Foreigners in their Own Country:
Undocumented and Unrecognised

The Netherlands' Legal Obligations Regarding the Regularisation of Ex Dutch Surinamese Individuals Living Undocumented in the Netherlands

13th April 2023

Migration Law Clinic
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A special thanks to Eva Bezem, Anna Louwerse, Guno Jones, Frederiek de Vlaming, our supervisors Dr. Katja Swider and Elles Besselsen, our clinic coordinator, Marcelle Reneman, our fellow clinic members, and all individuals involved in advocacy for ex Dutch Surinamese individuals living undocumented in the Netherlands.

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Introduction

This expert opinion has been written for use by anyone interested in establishing legal argumentation in favour of the regularisation of ex Dutch Surinamese people undocumented in the Netherlands. In particular, it has been drafted in support of human rights lawyer Eva Bezem of Prakken d'Oliviera who currently represents a number of individuals who are members of the aforementioned group as well as for immigration attorney, Anna Louwerse. It is also the aim of this expert opinion to support the work of legal practitioners, activists, academics, and others who are advocating in favour of the regularisation of ex Dutch Surinamese people living undocumented in the Netherlands.

This expert opinion will rely on international human rights standards to establish a claim for regularisation and right to residency for ex Dutch Surinamese people living undocumented in the Netherlands. In particular, Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) providing for the right to enter one's own country will be relied upon insofar as the Netherlands must be considered ex Dutch Surinamese peoples' 'own country'.[1] Further, Article 8 of the European Convention on Human Rights (ECHR) establishing the right to private and family life will be posited as a grounds for a right to residency on the basis of their long-standing, special ties to the Netherlands and their presence in the Netherlands for decades during which they have established family and private life that must be protected.[2] As such and because of the specific precarious circumstance of the individuals in question, the Netherlands has a positive obligation to regularise their former citizens who have been affected by its past and contemporary exclusionary migration policies which has resulted in their undocumentedness.

It should be mentioned from the outset that the argumentation of the two legal grounds relied upon in this expert opinion can at times be contradicting. It is not the intention that both grounds be simultaneously relied upon; instead, a hierarchy of legal reasoning needs to be established. Article 12(4) ICCPR is, in our opinion, the most fitting, holistic and inclusive grounds for regularisation of ex Dutch Surinamese citizens living in the Netherlands, as it recognises their claim to the Netherlands as their "own country". Article 8 ECHR is less suitable, as the state may claim a broad margin of appreciation, but it may be legally more operationalisable considering the ECHR's strong enforcement mechanisms. Article 12(4)'s ICCPR starting point is the establishment of the Netherlands as one's own country, and as a result the affected individuals are not considered as mere aliens. Meanwhile, Article 8 ECHR works within the framework of immigration systems and awards extensive freedom to the state to control access to nationality and safeguards territorial integrity as an expression of state sovereignty. The

[1] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12(4).
[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.

Article 8 line of argumentation must establish exceptions to the state's right to exclude foreigners from a territory that is assumed to not be their own, with only limited opportunities to argue for this specific group's connection to the Netherlands . The legal argumentation under Article 12(4) reflects better the nature of this group's claim to legal residence in the Netherlands, as it establishes a framework of protection against undocumentedness, but also a possible remedy for the practices of colonialism, in particular for the non-consensual stripping of Dutch nationality. Understanding the Netherlands as ex Dutch Surinamese peoples' own country best represents the actual relation these individuals have with the Netherlands. That being said, Article 8 ECHR is more easily invoked in Dutch courts because it is a ground for residence permit applications while Article 12(4) ICCPR is yet to be established as generally having direct effect within the domestic legal system. Either way, both provisions form strong grounds for establishing a right to residency for ex Dutch Surinamese people living undocumented in the Netherlands.

1 Legal Historical Context

The scope of this expert opinion *ratione materiae* encompasses the right to lawful presence on the territory of the Netherlands for ex Dutch Surinamese nationals currently undocumented in the Netherlands. Hence, the scope *ratione personae* includes those who previously held Dutch citizenship by virtue of being born and residing on the Dutch colonial territory of Suriname before Suriname declared independence in 1975, at which point Dutch citizenship was (non-consensually) stripped from this group, and Surinamese citizenship was granted.[3]

Now, a small population of undocumented ex Dutch Surinamese people live in the Netherlands (approximately 750 - 1000 people in Amsterdam, which is the main city of residence for this group)[4] without access to lawful presence or legal status such as a residency permit, and are particularly vulnerable as a result of being undocumented. On the basis of international human rights legal provisions and jurisprudence, this expert opinion makes the case that this group has a right to be regularised in the territory of the Netherlands. The reliance on international human rights norms will be explained in the following chapters.

[3] Guno R Jones 'Tussen Onderdaned, Rijksgenoten en Nederlanders: Nederlandse politici over burgers uit Oosten West en Nederland, 1945-2005' (2007) *Rozenberg Publishers.*

[4] Freek Haye 'Surinaamse Amsterdammers zonder papieren: 'Zonder Nederlands paspoort kan ik m'n kinderen niet zien' *Het Parool* (November 9 2022)*l* <https://www.parool.nl/amsterdam/surinaamse-amsterdammers-zonder-papieren-zonder-nederlands-paspoort-kan-ik-m-n-kinderen-niet-zien~ba80448f/#:~:text=PlusPortretten-,Surinaamse%20Amsterdammers%20zonder%20papieren%3A%20%27Zonder%20Nederlands%20paspoort%20kan%20ik,m%27n%20kinderen%20niet%20zien%27&text=Naar%20schatting%20wonen%20er%20zo,graag%20een%20Nederlands%20paspoort%20willen> accessed January 12 2023.

A brief explanation of how ex Dutch Surinamese nationals came to be undocumented in the Netherlands is necessary to holistically understand the legal and moral argumentation relied upon in this expert opinion. The political mandates pushed by the Dutch government across the last decades have constructed notions of nationality, national belonging and exclusion that are largely arbitrary and racialised,[5] yet are still at the foundation of the current nationality and immigration policy. An understanding of the underlying rationale of the Dutch state governing immigration policy affecting the legal status of now Surinamese people before, during and after the independence of Suriname can ensure that we acknowledge a full critique of the legal and political structures in place today. Further, it will allow for the Dutch government to be held fully accountable, historically, and contemporarily, for the precarious legal status of ex Dutch Surinamese nationals undocumented in the Netherlands, and the relevant rights threatened thereby.

It is important also to emphasise here that the general political stance towards migration and particular migration flows has a direct impact on the policy affecting said migrants, and hence an understanding of the former is necessary for an understanding of the latter. Political stances can vary greatly depending on the immigrant group in question, and often on the basis of gender and race. Immigration is an extremely salient policy issue, as we will see, and the progressive framing of immigration as a threat to the nation has historically led to more and more restrictive legal statuses.

1.1 A brief history of Dutch policy affecting the population in question

During its era of colonisation, the Dutch territory expanded East to the Dutch East Indies (now Indonesia) and West to Suriname and the Netherlands Antilles. To place the matter at hand into a temporal context, the Netherlands colonised Suriname from the year 1667.[6] Prior to decolonisation, 'all inhabitants of the Kingdom of the Netherlands were of Dutch nationality'.[7] However, according to academic expert on this matter, Guno Jones, 'in the eyes of politicians, overseas Dutch nationality did not automatically entail Dutch citizenship within the Dutch [European territorial] society'.[8]

That being said, it was of the utmost importance for the Dutch state in the pre-WWII era to maintain an image of Dutch hegemony as a means of maintaining the empire.[9] As such, 'the Dutch nationality was

[5] Raffaela Abbate et al, 'Report on the legal arguments which can be made in favour of or against the legalisation of undocumented Surinamese people born as Dutch citizens before 1975' (5 May 2022) *Nijmegen Law Clinic*.
[6] Britannica, 'History of Suriname'<https://www.britannica.com/place/Suriname/History> accessed 28 January 2023.
[7] Jones (n 3) 365.
[8] ibid 368.
[9] ibid 369.

helpful in the construction of predial and solitary subjects overseas'.[10] In other words, Dutch nationality as a legal status was used as a tool for maintaining the support of the colonised for colonisation. This legal status was accompanied with the legal entitlement to admission to the (European) territory of the Netherlands.[11] However, the limited degree of migration at the time meant that the conferral of this status and related entry rights was not considered as a 'gateway to future citizenship within the Dutch society'.[12] In other words, 'the Dutch nationality of the overseas population and the related rights were not yet [during the pre-war era of colonisation] linked to reflections on the Dutch nation'.[13]

The post-war era was characterised by waves of independence movements across many colonised states globally. In the Dutch context, their Eastern colonies gained independence first with Indonesiabecoming sovereign in 1949.[14] This 'loss of "Our Indies"' was considered a national trauma for the Dutch.[15] As such, the maintenance and protection of the Kingdom was considered of the utmost importance, and therefore 'great value was attached' to the remaining colonies in the West, including Suriname.[16]

While previously some in the Western colonies had held a lesser legal status (Dutch subject), now in efforts to maintain these territories as part of the Kingdom, full formal Dutch citizenship was granted to all colonised peoples.[17] In the case of Suriname, this occurred in 1951, perhaps in preparation for it becoming a constituent country of the Kingdom of the Netherlands in 1954.[18] This change of status of Suriname does not constitute an act of decolonisation nor means that Suriname was independent from the Netherlands at the time. Regardless, we can see how favourable access to legal status was used as a political tool to ensure support and reliance on Dutch colonialism.

Further, during this time, 'politicians did not even think about discouraging the admission of overseas citizens from the West', as this was seen as 'incompatible with the notion of the Kingdom'.[19] Hence, then Dutch Surinamese individuals, with right to entry to the European Dutch territory, were able and even encouraged to immigrate. Jones posits that this was possible within the political climate of the time because Surinamese immigrants did not make up a large population, 'did not lay a heavy claim on public facilities in the [European] Netherlands' and therefore held an 'unproblematic [non-threatening]

[10] Jones (n 3).
[11] Jones (n 3).
[12] ibid.
[13] ibid.
[14] Indonesia declared itself independent in 1945 but was officially determined as sovereign in 1949.
[15] Jones (n 3) 372.
[16] ibid.
[17] ibid.
[18] Abbate et al (n 5) 48.
[19] Jones (n 3) 373.

status' within Dutch society.[20] Further, politicians believed that Surinamese immigration was only temporary insofar as this group would "inevitably" return back to Suriname at one point.[21] Further, labour shortages in post-war Netherlands were another important factor as to why Surinamese immigration was desired.[22]

As the pattern normally goes, as migration flows increased from Suriname to the Netherlands in the 1960s, so too did political discourses shift; as such, 'their unrestricted admission to the Netherlands would become an issue of political debate' within Dutch politics.[23] This debate revolved also around gender and race issues, with a report even being commissioned by the Dutch government documenting the 'sexual relations between Surinamese male labourers and Dutch women'.[24] This is but one example to illustrate the changing political climate during the 1960s, however free movement remained in effect during this decade.

By the end of the 1960s, with waves of former colonies gaining independence across the globe, the idea thereof 'would become a vehicle for [Dutch] politicians to initiate a debate on the politically sensitive issue of migration and citizenship' of still Dutch Surinamese people.[25] In effect, Dutch politics performed a U-turn and framed the Dutch citizenship enjoyed by the Western colonies as imposed and as 'an unnatural status', a vessel of colonisation.[26] In fact, the Dutch government 'urged the Surinamese government to make haste with their independence'.[27] The rights attached to the Dutch citizenship of colonised peoples, such as freedom of movement, were not placed on the same pedestal of criticism. In other words, Dutch citizenship of Surinamese people was put forth for debate as a symbol of colonialism, while the right to freedom of movement enjoyed thereunder was conveniently left out of the conversation.

Suriname declared independence in 1975. Those on the newly independent territory lost their Dutch citizenship and gained Surinamese citizenship. They also lost the rights attached to Dutch citizenship due to the 'closure of the borders of the Netherlands to people from Suriname'.[28] Surinamese people in relation to the Netherlands, in which they had been living up until independence, were now 'legal

[20] Jones (n 3) 373.
[21] ibid.
[22] Abbate et al (n 5) 49.
[23] Jones (n 3) 373.
[24] ibid.
[25] ibid.
[26] ibid 374.
[27] ibid.
[28] ibid.

aliens'.[29] That being said, for approximately five years following independence, Surinamese legal aliens 'could rely on a privileged admission policy'.[30]

According to Jones, this policy, too, was premised on the belief that 'Surinamese Dutch would ultimately return to Suriname in large numbers', a belief that in turn was premised on the idea that the Netherlands was 'an unnatural social and cultural habitat' for them.[31] This notion also heavily influenced assumptions as to Surinamese people's (in)ability to integrate in the Netherlands during the 1970s and 1980s.[32] However, again as the familiar pattern goes, a new immigrant group regarded as threatening (Islamic Dutch citizens) 'were designated as the principle problem group of Dutch society' and hence the heat shifted off of ex Dutch Surinamese citizens.[33]

The liberal admission policy for ex Dutch Surinamese people was put to a stop in 1980 and 'the admission of Surinamese people into the Netherlands changed and became (almost) as strict as the admission of other foreigners'.[34]

It is worth noting there that Global Northern states' immigration policies are often racialised, resulting in discrimination, if not directly then indirectly. The Radboud University Law Clinic Report (Nijmegen Report) on the discrimination suffered by the scope *ratione personae* of this opinion provides detailed analysis on this. It explains that the requirement under Article 3.51 (1) (d) of the Vreemdelingenbesluit (Alien's Decree) to be born on the territory of the Netherlands in order to obtain a non-permanent residency permit has been ruled on by various courts to exclude what once was Dutch territory by way of colonisation, and hence to only include European Dutch territory.[35] This results in an indirectly discriminatory implementation of immigration policy along racialised lines.[36] This is important to keep in mind when constructing an understanding of Dutch political motivations for immigration policy affecting ex Dutch Surinamese people; the racial discrimination characterising them lends to the larger argument that immigration policies resulting in groups of undocumented previously colonised individuals on Dutch territory is arbitrary.

This subsection has intended to lay out the stance of the Dutch government towards Surinamese people from during colonisation until the point at which they were sidled with a legal status comparable to any

[29] Jones (n 3) 374.
[30] ibid.
[31] Jones (n 3).
[32] ibid.
[33] ibid.
[34] Abbate et al (n 5) 48.
[35] ibid 67.
[36] ibid 68.

other legal alien. The aim thereof is to enhance our understanding of the opportunistic motivations behind the conferral of various legal statuses on Surinamese people across time. These motivations resulted in racialised policies that disproportionately impacted previously colonised people of colour, including the group in question. As such, the racially discriminatory nature of migration policies leads to the conclusion that they were illegitimate and arbitrary. Such policies have left a number of ex Dutch Surinamese people in the Netherlands with an undocumented status.

1.2 Contemporary situation: undocumented status of ex Dutch Surinamese people in the Netherlands

There are a number of reasons and ways that an individual may become undocumented on a given territory, particularly in the context of such salient and therefore fluctuating immigration policies as were imposed on ex Dutch Surinamese people immigrating to the Netherlands. The five year period of liberal immigration policy from 1975 to 1980 advanced by the Netherlands following Surinamese independence meant that this migrant group was not obliged to obtain a visa for short stay purposes. For residence of longer than three months, the requirements were less strict than for other non-nationals; 'the only requirements for admission without a purpose of stay were that an applicant had sufficient funds to support themselves and had a place to live'.[37] If an employment visa was requested and the aforementioned conditions met, the visa must be granted, and the same went for student visas.[38]

Individuals who made use of these liberal admission policies became undocumented if they did not apply for a residency permit on time and/or overstayed their visa,[39] or their visa lapsed for other reasons, such as the breakup of a relationship.[40] Admission for individuals still in Suriname became expansively more restrictive as the political climate shifted as explained above;[41] the policy changes are laid out extensively in the Nijmegen Report.[42] Hence, those immigrating to the Netherlands from 1980 onwards in the hopes of obtaining residency rights on the basis of family reunification, for example, were largely disappointed and many became undocumented.[43]

[37] Abbate et al (n 5) 55.
[38] ibid.
[39] ibid 60.
[40] De Regenboog Groep, 'Geboren Als Nederlander, Maar Geen Recht Op Verblijf' (2022) 7 <https://issuu.com/deregenbooggroep/docs/oudere_ongedocumenteerde_vdef_2_/10> accessed 28 January 2023.
[41] See pages 5-7 of this document.
[42] Abbate et al (n 5).
[43] Iva Venneman, 'Geboren Nederlanders al tientallen jaren in de illegaliteit: 'Ik wil alleen een normaal bestaan leiden'' (7 november 2022) *de Volkskrant* <https://www.volkskrant.nl/nieuws-achtergrond/geboren-nederlanders-al-tientallen-jaren-in-de-illegaliteit-ik-wil-alleen-een-normaal-bestaan-leiden~b5f26650/?utm_source=link&utm_medium=app&utm_campaign=shared%20content&utm_content=free&referrer=https%3A%2F%2Fwww.linkedin.com%2F>

Individuals within the scope *ratione personae* arrived to the Netherlands at different times and now hold an undocumented status due to varying circumstances, however what they hold in common is that they all at one point were Dutch citizens. Further, this legal status was only conferred when it was politically beneficial for the Dutch state, and as such was continuously limited by the Dutch state when the political benefits subsided. This in and of itself, as well as the racialised nature of how certain immigrants were determined as politically beneficial or not, must lead to the conclusion that the policy of legal status conferral by the Dutch state on ex Dutch Surinamese people has been and continues to be arbitrary and discriminatory.[44]

1.3 Relevance

1.3.1 General consequences of being undocumented

The consequences of an undocumented status are extremely painful and give rise to a multitude of threatened rights.[45] In the Netherlands and relevant for the group in question, undocumented individuals only have access to a basic level of healthcare. At this point, most undocumented ex Dutch Surinamese people in the Netherlands are elderly and therefore require more medical and health support than they have access to.[46] Further, for decades now, these individuals' undocumented status has meant they have been restricted from exercising a wide range of human rights in an effort to remain unknown to authorities, in order to avoid expulsion; rights such as the right to freedom of movement,[47] right to privacy,[48] right to exercise one's religion,[49] freedom of expression,[50] right to peaceful assembly,[51] freedom of association,[52] non-discrimination,[53] the right to work,[54] adequate standard of living,[55] right to health,[56] and right to participate in cultural life,[57] to name a few.

