Avoidance of statelessness has been framed as an objective quantifiable[459] target to reduce or eliminate the phenomenon of statelessness within the world population, and the goal of avoidance is favoured by the policy discourse over the more rights-oriented goal of protection of stateless persons. The title of the main UN statelessness campaign 'End Statelessness in 10 Years'[460] sends a very clear signal that currently the policy's main approach is to focus on objective quantifiable targets, as opposed to empowerment of persons affected by such a policy through recognizing their rights and entitlements.

It is important to establish that none of the statelessness goals are inherently rights-based or objective target-based. They could all be re-formulated to include more objective-target oriented aspects or more respect for rights and agency of individuals. The goal of protection of stateless persons, for example, aims at extending rights and freedoms for affected persons, [461] and is itself largely in line with the principles of the rights-based approach. Instead, protection of stateless persons could have been approached as an objective target to quantifiably improve the life quality of the stateless populations by, for example, reducing poverty rates, increasing the proportion of stateless persons with legal residence, improving the employment opportunities and the level of education within stateless populations, and so on. The fact that statelessness policy focuses on rights of stateless persons in the context of protection, rather than their needs and objectively measurable welfare indicators, is a policy choice. The protection of stateless persons, under the current policies, aims at ensuring that each stateless person has a set of legal rights which can be used for the improvement of life quality by the stateless persons in the way they see fit. This goal does not aim to ensure that all stateless persons receive an education or join the labour market, but merely attempts to ensure that they have access to education and a

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[458] See, for example, UNHCR, *Note on UNHCR and stateless persons*, No. EC/1995/SCP/CRP.2, (2 June 1995), para 20: 'activities undertaken on behalf of stateless persons'; see also Jean Asselborn, commenting on the Council of the EU Conclusions on Statelessness of 4 December 2015, said: 'We have undertaken today to act together on behalf of stateless persons', see EU Press Release No. 893/15, available here: <www.consilium.europa.eu/en/press/press-releases/2015/12/04/council-adopts-conclusions-on-statelessness-89315/pdf>.

[459] 'Quantifiable' here does not mean that the target has in fact been accurately quantified, as a lot of controversy still exists around statistical information on the scope of stateless populations, see for more details Institute on Statelessness and Inclusion, *The World's Stateless*, (December 2014).

[460] See more in chapter 5, section 5.2.4 above.

[461] See chapter 5, section 5.3 above.

right to work. In the context of avoidance of statelessness, a policy choice has been made to focus on objectively quantifiable avoidance of statelessness rather than the rights of affected persons to access or not to lose a nationality. Stateless persons are objects of the goal to avoid statelessness, where the goal is to change their legal situation from that of statelessness into that of nationality, or to ensure that they remain nationals and do not become stateless. Even though the intention and the effects of this goal may largely be the improvement of lives of the stateless, and it may coincide with what the affected persons want, the latter merely undergo such effects, but are not in control of the change.

Section 7.2.2 below discusses in more detail the way in which the goal to avoid statelessness shows clear shortcomings in terms of the rights-based approach. Section 7.2.3 analyses the rights-based aspects of the goal to identify stateless persons, as well as the ways in which this goal in its current formulation falls short of embracing rights-based values. Section 7.2.4 explains that applying the rights-based approach to statelessness policies overall resolves the tensions among the current policy goals identified in chapter 6 above. The goal to protect stateless persons, as explained in this section, is in line with rights-based values. It is a rights-based element that already exists within current statelessness policy. It is unfortunate that the protection-related elements of statelessness policies are overshadowed and de-prioritized in favour of the avoidance goal,[462] while the latter fall short in terms of the rights-based approach. In this chapter, in particular in section 7.4, I invoke the way in which the goal to protect stateless persons is currently framed to suggest how statelessness policy can develop so as to embrace the rights-based approach more broadly.

7.2.2   Avoidance of statelessness, the right to a nationality, and nationality rights

The avoidance goal severely lacks a rights-based approach. Even though individual rights to acquire and not to lose a nationality can be derived from the 1961 Convention, the wording of the text of the Convention makes no reference to individual rights. The specific articles speak of various situations in which a 'contracting state shall grant' its nationality to a person, or 'shall not deprive' of its nationality, but not of individuals *having the right* to acquire or not to lose a

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[462] See more in chapter 6, section 6.3 above.

specific nationality. The preamble of the 1961 Convention merely refers to the desirability of reducing statelessness as an objective target, and does not invoke individual's rights. As to the follow-up documentation, even though references are often made to the right to a nationality,[463] the primary overarching theme centres on the objective target of having as few stateless persons as possible, with individual rights being merely a tool to achieving the objective target.[464]

The position of the right to a nationality in the policy discourse on avoidance of statelessness needs special attention.[465] The relationship between the right to a nationality and the goal to avoid statelessness is often presented in policy documents as a relationship of cohesion and mutual reinforcement, as if they are two sides of the same coin, which may create a false impression that the goal to avoid statelessness is in fact a policy promoting the right to a nationality. The Explanatory Report to the European Convention on Nationality, for example, refers to the individual right to a nationality as a 'positive formulation' of the states' duty to avoid statelessness, and that '[t]he principle of a right to a nationality […] provides the inspiration for the substantive provisions [on] the avoidance of statelessness'.[466] Such a formulation fails to recognize important differences between the right to a nationality and the goal to avoid statelessness. The European Convention on Nationality, which the Report explains, offers an example of an important difference, by prohibiting voluntary statelessness. Voluntary statelessness can be prohibited from the point of view of the objective target to reduce statelessness, but not from the point of view of the right to a nationality.[467] Empowering individuals to choose whether, when, and how to invoke their nationality rights is distinct from ensuring that those individuals become and remain nationals. The former approach addresses the vulnerability through empowerment, while the latter merely imposes transformations of nationality status on the affected persons. The difference may only have tangible expression when the individual goals of affected persons deviate from the general policy goals. However, even when the differences are not apparent, the lack of a rights-based approach has an impact on the power position of those affected by statelessness policies.

