The right to legal residence and the colonial past: are former Dutch citizens born in Suriname discriminated as compared to former Dutch citizens born in other (Western) countries?

An analysis of the regulations impacting undocumented Surinamese people in the Netherlands, who were born as Dutch citizens before 1975, in their historical context, and by reference to law in the UK (Windrush), Belgium and France, and the compatibility of these regulations with international human rights law

Radboud Universiteit

PILP

February/December 2022

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Executive Summary

The issue

The Netherlands colonised Suriname from 1683 until 1954. In 1954 Suriname became an independent part of the Dutch Kingdom. Three years prior, in 1951, the Dutch government granted people born in Suriname Dutch nationality, which gave them the exact same rights as Dutch nationals born in the Netherlands.[1] People living in Suriname kept the Dutch nationality until the formal independence of Suriname in 1975.

Next to a large group of Surinamese Dutch citizens living in the Netherlands there also is a group of Surinamese citizens residing in the Netherlands with a residence permit. However, a small group of Surinamese people currently living in the Netherlands, born as Dutch citizens, lost their Dutch nationality in 1975 following the bilateral agreement on nationality, and due to a variety of reasons did not obtain legal access during the 1975-1980 period when there was a liberal admission policy. Subsequently they have not been able to make use of regulations on the right of admission for former citizens, because for former Dutch nationals born outside of the Netherlands a separate rule was created. They need to live in a country of which they do not have the nationality, in other words: not in Suriname. This separate rule for former Dutch citizens born outside of Europe, makes family reunification with their family members living in the Netherlands extremely difficult. For them it is only possible to gain admission as a former citizen when they have had legal residence in the Netherlands for a year with a residence permit for a non-temporary purpose. They must obtain a work permit before they enter the Netherlands, which in many cases is virtually impossible. This means that while they have been in the Netherlands now often for a great number of years, they do not have a legal ground to reside in the country of which they used to be citizens. This leads to perpetual uncertainty and limits their access to basic facilities.

This research concerns the situation of those people born in Suriname who lost their Dutch nationality in 1975 and who are currently living in the Netherlands undocumented, without any longer being legally recognized as Dutch citizens. They do not have legal access on the same conditions as former nationals who, different from them, were born in the Netherlands and not in Suriname. This triggered this research by the Radboud Law Clinic, commissioned by the Public Interest Litigation Project (PILP). The question was whether the distinction made in Dutch regulations on the right to reside in the Netherlands, between former Dutch citizens who were born in the European part of the Netherlands and former citizens who were born in the Surinamese part, is discriminatory.

Historical setting and governmental attitudes

Over the years there has been a shift in sentiment of the Dutch government towards people from Suriname. It started with a welcoming attitude towards Dutch nationals from Suriname until the 1960s, but from that time on the Dutch government restricted migration from Suriname to the Netherlands, in a manner lacking transparency.

This can be illustrated by the discussion on residence permits and naturalisation of former Dutch nationals between 1973-1976. The option of granting residence permits for work

[1] Guno Jones, "Tussen Onderdanen, Rijksgenoten en Nederlanders: Nederlandse politici over burgers uit Oost en West en Nederland, 1945" (PhD diss., Vrije Universiteit Amsterdam, 2007), 198.

was excluded for applicants who were still residing abroad.[2] Yet this was contrary to the promise the Dutch government had made in the negotiations about the independence, in which it had said that naturalisation would remain easy for Surinamese people.[3] State Secretary of Justice and Security Zeevalking refused to state openly that he would be breaking this promise, which may be assumed to be the reason why he made several statements saying "wie oren heeft om te horen, die hore" (meaning: those who have ears to hear, will hear).[4] Being called out on 'concealed arguments', and after being asked to have a public discussion with openness about the arguments, he mentioned it was better "not to name names" (using the Latin expression: *nomina sunt odiosa*).[5]

Research question

This report addresses the question what the human rights obligations of the Dutch State are towards undocumented Surinamese people in the Netherlands, who were born in Suriname before the independence (1975), as Dutch citizens. The focus is on the prohibition of (in)direct discrimination on the grounds of race, ethnicity or 'other status'. In addition, in case of violations of the prohibition against discrimination, the report explores what remedies could address these violations with a reach beyond individual cases.

Dutch regulations

This report first addresses the question what are the rights of former Dutch nationals present in the Netherlands, who currently have Surinamese nationality under Dutch law and regulations. It sketches the legal developments in historical context, by reference to the studies of Guno Jones, J.M.M. van Amersfoort and H.A. Ahmad Ali on the migratory history and the bilateral agreement on nationalities and the temporary liberal admission policy (1975-1980).

The current regulations on admission of former nationals no longer include specific provisions on the admission of Surinamese people. Like the previous regulation of 1994, art 3.51 (1) (d) and (e) Vb formulates the categories as former Dutch nationals born in the Netherlands and former Dutch nationals born outside of the Netherlands. Art. 3.51 (1) (d) Vb states that former Dutch nationals born in the Netherlands are eligible for a non-temporary residence permit on grounds of this article. Additionally, this right is also given to former Dutch nationals born outside of the Netherlands, who live in a country of which they do not have the nationality (art. 3.51 (1) (e) Vb)). Thus, new requirements for former Dutch nationals born outside of the Netherlands are added, most notably the requirement of needing to live in a country of which they are not a national. This limits the possibilities for family reunification and legal residence in the Netherlands for former Dutch citizens from Suriname on the grounds of these provisions. In our case, the Dutch government factually does not consider people born in the overseas territories before the independence to be former Dutch nationals in the context of 3.51 (1) (d) Vb.

Next to the explicit distinction made between different groups of former nationals, there is also a clear difference in impact of the abolition of the policy to grant the right to residence in the Netherlands for dependent parents (1973-2012) as part of the extended family reunification policy. The abolition of this policy in 2012 affects Dutch nationals with a

[2] Handelingen II 1975/76, 4102 en 4103.
[3] Jones, "Tussen onderdanen", 254.
[4] Handelingen II 1975/76, 4103.
[5] Handelingen II 1975/76, 4108.

migration background in particular, since many of them still have their elderly parents living in their country of origin. Even though there is no reason to believe the abolition of the policy had anything to do with restricting migration from Suriname to the Netherlands in particular, Dutch citizens with a Surinamese background are one of the groups who are disproportionately disadvantaged by this policy. When comparing this to Dutch, citizens with a European Dutch background, the latter can take care of their elderly parents when needed without having to go to excessive lengths in order to do so.

International rules against discrimination

Several authors have argued that the way the Dutch government has treated Surinamese former Dutch nationals can be seen as discriminatory.[6] The relevant international and European human rights framework we applied concerns in particular (in)direct discrimination on grounds of race or ethnicity (or 'other status'), independently or in relation to other human rights. The authoritative interpretations of applicable treaties by independent experts appointed by State parties, including in General Comments and decisions in individual cases, have confirmed the importance of the principle of non-discrimination and the fact that non-discrimination can consist of both direct and indirect discrimination. The states parties to the International Covenant on the elimination of Racial Discrimination (ICERD) have to meet their obligations under this treaty when it comes to discrimination between non-nationals (including former nationals) on the apparent basis of ethnicity, and the states parties to the International Covenant on Civil and Political Rights (ICCPR) have to meet their obligations when it comes to discrimination in an open-ended list of categories, including 'any other status'.

Moreover, the states concerned have similar obligations under Article 14 European Convention on Human Rights (ECHR) in conjunction with another article in the Convention, or Protocol 12 with its free-standing non-discrimination principle. The authoritative interpretations by the European Court of Human Rights (ECtHR), among which *Biao,*[7] are significant here. This Court's judgments emphasise that distinctions based on certain categories, such as ethnicity, are inherently suspect.

The ECtHR has repeatedly stressed that a difference in treatment that is based exclusively or to a decisive extent on ethnic origin is not 'capable of being objectively justified in a modern democratic society built on the principles of pluralism and respect for different cultures'.[8] In a similar vein it has pointed out that differences in treatment on the basis of gender or sexual orientation may only be justified by 'very weighty reasons'.[9] 'Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.'[10] This is a distinction that requires strict

[6] K. Groenendijk, "Minderhedenbeleid in een onwillig immigratieland," *Aers Aequi* 1981, p. 541. Mr. K. Groenendijk argues that a policy change in 1979 would disproportionately disadvantage former Dutch nationals from Suriname and Indonesia. Mr. A Kuijer and J.D.M. Steenbergen argued that the rule that Indonesia and Suriname were not considered to be part of the kingdom for purpose of the definition of being a former Dutch national, was a violation of art 1 of the Dutch constitution (in A. Kuijer and J.D.m. Steenberger, *Nederlands Vreemdelingenrecht,* (Nederlands Centrum Buitenlanders, 1999), p. 130.

[7] ECtHR *Biao v. Denmark*, App no. 38590/10 (ECtHR, 24 May 2016, in particular §§ 25, 28, 94, 114 and 138.

[8] ECtHR *D.H. and Others v. the Czech Republic* [GC], 2007, § 176; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, §§ 43-44.

[9] ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, § 78; *Konstantin Markin v. Russia* [GC], 2012, § 127; *Schalk and Kopf v. Austria*, 2010, § 97

[10] ECtHR *D.H. and others v Czech Republic* November 13, 2007, No. 57325/00, para. 196. See also ECtHR *Sampanis and Others v. Greece* (no. 32526/05), 5 June 2008, para 69 and ECtHR *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, paras. 43-44.

scrutiny, or as the ECtHR would put it, the state has to put forward 'very weighty reasons' for the distinction. In fact it could be argued that such distinctions simply are 'not capable of being objectively justified.'[11] In the alternative, the distinction between former citizens on the basis of place of birth could in any case qualify as discrimination based on 'other status'. Yet it could be argued that place of birth in this setting so closely relates to distinction on the basis of ethnicity that justifications by the state for such distinctions would also require 'very weighty reasons'.[12]

Compatibility of the regulations with the international rules against discrimination

Our analysis of the legal history strongly indicates a direct distinction based on place of birth, because a direct distinction is made between 'place of birth' in the European part and the overseas part of the Kingdom of the Netherlands of former Dutch nationals. It discriminates between two groups of former citizens, by making it easier to apply for a residence permit for people born in the European part of the Netherlands. The distinction has the effect of discrimination based on colour, ethnic background and descent, since the majority of the population born in the overseas part of the Kingdom of the Netherlands are non-white and particularly of African and Asian descent. It appears to us that this distinction was not an unwanted side effect, but consciously made legislation which intends to distinguish between the two groups of former citizens.

The Netherlands are a party to the ICERD. Both race and descent are grounds for discrimination recognised by the supervisory CERD-Committee. According to this Committee, immigration policies should not have the effect of discrimination based on race or descent. Furthermore, the Committee also states that the status of former citizens should be regularised. It points out that people of African descent are particularly vulnerable in this situation.

Equally, as a state party to the ICCPR, the Netherlands is obligated to combat racial discrimination and distinctions made based on descent. In *Rosalind Williams Lecraft v. Spain* (2009), the Human Rights Committee supervising the ICCPR stipulated that discriminatory conduct based on skin colour, is an infringement of a person's dignity. This conduct is said to interfere with active antidiscrimination policies. This argumentation also applies beyond ethnic profiling, in that the provisions concerning former Dutch nationals are particularly harmful to a group of non-white (former) citizens.

The Committee also states that the definition of 'own country' in Article 12 (4) ICCPR (which dictates that no one should be arbitrarily prevented from entering their own country) should be wider than meaning the country of which the person in question is a national. In this situation,[13] this would mean that Surinamese former Dutch nationals should not be treated like other aliens, but that their descent and special ties to the Netherlands obligate the Dutch government to arrange for more accessible residence permits for the group. This is in line with the observations made by the UN Special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance in a visit to the Netherlands. These observations show that the Netherlands is still struggling to accept non-white people of non-

[11] ECtHR *Timishev v. Russia*, 2005, §§ 56-58 and *Biao v. Denmark*, §§94 and 114.
[12] ECtHR *Biao v. Denmark*, §114. See also §§ 130-140)
[13] HRCtee General Comment no. 27 (67), *Freedom of movement (article 12)*, CCPR/C/21/Rev.1/Add.9, 1 November 1999, §20.

European descent as a full and valued part of Dutch society. It seems that article 3.51 (1) (d) Vb was drafted with a similar mindset.

The ECtHR *Biao* case is singled out, discussing a situation in which naturalised people were being treated indirectly differently in realising family reunification than people being born with the Danish nationality, which led to discrimination based on race or ethnic origin. By using the so-called 28-year rule in Denmark, an unjustifiable distinction was made between in fact two equal groups of citizens. This shows similarities with our case where a distinction is made between two groups of former Dutch citizens, because of an alleged lack of cultural ties with the Netherlands of one group.

Relevance of intent

Unintentional discrimination is still discrimination. The abolition of the elderly policy for family reunification discriminates between different citizens in that citizens who have parents who are themselves also Dutch citizens have the possibility to take care of them in the Netherlands, while Dutch citizens whose parents have Surinamese citizenship can no longer do so. In fact this also exacerbates the situation that is the focus of this report, that of one group of former Dutch citizens, who had been assigned Surinamese citizenship in 1975 and have been working and living in the Netherlands undocumented for many years, but are now elderly and still without legal status. Because of this, their children, who do have Dutch citizenship, cannot take care of them either. The focus of this report though is not on the abolition of the policy of granting the right of residence for dependent parents, but on the distinction made in article 51 (1) (d) Vb between two groups of former citizens.

When assessed against the international framework on indirect discrimination, article 51 (1) (d) Vb does contain indirectly discriminatory elements distinguishing white former citizens from former citizens of colour, since Surinamese people are mostly non-white and of African and Asian descent. As noted, unintentional impact discrimination still constitutes discrimination.

Moreover, based on an analysis of the development of article 3.51 (1) (d) Vb, in conjunction with the migratory and legal history of Surinamese people, the case law concerning this provision, and other case law concerning the admission of former Dutch nationals, we can draw the conclusion that the differences made between former Dutch nationals from the European part of the Kingdom, on the one hand, and the non-European part of the Kingdom, on the other hand, have not been unintentional. This, we consider, makes the discriminatory character the more serious.

Direct discrimination on the basis of place of birth & indirect discrimination on the basis of race, ethnicity and/or descent

Article 3.51 (1) (d) Vb may be considered *directly* discriminatory under the non-discrimination obligations of the Netherlands under ICERD, ICCPR and ECHR, because of the distinction made between two groups of former Dutch citizens on the basis of place of birth. Former Dutch nationals born in the former colonies, amongst them Surinamese people, are excluded from the policy concerning former Dutch nationals.[14]

[14] See also e.g. Luttikhuis, Bart (2013), 'Beyond race: constructions of « Europeanness » in late-colonial legal practice in the Dutch East-indies', *European Review of History* 2013, vol. 4, 539-558.

This results in *indirect* discrimination based on race and descent. Since Surinamese (and other people from former colonies) are being excluded from the policy on former Dutch nationals, this comes down to mostly non-white people of African or Asian descent being affected. This conclusion is based on our findings regarding the migratory and legal history, the development of article 3.51 (1) (d) Vb, the case law concerning this provision and other case law concerning the admission of former Dutch nationals.

In this context the recent attention paid at UN level to the influence of the colonial history on contemporary (in)directly discriminatory manifestations should be noted. Moreover, the UN Special Rapporteur against racism has also observed the 'Western' and 'white' nature of the Dutch concept of citizenship.

Objective and reasonable justification?

Whether an indirectly discriminatory provision is allowed, depends on whether it can be seen as objectively justifiable. In order to answer the question whether the indirect discrimination of art. 3.51 (1) (d) Vb is objectively justifiable because of a 'reason' the Dutch government had, the motivation behind drafting the article should be examined. However, there is no Explanatory Memorandum or anything similar to be found of article 3.51 (1) (d) Vb that indicates why a distinction was made between former Dutch people being born as citizens in the European and non-European part of the former Kingdom of the Netherlands.

In the 2008 domestic court case discussed in paragraph 1.3.5, the reason that was given by the Dutch government in making the difference between inhabitants of the European part of the Kingdom and the non-European part, was because they thought people from different non-European cultures have more trouble integrating in the Netherlands than people with European roots. However, the Court's argumentation did not contain any research showing that people from non-European cultures have trouble integrating into Dutch culture.[15] All the same, this sentiment has been witnessed in the Netherlands for a longer period of time, as indicated in paragraph 1.2.1. and 1.2.5.[16] In conjunction with the described (wishes for) restriction of migration from Suriname, we consider that this has been an unmentioned motivation for drafting article 3.51 (1) (d) Vb.

Thus, in order to answer the question whether the discrimination in the provision is objectively justifiable, we have tried to find a justification, yet other than the reason given in the above case, we have not found such justification, although there seems to have been an unmentioned motivation for the regulation. One could say that if any justification made at the time cannot be easily pinpointed, it would be rather unconvincing for the State to prepare one now on hindsight, based on stereotyping and unfounded assumptions about integration, assimilation and Dutch society.

There are no indications in the legislative history justifying the purpose of the legislation as objective and reasonable. There *are* contrary indications to the effect that the legislation may have been based on prejudice and preconceptions about what it means to be (or have been)

[15] Moreover, there is the general question what is integration, into what, and whether it should be one-sided.

[16] In the sixties and seventies, the sentiment that integration into Dutch society would be problematic was already present. This is contrary to several research reports from that time. Later, it was also a reason for the abolition of the policy on elderly, where it again was not based on proper research.

Dutch. Prejudice and preconceptions may not serve to justify distinctions, as was already made clear in early ECtHR case law.[17]

When looking at the reasons that were given for previous provisions that indirectly affected Surinamese people and other people from former colonies, for example the discussion on the naturalisation of former Dutch nationals between 1973-1976 and also in the abolition of the elderly policy, and when analysing previous judgments in cases concerning Surinamese people or other people from the colonies, it can be concluded that there have not been any objectively justifiable reasons for making a distinction between former Dutch nationals from the European and non-European part of the former Kingdom of the Netherlands.

Conclusion: both direct and indirect discrimination based on suspect grounds

Distinctions made on the basis of place of birth would appear to require at least 'very weighty reasons' when they play out predominantly along colour/ethnicity lines.[18] The distinctions made on the basis of place of birth do not appear to be essential for the purpose of migration control and in fact undermine the foundations of the 'democratic society built on principles of plurality and respect for different cultures.'[19]

In legally addressing the problems faced by the group of undocumented Surinamese people who were born as Dutch citizens before 1975, we consider that there is a strong argument that their situation, as well as the existence of article 3.51 (1) (d) Vb, constitutes both direct and indirect discrimination based on suspect grounds for which there is no objective justification, let alone 'very weighty reasons'.

UK (Windrush), Belgium and France, and the Netherlands

France and Belgium have been grappling with a distinction between 'subjects' and 'citizens'. While formally the Netherlands has abolished the distinction much earlier, it does appear that this distinction is a ghost of the past that is still present in our regulations and practice. Moreover, it appears that the bilateral agreement between Suriname and the Netherlands is less forthcoming than the one made between Algeria and France some years before. Moreover, the Netherlands especially (as compared to other former colonial states) seems to have failed to meet the promises made during the independence talks.

The UK seems to have left out of the Compensation Scheme's scope individuals who are members of the Windrush generation and have faced immigration injustice. In this sense, it would be important to monitor the categorisation of the potential groups at the centre of future litigation or other mobilisation so that they indeed include as many persons as possible who have been negatively affected by the specific form of colonial injustice to be addressed.

Moreover, we believe that the societal discussion, after the media uncovered the Windrush scandal, triggered involvement of political, legal, and to some extent also judicial actors already, in discussing the scandal and the role of the law therein. Equally, in the Netherlands possibilities for a real conversation involving the wider political and societal

[17] See e.g. ECtHR 28 October 1987, *Inze v Austria, Series A*, vol. 126, § 44. ECtHR 9 January 2003, *L.&V. v Austria,* judgment of 9 January 2003, (appl. Nos 39392/98 and 39829/98), para 52: "To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour."

[18] See e.g. ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, para 78; *Konstantin Markin v. Russia* [GC], 2012, para 127; *Schalk and Kopf v. Austria*, 2010, para 97.

[19] The quote can be found in, e.g., ECtHR *D.H. and Others v. the Czech Republic* [GC], 2007, para 176 and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, paras 43-44.

spectrum are finally emerging. Politicians and civil society raise concerns about systemic racism, the mistakes in dealing with the past of slavery and colonialism, including the injustice involved in the treatment of Surinamese in the Netherlands who were Dutch citizens before 1975, exactly in light of the colonial past.

Additionally, the distinction that several colonisers made between subjects and citizens, and the way this still plays out in France, and has recently appears to have been remedied, through the court, in Belgium, indicates different manifestations of similar colonial ways of thinking. There appears to be some movement, now that within some of these states research has been commissioned by the state and there are some verbal expressions of regret by governments (as discussed in the context of France), and a court lifted the discriminatory distinction between subject and citizen (as discussed in the context of Belgium). Therefore, coupled with international expert observations on the failure of former colonisers to deal with their past, and the need to take remedial measures, there appear to be openings for further discussion and societal change.

As colonial states, these previous Empires invited people from their former territories to rebuild post Second World War society in Europe. As colonial subjects, European citizenship was automatically granted to Surinamese and Caribbean people until Suriname's independence from the Netherlands as well as that of Caribbean countries from the UK. Therefore, many Surinamese, and people of Caribbean descent, resided legally as European citizens for a period of time in their European homelands. Ties between the individuals at stake and the European countries involved are not difficult to prove, with many family members already settled legally in these countries, the knowledge of the national language, working experiences and many other factors of attachment.

Remedies

Independent thematic experts appointed by the UN Human Rights Council have expressed themselves on the link between structural discrimination and the colonial past and the remedies that may be warranted in this respect. Besides the fact that the specific regulation discussed in this report is not in line with the UN antidiscrimination framework, more generally the Netherlands has so far also neglected to follow certain recommendations for former colonizers made by the UN. Because of the specific distinction made on the basis of place of birth, the regulation under discussion affects groups that have suffered from colonialism most in the past. Rather than having special provisions in place to take this history into account, former Dutch nationals who are not of European descent have to meet the same requirements as other third country nationals when applying for a residence permit. This indicates that the Dutch government does not try to accommodate the affected former Dutch nationals, even where various UN Rapporteurs have pointed out that former colonisers should offer reparations to those affected by racial discrimination, and it ignores the fact that these people have special ties with the Netherlands.[20]

The apparent incompatibility with article 1 of Protocol 12 and of article 14 read in conjunction with article 8 ECHR is a structural one that applies to all former citizens born in

[20] Special Rapporteur Racism, Racial justice and equality (2019 Report), A/74/321, 21 August 2019 ; Special Rapporteur truth, justice, reparation and guarantees of non-recurrence (2021), Transitional justice measures and addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts, report to the General Assembly, A/76/180, 19 July 2021, §99.

former colonies. While Article 8 ECHR does offer a legal path that can be successful in individual cases, it is unclear what kind of influence the 2020 ABRvS case on article 8 ECHR will have in the future.[21] If courts would only find a violation of article 8 in such extreme individual circumstances as in that case, it cannot really be said that this path offers access to justice. Moreover, it means that each former Dutch citizen who has been present in the Netherlands undocumented would have to go through this procedure individually.

We consider that the persons concerned should not have to be put through an individual legal procedure. Instead a practical as well as symbolic measure is needed to regularize their presence in the Netherlands. This would also be in line with the recent approaches by Belgium and France, and seemingly in a different context also those of Portugal and Spain,[22] as well as with the recommendations by UN experts.

More in general, in relation to the colonial past, measures could be considered, such as restitution in kind, in the sense of restoring people to their rights, and other forms of satisfaction as well as guarantees, such as establishing a trust fund for affected communities, but also an improvement in the general educational curriculum, and finally financial compensation schemes former Dutch nationals who have been living in the Netherlands undocumented for a considerable number of years. These schemes should not be too difficult or long for victims to apply for and obtain. The Inter-American system of protection of human rights includes interesting reasoning on guarantees of non-repetition and real apologies, as well as on substantive reparation, including trust funds, which deserves to be looked into further. Regarding reparations' complexity and length, the scandal regarding the so-called taxation fraud in The Netherlands and the ensuing failure to address this on a systemic level, and problems now with processing the compensation claims, can serve as a fresh lesson for the Dutch system of reparation.

Previous colonial empires have an enhanced responsibility when drafting immigration laws and policies considering their past. Apologies may be an independent example of a substantive remedy in itself, namely moral satisfaction. Apologies can also serve as a sign that the State is serious in guaranteeing non-repetition of wrongs. Yet this sign is only convincing when accompanied with an adaptation of the regulations, and providing material relief to the undocumented former Dutch nationals, including a regularization of their stay.

[21] ABRvS 2 October 2020, JV 2020/214. This was a very extreme case in which the applicant has had the Dutch nationality for a longer period of time (42 years) than she had the Surinamese nationality, she had been a Dutch civil servant for 22 years, she had to pay her taxes in the Netherlands, and she received her pension from the Dutch pension fund ABP, three of her four children had the Dutch nationality, and they all lived in the Netherlands. She also had legally stayed in the Netherlands for nine years between 1982 and 2012 and it became almost impossible for her to travel from Suriname to the Netherlands for short stays to meet her family due to her age.

[22] This concerns legislation opening the possibility of regaining Spanish nationality for victims of Francoism, and also Spanish and Portuguese legislation in response to the historic wrongs committed against Jewish citizens in the 1600s.This comes down to opening the possibility of victims and their descendants to live in Spain or Portugal in a regularized manner, if they so wish. In this case through regaining nationality. Further investigation may well show obstacles in effectuating this, especially for former nationals who are now nationals of previously colonised states. Yet the fact that this issue has been debated and that legislation has been put in place and to some extent implemented to address previous wrongs in this manner, appears to serve as an interesting example for the Dutch situation that may be worth looking into further.

General introduction

The Netherlands colonised Suriname from 1683 until 1954. In 1954 Suriname became an independent part of the Dutch Kingdom. Three years prior, in 1951, the Dutch government granted the people from Suriname Dutch nationality, which gave them the exact same rights as Dutch nationals born in the Netherlands.[23] People living in Suriname kept the Dutch nationality until the formal independence of Suriname in 1975.

A large group of Surinamese people living in the Netherlands has obtained Dutch nationality, and another part resides in the Netherlands with a residence permit. However, a small group of Surinamese people currently living in The Netherlands, born as Dutch citizens, lost their Dutch nationality in 1975, and were unable to obtain a residence permit. This means that they do not have a legal ground to reside in the country of which they used to be citizens, limiting their access to basic rights and freedoms.

It is the situation of those who lost their Dutch nationality in 1975 and who are currently living in the Netherlands undocumented, without any longer being able to obtain a residence permit or to be legally recognized as Dutch citizens, that triggered this research by the Radboud Law Clinic, commissioned by the Public Interest Litigation Project (PILP). The question was whether the distinction made in Dutch regulations between former Dutch citizens who were born in the European part of the Netherlands and former citizens who were born in the European part, with regard to their right to reside in the Netherlands, is discriminatory.

Our research concerns the legal residence of former Dutch nationals present in the Netherlands, who currently have Surinamese nationality. The community of Surinamese people born before 1975 as Dutch nationals has pointed out to PILP that they are not necessarily seeking a possibility to regain the Dutch nationality, but for a way to legally reside in the Netherlands. Even though with the 1975 independence some people did become stateless, this research is not focusing on deprivation of nationality and statelessness.[24]

Research question, sub questions and structure of the report

This research concerns the responsibility of the Dutch State. This report addresses the question what the human rights obligations of the Dutch State are towards undocumented Surinamese people in the Netherlands, who were born in Suriname before the independence (1975), as Dutch citizens. The focus is on the prohibition of (in)direct discrimination on the grounds of

[23] Guno Jones, "Tussen Onderdanen, Rijksgenoten en Nederlanders: Nederlandse politici over burgers uit Oost en West en Nederland, 1945" (PhD diss., Vrije Universiteit Amsterdam, 2007), 198.

[24] See B. Van Melle, "Surinaams, Nederlands of geen van beide," *A&MR*, nr. 05/06 (2013). More in general see e.g. Sergio Carrera Nuñez and Gerard-René de Groot (eds), *European citizenship at the crossroads : the role of the European Union on loss and acquisition of nationality*, Nijmegen : Wolf Legal Publishers, 2015, pp. 41-115; Maarten den Heijer, 'Visas and Non-discrimination', 20(4*) European Journal of Migration and Law* 470 (2018), 470-489; Sandra Mantu, *Contingent citizenship. The law and practice of citizenship deprivation in international, European and national perspectives* (Immigration and asylum law and policy in Europe, 37). Leiden: Brill Nijhoff 2015; Laura van Waas and Melanie Lhanna (eds), *Solving statelessness*, Nijmegen : Wolf Legal Publishers, 2016; Maarten Peter Vink & Gerard-René de Groot, Citizenship policies in the European Union : Douglas J. Besharov and Mark Hugo López (eds), A*djusting to a world in motion : trends in migration and migration policy*, Oxford ; New York : Oxford University Press, 2016, International policy exchange series, pp. 209-231 and Caia Vlieks, & Laura van Waas, (2022). Stateless persons. In: C. Binder, M. Nowak, J. A. Hofbauer, & P. Janig (Eds.), *Elgar encyclopedia of human rights* Edward Elgar Publishing 2022

race, ethnicity or 'other status'. In addition, in case of violations of the prohibition against discrimination, the report explores what remedies could address these with a reach beyond individual cases.

In order to answer this question, several sub questions are formulated. These are indicated here, by reference to the chapter in which they are discussed. The first sub question is what is the legal status of undocumented Surinamese people in the Netherlands, as former Dutch subjects. Chapter 1 discusses the facts and the applicable law in the Netherlands with regard to undocumented former Dutch citizens.

The second sub question is: what is the relevant international and European human rights framework, in particular on (in)direct discrimination on grounds of race or ethnicity, or 'other status', independently, or in relation to other human rights? This question is addressed in chapter 2. Next to discussing the law on direct and indirect discrimination, it refers briefly to some of the other human rights that may be at stake, together with the prohibition of discrimination, such as the right to private and family life. Moreover, it refers to the general recommendations by UN experts on responding to (post-)colonial wrongs.

The third sub question with regard to the situation in the Netherlands, namely whether it appears to be compatible with the human rights obligations described in chapter 2, is addressed in chapter 3. Finally, this chapter addresses a fourth sub question, which is also touched upon in subsequent chapters, namely: whether any substantive remedies have been granted by administrative, legislative or judicial bodies that have a reach beyond individual cases.

To the extent that incompatibility is found with the international and European human rights framework, this report addresses the question what possible remedies could have a reach beyond individual cases. In order to address this question this report discusses what insights can be drawn from practices developed in other former colonising states regarding forms of remedies for discrimination, as advanced by (domestic) judicial bodies, or proposed by the legislator and/or the executive authorities in those states. These insights are presented in chapter 4 with regard to the United Kingdom and responses to the Windrush scandal and in chapter 5 with regard to the legal situation in France and Belgium. In both chapters, first the colonial past and legislation and practice with regard to former citizens is discussed, followed by reactions of state bodies concerning alleged incompatibility of loss of nationality with the international and European law framework, and finally, any remedies with a reach beyond individual cases that have been used to rectify such incompatibility. Chapter 6 then provides conclusions with regard to the main question, namely the human rights obligations of the Dutch state towards undocumented Surinamese people in the Netherlands as former Dutch subjects, and the type of remedies with a reach beyond individual cases that could be used to enforce these obligations.

Methodology

This report takes an analytical-descriptive approach aiming to clarify the applicable law and then assess its compatibility with international human rights law.

We look into the question whether Dutch legislation (Vreemdelingenbesluit), specifically art 3.51 (1) (d) Vb, (in)directly discriminates against undocumented Surinamese people residing in the Netherlands, who had Dutch nationality in the past, on grounds of race or ethnicity. The focus is on the legal history (explanatory memorandums of legislation and (legal) historical

literature) and subsequent use of this regulation. In 1975, when Suriname became independent, the 'Toescheidingsovereenkomst' (TOS) determined who was given the Surinamese and Dutch nationality.[25] We discuss why the Toescheidingsovereenkomst excluded people living and born in Suriname from retaining the Dutch nationality and describe what policies apply to Surinamese nationals who do not also have the Dutch nationality, and what exceptions used to be in place and whether they still exist.

The international and European framework is outlined by reference to authoritative interpretations by UN treaty supervisory bodies and the European Court of Human Rights. We assess the compatibility of the legal situation in the Netherlands with the prohibition of (in)direct discrimination and related rights in the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of Racial Discrimination (ICERD) and the European Convention on Human Rights (ECHR). In addition a comparative approach is used to assess whether there are similarities in the situations in the UK, France and Belgium in violation of the international framework, but also to see whether, to the extent that there are such similarities, certain remedies for such violations have already been suggested or even implemented in these states. We also draw inspiration from statements about remedies made by UN thematic experts appointed by states.

To analyse whether the regulations and their application are discriminatory, in chapter 3 we assess this on the international law framework described in chapter 2, by reference to the colonial as well as the legal history. As noted, our focus is on the legal history and subsequent use of article 3.51 Vb (1) (d) and the question whether this article (in)directly discriminates against undocumented Surinamese people residing in the Netherlands. Moreover, we analyse Dutch case law concerning the granting of residence permits for undocumented Surinamese people who were, as we argue later in this report, born as Dutch nationals. We zoom in on a judgment by the judicial division of the Council of State of 2020 that also refers to obligations under the ECHR[26] and we discuss a specific ECtHR case involving the Netherlands, the *Jeunesse* case.[27] We also try to determine whether any general rules concerning granting of a residence permit can be distilled from these two judgments, one domestic and one regional. In both cases, the fact that the Surinamese applicant was born as a Dutch national before 1975 influenced the outcome of the case.

To address the question what possible remedies could have a reach beyond individual cases, a comparative law approach is taken.[28] The purpose of this legal comparison is to draw

[25] The subsequent agreement between the Netherlands and Suriname is still applicable and is relevant when discussing the rights of former Dutch citizens, but its discussion was left outside the current research. The same applies to visa policies within Europe, which may trigger additional legal concerns, but are not discussed in this report.
[26] ABRvS 2 October 2020, JV 2020/214.
[27] ECtHR *Jeunesse v The Netherlands*, 3 October 2014, App no. 12738/10.
[28] We chose the comparative method in order to gain a new perspective on how to understand (and often: address) a problem in one jurisdiction, by taking a step back from this jurisdiction, using the comparison as a yardstick for understanding the legal problem observed. Comparison, moreover, also serves to find out whether there are other relevant arguments/approaches/solutions to a similar problem in another jurisdiction, see Tyrrell, H. (2012), *Human Rights in the UK and the Influence of Foreign Jurisprudence*, Hart 2018, pp 198 and 202. Within the setting of the research, we tried to look for arguable explanations for differences and similarities identified. In comparative law it is necessary to find 'broader levels of abstraction and connections between law and society to the extent that the comparison turns up law that remains on some significant formal or functional level different in the various legal jurisdictions being studied.' We need to 'pay attention to the connections (or lack of connections) between the specific differences and similarities under study and broader, more systemic contrasts among legal systems'. Reitz, J. (1998), 'How to Do Comparative Law', 46(4) *The American Journal of Comparative Law* (Autumn, 1998), pp. 617-636, p. 627.

inspiration from the responses by other states to findings of discriminatory practices with regard to former citizens born in formerly colonised states. What insights can be drawn from practices developed in other former colonising states regarding forms of remedies for discrimination, as advanced by (domestic) judicial bodies, or proposed by the legislator and/or the executive bodies in those states? Because it was not possible to focus on all former colonial states, we chose to focus on the United Kingdom, France and Belgium. We chose the United Kingdom in light of the Windrush scandal involving detention and denial of rights to former British subjects in the UK, which had been widely publicized. Therefore, we expected that this scandal resulted in remedial responses that could serve to inspire decision-makers in the Netherlands (Chapter 4). France and Belgium were selected due to similarities in colonial history and their (civil) law system (Chapter 5).

Before undertaking a comparison, the situations in the individual countries are discussed by means of descriptive-analytical research. As to the UK, first, it is necessary to explain the historical facts concerning the Windrush scandal. Then, we discuss the political, social, and legal context that led to the debate regarding paperless colonial Caribbean subjects in Britain. Many historical sources exist documenting the events leading up to the scandal and these are discussed in more recent governmental documents. Relevant mediatic platforms have had an important role in democratizing access to information. Indeed, a lot of mediatic documents present the facts and tell people's personal stories.[29] We focus on the available legislation, regulations and litigation on the matter.[30] We go through the British and ECtHR case law involving the United Kingdom since the scandal arose in 2018, and the measures, policies, and legislation the government has put in place, focusing on litigation strategies that were put forward, as well as the type of remedies and compensation offered to victims. With the view to examine paths that have worked towards gaining justice and those that failed, we discuss the positive outcomes as well as the negative ones for victims. Finally, we draw parallels with the Dutch context regarding Suriname and evaluate whether measures, policies, legislation, and litigation techniques in the Windrush context are applicable and relevant.