[44] Abbate et al (n 5).
[45] For example, see Brigit Toebes et al, 'Access to health care for undocumented migrants from a human rights perspective: a comparative study of Denmark, Sweden, and the Netherlands' (2012) *Health and Human Rights;* Ines Keygnaert , Nicole Vettenburg and Marleen Temmerman, 'Hidden violence is silent rape: sexual and gender-based violence in refugees, asylum seekers and undocumented migrants in Belgium and the Netherlands' (2012) *Culture, Health and Sexuality* 505; M.A. Schoevers M.E.T.C. van den Muijsenbergh A.L.M. Lagro-Janssen, 'Self-rated health and health problems of undocumented immigrant women in the Netherlands: A descriptive study' (2009) *Journal of Public Health Policy* 409.
[46] Haye (n 4).
[47] ICCPR (n 1) art 12.
[48] ibid art 17.
[49] ibid art 18.
[50] ibid art 19.
[51] ICCPR (n 1) art 21.
[52] ibid art 22.
[53] ibid art 26; see also Jones (n 3).
[54] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1967) 993 UNTS 3 (ICESCR) Article 6.
[55] ibid art 11.
[56] ibid art 12.
[57] ibid art 15.

De Volkskrant recently published a piece featuring a member of the group named Humbert Gemerts, 59 years old. His Dutch citizenship was stripped of him as a child following Surinamese independence, and he later became orphaned. When he became an adult, he came to the Netherlands in the 1990s to join his remaining living family who had all immigrated. He thought he could obtain residency as his family had, and since, he has been undocumented in the Netherlands. As a result of his status, has not been able to register with the municipality, and he cannot rent nor buy a house. He has slept for 25 years on the couches of his three sisters, with friends or on the street. He makes his living with cleaning jobs and lending a hand for family members because he cannot work legally, despite speaking Dutch fluently. When he stepped on the plane from Paramaribo to the Netherlands decades ago, he did not know he would still be undocumented 25 years later. In his own words: "The only thing I want is to work legally here for a couple years more, to be able to rent my own place and to have a bit of peace".[58]

1.3.2 The Netherlands' moral and political obligations

Hence, from a human rights perspective, the undocumented status of this group is extremely problematic. Aside from its international legal obligations laid out in the following chapters, the Netherlands must take into account its moral obligations towards this group. Firstly, the Netherlands has been aware of the existence of this group of undocumented ex Dutch Surinamese individuals for some time now. In practice, the Dutch state has not tried to actively and directly target this group for expulsion, however nor has it entertained the notion of their regularisation;[59] this amounts to essentially the intentional, and at least the knowing, maintenance of the undocumented status of this group. According to the ECtHR, this should strongly be taken into account in making the argument for the regularisation of undocumented individuals.[60]

Further, the Dutch state must be held properly accountable and find suitable reparations for the role it played in colonialism and the slave trade, both elements of world history that significantly impact Surinamese people for which remedies must be ascertained. In light of recent apologies therefor, the Dutch government must ensure it takes steps beyond the symbolic, and affects actual change for those who continue to fall victim to (neo)colonial legal structures, and poorly executed decolonisation. It is here worth further contextualise the experience of Dutch colonialism by Surinamese people, as explained by Dr Barry Biekman;

[58] Venneman (n 43).

[59] Meeting with Eva Bezem and the authors, during which it was discussed that expulsion does of course occur in instances of criminality in which case those undocumented get found out as such. Further, another factor to take into account is the geopolitical issue of the Surinamese state's lack of cooperation in response to the Dutch state's return request for ex Dutch Surinamese individuals.

[60] *Jeunesse v the Netherlands* App no 12738/10 (ECtHR, 4 December 2012), para 116.

> ‘Even in the deepest interior of Suriname, Dutch is spoken. Dutch culture, heritage, the entirety of intercourse: Suriname has in fact always remained a colony, that is the result of four hundred years of colonialism. If you then apologise for the slavery past and colonialism, then acts of reparation belong with that’.[61]

1.3.3 Legal pathways: Structure of the expert opinion

This expert opinion will lay out the international legal provisions that form the bases of its argumentation for the regularisation of ex Dutch Surinamese people living undocumented in the Netherlands, starting with Article 12(4) ICCPR (right to enter one’s own country) in the second chapter, followed by Article 8 ECHR (right to private and family life) in the third chapter. In the respective chapters, these international human rights will be applied to the matter at hand to explicitly establish international legal responsibility of the Netherlands for the hardships (or even violence) suffered by ex Dutch Surinamese people undocumented on its territory. In the fourth chapter, this expert opinion will look to the practice of other former coloniser states as a means of establishing comparisons between their domestic practices and the Netherlands with the intention of identifying best and worst practices. The fifth chapter will discuss the limitations of this expert opinion, as well as possible and important further research. In the concluding chapter, this expert opinion will summarise the legal argumentation through which a claim can be made that the Netherlands is internationally legally responsible for the protection of the rights of ex Dutch Surinamese people undocumented on their territory under Article 8 ECHR and Article 12(4) ICCPR, and as such is obliged to regularise this group of people.

2 A Right to Residency under Article 12(4) of the International Covenant on Civil and Political Rights

Article 12 of the ICCPR states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. *No one shall be arbitrarily deprived of the right to enter his own country*.[62]

[61] Fréderike Geerdink, ‘Als Nederlander geboren in de kolonie, nu stateloos’ *One World* (November 22 2022) [Translated from Dutch to English].
[62] ICCPR (n 1), art. 12 *emphasis added.*

The wording of Article 12(4) of the International Covenant for Civil and Political Rights (ICCPR) provides that "no one shall be arbitrarily deprived of the right to enter his own country".[63] This provision has been specified and narrowed by way of the views of the Human Rights Committee (HRC) through communications and the General Comment No. 27. The following chapter argues that Article 12(4) ICCPR provides for a strong legal ground to regularise the ex Dutch Surinamese population living undocumented in the Netherlands and that directly invoking it in domestic courts is possible.

2.1 Article 12(4) ICCPR and its interpretation by the Human Rights Committee

The ICCPR was adopted in 1966 and entered into force on the 23rd of March 1976. To date, it has 74 signatories and 173 parties. It is legally binding to those who have ratified it, while merely being a signatory obliges a state to "refrain, in good faith, from acts that would defeat the object and purpose of the treaty".[64] Throughout the drafting process, there were conflicting views on the practicalities of Article 12 ICCPR, as it was considered impossible to include an exhaustive list of all limitations in effect in the State Parties, while the inclusion of one broad limitation clause instead would have rendered the Article ineffective.[65]

That being said, the importance of freedom of movement incited the states to find a compromise.[66] For example, early drafts of Article 12(4) dealt only with the right of nationals to enter their country, i.e., the country of their nationality, and were directed towards persons born abroad.[67] Since this wording was not sufficient for states which considered the right to settle wherever or the right to return for non-nationals to be fundamental, a compromise was found by replacing the wording with "own country", based on Article 13(2) of the Universal Declaration of Human Rights.[68] In particular, representatives from Uruguay emphasised the historical importance of the possibility to settle where one wishes,[69] whereas representatives from Australia pointed out that the right to enter should centre around where one has an established home, rather than nationality.[70] As Article 12(3) lays out restrictions to the

[63] ICCPR (n 1), art 12(4).
[64] Jessica Leal, 'Stateless with Nowhere to Go: A Proposal for Revision of the Right of Return According to the International Covenant on Civil and Political Rights' (2014) 46 George Washington International Law Review 683.
[65] United Nations General Assembly (UNGA) 'Annotations on the Text of the Draft International Covenant on Human Rights' (1 July 1955) 10th Session (1955) Agenda Item 28 Annexes (A/2929) 39.
[66] ibid (n 65) 39.
[67] ibid (n 65) 39.
[68] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 13(2): 'Everyone has the right to leave any country, including his own, and to return to his country'.
[69] Commission on Human Rights, 'Summary Record of the Hundred And Fifty-First Meeting' (19 April 1950) UN Doc E/CN.4/SR.151, para 3.
[70] ibid (n 69), para 17.

freedom of movement, it is important to note that the right of entry into one's own country in Article 12(4), placed afterwards, is not subject to the same limitations as the first and second subparagraphs. Accordingly, states can only derogate from their obligations in Article 12(4) ICCPR under the terms of Article 4(1-3) ICCPR.[71] As there are no other limitations, the core elements guiding this provision are 'arbitrarily', 'deprived' and 'one's own country'. Their interpretation and application are further discussed in the sub-sections below.

The body mandated to enforce the ICCPR is the Human Rights Committee (HRC). Its aim is to ensure the conformity of state action with the provisions of the Covenant. The latter has become considerably more important for the protection of individuals with the possibility of individual complaints to the HRC, which was introduced in the Optional Protocol of 1966.[72] States need to be signatories of the Optional Protocol to be subjected to the enforcement mechanisms of the HRC. Under the Optional Protocol, the HRC has the competency to consider individual complaints, issue communications and request that State Parties take interim measures necessary in exceptional circumstances 'to avoid irreparable damage to the victim'.[73] The HRC considers cases in which state parties do not comply with the request for interim measures as 'grave breaches of [a party's] obligations under the Optional Protocol if [the state party] acts to prevent or frustrate consideration by the Committee […], or to render examination by the Committee moot and the expression of its Views nugatory and futile'.[74] The compliant implementation of Article 12 ICCPR requires laws and practice on the part of state parties that are fully consistent with the provision, are transparent and accompanied by the availability of effective remedies.[75] Through the adoption of communications regarding individual complaints, the identification of breaches of rights in these cases and through its General Comment No. 27 of 1999, the HRC continuously specifies and clarifies the meaning of Article 12(4) ICCPR and the resulting international obligations.

A general comment is a treaty body's interpretation of human rights treaty provisions and a recommendation on states' duties and the treaty implementation. In 1999, the Human Rights Committee adopted its General Comment No. 27 providing guidance on Article 12 of the ICCPR, including the fourth subparagraph. General Comment No. 27 explains that the various facets of Article 12(4) include

[71] ICCPR (n 1) art 4(1-3): Only in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed and as long as such measures are not inconsistent with other obligations under international law and do not discriminate solely on the ground of race, colour, sex, language, religion or social origin.
[72] Leal (n 64) 683.
[73] United Nations Human Rights Committee (HRC) 'The mandate of the Special Rapporteur on New Communications and Interim Measures' (6 May 2014) CCPR/C/110/3, para B6.
[74] *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v. Kyrgyzstan* (31 July 2008) CCPR/C/93/D/1461,1462,1476 & 1477/2006, para 10.2.
[75] Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (1st edn, Cambridge University Press 2020) 352.

the right to remain in one's own country, to return to one's own country and, in some cases, to enter one's own country for the first time. It also includes the prohibition of forced relocation and mass expulsion from one's own country.[76] Further, it provides guidance on the personal scope of application and clarifies that it relies only on the determination of one's own country, as Article 12(4) ICCPR does not distinguish between nationals and non-nationals. With regard to the notion of 'own country', the General Comment departs from the requirement of formal relations with the state and creates the differentiation of the personal scope of Article 12(4) ICCPR and 'mere aliens' which are protected by Article 13 ICCPR.[77] This inference means that all those are protected by Article 12(4) who at least cannot be considered 'mere aliens' in the sense of Article 13 ICCPR. Further, the comment states that the concept of arbitrariness in Article 12(4) ICCPR refers to any state activity and that there are few, if any, cases in which expulsion from one's own country can be reasonable and thus not arbitrary.[78] In other words, once a state is determined to be an individual's 'own country', their expulsion therefrom would almost certainly be considered unreasonable under the meaning of Article 12 ICCPR.

2.2 Article 12(4) ICCPR test

2.2.1 What is 'one's own country'?

The Commission, in its earlier communications from 2000 until 2004, recognizes that it is the author's 'own country' if at the time of the communication the author holds the nationality of the country in which he wishes to enter or reside,[79] or if the author enjoys entitlement to the nationality under the respective domestic law.[80] Within the same timeframe, having the nationality of another state,[81] not having any connections to the state in question by reasons of birth or by descent from any citizen, not having resided in the respective state party as well as no further ties with it[82] led the Commission to conclude that the state party in question could not be considered the author's 'own country'. Additionally, entering the state party in question through their immigration system rather than acquiring the nationality, unless there are unreasonable impediments to do so, has the same effect.[83] The HRC has since deviated from these positions. In more recent communications, it is no longer required that the person concerned does not hold any other nationality and that entry into the respective country does not take place through the immigration system, as the next paragraph will lay out.

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[76] HRC, 'General Comment No 27: Article 12 (Freedom of Movement)' (adopted at sixty-seventh session on 2 November 1999) CCPR/C/21/Rev.1/Add.9, para 19.
[77] ibid (n 76), para 20.
[78] HRC, 'General Comment No 27' (n 76), para 21.
[79] *Toala et al v New Zealand* (22 November 2000) CCPR/C/70/D/675/1995, para 11.2; *Jiménez Vaca v Colombia* (25 March 2002) CCPR/C/74/D/859/1999, para 7.4; *Randolph v Togo* [Dissenting Opinion] (15 December 2003) CCPR/C/79/D/910/2000, para 12.1; *Madafferi v Australia* (22 November 2004) CCPR/C/81/D/1011/2001, para 9.6.
[80] *Toala et al v New Zealand* (22 November 2000) CCPR/C/70/D/675/1995, para 11.2.
[81] ibid (n 80), para 11.2.
[82] ibid (n 80), para 11.2.
[83] *Madafferi v Australia* (22 November 2004) CCPR/C/81/D/1011/2001, para 9.6.

Starting with the case of *Nystrom* in 2011, the Commission has held that the notion of 'own country' encompasses more than formal nationality acquired either by birth or conferral, but rather is based on whether the author cannot be considered a mere alien. This approach was derived from a comparison with Article 13 ICCPR, which provides a minimum level of protection for aliens in the context of expulsion. It follows that the personal scope of Article 12(4) cannot be about 'mere aliens', who are covered by Article 13 ICCPR. Not being a mere alien is based on the special ties to or claims in relation to a given country.[84] In identifying these ties in the cases of *Nystrom* and *Budlakoti*, the Commission has paid particular attention to 'long standing residence, close personal and family ties and intentions to remain, as well as the absence of such ties elsewhere'.[85] In a comparable wording, the Commission has taken into account the presence of family, the ability to speak the respective languages, duration of stay, and lack of any other ties than nationality to another country in the case of *Warsame*.[86] Ultimately, factors such as being an 'absorbed member' of a community[87] or not having confirmed possible other nationalities[88] were also taken into consideration in the cases of *Nystrom*, *Warsame* and *Budlakoti*.

This analysis of the HRC's communications shows that, in earlier communications, the provision was interpreted by the Committee as protecting the rights of citizens to return to their country of nationality, but it has since broadened its scope beyond nationality to consider factors like residence, language capacities and education to establish a country as 'one's own'. It can therefore be seen that a distinction has been made between a formal tie based on nationality and a social tie based on accumulating personal factors. This appeal to membership in a community as the basis of belonging to a country is an important constraint of territorial sovereignty, as such memberships can develop or exist independently of the formal granting of citizenship or residence permits.

2.2.2 What constitutes 'arbitrary' deprivation?

The concept of arbitrariness applies to all state action, including legislative, administrative, and judicial action. The General Comment No. 27 of the HRC establishes that it goes beyond requiring accordance with the law, as even if provided by the law, state action must be in accordance with the provisions of the Covenant and, in any event, reasonable.[89] Further, the Comment provides that 'there are few, if any, circumstances in which deprivation [of this right] could be reasonable'.[90] Considering Article 4(1) of

[84] *Nystrom v Australia* (28 July 2011) CCPR/C/102/D/1557/2007, para 7.4; *Warsame v Canada* (01 September 2011) CCPR/C/92/D/1959/2010, para 8.4; *Budlakoti v Canada* (29 August 2018) CCPR/C/122/D/2264/2013, para 9.2.
[85] *Nystrom* (n 84), para 7.4; *Budlakoti* (n 84), para 9.2.
[86] *Nystrom* (n 84), para 7.5; *Warsame* (n 84), para 8.5.
[87] *Nystrom* (n 84), para 7.5 [reference to Australian jurisprudence].
[88] *Warsame* (n 84), para 8.5; *Budlakoti* (n 84), para 9.3.
[89] HRC, 'General Comment No 27' (n 76), para 21.
[90] ibid (n 89), para 21.

the ICCPR, only in 'time of public emergency which threatens the life of the nation'[91] can a state party take measures derogating from Article 12(4), as long as these do not exceed what can be considered necessary and do not involve discrimination on the grounds of race, colour, sex, language, religion or social origin. Accordingly, deprivation of the rights under Article 12(4) ICCPR must in principle be considered inherently arbitrary if it is established that the country in question is the affected person's own country.