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[463] See, for example, UNHCR *Global Action Plan to End Statelessness* (2014), UNHCR, *Ending Statelessness Within 10 Years. A Special Report*, (4 November 2014).

[464] See more in chapter 6, section 6.3 above.

[465] See more on the right to a nationality in chapter 3, sections 3.3 above.

[466] Explanatory Report to the Council of Europe European Convention on Nationality of 1997, No. 166, (1997) para 32.

[467] See more on voluntary statelessness and the right to a nationality in chapter 3, sections 3.3.2-3.3.4 above. See also section 7.3 below on rights-based approach to voluntary statelessness.

Mere references to nationality as a human right are insufficient to claim a rights-based approach to the avoidance of statelessness. The empowerment of affected persons through rights needs to be prioritized over the objective of reducing the numbers of stateless persons. Such rights do not need to be limited to the right to a nationality, in the sense of a right to the most easily accessible nationality that offers escape from statelessness. The rights-based approach strives towards expanding the scope of nationality rights, which may include entitlement to more than one nationality, rights related to retaining nationalities, and rights to remain without a nationality: any rights that would lead to the greater empowerment and representation of persons affected by statelessness policies.[468]

The rights-based approach requires letting go of the approach to statelessness as a simplistic problem, where there is a problematic statelessness on the one hand, and an unproblematic nationality on the other hand, and where nationality solves statelessness. Access to and effectuation of rights is always a scale, and each person is somewhere on that scale. In the context of protection it is impossible to make a binary division between protected and unprotected stateless persons, each person is somewhere on a multi-dimensional graph of protection levels with regard to different rights. Similarly, with the rights-based approach to nationality rights, each person will be somewhere on a scale of empowerment through various nationality rights. A rights-based statelessness policy endeavours to gradually expand the scope of those rights, where the latter does not need to be fixed or have any upper limit, and can go as far as the circumstances allow. As long as the focus remains on empowerment through rights, any other considerations that interfere with such empowerment need to be approached as limiting circumstances, and not embraced as policy objectives.

Under a rights-based statelessness policy the avoidance of statelessness is a likely effect, but not necessarily a goal. Thus, while under the objective target approach to avoidance of statelessness lowering numbers of stateless persons among a given population is considered as an achievement, under the rights-based approach the legal existence and practical enforceability of

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[468] While there may be justifications for limiting the scope of possible nationality rights, such justifications cannot be derived from the rights-based approach or the empowerment of affected persons. Such possible justifications would need to be weighed and defended against the objective to empower persons affected by statelessness policies.

the right to a nationality would be considered as an achievement, regardless of whether the numbers of stateless persons increase or decrease.[469]

7.2.3 Identification of stateless persons and the right to the recognition of a legal status

The goal of identification of stateless persons is under the current statelessness policies a subordinate goal aimed at achieving the goal of protection and the goal of avoidance.[470] However, as discussed in chapter 5, section 5.4.1 above, establishing the legal fact of statelessness may be important for affected persons under a variety of circumstances, not necessarily related to specific targets of statelessness policies. Moreover, identification as a stateless person may be unwanted by affected persons, for example if it can undermine political claims to membership.[471] Identification of stateless persons thus has wider implications in the discourse on statelessness than just helping to achieve the two main statelessness policy goals; it is a process with its own tangible effects on the lives of affected persons. Under a rights-based statelessness policy, identification should be framed as a matter of individual rights of affected persons. It should by no means be imposed on individuals, under the blanket assumption that identification as a stateless person is beneficial for every stateless person, and that it leads to achieving other goals equally presumed to be beneficial and wanted. Instead, access to statelessness status determination should be an individual entitlement of everyone affected by uncertainty as to their nationality status.

Under the current statelessness policies, access to statelessness determination procedures is sometimes framed as a right, but often as a procedure stateless persons need to undergo for their

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[469] It is interesting to note that the progress reports of the End Statelessness campaign often focus on increased access to the right to a nationality, even using the word 'empowerment', when speaking of affected persons, in particular in UNHCR, 'Good Practices Paper - Action 3: Removing Gender Discrimination from Nationality Laws'of 6 March 2015, p. 6. However, UNHCR publications 'Good Practices Paper - Action 1: Resolving Existing Major Situations of Statelessness' of 23 February 2015 and 'Good Practices Paper – Action 9: Acceding to the UN Statelessness Conventions' of 28 April 2015 still largely focus on numbers and less on rights.
[470] See chapter 5, section 5.4.1 above.
[471] See more in chapter 6, section 6.2.4.

own good, to fulfil their needs for protection and for a nationality. The rights-based language can be observed when the UNHCR Handbook declares that '[e]veryone in a State's territory must *have access* to statelessness determination procedures' [emphasis added].[472] The details of the procedure, in particular the language of procedural guarantees, is also clearly inspired by rights, proclaiming, for example, the right of the applicant to be heard in an interview, to submit a separate individual application for each family member, the right to have an administrative decision reviewed in a higher instance, and so on.[473]

At the same time, the Handbook also formulates identification as an obligation of states, as opposed to an individual right:

> *States must identify stateless persons within their jurisdictions [...] in order to comply with their Convention commitments*[474]

When discussing situations where identification of stateless persons might be undesirable, the patronizing language of deciding for those groups what is best for them is adopted:

> *Statelessness determination procedures generally assist States in meeting their commitments under the 1954 Convention. Their use, however, may not be appropriate in relation to certain stateless populations.*[475]
>
> *[...]*
>
> *Depending on the circumstances of the populations under consideration, States might be advised to undertake targeted nationality campaigns or nationality verification efforts rather than statelessness determination procedures.*[476]

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[472] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 69.
[473] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para. 71.
[474] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 8.
[475] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para. 58.
[476] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para. 58.

