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8 Applying a rights-based approach to examples of policy responses to statelessness

8.1 Introductory remarks

This chapter consists of examples of policy responses to statelessness which involve tensions among policy goals on statelessness discussed in chapter 6. The cases discussed in this chapter exemplify the claim made in the previous chapter that tensions among statelessness policy goals are a symptom of the current policy's failure to prioritize empowerment of affected persons through rights.

Each sub-section discusses one policy response to an instance of statelessness. I briefly describe the relevant facts of the case, identify how tensions among policy goals on statelessness are manifested in each case, discuss to what extent affected persons have been empowered through rights in each case, and analyse how each case reveals that tensions among the policy goals are a manifestation of a lack of a policy response that prioritizes empowerment through rights.

I define policy responses as any decision of a state authority, local or national, who is confronted with an instance of statelessness. This includes not only written documents outlining authorities' formal positions about the case, such as administrative decisions, court judgments, legislation, or guidelines for civil servants, but also the factual action or inaction of authorities in response to the case. Instances of statelessness are also defined broadly as individual cases of statelessness, as well as populations of stateless persons towards whom there was an identifiable policy response.

8.2 Dangerous nationality: the case of army duty

This case study discusses the peculiar situation of male individuals of Armenian descent, who are stateless but could easily obtain Armenian nationality if they join the Armenian army.

After the fall of the Soviet Union and the formation of new states with their unique nationality laws, many former USSR nationals who were abroad in the early 1990s had unresolved questions about their nationality status. Due to legal impossibility, restrictive deadlines and lack of information, general confusion about the applicable rules in newly formed poorly functioning bureaucracies, or any other numerous possible reasons, not all of them became nationals of any of the successor states of the USSR.[528] Second generation persons born outside the USSR to stateless parents, are also often stateless, unless they acquire nationality iure soli.

Samvel is an example of a second generation post-USSR stateless person of Armenian descent.[529] He was born in Germany in 1993 to parents from the former Soviet Union, both of Armenian ethnic origin. His parents resided in the territories of Russia, Moldova and Armenia while those were still parts of the Soviet Union. They left the Soviet Union before its dissolution, and were not within the territories of any of the successor states when the latter were formed. They never went back, and never received any nationality from the successor states of the Soviet Union. In 1995 his family came to the Netherlands and applied for asylum. Samvel was registered in the Dutch population registry as Armenian, presumably based on the erroneous interpretation of the Armenian nationality legislation at the time. In 2007 the family's lengthy asylum procedure was still pending. Exhausted by the instability of their legal situation, the parents decided to accept a residence arrangement offered under an amnesty regulation.[530] This regulation provided numerous asylum seekers in prolonged procedures the right to reside legally in the Netherlands, but with a lower level of protection than normally available for recognized

[528] See examples of other cases of post-USSR statelessness in section 8.4 below, and in C. Vlieks, 'Contexts of Statelessness: The Concepts "Statelessness *In Situ*" and "Statelessness in the Migratory Context"' in *Understanding Statelessness* by T. Bloom, K. Tonkiss, and P. Cole (eds.), (Routledge 2017), pp. 45-46

[529] This specific chapter is based on two almost identical cases from the Dutch administrative practice. The names and some facts have been altered to protect the identity and privacy of the persons involved, and simplify legal aspects of the case that are not essential to this discussion. Relevant case files and records of interviews are on file with the author. The case was also discussed in K. Swider, 'Why End Statelessness?' in *Understanding Statelessness* by T. Bloom, K. Tonkiss, and P. Cole (eds.), (Routledge 2017), pp. 199 – 201; and in K. Swider, 'Let's talk about the army', *European Network on Statelessness Blog*, (23 July 2015).

[530] The so-called Ranov Amnesty (in Dutch - *Regeling ter afwikkeling van de nalatenschap van de oude Vreemdelingenwet (Ranov)*) of 25 May 2007.

refugees. One of the conditions for this residence permit was that any asylum claims would immediately and irrevocably be dropped.

When Samvel turned 18, he applied for a Dutch passport. He found out that he first needed to go through a naturalization procedure. He complied with all the substantive requirements for naturalization, such as demonstrable high level of integration in the Dutch society, sufficient number of years of legal residence, no criminal record and so on. However, he encountered a problem at the administrative level, when he was unable to show his foreign passport to the Dutch authorities. The requirement to identify oneself with a foreign passport in the naturalization procedure applies to all candidates, and only refugees and stateless persons are exempted. Since Samvel's residence permit was not a refugee permit, and since the Dutch authorities has registered him as an Armenian national, he could not make use of either exception. He attempted to argue that he was in fact stateless, but since the Netherlands lacked an adequate statelessness determination procedure,[531] he was not able to establish the fact of his statelessness in the eyes of Dutch authorities. Without a passport from Armenia, his naturalization was denied by the naturalization agency, as well as upon appeal in court.

Even though based on Armenian nationality legislation Samvel is not an Armenian citizen,[532] he made an inquiry with the Armenian embassy whether his situation could be resolved by easily obtaining the Armenian nationality and an Armenian passport, in order to immediately exchange those for Dutch nationality. He did not receive a formal response, but was told informally that if he would be willing to join the Armenian army, he would immediately be granted nationality and a passport.[533]

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[531] See more in K. Swider, 'Statelessness Determination in the Netherlands', *Amsterdam Centre for European Law and Governance Working Paper Series*, No. 2014-04, (May 2014); Adviescommissie Vreemdelingenzaken (Dutch Advisory Committee on Migration Affairs), *Geen land te bekennen. Een advies over de verdragsrechtelijke bescherming van staatlozen in Nederland*, (December 2013); UNHCR, *Mapping Statelessness in the Netherlands*, (November 2011). Note that the Netherlands is working on a new statesslessness determination procedure, but the relevant laws have not been adopted yet. See Dutch Proposal for a Law on Statelessness Determination (in Dutch – *Voorstel van Rijkswet vaststellingsprocedure staatloosheid*) of 28 September 2016.

[532] The initial determination of citizenry in Armenia relied mostly on the Soviet registration system with the republics and on residence in Armenia at the time of the adoption of Armenian constitution, see Law on the Citizenship of the Republic of Armenia of 6 November 1995, art. 10. Since Samvel was neither resident in Armenian at the time the Constitution was adopted, nor possessed the citizenship of the Soviet Republic of Armenia, he is not an Armenian citizen according to the law in force.

[533] The acquisition of nationality could presumably happen on the basis of wide discretionary powers of the state to naturalise individuals of Armenian origin without the latter having to comply with formal requirements for

Armenia is at war with a neighboring state, and while a cease-fire has been formally established, it is routinely violated. Serving in the Armenian army thus entails a high risk of actual danger in combat. In addition, and perhaps more importantly, the human rights situation within the army is so poor that instances of non-combat deaths and injuries are not uncommon.[534] All this makes acquisition of Armenian nationality by serving in the Armenian army a dangerous option.

Samvel thus is stateless, but has a nationality within reach. It is not the nationality he aspires to have and which is appropriate to his life circumstances,[535] but it is nevertheless an alternative to statelessness. His human rights situation, however, would suffer significantly if he became an Armenian national compared to his current human rights situation as a permanent legal stateless resident of the Netherlands.

The human rights situation of Samvel in the Netherlands is not below the required standards for the protection of stateless persons of 1954 Convention. Even though he has not been identified as stateless, and his access to rights is provided to him on different grounds, he has a stable legal residence in the Netherlands and benefits from a wide range of rights.

His facilitated naturalization is impeded by the Netherland's failure to identify him as stateless, which is a gap that the Netherlands should doubtless address in order to comply with its international obligations.[536] But there is no obligation on the Netherlands to consider Samvel as a Dutch national, merely to facilitate his access to the naturalization procedure. Germany (where he was born) also has no strict obligation under the 1961 Convention to grant citizenship to Samvel, as he has not been living there for 5 years, and neither does Armenia. It appears appropriate for the Netherlands to accept Samvel as a citizen, as he has established his life there since a very young age. However, as the relevant nationality laws and practices stand right now, Armenian citizenship is the only one accessible to him. This fact does not violate relevant

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naturalisation, see Law on the Citizenship of the Republic of Armenia of 6 November 1995, art. 13. However, the exact legal grounds for acquisition of nationality were not made explicit by relevant authorities.