This is followed by a descriptive research concerning France and Belgium (Chapter 5). To provide the necessary context, the historical backgrounds of the French and Belgian Colonial Empires are discussed. We zoom in on the situations of former French citizens from Algeria and former Belgian nationals from DRC Congo. Moreover, we consider the political, societal and the legal context around the Algerian population in France and the Congolese (DRC) population in Belgium.[31] Following the descriptive part of the research, we focus on the analysis

[29] *The Guardian* and *The British Broadcasting Corporation* (BBC) in particular, have been relevant actors in informing the public on the issue. See para 4.3 of this report.

[30] we use research platforms such as Westlaw, LexisNexis, HeinOnline (English reports) and British and Irish Legal Information Institute (BAILII). Westlaw https://legalsolutions.thomsonreuters.co.uk/en/products-services/westlaw-uk.html; LexisNexis https://www.lexisnexis.co.uk; HeinOnline (English reports) https://home.heinonline.org/content/english-reports/ and British and Irish Legal Information Institute https://www.bailii.org.

[31] There are many documents belonging to the time of the colonization, including documents of the authorities prepared during the nineteenth and twentieth centuries, and more recent reports produced by academic researchers and organs or bodies connected with the government. Based on those documents, we will draw a picture of the situation concerning Algerians and Congolese in France and Belgium respectively. More precisely, we examine the French and the Belgian Civil Codes and the Nationality Codes.

of the case-law and of the literature relevant for cases similar to the one concerning the Surinamese in the Netherlands.[32]

Legal arguments are at the centre of our inquiry. However, we also note the political and mediatic reactions that could inspire decision-makers in the Netherlands.

Scope, relevance and positionality

We explore the situation in the United Kingdom (chapter 4) given our expectation that responses to the Windrush scandal may generate examples that could be relevant to the analysis of legal responsibilities and potential concrete remedies in the context of The Netherlands. The UK is equally subject to the United Nations and Council of Europe human rights frameworks, and was, until recently, subject to the European Union (EU) framework.

For a realistic comparison within the time constraints, in addition we selected two states neighbouring the Netherlands, which also have a past as a colonial empire: France and Belgium (Chapter 5). Two of the participating students are French, three of the five students are French native speakers and the other two students are Dutch native speakers, which is helpful when analyzing French and Dutch language case law, legislation and secondary literature.

The research is conducted to respond to a legal research question raised by the Public Interest Litigation Project (PILP), a division of NJCM, the Dutch Section of the International Commission of Jurists, who need an overview of the international and domestic legal situation in order to be able to decide on the question what, if any, legal actions would be feasible to obtain justice for Surinamese undocumented people in the Netherlands.

This research assesses the legal situation and aims to do so thoroughly and in a balanced and transparent manner. At the same time, in light of transparency, we also wish to indicate our own position regarding the wider context. We hope to take part in the development of conversations on colonial and neo-colonial violence and towards legal decolonization processes.

We are aware of the importance of exploring possible legal avenues, avoiding mistakes that have been made in the past and closely analysing long term consequences on the possible temporary victories that could emerge.

This legal research ultimately relates to state responsibility. We are aware that states are represented by people, and that we are also subjects of former colonizing, and arguably neo colonial powers. Within the Clinic, we are aware of the many privileges we have as such subjects and aim to conduct this research with this awareness in mind.

One may believe colonialism is strictly an issue of the past, but its consequences are still socially and legally present today in a diversity of ways and in various geographical settings. Regarding North America, in the past months, shocking evidence of blood on Canada's hands has marked international headlines relating to the treatment of First Nation populations.[33] From

[32] We examined the legislation and the case-law and the practice, helped by websites like GISTI, info-droits-étrangers, ADDE (Association pour le Droit des Étrangers), Droitbelge.be, Myria, Legifrance, websites of the French and Belgian Ministries of the Interior ("Ministère de l'Intérieur"). Moreover, we consulted works of academic researchers analyzing the legislation, the case law, the policies and their consequences. Also, we examined domestic case-law of Belgium and France and literature concerning the question of people from former colonies living in France and Belgium. Based on this we evaluate the differences and similarities between the legislation, practice, policies and decisions of the Netherlands, Belgium and France on this subject.

[33] See e.g. The Guardian, "'Cultural genocide': the shameful history of Canada's residential schools – mapped" https://www.theguardian.com/world/ng-interactive/2021/sep/06/canada-residential-schools-indigenous-children-cultural-genocide-map; "The New York Times, Hundreds More Unmarked Graves Found at Former Residential School in

a European perspective, ever since former colonies have gained sovereignty over their European Empires, complete independence from any form of colonial dominance has not been acquired. Even though new systems of domination may not function purposely, power structures are still visible through social policies and law across the world.[34] Postcolonialism is described as a new international colonial order.[35] From a practical point of view, we believe law can serve as a tool for decolonial purposes.

The research was concluded in February 2022 and the report was edited and made public in December 2022.

Canada" https://www.nytimes.com/2021/06/24/world/canada/indigenous-children-graves-saskatchewan-canada.html; BBC "Canada: 751 unmarked graves found at residential school" https://www.bbc.com/news/world-us-canada-57592243

[34] Schluchter, Wolfgang, and Steven Vaitkus. 2002. "The Sociology of Law As an Empirical Theory of Validity." Journal of Classical Sociology 2 (3): 257–80. See also, e.g. Nijman, Janne (2020), 'Marked Absences: Locating Gender and Race in International Legal History', 31(3) *European Journal of International Law* (2020): 1025–1050.

[35] Gurminder K Bhambra (2014) Postcolonial and decolonial dialogues, Postcolonial Studies, 17:2, 115-121, DOI: 10.1080/13688790.2014.966414 To link to this article: https://doi.org/10.1080/13688790.2014.966414.

Chapter 1. Dutch provisions on the admission of former Dutch nationals into the Netherlands

1.1 Introduction

The Netherlands colonised Suriname from 1683 until 1954, when it became an independent part of the Dutch Kingdom. As noted, in 1951 the Dutch government granted the people from Suriname Dutch nationality, which gave them the exact same rights as Dutch nationals born in the Netherlands.[36] People living in Suriname kept the Dutch nationality until the independence of Suriname (1975), after which the Toescheidingsovereenkomst inzake Nationaliteit (the Agreement on Nationality) (hereinafter: TOS) decided the division of nationalities for the people living in Suriname. The persons who were granted the Surinamese nationality initially could get access to the Netherlands based on the liberal admission policy between 1975 and 1980. However, after the promises made by the Dutch government during the negotiations about the independence of Suriname were no longer upheld, the admission of Surinamese people into the Netherlands changed and became (almost) as strict as the admission of other foreigners.

Today, former Dutch nationals can be allowed a residence permit on the grounds of article 3.51 (1) (d) or (e) Vreemdelingenbesluit (Aliens Decree) (Vb). Article 3.51 (1) (d) Vb lays down admission for people who lost their Dutch nationality and were born in the Netherlands (specifically the country the Netherlands, not in another constituent country of the Kingdom). Article 3.51 (1) (e) Vb, on the other hand, lays down a right of admission for former Dutch nationals born outside of the Netherlands. Conditions for this admission are that these people do not live in the country of which they are a national, and that they have special ties with the Netherlands. Because of this, former Dutch nationals, who now live in Suriname and have the Surinamese nationality cannot obtain a residence permit on the basis of either art. 3.51 (1) (d) or (e) Vb. Although they do have a right to opt for Dutch nationality, they can only do so after having spent a year in the Netherlands on a valid residence permit. Because there is no specific residence permit for former Dutch nationals from Suriname, this is often not an option. In order to obtain a residence permit, a person needs to have a 'purpose of stay' and meet strict conditions. For instance, a residence permit based on labour is an obvious purpose, but in order to be able to obtain such a residence permit, an employer needs to have permission from the UWV (social benefits agency) for the employee to work here. Additionally, there needs to be proof that a possible suited employee cannot be found in other European Union countries. Therefore, it is very difficult for Surinamese people to find a way to reside legally in the Netherlands for a year, which is necessary for being able to opt for the Dutch nationality.

In this chapter, we analyse the complicated migratory history of the Netherlands and its colonies. Although we mainly focus on Suriname, we use examples from Indonesia were necessary. Subsequently, we assess the compatibility of the Dutch policies regarding admission

[36] Guno Jones, "Tussen Onderdanen, Rijksgenoten en Nederlanders: Nederlandse politici over burgers uit Oost en West en Nederland, 1945" (PhD diss., Vrije Universiteit Amsterdam, 2007) , 198; Inter-American Commission on Human Rights & Organizations of American States, Compendium on Equality and Non-Discrimination. Inter-American Standards, (February 2019), 147, accessed February 18, 2022, https://www.oas.org/en/iachr/reports/pdfs/compendium-equalitynondiscrimination.pdf.

of former Dutch nationals with the international anti-discrimination framework as set out in chapter 2. To do so, we firstly examine the migratory history between the Netherlands and Suriname between 1950 and 2012, in which we specifically look into the TOS, the liberal admission policy of 1975-1980, and the *ouderenbeleid* (policy vis-à-vis elderly) as part of the extended family reunification (para 2.2).

Secondly, we examine several former and current provisions on which former Dutch nationals can gain legal residence in the Netherlands (para. 2.3). In the final paragraph, we analyse the findings from the previous paragraphs, and will use these findings to see whether any of the discussed legislation is compatible with the international legal framework (para 2.4).

1.2 Legal history of Surinamese people born as Dutch nationals before 1975

1.2.1. Legal history: Suriname – Netherlands migratory history

As noted, the Netherlands colonised Suriname from 1683 until 1954, when it became an independent part of the Dutch Kingdom. Three years prior, the Dutch government granted the people from Suriname with Dutch nationality, which gave them the exact same rights as Dutch nationals born in the Netherlands.[37]

After Suriname became part of the Kingdom in 1954, the Dutch nationals born in Suriname came to European soil gradually. With the violent independence of Indonesia still fresh in memory, the Netherlands was determined to do better with Suriname.[38] A small number of people, mostly students, arrived in the Netherlands to finish their education here in the late fifties.[39] The idea was that they would stay for a couple of years, after which they would go back to Suriname. Having studied in the Netherlands, the Suriname Dutch citizens would take what they learnt in the Netherlands and benefit the Surinamese economy.[40] Along with the students, a number of labour migrants emigrated to the Netherlands. Initially, they were recruited by the Dutch government because of a labour shortage. Particularly nurses from Suriname were encouraged to come and work in the Netherlands.[41] Interestingly, the Dutch politicians and citizens saw this migration as temporary, even though the labour shortage was of a much more substantial proportion.[42] The Dutch public and politicians did not see any threats in the coming of the nurses and students from Suriname. In fact, an alleged account of racism against students from Suriname was condemned heavily by parliament.[43]

The reaction to the male labour migrants from Suriname was, however, less positive. People living in the Netherlands were scared that their countrymen from Suriname would seduce their women and lead them to behave in unacceptable manners.[44] These concerns,

[37] Guno Jones, "Tussen Onderdanen, Rijksgenoten en Nederlanders: Nederlandse politici over burgers uit Oost en West en Nederland, 1945" (PhD diss., Vrije Universiteit Amsterdam, 2007) , 198.
[38] J.M.M. van Amersfoort, "Van William Kegge tot Ruud Gullit. De Surinaamse migratie naar Nederland: Realiteit, beeldvorming en beleid." *Tijdschrift voor Geschiedenis,* 100 (1987): 478
[39] Jones, "Tussen Onderdanen", 199.
[40] Ibid., 200
[41] Ibid, 205
[42] Ibid.
[43] Ibid., 200.
[44] Ibid., 208.

however, did not outweigh the fact that there was a labour shortage, leaving access to the Netherlands unrestricted for the time being.[45]

During the 1960's, there was an influx of countrymen from Suriname.[46] Along with this influx came the growing idea that the people from Suriname were less capable of properly integrating into Dutch society because of their culture.[47] Even though no evidence of this was put forward, this sentiment grew, along with the growing number of Surinamese labour forces coming to the Netherlands.[48] While several studies debunked ideas of overrepresentation of people from Suriname in criminal statistics, the idea of indecent men from Suriname degrading the Dutch women was one difficult to get rid of.[49] In 1972, parliament spoke of an admissions policy for countrymen from Suriname.[50] Where the idea was seen as undesirable in the 1960's, when the British had passed the Common Wealth Immigrants Act,[51] most politicians now agreed admissions should be restricted.[52] Although most politicians claimed this was to help the people from Suriname, some parties had their hesitations, and some even saw this as restrictive migration policy in disguise.[53]

The admissions policy was never enacted, mainly because there was talk about the independence of Suriname in the early 1970's. The people in the Netherlands were eager for the country's independence, predominantly because Suriname was one of the last former European colonies that had not gained independence.[54] Progressive Dutch politicians were eager to get rid of the outdated (neo)colonial construction.

In 1974, the Surinamese Prime Minister, Arron, had stated the country would become independent before the end of 1975.[55] This was particularly interesting because independence had not been part of the election campaign a year before, nor were there a lot of people in Suriname concerned about the independence.[56] Van Amersfoort argues that the reason behind this is because Surinamese nationalism was created in Amsterdam, and because it focussed specifically on Creole-Surinamese nationality, omitting the other ethnic groups in Suriname.[57] Since independence was an especially sensitive subject within the Creole community in Suriname, the biggest Creole political party in Suriname consciously avoided the subject in their political campaign of 1972.[58]

Whilst preparing the independence of Suriname, Dutch politicians were not eager to discuss the matter in detail, being afraid the news of independence would increase the number

[45] Ibid.
[46] Ibid., 211
[47] Van Amersfoort, "Van William Kegge," 480.
[48] Jones, "Tussen Onderdanen", 211.
[49] Ibid., 218
[50] Ibid., 229
[51] Ibid., 209
[52] Van Amersfoort, "Van William Kegge," 481.
[53] Jones, "Tussen Onderdanen", 229-230. The KVP (Katholieke Volkspartij), ARP (Anti Revolutionaire Partij), and CHU (Christelijk Historische Unie) had their hesitations regarding the restrictive policy. Bas De Gaay Fortmann (PPR, Politieke Partij Radikalen), argued that the way the colonial relation with Suriname was ended, was done to 'obtain legal remedies to restrict migration from Suriname and the Dutch Antilles' (translated by the author. VVD, D66, and PvdA were in favour of the restrictive policy.
[54] Ibid., 238
[55] Ibid., 235.
[56] Ibid., 231.
[57] Van Amersfoort, "Van William Kegge," 482-483.
[58] Ibid., 481-482.

of migrants from Suriname even further.[59] After a number of negotiations, Suriname became an independent country.

1.2.2. Discussion on the naturalisation of former Dutch nationals between 1973-1976

Between 1973 and 1976, the Dutch government (Kabinet-Den Uyl) drafted a law called 'Wijziging van de wet op het Nederlanderschap en het ingezetenschap' (translation: Modification of the law on Dutch nationality and the residential status). A certain article of this draft led to debate in Parliament which, seen in light of the decolonisation of Suriname can be of relevance for our research, since it gives an impression of the position of the Dutch government towards the Dutch nationals in Suriname.

The article in the draft about former Dutch nationals initially read: "*Artikel 5: Wij kunnen op verzoek het Nederlanderschap verlenen aan een persoon die: te eniger tijd het Nederlanderschap dan wel de staat van Nederlands onderdaan niet-Nederlander*[60] *heeft bezeten, meerderjarig is in de zin van de Nederlandse wet en ten tijde van de indiening van het verzoek woonplaats of werkelijk verblijf in het Koninkrijk heeft*" (translation: on request we can grant the Dutch nationality to a person who: for some time had the Dutch nationality or the status of Dutch subject, who is an adult according to Dutch law and who at the time of filing the application has their official place of residence or actual residence in the Netherlands).[61] According to the 'Memorie van Toelichting (translation: Explanatory Memorandum), these people had certain ties with the Netherlands.[62]

It is however the reaction of the State Secretary of Justice and Security Zeevalking (from the political party D66), that indicates the position of the government at the time. He stated that "it would be a good idea to await the independence of Suriname when continuing drafting this law", as can be read in the Explanatory Memorandum of this draft on June 30th, 1975.[63] By saying this, the Secretary of State placed the drafting of the law in the context of the independence of Suriname, and more broadly in the context of the TOS. The independence would create a large group of former Dutch nationals who would be able to naturalise relatively easily if the law would include restrictive measures regarding the naturalisation of former Dutch nationals. Right before the independence, immigration from Suriname to the Netherlands peaked, after already having increased for several years. The prospect of independence, which made the Dutch government hope for a decline in immigration, had the opposite effect on Dutch nationals living in Suriname and many decided to settle in the Netherlands while it was still possible.[64]

Following this reaction, an amendment of June 30th, 1975, added another element to the provision on the naturalisation of former Dutch nationals, ending article 5 by stating "*en wiens*

[59] Jones, "Tussen Onderdanen", p. 233.
[60] Jones, "Tussen onderdanen", 63-64, The distinction being made in this draft between persons who had the Dutch nationality and persons who had the status of Dutch subject is only relevant for former Dutch people born in Suriname before the fifties. Before then, for example descendants of contract workers who resided in Suriname after 1892 were stateless and became Dutch subjects as non-Dutch person in 1927, which lasted until 1951, when everyone in Suriname was granted Dutch citizenship.
[61] Kamerstukken II 1973/74, 12 837, nr. 2.
[62] Kamerstukken II 1973/74, 12 837, nr. 3.
[63] Kamerstukken II 1974/75, 12 837, nr. 6.
[64] Vgl. E. Heijs, *Van vreemdeling tot Nederlander. De verlening van het Nederlanderschap aan vreemdelingen 1813-1992* (Amsterdam: Het Spinhuis, 1995), 146.

verblijf aldaar zonder beperkingen ten aanzien van het doel daarvan is aanvaard" (translation: whose residence in the Netherlands is accepted without any objections).[65] The goal of this amendment was to avoid the naturalisation policy from interfering with the admission and settlement policy, which for example meant applicants needed to have stayed in the Netherlands legally for five years before being able to apply for a settlement permit. According to Zeevalking, the addition mentioned above was much needed, since not adding it in might result in the possibility for former Dutch nationals and subjects to apply for the Dutch nationality *before* the period of five years, which would not be consistent with the migration policies.[66] This amendment was tabled only four months before the independence of Suriname.

After being pointed to the negative consequences for the upcoming big group of former Dutch nationals, the Surinamese people, members of the Dutch Parliament Haas-Berger and Salomons, both from the political party PvdA, tabled an amendment on June 11th, 1976. The addition to article 5 would make naturalisation for Surinamese people much more difficult. In this amendment, the latter addition was changed to one year of legal residence instead of five years.[67] This amendment was voted into the law, based on the oral proceedings of the Parliament. In the oral proceedings, the arguments and considerations on this addition are discussed. Haas-Berger argued that the naturalisation provision for former Dutch nationals does not have to be in line with the migration policy, since former Dutch nationals or subjects are an exceptional case and therefore should not have to meet the five-year requirement.[68] Zeevalking, on the other hand, raised his concern about the effect of removing the addition, since it would create a possibility for former Dutch nationals or subjects to apply for naturalisation only one day after arrival, which he deemed to be possibly undesirable. Especially residence permits for labour, which were granted when the applicant still resided abroad, were seen as a topic of concern and should therefore not be included in the grounds on which a permit can be granted.[69] This is contrary to the promise the Dutch government made in the negotiations about the independence, in which he said that naturalisation would remain easy for Surinamese people.[70] However, Zeevalking refused to state openly that he would be breaking this promise, which may be assumed to be the reason why he made several statements saying "wie oren heeft om te horen, die hore" (meaning: those who have ears to hear, will hear).[71]

Zeevalking also argued that the additional element should be included in article 5 "to find a way to prevent undesirable developments from occurring".[72] Besides that, Zeevalking states that the amendment would simply be "the current practice" being turned into law. When asked about his meaning of "current practice" by parliamentarian Kappeyne van de Coppello, Zeevalking says that there is no actual current practice, but that "in the past big floods of Dutch nationals came to the Netherlands and without the addition in the law, it would be too easy for former Dutch nationals or subjects to be granted the Dutch nationality, without even needing to have stayed here for five years and having a "vestigingsvergunning". He stated that "this has

[65] Kamerstukken II 1974/75, 12 837, nr. 7.
[66] Ibid.
[67] Kamerstukken II 1975/76, 12 837, nr. 11.
[68] Handelingen II 1975/76, 4100.
[69] Handelingen II 1975/76, 4102 en 4103.
[70] Jones, "Tussen onderdanen", 254.
[71] Handelingen II 1975/76, 4103.
[72] Handelingen II 1975/76, 4103 en 4108.

led to undesirable situations in the past and we should be able to face this problem. This is the only practical reason for adding another element to the new provision." When it was pointed out that these were 'concealed arguments' and after being asked to have a public discussion with openness about the arguments, he mentions it is better "not to name names" (using the Latin expression: *nomina sunt odiosa*).[73]

Considering that these oral proceedings were taking place on the 11th of June 1976 and the independence of Suriname only happened half a year before, it is clear which "big floods of Dutch nationals in the past" he is referring to and what group of former Dutch nationals he wants to keep out of the Netherlands..[74] Due to the fact that Zeevalking refused to give openness about his arguments, the VVD voted in favour of the amendment of Haas-Berger, striking out the additional part of the provision.[75]

1.2.3. Toescheidingsovereenkomst (TOS): nationality agreement between Suriname and the Netherlands (1975)

After losing Indonesia in a way that was frustrating for the Netherlands, the country wanted to avoid a similar situation regarding Suriname by granting everybody on Surinamese soil the full Dutch nationality. However, when the independence of Suriname was inevitable, in 1975 the Kingdom of the Netherlands and the Republic of Suriname signed the TOS, because they thought it was necessary to create a nationality agreement.[76] In this agreement the countries decided on the division of the Dutch and Surinamese nationality.

Article 2 of the TOS determined that people were either granted the Surinamese nationality or the Dutch nationality. Dual nationality was not one of the possibilities. Article 3 and 4 of the TOS subsequently stated that the Surinamese nationality was granted involuntarily to adults born in Suriname who factually resided in Suriname at the time the TOS came into force and to adults who were living/had their actual residence in Suriname and whose father, or if unknown their mother, was born in Suriname. According to article 4 (b) TOS the latter also applied to adults who were not born in Suriname but who lived/had their actual residence in Suriname at the time the TOS came into force and had previously been granted the Dutch nationality because of a) the Soevereiniteitsoverdracht Indonesië and were living/had their actual in residence in Suriname on 27 December 1947, b) naturalisation or c) marriage with a Dutch citizen. Adult Dutch nationals born in Suriname or categorized under article 4 (b) TOS, born outside of Suriname and who lived/had their actual residence outside of Suriname at the time the TOS came into force in 1975, could opt for the Surinamese nationality. They and their families had the right to be treated as Surinamese people.

Until the independence, Dutch people born in Suriname were fully considered as Dutch nationals.[77] The TOS resulted in a big part of this group losing their Dutch nationality, because of what is called 'collective naturalisation', where the people concerned do not have a say in the assignment of nationality. It is, however, considered acceptable in situations of

[73] Handelingen II 1975/76, 4108.
[74] This was pointed out to us by prof. mr. C.A. Groenendijk, who is one of the experts who reached out to PILP to give advice on the legal aspects of the case.
[75] Handelingen II 1975/76, 4130.
[76] Toescheidingsovereenkomst inzake nationaliteiten tussen het Koninkrijk der Nederlanden en de Republiek Suriname 1975.
[77] Heijs, *Van vreemdeling tot Nederlander,* 147.

independence.[78] The Netherlands and Suriname both agreed in the TOS on using the criteria 'place of birth' and 'place of residence'. Compared to other independence processes, the difference is that other processes only used the criteria of 'birthplace'.[79] This resulted in people with European roots having easier admission to the Netherlands than Surinamese people with different roots, which was one of the aims of the Netherlands: to guarantee that the 'true' Dutch nationals could always go back to their 'own' country.[80] This is also the group who had the right to opt for the Dutch nationality, as opposed to the Dutch people in Suriname with non-European roots.[81]

According to anthropologist dr. Guno Jones, who wrote his PhD about citizenship and the relationship between the Netherlands and Suriname, the conclusion can be made that the TOS was in fact based on an ethnonational body of thought, even though this is not mentioned directly in the TOS. The Netherlands initially wanted all Dutch people with non-European roots in relation to Suriname to lose the Dutch nationality even when they had been living in the European part of the Netherlands for years, but Suriname successfully objected.[82] The fact that the Dutch government wanted this, is the reason scholars like dr. Guno Jones regard the TOS and the independence of Suriname as a migration policy rather than a mere nationality agreement.[83]

Another reason for having doubts about the TOS was the way it has been realised. The democratic legitimacy of the decisions the Surinamese government made in negotiating about the TOS is questioned, since the Surinamese opposition stated that only 25% of the Surinamese population wished for independence and thus were prepared to lose the Dutch nationality.[84] Also, one of the arguments that was used for depriving non-European Dutch people in Suriname of their Dutch nationality when the TOS was drafted, was that these strict provisions would be compensated by a tolerant admission policy to the Netherlands for Surinamese nationals. Ultimately however, the subsequent agreement on settlement (further discussed in 2.2.4) turned out to be less tolerant than previously agreed upon.[85]

Even though the substance and realisation of the TOS can be considered unjust, our research only applies to undocumented Surinamese people born before 1975 as Dutch nationals who are undocumented not because of problems caused by the TOS, but for other reasons, like staying in the Netherlands illegally after having resided there legally in the context of family reunification. We will not be discussing issues of statelessness, nor possibilities for challenging denaturalisation and the allocation of nationalities in the past.

As noted, a Dutch national through option is a not a realistic possibility for former Dutch nationals who now have the Surinamese nationality, since in order to make use of this option, it is mandatory for them to have had legal residence in the Netherlands for a year with a residence permit for a non-temporary purpose. Since these problems are not caused by the TOS

[78] Haarmans, *Toescheidingsovereenkomst,* 21-22.
[79] Jones, "Tussen onderdanen", 243.
[80] Heijs, *Van vreemdeling tot Nederlander,* 147.
[81] P.D. Haarmans, *Toescheidingsovereenkomst in de praktijk* (Paramaribo: Vaco Uitgeversmaatschappij, 1987), 27-28.
[82] Jones, "Tussen Onderdanen", 245.
[83] H.A. Ahmad Ali, "De Toescheidingsovereenkomst inzake nationaliteiten tussen Nederland en Suriname", (PhD diss. Universiteit Utrecht, 1998), 28.
[84] Ibid., 42.
[85] Ibid., 32-35.

and the matter of nationality, there is no need to explore the nationality issue further. Instead, it is important to focus on the admission policy for Surinamese people rather than the nationality matter. This background on the TOS simply served to provide a foundation for understanding the development of the different admission policies the Netherlands has known towards Surinamese people. Additionally, it illustrates the reason why a significant number of people born as Dutch nationals in Suriname no longer have the Dutch nationality.

1.2.4. Liberal admission policy for Surinamese people from 1975-1980

As previously mentioned, one of the reasons the TOS was formulated strictly was the compensation that was promised in terms of a tolerant admission policy for Surinamese nationals who used to be Dutch nationals.[86] The Dutch government stated that the people of Suriname and the Netherlands had 'special ties' and could therefore not be treated as any other non-national.[87] However, in return the Surinamese government had to promise the Netherlands to actively promote remigration to Suriname.[88]

This liberal admission policy was called the 'vestigingsovereenkomst and visumafschaffingsovereenkomst' (agreement on settlement and the abolishment of visa). Under this policy Surinamese nationals were not obliged to obtain a visa before entering the Netherlands for a short stay. For a residence longer than three months the conditions 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.[89] If Surinamese people applied for a residence permit based on labour, the permit merely required a place to work and live. The 'tewerkstellingsvergunning' (employment permit) always had to be granted, as opposed to those requested by other non-nationals. Also, for self-employed persons who met the requirements and had a place to live and for students with enough money, a place to live and a registration at an educational institution, admission was accessible.[90] Besides that, regular non-nationals needed a provisional residence permit (mvv) to enter the country, but this did not apply to Surinamese people.[91] According to State Secretary Zeevalking, this was the actual meaning of the liberal admission policy that was promised to the Surinamese people.[92]

Overall, these provisions made it quite easy to get admitted to the Netherlands, which had indeed been promised by the Dutch government. This 'liberal' admission policy was, however, strictly interpreted, and the people who carried out this policy were not aware of the tolerant policy, which led to considerable problems affecting Surinamese people.[93] For example, some municipalities still obliged Surinamese people to get a provisional residence permit first.[94] Despite the strict interpretation of the admission policy, many Surinamese people

[86] Jones, "Tussen Onderdanen," 252.
[87] Ibid, 252.
[88] Ibid, 253.
[89] Ibid, 253.
[90] Ibid, 254.
[91] Ibid, 254.
[92] Handelingen II 1975/76, p. 602.
[93] Jones, "Tussen Onderdanen," 254.
[94] Ibid, 254.

came to the Netherlands, apparently to the displeasure of the Dutch government.[95] This was possible, since the vestigingsovereenkomst expired in 1980 and the Dutch government could decide individually on the admission of Surinamese people.[96] It is therefore not surprising that the policy was one-sidedly suspended by the Netherlands in 1980 and the Dutch government became strict in admitting Surinamese people.[97]

1.2.5. Ouderenbeleid (policy regarding elderly) 1973-2012

The 'ouderenbeleid', which is part of the extended family reunification policy, was one of the provisions of Dutch migration law that went beyond what was required by EU law. This provision, which was valid from 1973 to 2012, was laid down in article B-19-5 Vreemdelingencirculaire and subsequently in article 3.25 Vb. The ouderenbeleid stated:

"1. De verblijfsvergunning voor bepaalde tijd, bedoeld in artikel 14 van de Wet, kan onder een beperking verband houdend met gezinshereniging worden verleend aan de vreemdeling, die vijfenzestig jaar of ouder is, die in het land van herkomst alleenstaand is en die in Nederland wil verblijven bij zijn kinderen, indien:

a. vrijwel alle kinderen rechtmatig als bedoeld in artikel 8, onder b, c en d, van de Wet, of als Nederlander in Nederland verblijven, en

b. er in het land van herkomst geen kind van de vreemdeling woont dat naar het oordeel van Onze Minister geacht kan worden in de opvang van de vreemdeling te kunnen voorzien.

2. In afwijking van artikel 3.74 zijn middelen van bestaan voldoende, indien de in het eerste lid, onder a, bedoelde kinderen gezamenlijk duurzaam en zelfstandig beschikken over een netto-inkomen gelijk aan de som van de bestaansminima, bedoeld in de Algemene bijstandswet, voor de desbetreffende categorie, aangevuld met het bestaansminimum voor alleenstaanden."

This meant that a temporary residence permit could be granted to a third-country national of 65 years or older to stay with his children in the Netherlands. The policy required that the persons above 64 years old stayed on their own in their country of origin. Furthermore, almost all children had to have legal residence in the Netherlands or be Dutch. Additionally, the policy required that there was no other child left in the country of origin who could be considered to be able to take care of the third-country national. The policy also had less strict income requirements: all the children together needed to have an independent and sustainable income (which equals the statutory minimum wage), instead of one person.

From 2012 onwards, the ouderenbeleid was abolished after a coalition agreement between the VVD, CDA and PVV in 2010. In return for the support necessary for the government's majority in parliament, the PVV demanded the abolition of this and other policies that could be abolished under EU law. This made Dutch migration law even stricter.[98] The motivation for the abolition of the ouderenbeleid mentioned in the 'Nota van toelichting'

[95] Ibid., 255.
[96] Ibid, 254.
[97] Ibid, 254.
[98] The restriction of family reunification is mentioned in the Gedoogakkoord VVD-PVV-CDA of September 30, 2010, 5.

implied that people of 65 years or older would not be able to integrate into society in a way younger people could, since they would not be working or going to school. However, no research had been conducted on how elderly people integrate into societies. Besides that, the policy was only used by a small group of people. Overall, this motivation for abolishing the policy regarding elderly can be considered as meagre and can be explained by the political context.[99]

The elderly parents of Dutch people usually live in the Netherlands or at least have the Dutch nationality. When they need the care of their children, it is self-evident that no migration restriction interferes. Therefore, the abolition of the ouderenbeleid affects people with a migratory background in particular, since many of them still have their elderly parents living in their country of origin.

On January 1st, 2022, 14,4% of the Dutch residents had a non-western migration background, 350.000 of which were of Surinamese descent.[100] Even though there is no reason to believe the abolition of the ouderenbeleid had anything to do with restricting migration from Suriname to the Netherlands in particular, Dutch citizens with a Surinamese background are one of the groups who are disproportionately disadvantaged by this policy. When comparing this to Dutch people with a Dutch background, they can take care of their elderly parents when needed without having to go to excessive lengths in order to do so.

1.3 Former and current policies regarding the admission of former Dutch nationals

1.3.1. Introduction

In this paragraph, we will discuss the possibilities for admission of former Dutch nationals into the Netherlands. We will focus on this admission legislation, rather than the right to opt.

Before the independence of the colonies, policy about the admission of former Dutch nationals was laid down in internal documents and directives. This means they were and are not freely accessible.[101] The administration was given a wide margin of appreciation when assessing the admissibility of former Dutch nationals into the country. Therefore, it can be concluded that standard guidelines, such as the one we can now find in the Vb, did not exist. This was most likely due to the fact that there was no need for such policy, since the independence of the colonies was the first time the Netherlands had to deal with migration flows of that scale.

Because these directives and regulations are not accessible, we were not able to analyse them. Instead, we will chronologically analyse several provisions regarding the admission of former Dutch nationals, starting with the policy regarding so called "spijtoptanten" (1.3.2). Secondly, we will look into the predecessors of the current legislation regarding admission of former Dutch nationals (1.3.3 and 1.3.4), after which we will analyse the current policies in

[99] Klaassen en Lodder, "Kroniek Gezinshereniging 2016-2017," *A&MR* 1 (2014): 40.
[100] "Hoeveel mensen met een migratieachtergrond wonen in Nederland?," CBS, accessed February 8, 2022, https://www.cbs.nl/nl-nl/dossier/dossier-asiel-migratie-en-integratie/hoeveel-mensen-met-een-migratieachtergrond-wonen-in-nederland
[101] Kamerstukken II, 1963/64, 7163, nr. 9, 13.

place (12.3.5). Finally, we will also look at the option to be admitted on grounds of the right to family life as provided in art. 8 ECHR (1.3.6).

1.3.2. 'Spijtoptanten' policy following the nationalities agreement (1949) between Indonesia and the Netherlands

The Netherlands colonised Indonesia until 1949, when Indonesia was given back its sovereignty. In 1949, the Netherlands and Indonesia drafted a Toescheidingsovereenkomst (TOS) about the division of nationalities. The majority of the habitants of Indonesia did not have a choice in their nationality, and were given the Indonesian nationality by default.[102] There was a rather large minority, however, that did have the option to choose between the Dutch and Indonesian nationality. This group was comprised of Indo-European nationals and "totoks". The Indo-European nationals were people who were of a mixed Dutch-Indonesian heritage, totoks were people of Dutch nationality and heritage, who had been born in Indonesia.[103] These groups were given the option to choose between the two nationalities between 27 December 1949 and 1951.[104]

Dutch politicians considered the Indo-Europeans to be more Indonesian than Dutch, and encouraged them to opt for the Indonesian nationality.[105] As Jones states in his dissertation, the urging of Indo-Europeans to opt for Indonesian nationality by the Dutch politicians shows that the view on being Dutch was centred around ethnicity.[106] Despite encouragements by the Dutch government, at least 80% of Indo-Europeans who were allowed to opt, chose for the Dutch nationality. Being Dutch was a big part of their cultural identity, and a majority of these people were much more focussed on the Netherlands than Indonesia.[107]

Among the people who did choose for the Indonesian nationality, pressured to do so by the Dutch government, a large number quickly regretted their decision and wanted to leave Indonesia.[108] They did so especially after relations between the Netherlands and Indonesia cooled down because the Dutch government refused to grant New-Guinea its sovereignty.[109] Indonesia became increasingly more anti-Dutch and the Indo-Europeans that had chosen to opt for the Indonesian nationality were often a target of this anti-Dutch movement.[110] These people, who quickly wanted to leave Indonesia and move to the Netherlands, are referred to as "spijtoptanten". Many of them issued requests to opt for Dutch nationality.[111] Although some of the early requests were granted, the Dutch government soon installed a visa policy, and used guidelines to assess whether people were eligible for a visa for the Netherlands.[112]

The policy to admit the spijtoptanten was government policy. The criteria to be admitted varied throughout the years, and the administration was given a rather large margin of appreciation in assessing the applicants. Still, four main criteria can be found. They were a person's ties with

[102] Jones, "Tussen Onderdanen", 80-81.
[103] Ibid., 82.
[104] Ibid.
[105] Ibid., 143.
[106] Ibid., 144.
[107] Ibid., 148.
[108] Ringeling, 85.
[109] Ibid., 81.
[110] Ringeling, p. 82-83.
[111] Ringeling, p.85.
[112] Ibid.

the Netherlands, whether a person was in distress in Indonesia because of their ties to the Netherlands, whether they would be able to assimilate into the Dutch society, and whether there were any other indicators as to why they should not be admitted into the country.[113]
During the years that the spijtoptanten policy was in place, roughly between 1960 and 1968, approximately 25.000 persons were admitted to the Netherlands.[114]

1.3.3. VC 1982

After the spijtoptanten policy, more general provisions regarding the admission of former Dutch nationals were adopted in the *Vreemdelingencirculaire (*Vc*).* This, however, did not happen until 1982. The policy was adjusted in the Vc of 1994. Before the policy was included in the Vc, it had not been properly established, until the highest administrative court The Raad van State (which at the time was also a policy maker) did so in a 1979 case. In this case the Raad van State concluded that a former Dutch citizen could return to the Netherlands and reside there, as long as he is able to find a place to live and work.[115]

In both the version of 1982 and that of 1994, there were roughly four categories of former Dutch nationals who could be admitted on grounds laid down in the Vc. On the one hand, there were the former Dutch nationals who were born in the Netherlands (category 1), or as Dutch nationals in a different country (category 2). On the other hand, there were the people born as Dutch citizens in Suriname, who had lost their Dutch nationality after the independence of Suriname. Among them were the ones who had gained access under the liberal admissions policy (category 3, see 2.3.3.), and the ones who had not, and wanted a residence permit after November 24, 1980 (category 4).