This has a significant impact on a possible balancing of interests, as a balance can barely be made once it has been established that the country in question is the authors 'own country'. This stance was confirmed by the Committee in various communications. For example, it has held that the mere enforcement of immigration policy cannot be regarded as a legitimate state interest. As it was stated in *Winata* 2001, a state must as a bare minimum demonstrate additional factors that go beyond a simple enforcement of immigration policy.[92] In the case of *Warsame*, the Committee concluded that even the prevention of further crimes was not sufficient to reasonably justify the expulsion of the author from his own country. Expulsion from one's own country on the basis of a criminal record and to prevent further crimes was disproportionate as long as it was indeed the author's own country.[93] Accordingly, (particularly in the case of people who have been tolerated for a longer period of time) any state interest proposed in the balancing exercise resulting in expulsion or in maintaining a precarious residence status can be rejected, since even newly emerging factors within the balancing of interest like criminal convictions do not constitute an acceptable reason to restrict safe residence in one's own country.

2.2.3 When is one 'deprived' of the right to enter?

The HRC's communications shed light on what it means to be deprived of the right codified in Article 12(4). In particular, it becomes clear that Article 12(4) ICCPR encompasses not only the right to physically enter one's own country, but it also prohibits both direct interference with the safe entry and residence in one's own country, as well as indirect interference through a failure to guarantee the safe enjoyment of these rights. In the communications on *Jimenez Vaca* 2003 and *Randolph* 2004, as seen above, the HRC considered it a breach of Article 12(4) ICCPR that the states did not ensure the safe enjoyment of the right to residence in the author's own countries. Both were forced out of their own country due to imminent threats to their physical health which led to a breach of the state's obligation to ensure the rights provided for in Article 12(4) ICCPR. The HRC elaborates on states' obligations in its General Comment No. 3. It establishes that State Parties, including all 'administrative and judicial authorities', shall undertake 'specific activities' to 'ensure the enjoyment of these rights to all

[91] ICCPR (n 1) art 4(1).
[92] *Hendrick Winata and So Lan Li v. Australia* (16 August 2001) CCPR/C/72/D/930/2000, para 7.3.
[93] *Warsame* (n 84), para 8.4-8.6.

individuals under their jurisdiction' as legislative actions alone are 'often not per se sufficient'.[94] These obligations have been reflected on and developed further by the General Comment No. 31, which replaced General Comment No. 3, whereas the main idea, namely that states must 'give effect' to the provisions of the ICCPR, is emphasised.[95] The term 'deprivation' thus means not only the refusal of entry, but also the failure to take measures that ensure the safe enjoyment of the right to enter and reside in one's own country. In other words, a state has the positive obligation to protect the safe entry and residence from private and public interference. Due to the inherently precarious and threatenedresidence status of undocumented people, as it was laid out in Chapter 1.3.1 of this expert opinion, thefailure to regularise them in their own country must also be considered as prohibited by the article as ithinders the full enjoyment of their rights.

2.3 Application of article 12(4) ICCPR to the case of ex Dutch Surinamese citizens

The affected population of ex Dutch Surinamese individuals used to hold a status of citizens, formally equal to any other Dutch citizen, but have subsequently been deprived of this equality and have now been living undocumented in the Netherlands for a significant time. The Dutch state has gradually de-regularised this racialised population, and subsequently failed to provide them with a safe and stable status that would allow them to continue their lives in their own country. This expert opinion argues that this group has the right to reside legally in the Netherlands under Article 12(4) ICCPR. In accordance with the Article 12(4) ICCPR test explained above, we argue that, firstly, the Netherlands is their 'own country'; secondly, the failure to regularise them constitutes a deprivation of their rights under Article 12(4); and thirdly, that this deprivation is of an arbitrary nature.

2.3.1 The application of the concept of 'own country'

The ex Dutch Surinamese individuals living undocumented in the Netherlands are in their 'own country' within the meaning of Article 12(4) ICCPR because they cannot be considered as 'mere aliens' and precisely fall under the General Comment's understanding of 'own's own country' as being broader than simply the country of nationality.[96] Not only did they hold the Dutch nationality until 1975, but they also most likely developed strong personal and social ties, may have family in the Netherlands, have Dutch as their native language, and may have lost or never had significant ties with Suriname post-1975. Being born prior to 1975, they were born on Dutch territory either in the European territory of

[94] HRC, 'General Comment No 3: Article 2 (Implementation at the National Level)' (adopted at thirteenth session on 29th July 1981), para. 1-2 [replaced by General Comment No 31 (n 95)].
[95] HRC, 'General Comment No 31: The Nature of the General Legal Obligations Imposed on State Parties to the Covenant' (adopted at 2187th meeting on 29 March 2004), para 4.
[96] HRC, 'General Comment No 27' (n 76), para 21.

the Netherlands or in Suriname, which was Dutch territory prior to 1975. Hence, special ties to the Netherlands as such have always existed, and their long-standing residence in the European territory of the Netherlands post-1975 has strengthened these ties and added to them cumulatively. These social and personal ties can develop and strengthen independently from lawful residence status, but through mere presence in the community and the leading of social life in the respective territory. As it has been argued by Martijn Stronks on the concept of *ius temporis*, 'human time within a certain territory matters, legally and normatively' and migrants develop roots and hence claims regardless of legal status.[97] Special connections like long-standing residence, ability to speak the language, strong personal and social ties, being an absorbed member of the community etc. alone suffice to consider a country one's own. In this particular case, it must be emphasised that the persons concerned were born on Dutch territory, had Dutch citizenship prior to 1975, may have no such ties to Suriname post-1975 and, in part, their formal Surinamese citizenship cannot be confirmed as they can no longer be found in the Surinamese civil status register.[98] Therefore, without doubt, the Netherlands must be considered to be their own country.

2.3.2 Application of the concept of 'deprivation'

It is the state's obligation to not arbitrarily deprive anyone of the right to enter or reside safely in their own country. As this includes the obligation to ensure a safe enjoyment of residency, it must include the obligation to regularise people in their own country. To be able to safely enjoy the right to residency, a person must have the right to be regularised in his or her own country. Living without papers puts those affected in an inherently precarious situation, as many rights are simply out of reach; these are basic things like non-acute medical care, legal access to the labour market or the housing market.[99] In particular, the advanced age of the group affected contributes to a high vulnerability.[100] The lack of access to rights, to stability and security, the impossibility to plan, to shape a future, remains as long as they remain unregularised. Safe enjoyment of residence in their own country thus becomes impossible. A failure to regularise people in their own country must therefore be considered a deprivation within the meaning of Article 12(4) ICCPR.

2.3.3 The 'arbitrariness' of deprivation

Last but not least, a failure to regularise must be arbitrary to establish a violation of Article 12(4) ICCPR. As it has been clarified by the HRC, the concept of arbitrariness refers to any state action and goes beyond merely being provided for by the law. If the failure to regularise in any case at all is not arbitrary,

[97]Martijn Stronks, *Grasping Legal Time: Temporality and European Migration Law* (1st edn, Cambridge University Press 2022) 76.
[98] Geerdink (n 61).
[99] Regenboog Groep (n 40) 8.
[100] Venneman (n 43).

the state would have to argue that there is a vital interest in refraining from regularisation. The HRC clarifies that there are few, if any, situations where such deprivation is reasonable in the case of one's 'own country'. Since mere enforcement of immigration policy does not serve as a definite ground to not regularise a person in his or her own country, there is no clear vital interest to de-regularise this group of former nationals. Consequently, noncompliance with immigration rules also cannot be drawn upon as a legitimate interest to continue to refrain from regularisation. In particular since the affected population has been tolerated by the state for decades within its territory, any state interest invoked as a legitimation for depriving them of their rights must be rejected. Hence, it must be concluded that the failure to regularise the Ex Dutch Surinamese population living undocumented in the Netherlands is a breach of the Netherland's obligation to not arbitrarily deprive them of their right to reside in their own country within the meaning of Article 12(4) ICCPR. It may even be considered that the racialised nature of the gradual de-regularisation of the respective group adds to the arbitrariness of the deprivation.

2.4 The practical relevance of the Article 12(4) ICCPR for domestic procedures

The previous section established that ex Dutch Surinamese nationals have the right to legal residence in the Netherlands under Article 12(4) ICCPR. Individuals must be able to assert this right through forms and procedures. Furthermore, it must be possible to invoke these rights in court in order to have access to legal remedies. Therefore, the extent to which Article 12(4) ICCPR represents an opportunity for practice depends on the possibilities to directly invoke it in domestic procedures and the weight that is attached to the views of the Committee in domestic courts. The following chapter deals with these two questions.

2.4.1 The relationship between international obligations and the Netherlands' legal system

The Netherlands is a monist country in the sense that international treaties do not, in principle, have to be translated into national legislation through transformation laws in order to become part of the legal order.[101] In monist legal theories, the decisive factor for a direct effect is that the treaty provision itself is to be understood as self-executing, i.e., it is suitable for establishing direct rights and obligations without further legislative steps. Many provisions of international human rights treaties are directly applicable because their wording, content and purpose are sufficiently precise whereas not taking them into consideration, as well as the guidance by its governing bodies, cannot qualify as *lege artis*.[102] Some provisions may only be partially directly applicable. According to Article 93 of the Dutch Constitution, all provisions of international treaties that 'may be binding by virtue of their contents' become binding

[101] Aalt Willem Heringa, 'Judicial Enforcement of Article 26 of the International Covenant on Civil and Political Rights in the Netherlands' (1993) 24 Netherlands Yearbook of International Law 142.
[102] Stefanie Schmahl, 'Rechtsgutachten über den Umgang mit rassistischen Wahlkampfplakaten der NPD' (24th October 2015) University of Würzburg (on behalf of the German Federal Ministry of Justice and Consumer Protection) 4, 8.

following their publication. This implies that provisions which can be considered self-executive, meaning that they confer clearly enforceable rights to the individual, must be considered binding and therefore directly invokable.[103] This approach towards international obligations was shared by the Dutch Supreme Court as early as 1986, with regard to the direct effect of Article 6(4) of the European Social Charter (the right to strike).[104] It held that it matters less whether the Contracting State has provided for a direct effect, as long as it is not clear from the text, nor from the Travaux Préparatoires, that this has been excluded.

2.4.2 The self-executing character of Article 12(4) ICCPR

In the context of the Covenant's drafting history, there was disagreement as to whether the provisions should have a direct effect on domestic systems. The United States proposed that the provisions of this legal framework should not develop such a direct effect. However, this met with opposition from other members of the Drafting Committee; this proposal was rejected. This does not mean that a direct effect was planned for, but it indicates that it was not deemed impossible.[105] The enforcement of the Covenant required by Article 2(2) ICCPR is, despite the cumbersome formulations and restrictive references to domestic constitutional procedures, much more effective and definite than the gradual enforcement of the ICESCR foreseen for in its Article 2(1). From this difference in the timing and effectiveness of the two Covenants, it must be concluded that Article 2(2) ICCPR cannot be cited as evidence of this Covenant to merely create legislative obligations. Moreover, Article 12(4) of the ICCPR must be viewed dogmatically as an individual right and not as an obligation of the state to provide legal protection. It contains a specific and unambiguous right to which the individual is entitled and is not a mere prohibition or obligation directed towards the state. Whereas Article 17(2) ICCPR, for example, obliges the state to ensure that everyone 'has the right to the protection of the law', against interferenceswith the rights provided for,[106] Article 12(4) ICCPR confers rights directly on the individual to which he or she may point. With the introduction of the Covenant, the individual became the central focus of international obligations. The establishment of a procedure for individual claims before the HRC suggests that the individual is less an object of this framework than a subject with rights of their own.[107]

In any case, the provisions of the ICCPR - and thus also the prohibition to arbitrarily expel someone from their country - remain a binding international obligation. Each contracting State is obliged to refrain from actions that are contrary to the purpose of the ICCPR.[108] This applies to all state action,

[103] ibid (n 102) 8.
[104] Heringa (n 101) 143.
[105] Anja Seibert-Fohr, 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to Its Article 2 Para. 2' (2001) 5 Max Planck Yearbook of United Nations Law 419.
[106] ICCPR (n 1) art 17(2).
[107] Seibert-Fohr (n 105) 418.
[108] Leal (n 64) 683.

including judicial action. Invoking norms of the ICCPR in domestic courts is at least an adequate safeguard of the rights established in the provisions, especially given that the individual complaint procedure was seen as subsidiary to the implementation at the national level. After all, all national judicial instances must be exhausted before the person concerned can turn to the HRC for an assessment.[109] The right to an effective remedy in Article 2(3a-c) ICCPR must be provided for by allowing for a direct effect in domestic courts.

The HRC itself has on many occasions emphasised the importance of a direct effect of the ICCPR's provisions as a safeguard of compliant implementation. In 1993, the Committee recommended in its comments on Hungary to either incorporate the Covenant fully or give direct effect to it.[110] In the same year towards Ireland, the HRC stressed that 'the need to comply with the international obligations should be taken fully into account by the judiciary', thereby making the latter responsible for safeguarding its implementation.[111] It was further recommended that states should view the respective provisions as self-executing and to promote the possibility to invoke such in court as safeguards.[112] It is important to note that the HRC does not only recommend to either fully incorporate the provisions into national law or allow for a direct effect, but to also allow for a reference to the ICCPR in case of incorporation.[113] The legal obligations imposed on the State Parties are further elaborated on in the General Comment No. 31 of the HRC where it is emphasised that all individuals under the jurisdiction shall be able to enjoy their rights while the State Party must ensure that the provisions are given effect.[114] Concluding, the Netherlands international obligation combined with the interpretation and recommendations of the HRC suggest that it should be possible to directly invoke Article 12(4) ICCPR in domestic courts and procedures.

What generally impedes a direct effect is vagueness. Although Article 12(4) of the ICCPR provides for individual rights that do not in themselves require further legislative modification - and it should also be noted that it is comparable in its specificity to Article 8 of the ECHR, which can already be directly invoked in domestic proceedings and courts - there remains some room for interpretation. This room is, however, continuously narrowed via the views of the HRC. The HRC offers specific guidance on the implementation and interpretation of Article 12(4) through its communications and the General Comment No. 27. Due to the article being dogmatically designed as an individual right and the abundance of clarification and guidance by the HRC as the body charged with monitoring its

[109] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA 2200A (XXI) art 2, 5(2b).
[110] Seibert-Fohr (n 105) 431.
[111] ibid 431.
[112] ibid 433.
[113] ibid 434.
[114] HRC, 'General Comment No. 31' (n 95), para 4.

implementation, Article 12(4) ICCPR unfolds a self-executive character within the legal system of the Netherlands and must be therefore seen as directly invokable in domestic procedures and courts.

2.4.3 The relevance of the views of the HRC

The Human Rights Council is not a court, and it does not have the power to issue actual judgements. The Optional Protocol I refers in Article 5(4) to the decisions of the Committee as views. The views of the HRC do not have the formal quality of judgments and are not binding. However, it has been pointed out in a report by the European Commission for Democracy through Law in 2014 that the legal standards on which the treaty bodies express their views are binding on the States Parties and that the views expressed by the treaty bodies are therefore more than mere recommendations:

> States have to consider them in good faith (bona fide). On the other hand, they are not debarred from dismissing them, after careful consideration, as not reflecting the true legal position with regard to the case concerned. Not to react at all to a finding by the HRC, however, would appear to amount to a violation of the obligations under the ICCPR. [Due to its] composition, its independence and, importantly, its practice in examining State reports and individual communications procedures, the HRC has garnered an international reputation that imparts great moral authority to its decisions that a State party has violated ICCPR rights.[115]

Hence, the views are said to be nothing that can be disregarded without further consideration because a State Party disagrees with the interpretation given by the Human Rights Council or with the application to the facts of the case. A state must at least provide substantial reason for why it would derogate from the final views of the Human Rights Committee.

This approach towards the views of the Committee has been shared already in 2006 by the Centrale Raad van Beroep which held that although they are not formally binding, they 'should generally be regarded as an authoritative judgement, which has special significance in [domestic] procedures […] National courts may derogate from such an opinion only where there are compelling reasons which may justify it'.[116] This judgement has been commented by Barkhuysen and Van Emmerik as an important starting point for the effective implementation of the views of the HRC. They recommended that, in the

[115] European Commission for Democracy Through Law (Venice Commision), 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' (8 December 2014) CDL-AD(2014)036 Study No. 690/2012, para 77-78.