[534] See Council of Europe, *Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Armenia, from 5 to 9 October 2014*, No. CommDH(2015)2, (10 March 2015), pp. 22-23.

[535] See more on the right to access a specific nationality appropriate to the life circumstances in E. Hirsch Ballin, *Citizens' Rights and the Right to be a Citizen*, (Brill 2014), and 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), pp. 158-175.

[536] The Netherlands has since started working on a new statelessness determination procedure, but the relevant laws have not been adopted yet. See Dutch Proposal for a Law on Statelessness Determination (in Dutch – *Voorstel van Rijkswet vaststellingsprocedure staatloosheid*) of 28 September 2016.

international legal norms. The norms on the reduction of statelessness do not impose standards on the type of nationality which needs to replace statelessness: there is no requirement of genuine links with the state, or that the state is prepared to protect the human rights of the person in question.[537]

Eliminating Samvel's statelessness by obtaining Armenian nationality would thus be in line with the goal to avoid statelessness, but not with the goal to protect him, and with his personal wishes to become a national of the Netherlands. His situation as an unrecognized stateless person in the Netherlands is significantly better in terms of protection of his rights than the situation he would need to face as a result of obtaining the Armenian nationality.

He has a strong connection with the Netherlands; obtaining Dutch nationality would increase his level of protection compared to his current situation, and be in line with his personal aspirations. However, favouring solutions that are in line with the wishes of affected persons or that ultimately lead to better protection needs is not an explicit priority in the current statelessness policy. Armenian nationality would appear a valid solution to Samvel's statelessness under the current statelessness regime.

A rights-based approach to statelessness policies would require that each state involved prioritizes empowerment of Samvel by recognizing his access to nationality rights, without deciding on his behalf whether, when, and how he should invoke those rights, or which nationality is most appropriate for him. Recognition and enforceability of Samvel's entitlement to one or more nationalities is a measure of success of a rights-based statelessness policy, not his acquisition of any of those nationalities. Samvel's potential choice to remain stateless is not problematic under a rights-based policy. His inability to enforce his right to the Dutch nationality may be problematized as disempowering, but not his choice to refuse to invoke his rights to other nationalities. His choice to prioritize his humanitarian and human rights situation over being a national is thereby also not problematic, but merely an exercise of his agency to achieve maximum empowerment through rights available to him.

[537] See more in chapter 6, section 6.2.2 above.

8.3 Unrecognized statelessness: the case of Dutch municipal records

This case follows up on one aspect of the previous case, and considers the Dutch administrative practice of registering statelessness. It illustrates how not only the protection, but the mere recognition of statelessness comes into tension with the goal of avoiding statelessness, pushing affected persons into further vulnerability. In theory such tension should not exist, as long as the identification of an individual as stateless is understood as a declaratory and not a constitutive act.[538] In practice, however, the differences between constitutive and declaratory findings might get blurred, and the determination of statelessness may be perceived by relevant authorities as creating statelessness. Determination of a statelessness status can in some contexts be perceived as validating condemned practices that lead to the creation of statelessness, or as discouraging a solution that involves granting a nationality status by formalizing the absence of a nationality. This tension between statelessness status determination and the goal to avoid statelessness has already been observes in chapter 6 section 6.2.4 in the context of UNHCR's policies towards in situ stateless persons. Similar perceived tensions between the goal to avoid statelessness and the goal to identify stateless persons are illustrated by the current Dutch administrative instructions and practice on non-registration of instances of statelessness.

While the Netherlands has committed to introducing a dedicated statelessness determination procedure already in 2014,[539] and drafted a relevant legislative proposal in 2016, there is at the time of writing no adequate procedure for determining statelessness status in the Netherlands. State authorities are required to derive information about the nationality status of residents of the Netherlands from the municipal records of personal data, a database maintained by

[538] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 16. See also chapter 6, section 6.2.4 above.

[539] See Dutch government's response to the report by the Dutch Advisory Committee on Migration Affairs regarding statelessness (in Dutch - *Eerste reactie van het kabinet op het advies van de ACVZ inzake staatloosheid*), letter by State Secretary of Security and Justice F. Teeven to the Parliament, No. 548084, of 10 September 2014; and Dutch Proposal for a Law on Statelessness Determination (in Dutch – *Voorstel van Rijkswet vaststellingsprocedure staatloosheid*) of 28 September 2016.

municipalities.[540] The personal data is recorded and maintained on the basis of the Law on Personal Records (*Wet basisregistratie personen*, hereafter – BRP Law). The Instructions on maintaining municipal records issued by the Ministry of Interior and addressing the responsible municipal civil servants (hereafter – the Instructions) [541] are the main administrative document providing detailed guidance for municipal civil servants on how to register and alter information on nationality of their inhabitants. The latter document is not legally binding, but is influential in implementing relevant laws.[542]

Neither the BRP Law nor the Instructions provide clear rules on how statelessness can be detected, and on the basis of what evidence a decision can be reached to register a person as stateless.

In addition to not establishing clear rules on registering statelessness, the Instructions are formulated in a way that discourages civil servants from recognizing actual instances of statelessness.[543] For example, whenever the technical possibility of registering an individual as stateless is mentioned, it is followed by a disclaimer that statelessness 'hardly ever occurs in practice'.[544] According to the Instructions, the only two possible outcomes of loss of a nationality are the acquisition of a different nationality, or the nationality status becoming 'unknown';[545] no possibility of the individual becoming stateless as a result of having lost a nationality is mentioned.[546] In a section on state succession the Instructions insist that individuals who lost the nationality of the predecessor state are never stateless: not if the acquisition of the nationality of the successor state is delayed in time and not even when there is no clear prospect of acquiring

[540] See Dutch Law on the Population Register (in Dutch - *Wet basisregistratie personen*) of 2013, art. 1.7 (1), which requires all state authorities to rely on the information in the BRP about personal details of the individuals registered there.
[541] Administrative instructions on maintaining municipal records (in Dutch - *Handleiding Uitvoeringsprocedures*), Version 2.2, of 31 August 2015.
[542] In particular the Dutch Law on the Population Register (in Dutch - *Wet basisregistratie personen*) of 2013.
[543] K. Swider, 'Statelessness Determination in the Netherlands', *Amsterdam Centre for European Law and Governance Working Paper Series*, No. 2014-04, (May 2014), pp. 10-21.
[544] Administrative instructions on maintaining municipal records (in Dutch - *Handleiding Uitvoeringsprocedures*), Version 2.2, of 31 August 2015, pp. 88, 151.
[545] It is also specifically stated that 'unknown nationality' or the lack of a registration of nationality cannot lead to the conclusion that a person is stateless, Administrative instructions on maintaining municipal records (in Dutch - *Handleiding Uitvoeringsprocedures*), Version 2.2, of 31 August 2015, p. 161.
[546] Administrative instructions on maintaining municipal records (in Dutch - *Handleiding Uitvoeringsprocedures*), Version 2.2, of 31 August 2015, pp. 332-334.

any nationality of any of the successor states.[547] Another example is when the Instructions discuss the nationality status of children born to foreign parents in the Netherlands. If the acquisition of the parent's nationality is conditional upon a formal request to the relevant consular authorities, and is conferred on the child retroactively from the moment of birth, the child cannot be registered as stateless even if the formalities at the foreign consulate did not take place yet.[548] Such guidance on avoiding the registration of statelessness contradicts the definition of a stateless person as well as available research on statelessness. For example, the statement that statelessness 'hardly ever occurs in practice' is difficult to reconcile with the UNHCR estimate of about 10 million stateless persons worldwide.[549] State succession is a well-known cause of statelessness, and the Instructions forbid registration of statelessness that results from state succession. Similarly, the prospect of acquisition of nationality in the future is not relevant for the definition of a stateless person established in the 1954 Convention and accepted in the Dutch law.[550] Thus, a child who may acquire a nationality retroactively from birth after the parents register birth with the relevant consular authority is stateless until such registration has taken place, as the resolution of such statelessness is contingent upon future administrative processes. Denial to register statelessness of such children is inconsistent with the definition of a stateless person. Failure to register such children as stateless may lead to the children never acquiring any nationality: for instance, if the parents fail to undertake the necessary administrative steps, and the Dutch anti-statelessness safeguards are not activated due to the lack of registration of the child as stateless.