The admissions policy regarding admission of category 1 people was the least restrictive. B17 Vc (1982) laid down the rules for admission of former Dutch nationals born in the Netherlands, and specified three types of former Dutch citizens within its scope. Firstly, foreigners who lost Dutch nationality because of naturalisation. Secondly, women who had lost their Dutch nationality due to marriage. Lastly, foreigners who lost Dutch nationality due to their joining of a foreign army without the King's consent (B17/1 (a) (b) (c) Vc ('82)). B17/2.1 Vc ('82) stated that the people belonging to the categories mentioned in B17/1 can only be excluded from admission to the Netherlands when they pose a serious threat to public order or national security (a), or when they do not have sufficient money to support themselves (b).

The admission of people belonging to category 2 was regulated more strictly than those belonging to category 1. B17/2.3 Vc ('82) stated that admission of former Dutch nationals born outside the Netherlands is regulated in A4/5.1 Vc ('82), which laid down the regular procedure for admission into the Netherlands. This means that there was no specific admissions policy for this group, and that, in theory, they had to meet the same standards as foreigners seeking admission into the Netherlands.

The admission of people belonging to category 3, also referred to as those who gained rights, is again divided into three sub-categories. The first category is people who gained access on grounds of the liberal admissions policy (par. 2.2.4). The second category is composed of

[113] Ibid., p.96.
[114] Ibid., p.87
[115] (RvS March 8, 1979, Rv 1979, 51).

people who applied for a permit on grounds of the liberal admissions policy before the end of this policy five years later, but who did not receive the permit in time. The last category consists of people who were able to obtain a residence permit on grounds of the liberal admissions policy, and who requested such a permit before 25 February 1981 (B10/4(a)(b)(c) Vc ('82).[116] The second and third category within this first group did not have the same expanded right to residence as the first category. Although all categories within this group were able to obtain a residence permit without having to show a purpose of stay, as long as they were able to provide for themselves (B10/5.1.1. Vc ('82)), the people within the first category did not need a provisional residence permit (mvv) for admission to the Netherlands (B10/5 Vc ('82)).

Category 4 was comprised of Surinamese people who did not derive rights from the liberal admissions policy. These people were able to apply for a residence permit, but had to meet the same criteria as foreigners (B10/2.2.2 jo. B11 Vc ('82)). They were, however, provided with the possibility of obtaining a residence permit on grounds of family reunification with Surinamese people belonging to category 3. The most important criterion to gain a permit on these grounds was that there was housing available for the family member who was travelling to the Netherlands (B10/2.2.3 Vc ('82)).

1.3.4. Vc. 1994

In 1994, the renewed Vc came into force. The provisions regarding former Dutch nationals born in the Netherlands remained the same as in 1982 (B18/3 Vc ('94)). Regarding individuals born as Dutch nationals outside of the Netherlands, B18/3 lays down that admission was possible if the applicants had sufficient means to support themselves, and did not pose a threat to national safety and security. Additionally, they needed to have reached adulthood, and needed to live in a country of which they were not a national. Finally, in order to be eligible for the permit, a person needed to have either enjoyed at least half of their primary education in a country which is part of the Kingdom (B18/3 (e) Vc ('94)) or had to have exceptional ties with The Netherlands due to social class or the way they were raised (B18/3 (f) Vc ('94)).

Regarding the admission of people from Suriname specifically (B10 Vc ('94)), the only major change in the Vc 1994 is that the residence permit on grounds of family reunification with Surinamese people who had a residence permit based on the liberal admissions policy is no longer specifically mentioned in B10. Other than this, B10 still identifies the same two groups mentioned in Vc '82: Surinamese people who derive their residence permit from the liberal admissions policy, and those who do not. The latter group has to meet the same requirements as other foreigners in order to obtain a residence permit.

The current legislation on admission of former nationals does no longer include specific provisions on the admission of Surinamese people. The categories from the Vc '94, being former Dutch nationals born in the Netherlands and those born outside of the Netherlands, are now formulated in art 3.51 (1) (d) and (e) Vb. From the current desk research, we can conclude that the 1994 Vc no longer contains a reference to residence permit on grounds of family reunification. Additionally, new requirements for former Dutch nationals born outside of the Netherlands are added, most notably the requirement of needing to live in a country of which

[116] This date is three months after the end of the Vestigingsovereenkomst and visumafschaffingsovereenkomst.

they are not a national. This limits the possibilities for family reunification and legal residence in the Netherlands for former Dutch citizens from Suriname on grounds of these provisions.

1.3.5. Current legislation

Article 3.51 (1) Vb lays down a non-temporary right of residence on humanitarian grounds for different groups. Art. 3.51 (1) (d) Vb states that former Dutch nationals born in the Netherlands are eligible for a non-temporary residence permit on grounds of this article. Additionally, this right is also given to former Dutch nationals born outside of the Netherlands, who live in a country of which they do not have the nationality (art. 3.51 (1) (e) Vb)). In a case in 2008, an elderly man born in Indonesia when it was still part of the Kingdom argued that having been born in Indonesia at that time should allow him to apply for a residence permit under art. 3.51 (1) (d) Vb, because he had been born in a part of the Netherlands.[117] The court argued that this was not the case. The article's predecessor in 1994 had stated that in order to apply for a residence permit, a person had to be born in the Netherlands within the European part of the Kingdom. The court did not see any reason as to why this would have been changed. The court argues that the reason behind this legislation is that only those who have been born in the European part of the Netherlands can be seen as having strong enough ties with the country.

In a case in 2016, the CRvB answered a question relating to this subject. An applicant, born in Suriname in 1948, contested the decision that he was not granted a full pension on grounds that he had not lived in the European part of the Netherlands for 12 years.[118] The applicant argued that the exclusion from the pension on the ground that he lived in Suriname is discriminatory, because Suriname had at that time been part of the Netherlands.[119] The Dutch court however, ruled that the provision was not discriminatory. It argued that the Netherlands and Suriname had, when Suriname was still part of the Dutch Kingdom, agreed that pensions would be a case of internal affairs.[120] The court also argued that there was no discrimination on grounds of race, because the regulation itself did not have any discriminatory intentions.[121]

1.3.6. Admission on grounds of family reunification ex art. 8 ECHR

Art. 8 ECHR provides a right of family life. While the provision does not lay down an absolute right of family reunification for migrants, it can in certain circumstances grant a right of admission into a country when a migrant's right to family life would otherwise be violated.[122]

In order to answer the question whether a person's right to family life is violated, the following questions need to be examined. First, whether there a family life in the specific

[117] RB Den Haag, June 2008, para. 3. Additionally, the following cases regarding the application of art. 3.51 Vb are also relevant: ECLI:NL:RBDHA:2018:6456 and ECLI:NL:RBDHA:2021:12260. The 2018 case discusses the definition of being 'born and raised in the Netherlands' (a requirement posed in art 3.51 (1) (d) Vb). The 2021 case discusses the fact that the children of people who are former Dutch nationals cannot be seen as Dutch nationals themselves (see par. 5 of the judgment)
[118] (CRvB April 1, 2016), para. 1.1 and 1.2. For similar cases, see CRvB February, 2013, and RB April 22, 2021.
[119] Ibid., para. 2.
[120](CRvB April 1, 2016), para. 4.1.
[121] Ibid., para. 4.3.
[122] Karin Zwaan e.a. (eds.), *Nederlands Migratierecht* (Den Haag: Boom Juridisch, 2020), 216.

case,[123] and secondly, whether this family life is interfered with. Third, whether the interference can be justified. Fourth, when there is no interference, whether the state has the positive obligation to enable a person's family life.[124]

Under these circumstances, former Dutch nationals can be granted a residence permit ex. Art. 8 ECHR, because their right to family life would be violated if they would not be admitted into the country. Two examples include the ECtHR case *Jeunesse* and a case by the highest administrative court in the Netherlands, *ABRvS 2 October 2020.*[125]

In the case of *Jeunesse*, an elderly woman from Suriname who was born Dutch repeatedly applied for a residence permit, but these applications were all rejected.[126] In the meantime, she resided in the Netherlands undocumented and built up her family life.[127] Although usually the success of an appeal to family life in the sense of art. 8 ECHR is very unlikely when the migration status of one of the family member is uncertain, in this case the ECtHR considered that there would be a violation of art. 8 ECHR if the applicant would be sent back to Suriname. The reasons for this are layered. Firstly, the Dutch authorities neglected to take any concrete steps in the removal of the applicant, even though they were aware of the fact that she had been residing in the Netherlands illegally for 16 years.[128] Secondly, her husband and children all had the Dutch nationality, and the applicant had been a national of the Netherlands before she lost it after the independence of Suriname.[129] Considering these circumstances, the ECtHR answered the question whether the Netherlands had a positive obligation to grant the applicant a residence permit affirmatively.[130] The ECHR stated that "her position cannot be simply considered to be on a par with that of other potential immigrants who have never held Netherlands nationality."[131]

In the domestic case dating from 2 October 2020,[132] the highest administrative court, ABRvS, decided on the case of an 82-year-old Surinamese widowed woman who was born a Dutch national in Suriname. She applied for a provisional residence permit (mvv) to be re-admitted into the Netherlands as a former Dutch national born outside of the Netherlands, based on article 3.51 (1) (e)Vb.

In applying article 8 ECHR, the State Secretary of Justice and Security (in fact the Immigration and Naturalisation Service) has to make a fair balance of the interest of the applicant to have the right to private and family life and the Dutch public interest of being able to have a restrictive admission policy.[133] The specific circumstances of the case have to be balanced to see if the ties the applicant has with the Netherlands are significant. In this case the administrative court found significant that the applicant has had the Dutch nationality for a longer period of time (42 years) than she had the Surinamese nationality. Her education was

[123] Features like concubinaat, which developed because during slavery, enslaved people were not allowed to marry, are not taken into account when determining the scope of the right to family life. See also Westra and Bonjour (2022), 'Postcolonial Migration and Citizenship in the Netherlands', VerfBlog, 2022/1/28, https://verfassungsblog.de/postcolonial-migration-and-citizenship-in-the-netherlands/
[124] Ibid., 217.
[125] Jeunesse (ECtHR October 3, 2014), (ABRvS October 2, 2020).
[126] Jeunesse (ECtHR October 3, 2014), para. 12.
[127] Ibid., para. 116
[128] Ibid., para. 138
[129] Ibid., para. 78
[130] Ibid., 105.
[131] Ibid., 116.
[132] (ABRvS October 2, 2020).
[133] Zwaan, *Nederlands Migratierecht,* 221.

focused on the Netherlands, she was a Dutch civil servant for 22 years, she had to pay her taxes in the Netherlands, and she receives her pension from the Dutch pension fund ABP. Besides that, three of her four children had the Dutch nationality, and they all lived in the Netherlands. She also had legally stayed in the Netherlands for nine years between 1982 and 2012 and it became almost impossible for her to travel from Suriname to the Netherlands for short stays to meet her family due to her age.[134] All these circumstances lead to the conclusion that the complaint made by the applicant was well founded. Additionally, the highest administrative court argues that the lower court should have demanded more explanation from the state secretary as to why he had thought the existing ties with Suriname to be decisive in this case.[135]

It is very exceptional that the ABRvS comes to the conclusion that article 8 ECHR is violated in these types of cases.[136] In an earlier case in 2017 the ABRvS did not even take into account that the woman used to be a Dutch national in Indonesia and has had legal stay in the Netherlands for several years.[137] This possibly means the ABRvS changed its approach on testing article 8 ECHR. While this can be considered a positive development, this case also shows that the immigration and naturalisation service (IND) would rather take the path of article 8 ECHR than the path of article 3.51 (1) (d) Vb and refused to grant him a residence permit based on that provision, even though this case concerned a former Dutch national with very close ties with the Netherlands.

Since both of the applicants in these cases were Surinamese people born as Dutch nationals, the case could potentially be a ground for an individual proceeding for people from Suriname illegally residing in The Netherlands at this time. The government, however, has not changed its policy on art. 8 ECtHR following the *Jeunesse* judgement. In a letter to parliament, the then Deputy-Minister of Justice and Safety argued that the administration did not need to change the existing policy because the judgment follows the regular line of case-law regarding family reunification, and only poses an exceptional case.[138] The deputy minister only stated that the instructions of the immigration and naturalisation service (IND) would be updated to incorporate the effects of the judgment.[139] The updated document contains a guideline on the fact that there are cases in which the special circumstances can lead to a positive obligation for the administration, but that these should always been looked at individually.[140] As far as we have found, the document has not been updated after the *ABRvS 2020* judgment.

1.4. Conclusion

There has been a shift in sentiment of the Dutch government towards people from Suriname over the years. It started with a welcoming attitude towards Dutch nationals from Suriname until the sixties, but from that time on the Dutch government has looked for ways to restrict the migration flow from Suriname to the Netherlands, even though they did not always open up about this, not even when being questioned about this in Parliament.

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[134] (ABRvS October 2, 2020), para. 1.2.
[135] Ibid.
[136] (ABRvS October 20, 2019) and (ABRvS March 1, 2017).
[137] (ABRvS March 1, 2017).
[138] *Kamerstukken II* 2014/2015, 32317, nr. 282
[139] Ibid.
[140] IND werkinstructie 7 april 2015: Richtlijn voor de toepassing van artikel 8 EVRM, p.17

Chapter 2. International and European framework regarding (in)direct discrimination

2.1 Introduction

As this study aims to assess the compatibility of distinctions made in the Netherlands between specific groups (as discussed in the previous chapter) with the international and European framework on the prohibition of (in)direct discrimination, it must be determined what this framework is. Moreover, as indicated in the introduction, following the chapter on the Netherlands, we discuss the domestic situations in the UK, France and Belgium in order to see whether these States are faced with similar problems and, if so, whether efforts made in those States to meet their international obligations can also serve to inspire similar efforts in the Netherlands. It should be noted that this international and European law framework also applies to the studies regarding the UK, France and Belgium.

The situation on which the legal question posed by PILP is based concerns distinctions made between different groups of former Dutch citizens present in the Netherlands, and distinctions made between Dutch citizens with and without a, more or less recent, immigrant background. These distinctions do not concern deprivation of nationality. Our focus is on the prohibition of discrimination. We discuss the importance attached to this prohibition and its scope. We discuss law developed within the United Nations and the Council of Europe and we also briefly refer to European Union law. The Netherlands is a member of all three organisations and is a party to the relevant treaties. The same applies to Belgium and France. Although the UK is no longer an EU Member State since 1st January 2021, it does have obligations under the law developed within the UN and the Council of Europe. Also, it was still part of the EU and its legal system in the period when the Windrush scandal unfolded.

We have specifically chosen to explore a framework of anti-discrimination legislation and case law which regulates discrimination on the basis of race or ethnicity (and 'other status'). This is because the Dutch legislation under review does not distinguish between people on grounds of nationality, but rather between former nationals, born in different countries. Therefore, the research in the third and fourth chapter will also focus on the question whether the practices constitute (in)direct discrimination between former nationals born in different countries.

For the international and European law framework we do not take a 'framework light' approach, by only listing relevant treaty provisions. Instead, we also consult the authoritative interpretations as to the meaning of these provisions.

The first basic principle of treaty law is *pacta sunt servanda*: States are bound to the treaties they have ratified, as also laid down in article 26 Vienna Convention on the Law of Treaties (VCLT): treaties, once they have entered into force, are 'binding upon the parties to it and must be performed by them in good faith'. Moreover, these treaties 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose' (article 31 VCLT). UN treaty bodies and regional human rights courts also invoke and apply these rules. Accordingly, we will look at the ordinary meaning of the terms (textual), interpret them in the context of the treaty provision and the treaty as such (contextual interpretation), and in light of the object and

purpose of the treaty (teleological interpretation). The context is seen in light of the changing circumstances and subsequent practice (dynamic interpretation).

The regional human rights courts and the UN treaty bodies were created by States. The independent experts who are members of these bodies are equally appointed by State parties. They derive their authority in the first place from their mandates. Generally speaking, because the documents they monitor and apply are 'living instruments', international and regional human rights bodies often adhere to the dynamic or evolutive interpretation method.

This chapter first discusses the status of the principle of non-discrimination in general international law (para 2.2). Then it addresses the right to equality and non-discrimination in two treaties developed within the United Nations, as well as the UN approach to reparation for continuing effects of colonialism (par 2.3); followed by a discussion of the right to equality under the ECHR (par. 2.4), and a brief discussion of how this right has been dealt with within the EU (par 2.5); some inspiration that could be derived from the Inter-American human rights system (par. 2.6); and concluding with a brief overview of the applicable legal framework (par. 2.7).

2.2 The special status of the principle of non-discrimination

The principle of non-discrimination is one of the few rights specifically referred to in the UN Charter: human rights 'for all without distinction as to race, sex, language or religion'.[141] Already in *Barcelona Traction* (1970), the International Court of Justice (ICJ) referred, among others, to the protection from slavery and discrimination as one of the principles and rules concerning the basic rights of the human person.[142]

Specifically with regard to racial discrimination, the International Law Commission (ILC) stated in 2019: "a reservation that limits the implementation of such right to a particular racial group or excludes a particular racial group from the enjoyment of the treaty right, may well be found to violate the generally recognized peremptory norm of general international law prohibiting racial discrimination".[143]

In 1994 the Human Rights Committee, the supervisory body to the ICCPR, had already noted the special status of the non-discrimination principle. Discussing the compatibility with the object and purpose of the ICCPR of certain reservations made by States when they ratified the treaty, it observed that "a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (article 2 (1)) would not be acceptable."[144] Some years later it found a reservation to the Optional Protocol on the right of individual complaint 'incompatible with the object and purpose of the Optional Protocol' because it 'single(d)out a certain group of individuals for lesser procedural protection than that which is enjoyed by the

[141] See art 1(3) UN Charter.
[142] ICJ *Case Concerning Barcelona Traction, Light, and Power Co., Ltd (Belgium v. Spain)*, 5 February 1970, p. 32, para. 34.
[143] Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), General Assembly, Supplement No. 10 (A/74/10), Advance version (20 August 2019), discussing draft Conclusion 13 Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*): 1. A reservation to a treaty provision that reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such. 2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*), para 4.
[144] HRCtee General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, 4 November 1994, para 9.

rest of the population', constituting 'discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols'. [145]

Regional human rights bodies have also referred to the special status of this principle. The African Commission on Human and Peoples' Rights has pointed out: "Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights".[146]

The Inter-American Court of Human Rights has stressed that 'the fundamental principle of equality and non-discrimination forms part of general international law', that it is 'fundamental for the safeguard of human rights in both international law and domestic law' and that '(a)t the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens'*.[147] It has pointed out that '(t)he juridical structure of national and international public order rests upon it and it permeates the entire legal system'.[148]

Indeed, the UN's State appointed body of international law generalists, the International Law Commission (ILC), confirmed the peremptory status (*jus cogens* status) of the non-discrimination principle in its Commentary to the Articles on State Responsibility (2001): "Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."[149]

2.3 United Nations (UN)

2.3.1 Introduction

[145] HRCtee *Rawle Kennedy v. Trinidad and Tobago*, admissibility decision of 2 November 1999, CCPR/C/67/D/845/1999, para 6.7.

[146] African Commission on Human and Peoples' Rights, Decision of 15 May 2006, *Zimbabwe NGO Human Rights Forum v. Zimbabwe*, Communication No. 245/2002, para. 169.

[147] IACtHR *Juridical Condition and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of 17 September 2003, Series A No. 18, para 173(3) and (4).

[148] IACtHR *Duque v Colombia* judgment of 26 February 2016, para 191, referring to *Juridical Condition and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 101 and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*, judgment of 20 November 2014, para. 216.

[149] International Law Commission (ILC) Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission* 85, *2001*, vol. II, Part Two, as corrected, Commentary to article 26 (Compliance with peremptory norms: Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. The ILC also referred to the 1969 Vienna Convention on the Law of Treaties, with its article 53 on peremptory norms of general international law 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'. The 2001 Commentary states, by reference to the *travaux préparatoires* to the VCLT, and the ILC's Commentary at the time: "There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz. the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference." ILC Articles on State Responsibility (2001), Commentary on Article 40, at para 4. It also noted that the scope of the concept 'will necessarily evolve over time'. Commentary on Article 48. Invocation of responsibility by a State other than an injured State, para 9.

The first United Nations human rights document to contain an anti-discrimination provision is the Universal Declaration of Human Rights. Article 7 guarantees equality before the law without distinction: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.[150]

In an attempt to further protect human rights and equality, the United Nations created the International Convention on the Elimination of all forms of Racial Discrimination (CERD), which was adopted on 21 December 1965. Its first article sets out the meaning of racial discrimination as prohibited under the treaty:

> 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.[151]

Next to the Universal Declaration it was decided to develop a binding document containing all human rights. Eventually, due to the Cold War, in 1966 two different treaties were adopted: the International Covenant on Economic, Social and Cultural Rights[152] and the International Covenant on Civil and Political Rights (ICCPR). In this report we focus on article 26 ICCPR:

> 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[153]

CERD and ICCPR both include a supervisory system with a Committee of independent experts with a specific monitoring task. The Committee members are appointed by State parties to the treaty. They receive reports by State parties on compliance with obligations and discuss these in public before publishing Concluding Observations. In this report we only refer to those commenting on the State reports submitted by 'our' States. In addition, these Committees publish General Comments (regarding the ICCPR) and General Recommendations (regarding

[150] United Nations General Assembly resolution 217 A, of 10 December 1948, Article 7.
[151] United Nations General Assembly resolution 2106 of 21 December 1965.
[152] In a further research relevant interpretations by the ESC-Committee supervising ICESCR and by other authorities could be added. For a discussion of the general rights of all undocumented see e.g. Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the Netherlands, E/C.12/NLD/CO/6, 6 July 2017, §§39-40; See also Paul Minderhoud, *Het doorgeslagen koppelingsbeginsel*, oratie Universiteit Utrecht, 26 January 2022. From disciplines beyond law see e.g. Giorgio Agamben (2005), *State of Exception*. Chicago: University of Chicago Press; Henk van Houtum, 'Beyond 'borderism': overcoming discriminative b/ordering and othering', *Tijdschrift voor Economische en Sociale Geografie* – 2021, DOI:10.1111/tesg.12473, Vol. 112, No. 1, pp. 34–43. On the worldwide inequality of paper borders and cages through visa-policies in which no individual assessment takes place, but instead distinctions are made on the basis of place of birth see Henk van Houtum and Annelies van Uden, 'The birth of the paper prison. The global inequality trap of visa borders,' EPC: Politics and Space 2021, pp 20-27, DOI: 10.1177/2399654420981389e.
[153] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. ,

CERD) on the meaning of specific treaty provisions and on themes relevant to the treaty. With regard to those States that also have ratified the relevant individual complaint mechanism, the Committees decide on individual complaints (referred to as "Views") as well.[154] Hence, in order to clarify the meaning of the specific rights in the treaties the case law and General Comments /Recommendations of these expert bodies must be consulted.

In addition to the findings by the CERD-Committee and the UN Human Rights Committee, instituted under the ICCPR, other statements on the meaning of the prohibition of discrimination can be found in the reports of UN Special Rapporteurs appointed by States in the Human Rights Council.

For the purpose of this report we specifically looked for their discussions on discrimination grounds and on direct and indirect discrimination.

2.3.2 CERD: direct and indirect discrimination and bases for discrimination

As noted, article 1 CERD stipulates that in this Convention "racial discrimination" 'shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. By referring to 'which has the purpose or effect' the text already relates to direct as well as to indirect discrimination.

The treaty's supervisory body has discussed the meaning of the obligations under the treaty in its General Recommendations, in its decisions in individual cases, its admissibility decisions in inter-State cases, and in its Concluding Observations to State reports. In this framework we focus on the General Recommendations on specific treaty provisions or themes, and some specific case law.

In its General Recommendation XX (1996) the CERD-Committee has explained that State parties may not discriminate intentionally, but also not in effect:

> "Whenever a State imposes a restriction upon one of the rights listed in article 5 of the Convention which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose nor effect is the restriction incompatible with article 1 of the Convention as an integral part of international human rights standards. To ascertain whether this is the case, the Committee is obliged to inquire further to make sure that any such restriction does not entail racial discrimination."[155]

In another General Recommendation it has clarified that also in case of discrimination between citizens and non-citizens article 1(2) "must be construed so as to avoid undermining the basic prohibition of discrimination'.[156] The criteria for differentiation must be applied pursuant to a legitimate aim and proportionate to the achievement of that aim, 'judged in the light of the

[154] In principle they can also deal with inter-state complaints, but so far only the CERD-Committee has received a few complaints, which are now at the admissibility stage.
[155] CERD General recommendation on article 5 of the Convention, A/51/18, Forty-eighth session (1996), para 2.
[156] CERD-Committee, General Recommendation 30 Discrimination against non-citizens, CERD/C/64/Misc.11/rev.3, 23 February-12 March 2004, para 2. The Committee referred, among others, to the ICESCR and ICCPR.

objectives and purposes of the Convention'.[157] Thus, it recommends states to "(e)nsure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin"[158] and to ensure "that non-citizens are not subjected to racial or ethnic profiling or stereotyping."[159] It also calls on State parties to "Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization (…)"[160] and to '(r)egularise the status of former citizens of predecessor States who now reside within the jurisdiction of the State Party'.[161]

Under article 1 CERD, racial discrimination means 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'. The specific reference to descent relates in any case to the own place of birth or the place of birth of parents. It can also relate to descent further back that is related to self-identification or identification by majorities on the basis of colour. In 2011 the CERD-Committee adopted a General Recommendation specifically regarding racial discrimination against people of African descent. On access to citizenship it pointed out that States must ensure that legislation regarding citizenship and naturalization "does not discriminate against people of African descent and pay sufficient attention to possible barriers to naturalization that may exist for long-term or permanent residents of African descent."[162] Moreover, states must "(r)ecognise that deprivation of citizenship on the basis of race or descent is a breach of State parties' obligation to ensure non-discriminatory enjoyment of the right to nationality."[163] It also specifically referred to social and economic rights: "in some cases, denial of citizenship for long-term or permanent residents could result in the creation of disadvantage for the people affected in terms of access to employment and social benefits, in violation of the Convention's anti-discrimination principles."[164]

When invoking CERD, it is important to be aware of a recent ICJ judgment[165] that does not appear to be in conformity with international human rights law.[166] Indeed, this decision is weak and inconsistent, is based on a small majority, with strong dissents.[167] In response to a claim invoking CERD in the context of discrimination between groups of (former) citizens, a State may bring up this ICJ judgment. However, this judgment concerned distinctions on the basis of nationality, not on other categories such as place of birth. Moreover, as stated previously, this decision has been criticised for taking a very rigid and frozen approach to CERD, which is contrary to the approach by the CERD-Committee itself.[168] Finally, this

[157] CERD-Committee, General Recommendation 30 Discrimination against non-citizens, CERD/C/64/Misc.11/rev.3, 23 February-12 March 2004, para 4.
[158] CERD General Recommendation (2004), para 9.
[159] Ibid., para 10.
[160] Ibid., para 13.
[161] Para 17.
[162] CERD General recommendation No. 34 adopted by the Committee, Racial discrimination against people of African descent, CERD/C/GC/34, 3 October 2011, para 47.
[163] Ibid., para 48.
[164] Ibid., para 49.
[165] ICJ *Application of the International Convention on the Elimination of all Forms of Racial Discrimination*, Judgment on preliminary objections, 4 February 2021.
[166] See e.g. Ulfstein, Geir (2022), 'International Court of Justice Qatar v. United Arab Emirates. Judgment, Preliminary objections, February 4, 2021', 116(2) *American Journal of International Law*, 39-403.
[167] See the Declaration by President Yusuf and the dissenting opinions by judges Sebutinde, Bhandari, Robinson and Iwasawa (four of them from formerly colonized countries).
[168] See e.g. C. Costello and M. Foster, 'Race discrimination effaced at the International Court of Justice', *AJIL* Unbound, 115 (2021), p. 339-343, doi:10.1017/aju.2021.51.

judgment does not diminish obligations under the ECHR, as explained by the ECtHR (Section 2.4.2)[169] on distinctions between different groups of citizens without sufficient justification.

Moreover, in international human rights law, in cases between a group of individuals and a State, the most human rights protective interpretation should generally be adhered to, something that the Inter-American Court of Human Rights has referred to as the *pro humana/pro homine* approach.[170]

Finally, the ICJ only referred to the Committee's General Recommendations, but not to its case law. Internationally, it is only the Committee that individuals can resort to with claims about violations of CERD. The ICJ cannot receive their complaints and it could be argued that this Court should therefore be particularly sensitive to decisions on individual complaints by the supervisory bodies to the human rights treaties in question.[171]

In a 2005 case, the Committee recalled 'that the definition of racial discrimination in article 1 expressly extends beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination'. Indeed, and importantly, the Committee has noted that when assessing such indirect discrimination, it 'must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially'.[172]

The Committee also attaches importance to the circumstances in which legislation is adopted. In this case, involving resolutions adopted by a municipal council, it noted that the circumstances made **'**abundantly clear that the petition was advanced by its proponents on the basis of ethnicity and was understood as such by the council as the primary if not exclusive basis for revoking its first resolution.'[173]

It made a strong statement about substance rather than form and about the purpose of the Convention and the need to scrutinize the whole decision-making chain: 'it would be inconsistent with the purpose of the Convention and elevate formalism over substance, to consider that the final step in the actual implementation of a particular human right or fundamental freedom must occur in a non-discriminatory manner, while the necessary preliminary decision-making elements directly connected to that implementation were to be severed and be free from scrutiny.'[174]

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[169] See ECtHR *Biao v. Denmark*, App no. 38590/10 (ECtHR, 24 May 2016 explained in section 2.4.2.

[170] Article 5(2) ICCPR: the ICCPR cannot be used to justify restrictions upon or derogations from fundamental rights recognised in other legal instruments 'on the pretext that the Covenant does not recognise such rights or that it recognises them to a lesser extent' HRCtee General Comment 29 on states of emergency (article 4), 24 July 2001, paras 9 and 10. Article 53 ECHR: no provisions in the treaty will be interpreted to limit fundamental rights recognised in any other treaty ratified by the member States.

[171]International Law Association (ILA) International Human Rights Law Committee, *The International Court of Justice and Its Contribution to Human Rights Law* (Final Report Part 1, rapporteur Eva Rieter), Washington Conference 2014, para 41, reprinted in ILA Report 2014, at 476–501, paras 19-88, and in slightly edited version in S. Kadelbach, Th. Rensmann, E. Rieter (eds), *Judging International Human Rights, Courts of General Jurisdiction as Human Rights Courts*, Springer Verlag 2019, at pp 27-28. See also in the same volume S. Kadelbach, Th. Rensmann, E. Rieter, 'Introduction', pp 3-18, in particular pp 5-6 discussing the importance for an inter-state court to take into account the 'procedural absence of the individual concerned in the proceedings' and the need therefore to take seriously the findings of the UN supervisory committees dealing with individual complaints under the specific treaty. https://doi.org/10.1007/978-3-319-94848-5_2.

[172] CERD *Ms. L. R. et al. (represented by the European Roma Rights Center and the League of Human Rights Advocates) v Slovak Republic*, CERD/C/66/D/31/2003, 10 March 2005, para 10.4.

[173] Ibid., para 10.5.

[174] Ibid. para 10.7. (adding: "As a result, the Committee considers that the council resolutions in question, taking initially an important policy and practical step towards realization of the right to housing followed by its revocation and replacement with a weaker measure, taken together, do indeed amount to the impairment of the recognition or exercise on an equal basis of the

In another case, the Committee established that the petitioner belonged to a category of potential victims in light of a given school practice 'consisting in fulfilling employers' requests to exclude non-ethnic Danish students from traineeships.' This would in itself be "sufficient to justify that all non-ethnic Danish students at the school be considered as potential victims of this practice, irrespective of whether they qualify as trainees according to the school's rules."[175]

On the merits, it found that the petitioner's 'chances in applying for an internship were more limited than other students because of his ethnicity. This constitutes, in the Committee's view, an act of racial discrimination and a violation of the petitioner's right to enjoyment of his right to education and training under article 5, paragraph e (v) of the Convention'.[176]

2.3.3 ICCPR: direct and indirect discrimination and bases for discrimination

The right to equality and non-discrimination is included in articles 2(1) and 26 ICCPR. Article 2 (1) ICCPR provides:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

As noted, Article 26 ICCPR stipulates:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

As discussed in para. 2.1 the right to equality and non-discrimination have a special status in international law in general. They also have a special status within the ICCPR. They constitute

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human right to housing, protected by article 5 (c) of the Convention and further in article 11 of the International Covenant on Economic, Social and Cultural Rights. The Committee thus dismisses the State party's objection on this point.")

[175] CERD, *Murat Er v Denmark*, CERD/C/71/D/40/2007, 8 August 2007, para 6.3.

[176] Ibid., para 7.3, after having explained: "In respect of the author's claim that, as a result of the school's practice, he was not offered the same possibilities of education and training as his fellow students, the Committee observes that the uncontroversial fact that one of the teachers at the school admitted having accepted an employer's application containing the note "not P" next to his name and knowing that this meant that students of non-Danish ethnic origin were not to be sent to that company for traineeship is in itself enough to ascertain the existence of a *de facto* discrimination towards all non-ethnic Danish students, including the petitioner. The school's allegation that the rejection of the petitioner's application for traineeship in September 2003 was based on his academic records does not exclude that he would have been denied the opportunity of training in that company in any case on the basis of his ethnic origin." In para 7.4: "With regard to the petitioner's allegation that the State party failed to provide effective remedies within the meaning of article 6 of the Convention, the Committee notes that both national Courts based their decisions on the fact that he did not qualify for an internship for reasons other than the alleged discriminatory practice against non-ethnic Danes –namely, that he had failed a course-. It considers that this does not absolve the State party from its obligation to investigate whether or not the note "not P" written on the employer's application and reported to be a sign recognised by a school teacher as implying exclusion of certain students from a traineeship on the basis of their ethnic origin, amounted to racial discrimination." Here it also referred to its earlier decision in, - *Mohammed Hassn Gelle v Denmark*, CERD/C/68/D/34/2004, 6 March 2006, para.7.5.

a 'basic and general principle relating to the protection of human rights'.[177] Even where derogations of rights are permitted in times of emergency that meet the requirements of article 4 ICCPR, this provision stresses that such derogations 'should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.[178] In its General Comment on states of emergency the Committee expanded on this:

> "Even though article 26 or the other Covenant provisions related to non-discrimination (arts. 2, 3, 14, para. 1, 23, para. 4, 24, para. 1, and 25) have not been listed among the non-derivable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances."[179]

This indicates the importance, in fact, the elevated status, of the right within the ICCPR.[180]

The Covenant does not include a definition of 'discrimination'. It does provide a supervisory Committee of independent experts and in its General Comment on non-discrimination (1989), this Committee has provided the following description:

> "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[181]

Article 26 concerns an autonomous right. Equality and non-discrimination apply irrespective of whether other rights in the ICCPR are violated.[182] As the HRCtee already explained in early case law, such as *Zwaan-De Vries v The Netherlands* (1987):

> "For the purpose of determining the scope of Article 26, the Committee has taken into account the 'ordinary meaning' of each element of the Article in its context and in the light of its object and purpose (Article 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that Article 26 does not merely duplicate the guarantees already provided for in Article 2. It derives from the principle of equal protection of the law without discrimination, as contained in Article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof."[183]

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[177] HRCtee General Comment 18, Non-discrimination, 10 November 1989, CCPR/C/37, para. 1. See also para. 6.
[178] As the HRCtee already observed in General Comment 18, para. 2
[179] HRCtee General Comment 29: article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, , 31 August 2001, para.8.
[180] See also General Comment No. 29, para 13 (c) "The Committee is of the opinion that the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances. This is reflected in the prohibition against genocide in international law, in the inclusion of a non-discrimination clause in article 4 itself (para. 1), as well as in the non-derogable nature of article 18."
[181] HRCtee General Comment 18, Non-discrimination, 10 November 1989, CCPR/C/37, para. 7
[182] Ibid., para.12.
[183] HRCtee *Zwaan-de Vries v. The Netherlands*, 9 April 1987, com.no. 182/1984, para. 12.3.