The Handbook also grants governments the power to initiate the procedure for identification of the statelessness status, 'given that individuals are sometimes unaware of statelessness determination procedures or hesitant to apply for statelessness status',[477] without discussing further why individuals might be hesitant, and why that hesitation should not be respected. Such language is contrary to the rights-based approach, which requires empowering affected persons to take their own decisions about whether, when and how to invoke their rights. This involves respecting any possible hesitations, and trusting individuals to define what their own best interests are. The argument whereby unawareness may be a reason to act on behalf of a stateless person is contrary to the principle of empowerment as well. Lack of awareness needs to be remedied by awareness-raising, as opposed to deciding on behalf of the hesitant and unaware vulnerable persons, thus perpetuating their unawareness, hesitation, and vulnerability. The Handbook does not mention whether the affected person should have a veto power over such a procedure to be continued on the government's initiative.

Thus, there is certainly a place for statelessness determination procedures under the rights-based approach to statelessness, but it is important that such procedures are framed, in rules as well as in policy documents, as tools of empowerment through rights. Access to identification of the statelessness status should be guaranteed as a matter of individual rights, and not as a government's obligation, or a measure to solve population-wide problems in a uniform manner. In particular the policy language needs to become more rights-aware, and respectful of the will of individuals to decide whether, when and how to invoke their right to recognition of their statelessness status.

7.2.4   Rights-based approach as a solution to tensions among current policy goals

The rights-based approach solves tensions between current policy goals described in chapter 6. The source of tensions between the goals of avoidance and protection under the current approach is rooted in the fact that nationality is not always desirable for, and desired by, the affected person. Possession of a nationality does not always lead to the improvement of their rights

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[477] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para. 68.

situation, while statelessness might be a status that results in access to rights and empowerment. If the goal to avoid statelessness is re-framed as a goal to promote access to the widest possible scope of nationality rights, where affected people are empowered rights-holders with agency to decide whether, when and how to invoke their nationality rights, the fact that some nationalities may not be desirable for some people under certain circumstances is no longer an issue that needs to be addressed at the policy level. This issue is addressed on the individual level by each affected person when deciding whether, when, and how to invoke relevant rights. A personal choice not to make use of a right to a nationality at a specific point in time is controversial in light of the general target goal to avoid statelessness. Once this target is demoted to a mere possible effect of promoting nationality rights, individual choices not to be(come) nationals are no longer problematic in light of the statelessness policy as a whole. The freedom of stateless persons to pursue their own life goals by choosing which rights to exercise and when becomes uncontroversial under the rights-based approach. The same applies to tensions between the goals of identification and avoidance. If identification of statelessness is framed as a matter of individual rights, as opposed to an objective goal or a means towards achieving other goals, and avoidance of statelessness is transformed into promotion of nationality rights, it is no longer a matter of policy choice to regulate how the two need to be prioritized. Each specific individual can establish their own priorities when deciding whether, when and how to invoke relevant rights.

7.2.5   Concluding remarks

The current international policy on statelessness certainly has some rights-based elements, in particular in the way the goal of protection of stateless persons is approached. However, many of the dominant elements of the current policy are inconsistent with the rights-based approach, and do not foster empowerment of affected persons through rights. Rules and principles guiding the framing and implementation in the goal on avoidance of statelessness are rooted in the needs-based, charity-based, and objective target-focused approaches, where the reduction in numbers of stateless persons seems to be the main motto and the ultimate goal. The goal of avoidance is

often implicitly or explicitly prioritized over the rights-oriented protection issues.[478] This leads to the overall statelessness policy being inconsistent with the rights-based approach. In order to achieve a rights-based policy on statelessness, the goal of avoiding statelessness needs to be reframed in terms of an ever-expanding scope of rights (not) to acquire, and (not) to lose a nationality. The rights related to acquiring, losing and retaining a nationality should not be in a hierarchical relationship with the rights to having one's statelessness status formally recognized, or the rights to protection as a stateless person. Individuals should be empowered to decide for themselves whether, when and how to invoke any of these rights to achieve their own personal self-defined well-being. Achieving a rights-based approach to statelessness involves adjusting specific rules,[479] as well as re-considering the language of policy documents and campaigns so as to emphasize empowerment through rights as the main policy priority; shifting the focus away from the numbers of stateless persons as indicators of policy success.

7.3   Rights-based approach and voluntary statelessness

7.3.1   Introductory remarks

The lack of a rights-based approach in current statelessness policies is strongly manifested in the context of voluntary statelessness, where the affected person's wishes do not correspond to the goal of avoiding statelessness. Instances of voluntary statelessness are confronting for the current statelessness policies; they reveal that many of the basic assumptions the policies are built on are unfounded. In cases of voluntary statelessness the nationality at stake is not desired by the relevant individual, indicating that statelessness might be empowering under certain circumstances and that nationality might not always be as great as the policy frames it to be. Essentially, voluntary statelessness questions core assumptions on the basis of which needs of affected persons are assessed, and charitable intentions of the institutions are defended. Addressing voluntary statelessness requires weighing on the one hand respect for free will of individuals, their empowerment to decide how to invoke their own rights, and their agency to

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[478] See chapter 6, section 6.3 above.
[479] Such as those on voluntary statelessness, see section 7.3 below.

define what constitutes their own well-being, against on the other hand quantifiable success indicators of current policies on statelessness.

The difference between the objective quantifiable target of avoiding statelessness and the rights-based approach of promoting empowerment through rights is sharply visible in cases of voluntary statelessness, as the two approaches warrant opposite responses. A rights-based approach empowers affected persons to pursue their own individual goals by invoking or choosing not to invoke relevant rights, also if this leads to temporary or permanent statelessness. An objective target-based approach of avoiding statelessness, on the other hand, would insist on the acquisition or retention of a nationality, regardless of the will and personal interests of affected persons.

In cases of involuntary (risk of) statelessness, the observable end-result of imposing a nationality as opposed to promoting a right to a nationality may be the same, but this does not mean that the rights-based approach only makes a difference in limited cases of persons who do not wish to acquire the specific nationality that is made available to them by policy institutions. As described in section 7.1 above, recognizing an entitlement to benefits has a profoundly different long-term impact on remedying vulnerability compared with simply providing the benefits. This impact is easier to observe and understand in cases where statelessness is voluntary, but it has an impact on how policy generally affects all vulnerable individuals.