While the Instructions' discouragement of the registration of statelessness make little sense in light of the definition of a stateless person, known causes of statelessness and norms on protection of stateless persons, they do strangely mirror international norms on avoidance of statelessness. These norms generally try to ensure that statelessness does not occur in practice, and in particular aim to prevent statelessness at birth and in the context of state succession. The Instructions do not explicitly state that registration of statelessness should somehow be

[547] Administrative instructions on maintaining municipal records (in Dutch - *Handleiding Uitvoeringsprocedures*), Version 2.2, of 31 August 2015, pp. 333-334.
[548] Administrative instructions on maintaining municipal records (in Dutch - *Handleiding Uitvoeringsprocedures*), Version 2.2, of 31 August 2015, pp. 139-140.
[549] See, for example, UNHCR, *Global Action Plan to End Statelessness*, (2014), p. 4.
[550] See UN Convention Relating to Status of Stateless Persons of 1954, art. 1. This definition was implemented in Dutch legislation, see Dutch Nationality Law of 1984. art. 1(1f).

understood as creating statelessness, and thus should be avoided on the basis of norms on avoidance of statelessness. However, lack of clear guidance on how to recognize statelessness and the language of avoidance that is applied to discourage registration may create a misleading association between avoiding the recognition of statelessness and avoiding statelessness among the addressees of the Instructions.

In the case of Alina, a former Yugoslavian national of Roma origin living in the Netherlands since the age of 3, the denial of recognition of statelessness was substantiated in light of the international norms on the avoidance of statelessness, when the civil servant stated in relation to her case that:

> *The nationality laws of most countries aim to avoid statelessness. This also holds for nationality laws of Bosnia and Herzegovina.*[551]

The fact that Alina's request to change her nationality status from 'unknown' to 'stateless' was denied on the basis that she comes from a Yugoslav successor state that aims to avoid statelessness meant that she could not naturalize in the Netherlands, as she could not profit from the exemption on having to identify herself with a foreign passport.[552] Contrary to the presumed intentions of the civil servant, the decision not to register Alina as stateless leads to the perpetuation of her statelessness, potentially for life, against her wishes. If she has children in the Netherlands they may inherit her statelessness,[553] as the Netherlands does not apply statelessness safeguards to children whose nationality status is registered as 'unknown' in municipal records.

The idea that determining statelessness status may somehow interfere with the goal to avoid statelessness can be traced back to UNHCR policy guidance on in situ statelessness.[554] The UNHCR, however, specifically refers to in situ stateless populations, and while the concept of in situ statelessness is not clearly defined, it often refers to some historically settled populations, rather than to individual cases.

[551] Email exchange with a civil servant handling the case, email of 7 July 2014, on file with the author.
[552] There are the same obstacles as Samvel faced, see previous case study in section 8.2 above.
[553] Unless they are able to obtain a nationality from the father.
[554] See more in chapter 6, section 6.2.4 above.

The UNHCR also points out that the recognition of statelessness should not be denied to persons whose statelessness occurred due to 'illegal' acts of states:

> *The illegality on the international level [of the act that leads to statelessness] is generally irrelevant for the purposes of [the definition of a stateless person]. The alternative would mean that an individual who has been stripped of his or her nationality in a manner inconsistent with international law would nevertheless be considered a "national" […]; a situation at variance with the object and purpose of the 1954 Convention.*[555]

This paragraph suggests that in the specific case of Alina, the UNHCR guidance would not justify denying Alina recognition of her statelessness, even if the Netherlands may be condemning post-Yugoslav states for leaving Alina without a nationality.[556]

The difference in the UNHCR's approach to whether identification is perceived to interfere with the avoidance of statelessness seemed to be related to how much the host state is perceived to be responsible for the statelessness of the affected persons. The deeper the connection between the host state and the stateless person, the more responsibility on the state to immediately proceed to providing a nationality, and not 'normalize' their own wrongdoings by identifying affected persons as stateless. The denial of status determination in favour of avoiding statelessness seems to be only justified where statelessness is about to be replaced by a nationality of the host state. Based on different definitions of in situ statelessness one may even argue that Alina, due to her rootedness in the Netherlands from a really young age, is in situ stateless. The Netherlands, however, does not offer Alina Dutch citizenship as an alternative to registration of statelessness, but instead insists that she has or should have the nationality of Bosnia and Herzegovina. Such an outcome is not in line with the UNHCR's policy intentions on statelessness, as it results in the perpetuation of the situation of statelessness.

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[555] UNHCR, *Handbook on the Protection of Stateless Persons*, (Geneva 2014), para 56. See also on recognition of statelessness resulting from illegal acts of states in chapter 2, section 2.5.1 and chapter 6, section 6.2.4 above.

[556] It is unclear based on Alina's case file whether she is in fact entitled to the citizenship Bosnia and Herzegovina by law, and even less clear whether she could in practice enforce such an entitlement. It was accepted, however, by the Dutch civil service handling her case that she was at the time of registration not in possession of the citizenship of Bosnia and Herzegovina or any other successor state, and hence stateless. The discussion was merely about whether she could potentially claim an entitlement to the citizenship of Bosnia and Herzegovina in the future. Source: email exchange with the civil servant handling the case, between 7 July 2014 and 10 September 2014.

Thus, even though UNHCR policy guidance, if correctly applied to Alina's case, cannot directly be held responsible for her non-registration as stateless, the policy's lack of a rights-based approach is responsible for Alina's inability to frame the issue as a matter of her individual rights. The fact that authorities are at all debating and deciding whether a specific nationality or a specific status is more appropriate for her, as opposed to Alina deciding which rights to invoke and how against the authorities, is the consequence of lack of a rights-based approach in statelessness policies. A policy discourse that prioritizes and over-emphasizes the avoidance of statelessness, while downplaying empowerment of affected persons through rights, allows for such misinterpretations, and fosters highly problematic instructions for civil servants such as discussed in section 8.3.2.

Under the rights-based approach, the right of a stateless person (but not an obligation) to have their statelessness formally recognized and acknowledged by the bureaucratic system of a state where they live is as important as the right to become a national. The ability to obtain clarity and appropriate documentation of one's nationality status may be relevant for a person in a variety of contexts. Those include the ability to claim relevant protection rights or to claim a nationality, but are not limited to them.[557] Recognition and acknowledgement of one's statelessness status leads to 'normalization' of a stateless person's legal situation, which is often an essential first step to functioning in any bureaucratic system.[558]

The right to recognition of statelessness is not inconsistent with the right to acquire a nationality, but may be perceived as inconsistent with the avoidance of statelessness an objectively quantifiable target. Recognition of statelessness is associated with acceptance of the situation of statelessness, which UNHCR deems unproductive in the context of in situ statelessness. Under the rights-based approach, however, decisions about what is better for each person affected by statelessness should not be taken at the level of policy institutions, but at the individual level, in deciding whether, when and how to invoke relevant rights. Acknowledging entitlement to a variety of rights does not cause policy inconsistencies; objective quantifiable targets do, as they

[557] See chapter 5, section 5.4.1 above.
[558] See chapter 5, section 5.4.4 on the phenomenon of normalization of statelessness through statelessness determination procedures.

can clash with each other, or with the will of persons they affect, the latter being problematic if the relevant targets claim to be in the interests of persons they affect. In Alina's case, a rights-based policy on statelessness should ensure her the right to have her statelessness status acknowledged, registered and normalized under the Dutch bureaucratic system, as well as her right to access at least Dutch nationality. The rights-based approach would also make manifestly clear the problematic nature of the Instructions for Dutch civil servants on registering statelessness. It would reveal that the main problem is not mere misinterpretation of the definition of a stateless person, but lack of an approach to statelessness status determination as a matter of an individual right that can be invoked by affected persons, and is meant to empower them to address their own vulnerabilities in the way they see fit.