While article 26 does not require specific legislation on, for instance, social security, once a State enacts such legislation, in the exercise of its sovereign power, this legislation must comply with article 26.[184] Moreover, in its General Comment on article 2(1) ICCPR, it has observed that '(i)n fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.'[185]

Article 26 concerns not only discrimination in law, but also in fact: it 'prohibits discrimination in law or in fact in any field regulated and protected by public authorities'.[186]

The list of grounds for discrimination in article 26 is not limitative, as is shown by the words 'such as' and 'other status'. Discrimination is forbidden 'on any ground'. As examples, in addition to national origin and colour, the article mentions 'birth'.

The Committee has also observed that not all differences in treatment are discriminatory under article 26: "A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26."[187] In *Zwaan-De Vries v. The Netherlands* it found that 'a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable'.[188] It confirmed this in its 1989 General Comment: "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[189]

The Committee has declared article 26 claims inadmissible for failure to substantiate when it considered that the authors had 'not explained' how certain limitations are 'linked to national or ethnic origin,' finding that certain limitations are equally applicable to all involved.[190] On the merits it has found 'that a simple difference in the treatment of individuals related to their advancement or promotion in the civil service, in the absence of any additional evidence that this was not based on reasonable and objective criteria or that it had no legitimate purpose, is not sufficient to establish the existence of discrimination within the meaning of article 26 of the Covenant'.[191]

It has dealt with article 26 claims in cases involving citizenship in a set of cases turning on national security as a ground for refusal to grant citizenship.[192] In these cases the Committee did confirm that the criteria applicable under article 26 require 'reasonable and objective

[184] *Zwaan-de Vries*, para. 12.4 and 12.5.
[185] HRCtee General Comment 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 8.
[186] HRCtee General Comment 18, para.12
[187] *Zwaan-de Vries* para.13.
[188] *Ibid.*, para. 14. See also, e.g. HRCtee *Waldman v Canada*, 3 November 1999, com.no. 694/1996, para. 10.6.
[189] HRCtee General Comment 18, Non-discrimination, 10 November 1989, CCPR/C/37, para. 13..
[190] HRCtee *B. and C. v. Czech Republic*, 2 April 2015 (inadm.), CCPR/C/113/D/1967/2010, 1 July 2015, para. 6.4: "The Committee observes that the time limitations set forth in the Constitutional Court Opinion, which prevented the authors from seeking restitution of the property because it was confiscated prior to 25 February 1948, were applicable to all equally. The Committee notes that the authors have not explained how the time limitations were linked to national or ethnic origins."
[191] HRCtee *Jérémie Ebénézer Ngapna et al. v. Cameroon*, 17 July 2019, CCPR/C/126/D/2035/2011, 14 October 2019, para. 10.5.
[192] See e.g. HRCtee *Gennadi Šipin v. Estonia*, CCPR/C/93/D/1423/2005, 4 August 2008; *Vjatseslav Tsarjov v. Estonia*, CCPR/C/91/D/1223/2003, 14 November 2007; *Vjatseslav Borzov v. Estonia*, CCPR/C/81/D/1136/2002, 25 August 2004.

justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26, including "other status".[193] Another general notion that can be derived from this case law is that the Committee requires genuine substantive review of administrative decisions.[194] Yet otherwise these national security cases, in which no violation was found, are very different from cases of distinctions made between former citizens on the basis of place of birth.

The Committee did find a violation of art 26 in a case involving a claim of discrimination in decision-making on citizenship through naturalization, by not granting a language exemption on grounds of disability. This concerned the failure to take into account an unequal situation.[195] It did not relate to legislation *creating* an unequal situation. Yet the general statements made by the Committee again confirm its general jurisprudence, indicating criteria for assessing the compatibility with the rights in 26 ICCPR:

> "when adopting and implementing legislation, States parties' authorities must respect the applicants' rights enshrined in article 26. The Committee recalls in this respect that article 26 requires reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26, including "other status" such as disability."[196]

It has also found violations of article 21 (freedom of assembly), read alone and in conjunction with article 26 for a failure by the state to show that there were factors that could justify the distinction made between events of a 'social and political nature' organised by non-governmental organizations, as opposed to State-run or non-political events 'was based on reasonable and objective criteria and in pursuit of an aim that is legitimate under the Covenant'.[197]

Noteworthy, and distinguishable from the situation of distinctions made between two groups of former nationals, is a case that had been brought against the Netherlands about denial of general child benefit in the period before the author of the petition regained her Dutch citizenship. She was born in Suriname prior to Surinamese independence in 1975 and therefore

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[193] HRCtee *Gennadi Šipin v. Estonia*, CCPR/C/93/D/1423/2005, 4 August 2008, para 7.3.
[194] HRCtee *Gennadi Šipin v. Estonia*, CCPR/C/93/D/1423/2005, 4 August 2008, para 7.4.
[195] HRCtee *Q (represented by the Documentation and Advisory Centre on Racial Discrimination) v Denmark*, 1 April 2015, CCPR/C/113/D/2001/2010, 19 May 2015. In this case the Committee found that the State had 'failed to demonstrate that the refusal to grant the exemption was based on reasonable and objective grounds. The Ministry was unable to give details about the reasons for the Naturalization Committee's decision to deny the author's request since the Committee proceedings were confidential. According to the State party's own submission, the exemption provision was open to interpretation and practice was laid down by the majority of the Naturalization Committee at any time. Furthermore, the lack of motivation for the decision and transparency of the procedure makes it very difficult for the author to submit further documentation in order to support his request, as he does not know the real reasons for the refusal and the general trends regarding decisions of the Naturalization Committee in applying section 24, paragraph 3, of the Guidelines. The Committee considers that the fact that the Naturalization Committee is part of the legislature does not exempt the State party from taking measures so that the author is informed, even if in brief form, of the substantive grounds of the Naturalization Committee's decision. In the absence of such justification the State party has failed to demonstrate that its decision not to accept the author's mental disability as a basis for a language exception provided for in the law and to require from him language proficiency despite his learning disabilities was based on reasonable and objective grounds. The Committee therefore concludes that the facts before it reveal a violation of the author's right to equality before the law and equal protection of the law under article 26 of the Covenant." (para 7.5).
[196] HRCtee *Q (represented by the Documentation and Advisory Centre on Racial Discrimination) v Denmark*, 1 April 2015, CCPR/C/113/D/2001/2010, 19 May 2015, para 7.3.
[197] HRCtee *Bakhytzhan Toregozhina v Kazakhstan*, 25 July 2019, CCPR/C/126/D/2311/2013, 30 September 2019, paras 8.7 and 8.8.

used to be a Dutch citizen. In this 2018 case the Committee did not find a violation of article 26. The author had travelled from Suriname to the Netherlands with her daughter to visit her father, a citizen of the Netherlands, when she found out that her daughter had a rare disease that required a diet that was not available in Suriname. Subsequently, in the period before she regained her Dutch citizenship, general child benefit was denied. She had argued that denying the general child benefit to her and her daughter when they did not have residence permits was contrary to, among others, article 26 ICCPR. The Committee considered 'that the author has not demonstrated how the differential treatment of her and her daughter failed to meet the criteria of reasonableness, objectivity and legitimacy of aim'. It concluded that the facts before it did not disclose a violation of the author's and her daughter's rights under article 26 ICCPR.[198] Given the finding of the Committee (no violation of article 26) and the fact that this relates to a former Dutch national and her daughter from Suriname, it is useful to reproduce elements of the submissions by the state to gain insight on the official state position. The State party's information includes the following:

> "On 26 October 2010, the author and her daughter acquired Dutch nationality. The "option procedure" they utilized is a short, straightforward way for people like the author, who previously possessed Dutch nationality as a result of her birth in Suriname prior to 1975, to reacquire it. The author's daughter, who did not previously possess Dutch nationality, was included in the author's application under the option procedure."[199]

In addition, in this case the State expressed itself on Dutch immigration policy and the right under international law to control the entry, residence and expulsion. Moreover, the State invoked ECtHR case law:

> "With respect to the author's argument that denying the general child benefit to her and her daughter when they did not have residence permits violated their rights under articles 23, 24 and 26 of the Covenant, the State party argues that it is common for such distinctions to be made on the basis of residence status and, consequently, nationality.[200] Not all forms of unequal treatment are prohibited under

[198] HRCtee *M.S.P.-B. v the Netherlands*, 25 July 2018, CCPR/C/123/D/2673/2015, 17 August 2018, para 7.5 (it noted that 'the State party made a distinction regarding entitlement to the general child benefit on the basis of alien residence status. That rule was applied equally to all applicants for the general child benefit who did not have a residence permit in the State party. The Committee also notes that on 13 June 2006, the author applied for a residence permit for her daughter on medical grounds and that the District Court of The Hague granted the author's request for interim relief on 29 May 2007, entitling her and her daughter to lawful residence in the Netherlands while their applications for residence permits were pending. The Committee further notes the State party's argument, which is not contested by the author, that from 1 January 2007 the author and her daughter thus qualified for alternative provisions to the social insurance scheme for non-resident aliens under the Certain Categories of Aliens Order, which makes specific financial provision for minors. The author and her daughter accordingly were entitled to financial allowances, a medical expenses scheme, access to education for the author's daughter and legal aid. The Committee notes that the author has not demonstrated that the alternative financial assistance available to them materially disadvantaged her daughter's health, in comparison to the general child benefit scheme. In the light of these circumstances, the Committee').

[199] HRCtee *M.S.P.-B. v the Netherlands*, 25 July 2018, CCPR/C/123/D/2673/2015, 17 August 2018, para 4.5.

[200] The State party refers to article 1 of the European Convention on Social and Medical Assistance and to article 1 (1) of the appendix to the revised European Social Charter.

> the Covenant, only unequal treatment that constitutes discrimination. In the present case, the distinction is based primarily on residence status and the fact that there is sufficient justification for it. States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment, and the scope of the margin of appreciation varies according to the circumstances, the subject matter and its background. The Social Entitlements Act supports Dutch immigration policy. Linking social entitlements to residence status seeks to prevent aliens who are residing in the Netherlands unlawfully or who are lawfully resident solely on the basis of a pending application for a residence permit from prolonging their residence or establishing the appearance of lawful residence, so that once their procedure is complete it is not possible to expel them. Other individual schemes create entitlements to provisions, benefits and payments for aliens who are lawfully resident on the basis of a pending application for a residence permit. While the author had a pending application, she benefited from an order allowing the provision of the basic necessities at that time."[201]

The state applied a peculiar reasoning, in reference to ECtHR case law on family reunification under article 8 ECHR. The HRCtee does not address this argument by the State, but it may be useful to be aware of it, and of the difference between this case and a situation of unequal treatment between two groups of former nationals. This is what the State argued:

> "An unqualified obligation to treat aliens without legal residence status equally to a country's own nationals and individuals who have been admitted to the country would deprive a State of the ability to pursue an immigration policy to protect the country's economic well-being. Immigration policy is primarily an issue dealt with at the level of national States. It would run counter to this principle if States were obliged to recognize the same rights for those who reside in their territory unlawfully, thereby prolonging the unlawful situation and preventing the State from striking a fair balance between the public interest and the personal interests of the individuals involved. States have the right under international law to control the entry, residence and expulsion of aliens. The State party refers to the European Court of Human Rights judgment in *Nacic and others v. Sweden*,[202] in which the Court found that measures aimed at ensuring the effective implementation of immigration controls sought to preserve the economic well-being of a country and therefore served a legitimate aim within the meaning of article 8 (2) of the Convention for the Protection

[201] HRCtee *M.S.P.-B. v the Netherlands*, 25 July 2018, CCPR/C/123/D/2673/2015, 17 August 2018, para 4.7
[202] The state party referred to ECtHR, *Nacic and others v. Sweden* (application No. 16567/10), judgment of 15 May 2012, para. 79.

> of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The State party argues that in weighing the public interest and the individual interest, limiting the entitlement to full social benefits to those who are lawfully resident in the Netherlands is objective and reasonable. This is valid even if individuals have resided for a long period with the knowledge of the State. The fact that someone resides in the Netherlands for a long time without holding a valid residence permit is not an inherent and immutable personal characteristic, but is subject to an element of choice. The public interest is to eliminate the ability to claim benefits absent a valid residence permit, which may otherwise create the opportunity to prolong what in principle is an unlawful residence."[203]

Moreover, in light of the recent UN discussion on this, as discussed in paragraph 2.3.4, it is unconvincing for the State to simply argue on the basis of controlling the presence of aliens and to simply stress the 'element of choice' without taking into account the colonial history and the resulting presence of family members in two different countries.

> "With respect to the author's claims under article 23 of the Covenant, the State party argues that this provision does not entail an obligation to provide child benefits. Regarding the author's claim of living in poverty as a result of not receiving the child benefit, the State party argues that the general child benefit is not a general income support scheme and is not paid to families with children as a way of providing them with a minimum level of subsistence."[204]

It must be noted that the state uses language from ECtHR case law here about 'inherent and immutable personal characteristic' and 'subject to an element of choice'. This interpretation, borrowed from the ECtHR case law, is not applicable in cases brought before the HRCtee. It therefore seems to be an irrelevant argument. As noted, it would also appear to be a rather static approach to what constitutes discrimination, not taking into account the colonial history resulting in families living both in the Netherlands and in Suriname while depending upon each other as families. This makes the state's reference to 'choice' appear somewhat inappropriate, especially in light of the specific legislation that makes it difficult for former citizens from Suriname to obtain a valid residence permit. The UN discussion about the continuing impact of colonial history gained traction after 2018 (see para 2.3.4).

Nell Toussaint v Canada (2018) concerns a situation where the Committee did find a violation of article 26, but this case involved a risk to life. Again this concerns discrimination in the context of the rights of undocumented in general. It is not specifically based on a *direct* colonial history between Canada and Grenada, but it does relate to article 26 and immigration. A national of Grenada who had been working in Canada since 1999 had begun seeking

[203] HRCtee *M.S.P.-B. v the Netherlands*, 25 July 2018, CCPR/C/123/D/2673/2015, 17 August 2018, para 4.8.
[204] HRCtee *M.S.P.-B. v the Netherlands*, 25 July 2018, CCPR/C/123/D/2673/2015, 17 August 2018, para 4.9.

regularisation of her status in 2005. In 2006 her health began to deteriorate and in 2009 she was diagnosed with a life-threatening illness. Her application for health-care coverage under the Federal Government's programme of health care for immigrants was denied by an immigration officer as she did not fit any of the four categories under that programme.[205] In its discussion on the merits, the Committee recalled 'that in its general comment No. 15 (1986) on the position of aliens under the Covenant, it stated that the general rule was that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens'. While the Covenant does not recognize the right of aliens to enter and reside in the territory of a State party, the Committee also stated that aliens had an "inherent right to life". States therefore cannot make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants.[206] It found that 'exclusion of the author from the care under [programme] could result in the author's loss of life or irreversible, negative consequences for the author's health, the distinction drawn by the State party for the purpose of admission to the Programme between those with legal status in the country and those who had not been fully admitted to Canada was not based on a reasonable and objective criterion and therefore constituted discrimination under article 26'.[207] With regard to the effective remedy warranted in response to the violation found, the Committee noted, among others, that the State party is 'under an obligation to take all steps necessary to prevent similar violations in the future, including reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life'.[208]

In *Gueye et al. v. France* (1989) the HRCtee notes that nationality as such does not figure among the prohibited grounds of discrimination listed in article 26, and that the Covenant does not protect the right to a pension, as such. All the same, under article 26, discrimination in the equal protection of the law is prohibited on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The differentiation in pensions based on the fact that they were no longer French nationals, having acquired Senegalese nationality upon independence, fell within the "other status" in the second sentence of article 26.[209] The Committee noted that the question of nationality did not determine the granting of pensions to the authors. It were the services rendered by them in the past. "They had served in the French Armed Forces under the same conditions as French citizens; for 14 years subsequent to the independence of Senegal they were treated in the same way as their French counterparts for the purpose of pension rights, although their nationality was not French but Senegalese. A subsequent change in nationality cannot by itself be considered as a sufficient justification for different treatment, since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided. Nor could differences in the economic, financial and social conditions as between France and Senegal be invoked as a legitimate justification. If one compared the case of retired soldiers of Senegalese nationality living in Senegal with that of retired soldiers of French nationality in Senegal, it would appear that they enjoy the same economic and social conditions. Yet, their treatment for

[205] HRCtee *Nell Toussaint v Canada*, 24 July 2018, CCPR/C/123/D/2348/2014, 30 August 2018, para 2.7.
[206] Id., para 11.7, and stating in the footnote: 'See also Inter-American Court of Human Rights, *Juridical conditions and rights of undocumented migrants*, advisory opinion AO-18/03 of 17 September 2003.'
[207] Id., para 11.8.
[208] Id., para. 13.
[209] HRCtee *Gueye et al. v. France*, 3 April 1989, CCPR/C/35/D/196/1985, §9.4,

the purpose of pension entitlements would differ. Finally, the fact that the state party claims that it can no longer carry out checks of identity and family situation, so as to prevent abuses in the administration of pension schemes cannot justify a difference in treatment. In the Committee's opinion, mere administrative inconvenience or the possibility of some abuse of pension rights cannot be invoked to justify unequal treatment. The Committee concludes that the difference in treatment of the authors is not based on reasonable and objective criteria and constitutes discrimination prohibited by the Covenant."[210]

In *Williams Lecraft v. Spain* (2009), a police officer had singled out one woman for identification and had responded to her enquiry as to the reasons for this check 'that he was obliged to check the identity of people like her, since many of them were illegal immigrants. He added that the National Police were under orders from the Ministry of the Interior to carry out identity checks of "coloured people" in particular'.[211] On the merits the HRCtee noted that 'when the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination'.[212] In this case it was 'of the view that the criteria of reasonableness and objectivity were not met. Moreover, the author has been offered no satisfaction, for example, by way of apology as a remedy."[213]

The facts of the case (ethnic profiling) differ from the legal question underlying this research, concerning differentiation in regulations between different groups of former nationals. Nevertheless the Committee's statements indicate its interpretation of article 26 in its expression of concern when only persons with specific physical or ethnic characteristics are targeted. Such a practice 'would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination'.

In its early General Comment on the position of aliens under the Covenant (1986), the Committee already pointed out that 'each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness'.[214] It showed the significance of the prohibition of discrimination, also in the context of the entry or residence of non-nationals. It pointed out that the ICCPR 'does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to

[210] HRCtee *Gueye et al. v. France,* 3 April 1989, CCPR/C/35/D/196/1985 §9.5. Another is *Simunek v. Czech Republic*, 19 July 1995, CCPR/C/54/D/516/1992 (involving discrimination on place of living and nationality). Yet another important case is HRCtee *X v. Sri Lanka*, 27 July 2017, CCPR/C/120/D/2256/2013 (concerning intersecting discrimination based on gender and ethnicity).

[211] HRCtee *Rosalind Williams Lecraft v. Spain*, 27 July 2009, Comm. 1493/2006, A/64/40, vol. II (2009) Annex VII.FF., p. 295, para. 1.1.

[212] HRCtee *Rosalind Williams Lecraft v. Spain*, 27 July 2009, Comm. 1493/2006, A/64/40, vol. II (2009) Annex VII.FF., p. 295, para. 7.2.

[213] HRCtee *Rosalind Williams Lecraft v. Spain*, 27 July 2009, Comm. 1493/2006, A/64/40, vol. II (2009) Annex VII.FF., p. 295, para. 7.4:

[214] HRCtee General Comment 15: *The position of aliens under the Covenant*, 11 April 1985, para 1.

its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise'.[215]

Apart from discussions on non-discrimination the Committee has also dealt with the freedom of movement in article 12 ICCPR. In this light, it has discussed the right to enter *one's own country*. It has noted that: "The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country."[216] Indeed, it has pointed out, "[t]he scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien."[217] "Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, State parties should include in their reports information on the rights of permanent residents to return to their country of residence."[218]

Specific expert assessments regarding the Netherlands

In 2019 the HRCtee published some concluding observations on the Netherlands and its compliance with the ICCPR.[219] For example, it stated that:

> 'The State party should review its anti-discrimination legislation, including the Equal Treatment Act of 1994, with a view to ensuring that its anti-discrimination legislation:
>
> (a) Provides full and effective protection against discrimination on all the prohibited grounds under the Covenant in all spheres, including the private sphere, and prohibits direct, indirect and multiple discrimination;
>
> (b) Provides for effective remedies in cases of violation, including effective complaints mechanisms in all the constituent countries.'[220]

Thus, the Human Rights Committee recommended that the Netherlands '(p)rovides full and effective protection against discrimination on all the prohibited grounds under the Covenant in all spheres, including the private sphere, and prohibits direct, indirect and multiple discrimination'.

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[215] HRCtee General Comment 15: *The position of aliens under the Covenant*, 11 April 1985, para 5.
[216] HRCtee General Comment No. 27 (67*), Freedom of movement (article 12),* CCPR/C/21/Rev.1/Add.9, 1 November 1999.
[217] Ibid., para. 20. "This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons."
[218] HRCtee General Comment No. 27 (67), Freedom of movement (article 12), CCPR/C/21/Rev.1/Add.9, 1 November 1999, para 20.
[219] HRCtee Concluding Observations (Netherlands), ICCPR/C/NLD/CO/5, 22 August 2019.
[220] HRCtee Concluding Observations (Netherlands), ICCPR/C/NLD/CO/5, 22 August 2019, para 13.

The CERD-Committee recently confirmed this concern about the Netherlands' non-discrimination law in its 2021 Concluding Observations to the Netherlands report on its implementation of the obligations under CERD.[221] From this it can be derived that the Dutch legislation also is not in conformity with the definition in CERD.[222] It also raises concerns about the fact that anti-discrimination legislation is not "fully applicable" in the Caribbean territories of the Kingdom of the Netherlands and the absence of supervision of the implementation of anti-discrimination laws.[223]

Besides that, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance paid a visit to the Netherlands and indicated the impression of a 'Dutch paradox':

> "The reality therefore seems to be one in which race, ethnicity, national origin, religion and other factors determine who is treated fully as a citizen. To be more specific, in many areas of life – including in social and political discourse, and even in some laws and policies – different factors reinforce the view that to truly or genuinely belong is to be white and of Western origin. Individuals belonging to other racial and ethnic groups, such as people of African and Asian descent (who have been a part of the State for centuries), people of North African and Middle Eastern descent and people belonging to the Roma, Sinti and Traveller communities are confronted with characterizations that they are neither truly nor wholly Netherlanders. Such characterizations hold even when those individuals and their families hold full citizenship and have done so for multiple generations."[224]

Therefore, the Special Rapporteur recommends the Netherlands to ensure that every citizen is being treated equally in every aspect in law and society.[225] Besides that, education about its colonial past is crucial.[226]

2.3.4 UN expert statements on human rights and the consequences of slavery and colonialism

While the previous discussion mainly dealt with the obligations of states under the right to equality and non-discrimination, this section discusses the obligation of states to address causes of structural discrimination and the related right to a remedy. More in particular it discusses how recent UN expert reports have dealt with the consequences of slavery and colonialism for former colonizer states.

[221] CERD-Committee CERD/C/NLD/CO/22-24, 16 November 2021.
[222] CERD-Committee CERD/C/NLD/CO/22-24, 16 November 2021, para 7 and 8.
[223] CERD-Committee CERD/C/NLD/CO/22-24, 16 November 2021, para 9.
[224] Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2019 report, para 8.
[225] Id., para 20.
[226] Id., 2019 report, para 13.

Based on the UN Charter, the States in the Human Rights Council have appointed Special Rapporteurs and Working Groups dealing with specific themes. Some recent by such thematic experts deal with the long-term consequences of slavery and colonialism.

The UN Working Group of Experts on People of African Descent, which has published a range of reports, has pointed out in its 2018 report that '(i)nstitutional and structural racism and racial discrimination are the legacies of enslavement, colonialism, neo-colonialism and centuries of dehumanization. People of African descent are disproportionately discriminated against in the administration of justice."[227]

The report refers to the right to reparation: "People of African descent have a right to reparations, which should be proportional to the gravity of the violations and the harm suffered. The consequences of the trade in enslaved Africans, enslavement, colonialism, neocolonialism and discrimination go beyond mere financial inequalities. They include injustices, such as intergenerational health issues, disproportionately high illiteracy rates and the erasure of collective culture, history and identity. Reparations include the right to restitution, rehabilitation, compensation, and safeguarding and protection from future violations."[228]

The Working Group expresses particular concern for the risk 'of people of African descent making contributions to State funds, including through taxation, that could be used to pay reparations to descendants of enslaved Africans'.[229] It notes 'that some have taken the initiative of regretting or expressing remorse or presenting apologies and calls on members that actively participated in the transatlantic trade in enslaved Africans to pay reparations to their descendants, who continue to suffer the consequences of the slave trade and colonialism, and to contribute to restoring the dignity of the victims'.[230] It points out that 'States responsible for historical injustices must ensure that reparations are made for those injustices to people of African descent. In addition to financial compensation, those States should consider special measures (…).' It 'recommends the CARICOM 10-point action plan for reparatory justice as a guiding framework.[231]

Moreover, it notes that 'States should consider, where relevant, implementing a tax-relief scheme that avoids double taxation for people of African descent, while simultaneously easing the burden on successive generations of people of African descent'.[232] In its consideration of a draft declaration on the promotion and full respect of human rights of people of African descent it specified that it 'should call upon States to recognize the existence of their populations of people of African descent and the cultural, economic, political and scientific contributions they have made. It must stress the relationship between the legacy of the transatlantic trade in enslaved Africans and colonialism and the persistence of racism, racial discrimination, xenophobia and related forms of intolerance against people of African descent today. The draft declaration should also address the marginalization, poverty and exclusion faced by people of African descent, and their vulnerable condition owing to multiple and intersecting forms of discrimination. The draft declaration should underline the importance of

[227] Working Group of Experts on People of African Descent, Report on its twenty-first and twenty-second sessions, A/HRC/39/69, 15 August 2018, para 54.
[228] Id., para 61.
[229] Id., para 62.
[230] Id., para 77.
[231] Id., para 78.
[232] Id., para 79.

eradicating all forms of discrimination faced by people of African descent, including through the framework of the 2030 Agenda for Sustainable Development'.[233] It 'should emphasize that people of African descent, as a collective and as individuals, have the right to the full enjoyment of all human rights and fundamental freedoms as recognized in international human rights law. It should require all States to ratify the relevant treaties and ensure that national legislation is compatible with international human rights law'.[234]

In her 2019 Report, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance equally addresses 'the human rights obligations of Member States in relation to reparations for racial discrimination rooted in slavery and colonialism'.[235] She analyses how the failure to redress racism linked to slavery and colonisation still has discriminatory effects today and shows the impact of colonisation on current discrimination.[236] She argues that '(o)ne of the persisting legacies of slavery and colonialism remains the unequal application of the law to descendants of historically enslaved and colonized peoples'[237].The Rapporteur notes that "In addition to implicating individual wrongful acts, reparations for slavery and colonialism implicate entire legal, economic, social and political structures that enabled slavery and colonialism, and which continue to sustain racial discrimination and inequality today. That means that the urgent project of providing reparations for slavery and colonialism requires States not only to fulfil remedial obligations resulting from specific historical wrongful acts, but also to transform contemporary structures of racial injustice, inequality, discrimination and subordination that are the product of the centuries of racial machinery built through slavery and colonialism."[238]

The report describes how reparation schemes following abolition of slavery benefited the former 'owners' rather than provided reparation to those people they had enslaved: "In cases where States have pursued reparations for slavery and colonialism, they have often done so in a racially discriminatory fashion. Notable historical examples exist where whites who profited and benefited the most from chattel slavery and colonialism received monetary compensation, while non-whites and their nations were partially or wholly left without redress or were forced to make payment to former colonizers or enslavers. For example, after slavery was abolished in the colonies of the United Kingdom in 1833, about 3,000 families received £20 million, valued at over £16 billion today, for their loss of "property", in other words, enslaved Africans.7 At the time, those payments accounted for 40 per cent of the annual expenditure budget of the United Kingdom Treasury.8 In 1862, the President of the United States of America, Abraham Lincoln, signed the District of Columbia Compensated Emancipation Act, requiring the immediate emancipation of enslaved people in exchange for US$ 300 for each freed person payable to former slave owners.9 In less than a year, 930 petitions for compensation were wholly or partially approved, resulting in the freedom of nearly 3,000 enslaved people.10 The Compensated Emancipation Act also authorized the payment of US$ 100 to formerly enslaved people but only if they were willing to repatriate to Africa In 1825, newly independent Haiti

[233] Id., para 80.
[234] Id., para 81.
[235] Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, E. Tendayi Achiume, Reparation, racial justice and equality: Report to the General Assembly, A/74/321, 21 August 2019, Summary.
[236] Ibid., II. Introduction, paragraphs 6b), 8 and 14
[237] Special Rapporteur on contemporary forms of racism 2019 report, para 7.
[238] Id., para 8.

was forced into an agreement to pay 150 million gold francs to France in order to compensate French planters for "lost property" (land and enslaved people), an amount that was well in excess of the planters' actual financial losses.12 In short, racial discrimination has historically pervaded the consideration and implementation of reparative justice; the discriminatory pursuit of reparations is itself a product of the cemented and continuing legacy of colonialism and slavery.[239]

The Rapporteur notes: "Racial discrimination was also at the core of European colonialism." "European colonial domination, first in the Americas and then in Asia and Africa, eventually constructed race as "a supposedly different biological structure that placed some in a natural situation of inferiority to the others".[240] According to the Rapporteur, 'many contemporary manifestations of racial discrimination must be understood as a continuation of insufficiently remediated historical forms and structures of racial injustice and inequality'.[241]

The report invokes research noting that wealth disparities "are rooted in historic injustices and carried forward by practices and policies that fail to reverse inequitable trends."[242] It also states that it is 'not possible to determine the exact number of enslaved Africans that were transported to the Americas. Contemporary research places the estimate at about 12 million, 46 per cent of whom were taken to Brazil'[243] Thus, it zooms in on Brazil noting: "After the abolition of slavery, racial segregation, "whitening" policies and other forms of institutionalized discrimination against Brazilians of African descent preserved the racial hierarchies created by slavery."[244]

The third recent UN expert report is one from 2021 by the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. While this Rapporteur thus far mainly focussed on the obligation of states to appropriately respond to more recent violations, this report focuses specifically on the colonial context and the challenges of transitional justice in this respect [245] It explores the legacy of colonial systems on "indigenous" populations and the repression of Afro-descendant populations, as well as their current consequences.

The Rapporteur states that "Colonialism resulted in a State that perpetuated it through a legal, institutional and cultural apparatus that subjected colonized populations to discrimination, assimilation, criminalization and, in some cases, violence; and denied them basic rights such as ownership of ancestral lands and resources, and access to justice, health,

[239] Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, Report on human rights obligations of Member States in relation to reparations for racial discrimination rooted in slavery and colonialism, A/74/321, 21 August 2019, para 11 (references omitted in this quoted paragraph).
[240] Anibal Quijano and Michael Ennis, "Coloniality of power, Eurocentrism and Latin America", *Nepantla: Views from South*, vol. 1, No. 3 (2000), p. 533, quoted in Special Rapporteur on contemporary forms of racism 2019 report, 18.
[241] Special Rapporteur on contemporary forms of racism 2019 report, para 20, referring to A/CONF.189/PC.2/7.
[242] Special Rapporteur on contemporary forms of racism 2019 report, para 23, quoting from Laura Sullivan and others, "The racial wealth gap: why policy matters", Demos and Institute for Assets and Social Policy, 2016, p. 5.
[243] Special Rapporteur on contemporary forms of racism 2019 report, para 24, referring to Myrian Sepulveda Santos, "The legacy of slavery in contemporary Brazil", in *African Heritage and Memory of Slavery in Brazil and the South Atlantic World*, Ana Lucia Araujo, ed. (New York, Cambria Press, 2015).
[244] Special Rapporteur on contemporary forms of racism 2019 report, para 24, referring to Report of the Working Group of Experts on People of African Descent on its fourteenth session, Addendum, Mission to Brazil, A/HRC/27/68/Add.1, 4 September 2014, para 5.
[245] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Salvioli, Transitional justice measures and the legacy of human rights violations in colonial contexts, A/76/180, 19 July 2021,

education and economic opportunities".[246] This statement is very important because it is a confirmation by the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence *in general* concerning the continuing effects of colonialism. Regarding the establishment of reparations schemes for acts carried out during colonization, the report explains that some countries have begun to set them up, notably Belgium,[247] a country that will be discussed later in the report. The issue of accountability is also addressed.[248] With respect to the cases of France and Belgium, and the crimes committed during colonization, accountability is addressed as follows: "In France, the 1968 amnesty act and the restrictive definition of crimes against humanity have allowed impunity for torture and other crimes committed in Algeria. In Belgium, the complaint filed against Belgian officers for the death of Patrice Lumumba has remained pending at the pretrial stage for 10 years."[249] the report also refers to the United Kingdom, particularly because it had to pay compensation to Kenyan communities. The report explains: "The High Court of the United Kingdom of Great Britain and Northern Ireland ruled against the Government of the United Kingdom, which in its defence had argued that State responsibility for the grave violations of human rights that had been committed rested with the successor State and that the passage of time imposed a statute of limitations on criminal prosecution.[250] In 2013, the government agreed to settle the dispute by offering the amount of 20 million pounds in compensation, apologies for the damage caused, and the construction of a memorial in Nairobi."[251]

The Netherlands was also discussed in the report, with regard to the Indonesian Civil War and the crimes committed by the Dutch State during that period, and the issue of compensation offered:[252]

> "In the Netherlands, the courts rejected the statute of limitations argument put forward by the Government of the Netherlands in relation to violations committed by Netherlands soldiers during the Indonesian War of Independence (1945–1950). In response, the Government of the Netherlands offered compensation to the widows and some relatives of 11 Sulawesi men who had been executed and promised compensation of 5,000 euros for the children of any Indonesian executed during the war." [253]

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[246] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Salvioli, Transitional justice measures and the legacy of human rights violations in colonial contexts, A/76/180, 19 July 2021, para 10.
[247] Id., para 13.
[248] Id., para. 22-32
[249] Id., para. 26
[250] Id., para 27, footnote referring to Théophraste Fady, "The Mau Mau case: post-colonial justice on the Strand", *Strandlines*, 7 October 2019, available at www.strandlines.london/2019/10/07/post-colonial-justice-on-the-strand; and Leigh Day, "The Mau Mau case: five years on", available at www.lexology.com/library/detail.aspx?g=a376823b-224d-4551-821d-abb7f32c8065.
[251] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Salvioli, Transitional justice measures and the legacy of human rights violations in colonial contexts, A/76/180, 19 July 2021, para 27. This paragraph also notes that "Subsequent court decisions, however, have applied the statute of limitations set out in the Limitation Act 1980, preventing other Kenyan victims from pursuing their claims."(referring to the communications KEN 3/2021 and GBR 5/2021, which will be available at https://spcommreports.ohchr.org/Tmsearch/TMDocuments.)
[252] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Salvioli, Transitional justice measures and the legacy of human rights violations in colonial contexts, A/76/180, 19 July 2021, , para. 28.
[253] Idem, referring to Reuters, "Netherlands offers compensation to children of executed Indonesians", 19 October 2020, available at www.reuters.com/article/us-netherlands-indonesia-compensation-idUSKBN2741XY.