Under the current international policy regime on statelessness, voluntary statelessness is either prohibited or strongly discouraged, illustrating the lack of a rights-based approach. This section first describes how different forms of voluntary statelessness are currently approached within the goal to avoid statelessness (sections 7.4.2, 7.4.3) and the goals to protect and identify stateless persons (section 7.4.4), and subsequently discusses how negative attitudes towards voluntary statelessness would need to be revisited under the rights-based approach (section 7.4.5).

7.3.2 Prohibition on voluntary statelessness

For the purposes of the analysis in this section, it is necessary to distinguish between active and passive voluntary statelessness. Active voluntary statelessness refers to the choice of an individual to *become* stateless, most commonly by renouncing their sole nationality. Passive voluntary statelessness refers to the choice to *remain* stateless, through for example refusing to acquire a nationality that is being offered. Active and passive statelessness are not mutually exclusive. A person may actively choose to renounce a nationality, and then later passively choose not to acquire a nationality, thus being both actively and passively voluntarily statelessness. However, the choice to rid oneself of a nationality and become stateless is addressed under the current policies in different ways than the choice to remain stateless by refusing to acquire a nationality. While the former is prohibited in almost absolute terms, the latter is rather looked down upon and indirectly discouraged.

It is also important to remember how voluntariness is defined in the current policy discourse on nationality and statelessness. As has already been noted in chapter 3, section 3.3.2, in statelessness policy documents voluntary statelessness refers not only to cases of ideological or political convictions according to which being a national of any state is unacceptable,[480] but also to much more common cases where the specific nationality practically accessible to a person is unacceptable to that person for whatever reasons. In the latter cases, the choice to become or remain stateless may have nothing to do with ideological objections to being a national in principle, but may be a result of a variety of possible objections to being a national of a specific state or at a specific time, or both. The same person may be open to being a national of another state, or to accessing that same nationality, but in a different context or at a different point in time.

The 1961 Convention prohibits voluntarily becoming stateless by renouncing a nationality, unless this interferes with the right to seek asylum or leave one's own country.[481] The European Convention on Nationality prohibits active voluntary statelessness altogether, without any

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[480] See for an example of a personal account of a contentious objection against having a nationality, C. Hanjian, *The Sovrien: An Exploration of the Right to be Stateless*, (Polysipre, 2003).
[481] UN Convention on the Reduction of Statelessness of 1961, art. 7(1).

exceptions.[482] The prohibition on active voluntary statelessness is quite central to international laws and policies on statelessness. Even in one of the UN General Assembly resolutions where the UNHCR's mandate was extended to statelessness, this mode of becoming stateless was singled out from other statelessness issues alongside arbitrary deprivation of nationality.[483]

This negative attitude towards active voluntary statelessness is reflected in national laws as well. Out of 77 countries covered by the EUDO-citizenship database on statelessness,[484] only 10 allow voluntary renunciation of nationality if it results in statelessness,[485] 9 of which are in the Americas.[486] Another 3 countries reserve the right to choose to voluntarily become stateless to naturalized citizens only.[487] The vast majority, 67 states, thus prohibit voluntarily becoming stateless for all or most of their citizens.

Interestingly, 6 of the states included in the EUDO-citizenship statelessness database, and 17 more states in Asia and Africa,[488] do not allow the voluntary renunciation of their citizenship under any circumstances, also not if another nationality is acquired,[489] and that fact is coded as being 'in line with international standards' in the EUDO database on statelessness.[490] The lack of respect for the agency and free will of an individual, even when it does not threaten the target of avoiding statelessness, is notably not problematized either within the EUDO-citizenship project, or by the current statelessness policy discourse more broadly. At the same time, allowing individuals to renounce their nationality without imposing on them the condition to be a national elsewhere is highly problematized by laws and policies on statelessness.

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[482] See Council of Europe European Convention on Nationality of 1997, art. 8(1).
[483] General Assembly Resolution No. A/RES/50/152, 9 February 1996, para. 16.
[484] EUDO-citizenship Statelessness Database, accessible here <http://eudo-citizenship.eu/databases/protection-against-statelessness>, accessed on 20 January 2017.
[485] Those are Belize, Bolivia, Colombia, Cuba, El Salvador, Greece, Panama, Paraguay, Peru and the United States.
[486] According to the GLOBALCIT, *Global Database on Modes of Loss of Citizenship*, Version 1.0, (Robert Schuman Centre for Advanced Studies, European University Institute 2017), another 18 in Africa and Asia, allow renunciation that can result in statelessness, those are Afghanistan, Brunei, China, Eritrea, Gabon, Israel, Kazakhstan, Kyrgyzstan, Mongolia, Myanmar, Nigeria, Philippines, South Sudan, Sri Lanka, Sudan, Syria, Tanzania, Uzbekistan, Vietnam, Zimbabwe.
[487] Those are Ecuador, Haiti and Nicaragua.
[488] See GLOBALCIT, *Global Database on Modes of Loss of Citizenship*, Version 1.0, (Robert Schuman Centre for Advanced Studies, European University Institute 2017); the countries are Bhutan, Congo Kinshasa, Egypt, Equatorial Guinea, Kuwait, Lesotho, Liberia, Libya, Nepal, Niger, North Korea, Oman, Thailand, Qatar, Saudi Arabia, United Arab Emirates, and Yemen.
[489] Those are Argentina, Costa Rica, Dominican Republic, Guatemala, Honduras and Uruguay.
[490] See EUDO-citizenship Statelessness Database, accessible here <http://eudo-citizenship.eu/databases/protection-against-statelessness>, under Mode S07: Renunciation Citizenship.

The Law on the Citizenship of Turkey is worth special mention, as it formulates the renunciation of nationality in the context of an individual's right of choice, but subsequently limits that right by the objective target of avoiding statelessness:

> *The persons fulfilling the conditions below can renounce Turkish citizenship within three years after they become adults*
>
> *[...]*
>
> *(2) If the provisions mentioned above would render the person stateless, the right of choice shall not be applied.*[491]

The language of depriving those who voluntarily wish to become stateless of their 'right of choice' is very telling.