8.4 Politically sensitive nationality: the case of Latvian non-citizens

There is a large stateless population of non-citizens in Latvia,[559] which was created as a result of a chain of historical events.[560] During the Latvian occupation by the USSR, soviet-sponsored mass immigration into the territory of Latvia from other SSRs took place. Upon the restoration of its independence half a century later, Latvia chose not to include the Soviet-era immigrants and their descendants into its citizenry, but extended citizenship only to those who were citizens of Latvia prior to the occupation, and to their direct descendants. Others were expected to either leave Latvia and become nationals elsewhere or go through a regular naturalization procedure to obtain Latvian nationality. However, several years after independence a large settled population

[559] Around 280,000 according to the governmental statistical data of 2014, see Baltic Institute of Social Sciences, *Analysis of Integration of Latvian Non-Citizens*, (Riga, 2014), p. 18. See also K. Krūma, 'Country Report on Citizenship Law: Latvia', *EUDO Citizenship Observatory Country Reports*, No. RSCAS/EUDO-CIT-CR 2015/6 (January 2015).

[560] A very similar situation can be observed with a stateless minority in Estonia that occurred in similar historical circumstances. The Estonian stateless are called persons with "undefined citizenship" as opposed to "non-citizens", and their population is less numerous than that of Latvian non-citizens. See more in P. Järve and V. Poleshchuk, 'Country Report: Estonia', *EUDO Citizenship Observatory Country Reports*, No. RSCAS/EUDO-CIT-CR 2013/6 (January 2013), p. 1; R. Vetik, 'Statelessness, citizenship and belonging in Estonia' in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishing 2011), p. 162.

of stateless ex-Soviet citizens was still in Latvia, and their legal status had to be formalized somehow. Latvia therefore created what was intended to be a transitional status of 'non-citizen', allowing its beneficiaries to live and work in Latvia, until a more permanent solution involving a nationality would be achieved for them. It was (and still is) a strong matter of principle for the Latvian state not to automatically include the 'non-citizens' into its citizenry, for fear of implicitly recognizing the legality of the Soviet occupation.[561]

In the early years of Latvian independence there was also a concern that too many non-citizens would naturalize, and that the growth in voting rights among this population would undermine Latvian independence from within. To prevent that, various barriers in the form of quotas and stringent naturalization exams were introduced. It soon became apparent, however, that naturalizations were not happening at a high pace at all. Even after the state policy towards naturalization and integration of non-citizens shifted from restrictive to welcoming, the naturalization rates remain low.[562]

Attempting to integrate non-citizens into Latvian society, the Latvian government not only relaxed naturalization requirements, but in the past two decades also significantly strengthened the legal position of non-citizens.[563] The set of rights which one is entitled to through the status of a non-citizen goes well beyond the minimum requirements of the 1954 Convention, and includes the right to reside permanently in Latvia, to access most state welfare services related to housing, healthcare, education and unemployment benefits, engage in most economic activities and so on. That is not to say that the rights of non-citizens are equivalent to those of Latvian citizens; the political participation rights of non-citizens are still limited, as is their access to certain types of jobs in the public sector and some property rights concerning purchase of land. There is thus undisputable differentiated treatment between citizens and non-citizens, but the human rights situation of the latter can hardly be described as 'a life without dignity and security',[564] the image which dominates the perception of a life without a nationality.

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[561] K. Krūma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*, (Brill 2013), pp. 325-328.
[562] K. Krūma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*, (Brill 2013), pp. 333-337, 342-351, 401-405.
[563] K. Krūma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*, (Brill 2013), pp. 377-398.
[564] Foreword by V. Türk to UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), p. 1.

Latvian non-citizens present an interesting case of a stateless population which is well protected in light of the standards of the 1954 Convention, yet is very sizeable and fairly stable, and thus stands firmly in the way of the goal to avoid statelessness. The Latvian Government does not actually consider non-citizens to be stateless persons, but the UNHCR does, and the requirements for accessing the status of a non-citizen leave no doubt that all non-citizens fall under the UN definition of a stateless person.[565] If the principle of prioritizing the avoidance of statelessness above the protection of stateless persons is applied here, the current situation cannot be seen as positive in light of statelessness policies. Turning non-citizens into citizens is a goal of the current international statelessness policies.[566]

This case illustrates the type of tension between the goal to protect stateless persons and the goal to avoid statelessness where high levels of protection may be an obstacle to eliminating statelessness.[567] The wide range of rights Latvian non-citizens enjoy in Latvia has been found to be a factor in the disinterest among non-citizens to naturalize.[568] This fits with Gibney's idea quoted above that the 'very need to join a state derives from the fact that [stateless persons] are not already receiving the protection of the state'.[569] Indeed, if non-citizens were unable to work, own any property, or access basic human rights in Latvia without becoming citizens, perhaps their motivation to obtain citizenship would be higher. While those rights are secured, there undoubtedly are additional benefits to becoming a national, but those do not necessarily outweigh the costs for each affected person to have recourse to naturalization. The balance between costs and benefits will differ depending on the individual circumstances of each person. Some non-citizens may be reluctant to become members of the Latvian state at all. Others may be willing to become nationals, but not through naturalization, but instead for example through a measure that acknowledges their original entitlement to Latvian nationality at the time Latvia

[565] See more in K. Krūma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*, (Brill 2013), pp. 361-366; and K. Swider, 'The Nature of Citizenship', *Journal of European Integration*, Vol. 38. No. 4, (2016), pp. 475-476.
[566] See, for example, UNHCR, *Compilation Report - Universal Periodic Review: Latvia*, Submission for the Office of the High Commissioner for Human Rights, (November 2010), pp. 5-7; and S. Djackova, 'Ending Childhood Statelessness: A Study on Latvia', *European Network on Statelessness Working Paper*, No. 07/15, (2015).
[567] See more in chapter 6, section 6.2.3 above on this type of tension.
[568] K. Krūma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*, (Brill 2013), p. 408.
[569] 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), p. 61.

restored independence, on an equal footing with ethnic Latvians, without having to fulfil additional conditions. Some may find the administrative procedures required in order to naturalize too burdensome; and some may simply not prioritize naturalization among their other ambitions. If the choice to transition from statelessness to nationality is left up to each individual, a high level of protection of non-citizens, in combination with other personal, societal and historical factors, may lead to their reluctance to naturalize.

In terms of tensions among current statelessness policy goals, this raises the controversial question of whether a high level of protection of non-citizens can be sacrificed in order to expedite their naturalization. A policy on statelessness that prioritizes elimination of statelessness over the protection of stateless persons might in this case want to encourage the lowering of the level of protection of non-citizens, or at least not to encourage further strengthening of their legal status in Latvia, in order make the protection more dependent on nationality, and thus making non-citizens more motivated to become citizens. If the level of protection of non-citizens in Latvian goes up or remains the same, the goal of avoidance of statelessness is not served.

It is noteworthy that under existing international treaty norms, Latvia *does not have to* eliminate the status of a non-citizen. It *can* achieve such elimination, and it is perhaps *encouraged* to, but it is *not required* to by existing binding legal norms on statelessness.[570] The 1961 Convention does not require automatic conferral of nationality on stateless children born on the territory of a state, and allows the state to make such acquisition conditional on the will of the parents, and - after the child reaches adulthood – on his or her own will. Thus, the norms of the 1961 Convention allow the Latvian state to simply offer nationality to, as opposed to impose it on, Latvian born non-citizens. Thus, norms of the 1961 Convention allow for the perpetuation of this status of non-citizens if the state wants to respect the will of affected persons, and the affected persons continue to choose statelessness for successive generations.

At the same time, while the 1961 Convention does not require that Latvian non-citizens all become nationals, it also does not require that they should be allowed to remain stateless.