In line with its mandate, the Rapporteur pays particular attention to the right to truth. He observes, by reference to Belgium and France, that (t)ruth-seeking initiatives were also adopted in former colonizing Powers. In July 2020, the Federal Parliament of Belgium established a Special Commission to examine its colonial past, in response to the Black Lives Matter movement. Recently, the President of France reported on the creation of a Commission of Memory and Truth to review the country's colonial history in Algeria, and the opening of classified archives related to that period.[254] He observes that '(i)f the colonial legacy is to be satisfactorily addressed, truth commissions should prioritize facts that reveal connections between past violations with implications for present events (such as current economic and social injustices and outstanding grievances or claims). If this connection is not established, the truth-seeking exercise could lose political and historical credibility. This is no easy matter, as there can often be a chain of events that stretches over decades or centuries and facts that, by their nature, are subject to different interpretations; for that reason, serious and detailed studies must be carried out'.[255]

He also draws attention to the role of the EU: "It is worth noting that, in 2019, the European Parliament adopted a resolution on the fundamental rights of people of African descent in Europe, in which it "recalls that some Member States have taken steps toward meaningful and effective redress for past injustices and crimes against humanity" and "calls for the EU institutions and the remainder of the Member States to follow this example".[256]
Again in line with his mandate he discusses the substantive remedy of providing guarantees of non-repetition (or non-recurrence): "Legislative and institutional reforms that guarantee the effective enjoyment of the human rights of indigenous peoples and former colonized peoples, without discrimination, and favour their empowerment are State obligations and essential guarantees of non-recurrence."[257]

Next to legislative and institutional reforms he refers to education about the past: "Another important measure is the inclusion of information on the legacy of colonialism in curricula and educational material at all levels to ensure that society and future generations are aware of that past."[258] The report points out the importance of protecting and ensuring access 'to the cultural heritage of indigenous or formerly colonized peoples, including their narratives of violence suffered. For communities that have endured and survived gross and systematic human rights violations (genocide, apartheid, crimes against humanity), these experiences are often a crucial part of their history, culture and identity'.[259] He points out that '(i)nternational human rights law obliges States to protect a community's right to its cultural heritage and to

[254] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Salvioli, Transitional justice measures and the legacy of human rights violations in colonial contexts, A/76/180, 19 July 2021, para 43, by reference to civil society responses to the Rapporteur's questionnaire and to a newspaper article: France is confronting its history in Algeria", *The Economist*, 15 May 2021, available at www.economist.com/international/2021/05/13/france-is-confronting-its-history-in-algeria

[255] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Salvioli, Transitional justice measures and the legacy of human rights violations in colonial contexts, A/76/180, 19 July 2021, para 46.

[256] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2021), para 62, referring to EP Resolution 2018/2899 (RSP) of 26 March 2019.

[257] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2021), para 85.

[258] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2021), para 86, referring to General Assembly resolution 60/147, annex, principle 22.

[259] Ibid., referring to Pok Yin Chow, 2015. "Memory denied: a commentary on the reports of the UN Special Rapporteur in the field of cultural rights on historical and memorial narratives in divided societies", *The International Lawyer*, vol. 48, No. 3 (Winter 2015), pp. 191–213.

ensure that educational materials provide a fair, accurate and informative picture of indigenous peoples' societies and cultures'.[260]

In the conclusions the report connects contemporary discrimination with the colonial past:

> "The unacceptable idea of racial or national superiority continues to be explicit in some political discourse and implicit in many societies, including within the international community. It is essential to bring about cultural change based on the recognition of and a holistic approach to the violations of rights committed during the colonial past; this will furnish a vital tool for preventing and properly addressing contemporary discrimination and racism."[261]

This is then explicitly related to the mandate of truth, justice, reparation and guarantees of non-recurrence (and linked to earlier reports on the related notion of memorialization)[262]:

> "The responsibilities and expectations relating to efforts to address the legacy of violations of human rights and international humanitarian law in colonial settings through measures of truth, justice, reparation, memorialization and guarantees of non-recurrence differ among those States that were colonizing Powers, those that were colonies and are now independent nations, and those where the colonization of indigenous peoples and the oppression of people of African descent persist in different forms. As the Special Rapporteur details below, however, in all cases the authorities must take appropriate measures tailored to their specific contexts and responsibilities to respond promptly and effectively to the long-standing grievances of victims and affected communities."[263]

The report also specifies individual or collective reparations:

> "States that were colonizing Powers and States where the colonization of indigenous peoples and the oppression of people of African descent persists in various forms should consider mechanisms to redress the harm caused to victims and affected communities. Such reparations, whether individual or collective, should aim to be comprehensive and include the following:
> (a) Satisfaction, including restoration of the victims' dignity, recognition of the harm caused and the responsibilities involved, the dissemination of information in this regard,

[260] Ibid., referring to International Covenant on Economic, Social and Cultural Rights, art. 15, para. 1; General Comment No. 11 (2008) on plans of action for primary education (art. 14) (HRI/GEN/Rev.9 (Vol. I)); United Nations Declaration on the Rights of Indigenous Peoples (General Assembly resolution 60/147, annex), art. 15, para. 1; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (General Assembly resolution 47/135, annex), art. 4, para. 4.

[261] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2021), para 99.

[262] See e.g. Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Salvioli, *Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice*, A/HRC/45/45, 9 July 2020.

[263] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2021), para 100.

and the issuance of public apologies that meet the requirements set out in the Special Rapporteur's previous report to the General Assembly (A/74/147);
(…)
(d) Physical and psychosocial rehabilitation and access to essential rights, infrastructure and services that ensure a dignified life, including housing, health, education and access to water and sanitation."[264]

Next to reparations, the report also discusses the substantive remedy of guarantees or non-recurrence by identifying and reforming state standards, structures and processes[265] and by identifying and reforming 'the concomitant material, cultural and ideological conditions, including the revision of curricula'.[266] In particular, the report stresses that '(f)ormer colonizing Powers and the now-independent States must ensure that the legal and institutional frameworks and the material, ideological and cultural conditions in their countries do not reproduce stereotypes or discriminatory practices from the colonial period, or any other persistent form of racism or exclusion'.[267]

Finally, the report addresses the issue of accountability. Among others, '(f)ormer colonizing and settler States must ensure access to an effective remedy for victims of human rights violations related to colonialism and its continuing consequences, including racial oppression and violence, in their national courts so that legal complaints and claims for reparations for the harm suffered can be processed without legal or procedural obstacles'.[268]

2.4 Council of Europe

2.4.1 Introduction

The Council of Europe was the first European institution aiming to combat discrimination through its European Convention on Human Rights (ECHR), in particular article 14 ECHR.[269] All 47 Member States of the Council of Europe are legally bound to the human rights provisions of the ECHR.

The European Court of Human Rights (ECtHR) decides on individual complaints brought under the Convention. It assesses whether those provisions are respected. In this paragraph we discuss the European Convention and its rule on non-discrimination, first by naming the ancillary and self-standing non-discrimination rules applicable in the European

[264] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2021), para 107 under (a) and (d).
[265] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2021), para 111: 'States in which the colonization of indigenous peoples and the oppression of people of African descent persist in various forms must identify and reform State standards, structures and processes that perpetuate the oppression, the violence, the exclusion and the racism that affect those peoples".
[266] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2021), para 111.
[267] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2021), para 112.
[268] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2021), para 113.
[269] Within the Council of Europe there is a specific European Commission against Racism and Intolerance (ECRI), which is specialized in problems relating to discrimination based on race or ethnic origin. It drafts reports and recommends member states on action to be taken. Council of Europe Portal. "European Commission against Racism and Intolerance (ECRI)", accessed on 17 November 2021, https://www.coe.int/en/web/european-commission-against-racism-and-intolerance.

system (2.4.2), then the Court's recognition of direct as well as indirect discrimination (2.4.3); the types of distinctions covered by the non-discrimination principle (2.4.4); what types of justifications may be brought by states for making such distinctions (2.4.5); and how the Court considers certain distinctions as particularly suspect (2.4.6).

2.4.2 The self-standing and ancillary prohibition of discrimination in the ECHR

The European Convention on Human Rights aims to protect human rights and fundamental freedoms, its article 14 entitled *"prohibition of discrimination"* proclaims the respect of the convention without any differentiation based on *"sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"*.

However, this article cannot be invoked on its own. As noted, it is ancillary and must be invoked together with the claim of the violation of another right in the ECHR. For undocumented people this generally is article 8.

In 2000, the Member States also agreed on the 12th Protocol of the ECHR, containing more important provisions on anti-discrimination and, different from article 14 (which is ancillary), article 1 of Protocol 12 extends the scope of protection against discrimination to 'any right set forth by law'. It stipulates:

> 1.The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.[270]

Thus, by contrast to article 14 ECHR, Protocol No. 12 prohibits any discrimination without a need to link it to the violation of other rights protected by the Convention.[271] The Netherlands has signed and ratified this Protocol.[272]

2.4.3 Direct and indirect discrimination under the ECHR

The (ECtHR) recognises both direct and indirect forms of discrimination. Simply put, *direct discrimination* means, treating one person differently than another person who finds themselves in the same or a similar position. The difference in treatment is negative for the person who is

[270] Council of Europe, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1, see also ECtHR Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of Discrimination, Updated on 31 August 2021, para 19 ff.

[271] In *Biao* the ECtHR also stated that, thanks to Article 5 (2) of the European Convention on Nationality, which had been ratified by 20 countries, including Denmark, a trend toward a European standard aimed at eliminating discriminatory application of rules in matters of nationality between birth nationals and other nationals was underway, ECtHR *Biao v. Denmark*, 24 May 2016, App no. 38590/10, para. 132.

[272] Ratified by the Netherlands on 28 July 2004. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177.

treated differently from the rest.[273] The difference in treatment should be on basis of an identifiable trait that the individual or group in question have, which the person or people who are treated more favourably do not, or the other way around.[274] This means that the specific trait should be the reason why the person is treated differently.[275] This can be the case explicitly, but also implicitly but nevertheless intentionally.

By contrast, *indirect discrimination* is discrimination in effect, or impact discrimination. Sometimes, rules that seem to be neutral can actually negatively affect a certain group of people, even though that is not the goal of the rule.[276] Examples include job openings which are only open for people who speak a certain language. The rule is applicable to all applicants and does not aim at negatively affecting a certain group. However, the rule causes all people who do not speak the language to be excluded from being able to apply for the job. Indirect discrimination also takes place when two people who find themselves in two different situations, are treated identically.

In *Biao v. Denmark*[277] the ECtHR (Grand Chamber) found indirect discrimination. It found that Denmark had discriminated against some of its citizens. The Court found a violation of Article 14 of the European Convention of Human Rights (ECHR) read in connection with Article 8 of the Convention. This case concerns family reunification and discrimination between nationals. Mr. Biao, a Danish national of Togolese descent who is married to Ghanaian citizen, lived in Sweden and had a child who received Danish citizenship as a result of Mr. Biao's citizenship. In 2003 and 2004, their applications for residence visa in Denmark and, as a result, their family reunification, were denied. In January 2010, the Danish Supreme Court reaffirmed this denial.[278] The law in question here was the attachment requirement provided by the Danish Aliens Act, as amended in December 2003, which states that for a Danish citizen married to a third country national to have the possibility to obtain family reunification and the advantages of citizenship, he or she must demonstrate that he or she has greater links to Denmark than to any other nation by living in Denmark for at least 28 years. As a result of the 28-year rule, Danish citizens who had not been born in Denmark were treated differently from Danish people who had obtained Danish nationality from the moment they were born. The latter were free from having to show such a 'link'.[279] Because those receiving Danish nationality later in life "would largely be of other ethnic origins, that is, other than Danish," this treatment was also an indirect discrimination on the basis of race or ethnic origin.

2.4.4 Prohibition of discrimination: grounds of discrimination, including "other status"

Many international instruments include anti-discrimination sections. They all list explicit characters on which discrimination is prohibited and some offer more by including "other

[273] European Union Agency for Fundamental Rights and Council of Europe. "Handbook on European non-discrimination law". Luxembourg: Publications Office of the European Union, 2018, p. 22.
[274] Ibid, p. 22.
[275] Ibid, p. 22.
[276] Ibid, p. 30.
[277] ECtHR (GC) *Biao v. Denmark*, 24 May 2016, App no. 38590/10.
[278] See Pecorella, Giulia, "The European Court's Grand Chamber decision in Biao v. Denmark: A case of indirect discrimination against nationals of non-Danish ethnic origins". International Law Blog. 6 June 2016, at: https://internationallaw.blog/2016/06/06/the-european-courts-grand-chamber-decision-in-biao-v-denmark-a-case-of-indirect-discrimination-against-nationals-of-non-danish-ethnic-origins/
[279] ECtHR (GC) *Biao v. Denmark*, 24 May 2016, App no. 38590/10, para.25

status". Indeed, the ECHR (article 14) broadens the prohibition of discrimination by using this reference to 'other status'.

Even though discrimination on grounds of race/ethnicity may seem the most relevant legal framework on which to assess claims of discrimination of Surinamese people in The Netherlands, the "other status" character may be relevant in the framework as well.

The Council of Europe's European Court of Human Rights Registry's Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 displays how "other status" has been used to implement the prohibition of discrimination. Immigration status, for example, has been recognized as part of "other status" in article 14.[280] It is not necessary for there to be personal characteristics.[281] Then, a wide range of legal and other effects flow from a person's immigration status. Immigration has personal consequences, notably legal ones, as shown by the *Biao* case in which the ECtHR found that family life was not respected. In addition, the Danish new-citizen status of Mr. Biao had consequences since the law was very restrictive. This indicates that "other status" has also been referred to by the Court in the context of claims of violations of article 8 read in conjunction with article 14 on non-discrimination.[282]

2.4.5 Justifications for making distinctions

To decide whether a case concerns discrimination, the ECtHR asks itself the following questions:

> *"1. Has there been a difference in treatment of persons in analogous or relevantly similar situations – or a failure to treat differently persons in relevantly different situations?*
> *2. If so, is such difference – or absence of difference – objectively justified? In particular,*
> *a. Does it pursue a legitimate aim?*
> *b. Are the means employed reasonably proportionate to the aim pursued?"*[283]

A 'difference in treatment is discriminatory if "it has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised'.[284]

While the ECtHR may accept certain justifications offered by the state, these must be sufficiently specific and not suspect in themselves. Prejudice and preconceptions may not serve to justify distinctions, as was already made clear in early ECtHR case law.[285]

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[280] ECtHR *Hode and Abdi v. the United Kingdom*, App n°22341/09 (ECtHR, 6 February 2013) § 47; *Bah v. the United Kingdom*, App no. 56328/07 (ECtHR, 27 December 2011), § 46.
[281] European Court of Human Rights, "Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention", Updated on 31 August 2021, paragraph 189.
[282] *Biao v. Denmark,* App no. 38590/10 (ECtHR, 24 May 2016), para 130-140.
[283] European Court of Human Rights, "Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention". Accessed on 19 November 2021, https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.
[284] See ECtHR *Oršuš and Others v. Croatia* [GC], (no. 15766/03), 16 March 2010, para 156 and references therein.
[285] See e.g. ECtHR 28 October 1987, *Inze v Austria, Series A*, vol. 126, § 44. ECtHR 9 January 2003, *L.&V. v Austria*, judgment of 9 January 2003, (appl. Nos 39392/98 and 39829/98), para 52: "To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of

The Court has accepted distinctions made between EU citizens and citizens of states from beyond the EU, due to the special legal order created by the EU. In fact, the ECtHR already said so when this legal order was still that of the EU's predecessor the European Communities (EC).[286] Yet former citizens were in fact part of the EC and its legal order, making an argument based on geographical origin from beyond Europe particularly suspect.

The ECtHR also accepts the argument that preferential treatment of specific nationals in social security, based on a bilateral agreement justifies unequal treatment and does not violate article 14.[287] Indeed, it is imaginable that such a preferential treatment would be agreed upon bilaterally between a former colonising state and a newly independent state.[288]

2.4.6 Particular seriousness and suspect categories warranting strict scrutiny and requiring 'very weighty reasons'

The particularly serious nature of discrimination based on race or ethnicity has been shown, for instance, shown by the link that has been found with the prohibition of degrading treatment under article 3 ECHR. Already in 1981, in *East African Asians* v. *United Kingdom*[289] the (now abolished) European Commission on Human Rights adopted a report asserting that in some cases discrimination based on race or ethnic origin can result in a violation of article 3 ECHR, precisely a "degrading treatment". In this case a group of Asian descendants were living in East Africa, at the time part of the territory was colonized by the United Kingdom. As a consequence of East African countries' independence, Asian descendants living in East Africa no longer had a possibility of legal stay in those countries and neither in the United Kingdom. They had been discriminated on the grounds of their colour or race by the Commonwealth Immigration Act of 1968 and were not able to enter the United Kingdom even though they had a British passport, whereas people from East Africa with European roots (mostly white people) had the possibility to return to the United Kingdom.[290] The Commission concluded: "When it [the 1968 Commonwealth Immigration Act] was introduced into Parliament as a Bill, it was clear that it was directed against the Asian citizens of the United Kingdom and Colonies in East Africa and especially those in Kenya*"*[291] It found 'that the 1968 Act, by subjecting to immigration control citizens of the United Kingdom and Colonies in East Africa who were of Asian origin, discriminated against this group of people on grounds of their colour or race. [292] In fact, it noted 'the persons concerned were not aliens but were and remained citizens of the United Kingdom and Colonies. As such they had the same rights as other citizens. They were thus, as submitted by the applicants, reduced to the status of second-class citizens. [293] Here the Commission noted, article 3 was triggered as well: 'the racial discrimination to which the applicants have been

themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour."

[286] See e.g. ECtHR *Moustaquim v Belgium*, 18 February 1991, nr. 12313/8, para. 49.

[287] ECtHR, *Carson et al. v. United Kingdom*, 16 March 2010, nr. 42184/05, para. 88.

[288] Chapter 4 discusses how France has done so, in particular in its Agreement with Algeria after independence.

[289] ECtHR *East African Asians* v. *United Kingdom*, 3 EHRR 76, 1981.

[290] Portes, J., Burgess, S., & Anders, J. "The long-term outcomes of refugees: tracking the progress of the East African Asians". *Journal of Refugee Studies*, 2018.

[291] EComHR *East African Asians* v. *United Kingdom*, 3 EHRR 76, [1981], para 199.

[292] EComHR *East African Asians* v. *United Kingdom*, 3 EHRR 76, [1981], para 201.

[293] EComHR *East African Asians* v. *United Kingdom*, 3 EHRR 76, [1981], para 205.

publicly subjected by the above immigration legislation constitutes an interference with their human dignity, which in the special circumstances described above, amounted to "degrading treatment" in the sense of Article 3 of the Convention'.[294] Articles 5 (right to security) and 8 (right to respect for family and private life) ECHR also came into play. Indeed, the Council of Europe's Commission concluded that article 5 ECHR extended to the right to a full "protection from arbitrary interference by a public authority with an individual's personal liberty."[295] Moreover, family members already residing in the United Kingdom and Asians living in East Africa were denied reunion on the basis of the Commonwealth Immigration Act of 1968, violating article 8 ECHR.[296]

The approach of the European Commission on Human Rights of finding that in certain circumstances discrimination could constitute cruel treatment in violation of article 3 was later confirmed by the ECtHR.[297] In *Cyprus* v *Turkey* (2001) the ECtHR considered that "a special importance should be attached to discrimination based on race".[298] This is also shown by the level of scrutiny with which the Court deals with justifications offered by the State. Indeed, since *D.H. and others v Czech Republic* (2007) an important principle established by the Court's case law is that "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures".[299] In fact, '(w)here the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible'.[300]
In a case involving discrimination in education ('Roma classes'), the Court stated:

> "The Court considers that temporary placement of children in a separate class on the grounds that they lack an adequate command of the language is not, as such, automatically contrary to Article 14 of the Convention. It might be said that in certain circumstances such placement would pursue the legitimate aim of adapting the education system to the specific needs of the children. However, when such a measure disproportionately or even, as in the present case, exclusively, affects members of a specific ethnic group, then appropriate safeguards have to be put in place."[301]

In such case the Court examines 'whether there existed such safeguards at each stage of the implementation of the measures complained of and whether they were effective'.[302]

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[294] EComHR *East African Asians* v. *United Kingdom*, 3 EHRR 76, [1981], para 208.
[295] EComHR *East African Asians* v. *United Kingdom*, 3 EHRR 76, [1981], paragraph 222.
[296] Ibid., paragraph 232.
[297] See e.g. ECtHR *Cyprus v Turkey*, App no. 25781/94, 10 May 2001, para 310. See also ECtHR *Moldovan et al. v Romania*, 12 July 2005, 41138/98. For a similar approach see, e.g. UN Committee against Torture, *Dzemajl et al. v. Yugoslavia (Montenegro)*, 21 November 2002, UN Doc. CAT/C/29/D/161/2000.
[298] ECtHR *Cyprus v Turkey*, App no. 25781/94, 10 May 2001, paragraph 306.
[299] ECtHR *D.H. and others v Czech Republic* [GC], 13 November 2007, No. 57325/00, para. 176.
[300] ECtHR *D.H. and others v Czech Republic* November 13, 2007, No. 57325/00, para. 196. See also ECtHR *Sampanis and Others v. Greece* (no. 32526/05), 5 June 2008, para 69 and ECtHR *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, paras. 43-44.
[301] ECtHR *Oršuš and Others v. Croatia* [GC], 2010, § 157, referring to *Buckley v. the United Kingdom*, 25 September 1996, §76, *Reports* 1996-IV; *Connors, v. the United Kingdom*, no. 66746/01, 27 May 2004, §83; and ECtHR *Timishev, v. Russia*, nos. 55762/00 and 55974/00.
2005-XII), §56.
[302] ECtHR *Oršuš and Others v. Croatia* [GC], 2010, § 157, referring to *Sampanis and Others*, cited above, § 69.

In a similar vein the Court has pointed out that differences in treatment on the basis of gender or sexual orientation may only be justified by 'very weighty reasons'.[303] It has also qualified differences in treatment on the basis of nationality as suspect: "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention."[304]
In *Biao v Denmark* (2016) the Grand Chamber stressed once more that:

> "No difference in treatment based solely or to a significant extent on a person's ethnic origin is capable of being justified in a contemporary democratic society, and a difference in treatment based solely on the ground of nationality is allowed only on the basis of compelling or very weighty reasons."[305]

It concluded that the Government had "failed to prove that there were compelling or extremely important grounds unrelated to ethnic origin to justify the indirect discriminatory impact of the 28-year rule".[306] The Court stated that even taking into account the margin of appreciation of States, this regulation does have a disproportionately negative impact on those who gained Danish nationality later in life and are of non-Danish ethnic background.[307]

In other words, differences in treatment based on ethnic origin and other suspect classifications must be interpreted 'as strictly as possible'. States will only be able to justify differences in treatment in suspect categories by giving 'very weighty reasons' and some distinctions simply are 'not capable of being objectively justified' altogether.[308]

2.5 EU law

It is relevant to briefly mention the context of the European Union (EU), which has also dealt with the issue of discrimination, since The Netherlands, France and Belgium are members, and the United Kingdom was until recently. While it initially started as an economic community (1951/1957), in response to the second World War, it is now a political and economic union, with European Citizenship and the EU Charter of Fundamental Rights (2007). It has developed from six Member States to 27. The EU has expressed its attachment to fundamental rights within the EU, as well as to protection of human rights in its external relations.

Article 21 Charter of Fundamental Rights of the EU (2012) provides:

> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion,

[303] ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, § 78; *Konstantin Markin v. Russia* [GC], 2012, § 127; *Schalk and Kopf v. Austria*, 2010, § 97.
[304] ECtHR *Gaygusuz v Austria*, 16 September 1996, 17371/90, para. 42. See also e.g. *Koua Poirrez v. France*, 30 September 2003, 40892/98, par 46 and *Andrejeva v. Latvia*, 18 February 2009, nr. 55707/00, para. 87.
[305] ECtHR (GC) *Biao v. Denmark*, 24 May 2016, App no. 38590/10, para. 28.
[306] ECtHR *Biao*, para. 138.
[307] Ibid.
[308] In general, see Gerards.

membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 13 of the Amsterdam Treaty, which went into effect in 1999, confers to the EU the authority to enact legislation to counteract racial discrimination. It does so mainly through its Equality Directives.[309] Nevertheless, its specific legislation on non-discrimination, Directive 2000/43/EC on non-discrimination based on race or ethnic origin, explicitly rules out application to domestic immigration law decisions. Article 3, on the scope of the directive, sets out in paragraph 2:

> "This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned."[310]

Therefore, the Directive is not applicable to the admission of former Dutch nationals and to treatment arising from their legal status as third country nationals.

While undocumented Surinamese in the Netherlands cannot depend on the Directive, the discussion on discrimination within the EU context does illustrate the general principles on equality and non-discrimination. It also confirms that in EU law indirect and *de facto* forms of discrimination are recognised as prohibited, next to direct discrimination. In that sense, the principle of substantive equality is recognised.[311]

The following is a thought exercise and not the focus of our research, which in this chapter concerns the current international law framework. Yet we would like to note that it could be argued that when an EU Member State makes it easier for former citizens of European descent rather than former citizens born in a country that used to be part of its jurisdiction, this should be qualified not so much as 'immigration policy', but as *suspect* immigration policy.

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[309] See the 'Race Directive': Directive 2000/43/EC (non-discrimination based on race or ethnic origin) and the 'Framework Directive': 2000/78/EC (non-discrimination in employment and occupation). See further, e.g. Maliszewska-Nienartowicz, Justyna. "Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line? ." iises.net, 2014. https://www.iises.net/download/Soubory/soubory-puvodni/pp041-055_ijoss_2014v3n1.pdf. The EU also deals with migrant integration and inclusion. See e.g. https://ec.europa.eu/migrant-integration/news/ec-reveals-its-new-eu-action-plan-integration-and-inclusion-2021-2027_en

[310] See also para 13 of the Directive's preamble: "To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation."

[311] One CJEU case clarifying indirect discrimination on grounds of racial and ethnic origin is CHEZ Razpredelenie Bulgaria AD case, ECLI:EU:C:2015:480. One case clarifying indirect discrimination on grounds of racial and ethnic origin . The complainant was living in a district composed pf a majority of Roma people in Bulgaria and the electricity meters had to be installed by the CHEZ (electricity company in Bulgaria) for free but this did not happen in the specific Roma District. The CJEU refused the allegiance of "direct discrimination" but studied the possibility of a breach under "indirect discrimination", para 110. In the paragraph 68 of the case, the CJEU explained that Directive 2000/43 was relevant for the case under prohibition of discrimination based on ethnic origin (para 68). The only exceptions recognized are the ones "necessary" with a "legitimate aim", proportionate, appropriate according to the CJEU (paras 111-121). In the CHEZ case, the discrimination did not fulfill all those requirements.

The international and European (ECHR) framework would indeed treat this type of distinction as suspect. Making it easier for former citizens whose place of birth was in Europe could be seen as a *confirmation of the past*. By contrast, making conditions to regain citizenship easier when the place of birth had been on the territory of a former colony could be seen as meeting a positive obligation *in light of/responding to the colonial past*.

The question then arises whether the EU can be presumed to have excluded such suspect policy from scrutiny. Such distinction between two groups of former nationals is in fact based on place of birth, and disadvantages people who had been born as citizens in former colonies over people who had been born as citizens in Europe. This is a distinction of such suspect nature that it is contrary to article 21 Charter of Fundamental Rights, as well as the spirit of Directive 2000/43/EC. Its object and purpose is clearly described in article 1: "The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment." For these reasons it could be questioned whether article 3, paragraph 2 of Directive 2000/43/EC (non-discrimination based on race or ethnic origin) can be held to allow also excluding this type of situation from the material scope of the Directive, simply by using the obscuring label 'third-country nationals'.

2.6 Inspiration from the Inter-American system

Apart from drawing inspiration from relevant case law developed in other *domestic* jurisdictions, there is also an established practice of consulting case law of regional human rights courts that equally is not applicable, but certainly relevant. This case law may confirm underlying general principles. It may show a direction for, or confirm the interpretation of the meaning of applicable international law.[312] Or it may simply provide inspiration for approaches to remedying wrongs. We will draw briefly from the Inter-American system, of which Suriname is part. While the Inter-American Court of Human Rights has pronounced itself more on nationality and naturalisation than on legal residence, what it has said about discrimination does appear relevant as well with regard to distinctions made in regulations based on a person's place of birth.[313]

Already in an old Opinion (1984) it stressed that its 'conclusion[314] should not be viewed as approval of the practice which prevails in some areas to limit to an exaggerated and

[312] See e.g. Eva Rieter, *Preventing Irreparable Harm, Provisional measures in international human rights adjudication*, Intersentia (2010) p. 1086; Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies (2020) *21 German LJ* 357; Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press 2018); Michael Hamilton and Antoine Buyse, 'Human Rights Courts as Norm-Brokers' (2018) 18 *Human Rights Law Review*; Dinah Shelton, 'The human rights judgments: the jurisprudence of regional human rights tribunals – lex specialis or lex regionis?' in William A Schabbas Shannonbrooke Murphy (eds), *Research Handbook on International Courts and Tribunals* (Edward Elgar Publishing 2017).

[313] See e.g. IACtHR Case of *Yean and Bosico Children v. The Dominican Republic*, judgment of 8 September 2005, paras 3, 140-142 and 260.

[314] IACtHR *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of 19 January 19 1984, Series A No. 4. The Court noted that the basis of such a distinction between 'by birth' and 'by naturalization' was not obvious: "Since nationality is a bond that exists equally for the one group as for the other, the proposed classification appears to be based on the place of birth and not on the culture of the applicant for naturalization." See para 61. The Court discussed the compatibility with the ACHR of proposed legislation distinguishing between Central Americans, Ibero-Americans and Spaniards by birth and by naturalization. The distinction is of a different kind, and it is an old opinion, leaving a wide margin of appreciation to the State and concluding that in the circumstances the distinction would not constitute discrimination. The Court as a whole also expressed doubts: the basis of such a distinction between 'by birth' and 'by

unjustified degree the political rights of naturalized individuals. Most of these situations involve cases not now before the Court that do, however, constitute clear instances of discrimination on the basis of origin or place of birth, unjustly creating two distinct hierarchies of nationals in one single country."[315]

This statement appears pertinent in the context of distinctions made between former citizens 'on the basis of origin or place of birth'. Moreover, in 2013 the Inter-American Court also discussed impact discrimination:

> "(…) States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons."[316]

The Inter-American system is particularly well known for its concrete instructions to states to adapt legislation and take specific measures guaranteeing non-repetition, conducting hearings on merits and reparations and issue judgments requiring real apologies, as well as substantive reparation, including trust funds.

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naturalization' was not obvious: "Since nationality is a bond that exists equally for the one group as for the other, the proposed classification appears to be based on the place of birth and not on the culture of the applicant for naturalization." and: "Although the distinctions made are debatable on various grounds, the Court will not consider those issues now. Notwithstanding the fact that the classification resorted to is more difficult to understand given the additional requirements that an applicant would have to meet under Article 15 of the proposed amendment, the Court cannot conclude that the proposed amendment is clearly discriminatory in character", both in para 61 of the Advisory Opinion. Judge Buergenthal, who upon expiry of his term as Judge and President of the Inter-American Court became a member of the UN Human Rights Committee and subsequently a judge at the International Court of Justice, attached a strong dissent, considering that there was indeed incompatibility: "The manner in which the Court has interpreted Article 24 of the Convention, and I agree with that interpretation, in my view compels the conclusion that the distinction sought to be established is discriminatory because it is disproportionate and not reasonably related to the governmental objective sought to be accomplished by it. In reaching this conclusion, I do not deny the right of a State Party to the Convention to adopt legislative classifications based on the historical, cultural, social, linguistic and political ties that bind Central Americans, Spaniards and Ibero-Americans. No one familiar with this region of the world would deny the reality of these ties, notwithstanding the fact that exaggerated claims are at times made in its name. But given this reality and the standards that govern the interpretation and application of Article 24 of the Convention, I have no choice but to recognize, even if I wished to question the wisdom of the proposed legislation, that it is not incompatible with the Convention for Costa Rica to treat other Central Americans, Spaniards and Ibero-Americans differently for purposes of naturalization than it treats nationals of other nations. But when Central Americans, Spaniards and Ibero-Americans are classified differently depending upon whether they are nationals of these countries by birth or by naturalization, I must ask, applying the standard of interpretation the Court adopts, how reasonable and proportionate the classification is, given the legitimate governmental objective sought to be achieved." para 4 of his dissent.

[315] IACtHR Advisory Opinion 1984, para 62. Another statement by the Court concerns regulations that may lead to *indirect* discrimination: "The Court feels compelled to emphasize, however, that in practice, and given the broad discretion with which tests such as those mandated by the draft amendment tend to be administered, there exists the risk that these requirements will become the vehicle for subjective and arbitrary judgments as well as instruments for the effectuation of discriminatory policies which, although not directly apparent on the face of the law, could well be the consequence of its application." IACtHR Advisory Opinion 1984, para 63.

[316] IACtHR *Juridical Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of 17 September 2013, para 103. Generally, see also, e.g. Inter-American Commission on Human Rights & Organizations of American States, Compendium on Equality and Non-Discrimination. Inter-American Standards, (February 2019), 147, https://www.oas.org/en/iachr/reports/pdfs/compendium-equalitynondiscrimination.pdf.

2.7 Conclusion

This chapter discussed the relevant international and European human rights framework, in particular on (in)direct discrimination on grounds of race or ethnicity (or 'other status') independently or in relation to other human rights, as a first step in answering the question what, if any, are the human rights obligations of the State towards undocumented Surinamese people in The Netherlands, as former Dutch subjects.

This framework consists of, firstly, the UN human rights treaties, in particular the right to equality and the prohibition of discrimination under CERD and the ICCPR. The focus was on direct and indirect discrimination and the various grounds of discrimination. The authoritative interpretations of these treaties by independent experts appointed by State parties, including in General Comments and decisions in individual cases, have confirmed the importance of the principle of non-discrimination and the fact that non-discrimination can consist of both direct and indirect discrimination. Independent thematic experts appointed by the UN Human Rights Council have expressed themselves on the link between structural discrimination and the colonial past and the remedies that may be warranted in this respect. As noted, the ICJ seems to have digressed from this approach regarding discrimination between nationals and non-nationals, but in any case, the States concerned have to meet their obligations under CERD when it comes to discrimination between non-nationals on the apparent basis of ethnicity, and under the ICCPR when it comes to an open-ended list of categories, including 'any other status'.

Moreover, the states concerned have similar obligations under the ECHR, Article 14 in conjunction with another article in the Convention, or Protocol 12 with its free-standing non-discrimination principle. The authoritative interpretations by the ECtHR, among which *Biao*,[317] are significant here. This Court's judgments emphasise that distinctions based on certain categories, such as ethnicity, are inherently suspect.

[317] ECtHR *Biao v. Denmark*, App no. 38590/10 (ECtHR, 24 May 2016.

Chapter 3. An assessment of the migratory history and admission policy of former Dutch nationals based on the international anti-discrimination framework

3.1 Introduction

In the previous Chapters we discussed the migratory history and admission policy of the Netherlands towards Surinamese people, being former Dutch citizens, in chronological order, as well as the international human rights framework related to non-discrimination and residency rights of former citizens. We combine our findings to assess them in the light of the decolonisation of Suriname in part 1 of this Chapter (3.2). In part 2 we analyse whether the developments and events referred to in part 1 compatible with the international anti-discrimination framework, as set out chapter one (3.3).

We start part 1 by analysing our findings of the migratory history between the fifties and 1975. We describe the changing sentiment and opinions in society and politics about the ties between Surinamese and the Netherlands. After that, we analyse the "Kamerstukken en Handelingen", focussing in particular on what has been said by the Members of Parliament, and that which has not been made explicit. We examine at these statements in light of the decolonisation of Suriname. Subsequently we try to define the motivations behind the Toescheidingsovereenkomst, and discuss the correlation between the Toescheidingsovereenkomst and the drafting of a new law regarding naturalisation, and the changing attitude towards migration from Suriname in general. We support our findings by reference to the allocation of nationalities when Indonesia became independent (3.2.1). Finally, we analyse the evolution of the Dutch provisions regarding the admission of Surinamese people, and former Dutch citizens in general (3.2.2).

In Part 2, we use the findings presented in part 1 and analyse whether they constitute an infringement of the international framework as presented in chapter 2 (3.3).

3.2. Part 1: migratory history and admission policy of former Dutch nationals

3.2.1. Migratory history

As described in Chapter 1, the attitude of the Dutch government towards the migrants from Suriname became significantly less tolerant from the 1960's onward. Where previously the country had actively encouraged people from Suriname to come to the Netherlands, in the first years of the 1970s the administration considered introducing a strict immigration policy towards people from Suriname. This policy never saw the light of day, mainly because Suriname gained its independence, rendering such a policy useless.

There is a contradiction between the promise made by the Dutch government during the negotiations about the independence, that stated that it would sustain a gradual admission policy for Surinamese people after the independence, and the unmentioned motivations of the new naturalisation policy during the oral proceedings in the Dutch parliament which took place around the time of the independence. The Dutch government had in fact promised that the strict provisions about the allocation of nationality in the TOS would be compensated by a tolerant admission policy. There was a 'liberal admission policy' between 1975 and 1980, but after 1980

applications from Surinamese were processed strictly and they were treated the same as other third country nationals, despite the ties they had with the Netherlands and the promises that were made.