Passive voluntary statelessness is perhaps not prohibited in equally absolute terms as active voluntary statelessness under current statelessness policies, but it is certainly not included in international policy documents as a valid choice a person might want to make, and which needs to be respected. There are no legal standards for solving existing cases of statelessness by enforcing naturalization, since naturalization of adults is largely perceived as an act which has to be voluntary.[492] Policy documents on statelessness often assume that all stateless persons want to obtain a nationality, and do not address scenarios where this might not be the case.[493] The 1949 UN Study on Statelessness[494] is a notable exception by at least bringing up the issue of stateless persons possibly not wanting to naturalize in their host state. The Study dismisses this possibility, however, as simultaneously unlikely and unproblematic, with unconvincing reasoning.[495] Current international policy discourse on statelessness rarely directly addresses passive voluntary statelessness, but in the discourse on protection of stateless persons, discussed in the next section, disrespect towards such choices is apparent.

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[491] Turkish Citizenship Law, Law No. 5901, (29 May 2009), art. 34(2).
[492] See more in chapter 4, section 4.4 above.
[493] See, for example, UNHCR, *Global Action Plan to End Statelessness*, (2014), UNHCR, *Ending Statelessness Within 10 Years. A Special Report*, (4 November 2014).
[494] UN, *A Study of Statelessness*, UN Doc E/1112; E/1112/Add.1, (August 1949).
[495] The reasoning is discussed in more detail in chapter 6, section 6.2.3 above.

7.3.3   Identification and protection of voluntarily stateless persons

In the discourse on identification and protection of stateless persons, the choice of having become or remained stateless is often viewed in a negative light, as an honest mistake at best,[496] or as a sneaky attempt to trick the righteous system at worst.[497] Voluntarily stateless persons are not entirely excluded from identification and protection mechanisms, but are clearly disadvantaged compared to involuntarily stateless persons whose personal life goals coincide with the goal to avoid statelessness.

The UNHCR Handbook on the Protection of Stateless Persons emphasizes that the definition of a stateless person does not say anything about statelessness having to be involuntary in order for a person to qualify as stateless.[498] However, when it comes to protection, the UNHCR does allow discrimination between those who are voluntarily and involuntarily stateless, without an apparent basis for such discrimination in the 1954 Convention. Those who are voluntarily stateless are furthermore divided into those who made their choice 'in good faith', hoping to obtain another nationality, and therefore did not intend to become or remain stateless, and those who 'voluntarily renounce a nationality because they do not wish to be nationals of a particular State or in the belief that this will lead to grant of a protection status in another country'.[499] In the case of the latter the Handbook emphasizes that the host state 'need not necessarily grant or renew permission for stay to such individuals' and that such stateless persons are not entitled to 'all of the rights foreseen by the 1954 Convention'.[500] The tone of speaking about those who voluntarily became stateless without really meaning to and those who 'maliciously' became stateless to benefit from protection is very different. The former are expected to willing cooperate with the re-acquisition of the former nationality, where the host state's efforts should be directed towards helping them reverse the 'mistake' of having become stateless. If they in fact cooperate with re-acquisition of the former nationality, and thus do not show signs of making the choice of remaining stateless, but despite everyone's best efforts the re-acquisition does not happen, the

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[496] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), paras. 51, 158-160.
[497] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), paras. 161-162.
[498] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para. 51. See also chapter 5, section 5.4.3 above.
[499] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 161.
[500] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 162.

host state is obliged to offer such stateless persons full protection. In contrast to that, stateless persons whose choice to become stateless was not a mistake, but is instead an expression of a wish not to be a national of a particular state for whatever reasons, are presented as not entitled to protection. The Handbook refers to the acceptability of coerced displacement abroad of such persons, and emphasizes the lack of obligation on the part of the host state to secure their access to rights.

Thus, according to the UNHCR guidance, voluntariness should not matter in the context of identification of statelessness, but is definitely penalized in the context of protection. Where individuals become stateless of their own free will, the emphasis is not on protection, but on the re-acquisition of former nationality. The more conscious the choice to become stateless is, the less the stateless person is entitled to protection and respect. Such a discourse is clearly not in line with the rights-based approach, where individuals are not dictated as to what they ought to do to have a better life, but are instead equipped with a set of relevant rights, to be invoked when and how they please. Empowering the vulnerable through rights to take agency over their lives is incompatible with penalizing individual choices about whether or how to rely on relevant rights. Discriminating between voluntarily and involuntarily stateless persons in their ability to access protection reveals that the policy priority is not that of empowering the affected persons through rights, but instead reducing the numbers of the stateless for some other reasons unrelated to empowerment.

National practice on identifying and protecting voluntarily stateless persons is difficult to analyse, since only a handful of states have explicit policies on identification and protection of stateless persons generally, and special mention of voluntarily stateless persons is rare in national protection and identification laws and practices. States like Hungary form an interesting example for excluding individuals who voluntarily renounce their nationality even from being identified as stateless,[501] contrary to the UNHCR guidance. A somewhat different approach can be seen in a Dutch judgment that dealt with a voluntarily stateless former Georgian national, who renounced his citizenship for political reasons. The court interpreted the UNHCR guidance as

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[501] Hungarian Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.), Section 78, see also chapter 5, section 5.4.3 above.

requiring the Netherlands to extend access to at least some minimum rights to the applicant, and in particular the right to identity documents.[502]

Thus, while the 1954 Convention does not draw a distinction between voluntary and involuntary statelessness, current internationality policy discourse clearly normalized discrimination between voluntarily and involuntarily stateless persons in their entitlement to protection. This discourse clearly falls short of a rights-based approach, although it is unclear what effects it has on national practices of addressing statelessness.

7.3.4   Rights-based approach to voluntary statelessness

The prohibition on voluntary statelessness cannot be justified by reference to the human right to a nationality.[503] In this section I make a case that under the rights-based approach voluntary statelessness cannot be prohibited or discouraged.