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[570] Right now Latvian legislation on non-citizen status and on Latvian nationality is not fully in line with those standards, partially because Latvia does not consider non-citizens to be stateless, and does not apply the safeguards of the 1961 Convention to their situation. See more in K. Swider, 'The Nature of Citizenship', *Journal of European Integration*, Vol. 38. No. 4, (2016), p. 476; K. Krūma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*, (Brill 2013), p. 445.

Respect for the will of affected persons is optional according to the 1961 Convention. The state can opt for either automatic imposition of nationality at birth, without regard to the preferences of affected persons, or acquisition that is dependent on application being made by affected persons.

From the rights-based point of view, this treaty structure permitting states to allow affected persons to choose their destiny of whether to remain stateless or to acquire a nationality is positive. It would have been better if respect for the will of affected persons was compulsory, and not optional.[571] The current statelessness policy discourse, however, suggests opposite priorities.

More recent interpretation of the 1961 Convention by the UNHCR, combined with a strong emphasis on avoidance of statelessness in statelessness policies generally, encourages the automatic acquisition of nationality[572] without regard to the will of affected persons over the more rights-focused alternative of allowing affected persons to invoke their nationality rights if and when they see fit.

The rights-based approach, which shifts the focus away from the goal of avoidance of statelessness to nationality rights, does not frame the statelessness of Latvian non-citizens necessarily as a problem per se. Their lack of nationality rights may instead be problematized, and questions such as whether the nationality is sufficiently accessible to them can be raised. This may well be the case, and the rights-based approach would require transforming the

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[571] Interestingly, this line of argument was put forward in 1978 by the Dutch Advisory Commission on Public Law (in Dutch - *Commissie van Advies Inzake Volkenrechtelijke Vraagstukken*) in the context of the legislative proposal for the Dutch Law on Nationality, see Commissie van Advies Inzake Volkenrechtelijke Vraagstukken, *Rapport inzake Voorontwerp van de Rijkswet betreffende het Nederlanderschap*, No. 1250, of 15 December 1978, in particular pp. 4-5, para 7. The Commission advised the Dutch legislature against automatic acquisition of nationality by stateless children born in the Netherlands, and emphasized the importance of choice for the affected persons, stating that 'the principle that everyone has a right to a nationality does not entail that a specific nationality can be imposed on a person against their will'. The Commission cited the case of the special position of the population within the Netherlands of South-Moluccans many of whom chose to remain stateless as an expression of a collective political claim to statehood against Indonesia. The Commission also cites the prohibition on voluntary renunciation of nationality that results in statelessness contained in Article 7(1) of the 1961 Convention as an additional argument against the automatic acquisition of nationality by members of this group, as they would also not be able to renounce Dutch nationality later in life for the purposes of strengthening their collective political claims.

[572] See, for example, UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, (21 December 2012), paras. 34-35; UNHCR, *Good Practices Paper - Action 2: Ensuring that no child is born stateless*, (20 March 2017), pp. 2, 4-5 where it is recommended that 'States automatically grant their nationality to children [born on their territory who would otherwise be stateless], rather than providing for an application process'.

naturalization procedures to the extent that access to nationality of the affected persons indeed becomes a right. Automatic imposition of nationality on the affected persons would, however, be a step in a wrong direction in light of a rights-based approach, while it might be welcomed under the current objective target-focused policies.

Another set of international norms that form part of the contemporary discourse on statelessness and might be applicable to statelessness of Latvian non-citizens are norms on the avoidance of statelessness after state succession. If Latvia had followed those norms, non-citizens would have become citizens of Latvia regardless of their will at the moment of independence, unless they acquired another nationality.[573] As has been discussed in chapter 4 section 4.4 above, state succession forms one of the few exceptions to when imposition of a nationality on adults without respect for their will is deemed acceptable when it serves the purpose of preventing statelessness. Those norms are not rights-based, as they do not empower affected persons through rights, but merely impose a nationality status on them. The Latvian state denies the applicability of those norms, since it does not see its independence in 1990 as a case of state succession from the Soviet Union, but a case of restoration of independence after an occupation by the Soviet Union.

The Latvian solution was initially also not in line with a rights-based approach, as it left the non-citizens stateless, and the possibility to access Latvian citizenship was very restricted. In the course of the years, access to Latvian nationality was made gradually easier, with bureaucratic hurdles, quotas and tests being simplified or eliminated. Non-citizens still do not enjoy an unconditional right to Latvian nationality. Expanding and simplifying access to nationality to the extent that it becomes an unconditional right is a development in line with a rights-based approach. Norms on automatic imposition of nationality on adults without regard to their will in the context of state succession are not in line with the rights-based approach, and are particularly problematic when applied retroactively.[574]

Latvian non-citizens are an example of a stateless population whose rights have been gradually expanding: both rights related to protection, as well as rights related to access to nationality.

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[573] International Law Commission, *Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries*, (1999), Arts. 7, 8 (comment No. 5) and 11 (comment No. 6). See more in chapter 4, section 4.4 above.

[574] See more in K. Swider, 'Why End Statelessness?' in *Understanding Statelessness* by T. Bloom, K. Tonkiss, and P. Cole (eds.), (Routledge 2017), pp. 198-199.

International norms that would have require automatic grant of Latvian nationality for non-citizens and their descendants have been carefully avoided or outright violated. From the rights-based point of view, imposing Latvian nationality on non-citizens, and thus depriving them of choice and agency to achieve their personal goals, would be undesirable. Expanding their access to Latvian nationality to the extent it becomes a genuine unconditional right is an appropriate goal to set in light of a rights-based approach. Such a goal would not guarantee that no one would opt to remain a non-citizen, and would not eliminate statelessness as effectively as perhaps a measure that would automatically impose nationality on all non-citizens. It would, however, be in line with the core values of the rights-based approach, and ensure empowerment and participation of the affected persons through rights.

8.5 Traumatic nationality: the case of restoration of nationality to German Jews and Iraqi Faili Kurds.

Institutional discrimination of a specific minority is sometimes expressed through discriminatory citizenship legislation which revokes nationality from, or denies acquisition of nationality to, the discriminated population. One of the most well-known examples of such discriminatory revocation of nationality in European history is the denationalization of German Jews under the Third Reich. A lesser known example of a comparable instance of discriminatory denationalization of a persecuted minority is that of Faili Kurds[575] in Iraq during the regime of Saddam Hussein. Often such practices lead to statelessness, unless victims of denationalization have or manage to acquire an alternative nationality. In both these examples the political regime that was responsible for the persecution and denationalization came to an end, most of its discriminatory legislation and corresponding administrative acts were declared null and void, and the denationalized citizens were welcomed back, at least formally, into the state membership.

This section looks at how the nationalities were lost and re-instated for these discriminated groups, focusing in particular on respect for the will and empowerment of affected persons through rights, and the tension between the goals to protect them and to avoid statelessness.

[575] Sometimes also spelled in English texts as Feili, Feyli, Faylee, Faily or Fayli.

From the point of view of avoiding statelessness, declaring the denationalizing legislation null and void and considering the relevant nationality as never having been lost, and statelessness never having had occurred, seems to be the ideal solution. However, this imposed solution is problematic from the point of view of protection of the persecuted stateless population, as well as respect for their will and maximization of their empowerment through rights.

Revocation of nationality that occurs in the context of severe persecution may result in the former nationality no longer having much of an emotional appeal to the discriminated population. The former nationality may be associated with forced displacement, abuse, loss of family members, or other traumatic events. Subjectively, and perhaps even objectively, the prospect of receiving protection from the state that recently conducted the persecution may not be acceptable to the victims, even if the political regimes have changed. It is therefore questionable whether it is ethical to simply declare the denationalizing laws as null and void, and consider the denationalization as never having had happened, merely for the sake of highest results in terms of avoiding statelessness.