The 'wait and see' attitude the Dutch government took in the oral proceedings of the Wijziging van de wet op het Nederlanderschap en het ingezetenschap' (translation: Modification of the law on Dutch nationality and the residential status) can also been seen in light of the independence. Yet Secretary of State Zeevalking wanted to await the independence of Suriname when drafting a new naturalisation policy, of which we cannot see the relevance. If former Dutch nationals were treated in a certain way, that should not have to change now a big group of Surinamese people would also become former Dutch nationals. Zeevalking stated that he wanted to "find a way to prevent undesirable developments that might happen from occuring". As we mentioned earlier, he based this on the fact that "in the past big floods of Dutch nationals came to the Netherlands and without the addition in the law, it would be too easy for former Dutch nationals or subjects to be granted the Dutch nationality, without even needing to have stayed here for five years and having a "vestigingsvergunning". This has led to undesirable situations in the past and we should be able to face this problem. This is the only practical reason for adding another element to the new provision." We assume that by mentioning "big floods of Dutch nationals in the past", he referred to the expected influx of Surinamese migrants that was expected after the country's independence. He however, refused to mention this explicitly.

This also relates to the assumption made by Hamid Ahmid Ali, that the independence of Suriname and the TOS were a migration policy rather than a mere nationality agreement.[318] From the migratory history from Suriname to the Netherlands we also believe that the independence became all about the limitation of a migratory movement.

Comparisons can be made between the admission policy of former Dutch nationals from Indonesia after Indonesia's independence and our case. It is true that the Dutch government did provide the spijtoptanten who were in distress in Indonesia with a residence permit. However, the Dutch government had actively tried to convince Indo-Europeans to opt for Indonesian nationality. This shows a reluctance to admitting people from the colonies into society in the Netherlands.

As to the changed policies regarding elderly, there is no reason to believe the ouderenbeleid was abolished to scale down the migration flow from Suriname, but it did affect the possibilities on family reunification with elderly parents of the group of Dutch nationals with a non-western background in particular. Not only Surinamese Dutch suffer from this abolition, also other groups of Dutch with a non-western background experience this, like people with a Moroccan background. Even though there is no relation with the independence processes of Suriname, this abolition caused an extra restriction for Surinamese people or Dutch nationals with a Surinamese background and it comes on top of the other restrictions.

3.2.2. Admission policy

[318] Hamid Ahmid Ali, "De Toescheidingsovereenkomst inzake nationaliteiten tussen Nederland en Suriname", (PhD diss. Universiteit Utrecht, 1998), 28.

The independence of Suriname created a large group of former Dutch nationals. The Netherlands did have provisions in place for dealing with the admission of 'spijtoptanten' born in Indonesia, but the admission of other former Dutch nationals was regulated in directives which gave the secretary of state a large margin of appreciation.[319] The new group of migrants that was created after the independence of Suriname explains the wish of the Dutch government to want a new, properly organised policy regarding their admission. The way this policy was structured however, leads us to believe that the Dutch administration did not want the majority of former Dutch nationals from Suriname to come to the Netherlands.

The Vc '82 shows that the applications of those people who could not apply for a permit on grounds of the liberal admissions policy, were processed in the same way as regular applications for residence permits. At the time, the admission of foreigners was restrictive, and people were not admitted unless they could be of economic value to the country. This policy became even strict in the Vc 94. The family reunification rule based on the liberal admissions policy, as described in B10/2.2.3. Vc ('82), was revoked. Additionally, although the Vc now included a provision of admission for former Dutch nationals who were not born in the European part of the Dutch Kingdom, the requirements that had to be met were high. The requirement that one should either have enjoyed education in parts of the *current* Kingdom, could indicate a reluctance of admitting former Dutch nationals from Suriname, since education in Suriname before 1975 was focussed mainly on The Netherlands. The fact that people from Suriname nowadays do not need to pass the civic integration exam when having enjoyed education in Suriname shows us that the educational system there is, even now, oriented towards Dutch language and culture (article 16 (3) Vw). Suriname having been part of the Kingdom, the education had not been vastly different from that on the islands that were still part of the Kingdom at the time, such as Aruba. Possibly, former Dutch nationals from Suriname could be admitted because of possible special ties to The Netherlands. This provision however, is worded vaguely and attests to a wide margin of appreciation granted to the State Secretary dealing with applications based on this provision. Consequently, the formulation of these provisions indicates a resistance to admission of Surinamese people who used to have Dutch nationality.

The Vc '94 adds the requirement that former Dutch nationals should live in a country of which they are not a subject. We have looked for government documents in which this change is discussed, but have not been able to find them. We estimate that the provision was added to narrow the group of people who were able to apply on grounds of this provision. This however, remains a guess.

The cases regarding the question whether being born in Suriname of Indonesia when they were still part of the Kingdom is the same as being born in the Kingdom, European part, are interesting for a number of reasons. The court of first appeal in the 2008 case gives a reason as to why the lawmakers differentiated between being born in the Kingdom of Europe and other parts of the Kingdom, stating that the government thought people from different cultures would have more trouble integrating into Dutch society than former Dutch people born in Europe would. This might indicate a hostile attitude towards people from different cultures.

[319] In this case, other former Dutch nationals refers mainly to people who had lost their Dutch nationality in other ways than because of the independence of Indonesia.

Additionally, the argument can be seen as flawed since the majority of people born as Dutch nationals in the colonies enjoyed Dutch education, and grew up in a country which was heavily influenced by Dutch culture since these countries were part of the Netherlands.

3.3. Part II: application to the international anti-discrimination framework and compatibility with the UN recommendations

Several authors have argued that the way the Dutch government has treated Surinamese former Dutch nationals can be seen as discriminatory.[320] In the previous paragraph, we discussed the policies and changing attitude towards people from Suriname. We also looked into the changes made in the policy regarding admission of former Dutch nationals and tried to uncover the reason as to why these changes were made. In this part, we use the international legal framework as set out in Chapter 2 and the information as set out in Chapter 3 and answer the question whether art 3.51 (1) (d) Vb is compatible with the international legal framework. The possibly discriminatory part of the previously mentioned article is the requirement that a person needs to be born in the Netherlands. Several courts have ruled in their case law that being born in the Netherlands in this case means that a person should be born in the European part of the Netherlands.

We use the CRvB case of April 1st, 2016, as a starting point. In this case the same distinction has been made between the European and overseas part of the Kingdom of the Netherlands, in which the Court ruled this to be indirectly discriminatory. We analyse the argumentation of the Court and the opinion of the *Comissie gelijke behandeling* (CGB). Dutch nationals who have lived in the Netherlands their whole lives are automatically ensured for the AOW (state pensions) because of their residence in the Netherlands. Several people born as Dutch nationals in Suriname, who lived in Suriname between 1957-1975 (then still a part of the Dutch kingdom), did not receive full state pension because they lived outside of the European part of the Dutch kingdom. In the previously discussed 2016 CRvB case, the applicant argues that this provision discriminates on ground of residence or race.[321] The court finds that there is no unjustifiable violation and refers to reports by the CGB to support its arguments.

In a 2012 report, the CGB argues that, although the provision is indirectly discriminatory, there is an objective justification for it.[322] It argues that the requirement to live in the European part of the Netherlands is made to respect the autonomy of the other countries in the Kingdom, which were all given the autonomy to regulate their own state pension. Additionally, the provision is also deemed justifiable because it allows the government to more or less predict how much money will be needed to finance all the people eligible for the state pension.[323]

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[320] K. Groenendijk, "Minderhedenbeleid in een onwillig immigratieland," *Aers Aequi* 1981, p. 541. Mr. K. Groenendijk argues that a policy change in 1979 would disproportionately disadvantage former Dutch nationals from Suriname and Indonesia. Mr. A Kuijer and J.D.M. Steenbergen argued that the rule that Indonesia and Suriname were not considered to be part of the kingdom for purpose of the definition of being a former Dutch national, was a violation of art 1 of the Dutch constitution (in A. Kuijer and J.D.m. Steenberger, *Nederlands Vreemdelingenrecht,* (Nederlands Centrum Buitenlanders, 1999), p. 130.
[321] CRvB April 1, 2016 para. 4.2
[322] Rikki Holtmaat (ed.) *Gelijke Behandeling 2012, Kronieken en Annotaties*, (Oisterwijk: Wolf Legal Publishers 2013), 45
[323] Ibid.

Although the argumentation by the CRvB in the April 2016 case is partially flawed, the CGB argumentation is compatible with the international legal framework.[324] When looking at the ECtHR's discrimination test (as explained in par. 2.4.2), it justifies discriminatory provisions if they are objectively justified, meaning they should pursue a legitimate aim and are proportionate to the aim pursued. This means that even though the rule is indirectly discriminatory, it is allowed.

The case discussed in the previous paragraph is very similar to the case we are analysing. However, there is one important difference. In our case, the Dutch government factually does not consider people born in the overseas territories before the independence to be former Dutch nationals in the context of 3.51 (1) (d) Vb. In the CRvB case, people who lived outside the former Dutch Kingdom in Europe were not considered to be former Dutch inhabitants in the context of that state pensions' provision.

Because of this subtle difference, we cannot directly take the same conclusion drawn by the *CGB* – the state pension provision being, although justifiably so, indirectly discriminatory, and apply it to art 3.51 (1) (d) Vb. Even though it is a strong indication that the latter might be indirectly discriminatory as well, that conclusion cannot be drawn without further discussion. Therefore, we will apply the international framework on 3.51 (1) (d) Vb in order to find whether there are (indirectly) discriminatory aspects.

Our analysis of the legal history strongly indicates a direct distinction based on place of birth, because a direct distinction is made between 'place of birth' in the European part and the overseas part of the Kingdom of the Netherlands of former Dutch nationals. It discriminates between two groups of former citizens, by making it easier to apply for a residence permit for people born in the European part of the Netherlands. The distinction has the effect of discrimination based on colour, ethnic background and descent, since the majority of the population is mostly non-white and particularly of African and Asian descent. It appears to us that this distinction was not an unwanted side effect, but consciously made legislation which intends to distinguish between groups. Both race and descent are grounds for discrimination recognised by the CERD-Committee. According to this Committee, immigration policies should not have the effect of discrimination based on race or descent. Furthermore, the Committee also states that the status of former citizens should be regularised. It points out that people of African descent are particularly vulnerable in this situation.

Moreover, when assessing whether a regulation or practice is discriminatory it has stressed that it is important to scrutinize the whole decision-making chain.[325]

As a state party to the ICCPR, the Netherlands is equally obligated to combat racial discrimination and distinctions made based on descent. In *Rosalind Williams Lecraft/Spain* (2009), the ICCPR Committee stipulated that discriminatory conduct based on skin colour, is an infringement of a person's dignity. This conduct is said to interfere with active antidiscrimination policies. Even though the case concerns ethnic profiling, it is still relevant in

[324] The CRvB argues in this case that the provision is not discriminatory because it does not intend to discriminate. This is flawed, because the intention behind a provision does not mean that the effect of the provision cannot be discriminatory.
[325] CERD *Ms. L. R. et al. (represented by the European Roma Rights Center and the League of Human Rights Advocates) v Slovak Republic*, CERD/C/66/D/31/2003, 10 March 2005, para 10.7.

this context as well because the provisions concerning former Dutch nationals are particularly harmful to a group of non-white citizens and former citizens.[326]

The Committee also states that the definition of 'own country' in Article 12 (4) ICCPR (which dictates that no one should be arbitrarily prevented from entering their own country) should be wider than meaning the country of which the person in question is a national. In this situation,[327] this would mean that Surinamese former Dutch nationals should not be treated like other aliens, but that their descent and special ties to the Netherlands obligate the Dutch government to install more accessible residence permits for the group. This is in line with the observations made by the UN Special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance in a visit to the Netherlands. These observations show that the Netherlands is still struggling to accept non-white people of non-European descent as a full and valued part of Dutch society. It seems that article 3.51 (1) (d) Vb was drafted with a similar mindset.

Besides the fact that the provision is not in line with the UN antidiscrimination framework, the Netherlands has also neglected to follow certain recommendations for former colonizers made by the UN. Because of the specific distinction made between place of birth, the provision affects the groups which have suffered from colonialism most in the past. Rather than having special provisions in place to take this history into account, former Dutch nationals who are not of European descent have to meet the same requirements as other third country nationals when applying for a residence permit. This indicates that the Dutch government does not try to accommodate the affected former Dutch nationals, even when various UN Rapporteurs have pointed out that former colonisers should offer reparations to those affected by racial discrimination and by ignoring the fact that these people have special ties with the Netherlands.[328]

Considering the framework of the Council of Europe, the ECtHR set up a discrimination test, as explained in paragraph 2.4.2. Whether an indirectly discriminatory provision is allowed, depends on whether it can be seen as objectively justifiable. In order to answer the question whether the indirect discrimination of art. 3.51 (1) (d) Vb is objectively justifiable because of a 'reason' the Dutch government had, the motivation behind drafting the article should be examined. However, there is no Explanatory Memorandum or anything similar to be found of article 3.51 (1) (d) Vb that indicates why a distinction was made between former Dutch people being born as citizens in the European and non-European part of the former Kingdom of the Netherlands.

In the 2008 CRvB case discussed in paragraph 1.3.5, the reason that was given by the Dutch government in making the difference between inhabitants of the European part of the Kingdom and the non-European part, was because they thought people from different non-European cultures would be having more trouble integrating in the Netherlands than people with European roots. However, the Court's argumentation did not contain any research which

[326] See in general also, e.g., K. de Vries and T. Spijkerboer, 'Ik zie ik zie wat ik niet zie, etnisch profileren en structurele rassendiscriminatie in het migratierecht', *NJB* 2022/459, afl. 8, pp 457-525.
[327] General Comment no. 27 (67), *Freedom of movement (article 12)*, CCPR/C/21/Rev.1/Add.9, 1 November 1999, §20.
[328] Special Rapporteur Racism, Racial justice and equality (2019 Report), A/74/321, 21 August 2019 ; Special Rapporteur truth, justice, reparation and guarantees of non-recurrence (2021), Transitional justice measures and addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts, report to the General Assembly, A/76/180, 19 July 2021, §99.

shows that people from non-European cultures have trouble integrating into Dutch culture.[329] Still, this sentiment has been witnessed in the Netherlands for a longer period of time, as indicated in paragraph 1.2.1. and 1.2.5.[330]

Thus, in order to answer the question whether the discrimination in the provision is objectively justifiable, we have tried to find a justification, yet other than the reason given in the above case, we have not found such justification, although there seems to have been an unmentioned motivation for the regulation. One could say that if any justification made at the time cannot be easily pinpointed, it would be rather unconvincing for the State to prepare one now on hindsight, based on stereotyping and unfounded assumptions about integration, assimilation and Dutch society.

It should also be noted that the ECtHR has ruled in some relevant cases. The *Biao* case in particular discusses a situation in which naturalised people were being treated indirectly differently in realising family reunification than people being born with the Danish nationality, which led to discrimination based on race or ethnic origin. By using the 28-year rule in Denmark, an unjustifiable distinction was made between in fact two equal groups of citizens, which shows similarities with our case where a distinction is made between two groups of former Dutch citizens, because of an alleged lack of cultural ties with the Netherlands.

The distinction on the basis of place of birth, as made in the Dutch regulation and practice, could constitute *de facto* discrimination on the basis of ethnicity. As discussed in chapter 2.4, the ECtHR has repeatedly stressed that a difference in treatment that is based exclusively or to a decisive extent on ethnic origin is not 'capable of being objectively justified in a modern democratic society built on the principles of pluralism and respect for different cultures'.[331] In a similar vein it has pointed out that differences in treatment on the basis of gender or sexual orientation may only be justified by 'very weighty reasons'.[332] Thus, differences in treatment based on ethnic origin must be interpreted 'as strictly as possible.'[333] This is a distinction that requires strict scrutiny, or as the ECtHR would put it, the state has to put forward 'very weighty reasons' for the distinction. In fact it could be argued that they simply are 'not capable of being objectively justified'.

In the alternative, the distinction between former citizens on the basis of place of birth could in any case qualify as discrimination based on 'other status', yet it could be argued that place of birth in this setting so closely relates to distinction on the basis of ethnicity that justifications by the state for such distinctions would require 'very weighty reasons', states will only be able to justify differences in treatment based on other suspect characteristics such as gender by 'very weighty reasons'.

There are no indications in the legislative history justifying the purpose of the legislation as objective and reasonable. There *are* contrary indications to the effect that the legislation may

[329] Moreover, there is the general question what is integration, into what, and whether it should be one-sided.

[330] In the sixties and seventies, the sentiment that integration into Dutch society would be problematic was already present. This is contrary to several research reports from that time. It was also a reason for the abolishment of the 'ouderenbeleid' where it again was not based on proper research.

[331] ECtHR *D.H. and Others v. the Czech Republic* [GC], 2007, § 176; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, §§ 43-44.

[332] ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, § 78; *Konstantin Markin v. Russia* [GC], 2012, § 127; *Schalk and Kopf v. Austria*, 2010, § 97

[333] ECtHR *D.H. and others v Czech Republic* November 13, 2007, No. 57325/00, para. 196. See also ECtHR *Sampanis and Others v. Greece* (no. 32526/05), 5 June 2008, para 69 and ECtHR *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, paras. 43-44.

have been based on prejudice and preconceptions about what it means to be (or have been) Dutch. Prejudice and preconceptions may not serve to justify distinctions, as was already made clear in early ECtHR case law.[334] Thus, distinctions made on the basis of place of birth would appear to require at least 'very weighty reasons' when they play out predominantly along colour/ethnicity lines.[335]

The distinctions made on the basis of place of birth does not appear to be essential for the purpose of migration control and in fact undermines the foundations of the 'democratic society built on principles of plurality and respect for different cultures.'[336]

Moreover, in the way they play out in practice, the distinctions ignore the family and other cultural and historical bonds that have been developed and persist between the Netherlands and 'its' overseas territories. Many of the elderly former citizens from Suriname who currently try to scrape by in the Netherlands undocumented, have not necessarily expressed a wish to regain their Dutch citizenship, but they need a policy that takes into account their interests and that does so acknowledging the rights owed to them by the Dutch state. It could be argued that exactly in light of the structural differences that were created on the basis of colonialism between people born in the colonising state and people born in the colonised state, a former colonial power has enhanced obligations towards former citizens who were born on formerly colonised territory. These are obligations that the former coloniser does not necessarily have towards other former citizens, who were born in Europe. Yet the distinction made now plays out negatively exactly for former citizens from former colonies rather than for former citizens who were born in Europe.

This distinction appears to be based on assumptions on former citizens and their 'Dutchness', which makes it inherently suspect 'in a democratic society built on the principles of pluralism and respect for different cultures'.[337] Such distinctions, even if not intentionally made on the basis of ethnicity, can only be justified by 'very weighty reasons'. [338] To the extent that reasons have been given, they related 'to a decisive extent' to assumptions about integration in society, which appear to be distinctions intentionally made. As discussed in the report these assumptions can be dismissed. Therefore they cannot be weighty, let alone very weighty.

The apparent incompatibility with article 1 of Protocol 12 and of article 14 read in conjunction with article 8 ECHR is a structural one that applies to all former citizens born in former colonies. It also appears to contain a message that is not lost on current Surinamese Dutch citizens and other citizens with ties to countries that have been colonised. While in practice the actual group of former citizens with such ties who are present in the Netherlands undocumented, does not appear to be very large (data on this should be provided by the state),

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[334] See e.g. ECtHR 28 October 1987, *Inze v Austria, Series A*, vol. 126, § 44. ECtHR 9 January 2003, *L.&V. v Austria*, judgment of 9 January 2003, (appl. Nos 39392/98 and 39829/98), para 52: "To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour."

[335] See e.g. ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, para 78; *Konstantin Markin v. Russia* [GC], 2012, para 127; *Schalk and Kopf v. Austria*, 2010, para 97.

[336] The quote can be found in, e.g., ECtHR *D.H. and Others v. the Czech Republic* [GC], 2007, para 176 and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, paras 43-44.

[337] ECtHR *D.H. and Others v. the Czech Republic* [GC], 2007, para 176; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, paras 43-44. While these cases were decided in very different contexts, the expression concerns a general principle of much wider import.

[338] See e.g. ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, para78; *Konstantin Markin v. Russia* [GC], 2012, para 127; *Schalk and Kopf v. Austria*, 2010, para 97.

we consider that the persons concerned should not have to be put through a case by case approach. Instead, a practical as well as symbolic measure is needed to regularize their presence in the Netherlands. This would also be in line with the recent approaches by Belgium and France, and with the recommendations by UN thematic mechanisms.[339]

This obligation to regularize their presence can be derived from the obligation to remedy violations under article 14 read together with art 8 ECHR, under article 1 of Protocol 12, as well as from the obligations under the ICCPR and CERD, as explained by their supervisory bodies.

Based on the discussed information and the international framework presented in chapter 2, we consider article 3.51 (1) (d) Vb – and, more generally in the context of the general attitude of the Dutch government and legal institutions – to be (in)directly discriminatory. The direct discrimination on the bases of place of birth results in indirect discrimination based on race and descent.

We assume that the provision mostly affects people from Suriname and Indonesia. We have not found any numbers which support this idea. This is why we recommend asking the IND for numbers of the applications that have been filed by migrants based on the former Dutch national's policy of art. 3.51 (1) (d) Vb. This would provide hard evidence for the fact there have barely been any applications by former Dutch citizens born as Dutch nationals in the European part of the Kingdom, which would mean particularly Surinamese (and Indonesian) former Dutch nationals would be adversely impacted by this provision. This could indicate that this policy was made as a tool to restrict migration from Suriname (and other former colonies). Several statements from Zeevalking and the fact that the Dutch government refused to call it by its name at that time, are examples supporting this assumption.

3.5. Conclusion

At first sight, article 3.51 (1) (d) Vb does not seem to have (in)direct discriminatory elements. It is not explicitly mentioned that the overseas territories do not fall under the scope of this article. However, case law shows that only former Dutch citizens born in the European part of the Netherlands can invoke this provision. This results in direct discrimination based on place of birth.

Moreover, when assessed against the international framework on indirect discrimination, article 51 (1) (d) Vb does contain indirectly discriminatory elements based on race and descent. This relates to impact discrimination since Surinamese people are mostly non-white and of African and Asian descent. Impact discrimination can be unintentional, but based on an analysis of the development of article 3.51 (1) (d) Vb, in conjunction with the migratory and legal history of Surinamese people, the case law concerning this provision, and other case law concerning the admission of former Dutch nationals, we can draw the conclusion that differences made between former Dutch nationals from the European part of the Kingdom, on the one hand, and the non-European part of the Kingdom, on the other hand, have not been unintentional.

[339] For the discussion on Belgium and France see chapter 4. For the recommendations by UN experts see the text accompanied by footnotes 91-93 and paragraph 1.3.4 of this report.

Former Dutch nationals born in the former colonies, amongst them Surinamese people, are excluded from the policy concerning former Dutch nationals.[340] Especially in the context of the recent attention paid at UN level to the influence of the colonial history on contemporary (in)directly discriminatory manifestations, and in light of the flaws the UN Special Rapporteur notices in the Dutch concept of citizenship as being 'Western' and 'white' and also the increased focus on reparations for the colonial history, the chance the provision is considered indirectly discriminatory based on race and descent increases.

When looking at the reasons that were given in previous provisions that indirectly affected Surinamese people and other people from former colonies, for example the discussion on the naturalisation of former Dutch nationals between 1973-1976 and also in the abolition of the ouderenbeleid, and when analysing previous judgments in cases concerning Surinamese people or other people from the colonies, it can be concluded that there have not been any objectively justifiable reasons for making a distinction between former Dutch nationals from the European and non-European part the former Kingdom of the Netherlands. We indeed consider that article 3.51 (1) (d) Vb, next to directly discriminatory on the basis of place of birth, might be unjustifiably indirectly discriminatory towards Surinamese people on the basis of race, ethnicity and/or descent.

An interesting a thought experiment would be to imagine the situation in the reverse (including slavery and colonialism). What if former Surinamese of European background would have more difficulty gaining legal access and residency in Suriname than other former Surinamese citizens? Suriname is a party to the American Convention on Human Rights and has recognised the jurisdiction of the Inter-American Court of Human Rights. If white former Surinamese could bring a complaint before the domestic Surinamese courts of violations of the American Convention of Human Rights and, upon exhaustion of those remedies, bring a complaint to the Commission in Washington, eventually the Inter-American Court in San Jose could hear their complaint. In such case it is likely that it, like its European counterpart in Strasbourg, would find that the domestic regulations distinguish between two groups of former nationals based on a suspect criterion, and that the state has failed to offer weighty reasons in its justifications.

[340] See also e.g. Luttikhuis, Bart (2013), 'Beyond race: constructions of « Europeanness » in late-colonial legal practice in the Dutch East-indies', *European Review of History* 2013, vol. 4, 539-558.

Chapter 4. The example of the UK and the Windrush scandal

4.1 Introduction

As colonialism is an international phenomenon, there is no doubt its consequences differ according to different contexts. The United Kingdom shares many colonial attributes with The Netherlands, but there are also many differences. In regard of nationality and citizenship status, there is potential in better understanding the outcome of colonialism. In parallel to what is called "The Windrush scandal", it is of interest to analyse what legal mobilization has taken place on the responsibility of Great Britain to its former colonial subjects and the legislative efforts underway, or pending, or already published court decisions, or public acknowledgments and new policies. This chapter first sketches the context of the Windrush scandal, explaining what is the Windrush generation (section 4.2). Then, goes on to explain the media's role in Windrush becoming a scandal (4.3). Further, UK legislation (4.4) and judicial proceedings by members of the Windrush generation (4.5) will be discussed. Legal and political reactions and remedies in the aftermath of the scandal will finally be portrayed (4.6) with concluding remarks on parallels to be drawn between the British and Dutch contexts (4.7).

4.2. The Windrush generation

"Windrush" refers to a vessel, precisely, the HMT Empire Windrush, that travelled from the Caribbean to the United Kingdom in June 1948 with hundreds of commonwealth citizens.[341] Commonwealth citizens are subjects who have British colony nationality. The British Nationality Act of 1948 (BNA 1948) affirmed that Commonwealth and British colony citizenship automatically resulted in British subject status.[342] "Windrush generation" refers to the people who travelled to the UK from the Caribbean between 1948 and 1971.[343] They are part of a migratory movement[344] of Black and Caribbean people who were encouraged by the British government to settle in the UK after the Second World War labour shortage. Among many fields, they occupied crucial but underpaid roles in the British public and private health-care systems,[345] transport network and construction industry.[346] Ever since, they largely contribute to the country's working force and culture.

According to The Oxford Migration Observatory, 368 000 people from African descent born in the West indies emigrated to the UK between 1948 and 1971.[347] Although the 1948 British Nationality Act is clear, the British government did not officially keep trace of the

[341] Goring, Namitasha, Beverley Beckford, and Simone Bowman. "The Windrush Scandal a Review of Citizenship, Belonging and Justice in the United Kingdom." *European Journal of Law Reform* 22, no. 3 (2020): 266–302.
[342] British Nationality Act, 1948, c. 56, sections 1(1) and 4(1).
[343] Goring, Beckford and Bowman, "The Windrush Scandal", 267.
[344] Reddie A.G. "Do Black Lives Matter in Post-Brexit Britain?" *Studies in Christian Ethics* 32, no. 3 (2019): 387–401.
[345] Gary Younge, "The NHS, Windrush and the debt we owe to immigration", *The Guardian*, June 22, 2018, available online at: https://www.theguardian.com/commentisfree/2018/jun/22/honour-nhs-built-on-immigration-windrush
[346] Gentleman, Amelia. 2019. The Windrush Betrayal : Exposing the Hostile Environment. London: Guardian Faber
[347] Oxford Migration Observatory, "Commonwealth citizens arriving before 1971", 4th of May 2018, available at: https://migrationobservatory.ox.ac.uk/resources/commentaries/commonwealth-citizens-arriving-before-1971/

Windrush emigration process by issuing any form of documentation.[348] The only formal data they had was consciously and purposely destroyed in 2010 because Home Office staff were told by superiors "that they would not be of much national interest".[349] Therefore, many were still legally British subjects, but could not prove so. On the other hand, with such clear invitations and having spent the greatest part of their life in the UK, many among the Windrush generation, who arrived as young children, failed to formalize their status in Britain following their birth country's independence leading to unlawful residence when failing to register on time as British citizens. National independence of former colonies had the effect of withdrawing British citizenship, but those who had previously travelled to the UK as British were never formally required to prove their British citizenship and lost all possibilities of officially proving so.[350] Hence, in 2018 when the scandal materialized, Windrush generation members were either British citizens that had been through the process of acquiring naturalisation, legal residents without any way of proving so or unlawful residents that had once been legally present in the UK, but failed to register in time to acquire British citizenship.

The British Nationality Act ended in 1973 and many pieces of legislation and amendments entering into force in the period since, have reflected the hostile anti-immigration environment present within British society.[351] Not only are status checks performed by government officials and public institutions, but also ordinary people such as landlords and employers who are required to ask for documents, track potential tenants' and workers' immigration status under the threat of significant fines.[352] Whether they had been desired or not, consequences of these laws and policies even managed to shock their creators. Theresa May, ex Home secretary and, later on, Prime Minister, was embarrassed by the denial of health services to many people who lived, worked and paid taxes for the majority of their life in the UK.[353] The Home secretary at the time of the scandal's outbreak, Amber Rudd resigned.[354] Among other consequences to the change in law and policies since 1973, next to the denial of health services, was the withdrawal of social housing, loss of jobs, separation of families, impossibility to work, possess bank accounts and renew drivers' licences, obtain bus passes or any kind of public benefits as well as facing deportation and detention.[355] It became impossible to leave the UK without facing entry bans upon return including when travelling for funerals or to assist severely ill relatives.[356] It has been stated that the psychological distress destroyed lives

[348] House of Commons, "Windrush Lessons Learned Review by Wendy Williams", March 2020, available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf, 9.
[349] Ibid., 7; Goring, Beckford and Bowman, "The Windrush Scandal", 272.
[350] Ibid., 268.
[351] Prabhat, Devyani, ed. 2019. Citizenship in Times of Turmoil? : Theory, Practice and Policy. Cheltenham, UK: Edward Elgar Publishing Limited, 21.
[352] Goring, Beckford and Bowman, "The Windrush Scandal", 275.
[353] Idem.
[354] Heather Stewart, "Amber Rudd resigns hours after Guardian publishes deportation targets letter", *The Guardian*, April 30, 2018, available online at: https://www.theguardian.com/politics/2018/apr/29/amber-rudd-resigns-as-home-secretary-after-windrush-scandal
[355] Goring, Beckford and Bowman, "The Windrush Scandal", 275.
[356] Amelia Gentleman, "'It's destroyed my life': Windrush victim recognised as legal citizen after 13 years" *The Guardian*, available online at: https://www.theguardian.com/uk-news/2018/may/10/its-destroyed-my-life-windrush-victim-recognised-as-legal-citizen-after-13-years

of ordinary hard-working people in the UK.[357] The main objective behind these legislative changes was to control illegal immigration, but they rather seemed to render illegal the invitations the British government had issued to rebuild post-war Britain. After having contributed to society, the result of so-called 'blind laws' criminalized fellow citizens participating in British life for decades.[358]

4.3. The media and the Windrush scandal

The only reason there is a conversation about a scandal today is because of the media's strong reaction and documentation about the legal situation Afro-Caribbeans are facing in Britain. Amelia Gentleman, writing for *The Guardian*, published an article regarding Albert Thompson, a member of the Windrush generation who was denied National Health Service cancer care.[359] From the publication of Thompson's story onwards, the media managed to create outrage within every political party inside the House of Commons as well as within society.[360] Failure of the government via its Home Office to react after the initial mediatic attention drawn to the scandal acerbated the anger and shame.[361] Therefore, Windrush became the subject of a scandal with the crucial participation of the media. From this point, political, legal and judicial actors intervened with more hurry.

In 2018, in the early stages of the scandal's outbreak, an independent report was ordered by the House of Commons to shed light on the events leading up to the Windrush scandal. The Home Secretary then asked Wendy Williams "to provide an independent assessment of the events leading up to the Windrush scandal […] and to identify the key lessons for the Home Office."[362] The function of public reports is to investigate transparently into particular events. Therefore, the conclusions of this report are important and are likely to have impacted the responses to the scandal for the victims involved. The author of the report stressed the predictability of the legal situation members of the Windrush generation would be subject to and added that this situation could have been avoided. The author notes that the government failed to offer documentation and lost track of archives and even destroyed migration status evidence.[363]

4.4. UK legislation and ECHR challenges

As stated previously, the British Nationality Act of 1948 affirmed that commonwealth and British colony citizenship automatically conferred the status of British subject.[364]Although many British subjects from Western colonies settled in the UK after formal invitations from the British government, they were not issued with any documentation proving their status. In an

[357] See e.g. Idem.; Amelia Gentleman, "Londoner Denied NHS Cancer Care: It's Like I'm Being Left to Die", *The Guardian*, March 10, 2018, available online at: https://www.theguardian.com/uk-news/2018/mar/10/denied-free-nhs-cancer-care-left-die-home-office-commonwealth
[358] House of Commons, "Windrush Lessons Learned Review", 29-34.
[359] Amelia Gentleman, "Londoner Denied NHS Cancer Care: It's Like I'm Being Left to Die".
[360] Goring, Beckford and Bowman, "The Windrush Scandal", 276.
[361] House of Commons, "Windrush Lessons Learned Review", 7.
[362] Idem.
[363] Idem.
[364] British Nationality Act 1948, c. 56, sections 1(1) and 4(1).

attempt to regularize such a situation, the government set up a programme in order to register Windrush generation subjects, but since officials said there was no need to register for formal naturalisation, at least 8,000 people indeed did not. Many of them were later wrongly classified as immigration offenders[365] when government leaflets clearly indicated:

> *If you have the right to register but you don't want to, you do not have to. Your other rights in the United Kingdom will not change in any way. You will not lose your entitlement to social benefits, such as health services, housing, welfare and pension rights, by not registering. Your position under immigration law is not changed.*[366]

This statement is surprising since many who actually struggled to have their rights recognised and lived in constant conditions of extreme distress.

Not only is the UK a party to the European Convention on Human Rights (ECHR), but it also has its own Human Rights Act (HRA)[367] incorporating human rights protection into UK legislation. In domestic litigation within the UK, nationality rights are invoked under article 8 ECHR. Article 8 recognises the right to respect for private and family life. The second paragraph prohibits interference by public authority with this right unless necessary for "national security, public safety, or the economic well-being of the country, for prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." The UK government via its Home Office has invoked the limitation clause in article 8(2) on the right to respect for private and family life, to justify limitation of naturalization and the adoption of legislation against illegal immigration.[368]

The objective of the Nationality, Immigration and Asylum Act of 2002[369] was to prevent international trafficking and illegal migration,[370] but it was also the beginning of deportations and detentions of Windrush generation members.[371]

Further, the 2014 and 2016 Immigration acts[372] were adopted with the explicit aim of making life difficult for illegal immigrants.[373] These laws introduced measures to prevent illegal immigrants from accessing all kinds of private and public services. Indeed, following a challenge by the Joint Council for the Welfare of Immigrants (JCWI) against these articles, the High Court of Justice stated that by imposing that landlords and employers check people's immigration status, articles 20 to 37 of the 2014 Immigration Act caused racial

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[365] Amelia Gentleman, "Home Office sued by family of Windrush man refused UK citizenship", *The Guardian*, December 10, 2020, available online at: https://www.theguardian.com/uk-news/2020/dec/10/home-office-sued-by-family-of-windrush-man-refused-uk-citizenship

[366] House of Commons, "Windrush Lessons Learned Review", 59.

[367] Human Rights Act, 1998, c. 42.

[368] R (On the Application of Hubert Howard (deceased, substituted by Maresha Howard Rose pursuant to CPR 19.2(4). and PD 19A)) v Secretary of State for the Home Department [2021] EWHC 1023 (Admin), 12.

[369] Nationality, Immigration and Asylum Act, 2002, c. 41.

[370] Goring, Beckford and Bowman, "The Windrush Scandal", 289.

[371] National Audit Office, "Handling of the Windrush situation", available online at: https://www.nao.org.uk/wp-content/uploads/2018/12/Handling-of-the-Windrush-situation-1.pdf, 7.

[372] Immigration Act, 2014, c. 22; Immigration Act, 2016, c. 19.