Prohibition of voluntary statelessness has been heavily criticized from the point of view of agency of the right-holders. This has already been expressed by the Special Rapporteur of the International Law Commission Manley Hudson in his report from 1952, maintaining that it would be undesirable 'to tie the individual irrevocably to a State from which he has severed his connexion', also if no new nationality is replacing the old one.[504] Matthew J. Gibney argues that '[t]he duty of states to offer citizenship to stateless people in their territory thus should create no correlative duty on the part of the stateless to accept the offer',[505] thus making a case against the prohibition of passive voluntary statelessness.

The issue of the prohibition of renunciation that results in statelessness is still the main reason cited by the United States of America for not ratifying the 1961 Convention.[506] Prohibition of

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[502] See, The Hague District Court (the Netherlands) *X v the Mayor of The Hague*, No. SGR 13/2490, (ECLI:NL:RBDHA:2014:2255), of 19 February 2014.

[503] See more in chapter 3, section 3.3.3.

[504] M. O. Hudson, Special Rapporteur of the International Law Commission, report 'Nationality, Including statelessness', *Yearbook of the International Law Commission*, Vol. II, Doc. No. A/CN.4/50, (1952), p. 21.

[505] M. J. Gibney, 'Statelessness and citizenship in ethical and political perspective' in *Nationality and Statelessness under International Law* by A. Edwards and L. van Waas (eds.), (CUP 2014), pp. 61-62.

[506] P. J. Price, 'Stateless in the United States: Current Reality and a Future Prediction', *Vanderbilt Journal of Transnational Law*, Vol. 46, No. 2, (2013), pp. 452-453; S. J. Cummins, *Digest of United States Practice in*

voluntary stateless is described as being in conflict with the 'right of expatriation as a natural and inherent right of all people',[507] and the 'right of Americans to renounce their nationality, even if doing so would lead to statelessness'.[508] Active voluntary statelessness is thus seen as an important right.

Ironically, the most highly criticized example of forceful imposition of nationality on stateless persons, thus a violation of the right to passive voluntary statelessness, originated in the US, in particular the imposition of US citizenship on indigenous people in the 1920s.[509] The process of imposing US citizenship on the indigenous inhabitants has been labelled by scholars as 'repressive emancipation', defined as an 'attempt to liberate a people from conditions they themselves do not consider oppressive'.[510] Nowadays, scholars invoke the concept of repressive emancipation to refer to policies that focus too much on citizenship and the imposition of a state model as the only appropriate route to legal emancipation for marginalized communities that are affected by statelessness.[511]

Any justification of the prohibition on voluntary statelessness that invokes the well-being or best interests of affected individuals are patronizing, as they imply that affected persons are not capable of deciding on what is good for them, and thus their freedom of choice ought to be limited. Moreover, justifications based on well-being of individuals necessarily imply that stateless persons are poorly protected and cannot enjoy a decent life as a result of deficient achievement of the goal to protect stateless persons. The justification to prohibit voluntary

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International Law, (OUP 2006), pp. 1-2; N. Green and T. Pierce, 'Combatting statelessness: a government perspective', *Forced Migration Law Review*, No. 32, (2009), p. 35.

[507] S. J. Cummins, *Digest of United States Practice in International Law*, (OUP 2006), p. 2.

[508] N. Green and T. Pierce, 'Combatting statelessness: a government perspective', *Forced Migration Law Review*, No. 32, (2009), p. 35

[509] See 1924 US Indian Citizenship Act. There is, however, controversy as to whether indigenous peoples can indeed be seen as stateless, as they often held the status of membership in tribes, and it is unclear whether the status of tribes can be seen as state-like for the purposes of defining nationality and statelessness in this context. See more in T. Bloom, 'Members of colonised groups, statelessness and the right to have rights' in *Understanding Statelessness* by T. Bloom, K. Tonkiss, and P. Cole (eds.), (Routledge 2017), pp. 153-172.

[510] See A. Witkin, 'To Silence a Drum: The Imposition of United States Citizenship on Native Peoples', *Historical Reflections/Réflexions Historiques*, Vol. 21, No. 2, (Spring 1995), p. 355; T. Bloom, 'Members of colonised groups, statelessness and the right to have rights' in *Understanding Statelessness* by T. Bloom, K. Tonkiss, and P. Cole (eds.), (Routledge 2017), p. 161; R. Evans Paulson, *Liberty, Equality, and Justice: Civil Rights, Women's Rights, and the Regulation of Business, 1865-1932*', (Duke University Press, 1997), p. 75.

[511] For example, L. N. Kingston, 'Statelessness as a Lack of Functioning Citizenship', *Tilburg Law Review*, Vol. 19, No. 1-2, (2014), pp. 133-134

statelessness due to the vulnerability of stateless persons is used by the same institutions that fail to achieve the protection of stateless persons under relevant statelessness policies.[512]

The rights-based approach requires the acceptance of voluntary statelessness, passive and active, as consequences of the freedom of affected persons to decide whether, when and how to invoke their nationality rights. It also requires, as far as possible, the recognition of the wish to become and remain stateless as a right of its own, unrelated to the right to a nationality.

It is also important to realize that allowing voluntary statelessness will not necessarily correlate with externally defined objective indicators of well-being of affected persons. People do not always make choices that lead to the improvement of their financial situation or measurable physical well-being, or other indicators of a life standard as quantified by policy institutions. A decrease in such indicators is in no way an indication of an unsuccessful policy from the point of view of the rights-based approach.

A rights-based approach to statelessness policies that aims at the empowerment of affected persons through rights would necessarily result in permitting and respecting voluntary statelessness, and ending discrimination between voluntarily and involuntarily stateless persons in their access to identification and protection.[513] The rights-based approach requires prioritizing respect for individual choices as an expression of their empowerment and agency over any objectively quantifiable criteria such as the number of instances of statelessness or measurable welfare indicators among affected persons.

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[512] A similar type of paradox is observed by Aleinikoff when discussing limitations on the power of the US to denationalize their citizens. Limitations on the power to denationalize are justified by the US legislator by the hardships a person might experience without a citizenship, while those hardships (in this case – deportations) are only possible because the same legislator allows for wide discretion to deport foreigners. See T. A. Aleinikoff, 'Theories of Loss of Citizenship', *Michigan Law Review*, Vol. 84, No.7, (June 1986), p. 1487.