[116] Centraal Raad van Beroep (CRvB) (21 July 2006) ECLI:NL:CRVB:2006:AY5560 [Translated from Dutch to English]

context of legal unity, other domestic courts opt for a similar legal embedding of these views.[117] The HRC itself explains the legal status of its views in its General Comment No. 33 from 2008:

> While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the HRC under the OP I exhibit some important characteristics of a judicial decision […] The views of the HRC under the OP I represent an authoritative determination….[118]

2.4.4 Application for residence permit on the basis of Article 12(4) ICCPR

In a decision of December 2022, the Rechtbank Den Haag ruled following an appeal to a rejected residence application that an applicant must be given the opportunity to have claims on the basis of Article 12(4) assessed by the authorities.[119] In this case, the applicant was expected to apply for a residence permit formally on the basis of Article 8 ECHR, and an explicit examination for rights under Article 12(4) ICCPR was not procedurally provided for. The district court ruled this to be unlawful. Based on this recent ruling, an individual must be able to procedurally assert their rights under Article 12(4) ICCPR, and have such claim examined by the authorities. In the case of a negative decision, there must be a possibility to appeal. This promising appeal judgment may open a pathway for better procedural enforcement of residence rights based on Article 12(4) ICCPR.

2.5 Conclusion

Article 12(4) of the ICCPR provides for a fruitful legal pathway to regularise the ex Dutch Surinamese people living undocumented in the Netherlands given that the Netherlands can be considered their own country and the state cannot provide for a legitimate and substantive interest in refraining from doing so. Further, due to its self-executing character, the provision develops a direct effect on domestic procedures and must be taken into consideration by domestic authorities and courts to ensure the compliant implementation of the ICCPR and access to effective remedies as provided for in Article 2(3) ICCPR. The herein established obligation to provide effective remedies is directed towards domestic judicial proceedings. In this context, the guidance of the HRC through communications and its General Comment No. 27 enjoys a high authority and executive and judicial bodies should not derogate from them without substantial grounds to do so, in order to not violate their obligations derived from the ICCPR. The Netherlands, being bound by the ICCPR, should provide legal remedies in cases where the HRC's views suggest a violation of Article 12(4) ICCPR in a way that has been deemed adequate by

[117] T. Barkhuysen, M.L. van Emmerik 'Centrale Raad van Beroep, 21-07-2006, 03/3332 ANW (met noot)' (31 March 2007) [Provided by Advokat Anna Louwerse, author had no access]
[118] HRC, 'General Comment No. 33: The obligations of state parties under the optional protocol to the international covenant on civil and political rights' (adopted at 94th session on 5 November 2008) CCPR/C/GC/33, para 11,13.
[119] Rechtbank Den Haag (6 December 2022) ECLI:NL:RBDHA:2022:13324, para 9.

the letter. This framework provides an adequate remedy for the people concerned, as it presents the Netherlands as their 'own country'. However, this can be complemented by a strong legal argument that even within a migration logic, they cannot be considered as outsiders without a right to residency as illustrated in the next chapter by recourse to Article 8 ECHR.

3 A Right to Residency under Article 8 of the European Convention on Human Rights

3.1 Introduction

This chapter argues that ex Dutch Surinamese people living undocumented in the Netherlands can derive a right to residence, or a right to regularise their irregular status, from Article 8 of the European Convention on Human Rights (ECHR). First, the chapter presents a development of Article 8 immigration case law, thereafter it discusses problems with the application of Article 8 ECHR in national courts and within the European Court of Human Right (ECtHR), and finally it provides a legal analysis to assess this group's right to regularise due to their right to respect for family life and thereafter private life.

As individual life circumstances are largely unknown to the authors of this expert opinion, more general group characteristics will be applied to perform the balancing of interests test required to verify compliance with Article 8 ECHR.[120] It must however be noted that Article 8 ECHR in the case of each individual applicant will differ, and additional facts and circumstances may play a role in the relevant legal test.

Article 8 of the ECHR states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[121]

[120] Mark Klaassen, 'Between Facts and Norms: Testing Compliance with Article 8 ECHR in Immigration Cases' (2019) 37 Netherlands Quarterly of Human Rights 164.
[121] ECHR (n 2) art 8.

3.2 Progression of Article 8 immigration case law

Throughout the ECtHR jurisprudence, Article 8 of the Convention has acquired increasing relevance in migration cases. Despite the intentional exclusion of immigration matters from the material scope of the Convention, the dynamic interpretation of Article 8 has allowed the Court to develop a human rights protection shield in immigration cases.[122] Specifically, this provision is one of the few contained in the Convention that directly provides for material protection for non-nationals from expulsion.[123] However, the scope of protection of Article 8 has been extended beyond mere expulsion matters, as to provide solid grounds for admission, as well as regularisation of an individual's irregular status in the host country.[124] Before exploring the legal relevance of Article 8 for ex Dutch Surinamese nationals undocumented in the Netherlands, a brief analysis of the progression of Article 8 jurisprudence will be outlined in order to shed light on the strengths and weaknesses that such evolution brought about.

3.2.1 The State's right to control the entry of non-nationals

The grounding principle that has been maintained and consistently upheld by the Court articulates the sovereign right enjoyed by each High Contracting Party to control the entry, residence, and expulsion of non-nationals into its territory.[125] Yet, the Court has made clear from the outset that such a right is not absolute; indeed, as a matter of international law, the state must exercise the right to control 'subject to its treaty obligations'.[126]

In *Abdulaziz, Cabales* and *Balkandali v The United Kingdom*, the Court firstly recognised that states' migration law and policy may fall within the scope of Article 8.[127] Despite the negative outcome of this judgement, it was acknowledged that claims of admission of family members to the State territory can give rise to State positive obligations under Article 8 of the Convention.[128] The right to family life was meant to be actively protected by the State, even in situations of family-reunion and admission of non-nationals. This ruling marked the beginning of a new trend for the Court, whereby Strasbourg judges started to rule more frequently about immigration matters under Article 8. A couple of years later, the Court held in *Berrehab v Netherlands* that a failure to renovate a residence permit to a non-citizen

[122] Alan Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?' (2018) 29 European Journal of International Law 262.
[123] Filippo Scuto, 'Expulsion and Prohibition of Collective Expulsion of Aliens and Asylum Seekers: the Level of the ECtHR's Protection' in Elspeth Guild and Valsamis Mitsilegas (eds), *Aliens before the European Court of Human Rights* (Brill Nijhoff 2021) 235.
[124] Daniel Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: a Human Right to Regularise Illegal Stay?' (2008) 57 International and Comparative Law Quarterly 88-89.
[125] Firstly introduced in *Abdulaziz, Cabales and Balkandali v the United Kingdom* App nos 9214/80, 9473/81, 9474/81 (ECtHR, 28 May 1985), para 67 and further expanded in *Moustaquim v Belgium* (1991) Series A no. 193, para 43.
[126] ibid.
[127] *Abdulaziz, Cabales, Balkandali v The United Kingdom* (n 125), para 59.
[128] ibid, para 67.

residing on the State territory, and the following issuance of an expulsion order, amounted to an unjustified interference with the applicant's right to enjoy established family life in the country.[129]

3.2.2 From family life to private life

Although Article 8 covers both the individual's familial and private sphere, in the early stages of its jurisprudence, the Strasbourg Court almost exclusively focused on the protection of family life.[130] The approach thereby adopted can be seen as pragmatic. The existence of family life was determined in concrete and substantial terms, by considering the legal ties and the blood bonds that connected members of the same family.[131] Nevertheless, several claims of protection of non-nationals under Article 8 remained uncovered by such definition.

Considered by many as the turning point of Article 8 immigration cases,[132] the *Slivenko v Latvia*[133] judgement finally enlarged the protection of this provision, by offering autonomous protection to the individual's private life. The latter was defined as the network of personal, social, and economic relations developed by any human being in the society of the country in which they live.[134] It was held that the expulsion order issued by the Latvian authorities interfered without legitimate justification with the applicants' right to respect for their private life. Through the introduction of an autonomous definition of private life, the traditional interpretation of the notion of family life had been reconceptualised and significantly limited to the applicant's 'core family'.[135] Hence, family members that 'have not been shown to have been dependent members of the applicants' family'[136] were excluded from this protection shield. It can be argued that, whereas the delineation between family and private life extended the protection offered by the latter, it substantially limited the safeguards provided by the former.

It is worth mentioning that, despite the apparently clear demarcation between private and family sphere introduced by the Court in *Slivenko*, subsequent cases[137] have shown that a substantial distinction

[129] *Berrehab v Netherlands* (1988) Series A no. 138, para 29.
[130] Thym 'Respect for Private and Family Life' (n 124) 89.
[131] Initially, the material scope included ties between parents and children, as well as ties between near relatives. For further reference see *Berrehab v Netherlands* (n 129), para 21 and *Marckx v Belgium*, App no 6833/74 (ECtHR, 13 June 1979), para 45.
[132] Thym, 'Respect for Private and Family Life' (n 124) 91; Desmond (n 122) 267; Georgios Milios, 'The Right to Family and Private Life in Migration and Asylum Cases (Article 8)' in Elspeth Guild and Valsamis Mitsilegas (eds), *Aliens before the European Court of Human Rights* (Brill Nijhoff 2021) 147.
[133] *Slivenko v Latvia* [GC] 2003-X.
[134] ibid, para 96.
[135] ibid, para 97.
[136] ibid.
[137] *Inter alia*, see *Sisojeva and Others v Latvia* (striking out) [GC], 2007-I.

between the two domains is neither necessary nor mandatory.[138] Article 8 offers equal protection to both private and family life by applying, in principle, the same legal criteria in examining interferences and potential justifications thereof. Nonetheless, a systematic analysis of the ECtHR jurisprudence on the topic shows that a delineation of private and family life is indicative of a positive trend undertaken by the Court.[139] Indeed, such distinction paves the way to the introduction of several instances of protection that might have been excluded by the sole focus on family life. By way of example, it is remarkable to notice the role played by long-term residence in a host country as an element triggering private life protection under Article 8 ECHR. While this provision guarantees protection to family life in a third-state regardless of the duration of its existence, an individual's private life can there draw protection only after a certain time period has lapsed.[140] It follows that the longer time has passed, the heavier a justification for the interference with this right will be required to be.[141] Hence, the distinction between private and family life proves to be capable of encompassing more instances of protection.

As a way of conclusion, the trend adopted by the Court throughout the years shows promising hints. The introduction of a clear delineation between private and family life – as adopted in *Slivenko* – shall be welcomed as a positive step undertaken by the Court.[142] Nonetheless, this step-forward has come with shortcomings at the expense of the notion of family life. As it will be explored later in this chapter, the limitation of the conception of family life to the 'core' or 'nuclear' family proved to be problematic for the effectiveness in the response to protection needs under Article 8 of the Convention. Furthermore, the progression of Article 8 jurisprudence has left some blind spots that are far from being solved. The following paragraphs will examine the main weaknesses of the approach adopted by the Court, and the adverse effects of the legal uncertainty derived in both family and private life cases.

3.3 Legal uncertainty in family life cases

Throughout the progression of the case law regarding Article 8 immigration cases, a problem of lack of clarity has also persisted. Before providing a legal analysis, it is important to also problematise this lack of clarity in the Court's decision making and guidance and how this impacts applicants and Contracting States. Firstly, different tests exist to assess compliance with Article 8 which in and of itself creates inconsistency. Secondly, the Court is also not consistent in which test it applies to one case or another.[143]

[138] Thym, 'Respect for Private and Family Life' (n 124) 92; Mark Klaassen, 'The Right to Regularise Irregular Residence is a Human Right' (*Leiden Law Blog*, 16 November 2020) <https://www.leidenlawblog.nl/articles/the-right-to-regularise-irregular-residence-is-a-human-right> accessed 30 January 2023.
[139] Thym, 'Respect for Private and Family Life' (n 124) 92.
[140] ibid 93.
[141] See for instance *Maslov v Austria* [GC] 2008-III, para 100.
[142] Daniel Thym, 'Residence as *de facto* Citizenship' in Ruth Rubio-Marin (ed.) in *Human Rights and Immigration* (OUP 2014) 115.
[143] Klaassen, 'Between Facts and Norms' (n 120) 159.

This leads to situations in which 'identical or comparable factors'[144] can in one case weigh in favour of an applicant and the next weigh against them so 'as [it] fits the Court's arguments'.[145] The inconsistency creates uncertainty for States as to how to apply Article 8 in domestic courts and what obligations the State actually has. Finally, it also perpetuates unpredictability in the potential outcome of cases for applicants themselves.[146]

As briefly mentioned, different types of cases can lead to different obligations on the State and the Court has therefore created various tests that it and national courts apply, despite the inherent inconsistency it creates. In cases regarding the termination of lawful residence, which is considered an interference in the right to respect for private and family life, it must be ascertained whether or not the State is under a negative obligation to refrain from interfering with Article 8. The interference must be justified through the test provided in Article 8(2) ECHR which provides that an interference is only justified if it is 'in accordance with the law', has a legitimate aim, and is 'necessary in a democratic society'.[147]

Moreover, when seeking the State's permission for the entry and residence of a foreign national residing outside of the State, considered a pure admission case,[148] the Court must establish whether or not the State has a positive obligation to allow for the entry and residence of the foreign national. The Court reasons that as the State did not yet allow for the lawful entry of family members, there is no actual interference in family life. Without an interference, there is no need to provide justification as is the case for the test mentioned above. Thus, a different test is used and the main query to be assessed is the possibility of family life in the country of origin. However, there are very few pure admission cases, as individuals are frequently already on the territory but have not been granted legal entry by the State. The final category is therefore considered 'hybrid obligations' cases.[149]

Finally, hybrid obligations cases concern long-term residents that are living irregularly within a State and were never formally admitted or granted the right to residence. The Court itself recognizes that it is difficult to precisely define positive and negative obligations in such cases and that it is often unnecessary to do so because in both situations a balancing of interests tests must be conducted. Three tests exist for hybrid cases and the Court is inconsistent even within the category of hybrid cases as to the test it applies.[150] That being said, as the individuals within the *ratione personae* scope of this expert

[144] Thomas Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 European Journal of Migration and Law 280.
[145] ibid.
[146] Klaassen, 'Between Facts and Norms' (n 120) 159.
[147] ibid 160-161.
[148] See *Tuquabo-Tekle v Netherlands* (2010) EHRR 1454; *Sen v Netherlands* (2003) 36 EHRR 81.
[149] Klaassen, 'Between Facts and Norms' (n 120) 162.
[150] ibid. 164.

opinion are living irregularly in the Netherlands and are seeking entry and residence, a mix of two tests falling under hybrid cases will be utilised in the following legal assessment with particular attention to the Court's testing of compliance in *Jeunesse v Netherlands*[151] and *Rodrigues Da Silva Hoogkamer v Netherlands.*[152]

3.4 Ascertaining positive obligations under the right to respect for family life

This is a case of individuals seeking official entry while residing on the territory, making it a hybrid case, as mentioned above. Therefore, this assessment will not refer to any interference in the individual's right to family life on the part of the State but rather focus on whether the interests of the individuals outweigh the interests of the State, creating a positive obligation for the State to effectively respect their right to family life by regularising the status of these individuals. It is well documented in the Court's case law that the common starting point for the Court's reasoning begins with, 'as a matter of well-established international law'[153], States' have the prerogative 'to control the entry of non-nationals into its territory'[154] and the Convention does not grant individuals the right 'to enter or to reside in a particular country'.[155] Moreover, if family life is created when the persons involved are aware of the immigration status (or lack thereof) of one of the individuals and knew that family life would be precarious due to this immigration status (or lack thereof), only in exceptional circumstances will the Court find that there has been a violation of Article 8.[156]

3.4.1 The scope of family life

To test compliance with Article 8, it must first be established what is family life and if the relationships considered fall within the scope of family life. Family life was initially defined more broadly by the Court as encompassing 'at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life'[157] and with 'respect' for family life indicating an obligation on the State 'to act in a manner calculated to allow these ties to develop normally'.[158] In addition to relationships between grandparents and grandchildren, the Court has also previously recognised relationships between adult siblings,[159] uncles/aunts and their nieces and nephews,[160] and very importantly, between adult children and their parents.[161] In the case of adults and

[151] *Jeunesse v Netherlands* (n 60).
[152] *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34.
[153] *Abdulaziz v United Kingdom* (n 125), para 67.
[154] *Abdulaziz v United Kingdom* (n 125), para 67.
[155] *Omoregie and Others v. Norway* App no 265/07 (ECtHR, 31 July 2008), para 54.
[156] *Jeunesse v Netherlands* (n 60), para 108.
[157] *Marckx v Belgium* (n 131), para 45.
[158] ibid.
[159] *Moustaquim v Belgium* (n 125), para 36.
[160] *Boyle v the United Kingdom* (struck out of the list) App no 16580/90 (Commission Decision 28 February 1994), para 45.
[161] *Boughanemi v France* App no 22070/93 (ECtHR, 24 April 1996), para 35.

their parents, the Court found family life even in a case where an individual did not cohabitate with either his parents or siblings[162] as well as in a case in which the adult had already formed a family and no longer lived with his parents or siblings.[163]

However, the Court has largely restricted this broad definition of family life in cases such as *Slivenko v Latvia* and reconceptualised it to encompass mainly the 'core family'.[164] This restriction puts relationships between adult children and their parents as well as between adult siblings, amongst others, generally outside of the scope of family life if an individual(s) is not deemed to be dependent on the applicant's family or if the applicant is not dependent on the family.[165] The Court has continued with this line of reasoning and established that relationships between adults generally fall outside of the scope unless there are 'additional factors of dependence' creating more than 'normal emotional ties'.[166]

Importantly, this restriction of family life has not gone without critique. In the partly concurring and partly dissenting opinion in *Slivenko v Latvia*, Judge Kovler questions this limitation of family life:

> the Court has opted for the traditional concept of a family based on the conjugal covenant – that is to say, a conjugal family consisting of a father, a mother and their children below the age of majority, while adult children and grandparents are excluded from the circle. That might be correct within the strict legal meaning of the term as used by European countries in their civil legislation, but the manner in which the Court has construed Article 8 § 1 in its case-law opens up other horizons by placing the emphasis on broader family ties.[167]

Judge Kovler goes on to say that the applicants in *Slivenko v Latvia*, fighting to not be separated from their 'elderly, sick ascendants',[168] could not conceive of family life if they were unable to care for said relatives. In Judge Kovler's own words, 'What could be more natural or more humane' than looking after your own family members?[169]

While this restriction seems to be the new rule regarding 'family life', in 2017, the Court stated in the relevant principles section of *Paradiso and Campanelli v Italy* that 'The existence or non-existence of 'family life' is essentially a question of fact depending upon the existence of close personal ties'.[170]

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[162] *Boughanemi v France* (n 161), para 35.
[163] *Moustaquim v Belgium* (n 125), paras 35,45-46.
[164] *Slivenko v Latvia* (n 133), para 97.
[165] ibid.
[166] *Belli and Arquier-Martinez v Switzerland* App no 65550/13 (ECtHR 3 November, 2019), para 65.
[167] *Slivenko v Latvia* (n 133) Dissenting and Partly Concurring Opinion of Judge Kovler, para I.
[168] ibid.
[169] ibid.
[170] *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 24 January 2017), para 140.