[373] Oliver, Caroline. 2020. "Irrational Rationalities and Governmentality-Effected Neglect in Immigration Practice: Legal Migrants' Entitlements to Services and Benefits in the United Kingdom." *The British Journal of Sociology* 71, 97.

discrimination.[374] The JCWI stressed that these provisions were incompatible with the ECHR, precisely articles 14 (prohibition of discrimination) and 18 (limitation on use of restrictions on rights).[375] Yet the decision was appealed by the Secretary of State for the Home Department (SSHD) who succeeded in doing so. The judge from the Court of Appeal stated that sections 20 to 37 of the 2014 immigration act were proportionate means of achieving a legitimate objective with regard to article 8 ECHR.[376]

The Court of Appeal refers to the *Bank Mellat* v *HM Treasury* case[377] where the justification test of article 8 ECHR was applied within the context of British law. Four questions are at play:

> **(3)** *whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (2) whether the measure is rationally connected to the objective; (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter*.[378]

After exposing the test, the Court rapidly comes to the conclusion that questions 1, 2 and 3 may be answered satisfactorily for the Government. Only question 4 deserved an in depth analyse according to the Court. In other words, "whether the impact of the right's infringement is disproportionate to the likely benefit of the impugned measure […] or whether a fair balance has been struck between the rights of the individual and the interests of the community".[379] A distinction is made between a challenge to the operation of statutory provisions in an individual case and a challenge to those provisions themselves. Indeed, in the case brought forward by the JCWI, no conflict had in effect occurred. Litigation with no concrete illustration has less potential in succeeding since the operation of law will not always lead to disproportionate consequences.[380] The Court believes the statuary provisions at stake can be respected by landlords as well as respecting article 14 ECHR, even though it obviously may lead to discrimination.[381] The rather theoretical case brought forward by the JCWI did not allow the Court to analyse in what type of situation a discriminatory behaviour, not respecting the proportionality test with regard to its forth component, could occur.

The Court seems to be satisfied with understanding that the provisions had contributed to the Government's aim of restricting access to social policies for illegal migrants.[382] Even though there is a very clear risk of discrimination, the Court specifies that the risk in question

[374] Joint Council for the Welfare of Immigrants, R (On the Application Of) v Secretary of State for the Home Department [2019] EWHC, 452.
[375] Idem.
[376] The Secretary of State for the Home Department v R (on the application of) Joint Council for The Welfare of Immigrants [2020] EWCA Civ 542, 151.
[377] Bank Mellat v HM Treasury (No 2) [2014] AC 700.
[378] [2020] EWCA Civ 542, 113.
[379] [2020] EWCA Civ 542, 114.
[380] Ibid., 117.
[381] [2020] EWCA Civ 542 (21 April 2020), 119.
[382] Ibid., 146.

does not undermine the positive outcome the provisions may lead to, therefore justifying the law.[383] Without having brought a proper incident illustrating discrimination forward, the JCWI opened the door to further discretion to the Court who analysed hypothetical discrimination and concluded that its consequences would not necessarily be as critical. For example, with regard to landlords performing status checks, the Court stated that illegal immigrants would "not necessarily become homeless: the most vulnerable may be entitled to some assistance."[384] This is a surprising statement considering the proof of evident difficulties faced by victims of discrimination. Therefore, it is interesting to keep in mind the possible failure of the proportionality test even with a strong case when no individual situation is at the centre of the proceedings.

4.5 Responses to the scandal by the legislature and the judiciary

Few cases have been brought before British courts regarding the Windrush scandal. This may be explained by the fact that there have been some significant legislative responses towards reparation. On the 23rd of April 2018, the British Home Secretary at the time, Amber Rudd pronounced a Windrush statement in Parliament announcing measures that would be put forward to regularize Windrush members' statuses and compensate them for the mistakes committed by the government.[385] Ever since, there has been one relevant court case where the State's decision to refuse naturalisation in a specific case regarding a member of the Windrush generation was deemed unlawful.[386] This case concerned Hubert Howard who was born in Jamaica in 1956 and settled in the United Kingdom at the age of three. As a subject of a British colony, he was also a British citizen. His birth country acquired independence from Great Britain in 1962, but remained part of the Commonwealth. From this moment on, Mr. Howard was a commonwealth citizen and no longer a British subject, as "British subject" cannot be granted as stated by the Jamaican Constitution. Mr. Howard could have regularized his status in the United Kingdom at the time, when he was six years old, but failed to do so. [387] In 2018, the Home Secretary refused Howard's application for naturalization as a British citizen.[388] He had been struggling to regularize his status since 2012, but applied to establish his right to remain after the Windrush statement pronounced in Parliament in 2018.[389] From this, the Home Secretary established the Windrush Scheme aiming to grant reparation and regularize immigration statuses.[390] This was only the beginning of a long and tiresome back and forth of refusals and appeals essentially concerning the "good character" requirement.[391] Howard had been convicted of minor offences leading to probation orders and fines. On behalf of her father who had recently passed away, Maresha Howard Rose, argued that the "good character" requirement in paragraph 1 of Schedule 1 of the 1981 British nationality Act leads to

[383] Ibid., 147.
[384] Ibid., 150.
[385] Home Office, "Home Secretary statement on the Windrush generation", April 23, 2018, available online at: https://www.gov.uk/government/speeches/home-secretary-statement-on-the-windrush-generation
[386] R (On the Application of Hubert Howard (deceased, substituted by Maresha Howard Rose pursuant to CPR 19.2(4) and PD 19A)) v Secretary of State for the Home Department [2021] EWHC 1023
[387] [2021] EWHC 1023, 1.
[388] Ibid., 6..
[389] Ibid., 9.
[390] Ibid., 15.
[391] Ibid., 12.

discrimination, contrary to articles 8 and 14 ECHR.[392] She also submitted that refusal to grant citizenship to her father in the circumstances of the Windrush statement and scheme was unlawful in common law.[393] Howard argued that "other status" in article 14 ECHR regarding the prohibition of discrimination includes members of the Windrush generation as a category including "those who had a right to remain in the United Kingdom by virtue of section 1(2) of the 1971 Act who, prior to 1 January 1988, could have obtained British nationality by registration."[394] The High Court of justice's administrative court refused to find discrimination based on race. Rather, it found that the distinction regards members of the Windrush generation specifically.[395] Therefore, the court considered the Windrush group as an applicable group within "other status" of article 14 ECHR. Although, in a report commissioned by the House of Commons in May 2018, Wendy Williams, an independent expert concludes "members of the Windrush generation are a racial group."[396] Therefore, the discussion over the ground of discrimination is still pending. Yet the court denied the claim based on articles 14 and 8 ECHR. Indeed, the discrimination argument was dismissed.[397] The court's conclusion in this case was rather that the decision of refusing Mr. Howard's naturalization was unlawful because irrational and outside the possible margin and discretion of reasonableness[398] which is a possible conclusion within common law regimes, such as the United Kingdom. As stated previously, litigation regarding the Windrush scandal has not been prioritized by individuals among the Windrush generation as other means have been put in place to obtain justice. However, in a joined case ruled in December 2021,[399] two claimants part of the Windrush generation challenged the Secretary of State for the Home Department (SSHD) for refusing their naturalisation as British citizens and obtained recognition on behalf of articles 14 and 8 ECHR. This case relates to the Windrush Compensation Scheme and is discussed in detail in paragraph 3.6.

As an administrative court, the First-tier Tribunal hears appeals from citizens that wish to turn individual government decisions down. In a case ruled by the Immigration and Asylum Chamber (IAC), articles 3 and 8 ECHR intervened and allowed an appeal on human rights grounds.[400] First of all, the IAC pointed out a grave material error made by the First-tier Tribunal who overlooked the crucial fact that the individual at stake was a member of the Windrush generation and not simply any other ordinary visitor in the UK that had remained illegally in the country.[401] The distinction made by the IAC is quite interesting on a larger bureaucratic point of view, where legally speaking the IAC is encouraging a different reflex within British administration when encountering situations regarding Windrush generation members. This is a very strong consequence of Windrush, as a scandal where, legal bodies in the UK are encouraging the Government and its agencies to readjust their decisions regarding individuals that fall within the immigration injustice of Windrush. In another case, even though

[392] Ibid., 16.
[393] Idem.
[394] Ibid., 19.
[395] Ibid., 20.
[396] House of Commons, "Windrush Lessons Learned Review", 113.
[397] Ibid., 19-20.
[398] [2021] EWHC 1023 (Admin), 36.
[399] Vanriel & Anor, R (On the Application Of) v Secretary of State for the Home Department [2021] EWHC 3415.
[400] HU088592018 [2019] UKAITUR HU088592018.
[401] Ibid., 8.

the final decision was not strictly influenced by the fact that the individual at the centre of the proceeding was a member of the Windrush generation, the IAC mentioned and considered the mediatic influence and impact : "there has been considerable focus in the media on the so-called Windrush generation and their children. The Secretary of State has made announcements to the effect that such persons who may have acquired rights to remain in the UK but have not regularised their status, or who have struggled to provide proof, may have their cases reviewed by special task force duly appointed."[402] In another IAC case, the claimant had mentioned that there was "Windrush dimension" involved, but also referred to his dyslexia that explained why his application had not succeeded and those of his parents and sisters had.[403] The Senior Home Officer responding in this case even suggested on behalf of the Government itself: "If the claimant had thought there was a particular problem as to his ability to pass the test he could have sought and obtained his diagnosis regarding dyslexia at an earlier stage and could have then put that difficulty to the Home Office."[404] This response would appear to be another Windrush scandal type of reflex. The judge observed that the applicant could not have claimed what he had been unaware of at the time. In that sense the tribunal's response seems in a way responsive to the underlying mechanisms of the Windrush scandal. Strictly speaking the Judge simply says that the main difference between him and his family is his disability and that 'tips the balance in his favour with respect to any Article 8 proportionality assessment'. He does not discuss the Windrush context, but apparently not because he considers it is not relevant, but more because he wanted to discuss the disability issue.[405] From a perspective of strategic litigation, mentioning the connection to the Windrush group definitely benefits the outcome for the individual even though other substantive arguments were involved in the IAC cases analysed above.[406]

4.6 The aftermath of the scandal

As Wendy Williams put it, in her report[407] the Windrush scandal is "more than a case of bureaucratic bad luck. It makes it a profound institutional failure."[408] Following these severe words, the government implemented a compensation scheme in order to offer reparation to victims for immigration fees, difficulties related to housing, education, administrative procedures, employment, banking as well as impacts on daily life, detention[409], and deportation. Unfortunately, many victims face unreasonable delays and the complexity and confusion of the compensation scheme renders applications long and difficult.[410] In October 2021, over three

[402] HU126662015 [2018] UKAITUR HU126662015, 38.
[403] HU267352016 [2018] UKAITUR HU267352016, 16.
[404] Ibid., 16.
[405] Ibid., 17.
[406] HU088592018 [2019] UKAITUR HU088592018; HU126662015 [2018] UKAITUR HU126662015; HU267352016 [2018] UKAITUR HU267352016.
[407] House of Commons, "Windrush Lessons Learned Review".
[408] Ibid., 10.
[409] House of Commons House of Lords Joint Committee on Human Rights, Windrush generation detention, Sixth Report of Session 2017–19, Report, together with formal minutes relating to the report Ordered by the House of Commons to be printed 27 June 2018, Ordered by the House of Lords to be printed 27 June 2018, Published on 29 June 2018 by authority of the House of Commons and House of Lords, available at https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1034/1034.pdf
[410] Goring, Beckford and Bowman, "The Windrush Scandal", 280.

years after the Compensation Scheme's launch[411], the government tried to facilitate the reparation process by publishing Guides for decision makers.[412]

With regard to the Windrush compensation scheme, the Mahabir & Ors v Secretary of State for the Home Department [2021][413] case is relevant. Trinidad and Tobago obtained independence from Great Britain in 1962. In 1969, at the age of two months, Mahabir travelled legally with her mother to the UK. By legally having been in the UK whilst never acquiring British citizenship, the claimant is recognized by the court as a Windrush victim. The issue in this case is the fact that Mahabir's five children were all born after 1980 in Trinidad and Tobago where Mahabir had later settled. Therefore, they never acquired British citizenship. Mahabir returned to the UK and wanted her husband and children, including two minors, to join her. On her application, the Home Office required fees of up to 23. 000 pounds. This sum made it impossible for Mahabir to reunite with her family. The questions referred to the court were: "Would the family's applications be made 'in connection with an application made under the Windrush scheme'? Was it a breach of Mrs Mahabir's right to family life for the family to be asked to pay a fee they could not afford? Was the lack of preferential treatment for the family members of a Windrush victim indirectly discriminatory? Were the children being directly discriminated against because they were being treated differently from children of Windrush victims applying from inside the UK?" The court concluded "that the disruption to family life created by a strict application of the fees regime cannot be substantively justified."[414]

The Windrush Compensation Scheme only applies to individuals' descendants when they arrived in the UK under the age of 18 or were born in the UK, excluding children who arrived as adults.[415] In an attempt to enlarge its scope, four members of the Windrush generation were denied in doing so by the High Court of Justice on the 14th of January 2022.[416] The decision has not yet been published, but it is understood that the Government has still failed to regularize injustice when all four claimants have lived in the UK legally for many years and most of their close relatives: parents, grandchildren, children and siblings are British citizens living in the country.[417]

The Prime Minister at the time of the scandal's outbreak, Theresa May, offered her official apologies on behalf of the government to members of the Windrush generation.[418] She reiterated her apologies even after no longer being in office, as a responsible of the outcome of the hostile environment policy. Although apologies are symbolic, they do not necessarily remain so. They can be the first step in acquiring concrete and substantive remedies, including

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[411] United Kingdom government, Home Office, "Windrush Compensation Scheme, Guidance for decision makers considering cases under the Windrush Compensation Scheme." Version 8.0, Published for Home Office staff on 27 October 2021, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1028652/Windrush_Compensation_Scheme.pdf, 4.

[412] Idem.

[413] R (Mahabir) v the Secretary of State for the Home Department [2021] EWHC 1177.

[414] [2021] EWHC 1177, 117.

[415] United Kingdom Government, Home Office, "Windrush Compensation Scheme", 15.

[416] Diane Taylor, "Windrush descendants lose high court fight to expand scheme", *The Guardian*, January 14, 2022, available online at: https://www.theguardian.com/uk-news/2022/jan/14/windrush-descendants-lose-fight-to-expand-compensation-scheme

[417] Idem.; Once the Case is published, it would be relevant to study it further and be cautious of potential appeals to come.

[418] Lizzy Buchan, "Theresa May apologises to Windrush children and Caribbean leaders over deportation scandal", *The Independent*, April 17, 2016, https://www.independent.co.uk/news/uk/politics/theresa-may-windrush-apology_immigration-home-office-deportation-caribbean-leaders-a8308426.html

reparation as well as expressing empathy to victims. As stated by Williams, "the sincerity of this apology will be determined by how far the Home Office demonstrated a commitment to learn from its mistakes by making fundamental changes to its culture and way of working that are both systemic and sustainable."[419] Goring, Beckford and Bowman suggest that apologies be institutionalized by including them formally in the preamble of the HRA.[420] Even further, they propose an amendment to the HRA including a provision recognising the right to a nationality.[421]

In a joined case ruled in December 2021,[422] two claimants recognised as belonging to the Windrush generation challenged the Secretary of State for the Home Department (SSHD) for refusing their naturalisation as British citizens on behalf of the Windrush Scheme due to Schedule 1 paragraph 1(2)a) of the British Nationality Act 1981 (BNA 1981) requiring an applicant to have been physically present in the UK five years before applying for citizenship. Articles 8 and 14 ECHR intervene together in this case. After exposing a rather theoretical question regarding the meaning of paragraphs 1 and 2 of Schedule 1 to the BNA 1981, the court asks "Were the Defendant's decisions, giving those provisions their natural meaning, incompatible with the Claimants' rights under ECHR Article 14?"[423] In his conclusion, the judge puts forward article 14 and 8 ECHR's conjunction.[424] The Secretary of State for the Home Department argued that ECHR rights are infringed only if legislation cannot be proportionate in the majority of situations referring to the conclusion reached in the JCWI case analysed previously.[425] However, a major difference between the factual backgrounds in both cases is stressed by the judge. Indeed, that of an individual challenge.[426] Two individuals' rights are at stake in the present case whereas the JCWI challenged legal provisions' potential discrimination. The same four question test, which is recognised by the EctHR, is put forward. That of the application of a substantive Convention right (i), the recognition of the status (ii), the equal treatment (iii) and the reasonable justification (iv).[427] The judge identifies indirect discrimination, since the SSHD failed to deal with the different circumstances brought forward divergently. (i)[428] Further, "Windrush victims who have applied for naturalisation but cannot satisfy the 5 year rule as a result of that very status" are argued to be part of a relevant status within article 14 ECHR's scope (ii)[429] as discussed in the Howard case[430]. However, this case differs from the Howard case and the status must be extended in order to include all claimants. The judge doesn't see any obstacle in allowing "other status" in article 14 ECHR's scope to extend "to those in a recognisable legal situation referable to the Windrush Scheme."[431] Concerning question iii of the test, the judge rapidly comes to the conclusion that the treatment between the recognised category and other citizenship applicants is the same. The most

[419] House of Commons, "Windrush Lessons Learned Review"15.
[420] Goring, Beckford and Bowman, "The Windrush Scandal", 299.
[421] Idem.
[422] [2021] EWHC 3415.
[423] Ibid., 37.
[424] Ibid., 86.
[425] [2020] EWCA Civ 542.
[426] [2021] EWHC 1177, 41.
[427] Ibid., 44.
[428] Ibid., 43.
[429] Ibid., 46.
[430] [2021] EWHC 1023.
[431] [2021] EWHC 1177, 52-53.

challenging question, the justification of the treatment towards the claimants (iv), is analysed according to the four subquestion test discussed in the JCWI case[432]. The five year rule enshrined in Schedule 1 paragraph 1(2)a) of the BNA 1981 does have a legitimate aim, that of ensuring a citizenship applicant's ties with the UK as well as being a rational manner of achieving that aim.[433] The SSHD argued that the margin of appreciation doctrine has more latitude when it comes to national immigration issues.[434] They also brought an analogy forward with the Howard case where no indirect discrimination was found. As we pointed out, the Court rather concluded irrationality of refusing Mr. Howard British citizenship on common law grounds. This way, the SSHD stressed the absence of indirect discrimination. On the other hand, the claimants argued that the five year rule contended in the BNA 1981 was arbitrary.[435] They further argued that "the application of the rule has unfairly interfered with the rights of those with the relevant status, and that it runs contrary to the Government's stated policy of remedying injustices suffered by the Windrush generation."[436] The judges final remarks on the question are relevant (our emphasis):

> 83. "Admittedly the preferential treatment anticipated by the Government when introducing the Windrush Scheme was to be of a procedural kind, enabling the recognition of existing rights rather than creating new substantive rights. In these cases, however, what was sought by the Claimants was not a relaxation of the substantive requirement that they prove a sufficient connection with the UK. *Rather it was a relaxation of the requirement to prove that connection in a way which was impossible for them, by presence in the UK on a day when, through no fault of their own, they were prevented from being in the UK.*
> 84. *It is clear that in cases such as these, the Government's aim of requiring citizenship applicants to prove commitment and connection to the UK could equally as well have been achieved by a less intrusive means, i.e. by applying a discretionary requirement rather than a rigid one.* That is all the more apparent in light of the fact that the detailed requirements other than the 5 year rule all contain some discretion or possibility of exception.
> 85. In these circumstances I conclude that *the severity of the effects of the treatment outweighed the importance of the Government's objective, even when regard is had to positive measures for Windrush victims such as the payment of compensation.*
> *86. For these reasons, making the decisions in the Claimants' cases by application of the 5 year rule with no discretion or flexibility was incompatible with their rights under Article 14 in conjunction with Article 8."*[437]

The Administrative Court therefore grants the claim[438] leading to the claimants naturalisation as British citizens.

[432] [2020] EWCA Civ 542, 113.
[433] Ibid., 61-62.
[434] Ibid., 63.
[435] Ibid., 75.
[436] Ibid., 78.
[437] [2021] EWHC 1177, 83-86.
[438] Ibid., 127.

The British Government has published numerous reports as well as ordered independent outputs on Windrush. Different private and public organisations have taken part, as well as individuals. These reports have had an impact since there have been legislative reactions. However, the process is slow. The British Law Commission (LC), among other public actors also published, nearly two years before the publication of the Guide, a report with the goal of simplifying Immigration Rules.[439] It then took the Home Office two months to respond to the report with concrete recommendations.[440] Although simplification has taken place, the Law Commission reiterated what advocates for Windrush victims put forward concerning access to legal advice. In the Government's opinion,[441] simplification of immigration rules no longer required legal advice for applicants. However, the LC concluded that "where the substantive content of the Rules is complicated, access to good legal advice remains necessary."[442] As discussed previously, one major issue concerning Windrush victims is the absence of formal evidence. Therefore, the LC recommended "that the Secretary of State considers the introduction of a less prescriptive approach to evidential requirements, in the form of non-exhaustive lists, in areas of the Immigration Rules which he or she considers appropriate."[443] The Government was concerned about non-consistency of decisions if agents were to take decisions on the balance of probabilities. The LC managed to suggest solutions that prevented inconsistent decision making, such as "the introduction of a less prescriptive approach to evidential requirements, in the form of non-exhaustive lists"[444] and that in cases where prescription is reduced, "lists of evidential requirements should specify evidence which will be accepted, together with a category or categories of less specifically defined evidence which the decision-maker would consider with a view to deciding whether the underlying requirement of the Immigration Rules is satisfied."[445]

Following Anthony Bryan's detention, among others of the Windrush generation, for being wrongly considered as an illegal immigrant,[446] the House of Lords together with the House of Commons published a report aiming at recognising human right violations, particularly that of having the right not to be detained arbitrary as provided by article 5 ECHR.[447]

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[439] The Law Commission, "Simplification of the Immigration Rules: Report, Ordered by the House of Commons", January 13, 2020, available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/912851/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf

[440] Home Office, "Simplifying the Immigration Rules: a response", March 2020, available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/914010/24-03-2020_-_Response_to_Law_Commission_for_publication.pdf

[441] "The Government's position is that obtaining legal advice is not necessary in making an immigration application and that no advantage in the application process should accrue to people who choose to access, and are able to afford legal advice, over those who cannot". See Windrush Compensation: Response to Consultation, Presented by Parliament by the Secretary of State for the Home Department by Command of Her Majesty, April 2019 available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791492/CCS207_CCS0119299498-001_Windrush_Response_to_Consultation_Web_Accessible.pdf, 4.15.

[442] The Law Commission, "Simplification of the Immigration Rules: Report", 17.

[443] Ibid., 68.

[444] Idem.

[445] Idem.

[446] Amelia Gentleman, "The children of Windrush: 'I'm here legally, but they're asking me to prove I'm British'", *The Guardian*, April 15, 2018, available online at: https://www.theguardian.com/uk-news/2018/apr/15/why-the-children-of-windrush-demand-an-immigration-amnesty

[447] House of Commons House of Lords Joint Committee on Human Rights, "Windrush generation detention", Sixth Report of Session 2017–19, June 2018, available online at: https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1034/1034.pdf, 6.

Decisions from the Commissioner's office with regard to access to information are also relevant within the "aftermath of the scandal". Indeed, section 10 (1) (Time for compliance with request) of the Freedom of information Act (FOIA)[448] obliges a public authority to respond to a communication "not later than the twentieth working day following the date of receipt." With regard to requests addressed to the Home Office concerning Windrush, different public authorities failed to respect section 10 (1) of the FOIA in a number of cases and the Commissioner's office issued favourable decisions to citizens requiring that Home Office respond.[449]

Access to information in cases where State liability is at stake may lead to sensitive issues. Therefore, article 27(1) of the FOIA states that: "Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice— (a) relations between the United Kingdom and any other State... ...(c) the interests of the United Kingdom abroad". The Commissioner's office had to inquire into a case where the Foreign and Commonwealth Office (FCO) refused access to information on this basis. It decided that the public interest was better protected by maintaining an exemption.[450] The test to apply in deciding whether an exemption is applicable or not consists in three steps. Firstly, the harm alleged, if the information is disclosed, must be likely to occur. It must also relate to the interests that are claimed to be protected by the public authority. Secondly, there must be a causal link between the disclosure and the predicted "real" or "actual" prejudice. Lastly, "the chance of prejudice occurring must be more than a hypothetical possibility".[451] The risk must be 'real' and 'significant'. Therefore, the burden is of higher importance for the public authority. The Commissioner's decision in this case was based on the need to protect healthy diplomatic relations between the UK and countries of the Caribbean. The Commissioners considered that discussions undergoing regarding Windrush were sufficient to address the claimants demands and that the disclosure in question would therefore be unnecessary.[452]

Section 35(1) (Formulation of government policy, etc.) of the FOIA states that "Information held by a government department or by [F1the Welsh Assembly Government] is exempt information if it relates to (a) the formulation or development of government policy, (b) Ministerial communications" The Ministry of Housing and Local Government (MHLG) as well as the Home Office both refused requests concerning information regarding members of the Windrush generation.

In the case concerning the MHLG, the request aimed for documents from the "Windrush Commemorative Committee (WCC) and evidence of settlers' arrival from the Caribbean in the 1950s/60s at Waterloo Station."[453] The Commissioner found that the public interest in disclosing the information related to the request is of higher importance than exempting the information.[454] The case concerning the Home Office[455] involved "information about meetings and discussions concerning the establishment of the Windrush Cross-Government Working

[448] Freedom of information Act, 2000, c. 36.
[449] Home Office (Central government) [2018] UKICO fs50779601; Home Office (Central government) [2018] UKICO fs50769024; Home Office (Central government) [2019] UKICO fs50823062.
[450] Foreign and Commonwealth Office (Central government) [2019] UKICO fs50779602.
[451] Ibid., 14.
[452] Ibid., 19.
[453] Ministry of Housing, Communities and Local Government (Central government) [2021] UKICO IC-44478
[454] Ibid., 2.
[455] Home Office (Central government) [2021] UKICO IC-66449.

Group [WCGWG]."[456] In this case, the Commissioner ruled differently, giving reason to the Home Office's decision to exempt information.[457] Indeed, "disclosing the withheld information would be likely to cause inhibition to both the Home Office and to the WCGWG which is not in the public interest."[458] The fact that talks were underway also had a role in the Commissioner's conclusion.

Decisions from the Commissioner's office with regard to access to information are very short and concise where the public interest test referred to above is rapidly applied. In the cases studied with regard to Windrush, no parallel with direct or indirect discrimination is put forward.

4.7 Conclusion

Similarities between the UK and the Netherlands with regard to the unjust treatment of colonial subjects in the country whether citizenship is acquired or not are striking. However, important contextual – legal, administrative, mediatic, political – differences also stand out and may be useful in order to understand what mistakes not to repeat, but also may inspire how to effectively avoid such irregularities and offer effective reparation.

As two colonial states, these previous Empires invited people from their former territories to rebuild post Second World War society in Europe. As colonial subjects, Dutch and British citizenship were automatically granted to Surinamese and Caribbean people until Suriname's independence as well as Caribbean countries'. Therefore, many Surinamese and people of Caribbean descent resided legally for a period of time in their European homelands. Ties between the individuals at stake and the European countries involved are not difficult to prove with many family members already settled legally in these countries, the knowledge of the national language, working experiences and many other factors of attachment.

Litigation on behalf of articles 8 and 14 ECHR have taken place with regard to the protection of family and private life and their relationship with discrimination under "other status" enshrined in article 14 ECHR.

In addition, other measures could be considered, such as restitution in kind, in the sense of restoring people to their rights, and other forms of satisfaction as well as guarantees, such as establishing a trust fund for affected communities, but also an improvement in the general educational curriculum, and finally financial compensation schemes that should not be too difficult or long for victims to apply for and obtain. In this sense, the Inter-American system of protection of human rights includes interesting substantive reparation which deserves to be looked into further. Regarding reparations' complexity and length, the scandal regarding the so called taxation fraud in The Netherlands and the ensuing failure to address this on a systemic level, and problems now with processing the compensation claims can serve as a fresh lesson for the Dutch system of reparation.

The UK seems to have left out of the Compensation Scheme's scope, individuals who are members of the Windrush generation and have faced immigration injustice. In this sense, it

[456] Idem.
[457] Home Office (Central government) [2021] UKICO IC-66449, 55.
[458] Ibid., 81.

may also be interesting to evaluate whether the categorisation of the potential group at the centre of future litigation or mobilisation includes as many subjects of colonial injustice.

Moreover, we believe that the societal discussion, after the media uncovered the Windrush scandal, triggered involvement of political, legal, and to some extent also judicial actors already, in discussing the scandal and the role of the law therein. Equally, in The Netherlands the possibilities can be explored of starting a real conversation in which politicians and civil society raise concerns about the injustice involved in the treatment of Surinamese in The Netherlands who were Dutch citizens before 1975, exactly in light of the colonial past.

Previous colonial empires have an enhanced responsibility when drafting immigration laws and policies considering their past. It is obvious with a multiplication of subjects from previous colonies emigrating throughout decades, that migration policies deserve to be analysed with particular attention to all the desirable and undesirable consequences that may occur. Apologies may be an independent example of a substantive remedy in itself, namely moral satisfaction. As well as in a sense, a sign that the State is serious in guaranteeing non-repetition of wrongs.

Chapter 5. The legal position of former citizens in Belgian and French law

5.1 Introduction

In this chapter, we provide further comparative context beyond that of the UK and Windrush. We discuss the legal position of former citizens in two other former colonising countries: Belgium and France. We will use this information to see whether these countries have any specific policies or legislation regarding their former citizens that could be of inspiration to the situation in the Netherlands.

We look back at the history of colonisation and the legal history of this phenomenon in order to demonstrate some of the problems it has caused for former citizens of the colonies. The research into the countries' colonial history also helps to clarify the differences and similarities between the Dutch colonial history, and that of France and Belgium. The relationship between former citizens and the country might differ across the three countries, and former citizens might have different wishes concerning their residence in the countries, varying from the regaining of their former nationality to simply being able to regularise their status. However, all three countries have seen an influx of former citizens immigrating after the colonies' independence. Therefore, it is beneficial to explore the legal status of former nationals in both France and Belgium.

France and Belgium are countries that, like The Netherlands, have a long history of colonisation. Although France colonised more countries than Belgium, the latter did gain control over the current DRC, a country rather large in size.

In this report, we will focus on the status of former Belgian citizens born in the DRC, and former French citizens born in Algeria. We have opted to look into the situation of these specific citizens, because a preliminary search regarding their position in their former colonisers' legal system provided the most interesting information for purposes of comparison with the position of Surinamese former nationals of the Netherlands. The question of nationality and the status of colonised people in domestic law is one that may have arisen over the years, as the law often made a distinction between subjects and citizens, which is beginning to be questioned recently, as we will develop later in this chapter. This distinction is a relevant question in post-World War II international law.

Our objective in this section is to set out the legal position of former Belgian and French citizens born in respectively the DRC and Algeria before both colonies' independence. We discuss the types of migration policies put in place in Belgium and France and consider to what extent these approaches could serve as inspiration for the development of arguments in favour of, or against, specific obligations towards former colonial citizens. Section 5.2 provides background on the French and Belgian colonial empires and their history, while section 5.3 analyses the consequences of the independence of former colonies for the populations and refers to domestic legislation and jurisprudence in Belgium and France. Section 5.4 concerns the agreements between the former colonising and colonised countries concerning the nationality of residents born in the former colonies and residing in France and Belgium.

5.2 The background of the French and Belgium colonial Empires

5.2.1 France

In the beginning of the invasion of Algeria by France, the French set up two legislative systems. One for the Europeans who had immigrated and were living on Algerian land, the other for the local population. During the colonial empire the "code de indigénat" and the French civil law defined rights and duties, including in assigning French nationality, according to the origins of the inhabitants. The laws and the sanctions in case of any infraction were very different depending on the category of population a person belonged to. [459]

The local populations of Algerian ancestry were considered to be indigenous. This meant that they were considered French, but treated differently from the citizens with 'European' ancestry.[460] So they were considered indigenous French 'subjects', who generally speaking could not apply for French citizenship. The apparent aim was to considerably improve the political and demographical influence of the European-origin Algerians. Thus, the French authorities limited the scope of the law, excluding the "indigènes" from its scope. Also, they limited the possibility for them to get out of their "indigenous" legal status. This kept them away from the citizenship and the better conditions that it would guarantee them.[461] Consequently, the law of 1889 simply did not apply to the local Algerian population.[462] This was a discriminatory system between the local population, clearly favouring the French (and other European) population over the local/indigenous people.

At the time, this had already given rise to strong criticism, such as that of P-L. Beaulieu (a professor of economy) and Michelin and Gaulier (two deputies from the left side at the French parliament).[463] A year after the introduction of this racist legislation, proposed law of 1890 tried give the opportunity to become French nationals equal to the European French citizens, albeit with rather strict conditions. However, the proposed legislation was not passed

[459] See in general Laure Blévis, 'L'invention de l'« indigène », Français non citoyen', in : Abderrahmane Bouchène, Jean-Pierre Peyroulou, Ouanassa Siari Tengour et Sylvie Thénault (eds), *Histoire de l'Algérie à la période coloniale: 1830-1962*, Éditions La Découverte et Éditions Barzakh, 2012, pp 212-218 and 'Quelle citoyenneté pour les Algériens?', in the same book, pp. 352-358 [We cannot identify the initial reference made by our colleagues to p.295-300 when stating that it was a racist judicial system. These pages do not correlate to the pages in this book, by this author, according to the publisher's information; we have not had a chance to retrieve this book and we therefore have not been able to identify exact pages using the qualification racist system; we agree with the qualification, but are not sure that the author referred to used it. In another article by the same author (which we could retrieve), the word racism or racist was not used. We decided to maintain a general reference in case you'd be interested in retrieving the source; we have redrafted the main text to a more general statement. The other article (which also looks useful) is: Laure Blévis, 'La citoyenneté française au miroir de la colonisation: étude des demandes de naturalisation des « sujets français » en Algérie coloniale' *Genèses*, 2003/4 (n°53), pp. 25-45, ID : 10670/1.3yngb9 (abstract: "Based on a study of naturalisation applications made by Algerian "natives" between 1865 and 1920, the article questions the meaning and stakes involved in obtaining French citizenship in a colonial situation for people who were by right already formally French. It also takes a look at colonial administrative practices, noting the criteria used by the general government departments in Algeria in selecting applicants who were "worthy" of the honour of becoming citizens. The motives of the rare Algerian applicants for naturalisation remain obscure, however.")] .

[460] Ibid [idem supra note 447]

[461] Ibid, p.314 [idem supra note 447]

[462] Article 2 of the Law on nationality of 26 June 1889.

[463] Weil, Patrick, 'Le Statut Des Musulmans En Algérie Coloniale, Une nationalité française dénaturée' in : *Historie de la Justice* 2005/1 (no. 16), pp 93-109. DOI : 10.3917/rhj.016.0093. URL : https://www.cairn.info/revue-histoire-de-la-justice-2005-1-page-93.htm2005. https://www.cairn.info/revue-histoire-de-la-justice-2005-1-page-93.htm, p. 99 Last accessed on 3 May 2022.

in Parliament. Almost thirty years later, in 1919, the law of naturalisations was passed.[464] According to Jean-Pierre Maury, "The Jonnart law of 1919, at the end of the Great War, aims to allow Algerian combatants to obtain citizenship, but it entails the renunciation of personal status based on Koranic law. This is why an Algerian who asks for French citizenship is often considered as a renegade."[465] In addition, the Public Prosecutor could oppose it 'on grounds of unworthiness'.[466] In other words, after the first world war, Algerians who had served in the French army could theoretically 'earn' French nationality, but only on condition of renouncing his religion and thereby alienating himself from his community. In 1946, the Lamine Gueye Act (No. 46-940) made it possible to declare all nationals of the overseas territories French citizens. This law was passed soon after the second World War, during which many persons from the colonies fought for the French Army, and also many of them died during it. Even though the formal legal position of all French citizens was the same, in practice a distinction was still made between the citizens from the colonies and the citizens from the European part of France.

In March 1962, negotiations led to the Evian agreements, which marked the end of the Algerian War. The Algerian independence was finally declared in 1962, after a traumatic war that lasted 8 years , including many massacres in Algeria and France (for example, by French police against Algerians on the 17th of October 1961).[467]Certain legislation from 2005 shows the continued difficulties of grappling with the past. It initially even mentioned the 'positive role of colonisation",[468] eventhough the then President (Chirac) withdrew this passage.[469] This indicates that France and Algeria remain countries with a heavy past and still complicated political relations.