Numerous Jews who possessed German citizenship before the 1930s lost their citizenship in the years before and during the Second World War through the laws and administrative acts introduced by the Third Reich. The system of nationality statuses under the Third Reich was rapidly changing and not always crystal clear with regard to, in particular, Jews who remained on the territory of Germany.[576] Those living abroad and deported to concentration camps were denationalized through a chain of discriminatory laws, regulations, administrative acts and practices. Many of them thereby became, and some remained, stateless.

By virtue of laws and regulations of 1933, the revocation of German citizenship from Jews residing abroad took place on a case-by-case basis, and targeted in particular those who naturalized in the interbellum period.[577] The authorities had broad discretion to revoke naturalizations that were not ‘deemed to be desirable’, and to deprive anyone, whether a citizen by birth or a naturalized citizen, who ‘harmed German interests’ of their citizenship provided

[576] See D. Majer, *"Non-Germans" Under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe with Special Regard to Occupied Poland, 1939-1945*, translated by P. T. Hill, E. V. Humphrey, and B. Levin, (The John Hopkins University Press 2003), pp. 108-126.

[577] K. Hailbronner and A. Farahat, ‘Country Report on Citizenship Law: Germany’, *EUDO Citizenship Observatory Country Reports*, No. RSCAS/EUDO-CIT-CR 2015/2, (January 2015), p. 2.

they had residence abroad.[578] The implementing regulations for this legislation indicate that the German citizens of Jewish descent were the main addressees of these measures.[579] Later in 1941 the Eleventh Decree to the Reich Citizenship Law collectively deprived all the German Jews who lived abroad of their nationality,[580] so an individual decision based on 'harm to German interests' was no longer required. It also declared automatic loss of German nationality for Jews who relocated abroad.[581] The relocation did not need to be voluntary, and thus all the deportees to the concentration camps in Poland fell under this regulation and lost their German citizenship. Returning to the Reich did not result in the recovery of nationality.[582]

The nationality status of Jews who remained within the Reich was not very clear. In 1935 a number of laws and regulations were passed distinguishing between various classes of German nationals, based on racial grounds, in the access to their rights.[583] Jews were classified as the lowest ranking nationals with progressively diminishing rights. The regulations are worded in ways that suggest that Jews who remained in the territory of Germany retained a formal bond of nationality with the state. A regulation implementing a Reich Citizenship Law of 1935 which declared that '[a] Jew cannot be a citizen [in German – *Reichsbürger*] of the Reich',[584] referring here to citizenship (*Reichsbürgerrecht*) in a meaning different from nationality (in German - *Staatsangehörigkeit*), where citizenship (*Reichsbürgerrecht*) was the highest class of nationality

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[578] D. Majer, *"Non-Germans" Under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe with Special Regard to Occupied Poland, 1939-1945*, translated by P. T. Hill, E. V. Humphrey, and B. Levin, (The John Hopkins University Press 2003), pp. 108-109.
[579] D. Majer, *"Non-Germans" Under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe with Special Regard to Occupied Poland, 1939-1945*, translated by P. T. Hill, E. V. Humphrey, and B. Levin, (The John Hopkins University Press 2003), p. 109.
[580] 11th Decree to the Reich Citizenship Law (in Gerrnan - *11.Verordnung zum Reichsbürgergesetz*) of 25 November 1941, section 2a, available in English in P. R. Bartrop and M. Dickerman (eds.), *The Holocaust: An Encyclopedia and Document Collection*, Vol. 4, (ABC-CLIO 2015), pp. 1115-1117.
[581] 11th Decree to the Reich Citizenship Law (in Gerrnan - *11.Verordnung zum Reichsbürgergesetz*) of 25 November 1941, section 2a, available in English in P. R. Bartrop and M. Dickerman (eds.), *The Holocaust: An Encyclopedia and Document Collection*, Vol. 4, (ABC-CLIO 2015), pp. 1115-1117.
[582] The concept of 'abroad' was defined as outside of the Reich, and included the occupied territories Ukraine and also the territory of Auschwitz, which was technically within the Reich, but was identified as 'abroad' for the purposes of application of this law. D. Majer, *"Non-Germans" Under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe with Special Regard to Occupied Poland, 1939-1945*, translated by P. T. Hill, E. V. Humphrey, and B. Levin, (The John Hopkins University Press 2003), p. 120.
[583] D. Majer, *"Non-Germans" Under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe with Special Regard to Occupied Poland, 1939-1945*, translated by P. T. Hill, E. V. Humphrey, and B. Levin, (The John Hopkins University Press 2003), p. 109.
[584] The Reich Citizenship Law (in German – *Reichsbürgergesetz*), of 15 September 1935 and the 1st Decree to the Reich Citizenship Law (in German – *1. Verordnung zum Reichsbürgergesetz*), of 14 November 1935 in particular para 4(1) of the Decree.

(*Staatsangehörigkeit*) reserved for persons of "German race". Members of other races were still nationals (*Staatsangehörige*), but not citizens (*Reichsbürger*), which meant they had the duty of obedience towards the state and had some rights guaranteed to them, such as the right to life, property and economic activity, but the range of rights was gradually shrinking over the years.[585] Thus, while the content of the nationality of German Jews in Germany was disappearing, the mere formal legal bond remained in existence; while the Jews who (were) relocated outside the Reich formally lost their nationality.[586]

The denationalization of Faili Kurds in Iraq under the Saddam Hussein regime has many parallels with the denationalization of German Jews under the Third Reich. The Faili Kurds lived in Iraq since the Ottoman period. Their religion is Shia Islam, unlike the majority of other Kurdish communities who are Sunni Muslims. Faili Kurds have historically resided in the border regions between Iraq and Iran. Nowadays many Faili Kurds live in Baghdad and near the Iranian border in Iraq.

By Decree 666 of the Revolutionary Command Council of Iraq of 26 May 1980, many Faili Kurds were deprived of their Iraqi citizenship on the basis of being disloyal to '*the homeland, people, higher national and social objectives of the Revolution*'.[587] It is estimated that this provision was used to deprive 250,000 to 300,000 Iraqis Faili Kurds of Iraqi citizenship, under a claim that they supported Iran and were disloyal to Iraq. This was combined with property seizures and exile to Iran, where affected persons lived in camps without access to government services such as health, education and employment.[588] Some of the Faili Kurds who could prove Iranian ancestry were able to obtain Iranian citizenship, but others were left stateless.

[585] D. Majer, *"Non-Germans" Under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe with Special Regard to Occupied Poland, 1939-1945*, translated by P. T. Hill, E. V. Humphrey, and B. Levin, (The John Hopkins University Press 2003), pp. 114-115.
[586] See also G.-R. de Groot, *Staatsangehörigkeitsrecht im Wandel: eine rechtsvergleichende Studie über Erwerbs- und Verlustgründe der Staatsangehörigkeit*, (Asser Institute 1988), pp. 56-57, 391.
[587] Iraqi Resolution No. 666 of 1980 (on nationality) of 26 May 1980, para 1. Unofficial translation by the UNHCR available at <www.refworld.org/docid/3ae6b51d28.html> [accessed 5 April 2016].
[588] E. Campbell, 'The Faili Kurds of Iraq: Thirty years without nationality', *Refugees International Blog*, 2 April 2010.

When the relevant regimes fell, the persecuted minorities were welcomed to restore their lost nationalities. The restoration of German citizenship is regulated by the German Constitution, Article 116(2), which reads:

> *Former German citizens who between 30 January 1933 and 8 May 1945 were deprived of their citizenship on political, racial or religious grounds, and their descendants, shall on application have their citizenship restored. They shall be deemed never to have been deprived of their citizenship if they have established their domicile in Germany after 8 May 1945 and have not expressed a contrary intention.*[589]

This provision gives the right to everyone who lost German citizenship as a part of discriminatory policies of the Third Reich, and to their descendants, to obtain German citizenship upon mere expression of will through application. For those who relocate to Germany the nationality is restored retroactively as if it has never been lost, unless the person expresses a wish to the contrary. The will of the individual is clearly emphasized in this provision. The citizenship is not restored as a matter of automatic annulment of discriminatory laws. Later commentaries on this law also emphasize the importance not to impose a nationality against the will of victims:

> *It is not […] the purpose of these laws […] to cause persons against their will to recover their lost German nationality. [] Restoration of nationality is granted at the request of the persons concerned .*[590]

In Iraq, Articles 17 and 18 of the 2006 Nationality Law repealed Decree 666 of the Revolutionary Command Council restored Iraqi nationality to denationalized Faili Kurds:

> *Article 17*
> *Decision No. 666 of 1980 issued by the (defunct) Revolutionary Command Council shall be repealed and Iraqi nationality shall be restored to all Iraqis deprived of their Iraqi*

[589] Basic Law for the Federal Republic of Germany. art. 166(2).
[590] UN, *A Study of Statelessness*, UN Doc E/1112; E/1112/Add.1, (August 1949), pp.143-144.

nationality under the said as well as all other unfair decisions issued by the (defunct) Revolutionary Command Council in this respect.