While this does not invalidate the court's restriction of family life to the 'core family' it does seem to indicate that the Court can and does sometimes formulate what can be considered family life rather simplistically and inclusively. Why it chooses to do so in some cases and not in others is unclear.

3.4.2 Additional elements of dependency for family outside of the core family

Understanding what elements of additional dependency are in practice is relevant to this expert opinion. It does not seem that there is a clear definition of additional dependency, so what can be drawn on is the facts of particular cases. Previously, the Court held that an applicant was not considered dependent on his mother and siblings because his health condition did not debilitate him to such an extent that 'he was compelled to rely on their care and support in his daily life' which sets a very high threshold.[171] Therefore, it seems that the situation must rise to the threshold of dependency stated before and the relationship between individuals must entail more than 'normal emotional ties' in order to establish family life.[172]

Extracting this threshold to apply to the ex Dutch Surinamese individuals living undocumented in the Netherlands, it is undoubtable that living undocumented imposes a very precarious situation on individuals with no access to non-acute medical services, no ability to work legally or to rent a house, and no certainty about the future.[173] As such, these individuals, most of whom are nearing their 60s and 70s, are often faced with extreme vulnerability.[174] This vulnerability and lack of access to normal rights and services causes many to rely on their family and friends.[175] Some sleep on the street, some sleep in shelters, but many depend on their family members for a place.[176] According to former politician and activist for ex Dutch Surinamese individuals, Ivan Leeuwen, this dependency creates constant stress in their lives. 'They leave home during the day, they stay on the streets or work a little here and there under the table, but they can never build a life of their own'.[177]

Individuals like Humbert Gemerts, mentioned in the introduction, has resided here in the Netherlands for decades, remaining dependent on his family members for small jobs to earn some money as well simply for a place to sleep for the past 25 years.[178] He is not the only one. A report from the Regenboog Groep on elderly, undocumented ex Dutch Surinamese also tells the story of George who does not rely on his family for housing, because he lives in a HVO Querido shelter, but still needs their active support

[171] *Savran v Denmark* App no 57467/15 (ECtHR 7 December 2021), para 178.
[172] *Belli and Arquier-Martinez v Switzerland* (n 166), para 65.
[173] Regenboog Groep (n 40).
[174] ibid.
[175] Geerdink (n 61).
[176] ibid.
[177] ibid [Translated from Dutch to English].
[178] Venneman (n 43).

to get by. He came to the Netherlands in 1998 and has been living undocumented since his temporary visa expired. He wants to be independent and works, illegally, as much as he can to support himself. However, he still needs the help of his sister, Nadia, who supports him as much as she can; sometimes with some extra euros, sometimes with a meal, sometimes with a place to stay.[179]

> 'Her kids…do the same. If he needs a jacket, he gets one from her sons. Shoes? A t-shirt? Same story. Her daughter bakes a cake when it is his birthday. If he has to go somewhere, then he just needs to call and they arrange it. He has a key to her house so that he can retreat there when she is in Suriname. "In our family, you help each other where you can. You don't let each other down"'.[180]

This is a mere small sampling of the complex stories that the individuals in this group have. While different from the Court's usual reasoning, many of these individuals do in fact rely on the care and support of their family members to navigate daily life. Therefore, the question remains, is this dependency considered more than 'normal emotional ties'? The authors of this report believe that this dependency, stemming from the Dutch State's refusal to regularise this group, creates a situation in which they are forced to have more than 'normal emotional ties' to survive bringing these relationships within the scope of Article 8 family life.[181]

3.4.3 The balancing of interests test

Therefore, presuming that individuals exist within this group of ex Dutch Surinamese individuals living undocumented in the Netherlands that have relationships falling within the scope of family life, primarily due to additional elements of dependence, the question that must be addressed is whether the accumulative interests of the individual reach the level of exceptional circumstances, which outweigh the interest of the State, resulting in a positive obligation on the State to regularise the status of these individuals. Based on arguments made and criteria used in *Jeunesse v Netherlands*[182] and *Rodriguesda Silva and Hoogkamer v Netherlands*,[183] below is a list of circumstances applicable to this groupwhich in cumulation rises to the level of exceptional circumstances.

3.4.4 The interests of the individuals

Firstly, the situation of these individuals is not the same as other migrants who never held Dutch nationality and they should therefore not be treated as any other non-national. The individuals involved

[179] Regenboog Groep (n 40).
[180] ibid [Translated from Dutch to English].
[181] *Belli and Aqruier-Martinez v Switzerland* (n 166), para 65.
[182] *Jeunesse v Netherlands* (n 60).
[183] *Rodrigues da Silva and Hoogkamer v Netherlands* (n 152).

all held Dutch nationality at one point in their life, likely for many years. They lost their Dutch nationality without their consent as anyone who was residing in Suriname at the time of independence lost their nationality without being given the option to opt for Dutch nationality.[184] Notably, many individuals born in Suriname before 1975 with the Dutch nationality, see themselves as Dutch, while no longer being recognised as such by the Dutch government. In the words of Humbert Gemerts,

> 'I'm not doing anything illegal, I'm Dutch…. The only reason why I'm here is that at independence the Surinamese government gave away my nationality when I was a child. If they had asked me, I would still be Dutch now'.[185]

The same applies to George Robbinson Ost, a 67 year old man born in what was considered the Netherlands, and held Dutch citizenship for 21 years.[186] He sees himself as Dutch, yet the Dutch State does not see him as such. These are particular circumstances that tie the individuals to the Netherlands in a very unique way. It can also be presumed that there are other members of their family that likely hold Dutch nationality. These factors are identical with those considered in *Jeunesse* when considering if 'exceptional circumstances' existed.[187]

Secondly, the Dutch government has tolerated the presence of these individuals without deporting them for presumably many years, if not decades. As they remain to this day on Dutch territory, it is in fact the State's allowance of the individuals on the territory and unwillingness to find another solution (i.e regularising their status via a pardon) that has allowed them to 'develop strong family, social and cultural ties' during their irregular presence.[188] As the State failed to act in what seems to be its own interests, the longer an individual has resided in the Netherlands with the acquiescence of the State, 'the more this factor should weigh in favour of the applicant'.[189]

Thirdly, while it is difficult to assess the ability of these individuals to establish family life in Suriname, it remains important to consider the hardship that this would cause the individuals as well as their family members. In *Jeunesse*, while no insurmountable obstacles were found to settle in the country of origin, the Court considered the hardship that it would cause each individual family member.[190] Considering their age, length of residence in the Netherlands, length of time since residing or visiting Suriname, as

[184] *Jeunesse v Netherlands* (n 60), para 115.
[185] Venneman (n 43) [Translated from Dutch to English].
[186] Geerdink (n 61).
[187] *Jeunesse v Netherlands* (n 60), para 115.
[188] Ibid, para 116.
[189] Klaassen, 'The Right to Regularise Irregular Residence is a Human Right' (n 138).
[190] *Jeunesse v Netherlands* (n 60), para 117.

well as likely the lack of familial ties in the Suriname,[191] it is presumable that many would face a significant degree of hardship if forced to return to Suriname.

Fourthly, the possibility that these individuals could have regularised their status or had a regular status at one point is significant. Albeit briefly, the Court actively pointed this out as something to consider in the case of *Rodrigues da Silva and Hoogkamer v Netherlands*. In that case, it was likely that the applicant could have received a residence permit at one point based on her relationship with her Dutch partner. In its judgement, the Court goes on to say that the case should be differentiated from other cases in which applicants 'could not at any time have reasonably expected to be able to continue family life in the host country'.[192] It is certainly the case that many of these individuals could have at one point had the chance to regularise their status and could have reasonably expected to continue their family life in the Netherlands.

According to politician and activist Ivan Leeuwen, Surinamese nationality was forced on some of these individuals particularly because they did not have the financial means to travel to the Netherlands before the independence of Suriname.[193] While not actively available to them, in theory, the individuals in this group might have never ended up in this situation had they simply had the means to travel to the Netherlands on time. Moreover, as is referenced in the introduction, more lenient visa policies existed for Surinamese people coming to the Netherlands in the transitional period after independence until the early 1980s. In this time some individuals had the chance to get residence permits as well, and some, unaware of their legal possibilities, or simply unaware of the future precarity they could land in, did not do so.[194] These factors should be taken into account, as it was in *Rodrigues da Silva and Hoogkamer*.[195]

Finally, while not directly addressed in any Article 8 family life case previously, a final circumstance to consider is that these individuals are formerly colonised individuals of the Netherlands. Just as in *Jeunesse*,[196] the Court identified that the applicant should not be considered 'on par' with other individuals who had never held Dutch nationality, it can be argued that these individuals should not be held 'on par' with other individuals who were never colonised by the Netherlands granting them status as individuals with a particular connection to their former colonising nation. The extent of colonial

[191] Hannah van der Werf, 'Organisaties doen oproep aan kabinet: 'Geef ongedocumenteerde Surinamers een paspoort' *Trouw* (7 November 2022) <https://www.trouw.nl/binnenland/organisaties-doen-oproep-aan-kabinet-geef-ongedocumenteerde-surinamers-een-paspoort~b57c4fb4/> accessed 28 January 2023.
[192] *Rodrigues da Silva and Hoogkamer v Netherlands* (n 152), para 43.
[193] Venneman (n 43).
[194] See Chapter 1.
[195] *Rodrigues da Silva and Hoogkamer v Netherlands* (n 152).
[196] *Jeunesse v Netherlands* (n 60).

influence and ties cannot be minimised considering the Netherlands' centuries of colonising Suriname.[197]

As Mark Rutte said recently while giving apologies for slavery:

> Centuries of oppression and exploitation still have an effect to this very day. In racist stereotypes. In discriminatory patterns of exclusion. In social inequality. And to break those patterns, we also have to face up to the past, openly and honestly. A past that we share with other countries and that has forged a special connection between our societies for all time.[198]

It is precisely these discriminatory patterns of exclusion, this social inequality, that keeps the individuals in this group in precarity, and it is in fact their special ties to the Netherlands as formerly colonised individuals that add to the exceptional circumstances already mentioned.

3.4.5 The interests of the State

While the State is afforded a margin of appreciation in immigration cases, a fair balance must be struck between the interests of the individual(s) and the interests of the State in Article 8 cases.[199] In this case, the main interest of the State can be presumed to be the pursuit of a restrictive immigration policy in order to protect the 'economic well-being of the country' or for reasons of public order.[200] However, considering the aforementioned reasons weighing in favour of the individuals and reaching the height of exceptional circumstances, the State's mere interest to control immigration does not outweigh the numerous interests of the ex Dutch Surinamese individuals living undocumented in the Netherlands and in precarity due to the Dutch government's own policies. Particularly, the Dutch State's tolerance of the group for decades points to the fact that there can be no genuine, strong interest to actually restrict their access to Dutch territory. Instead, the State has allowed the individuals to languish in legal uncertainty, while not taking genuine steps to either respect their right to family life nor to pursue theirlegitimate aim of a restrictive immigration policy or to protect the public order. Therefore, the failure to regularise this group is a violation of their Article 8 right to family life which must be immediately rectified by regularising their status. Considering this legal analysis, the following part of this chapter

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[197] Geerdink (n 61).

[198] Ministerie van Algemene Zaken, 'Speech by Prime Minister Mark Rutte about the role of the Netherlands in the history of slavery - Speech - Government.nl' (19 December 2022) <https://www.government.nl/documents/speeches/2022/12/19/speech-by-prime-minister-mark-rutte-about-the-role-of-the-netherlands-in-the-history-of-slavery> accessed 28 January 2023.

[199] *Jeunesse v Netherlands* (n 60), para 121.

[200] Such reasoning is frequently seen in Article 8 Immigration cases, see *Abdulaziz v UK* (n 125); *Jeunesse v Netherlands* (n 60).

discusses the right to regularise the status of these individuals under the heading of Article 8 private life.

3.5 Legal uncertainty in private life cases

As addressed above, in its jurisprudence concerning the adjudication of immigration cases for potential violation of the right to private and family life, the Strasbourg Court has adopted a distinction between cases involving the termination of lawful residence of 'settled migrants' and cases concerning mere aliens seeking admission to the state territory. The ECtHR has applied different tests and criteria to assess the existence of violations of state obligations under Article 8 for these two categories of applicants, increasing the level of uncertainty and inconsistency throughout its rulings.[201]

As effectively defined by the Strasbourg judges in *Pormes v Netherlands*, there might be circumstances in which the applicant qualifies neither as 'settled migrant', nor as an alien seeking admission for the first time.[202] It is of the opinion of the authors of this contribution that the examinationof cases involving the violation of the right to private life of Surinamese ex Dutch citizens that are long-term residents in the Netherlands cannot fall within either of the two categories established by the Court.Indeed, by virtue of the length of their stay on the State territory and in light of the specificcircumstances that brought about such condition,[203] they can be regarded neither as settled migrants, within the meaning attributed by the Court, nor as mere aliens seeking admission.

As regards the balancing of interests to be carried out in contexts of the like, the Court in *Pormes* departs from the 'exceptional circumstances' test applied in family life cases.[204] It observes that

> It can neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention nor that it would violate that provision only in very exceptional circumstances. Instead, the assessment must be carried out from a *neutral starting point*, taking into account the specific circumstances of the applicant's case.[205]

It is precisely within this scope that, in light of the peculiar circumstances of Surinamese ex Dutch citizens that have been long-term resident in the Netherlands, potential infringements of their right to private life by the Dutch Government's (in)action will be assessed. By following the criteria established in the ECtHR jurisprudence, the following paragraphs will analyse whether any violation of State

[201] See section 3.3.
[202] *Pormes v Netherlands* App no 25402/14 (ECtHR, 28 July 2020), para 61.
[203] See sections 1.1 and 1.2.
[204] Klaassen, 'The Right to Regularise Irregular Residence is a Human Right' (n 138).
[205] *Pormes v Netherlands* (n 202), para 61, emphasis added.

obligations under Article 8 of the Convention had occurred in the situation of ex Dutch Surinamese nationals currently residing in the Netherlands.

3.6 Ascertaining state obligations under the right to respect for private life

The area devoted to protection of the right to respect for private life has proved over the years to be one of the most fertile fields for innovations in the ECtHR jurisprudence.[206] The abundancy in terms of cases and rulings on the topic is partly due to the broad reach of this notion. The Strasbourg Court has stressed on several occasions that private life must be conceived as a 'broad term not susceptible to exhaustive definition'.[207]

3.6.1 The scope of private life

The wide-ranging reach of the notion of 'private life' is particularly manifest in the area of protection of settled migrants' rights in expulsion cases, under Article 8 ECHR. The Court repeatedly emphasised that;

> [A]s Article 8 protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity it must be accepted that the totality of social ties between settled migrants (. . .) and the community in which they are living constitutes part of the concept of private life within the meaning of Article 8.[208]

As illustrated above, the first use of the private life limb of Article 8 as a standalone bar in expulsion cases concretised in the *Slivenko* judgement.[209] Specifically, the Court found Latvia in violation of its obligations under Article 8 ECHR following the issuance and execution of an expulsion order for individuals that had been 'removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being'.[210] As subsequently reiterated in the *Maslov* judgement, the Court formulated that all long-term migrants residing in a host State for a certain period of time will have developed private life within the meaning of the notion established by Article 8 ECHR.[211] Interestingly, as affirmed in *Butt v Norway*, the ECtHR readily took this stance regardless of the (il)legality of the individual's stay in the

[206] Desmond (n 122) 261.
[207] *Peck v The United Kingdom* 2003-I, para 57.
[208] *Maslov v Austria* (n 141), para 63.
[209] See section 3.2.
[210] *Slivenko v Latvia* (n 133), para 96.
[211] *Maslov v Austria* (n 141), para 63.

host State,[212] showing that the applicants' irregular migration status did not prevent them from establishing both private and family life.