[513] See also P. Uvin, 'From the right to development to the rights-based approach: how 'human rights' entered development', *Development in Practice*, Vol. 17, No. 4–5, (2007), p. 603: 'any process of change […] ought to respect the dignity and individual autonomy of all those whom it claims to help'.

7.4 Recommendations and conclusions: towards a rights-based statelessness policy

In this chapter I explained what the rights-based approach means, and how it should be applied to statelessness policies. The current international statelessness regime refers to rights of stateless persons, and claims a concern with the empowerment and representation of those affected by statelessness. However, the language and mechanisms of the policy as a whole are focused on achieving objective quantifiable targets set by policy makers, first and foremost reduction of instances of statelessness. This approach may fulfil some externally identified needs of affected persons, but does not contribute to their empowerment through rights.

The rights-based approach requires, and provides the relevant criteria for, distinguishing between the interests of persons affected by statelessness on the one hand, and other interests which may perhaps frame the statelessness policies. The latter interests are not necessarily unjustifiable, there are merely not justifiable as a rights-based policy. States may be have strong valid interests in controlling the numbers of stateless persons in specific ways for the purposes of maximizing state sovereignty,[514] controlling access to limited public goods, or for maintaining 'orderly international relations'.[515] The current international policy regime often clusters such interests together with interests of affected persons.[516] The necessity of reducing statelessness for the sake of the well-being of affected persons is mentioned together with statelessness contributing to 'political and social tensions'.[517] Similarly, the necessity to protect stateless persons for the sake of the affected persons is casually followed by a statement that not protecting the stateless 'can impair the economic and social development of states'.[518] This is problematic for designing a rights-based statelessness policy focused on empowerment of affected persons through rights. Other interests, in particular those of institutions that may design and implement those policies, may coincide or compete with the interests of empowerment through rights. Such shared as well

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[514] See also T. Molnar, '(Ab)normality of international migration law: normative and structural asymmetries and contradictions', *European Society of International Law Blog*, (11 May 2015); K. Swider, 'States as a Root Cause of Statelessness', *European Network on Statelessness Blog*, (28 May 2015).
[515] M. O. Hudson, Special Rapporteur of the International Law Commission, report 'Nationality, Including statelessness', *Yearbook of the International Law Commission*, Vol. II, Doc. No. A/CN.4/50, (1952), p. 19.
[516] See more in chapter 5, section 5.5 above.
[517] UNHCR *Global Action Plan to End Statelessness* (2014), p. 6.
[518] UNHCR *Global Action Plan to End Statelessness* (2014), p. 6.

as competing interests need to be explicitly recognized, and in the context of competing interests an open critical weighing process needs to be applied. The rights-based approach may end up benefiting other interests than those of affected persons, as long as the former happen coincide with the latter. Under the current international policy, in particular in the context of avoiding statelessness, the priorities seem to be reversed: interests of affected persons are fulfilled to the extent they coincide with the objective quantifiable target of avoiding statelessness, where the latter is neither empowering affected persons, nor is owned by them. Conflating the interests of policy institutions with those of affected persons, and presenting the two as necessarily coherent, impedes an open discussion about weighing such interests when they come into conflict with each other.

Scholarly studies have problematized the way interests of states, in particular, play too important a role in current statelessness policies. Caia Vlieks, Ernst Hirsch Ballin and María José Recalde Vela, for example, suggest that 'solutions to statelessness must be meaningful to the individual as well as to States'.[519] The authors indicate concern for interests of the individuals, yet set a standard which is too low in light of the rights-based approach. States have no business having their interests represented by a policy the aim of which is to empower affected vulnerable persons through rights. The interests may happen to coincide, but states' interests do not need to be taken into account under a rights-based policy. That being said, states' interests may be brought into the discussion on statelessness policies from a point of view external to the rights-based discourse, acknowledging the separation between the two sets of interests. A rights-based approach allows the disentangling of such interests, and prioritizes the interests of affected persons as a matter of its mandate. Disguising compromises between competing interests as a rights-based approach only clouds an open critical discussion about how different interests are balanced against each other. A rights-based approach thus requires a confrontational acknowledgement that not everything that policy institutions do that affects vulnerable persons is in fact in the interests of those vulnerable persons, and that other interests may under certain circumstances take priority. Such priorities need to be openly and transparently defended by policy institutions against the rights-based norms they are potentially competing with, creating avenues for critical assessment of relevant policy priorities, leading to better transparency and accountability.

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[519] C. Vlieks, E. Hirsch Ballin, and M. José Recalde Vela, 'Solving Statelessness: Interpreting the Right to Nationality', *Netherlands Quarterly of Human Rights*, Vol. 35, No. 3, (2017), p. 160.

This chapter has illustrated the main ways in which the current statelessness discourse diverges from the rights-based norms, and how the shift to a rights-based policy could take place. As discussed in section 7.2, the current statelessness policy discourse already contains many rights-based elements. The goal of protecting stateless persons is based on recognizing stateless persons' rights, but without pursuing objectively quantifiable welfare indicators among stateless populations. Unfortunately, in the current policy discourse the rights-based protection measures are often framed as subordinate to the goal of avoiding statelessness,[520] thus de-prioritizing the existing rights-based aspects within the policy discourse. In order to achieve an overall coherent rights-based policy, the existing rights-based elements of the statelessness policy need to be brought forward and emphasized, instead of being subordinated to other elements of policy that are problematic in light of rights-based values.

Similarly, the discourse on identification of stateless persons contains many rights-based elements, heavily relying on recognition of rights and entitlements of affected persons. However, identification is overall often framed as a means to achieving other statelessness policy goals, and not recognized as an individual right in itself. Such an attitude towards identification of stateless persons subsequently allows for patronizing language, and lack of respect for individual choices of affected persons on whether, when and how to invoke relevant rights. Identification of statelessness status, under the rights-based approach, needs to be framed as an individual right, where the affected persons are free to invoke it as they see fit, and where the identification in itself is not a mere tool for achieving external objectives set by policy institutions.