Article 18

Any Iraqi, who was denaturalized on political, religious, racist or sectarian grounds, shall have the right to restore his Iraqi nationality, subject to submission of an application to this effect. In the case of his death, his children, who have lost their Iraqi nationality consequent to his father's loss of nationality, shall have the right to submit an application to restore Iraqi nationality.[591]

The two articles taken together are not clear on the issue of whether nationality is restored automatically, or whether each individual needs to express a wish to that end before the nationality is restored. Article 17 of the Nationality Law repeals the denationalizing legislation, and proclaims that 'nationality *shall* be restored to *all* Iraqis' [emphasis added] who lost it due to the discriminatory legislation of the former regime. This phrasing suggests an automatic (although not retroactive) restoration of all the lost citizenships to all the victims of denationalization, regardless of their will. The next article, however, paints a different picture, and speaks of the '*right* to restore his Iraqi nationality, subject to submission of an application', emphasizing the presence of a *right*, and the agency of the individual whose nationality was lost to decide on when and how to invoke the right.

Existing reports on the implementation of these two articles indicate that they are strongly interpreted in light of the wording of Article 18, and the affected individuals need to submit an application along with extensive documentary evidence in order to exercise their right to

[591] Iraqi Nationality Law, No. 26, of 7 March 2006. Unofficial translation by the UNHCR available at: <www.refworld.org/docid/4b1e364c2.html> [accessed 5 April 2016].

restoration of nationality.[592] Some have troubles accessing the documents required with such an application, which results in inability to exercise the right to the restoration of their nationality.[593] This indicates that in practice nationality is neither automatically restored, nor always available to the Faili Kurds as a matter of right. The will of the individual is taken into account to the extent that the lost nationality is not imposed. There is, however, no evidence of an effective right to access the lost nationality; the ability to invoke the relevant right is impeded by problematic procedures.[594] Such a situation is far from being in line with a rights-based approach, as affected persons are not empowered through any nationality rights they can invoke to address their vulnerability.

Commentators referred in this context to the potential unwillingness, and not only the practical inability, of stateless Faili Kurds to restore their Iraqi citizenship;[595] and that stateless communities 'deliberately shy away from registration and regularisation' as that 'has done many of them little good in the past'.[596] In-depth research into the protection needs of this population; and whether those are fulfilled by the acquisition of Iraqi citizenship is largely absent.

Automatic retroactive reacquisition of nationality is the best way to achieve the elimination of created cases of statelessness; but it does not necessarily coincide with the interests of every affected person.

In neither of the two cases discussed were the nationalities automatically retroactively restored. In both cases, nationality was restored on the basis of applications through which affected

[592] E. Campbell, 'The Faili Kurds of Iraq: Thirty years without nationality', *Refugees International Blog*, 2 April 2010.

[593] E. Campbell, 'The Faili Kurds of Iraq: Thirty years without nationality', *Refugees International Blog*, 2 April 2010. See also UN High Commissioner for Human Rights, 'Committee on the Elimination of Racial Discrimination considers report of Iraq', 20 August 2014, press release, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14956>, [accessed on 20 February 2018]; UNHCR, *Country of Origin Information – Iraq*, (October 2005), p. 119, 138.

[594] Interestingly, the Dutch administrative instructions on immigration policies automatically consider Faili Kurds who lost their Iraqi nationality as Iraqi nationals, and not as stateless persons, presumably on the basis of the text of Article 17 of the 2006 Iraqi Nationality Law. See Regulation on Foreigners (in Dutch – *Vreemdelingencirculair*), No. 2000(C), section C.7 on Policy Regarding Specific Countries (in Dutch – *Landgebonden beleid*), art. 13.8 Peculiarities: Faili Kurds (in Dutch - *Bijzonderheden: Fayli-Koerden*).

[595] J. Tucker, 'Exploring Statelessness in Iran. Gaps in the nationality law, populations of concern and areas for future research', *Tilburg University Working Paper*, (26 May 2014), p. 12.

[596] K. Hendriks, 'An unexpected frontrunner – Tackling statelessness in Iraq', *European Network on Statelessness Blog*, (8 February 2013).

persons expressed their interest to restore their lost nationality. In the case of legislation restoring citizenship to the German Jews, the need for a prior application is clearly stipulated in the Constitution, not leaving any doubt as to the possible automatic nature of restoration of citizenship. Subsequent literature and policy documents emphasized the symbolic as well as practical importance of the victim's right to choose when and how to restore their lost nationality.[597] The policy complies closely with the rights-based approach, framing the restoration of nationality as a matter of a strong right of affected persons, not an objective target that affected persons merely undergo.

In the Iraqi case of Faili Kurds, the legislation is less clear, but in practice nationality was not restored automatically. Affected persons could choose to remain stateless, but it is questionable to what extent the choice to restore nationality was in fact accessible as a matter of right. Despite the wording of the legislation, which refers to the right to restore Iraqi nationality, the reports of practice question the accessibility of nationality, quoting bureaucratic hurdles that proved prohibitive for some victims in attempting to restore their Iraqi citizenship. Moreover, the reports about distinct IDs issued to Faili Kurds, which distinguish them from the general population, in combination with the history of discrimination, raise questions as to the extent to which access to the right to restoration of the nationality is impeded by risk of discrimination. In order for the policy of restoration of Iraqi citizenship to comply with the rights-based approach, nationality would need to be available as a matter of a strong right, not impeded by bureaucratic hurdles, and not threatened by risk of discrimination in the form of distinct IDs. Policy institutions who adopt the rights-based approach need to address the case by prioritizing empowerment of affected persons' rights over any other consideration, such as reducing the numbers of stateless persons.

The UNHCR's Tunis Conclusions address the issues of restoration of nationality that was lost in violation of international norms, and draws a clear distinction between the context of persecution, where affected persons should be given the right to choose, and other contexts,

[597] See UNHCR, *Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")*, (March 2014), para 29. See also D. Bankier (ed.), *The Jews are Coming Back: The Return of the Jews to Their Countries of Origin After WW II*, (Berghahn Books 2005).

where affected persons should preferably not have such a right according to the Tunis Conclusions:

> *If loss or deprivation of nationality took place in violation of international law, including the rules of the 1961 Convention, the State has an obligation to restore, to the extent possible, the situation existing before the violation occurred. The principal remedy for loss or deprivation of nationality contrary to the 1961 Convention and international human rights law is restoration of nationality. In order to be effective and to address all persons affected, restoration of nationality generally must be automatic and preferably with retroactivity to the moment of deprivation. Requiring the persons concerned to reacquire nationality through regular naturalization procedures would not fulfil these requirements. Participants highlighted a range of relevant State practices, including in relation to violations of the right to a nationality which occurred many years prior or to previous generations. Where reacquisition of nationality requires an application, factors such as lack of information on procedures, costs, administrative requirements and corruption may exclude many of the individuals concerned. Remedies must ensure also the enjoyment of rights acquired while the person was a national.*
>
> *In some circumstances, arbitrary deprivation of nationality may be linked to past persecution against a specific population. In such cases, following a change in circumstances in the country concerned, it may be appropriate to provide for a simple, non-discretionary application procedure so that those individuals can reacquire nationality.*[598]