3.6.2 The balancing of interests test

In light of the above, it is safe to assume that ex Dutch Surinamese citizens – now undocumented long-term residents – hold an established private life in the Netherlands. Hence, their situation largely falls within the material scope of Article 8 of the Convention. The following step to be followed within this analysis concerns the traditional balance of interests carried out by the Court in order to identify potential obligations – and infringements thereof – of the respondent State. The factors to be considered in the balancing exercise can be derived from the ECHR jurisprudence. However, as addressed above, the legal uncertainties derived from past Court's reasonings in private life cases do not allow the identification of fixed criteria to be applied to each case. This consideration has led the authors to follow the most commonly employed factors, drawn from landmark private life cases like *Slivenko*, *Maslov*, *Butt*, *Hoti v. Croatia*[213] and *Pormes*. As the final stage of the analysis, it will be determined whether, within this balance, the interests of ex Dutch Surinamese nationals residing undocumented in the Netherlands outweigh the interests of the Dutch State.

3.6.3 The interests of the individuals

Firstly, the ex Dutch Surinamese nationals that belong to this group have been living undocumented in the Netherlands for years. Given the general address of this contribution, it would be unfitting to establish a specific lapse of time representing the duration of stay of an individual in the country. Nonetheless, it can be inferred that the temporal scope to be applied would be estimated to be in the decades. In all the jurisprudential instances analysed, it appeared that the applicants had spent no less than 16 years in the territory of the host state.[214] The Court has easily accepted that such lapse of time must be considered as a heavy factor weighing in favour of the interests of the applicant. Regardless of the legality of their immigration status, the applicants to those cases were allowed to develop a consistent network of social, personal, and economic ties within the community of the host State.[215] Their potential removal, as well as the adverse repercussions due to the uncertainty of their residence status would grossly disrupt the legitimate enjoyment of their right to private life.[216] On the same line,

[212] *Butt v Norway* App no 47017/09 (ECtHR, 4 December 2012), para 76.
[213] *Hoti v Croatia* App no 63311/14 (ECtHR, 26 April 2018).
[214] In *Slivenko v Latvia* (n 133) one of the applicants had spent 40 years in the host country; in *Maslov v Austria* (n 141) the applicant had spent 23 years residing in the host country; in *Butt v Norway* (n 212) the applicants had spent 16 years residing in the host country; in *Hoti v Croatia* (n 213) the applicant had spent 40 years residing in the host country; in *Pormes v Netherlands* (n 202) the applicant had spent 22 years residing in the host country.[215] *Butt v Norway* (n 212), para 76.
[216] ibid; *Hoti v Croatia* (n 213), para 125.

the situation of an ex Dutch Surinamese applicant, now long-term resident in the Netherlands for more than 16 years, could undoubtedly be equated to situations of the like previously considered by the Court.

Secondly, a further aspect to be assessed is the degree of integration into the Dutch community of ex Dutch Surinamese nationals residing in the Netherlands. Specifically, the integration into the domestic labour market, as well as Dutch language proficiency are indicators of the degree of assimilation into the host society, alongside the quality of the overall ties with such community. As regards the degree of integration into the labour market, although lacking precise information due to the general address of this contribution, it is straightforward to assume that an individual residing for many years in a country different from the one of their nationality will inevitably have developed access to the national labour market, despite the irregularity of their migration status. As held by the Court in the *Hoti* judgement, the level of integration into the domestic labour market must be taken into account as a weighty element towards the interest of the individual.[217] For what concerns language skills, the Court has acknowledged the level of fluency of the host country language as a relevant marker of the individual's overall integration into the host society,[218] as it demonstrates the capacity to daily integrate and the extent of being an active participant of society overall. While integration into the labour market is a process that can be examined individually, overall integration into Dutch society must be generally affirmed, since the group concerned was born into Dutch society and thus had no more or less need for integration than any person growing up. This can be measured easily, at least in terms of language proficiency, as Dutch was a main language from birth, and thus an integral part of this category is inherently given.

Thirdly, an additional factor that cannot go unnoticed in the assessment of the quality of the ties with the host country of an ex Dutch Surinamese national, now long-term resident in the Netherlands, is determined by the 'special connection' with that State that inevitably flows from the colonial relationship that tied the two countries.[219] Such a special bond is to be derived from the very fact that many Surinamese nationals nowadays residing on Dutch territory were born with Dutch nationality and were later stripped of the latter without their consent.[220] This consideration should be placed at the forefront of the assessment of the Court, as nationality – as repeatedly held by the Court – not only builds part of an individual's private life, but it is to be considered an effective component of a subject's social identity.[221] Hence, failing to consider the relevance of such a factor could undermine the solidity of the claims put forward in this context.

[217] *Hoti v Croatia* (n 213), para 125.
[218] *Slivenko v Latvia* (n 133), para 124; *Maslov v Austria* (n 141), para 96; *Butt v Norway* (n 212), para 76.
[219] Geerdink (n 61).
[220] Venneman (n 43).
[221] *Genovese v Malta* App no 53124/09 (ECtHR, 11 January 2012), para 33; *Ramadan v Malta* App no 76136/12 (ECtHR, 17 October 2016), para 62.

Fourthly, a further element to be taken into account is represented by the weak ties held by ex Dutch Surinamese nationals with what the Dutch State considers their country of origin – namely, Suriname. It can be assumed that an individual irregularly residing for many years in a host country would hardly get the chance to reach the country of origin and effectively spend time there with ease. On a comparative scale, it is safe to assume that ties developed in the Netherlands, after decades of uninterrupted stay, will inevitably be stronger in terms of *de facto* familial, social, and economic links there established than those held in Suriname. As it has been demonstrated in *Maslov*, the quality of the ties with the country of origin can be established *inter alia* by considering the time spent there over the years.[222] This is mainly due to the fact that the continued absence from the country of origin drastically limits the possibility to prove the existence of solid ties there. Furthermore, with the *Hoti* judgement, the Court accepts that the length of stay in the host country, without any *de facto* link with other countries, coupled with the applicant's advanced age contribute by themselves to bolster the uncertainty of his residence status that inevitably has adverse repercussions on his private life.[223] This shows how the cumulation of these factors can even more strongly prove the practical consequences on the enjoyment of the right to private life for ex Dutch Surinamese citizens undocumented in the Netherlands. While drawing a balance between the individual's and the State's interests, the Court would inevitably emphasise such effects in favour of the individual's position.

Fifthly, the precariousness of the legal status in which ex-Dutch Surinamese nationals residing undocumented in the Netherlands have been living for years has severe consequences in material and psychological terms. The uncertainty of their position majorly affects the regular course of their daily lives. The impossibility to be legally employed exposes these individuals to the hardships of the illegal labour market, exacerbating existing social and financial difficulties. On the same line, living undocumented precludes an individual from renting an apartment, obtaining a driving licence, and attending professional training. It goes without saying that the psychological impact of this situation on each subject cannot be underestimated. The decades-long continued precariousness in which the Dutch Government has deliberately left this group of individuals should be accurately taken into account. As mentioned by the Court in *Aristimuño Mendizabal v France*[224] and *Hoti*,[225] considerations of the like must be adequately integrated in the balancing of interests exercise.

Finally, although the criminal history of the members of this group is unknown, it is relevant to point out that petty criminal offences would not interfere with a positive outcome of a balancing assessment.

[222] *Maslov v Austria* (n 141), para 100.
[223] *Hoti v Croatia* (n 213), para 126.
[224] *Aristimuño Mendizabal v France* App no 51431/99 (ECtHR, 17 January 2006), para 72.
[225] *Hoti v Croatia* (n 213), para 126.

Whilst the absence of a criminal record will play a relevant role in favour of the applicant's interests,[226] the ECtHR jurisprudence has repeatedly shown that the commission of a criminal offence *per se* cannot be indiscriminately considered to fully weigh against the applicant in the balancing exercise. Several factors, among which the seriousness and nature of the crime, as well as the length of the stay in the host country and the behaviour adopted following the fact, will be scrutinised by the Court.[227] The *Maslov* ruling has proved that the long-term stay of the applicant could effectively weigh in favour of the applicant, in cases in which a crime is at stake, nullifying the practical repercussions of that act on the right to effectively enjoy their private life.[228]

3.6.4 The interests of the State

As a final step, the Court will weigh these factors as representing the interests of the members of ex Dutch Surinamese nationals group, now residing for a long term undocumented in the Netherlands against the interests of the Dutch Government. As addressed in the family life section, the Dutch general interest would be served by the pursuit of a restrictive immigration policy in order to foster the prevention of disorder or crime,[229] to protect the economic well-being of the country[230] and to safeguard national security and public safety,[231] as explicitly laid down in the second paragraph of the Article 8 ECHR.[232] As clearly shown by the above analysis, it is straightforward to affirm that the factors analysed may heavily weigh in favour of ex-Dutch Surinamese nationals, now long-term residents in the Netherlands, in such balancing of interests. The uncertainty that flows from the irregularity of their residence status has proven to have adverse repercussions on their right to enjoy their private and family life. Indeed, the failure to regularise this group of individuals amounts to a violation of their Article 8 rights.

3.7 Conclusion

Article 8 ECHR offers a second legal avenue through which ex Dutch Surinamese people living undocumented in the Netherlands can regularised their status based on their right to respect for family life and private life respectively. This chapter has firstly established that these individuals have a right

[226] See, *inter alia*, *Hoti v. Croatia* (n 213), para 130, in which the Court placed particular emphasis on the applicant's lack of a criminal record.
[227] *Maslov v Austria* (n 141), para 100; *Butt v Norway* (n 212), para 89. These criteria have been derived by the seminal case *Boultif v. Switzerland*, 2001-IX, para 48.
[228] *Maslov v Austria* (n 141), para 100.
[229] *Maslov v Austria* (n 141), para 67; *Pormes v Netherlands* (n 202), para 69.
[230] *Butt v Norway* (n 212), para 75.
[231] *Slivenko v Latvia* (n 133), para 77.
[232] ECHR (n 2) art 8 (2). This paragraph states that no interference by a public authority with the exercise of an individual's right to respect for private and family life shall exist except where it is in accordance with law, and it is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

to enjoy their family and private life in the Netherlands. Therefore, the Dutch Government, pursuant to its obligations under Article 8 of the Convention, must protect the effective enjoyment of such right. The ECtHR case law above analysed reflects such a positive obligation to regularise the irregular status of this group of individuals. In order to comply with its ECHR obligations, the Dutch State must take steps towards the regularisation of ex Dutch Surinamese nationals into the national territory, by materialising their established right to reside. A continued derogation from this obligation is an infringement of the right to family life and private life of ex Dutch Surinamese nationals who are long-term residents in the Netherlands – a violation of Article 8 of the European Convention on Human Rights.

To further contextualise the Dutch State's stringent immigration policies, the following chapter provides a comparison between different approaches in state policies towards formerly colonised peoples adopted by former coloniser States.

4 Comparative Approach

Comparing the Dutch state's immigration policy approach towards individuals it has previously colonised with that of other former coloniser states is an important exercise. It can demonstrate what sort of policies are practiced in other domestic systems, and consider what the Netherlands could potentially learn from those policies in order to better comply with its international obligations toward its irregularised former citizens and former colonial subjects. The chosen comparator states include France, Portugal and the United Kingdom and their immigration policies affecting the status of previously colonised peoples from their respective former colonies.

4.1 The case of Algerians in France

4.1.1 Pre-independence Algerian migration

Presence of Algerians in France remained relatively low throughout much of its colonial history: by 1936 there were nearly two million foreigners in France, of which less than 100.000 were Algerian.[233] This was due to strict travel restrictions. Indeed, the first time restrictions for travelling into the metropole were eased was during World War I, when around 120.000 Algerians were sent to France to work in factories or to go to the frontline. However, as from 1919, repatriations of soldiers and workers were ordered, and in 1924 measures to control movement of Algerians into France were put back in place.[234]

[233] Muriel Cohen, 'Post-colonial Algerian immigration: Putting down roots in the face of exclusion' (2017) Le Mouvement Social 2017/1 (No 258) 5.
[234] ibid.

Significant Algerian migration into France nevertheless arose in the mid twentieth century, when migration dynamics shifted coinciding with changes in the legal status of Algerians. Effectively, until 1944, Algerians had the status of 'French subjects'.[235] That year, the first of a series of legal provisions concerning French citizenship for Algerians was introduced. The Ordonnance of 7 March 1944 'ascribed citizenship to "deserving" Algerians'[236] i.e. males over the age 21 who held certain positions (former officers, diplomats, etc.) and those who had received civilian and military honours. Later, both in the Constitution of 1946 and Loi n° 46-940 of 7 May 1946, it was established that all nationals from the 'overseas territories' had the same status as French citizens from the metropole. Finally, Loi n° 47-1353 of 20 September 1947 specifically proclaimed effective equality between all French citizens, and established - once again - that Algerians enjoyed such status. This implied that all Algerians - including women - were free to travel between Algeria and France, which resulted in a rapid growth of the Algerian population in the metropole.[237]

It is worth noting that Algerian migration into France was originally conceived as temporary.[238] In effect, the 'first age' of Algerian migration (1945-1950) was composed of seasonal male workers, whereas the 'second age' (1950-1962) was mainly composed of male workers who, although remaining in France for longer periods of time, would sustain their families back in Algeria and return there during holidays.[239]

Demands of independence and fighting on Algerian territory resulted, nonetheless, in new travel restrictions in 1956 - this time for workers returning to Algeria for their holidays, since French authorities feared potential fighters returning to Algeria.[240] As a consequence of this, these workers were joined by their families in France, further increasing the number of Algerians and changing the demography of the population present in the metropole.[241]

4.1.2 Algerian independence and freedom to settle

After the war of independence (1954-1962), France and the Algerian National Liberation Front signed the Évian Accords, which contained provisions with respect to, inter alia, organisation of transitional public authorities, guarantees of self-determination, and cooperation between both countries. Accordingly, '[i]n a form of continuity with the colonial period, freedom of movement and permission

[235] Cohen (n 233) 4.
[236] Marc André, 'Algerian Women in France: What Kind of Citizenship? (1930s-1960s)' (2016) Clio. Women, Gender, History 2016/1 (No 43) 101.
[237] Cohen (n 233) 5.
[238] ibid 2.
[239] Thomas Lacroix and Julie Lemoux, 'The Three Ages of Algerian Emigration. By Abdelmalek Sayad' (2019) Migration Studies, Volume 7, Issue 3, September 2019, 389.
[240] Cohen (n 233) 5.
[241] ibid.

to settle was guaranteed, while Algerians benefited from the same rights as the French, apart from political rights'.[242] However, this freedom of movement and, particularly, freedom to settle only remained true for a few years. Since the question of freedom to settle for Algerians already present in the metropole could not be reopened given that Algerians had no need for a residence permit to travel and reside in France, steps were taken to control immigration into the country.[243] In line with that purpose, in 1964, the National Office for Algerian Labour was created, which was responsible for the selection of workers who could move to France.[244] Later, in 1965, the French authorities imposed requirements unilaterally, such as a return ticket to Algeria and a deposit of 550FF for entry into France. Additionally, the French introduced a requirement for an individual tourist visa and a limit on the number of Algerian tourists that could enter France per week, initially set at 200 people.[245]

The latter measures were a reflection of the views adopted by the Service for Muslim Affairs and Social Action, an organisation created during the war of independence for the social welfare and oversight of French Muslims from Algeria.[246] In a 1965 report, it expressed that workers coming from Algeria posed problems to social welfare services 'because of the resources and time needed to help this group to integrate as compared with foreign workers from European origin'.[247] Cohen maintains that '[a]lthough these allegations were not in any way substantiated, they were widely disseminated with the aim of convincing the government to review the Algerians' freedom of movement and permission to settle'.[248]

In 1968, 'a new development in the control of Algerian immigration'[249] into France was introduced with the signing of the Franco-Algerian Agreement. Even though this agreement was based on the foundations of cooperation between the two countries laid out in the Évian Accords, and it seemingly gave preferential treatment to Algerians when compared to other aliens and even citizens from other formerly French-colonised territories, it also introduced the requirement of a certificate of residence for Algerians, valid for 5 or 10 years. These certificates 'were principally intended to enable stricter police control over the Algerian population'.[250] Their existence implied a regression in terms of freedom to settle, given that before the implementation of the agreements, Algerians theoretically only needed a passport to live in France.[251]

[242] Cohen (n 233) 6.
[243] Cohen (n 233) 7.
[244] ibid.
[245] ibid.
[246] ibid 6.
[247] Cohen (n 233) 7.
[248] ibid.
[249] ibid 8.
[250] ibid.
[251] ibid.

4.1.3 Reintegration into French nationality

As to the question of nationality, the Ordonnance no. 62-825 of 21 July 1962 of the Ministry of Justice, modified by Loi no 66-945 of 20 December 1966, provided - in implementation of the Évian Accords - that people of Algerian origin who held civil status under local law[252] would lose their French nationality effective on the 1st of January 1963. The possibility to request reintegration into French nationality was simultaneously established: Algerians born before the date mentioned above could request to have their and their children's French nationality recognised until 22 March 1967. This could be done either in France or in one of the Overseas Departments.[253] Such requests were reportedly made by those who were settled in France and had already been living there for several years; they were, however, very small in number. As Cohen explains, '[m]ost did not want to take that route either because they did not want to "betray" the Algerian nation or sometimes, more prosaically, because they feared it would mean they would be unable to return to Algeria'.[254]

There are, to this day, cases in which persons of Algerian origin born before January 1st 1963 who have lived their entire life in France, yet don't have French nationality since their reintegration into French nationality was never requested by their parents.[255] People in this very specific situation can make use of two different pathways contained in the French Civil Code to achieve reintegration into French nationality. The first route is claiming French nationality through declaration of having possessed 'French status'[256] for at least ten years;[257] and the second pathway is through reintegration for persons who can establish they held French nationality.[258] There is no probation period requirement for the latter pathway.