In the context of avoidance of statelessness, nationality rights, and in particular the human right to a nationality, are often emphasized, but unfortunately are not prioritized above the objectively quantifiable target of reducing the numbers of stateless persons. The effects of this are particularly obvious in the context of voluntary statelessness. Under a rights-based approach to statelessness policies, the reduction of statelessness can be an effect, but not a goal. The right to a nationality, or rather the expansion of nationality rights more broadly, needs to become a statelessness rights-based policy objective. With the shift of focus on rights, and respect for the agency of affected persons to choose whether, when and how to invoke those rights, the negative attitude towards voluntary statelessness makes no sense.

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[520] See more in chapter 6, section 6.3 above.

In order to change the statelessness policy discourse into a rights-based one, the use of language plays a central role. Language is a powerful policy tool which is often underestimated in legal analysis of policies. As can be seen in chapters 5 and 6, the current statelessness policy discourse is a lot more than mere reproduction of the rules of the two main statelessness conventions. Discrimination between voluntarily and involuntarily stateless persons in their access to protection is, for example, entirely a result of the current discourse, with no basis in the Conventions. It is a result of language that implicitly or explicitly prioritizes avoidance over protection,[521] and objectively quantifiable targets over the agency of the affected persons; language that casually labels statelessness as a 'problem' and nationality as a 'solution';[522] language that labels stateless persons who want to be nationals as having 'good faith', and counter-poses these to stateless persons who do not wish to be nationals, implying those are not in good faith.[523] Discourse and language are powerful tools that often in unnoticeable ways 'slowly redefine the margins of acceptable action; create opportunities for redefining reputations and shaming; change incentive structures and the way in which interests and preferences are defined; influence expectations, etc'.[524] The shift towards a rights-based approach is first and foremost dependent on shifts in words that are used in policy documents, academic literature, and public discussions to describe statelessness, nationality, vulnerability that results from a nationality status and institutions that create and implement relevant policies. Thus, language that victimizes persons affected by statelessness,[525] depicts them as unaware, unknowledgeable and

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[521] See more in chapter 6, section 6.3 above.

[522] See, for example, in C. Vlieks, E. Hirsch Ballin, and M. José Recalde Vela, 'Solving Statelessness: Interpreting the Right to Nationality', *Netherlands Quarterly of Human Rights*, Vol. 35, No. 3, (2017), p. 165: 'Applying this idea to the problem of statelessness leads to the proposition that, as statelessness can (legally) only be solved by acquisition of a nationality and nationality presupposes a ''genuine connection'', statelessness can only be solved by the acquisition of a nationality representing a real link between the person and the State'; D. Weissbrodt and C. Collins, 'The Human Rights of Stateless Persons', *Human Rights Quarterly*, Vol. 28, No. 1, (2006), p. 276: 'The doctrine of the genuine and effective link is a viable solution to the problem of statelessness because it is generally "not difficult to determine to which state an individual has a genuine effective link for purposes of nationality decisions'; G. La Rocca and L. Prosperi, 'Απόλιδας: an analysis of the international legal framework in the field of statelessness and the U.N.H.C.R.'s communication campaign', *International Review of Sociology*, Vol. 27, No. 2, (2017), pp. 269, 273: 'Statelessness is a social problem' and 'the best solution for statelessness is to turn […] existing links with […] of birth and upbringing into the legal bond of nationality'.

[523] See UNHCR, *Handbook on the Protection of Stateless Persons*, (Geneva 2014), paras. 158-162. See also section 7.3.3 above.

[524] P. Uvin, 'From the right to development to the rights-based approach: how 'human rights' entered development', *Development in Practice*, Vol. 17, No. 4–5, (2007), p. 599.

[525] For example, R. Letschert and Z. van der Velde, 'Collective Victimization of Stateless Peoples. The Added Value of the Victim Label', *Tilburg Law Review*, Vol. 19, No. 1-2, (2014), pp. 285-293; See also UNHCR, *Ending Statelessness Within 10 Years. A Special Report*, (4 November 2014), which refers to stateless persons as being

confused,[526] in need of being patronized, in need of charity, or generally language that focuses on their needs as opposed to their entitlements, has to be avoided. Persons affected by statelessness are empowered rights-holders under the rights-based statelessness policy discourse. Similarly, statelessness should not be casually labelled as a 'problem' outside a specific individual context where it is seen as problematic by the specific affected person; and nationality should therefore not be casually referred to as a 'solution', unless in the context of a specific affected person pursuing a nationality as a solution to his or her problems.

The rights-based approach, by prioritizing the empowerment of the vulnerable, solves tensions among current policy goals described in chapter 6.[527] The source of tensions between the goals of avoidance and protection is rooted in the unrecognized fact that nationality is not always desirable for, and - most importantly - desired by, the affected person. Possession of a nationality does not always lead to the improvement of their rights situation, while statelessness might be a status that results in access to rights and empowerment. If the goal to avoid statelessness is re-framed as a goal to promote access to the widest possible scope of nationality rights, where affected people are empowered rights-holders with agency to decide whether, when and how to invoke their nationality rights, the fact that some nationalities may not be desirable for some people under certain circumstances is no longer an issue that needs to be addressed at the policy level. This issue is addressed on the individual level by each affected person when deciding whether, when, and how to invoke relevant rights. A personal choice not to make use of a right to a nationality at a specific point in time is controversial in light of the general target goal to avoid statelessness. Once this target is demoted to a mere possible effect of promoting nationality rights, individual choices not to be(come) nationals are no longer problematic in light of the statelessness policy as a whole.

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under 'one common curse, the lack of any nationality', and to statelessness as 'injustice', on p. 2. See more on injustice frames as opposed to rights frames in chapter 1, section 1.2 above.
[526] For example, UNHCR, *Handbook on the Protection of Stateless Persons*, (Geneva 2014), para 68, which reads: 'Given that individuals are sometimes unaware of statelessness determination procedures or hesitant to apply for statelessness status, procedures can usefully contain safeguards permitting State authorities to initiate a procedure'.
[527] Chapter 8 below discusses examples of how tensions among policy goals get resolved in practice by applying the rights-based approach.