A similar distinction is made by the UN's 'Study on Statelessness' from 1949 which speaks of '*the right* of reinstatement [of] nationality of origin to persons deprived of that nationality for racial, political, or religious reasons' [emphasis added][599] and about the need to 'reinstate in their nationality of origin persons who have obtained an expatriation permit but not acquired a

[598] UNHCR, *Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")*, (March 2014), paras 28-29.
[599] UN, *A Study of Statelessness*, UN Doc E/1112; E/1112/Add.1, (August 1949), p.147

new nationality'.[600] There thus seems to be a tendency in policy documents to distinguish between victims of persecution, whose access to nationality should be framed as a matter of right, and those who lose nationality under other circumstances, whose nationality should be restored as a matter of objective target. Victims of persecution appear to an outsider to have valid objective reasons for perhaps not wanting to re-require the former nationality. Granting them a choice in the form of a right to a nationality, and imposing a nationality on others, reflects an outsider's assessment of the 'needs' of affected persons. Such assessment leads to a conclusion that one group is 'miserable' enough to be empowered through rights, and another group not miserable enough to justify such empowerment through rights, yet vulnerable enough to need changes imposed on them. This is not in line with the rights-based approach to statelessness policies, which requires empowerment through rights of all individuals affected by policies that address vulnerability.

Individuals may want to choose not to make use of their right to restore their former nationality, as well as to acquire any other nationality, for a variety of reasons. It is in the nature of the concept of 'right' to empower the right-bearer to invoke the right as well as not to invoke it, in whatever context, without having to state reasons for either choice.[601] The cases where nationality was withdrawn under traumatic discriminatory circumstances are an extreme example where the importance of personal choices is sharply apparent, and evokes empathy of observers. In such extreme examples, granting rights as opposed to imposing nationalities feels intuitively more ethical. However, in less extreme cases, where no traumatic historical atrocities are involved, the importance of rights as opposed to patronizing assumptions about what every nationality means to every specific person is equally important. As long as a policy claims to want to empower and represent stateless persons, it needs to pursue empowerment though nationality rights rather than imposition of a nationality, without requiring justification for personal decisions about whether and how to invoke that right.

[600] UN, *A Study of Statelessness*, UN Doc E/1112; E/1112/Add.1, (August 1949), p.148.
[601] The reasons for choices to not restore, restore with delay, or restore without retroactivity in the case of German Jews were not solely based on considerations of personal trauma, but were sometimes very practical in nature. For example, being considered to have been a German national during the period of the second world war might have qualified victims of the Nazi regime who lived outside of Germany as 'enemies' under the legislations of their states of residence, and diminished their access to various rights which would have otherwise been accessible to them as stateless persons. See UN, *A Study of Statelessness*, UN Doc E/1112; E/1112/Add.1, (August 1949), pp.143-144.

8.6 Concluding remarks

The examples of policy responses to statelessness discussed in this chapter illustrate that the current policy discourse on statelessness that prioritizes objective quantifiable target of avoidance of statelessness does not always empower affected persons, and does not always achieve results coherent with the wishes of affected persons. The assumption that 'every State protects its nationals' is convenient but wrong.[602]

The contrasts between the rights-based approach to statelessness policy and the current approach, which prioritizes objective targets, are more apparent when the avoidance-focused statelessness policy fails to speak on behalf of the persons whose vulnerabilities it supposedly addresses. These cases also show that entitlements to various relevant rights, such as rights to specific nationalities, right to statelessness status determination, and rights to protection, can perfectly co-exist with each other within a rights-based policy. The tensions occur merely when objectively quantifiable goals are formulated by policy institutions, and those may clash with the will of affected persons, or with each other.

In the case of Samvel, a policy response that encourages the acquisition of the most accessible nationality risks a deterioration in the human rights situation of the affected person, against his wishes. Instead, a policy that prioritizes Samvel's empowerment through rights, without objective criteria to assess his choices as to whether, when, and how to invoke his rights, allows him to choose how to navigate the intricacies of his complex nationality situation. Under the rights-based approach, the overall statelessness policy is not responsible for balancing the protection considerations of Samvel against the goal of avoiding statelessness; instead it recognizes the agency of affected persons to establish their own priorities in the context of any such tensions by deciding whether, when and how to invoke their nationality rights.

In the case of Dutch registration of statelessness status, instructions to civil servants that discourage registration of statelessness may be perceived to support solutions that involve a

[602] UN, *A Study of Statelessness*, UN Doc E/1112; E/1112/Add.1, (August 1949), p. 24.

nationality, but instead deny affected persons an essential right to recognition of their nationality situation. According to the rights-based approach, establishment of the statelessness status is a matter of individual right. Identification of statelessness, as a right, does not clash with rights to acquire a nationality, as individuals can choose which of the rights to invoke and in which order, so as to maximize their own empowerment, and address their own vulnerabilities.

In the case of the Latvian non-citizens, Latvian nationality is a beneficial status, but the protection 'gap' between the relevant stateless population and the nationals is not extreme. A high level of protection of this specific stateless minority has been mentioned as a possible factor demotivating the stateless persons from naturalizing. This fact creates tensions between the well-achieved goal of protection of stateless persons and the goal of avoiding statelessness, which it might be interfering with. Under the rights-based approach such tensions are resolved, as each affected individual is empowered to decide whether, when, and how to invoke their right to Latvian nationality. Refusal to rely on this right, and resulting statelessness, is not a sign of failure from the point of view of the rights-based approach. The rights-based approach can, however, be relied on in the context of Latvian non-citizens to criticize the conditionality on the right to access Latvian nationality, and to argue for easier access to this right, but not the individuals' choice not to acquire the nationality.

The cases of German Jews and Iraqi Faili Kurds describe rules for restoration of nationalities that carry traumatic connotations for affected stateless persons. In both these cases access to the nationality was formulated as a matter of right and of a choice of affected persons, and relevant international policy documents seem to also emphasize the importance of choice in certain cases, but only where relevant nationality is specifically linked to former persecution. Under the rights-based approach, however, all affected person under policies that address their vulnerability should be empowered to make their own choices through recognition of their rights. The relatability of their considerations for an external observer should not be used to judge and police the choices of affected vulnerable persons as to whether, when, and how they invoke their nationality rights.

The assumption of nationality as the only pathway to empowerment, however, is deeply rooted in legal and political scholarship on nationality, state membership and statelessness. Tendayi Bloom rightly point out that '[i]t can sometimes be difficult for theorists in the liberal tradition to

examine citizenship divorced from the mythology of emancipation surrounding its development'.[603]

There is a lack of discussion of cases where nationality is not empowering, and where statelessness may be empowering instead. On the rare occasions that such discussions do take place, the relevant examples are often portrayed as exceptions to the general rule of transition from statelessness to nationality being a positive and desirable development. Authors emphasize the exceptional *reasons* that individuals in such exceptional cases have for rejecting a nationality, ensuring that those reasons are relatable and understandable to an outsider.[604] However, under a rights-based approach, a right-holder does not owe an outsider a reasoned explanation as to whether, when and how he or she chooses to invoke a specific right. Such choices remain entirely within the discretion of the right-holder. If such a choice is denied, or motivations for it policed, the person in question is not a right-bearer, and the benefits given to him or her are not rights. While it may be interesting to explore motivations of specific groups or individuals for choosing to reject a nationality under specific circumstances, under a rights-based approach such motivations cannot be framed as a justification for approving their choice, or allowing them a choice at all. It is in the nature of a right to empower the right-bearers, instead of imposing obligations on them, or holding them accountable. Therefore, under the rights-based approach the freedom to choose whether, when and how to invoke the right to a nationality cannot be limited to minorities with aspirations for statehood, formerly persecuted minorities, and individuals who face relatable forms of disadvantages from potential nationalities.

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[603] 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.

[604] For example, Tendayi Bloom when when discussing forceful imposition of US citizenship on Indigenous Nations, emphasizes the 'rational and political reasons' individuals in her case study had for rejecting the specific citizenship, see 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. 168.