4.1.4 Comparative analysis

Some similarities can be established when comparing the policies adopted by France towards Algerians to those introduced by the Netherlands towards ex Dutch Surinamese. The first element in common is

[252] As opposed to civil status under common law i.e. that of the French Civil Code. As the Ministry of Justice stated, 'civil status corresponds to all the rules of private law governing the person (civil status, marriage, divorce, filiation)'. 'Nationalité Des Personnes Nées En Algérie Avant L'indépendance De Ce Pays' (Sénat) <https://www.senat.fr/questions/base/1991/qSEQ910917451.html> accessed January 31, 2023 [Translated from French to English].
During colonial times, Algerians were governed by default under the local law concerning those matters, unlessan individual request was made to have the common law civil status apply to them.

[253] André (n 236) 110.

[254] Cohen (n 233) 6.

[255] Such is the case of the applicant in *Zeggai v France* App no 12456/19 (ECtHR, 13 October 2022).

[256] Possession of French status is defined as 'the fact that the person concerned has considered him/herself as [French] and has been considered by the public authorities as having this capacity, effectively exercised, and has assumed the obligations attached to it'. *Zeggai v France* (n 257), para 30 [Translated from French to English].

[257] French Civil Code art 21-13 [Translated from French to English].

[258] ibid art 24 and 24-1 [Translated from French to English].

the implementation of a legal status which made formerly colonised people formally equal to the citizens of the metropole, but not practically. Particularly, after Algerian independence, restrictions to the Algerians' freedom to settle in France were put in place, even when they legally could 'become' French again by requesting reintegration into French nationality. The second element in common is the belief that migration from the formerly colonised territory would be temporary, followed by the introduction of unfavourable migration policies justified by alleged integration difficulties within the former metropole upon the realisation that a significant number of persons from the formerly colonised territories sought to settle there.

However, there are also notable differences between practices. Indeed, the French practice entailed a more adequate policy regarding the lawfulness of Algerian presence on its territory, as opposed to the course of action taken by the Netherlands vis à vis ex Dutch Surinamese. The French approach allowing for Algerians to request reintegration into French nationality forms a basis to ascertain international legal practice rooted in the norm that previously colonised, newly independent individuals are entitled to have a say in the matter of their nationality. The Dutch state's failure to respect the agency of ex Dutch Surinamese people in the allocation of their nationality can be problematised in light of the French policy towards Algerians. Moreover, even as of today, persons of Algerian origin living in France who were born before independence can make use of the procedures described in the French Civil Code to achieve reintegration into French nationality based on ties with France.

In practice, although most Algerians gave up French nationality in favour of the Algerian one,[259] the policy emphasises the importance of a choice in the matter. The Netherlands' policy of non-consensually stripping Dutch nationality from newly independent Surinamese people must be considered inhumane and cruel in comparison to the French approach, in particular considering the long term problems that this forced nationality policy has caused for ex Dutch Surinamese people.

4.2 The Portuguese policies

Another case worth exploring and establishing comparisons upon is that of Portugal, particularly with respect to policies adopted following the independence of the formerly Portuguese-colonised territories in Africa, as well as those contained in the current nationality legislation. An analysis will establish how the former can be regarded as a bad practice, whereas the latter can be considered a good practice, from which the Netherlands could derive lessons.

[259] Cohen (n 233) 6.

4.2.1 Conservation of Portuguese nationality in formerly colonised territories in Africa

The Decreto-Lei no. 308-A/75 of 24 June 1974 was issued following the process of 'decolonisation' triggered by the Portuguese Revolution (25 April 1974), which led to the creation of the nations of Cape Verde, Guinea Bissau, São Tomé e Principe, Angola and Mozambique.[260] Indeed, it sought to regulate the conservation of Portuguese citizenship for Portuguese 'expatriates' residing in those newly independent countries, since '[i]t was assumed that these persons would acquire the citizenship of the new state'.[261] This Decreto-Lei also contained provisions concerning citizens of the formerly colonised countries, who - by virtue of previous regulations[262]- all held Portuguese citizenship. In order for them to conserve this citizenship, these persons had to: i) have resided in mainland Portugal or its adjacent islands for more than five years on 25 April 1974; and ii) request Portuguese nationality within two years following their country's independence.[263] This measure was justified by virtue of those individuals' 'special connection with Portugal'.[264] Conversely, those citizens of formerly colonised territories who did not meet the requirements mentioned previously, lost their Portuguese nationality.[265]

The latter provision was problematic, to say the least. In the words of Ana Rita Gil and Nuno Piçarra,

> *'[t]his legislation raised many questions about its interpretation and implementation. It has generated and continues to generate much case law. It has also been criticised by legal scholars because it led to the ex lege loss of Portuguese citizenship by thousands who had been born or had settled in the newly-independent overseas territories without considering their wishes and their effective links to Portugal. Furthermore, it fostered statelessness, whenever those concerned did not acquire the citizenship of the new state.*'[266]

The magnitude of the impact of this provision cannot be assumed, especially in relation to the individuals living in mainland Portugal who either did not meet the residence time requirement or perhaps missed the deadline to request Portuguese nationality. However, the abundance of case law and scholarly critiques suggests that it is not unreasonable to believe that some individuals living in mainland Portugal were left with an uncertain status following the non-consensual stripping of their Portuguese nationality.

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[260] Ana Rita Gil and Nuno Piçarra, 'Report on Citizenship Law: Portugal' (2020) Robert Schuman Centre for Advanced Studies, Global Citizenship Observatory 2020/1 8.
[261] ibid.
[262] Both in the 1867 Civil Code and the *Lei* no. 2098 of 29 July 1959, ius soli i.e. the right to nationality determined by country of birth, prevailed in relation to Portuguese citizenship. In this sense, persons born in the so-called overseas territories had Portuguese citizenship.
[263] *Decreto-Lei* no. 308-A/75 of 24 June 1974, art 2 [Translated from Portuguese].
[264] ibid consideration number 3 [Translated from Portuguese to English].
[265] ibid art 4 [Translated from Portuguese to English].
[266] Gil and Picarra (n 260) 8.

4.2.2 The 1981 nationality regulation and its 1994 amendment

The next development in terms of nationality regulation was the Lei n.º 37/81, of 3 October 1981. In this regulation, individuals who had previously held Portuguese citizenship were relieved from having to meet the minimum residence period and language knowledge requirements when applying for naturalisation.[267] Again, it cannot be assumed how far this benefited ex Portuguese persons from formerly colonised countries specifically; however, the fact that in 1994 another amendment aiming to, inter alia, make it more difficult for foreigners to obtain Portuguese citizenship through naturalisation[268] was introduced, hints at the potential intention of the 1981 regulation. With that in mind, this could be labelled as a bad practice since it barred an already precarious possibility for individuals from formerly colonised countries to claim the Portuguese citizenship which was stripped from them.

4.2.3 The current nationality regulation

For the sake of comparison between practices, it is necessary to highlight the importance of a particular provision established in the current nationality regulation. The Portuguese nationality Acts[269] stepped away from the ius soli approach since the 1981 regulation. However, the current nationality regulation established by Lei Orgânica no. 2/2006, of 17 April 2006 - following a 2018 amendment - provides a path to naturalisation based on what Gil and Piçarra call 'ius soli after birth'[270], which entails the right to access Portuguese citizenship based on birth on Portuguese territory as well as links to the country. In effect, the Portuguese Government shall grant citizenship to persons who cumulatively meet the requirements of: i) being born in Portuguese territory; ii) being children of a foreigner who resided in Portuguese territory, regardless of legal permit, at the time of their birth; and iii) residing in Portuguese territory, regardless of title, for at least five years.[271] Additionally, it is necessary to comply with general requirements for naturalisation, those being knowledge of Portuguese language, absence of criminal record, and absence of threat to public order.[272]

On this subject, Gil and Piçarra posit that 'the legal situation of the parents should not influence the acquisition of citizenship by the children, but only their own acquisition of citizenship';[273] otherwise there would be discrimination based on ancestry between the children of legal immigrants and children

[267] *Lei* n.º 37/81, of 3 October 1981 art 6.
[268] Gil and Piçarra (n 260) 10.
[269] Those being the mentioned 1994 amendment - *Lei* 25/94 of 19 August 1994 - and the *Lei Orgânica* 1/2004 of 15 January 2004.
[270] Gil and Piçarra (n 260) 22.
[271] *Lei Orgânica* No. 2/2018, of 5 July 2018 art 6(5) [Translated from Portuguese to English].
[272] *Lei Orgânica* No. 2/2006, of 17 April 2006 art 6(1)(c) and 6(1)(d) [Translated from Portuguese to English].
[273] Gil and Piçarra (n 260) 24.

of irregular immigrants, which is forbidden by the principle of equality contained in the Portuguese constitution.[274]

4.2.4 Comparative analysis

Just like the ex Dutch Surinamese, individuals from Cape Verde, Guinea Bissau, São Tomé e Principe, Angola and Mozambique were stripped of the nationality of their colonisers with complete disregard of their actual links to the metropole. Furthermore, the Portuguese practice left little room for claiming Portuguese citizenship from the outset. Indeed, the imposition of time limits and immigration policy grace periods favouring previously colonised peoples following their independence often in practice results in individuals getting left behind, undocumented, due to administrative issues. This can be seen as well in the Dutch state's policy towards ex Dutch Surinamese people.

Notwithstanding, there is an optimistic development on the provision described above from the 2018 amendment to the nationality act. It is not clear whether this policy could arguably be relevant to individuals born in Portuguese overseas territories living in mainland Portugal who lost their Portuguese citizenship due to not meeting the time requirements stated above, and are on Portuguese territory perhaps in an irregular manner. However, it does serve as an example to coloniser states. Indeed, the 'ius soli after birth' provision shows not only that it is possible to establish grounds for access to nationality despite an individual's undocumentedness, but also indicates that coloniser states hold a certain responsibility to do so as a form of remedy for the failure of the 'decolonisation' process which resulted in the undocumentedness of previously colonised peoples on their territory. In this sense, it is not legally inconceivable that coloniser states, like the Netherlands, implement policies in which ties to the country combined with historic responsibility justify, at the very least, the regularisation of individuals in the situation of the ex Dutch Surinamese.

4.3 UK immigration policy impacting previously colonised people on UK territory

A look to the Windrush scandal and the UK's treatment of a group of people known as the Windrush generation, who had previously been colonised by the UK, can serve as a warning to the Netherlands to remain sensitive to possible obstacles towards effectiveness of (administrative) remedies for ex Dutch Surinamese people undocumented in the Netherlands, and place safeguards in place to avoid similar problems that have been faced by the Windrush generation in the UK.

4.3.1 Who are the Windrush generation?

The Windrush generation are those from the formerly colonised, currently Commonwealth, Caribbean islands who were encouraged to immigrate to the UK following World War II as a means to fill gaps in

[274] Gil and Piçarra (n 260) 24.

the labour market there.[275] Despite their lawful presence in the UK,[276] they were still targeted by anti-immigrant policies which started in the 1960s and accumulated to the 'hostile environment' policy.[277] The hostile environment policy was a set of measures which targeted those unlawfully present in the UK, and required (certain) noncitizens to provide documentary evidence of their lawful entrance and presence before allowing access to social benefits such as schooling and healthcare.[278] Employers who hired irregular immigrants and landlords who rented to them were also targeted[279] Those found to be without documents faced deportation.

4.3.2 What is the legal status of the Windrush generation?

Under the 1971 Immigration Act,[280] Windrush generation immigrants hold the status of British Subject if they entered the UK lawfully before the passing of said Act, by virtue of being from a Commonwealth country, the nationality of which acted as a gateway citizenship to British subjecthood.[281] Some, by virtue of long term presence in the European UK territory (metropole) were considered 'patrials', a status which was afforded to those who were deemed to have close ties with the UK and hence deserved the right to abode. However, this was a small group which dwindled down under the 1981 Immigration Act and as decolonisation occurred because independence meant loss of the colonial UK citizenship as well as 'patriality'.[282]

Regardless of the complexities of statuses which previously colonised immigrants in the UK could attain, the bottom line is that the 1971 Immigration Act 'entitled people from the Commonwealth who arrived before 1973 to the "right of abode" or "deemed leave" to remain in the UK, [but] it hadn't automatically given them documents to prove it'.[283] It is worth noting here that the legal status of any previously colonised individual in the UK under the various Immigration Acts is complex and was subject to a large number of (policy) shifts in accordance with public opinion and the political saliency of the topic of (Global Southern) immigration. This complexity creates legal uncertainty which in turn

[275] Wendy Williams, in her report for the Government regarding lessons learned from the Windrush scandal, emphasises that many individuals she interviewed felt a sense of duty to immigrate to the UK, to 'build up the Mother Country' and 'contribute to the Commonwealth'. See Wendy Williams, 'Windrush Lessons Learned Review' (March 19 2020) *United Kingdom House of Commons* 31.
[276] Robin M White, 'The nationality and immigration status of the "Windrush Generation" and the perils of lawful presence in a "hostile environment"' (2019) *Journal of Immigration Asylum and Nationality Law.*
[277] Williams (n 275).
[278] BBC, 'Windrush: what is the 'hostile environment' immigration policy?' (20 April 2018)<https://www.bbc.com/news/av/uk-politics-43831563>.
[279] Williams (n 275) 2.
[280] Immigration Act 1971
[281] White (n 276).
[282] White (n 276).
[283] Williams (n 275) 2.

breeds vulnerability of individual rights.[284] Even if we look to the UK and consider (in comparison to ex-Dutch Surinamese undocumented people in the Netherlands) that this state provided a legal framework for allocating status and right to remain for previously colonised immigrants, we must question how genuine these efforts were, and problematise how easily the legal framework could be influenced by anti-immigrants politics of the time.

4.3.3 What was the Windrush scandal?

Despite the Windrush generation having the right to remain on European UK territory under the 1981 Immigration Act,[285] they too were targeted by the hostile environment policy. The hostile environment policy in and of itself is unacceptable despite of the legal status of those affected. Such environment was created by demanding often unrealistic administrative proof of lawful entrance into the UK, in an untransparent manner that lacked in legal certainty. Many affected individuals had entered the UK lawfully before any such documentation was required, and many had not since needed to obtain a passport from their newly independent state for any reason; nor had anyone been aware that at one point in the future any of this documentation would be required to prove their lawful presence. Further, there has been evidence of the UK Home Office destroying entry cards which could have protected many targeted Windrush individual. Hence, when asked to provide evidence of their lawful presence in the UK, many were unable to do so.

Therefore, despite their active and regular participation in British society, going to school, working (often for the UK government itself, social services, or the NHS),[286] 'paying taxes, mortgages and rent... and in many cases hav[ing] become elderly',[287] the Windrush generation became victim to the government's anti-(irregular) immigrant policy. Stories of being fired from their jobs, evicted from homes, refused NHS healthcare, threatened with detention, and being detained therefor, and in some cases of actual deportation, have come to light.[288]

The Windrush scandal was labelled as such because of the injustice of this treatment being carried out on people who it was not intended to impact, due to their regular legal statuses. How could this have happened? According to Wendy William's report requested by the UK Government on lessons learned from the Windrush scandal, there were quite clear warning signs of the wrong people being targeted by anti-immigrant policies as early as 2007.[289] It cannot be absolutely known why the Home Office did not

[284] Leslie J Abrego; Lakhani S M, 'Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses.' (2015) 37 *Law & Policy*.
[285] Immigration Act 1981
[286] White (n 276).
[287] ibid.
[288] Williams (n 275) 3; White (n 276).
[289] Williams (n 275) 36.

properly respond to complaints from Windrush individuals being the victims of hostile environment measures, however shortcomings in the Government's conduct can be evaluated to understand where to improve.

Wendy Williams asserts that 'the dominant political discourse failed to challenge, and even encouraged, the association of immigration with negative social and economic outcomes'[290] This suggests that those in power have a duty to influence the rhetoric surrounding migration given that the treatment of immigrants is directly affected on the discourse about them.[291] Further, she found there to be 'a culture of disbelief and carelessness when dealing with applications'.[292] A key issue is likely that training of officials, including necessary procedural safeguards to limit arbitrariness of decisions, was not properly conducted. Hence, subjective understandings of immigration and immigrants are allowed to infiltrate what should be an objective application of the law.

4.3.4 Comparative analysis

When it comes to deriving lessons from the Windrush scandal with regards to the Netherlands' obligations towards undocumented ex-Dutch Surinamese people, three key conclusions must be drawn.

Firstly, the UK example illustrates that it is possible to create a legal framework for allocation of status and right to reside legally for previously colonised peoples in the former colonial metropole. The presence of a legal basis for acknowledgement of the right to legal residence, while far from perfectly implemented in practice, created an indispensable foundation for this group's ability to stand up for their rights, and demand recognition and regularisation. It was easier to see and label the injustices inflicted on this group as a "scandal" in a context where their right to residence in the UK was recognised on a legal level. This is in contrast to the context of the Netherlands that is lacking a legal foundation in its national law for such a right for its ex Dutch former colonial subjects, thus underminingthe legitimacy and increasing the invisibility of this group's claim to legal residence. Despite UK's struggles with implementation of this legal framework, the existence of a legal framework acknowledging the right of the Windrush generation to legal residence was a necessary foundation for further progress with implementation.

Secondly, the government must ensure legal clarity of status and associated rights when developing and implementing a legal framework for the right of residence for its former colonial subjects. As Wendy Williams posits, the Immigration Acts 'progressively impinged on the rights and status of the Windrush

[290] Williams (n 275) 52.
[291] Charlotte Taylor, 'Representing the Windrush generation: metaphor discourses then and now' (2020) *Critical Discourse Studies* 17,1.
[292] Williams (n 275) 7.

generation and their children without many of them realising it'.[293] It seems that this lack of legal clarity reached even Home Office caseworkers.[294] Further, Government officials and politicians must be sensitive with the language and tone they use themselves on the topic of immigration, and act positively to discourage insinuating rhetoric.[295] Finally, an evaluation must be conducted before the introduction of new (restrictive) policies such as the hostile environment as to how realistic the expectations are on those impacted. In other words, the government should not burden immigrant groups with impossible tasks as a means to implement restrictive immigration policies, and an evaluation should be carried out to ascertain this.

Thirdly and more structurally, the UK example illustrates that the allocation of a legal residence status and associated rights is in itself insufficient. The Dutch government will only sufficiently fulfil its obligations under Article 8 ECHR and Article 12(4) ICCPR if it envisages the regularisation of undocumented ex Dutch Surinamese people as a positive obligation ensuring the *practical effectiveness* of the rights under the aforementioned provisions. A mere allocation of status is not a guarantee of effectiveness, because of the risk of discriminatory practices and existing structural biases within legal and administrative implementing institutions, such as those suffered by the Windrush generation. Anti-discrimination safeguards such as the proper training of authorities is necessary, as well as clarity of regulations on the administrative level, avoiding situations where caseworkers 'have to deal with legislation that is challenging even to specialist professionals of many years' standing'.[296]

Overall, the Windrush scandal offers important insight into how status allocation is an essential, but not in itself a sufficient step to ensure the protection of rights to residence of former colonial subjects. The state has an obligation to create a legal framework for regularisation, and subsequently, to ensure its implementation at every level of government in a non-discriminatory and correct way. This necessitates, among others, proper training of officials - through improved sensitivity in language use when it comes to issues as salient as migration - and taking into proper account the experience of the individuals impacted by any policy which may limit individual rights.

4.4 Conclusion

In sum, the comparative approach of this research has not necessarily given rise to a wealth of 'best practices' of post-colonial immigration policies adopted by colonising states. In general, we can recommend that, especially in cases of denial of dual citizenship such was the case for ex Dutch Surinamese people and for ex French Algerian people, a choice of citizenships must be offered. The

[293] Williams (n 275) 59.
[294] Ibid 105.
[295] Ibid 106.
[296] Ibid 105.

non-consensual stripping of citizenship has already occurred for ex Dutch Surinamese people, however there are ways to remedy this. The recent Portuguese amendment to its nationality policy indicates the possibility for previously colonised people from its former African colonies to meet nationality requirements. As such, it is legally and socio-politically conceivable in today's climate for coloniser states to remedy their colonial nationality policy failures, and it is advisable that the Netherlands does so. That being said, simple policy change is not enough. Even if legal pathways are created to allow access to residency rights or a legal status for ex Dutch Surinamese people undocumented in the Netherlands, the actors facilitating these legal pathways must be sufficiently trained. As we can see from the Windrush scandal, anti-immigrant rhetoric across Europe has created a culture of disbelief of immigrants, at all levels of the state. As such, the Netherlands must be diligent in providing sensitivity training for all agents dealing with undocumented people requesting a legal status or residency rights, should the opportunity therefor arise.

5 Discussion

The following sub-chapters discuss limitations that the authors have encountered as the objective of the opinion was to explore legal grounds for residence permits. First, we move beyond the struggle for residence permits and shortly address the question of rights to citizenship. Further, we focus on ethical considerations and the authors' own positionality.

5.1 Beyond a right to residence status

As outlined throughout the paragraphs, former Dutch now Surinamese individuals living undocumented in the Netherlands are entitled to a regularisation of their residence. The arbitrary expulsion of someone from their own country is prohibited, whereas the denial of residence rights and the resulting expulsion of a long-term resident – regardless of the nature and legality of their residence status – will inevitably interfere with the enjoyment of family life and private life in the state in which it was developed over time. Additionally, the repercussions of the uncertainty of an individual's residence status over a long lapse of time have proved to offer solid grounds for the regularisation of a subject's status. Nevertheless, the peculiar circumstances of the affected group suggest that the regularisation of their residence status is, in the opinion of the authors, merely the absolute minimum that the Netherlands is legally and morally obliged to pursue. In this sub-section, it is outlined the basis for an argument whereby this group of individuals is entitled to the restoration of their Dutch citizenship. Indeed, the case law of theECtHR has provided a foundation to build a case for a right to citizenship under the protection grantedby Article 8 ECHR. Although a right to a nationality is not explicitly guaranteed by the Convention or

its Protocols, the Court has repeatedly recognised that access to citizenship can fall under the protection of one's private life.[297]

Specifically, in *Genovese v Malta*, the Strasbourg Court held that the denial of citizenship can raise an issue under Article 8 ECHR because of its impact on the private life of the applicant, as 'private life' is wide enough to embrace aspects of an individual's physical and social identity.[298] It is precisely from the concept of social identity that an indirect right to citizenship can be derived. Although refraining from properly defining the meaning of 'social identity', the Court indirectly affirms that a non-citizen's social identity must encompass the ties to the host society based on the social relationships developed there,[299] the duration of residence on the territory,[300] as well as the existence of any familial links.[301] Drawing from a partly dissenting opinion by Judge Maruste in *Riener v Bulgaria* about the links existing between nationality and one's identity,[302] with the delivery of the *Genovese* ruling, nationality must be considered a component of an individual's social identity, protected by the right to private life under Article 8.[303] In *Ramadan v Malta*, the Court reaffirmed that the right to citizenship should be covered by Article 8 of the Convention, as part of an individual's social identity.[304] Initiated in *Genovese* and confirmed in *Ramadan*, the Court hence expanded the social identity approach to cases concerning acquisition and loss of citizenship. It attributed specific relevance to a non-citizen's social identity for the protection of the right to private life in migration cases.[305]

Not only extensive social relations, length of stay or possible family ties suggest that belonging to the Netherlands may be a significant part of the social identity of the group concerned. Reference must also be made to the fact that they held Dutch nationality prior to 1975, and the subsequent independence represented a primarily formal separation. It must be emphasised here that many of the people concerned have always felt that they belonged to the Netherlands. Since the protection of social identityfalls under the scope of private life within Article 8 ECHR, and the permanent affiliation to the Netherlands is an integral part of the social identity of the group concerned, the inference to a right to citizenship is anything but far-fetched. Especially since the group concerned has been involuntarily andformally deprived of it, and it cannot be assumed that this has any influence on their social identity, or

[297] *Karassev v Finland* (dec.) App no 31414/96 (ECtHR, 12 January 1999) 10; *Riener v Bulgaria* App no 46343/99 (ECtHR, 23 May 2006), para 151; *Savoia and Bounegru v Italy* (dec.) App no 8407/05 (ECtHR, 11 July 2006) 4; *Genovese v Malta* (n 221), para 30.
[298] *Genovese v Malta* (n 221), para 30.
[299] *Üner v Netherlands* [GC] 2006-XII, para 59.
[300] *Hoti v Croatia* (n 213), para 125.
[301] Barbara von Rütte, 'Social Identity and the Right to Belong – The ECtHR's Judgment in Hoti v. Croatia' (2019) 24 Tilburg Law Review 154.
[302] *Riener v. Bulgaria* (n 297) Partly Dissenting Opinion of Judge Maruste 31.
[303] *Genovese v Malta* (n 221), para 33.
[304] *Ramadan v Malta* (n 221), para 62.
[305] Von Rütte (n 301) 154.

that subsequently the social identity has adapted to the formal reality. Therefore, the right to Dutch citizenship of this group can be derived from ECtHR case law on Article 8 ECHR.

5.2 Ethical Considerations

This expert opinion was written within the framework of the Vrije Universiteit Migration Law Clinic law over a period of several months, under the direction, guidance and in exchange with various (academic) experts with different specialisations. The authors began with no relevant prior experience of the subject matter, the specific difficulties and the circumstances of the group concerned. Further, the mainly white authors have limited or no personal experience with being affected by racialised policies, continuing effects of colonisation, or precarious residence statuses. We raise this issue of our positionality here because it could be considered a limitation to our ability to research and advocate for circumstance of vulnerability that we cannot empathise with. That being said, our convictions as a research group are strongly decolonial and a key shared academic interest is the strive for justice for those marginalised by structural legal violence. As such, while we cannot speak for the vulnerable group in question, we hope that our political intentions are in line with their intentions.

Another related limitation of our research is that , although there were exchanges with various academic experts, there was no direct contact with persons affected by the regulations that are being legally questioned here. Nevertheless, group-specific characteristics, as well as social identities are assumed and presupposed for the purpose of the legal analysis. In principle, this should be done in an exchange with the persons affected, around whose future the expert opinion revolves, but due to the contextual limits given by writing a legal expert opinion as members of the law clinic, we decided against it. This decision was made for a number of reasons. Firstly, we felt that the contact we had with academic experts and individuals' legal representatives at Prakken d'Oliveira, as well as the secondary source information about the group published in various national newspapers, was sufficient to draw assumptions from for the purposes of this report. These sources were limited in and of themselves; individuals' lawyers could not divulge much specific information and the information in newspapers introduces a level of commerciality. However, the alternative of contacting affected individuals and including them in the research process also introduces ethical issues. For example, requiring individuals to recollect difficult experiences and to risk disclosing their undocumentedness simply for the sake of verifying assumptions made about them seemed unnecessary and disproportionate. In sum, while we would have liked to ensure the involvement of individuals affected so as not to speak for them and not to make blind assumptions about them, we felt when taking into account all relevant ethical implications that doing so would be too invasive.

After gaining a more comprehensive picture of the matter, the authors felt the need to contextualise the legal analysis into a broader framework of decolonial theory, as it is not possible to draw a line between

the discourse on the aftermath of colonialism, international law, and migration. The scope of the expert opinion has, however, been limited to a legal analysis non-critical of the colonial dimension of the respective law to provide strong and fruitful pathways for a regularisation of ex Dutch Surinamese people living undocumented in the Netherlands. The resulting discomfort can only be eased by emphasising the need for further research and pointing to at least the most prominent aspects of critique, which will be attempted by the same authors within the next months.

6 Conclusion

This expert opinion addresses the issue of what obligations the Dutch state has towards ex Dutch Surinamese individuals living undocumented in the Netherlands. The previous chapters established through two legal pathways as well as through a comparison to other former colonising states' practices that the Netherlands has a positive legal obligation to regularise the status of ex Dutch Surinamese individuals living undocumented in the Netherlands.

Various findings have been presented in the previous chapters. Firstly, a closer look at the historical context of this case has highlighted the direct responsibility of the Netherlands for the precarious legal status of the ex Dutch Surinamese. Throughout the decades, by pursuing restrictive, racist, and colonial migration policies, the Netherlands has opportunistically imposed Dutch citizenship upon individuals to support its colonial project. However, when it became more strategic to change policies, namely to curb Surinamese migration to the metropole, the Dutch citizenship was stripped in 1975 allegedly in the name of 'decolonisation'.

The Netherlands ensured that Surinamese individuals were not given a choice of whether or not to remain Dutch citizens and were over a period of a few years transformed from formally full and equal Dutch citizens to complete irregularised aliens of the State, who have been described by policy-makers as not belonging and "unnatural" to the Dutch society. The impact of these changing policies over time, slowly demoting the legal status of Surinamese individuals from citizen, to favoured alien, to irregularised migrant with no ties to the Netherlands, is highly problematic. The Dutch state must not only be held accountable for its actions but also must act in a way to provide material remedies for the individuals affected.

With this historical context as a backdrop, Article 12(4) ICCPR obliges the Netherlands to ensure the residence of the ex Dutch Suriname population living undocumented in its territory. A close analysis of the provision, specified by the HRC's communications and General Comments, reveals that the Netherlands must be considered their 'own country'. This is based on inter alia an accumulation of individual circumstances like long-standing residence, language capacities, social and family ties,

intentions to remain, combined with being born on Dutch soil and having held the Nationality at a time. The failure to regularise this group within their own country is an arbitrary deprivation of their rights, since there are few, if any, reasons to hinder one from enjoying the right to reside safely in one's own country. The Netherlands, as a signatory party, is legally bound by the ICCPR's provision, while the HRC's views within its communications and General Comments represent highly authoritative positions from which the Netherlands cannot deviate without providing substantial and vital reasons for doing so. The burden of demonstrating such lies with the Netherlands. So far, the State has tolerated the group in question for decades on its territory, but has refrained from taking actions to ensure the individuals safe enjoyment of rights within their own country. This constitutes a clear violation of the State's obligations under Art. 12(4) ICCPR.

Article 8 ECHR is discussed as a further pathway via which these individuals have a right to regularise their status. The individuals within the group are presumed to have family life within the meaning of Article 8 of the ECHR due to the additional elements of dependence that bring their familial relationships in the realm of more than 'normal emotional ties'. When family life is established on the territory while an individual has an irregular status, it is only in exceptional circumstances that the Court will find a violation of Article 8 in regards to family life. The particular circumstances of these individuals include: i) their former status as Dutch citizens whose citizenship was stripped without their consent, ii) the decades that the Dutch State has tolerated their presence and allowed them to build deep relationship in the Netherlands, iii) the hardship that the individuals and their family members would face if returned to Suriname, iv) the fact that they potentially could have requested a residence permit in the past, and finally v) their special ties to the Netherlands as formerly colonised individuals. All of these circumstances taken cumulatively rise to the level of exceptional circumstances and outweigh the mere interest of the state to maintain a restrictive immigration policy (in the name of protecting the economic well-being) and/or to protect the public order. This is particularly so because the State allowed these individuals to languish in legal uncertainty for decades with no actions to ameliorate this situation for the State or the individuals. Therefore, these individuals have a right to respect for their family life, and the Dutch State has the positive obligation to ensure this respect for family life by regularising the status of these individuals.

Accordingly, it must also be presumed that ex Dutch Surinamese nationals that have been living undocumented in the Netherlands for decades have an established private life here that fully deserves protection. In balancing the interests of the individual against the interests of the State, the following circumstances must be considered: i) the length of their stay in the country, ii) the close ties developed within the local community, iii) the special connection stemming from the colonial links between these individuals and the Netherlands that further exacerbates their ties with the country, iv) the lack of solid links with Suriname, v) the adverse repercussions of the continued uncertainty of their legal status

perpetuated by the Dutch State, and vi) the minor role played by the existence of a criminal record. It is safe to assume that the interests of the State to protect the economic well-being of the country by pursuing restrictive immigration policy cannot outweigh the interests of the individual, amounting to an infringement of these individuals' right to private life - as guaranteed by Article 8. Regularising their status is a positive obligation that needs to be urgently complied with by the Dutch State.

Our aim with the comparison approach was not to highlight that any one state is the model to follow. If anything, all states in question fall far short of what might be considered appropriate treatment of peoples previously colonised by the state in question. That being said, the comparative approach intends to highlight that better state practice is not only necessary, but also possible. The French/Algerian case offers insight into how the shift from Dutch to Surinamese citizenship could have been made consensual by offering those affected a choice of either citizenship. Meanwhile, the Portuguese case indicates that it is legally and socio-politically plausible to modify harmful colonial immigration policy decades later. The Windrush scandal shows that access to status for previously colonised people is not enough and that proper sensitivity training of agents implementing the policy is necessary. As such, at this time of potential policy reform in the Netherlands, the lessons we can learn from other colonising states' practices must be kept at the centre of the discussion.

Further, it must be considered that there is an emerging global political climate where a previously colonising State recognises its past atrocities, and not only apologises for them, but in fact takes action. The Dutch Government recently gave its formal apologies for slavery and recognised that the Dutch State itself was and is responsible for 'the suffering inflicted on enslaved people and their descendants. So we cannot ignore the effects of the past on the present…'.[306] And in this process, three words are important to remember: 'acknowledgement, apology, [and] recovery'.[307] In his own words, Mark Rutte said, 'We cannot change the past, but we can face up to it'.[308] Therefore, it is the time for the Dutch State to further and fully face up to its colonial wrongdoings; the wrongdoing of stripping Dutch citizens of their nationality; of leaving them in a state of legal precarity for decades; of denying individuals access to basic services and a humane existence in the Netherlands by way of arbitrarily and discriminatorily determined immigration policies.

The Dutch State could have chosen to act differently and still can. As the movement advocating for the rights of these individuals gains more momentum, it is important to ensure from the outset that the Dutch State has not offered empty apologies and promises regarding its colonial mistakes; it is important to hold the State accountable for making meaningful changes to rectify circumstances that can be traced

[306] Ministerie van Algemene Zaken (n 198).
[307] ibid.
[308] ibid.

back to the Dutch colonial legacy, such as the undocumentedness suffered by many ex Dutch Surinamese people in the Netherlands. It is now on the Dutch State to act according to its international legal obligations and uphold its word, face the consequences of its past actions, and regularise the situation of these individuals.

No one should be left undocumented and unrecognised.

No one should be a foreigner in their own country.

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