The situation of colonisation in Western Europe's history still has consequences in the way many Europeans see the rest of the world. Indeed, a better education was also one of the recommendations of the official report commissioned to Benjamin Stora regarding the memory of the colonization of Algeria by France.[470]

5.2.2 Belgium

King Leopold II of Belgium treated the Congo as his personal property from 1885 to 1908. During this period, slavery was widespread, as indigenous Congolese were forced to work in the rubber industry. They were subjected to torture if they were not deemed "productive"

[464] Maury, Jean-Pierre. Loi Jonnart Du 4 Fevrier 1919 Digithèque MJP. 2020. https://mjp.univ-perp.fr/france/loi1919algerie.htm. Last accessed on 22 October 2021.
[465] Ibid.
[466] Weil, Patrick. Le Statut Des Musulmans En Algérie Coloniale Cairn. 2005. https://www.cairn.info/revue-histoire-de-la-justice-2005-1-page-93.htm. Last accessed on 22 October 2021.
[467] Leprince, Chloé Massacre Du 17 Octobre 1961 : La Fabrique D'un Long Silence. France Culture. 22 October 2021. https://www.franceculture.fr/histoire/massacre-du-17-octobre-1961-la-fabrique-dun-long-silence. Last accessed on 24 October 2021.
[468] Open Edition Journals. La Loi Du 23 Février 2005: Texte Et Réactions. Cahiers d'histoire. Revue d'histoire critique. Association Paul Langevin, 3 April 2009. https://journals.openedition.org/chrhc/1077. Last accessed on 6 November 2021.
[469] L'Humanité. Chirac Abroge Le " Rôle Positif " De La Colonisation. humanite.fr. 27 January 2006. https://www.humanite.fr/chirac-abroge-le-role-positif-de-la-colonisation-343425. Last accessed on 15 November 2021.
[470] Stora, Benjamin. Rep. *LES QUESTIONS MÉMORIELLES PORTANT SUR LA COLONISATION ET LA GUERRE D'ALGÉRIE*. Paris, France : French Présidence, 2021 and Franceinfo, Guerre D'Algérie: Ce Qu'il Faut Retenir Du Rapport Stora Remis Aujourd'hui à Emmanuel Macron. Franceinfo, 20 January 2021, https://www.francetvinfo.fr/culture/patrimoine/histoire/guerre-d-algerie-ce-quil-faut-retenir-du-rapport-stora-remis-aujourdhui-a-emmanuel-macron_4265199.html. Last accessed on 20 February 2022.

enough.[471] Following international criticism of the violence of this colonial system,[472] Leopold II renamed the colony "Belgian Congo" in 1908 and 'ownership' went from the king to the Belgian state. The colonisation of the Congo Free State (now DRC, also referred to as EIC) was very bloody, and the Belgian state committed a great number of atrocities. From 1959 onwards, numerous riots broke out to demand the country's independence. It was not until 30 June 1960 that the Congo gained its independence. Today, in Belgium, many documents still glorify this colonial past[473] and in response more and more demands are emerging to remove the statues of Leopold II.[474]

Leopold II, in 1892, wrote a decree on nationality. He established that to be Congolese, one had to be born of a Congolese father and on the soil of the EIC. After independence, it was in 1967 that a law specified that anyone belonging to an ethnic group existing in the Congo "before November 1908", the date of the cession of the EIC to Belgium, was Congolese by origin.

According to Bausch, in 1957, "any individual born on Congolese soil to indigenous parents" was a "Belgian subject or Belgian of colonial status.". Moreover, the Belgian constitution allowed few rights to Belgian subjects compared to Belgian citizens. Citizens were given the right to vote, as an example, while the subjects were excluded from this right.[475] In 1957 Brausch noted that persons born in Congo of Congolese parents ('natives') are Belgian subjects and when in Belgium they enjoy all civil and public rights, but they are denied political rights; therefore they are not Belgian citizens and for that reason they are not required to perform military service.[476] He also noted that if they wished the same judicial and procedural competence, the freedom of movement at night time ('circulation nocturne')[477] etc. in 1948 they needed to apply for a card of 'civic merit' in order to be allowed to be 'assimilated' to Belgian citizens. He wondered about the legal repercussions of that discrimination of legal status and explains that according to the Explanatory Memorandum of the subsequent Decree of 1952, it was still premature to wish to achieve unity between Belgians born in Congo and in Europe and only when the indigenous authorities and population would have reached a sufficient 'political

[471] Dubuisson, Martine. Le Roi Reconnaît 'Les Actes De Cruauté' Commis Au Congo Sous Léopold II. Le Soir. 30 June 2020. https://www.lesoir.be/310315/article/2020-06-30/le-roi-reconnait-les-actes-de-cruaute-commis-au-congo-sous-leopold-ii. Last accessed on 16 December 2021.

[472] Universalis, Encyclopædia. Au Coeur Des Tenebres- Encyclopedie. Encyclopædia Universalis. https://www.universalis.fr/encyclopedie/au-coeur-des-tenebres/. Last accessed on 23 November 2021.

[473] Chambre des représentants de Belgique. COMMISSION SPÉCIALE CHARGÉE D'EXAMINER L'ÉTAT INDÉPENDANT DU CONGO ET LE PASSÉ COLONIAL DE LA BELGIQUE AU CONGO, AU RWANDA ET AU BURUNDI, SES CONSÉQUENCES ET LES SUITES QU'IL CONVIENT D'Y RÉSERVER. dekamer.be. 26 October 2021, p.45. https://www.dekamer.be/FLWB/PDF/55/1462/55K1462002.pdf. Last accessed on 1 December 2021.

[474] Pronczuk Monika, and Mihir Zaveri. "Statue of Leopold II, Belgian King Who Brutalized Congo, Is Removed in Antwerp." The New York Times. 9 June 2020. https://www.nytimes.com/2020/06/09/world/europe/king-leopold-statue-antwerp.html. Last accessed on 1 December 2021.

[475] Colinet, Mathieu, Eric Deffet, Bernard Demonty, Martine Dubuisson, Véronique Lamquin, and Joëlle Meskens. Carte Blanche: 'Dix Idées Reçues Sur La Colonisation Belge' - Point 8. Le Soir. 8 March 2019. https://www.lesoir.be/211032/article/2019-03-08/carte-blanche-dix-idees-recues-sur-la-colonisation-belge. Last accessed on 12 November 2021.

[476] "Les indigènes congolais étant sujets belges, ils jouissent en Belgique de la plénitude des droits civiques et publics; seuls leur sont refusés les droits politiques; ils ne sont donc pas citoyens belges et à ce titre ne sont pas astreints au service militaire." G.E.J.B. Brausch, "Pluralisme ethnique et culturel au Congo Belge", pp.243-267, in: Institut International des Civilisations Différentes (INCIDI), *Pluralisme ethnique et culturel dans les sociétés intertropicales. Compte-rendu de la XXème session tenue à Lisbonne les 15, 16, 17 et 18 avril 1957*, Bruxelles, 1957, reproduced in: Nationalite et citoyennete au Congo belge dans les annees 50. http://suffrage-universel.be/demo/zrdeco01.htm (last accessed 3 May 2022).

[477] It is not clarified in this text what 'circulation nocturne' means but it seems that only 'Belgian citizens' had free movement and 'Belgian subjects' had a curfew/evening clock.

maturity' would these constituencies be allowed to deal with the general interest rather than only with purely indigenous matters. To go beyond that would be dangerous now.[478] Similar to most French colonies, the Democratic Republic of Congo (then Zaïre) eventually became independent from Belgium in 1960.[479]

In 2011, demonstrations took place in Belgium to denounce living conditions, unemployment but also widespread racism.[480] There is an invisibility of black people in many professional sectors and in Belgian institutions. In 2016, the Belgian Minister of Foreign Affairs decided to limit the duration of Congolese visas to 6 months because of the violence of the government against demonstrations and the report of the presidential elections, due to the violence during the demonstrations, which created a very sensitive and unstable situation. The aim of such a measure was to send a message to the political power in Congo.[481] Relations between Belgium and the Congo are currently complicated. Today, many Congolese migrants seek asylum in Belgium, which has led Belgium to place these applicants in unoccupied social buildings.[482] Following the police violence scandals in the United States and the Black Lives Matter movement, there have also been calls in Belgium to decolonise spaces.

In 2020, King Philippe apologised to the Congolese government for the 'acts of violence and cruelty' inflicted during the rule of the Congo Free State, although he did not criticise the colonial policies of Leopold II's successors (the Belgian state).[483] The crimes committed have been the subject of studies on their possible genocidal nature.[484] The horrors were recounted in 1999 by Hotchschild in the book "The Ghost of King Leopold".[485]

International organisations have also visited and analysed the situation in former coloniser countries, and are aware of the problems they are facing. rIn May 2021, for instance, the Committee on the Elimination of Racial Discrimination expressed its concerns about education on colonisation and the history of people of African descent in Belgium.[486] The UN

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[478] "Dans les conseils des circonscriptions par contre, siègent exclusivement des indigènes, parce que selon les termes de l'exposé des motifs du nouveau décret sur les circonscriptions indigènes, il est encore prématuré de vouloir réaliser l'unité entre indigènes et non-indigènes à l'échelon des circonscriptions. Les intérêts des deux classes de la population, en effet, sauf peut-être au sein des villes dont un décret spécial règlera le statut, ne se rencontrent encore guère à ce niveau de l'organisation administrative. On vient de réunir indigènes et non-indigènes à l'échelon immédiatement supérieur, c'est-à-dire le territoire, par la création de conseils mixtes de territoire. Pendant un certain temps encore et tout au moins jusqu'à ce que les autorités indigènes et la masse de la population aient atteint une maturité politique suffisante, les circonscriptions ne s'occuperont donc que de questions d'intérêt purement indigène. Il serait périlleux d'aller actuellement au-delà." G.E.J.B. Brausch, "Pluralisme ethnique et culturel au Congo Belge", pp.243-267, in: Institut International des Civilisations Différentes (INCIDI), *Pluralisme ethnique et culturel dans les sociétés intertropicales. Compte-rendu de la XXème session tenue à Lisbonne les 15, 16, 17 et 18 avril 1957*, Bruxelles, 1957, pp. 249-251, reproduced in: Nationalite et citoyennete au Congo belge dans les annees 50. http://suffrage-universel.be/demo/zrdeco01.htm (last accessed 3 May 2022).

[479] "Décolonisation." Wikipedia. Wikimedia Foundation, 22 October 2021. https://fr.wikipedia.org/wiki/D%C3%A9colonisation. Last accessed on 23 October 2021.

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[481] RFI. La Belgique Raccourcit La Durée Des Visas Congolais. RFI. 5 October 2016. https://www.rfi.fr/fr/afrique/20161005-belgique-rdc-elections-visas-congolais-six-mois. Last accessed on 12 December 2021.

[482] Bernard, Nicolas. Le Droit Au Logement Des Migrants: Législation Belge Et Droit International. Housing Rights Watch. 9 March 2017. https://www.housingrightswatch.org/fr/content/le-droit-au-logement-des-migrants-l%C3%A9gislation-belge-et-droit-international. Last accessed on 16 November 2021.

[483] Dubuisson, Martine. Le Roi Reconnaît 'Les Actes De Cruauté' Commis Au Congo Sous Léopold II. Le Soir. 30 June 2020. https://www.lesoir.be/310315/article/2020-06-30/le-roi-reconnait-les-actes-de-cruaute-commis-au-congo-sous-leopold-ii. Last accessed on 16 December 2021.

[484] See e.g. Paula Drumond, Invisible Males: The Congolese Genocide, in Adam Jones (éd.), New Directions in Genocide Research, Routledge, 2011 (ISBN 978-0-415-49597-4), p. 96–112.

[485] Adam Hochschild. Les Fantômes Du Roi Léopold: La Terreur Coloniale Dans L'etat Du Congo, 1884-1908. Paris: Tallandier, 2019.

[486] Committee on the Elimination of Racial Discrimination, Concluding Observations on the combined twentieth to twenty-second periodic reports of Belgium, 21 May 2021, para 30.

Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-Recurrence also confirmed the importance of truth and memorialization and other measures to address the legacy of violations committed in colonial contexts.[487]

5.3 The Domestic legislation of France and Belgium

5.3.1. France

The ordinance of 21 July 1962 took as a criterion the personal status of the persons concerned: French people with civil status under ordinary French law, i.e. 'pieds-noirs' and Muslims who had renounced their local law status, retained French nationality by right, whereas people with civil status under local law, even if they were domiciled outside Algeria at the time of independence, could only retain French nationality by establishing their domicile in France and signing a declaration of recognition.

The decision about Algerian subjects' nationality was codified in Chapter VII of the French Civil code. The version that applies nowadays is from 1993, but there was a previous version in 1973, which was very similar. It applied not only to Algerians but more generally to former citizens of the former colonies. The article governing the question that concerns us in this case is article 32 of chapter VII of the French Civil Code, and in particular article 32-3:

> "Any French person domiciled at the date of independence in the territory of a State that had previously had the status of department or overseas territory of the Republic, shall automatically retain his or her nationality if no other nationality has been conferred on him or her by the law of that State."[488]

Nevertheless, according to French law, before the official date of independence, there was the possibility of acquiring French nationality by declaration under article 54 of the old code of nationality.[489]

Concerning Malagasy descendants of pre-independence immigrants, the same law of 28 July 1960 also applied. There are different situations regarding the nationality of residents of former colonies. Indeed, following independence of their territory of origin, the population from

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[487] Special Rapporteur Truth, Justice, reparations and guarantees of non-recurrence (2021), *Transitional justice measures and addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts*, report to the General Assembly, A/76/180, 19 July 2021, see e.g. §43 referring to the Declaration of the French President regarding the establishment of a truth and commemoration commission to analyse the colonial history with regard to Algeria and to open archives regarding this period that had been kept a secret: 'France is confronting its history in Algeria', *The Economist*, 15 May 2021, www.economist.com/international/2021/05/13/france-is-confronting-its-history-in-algeria. But see also Franceinfo, *Guerre D'Algérie: Ce Qu'il Faut Retenir Du Rapport Stora Remis Aujourd'hui à Emmanuel Macron.* Franceinfo, 20 januari2021, https://www.francetvinfo.fr/culture/patrimoine/histoire/guerre-d-algerie-ce-quil-faut-retenir-du-rapport-stora-remis-aujourdhui-a-emmanuel-macron_4265199.html. Last accessed on 20 February 2022.
For Belgium: Commission spéciale chargée d'examiner l'état indépendant du Congo (1885–1908) et le passé colonial de la Belgique au Congo (1908–1960), au Rwanda et au Burundi (1919–1962), ses conséquences et les suites qu'il convient d'y réserver", 17 July 2020, www.lachambre.be/kvvcr/pdf_sections/pri/congo/55K1462001.pdf. See also M. Dubuisson, Le Roi Reconnaît 'Les Actes De Cruauté' Commis Au Congo Sous Léopold II. Le Soir. 30 June 2020: https://www.lesoir.be/310315/article/2020-06-30/le-roi-reconnait-les-actes-de-cruaute-commis-au-congo-sous-leopold-ii.

[488] Legifrance. "Article 32 à 32-5 Du Code Civil Français." Legifrance.gouv.fr. https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070721/LEGISCTA000006136098/#LEGISCTA000006136098. Last accessed on 1 December 2021. Translated by ourselves.

[489] Legifrance. "Section IV De L'ancien Code De La Nationalité." Legifrance.gouv.fr. https://www.legifrance.gouv.fr/codes/id/LEGIARTI000006524028/1973-01-10. Last accessed on 1 December 2021.

the former colonies were able to retain French nationality under the conditions provided for by the law. If the nationality of the new State had been conferred on them, until 10 July 1973 these persons benefited from the possibility of having their French nationality recognized by a declaration made under the conditions provided for by this law, especially if having established their domicile in France.

However, persons who are currently undocumented may have been hindered in invoking this law at the time, because of steep evidentiary requirements for proving their French nationality within the deadline given in the law,[490] which created an injustice for them and their descendants. Finally, some people have never acquired either local or French nationality, especially in the case of immigrants from third countries in colonial territories that became independent later. An example of this is the problematic position of Indo-Pakistanis who immigrated to Madagascar when it was still a French colony and resided there as undocumented immigrants.[491] These people however, where not eligible for the Malagasy nationality after the independence of Madagascar, since they had not had the French nationality in the first place. Another example is the dire situation of the Harki's, who were Algerian auxiliaries in the French army. France abandoned them and many of them were killed or were imprisoned by the Front de Libération Nationale (main political movement for the Algerian independence) after 1962 as a "vengeance" for their "betrayal". Recently, the President Macron asked for their forgiveness for their suffering and that of their descendants.[492]

The procedure of recognition of French nationality was limited in time since it was just intended to allow persons who wanted to retain French nationality to have this nationality confirmed. The law of 20 December 1966 for Algeria and that of 9 January 1973 for the Sub-Saharan Africa and Madagascar put an end to the recognition procedure. However, the law of 9 January 1973, provided for a special procedure of reinstatement of French nationality for nationals of the former Overseas Territories, which was finally repealed by the law of 22 July 1993.[493] Indeed, it could happen that nationals of these former Territories d'Outre-Mer (Overseas territories, called TOMs) who opted for the procedure of recognition of French nationality after having transferred their residence to France saw their nationality contested years later. In the years following independence and until the end of the 1970s, the criterion of domicile was assessed broadly by the courts. The workers from the overseas territories could come alone (without their family) to work in France and the courts could accept more easily them to have a domicile in France, even if their family was not there. However, from the 1980s, court decisions began to emerge that cancelled the certificates of French nationality issued to the persons concerned in the 1960s or that found them to be foreigners on the grounds that they

[490] Défenseur des droits. Décision 2019-145 du 10 juillet 2019. https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=29688&opac_view=-1&lang_sel=de_DE. Last accessed on 2 December 2021.

[491] Assemblée Nationale. Réintégration - Malgaches Nés Sous Souveraineté Française. Fiche question. https://questions.assemblee-nationale.fr/q12/12-68825QE.htm. Last accessed on 19 November 2021.

[492] Deutsche Welle. Confronting France's Colonial Past: Harkis Eye Reparations. 15 October 2021. DW.COM. https://www.dw.com/en/confronting-frances-colonial-past-harkis-eye-reparations/a-59491421. Last accessed on 1 December 2021. See also e.g. Antoine Cuny-Le Callet. La Guerre D'Algérie Est 'Le Dernier Grand Tabou De L'histoire De Notre Pays.' Europe 1. 21 January 2021. https://www.europe1.fr/international/la-guerre-dalgerie-est-le-dernier-grand-tabou-de-lhistoire-de-notre-pays-4019884. Last accessed on 29 October 2021 and Stora, Benjamin. Rep. *LES QUESTIONS MÉMORIELLES PORTANT SUR LA COLONISATION ET LA GUERRE D'ALGÉRIE*. Paris, France : French Presidence, 2021. Last accessed October 18, 2021.

[493] GISTI. Geneviève Afoua-Geay : Les Anciens Colonisés Encombrants : Avocate (Entretien Mené Par Jean- François Martini) in *Plein droit* n° 79, December 2008 · GISTI. http://www.gisti.org/spip.php?article1389. Last accessed on 1 December 2021.

did not prove that they had established their domicile of nationality in France. According to the case law of the Court of cassation, the domicile of nationality "means an actual residence that is stable and permanent and coincides with the centre of occupations and family ties".[494]

In the *Bokassa* case decided in 1985, the Court of Cassation interpreted Article 78 of the Nationality Code to mean that presence outside France in a French army formation was to be assimilated to residence in France within the meaning of nationality law, and therefore that these soldiers had the right to residence in France. Thus, their descendants were to be considered as having retained French nationality by right.[495] However, the law of 22 July 1993 retroactively put an end to this case law.[496] While some organisations criticised it, it did not appear that there was a huge mobilisation against it, not even from the judicial bodies.[497] This situation, involving presence outside France in a French army formation could be comparable to the situation of Moluccans serving the Dutch Army in Indonesia (KNIL). Indeed, according to Hans van Amersfoort "The former soldiers were considered to be Indonesian citizens. But because they refused Indonesian citizenship they were displaced persons without citizenship. When the Dutch finally offered them Dutch citizenship on easy conditions, the diaspora was already established and most Moluccans refused to become Dutch citizens because they considered themselves citizens of the RMS.[498] In 1968 still more than 80 per cent of the Moluccans were without citizenship. After 1980 this number dwindled and at present (practically) all Moluccans are Dutch citizens." [499] In both the French and the Dutch case, the fact that a person or a group of persons served the interests of the armies of the previously colonial European states, allowed them to obtain the nationality of the country. The solution given by the Netherlands in the case of the East Asian population and the decision of the French state in the case of Bokassa were quite similar, until 1993 and the change of the French case law.

In France, several cases have been linked to the status of French citizenship for people born in the French colonies before independence, and therefore on French territory.[500]

GISTI is an association created in 1972 and made up of volunteers and practitioners (such as lawyers and social workers), who are in regular contact with migrant populations.[501] Since its inception, the goal has always been to combine theory and practice on the rights of

[494] Ibid, and Cour de cassation, Chambre civile 1, 15 novembre 2017, 16-24877 "résidence effective présentant un caractère stable et permanent et coïncidant avec le centre des attaches familiales et des occupations".
[495] Bat, Jean-Pierre. Les Diamants (De Bokassa) Sont Éternels. Cain.info. https://www.cairn.info/revue-afrique-contemporaine-2013-2-page-127.htm. Last accessed on 3 December 2021.
[496] Legifrance. Loi n° 93-933 Du 22 Juillet 1993 Réformant Le Droit De La Nationalité. Legifrance.gouv.fr. 2019. https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000362019/. Last accessed on 23 November 2021.
[497] Richez, Anne, X Pesenti, and H Fulchiron. Premier Bilan De L'application De La Loi Du 22 Juillet 1993 Sur La Nationalité : Une Manifestation Pacifique ?. GISTI. November 1996. http://www.gisti.org/spip.php?article3731. Last accessed on 5 December 2021.
[498] RMS means Republic of South Moluccans.
[499] Hans van Amersfoort (2004) The waxing and waning of a diaspora: Moluccans in the Netherlands, 1950–2002, Journal of Ethnic and Migration Studies, 30:1, 151-174, DOI: 10.1080/1369183032000170213.
[500] See e.g. Legifrance. Cour De Cassation, Chambre Civile 1, Du 10 Février 1993, 91-17.601. Legifrance.gouv.fr. https://www.legifrance.gouv.fr/juri/id/JURITEXT000007030001/. Last accessed on 19 November 2021; Legifrance. Cour De Cassation, Chambre Civile 1, Du 6 Décembre 1989, 87-15.888 ; Legifrance.gouv.fr. https://www.legifrance.gouv.fr/juri/id/JURITEXT000007024050. Last accessed on 19 November 2021. Legifrance. Cour De Cassation, Civile, Chambre Civile 1, 13 Avril 2016, 15-19.694 ; Legifrance.gouv.fr. https://www.legifrance.gouv.fr/juri/id/JURITEXT000032414493. Last accessed on 19 November 2021 ; and Legifrance. Cour De Cassation, Civile, Chambre Civile 1, 28 Février 2018, 17-14.239. Legifrance.gouv.fr. https://www.legifrance.gouv.fr/juri/id/JURITEXT000036697083/. Last accessed on 19 November 2021.
[501] Groupe D'information Et De Soutien Des Immigrés, GISTI, 1999, https://www.gisti.org/spip.php?page=sommaire. Last accessed on 19 February 2022.

foreigners and undocumented migrants in France. They are particularly known for the thematic works they share. In 2020 GISTI published a report about the situation of Algerians in France, since specific legislation and provisions is applicable to them.[502] It is this report we draw upon in the subsequent discussion on the legislation, which we consider to be thorough and well-informed on the relevant French law in practice.

Based on the agreement between France and Algeria, Algerian citizens have a special status in France that approximates the status of French citizens under ordinary ('common') law. According to the GISTI, given the mounting legislation concerning foreigners and the absence of any new modification of the Franco-Algerian agreement since 2001, there are now sometimes significant differences between the general rules of the Ceseda[503] and the specific rules that apply to Algerians.[504] Most of the time, the latter are favourable to them. However, it sometimes happens that the prefectural services do not take into account the specificities of the status of Algerians and wish to apply the provisions of the Ceseda to them.

It is then up to the interested parties to remind these services that these general provisions are not applicable to them, and to cite the specific stipulations of the Franco-Algerian agreement that must be taken into account. [505] In the GISTI report, it is explained that in 1968, with the bilateral agreement, Algerian citizens only needed a passport to come to France. However, since 1986, Algerians have been subject to the need to obtain a visa to come to France.[506]

The report also describes that in the provisions that concern Algerians, some are less advantageous for Algerians than those of ordinary law, as regards the multi-year residence permits, created by the law of 7 March 2016, and they are not allowed to get access the procedure for exceptional admission to residence.[507]

Moreover, the report describes the situation in which "Algerian nationals who can prove three years of uninterrupted residence in France, on a regular basis and whatever the reason, can claim a 10-year residence certificate."[508] Yet the prefects do not always apply this rule,

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[502] GISTI, *Statut Des Algériennes Et Des Algériens En France* (Paris, France: Groupe d'information et de soutien des immigrées, 2020).

[503] In French law, the Code de l'entrée et du séjour des étrangers et du droit d'asile or CESEDA, sometimes referred to as the Code des étrangers, is the code that brings together the legislative and regulatory provisions relating to the law on foreigners.

[504] GISTI, *Statut Des Algériennes Et Des Algériens En France* (Paris, France: Groupe d'information et de soutien des immigrées, 2020), p. 1.

[505] GISTI report (2020), p. 2.

[506] Ibid, page 5.

[507] Ibid, pp 11 and 13. In addition, there is an integration contract for all foreigners, which theoretically does not apply to Algerian populations, p 13. This contract is particularly targeted at Muslim populations, Myriam Hachimi-Alaoui et Janie Pélabay, « Contrats d'intégration et « valeurs de la République » : un « tournant civique » à la française ? », Revue européenne des migrations internationales [Online], vol. 36 - n°4 | 2020, mis en ligne le 02 janvier 2020, consulté le 05 février 2022. URL : http://journals.openedition.org/remi/17069 ; DOI : https://doi.org/10.4000/remi.17069. The law of 7 March 2016 (Ceseda, art. L. 311-9) having been put in place in 2016 shortly after Islamist terrorist attacks that affected France and Europe in general. Peter Cluskey, "Deaths from Terrorism in Europe Have Spiked since 2014," The Irish Times, 16 June 2017, https://www.irishtimes.com/news/world/europe/deaths-from-terrorism-in-europe-have-spiked-since-2014-1.3122948. Last accessed on 19 February 2022. The GISTI report (2020) says "6. Algerian nationals born in France (art. 6, 6°) An Algerian born in France may claim a certificate of residence by right if he or she can prove by any means that he or she has resided there continuously for at least 8 years, and that he or she has followed (possibly outside France), after the age of 10, a schooling of at least 5 years in a French school. The application must be made between the ages of 16 and 21." Identical provisions appear in the Ceseda (art. L. 313-11, 8°), GISTI report (2020), p. 27 referring to the Code de l'entrée et du séjour des étrangers et du droit d'asile, Article L313-11 (abrogé), point 8 (translation PF and SR).

[508] See art. 7 bis, d.

since the text is quite vague and they take a wide margin of appreciation making it easy for them to refuse such a certificate.[509]

Family members of Algerian nationals who have held a certificate for 10 years in France may also come and settle in France.[510] The duration of their stay is the same as for Algerian nationals. This provision is much more favour able than the common status regime for foreigners because family members only obtain a temporary "private and family life" residence permit in all cases.[511]

Moreover, the situation of Algerian nationals regarding French children in their custody is more favourable than that of other third-country nationals.[512] who, in the same situation of parental authority, are not entitled to a 10-year residence permit until they have held an annual or multi-year residence permit for three years .[513] Those are the conditions for Algerian nationals can stay legally in France, according to the French domestic law.

A report was published in 2019 by the Commission Nationale Consultative des Droits de l'Homme about the problem of racism in the French society.[514] The report on systemic racism states that "59% think that « many immigrants come to France only to qualify for social protection."[515] The African immigrants, from Northern Africa and Sub-Saharan Africa are especially affected by those stereotypes.[516]

Education can play a vital role by teaching people about the consequences of colonialism and racial discrimination Indeed, education could possibly help people to see a link between slavery, colonisation and racial discrimination in all its forms that we still know today.[517]

In terms of domestic court decisions, in 2019 case concerning Malian workers the court found that they were discriminated against within the company because of their origin,[518] Although this does not address institutionalised racism in the public system, it is a step towards explaining racism in society, beyond criminal racist acts, as it demonstrates a perception of non-white people.[519]

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[509] GISTI, *Statut Des Algériennes Et Des Algériens En France* (Paris, France: Groupe d'information et de soutien des immigrées, 2020), page 27.
[510] GISTI report (2020), p. 31.
[511] See GISTI (2020), pp 27 and 30.
[512] GISTI (2020), p. 32.
[513] Code de l'entrée et du séjour des étrangers et du droit d'asile, Article L314-9 (abrogé), point 2.
[514] Commission Nationale Consultative des Droits de l'Homme (CNCDH) Report on the Fight against Racism, anti-semitism and xenophobia - Report 2019 on the fight against racism - Les Essentiels. https://www.cncdh.fr/sites/default/files/essentiels_rapport_racisme_2019_format_a4_anglais.pdf. Last accessed on 10 February 2022.
[515] Ibid, p. 9..
[516] Le Racisme Ordinaire De La Sénatrice LR Jacky Deromedi. Libération, 2021, https://www.liberation.fr/politique/le-racisme-ordinaire-de-la-senatrice-lr-jacky-deromedi-20210412_HYBSCLBKYNFGHFQSYZSYRRPFHQ/. Last accessed on 11 February 2022.
[517] See also Chapter 2 of our Report about the International Law Framework.
[518] Conseil de Prud'hommes de Paris, 17 décembre 2019, N° RG F 17/10051.
[519] See Commission Nationale Consultative des Droits de l'Homme (CNCDH) Report on the Fight against Racism, anti-semitism and xenophobia - Report 2019 on the fight against racism - Les Essentiels. https://www.cncdh.fr/sites/default/files/essentiels_rapport_racisme_2019_format_a4_anglais.pdf. Commission Nationale Consultative des Droits de l'Homme (CNCDH) Report on the Fight against Racism, anti-semitism and xenophobia - Report 2019 on the fight against racism - Les Essentiels. https://www.cncdh.fr/sites/default/files/essentiels_rapport_racisme_2019_format_a4_anglais.pdf. , p. 19. See also Ministère de l'Europe et des Affaires étrangères, "La Réintégration Dans La Nationalité Française," France Diplomatie - Ministère de l'Europe et des Affaires étrangères, March 2016, https://www.diplomatie.gouv.fr/fr/services-aux-francais/etat-civil-et-nationalite-francaise/nationalite-francaise/article/la-reintegration-dans-la-nationalite-francaise

The French case law concerning nationality appears to be mixed. In certain cases the Court of Cassation has been very strict and reversed decisions by lower courts that had recognised French nationality.[520] By contrast, in another case it has found that French civil status is not subject to renunciation and it recognised nationality.[521]

5.3.3 Belgium

Concerning Belgium, in the colonial period the will to connect the two countries was strong. For example, a person born in the "Belgian Congo" of "indigenous" parents between 1908 and 1960 held Belgian nationality until the independence of the Congo. At the time, they were seen as Belgian subjects rather than Belgian citizens.

The distinction between Belgian citizens on the one hand and subjects on the other has caused problems for people born in the DRC who wanted to apply for Belgian nationality on grounds of being a former Belgian citizen. Since only "metropolitan Belgians" (those of European ancestry) were able to apply for Belgian nationality as a former Belgian citizen, it was not possible to do so as a former Belgian subject from the DRC under Belgian colonial rule.[522] The situation after independence was settled by Belgian legislation. Article 2, § 4, of the *law of 22 December 1961 on the acquisition or recovery of Belgian nationality by foreigners born or domiciled in the territory of the Republic of Congo or by Congolese who had their habitual residence in Belgium* stated that both groups needed to have three years of residence in Belgium.[523] This possibility was open for two years. Article 28 of the law of 28 June 1984, establishing the Nationality Code, granted a new period of two years to Congolese residing in Belgium to make a declaration of acquisition of nationality under simplified conditions. It also brought a peak of the number of changes of nationality in Belgium for 1984-1985.[524] Yet again the new period was only for two years, although it is possible that the limited period of two years was more problematic in 1961 when the independence had just been established, than in 1984. In 1961, there were 2585 Congolese in Belgium and this number increased constantly

[520] See e.g. Cass. Civ. 1re, 01 juillet 2003, pourvoi n°01-10677, Bull. civ. 2003 I N° 153 p. 120 (under French law, the former French subjects no longer had French nationality; Mr Abdelhamid X... had followed his father's condition, that the latter, originally from Algeria, under "indigenous" status (as French 'subjects') and not having made a declaration recognizing his nationality, was deemed to have lost French nationality on 1 January 1963) and Cass. Civ. 1re, 26 janvier 2011, pourvoi n°10-30124 (the plaintiff did not have documents proving his right to French nationality, such as a certificate of French nationality; the Court of Cassation considered that the interested party, rather than the state had the burden to produce evidence of nationality).

[521] See e.g. Cass. Civ. 1re, 25 septembre 2013, pourvoi n°12-27294 (the French nationality of a granddaughter could not be renounced just based on the argument that her grandmother had changed her name from Joséphine to Fatma and opted for Algerian nationality on 8 June 1965; the civil status of common law is not subject to renunciation and by excluding that the appellant can take advantage of the common law status of her grandmother...the Court of Appeal violated Article 32-1 of the Civil Code)

[522] Lambert, Pierre-Yves. La Participation Politique Des Allochtones En Belgique. Nationalité et citoyenneté EN BELGIQUE: Un historique. http://www.suffrage-universel.be/be/0101.htm. Last accessed on 2 December 2021. We are not entirely clear on this situation as compared to the situation discussed next involving the law of December 1961. We think it means that former Belgian 'subjects', indigenous Congolese, living in Congo, were not able to apply for Belgian nationality, while former Belgian citizens with European ancestry living in Congo were able to. The next page appears to discuss the situation of former Congolese Belgians who *were already living in Belgium* at the time of independence.

[523] 28 JUIN 1984. - Code De La Nationalité Belge. Loi - wet. https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1984062835. Last accessed on 19 November 2021.

[524] Quentin Schoonvaere, *Etude De La Migration Congolaise Et Son Impact Sur La Présence Congolaise En Belgique* (Brussels, Belgium: European Migration Network, 2010), p.36.

until today, with the exception of 1985 and 1995. By 2010there were 16.132 Congolese legally residing in Belgium and more than 25,000 Congolese by birth became Belgians.[525]

Belgian 'citizens' were considered differently under the Belgian Law than Belgian 'subjects'. The general jurisprudence until 2018 had been to deny access to Belgian citizenship for people born in Belgian Congo before 1960, in accordance with Article 24 of the Belgian Nationality Code.[526]

In 2018, the Brussels Court of Appeal changed this. This was in the context of a change in Belgian society regarding the question of the duty to remember atrocities done by Belgians in the context of colonization.[527] In this 2018 case the court ruled that persons born on the territory of the colony of "Congolese" parents were also of Belgian nationality, this nationality having replaced Congolese nationality following the incorporation of the territory of Congo into Belgian territory.[528] Moreover, the Court found that the differences in status between Belgian subjects and Belgian nationals did not have the effect of creating two Belgian nationalities of a different nature, since the legal situation of the Belgian Congo was characterized by a unity of sovereignty of the Belgian State. It explains the difference of status between the Belgian citizens, the Belgian subjects and the foreigners living in the territory of DRC.[529] Then, the Court specifies that nationality and citizenship are different, since the last one provides political rights. However, in the view of the Court the nationality was the same for all the Belgians. Thus, Article 24 of the Belgian nationality Code applies to all Belgian nationals, including to people born in Belgian Congo before 1960. The Brussels Court of Appeal noted that "in the absence of specific provisions regulating the question of nationality in a treaty of cession or annexation, the incorporation of one country into another entails the automatic naturalization of all nationals of the annexed country. This is a general principle of public international law or the law of nations."[530]

Thus, persons born in "Belgian Congo" of "indigenous" parents, between 1908 and 1960, held Belgian nationality until the independence of the Congo. They are therefore entitled to file an application for recovery of Belgian nationality on the basis of article 24 of the Nationality Code:

> "A person who has lost Belgian nationality otherwise than by forfeiture may, by a declaration made in accordance with Article 15, recover it on condition that he or she is

[525] Etude De La Migration Congolaise. EMN, 2010, https://emnbelgium.be/fr/publication/etude-de-la-migration-congolaise-centre. Last accessed on 19 February 2022.

[526] See Hof van Cassatie 21 April 2011, nr 275, AR C.10.0394.F, p. 1058-1062, accessible at: https://justitie.belgium.be/sites/default/files/downloads/AC 2011 04.pdf (last accessed 21 April 2022). On similar approaches and their history see e.g. Anton de Kom, *Wij slaven van Suriname,* Amsterdam: Uitgeverij Atlas Contact 2020 (18e druk); M. Bot, 'De natiestaat als olifant in de kamer van de postkoloniale rechtsstaat, Over nationaliteitsdiscriminatie, institutioneel racisme en het recht', *NTM/NJCM-Bull.* 2022, afl. 1, p. 81.

[527] The case that changed this is the case 2017/AR/701 from the Cour d'appel de Bruxelles, 43ème chambre, chambre de la famille, 28 JUIN 1984. - Code De La Nationalité Belge. Loi - wet. 2019. https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1984062835. Last Accessed on 19 November 2021.

[528] RDC: Cour d'Appel de Bruxelles Procureur Général v. M.N.– Arrêt Définitif of 10 August 2018 – 2017/AR/701. See Citizenship Rights in Africa. 2018. https://citizenshiprightsafrica.org/rdc-cour-dappel-de-bruxelles-arret-definitif-2017ar701/. Last accessed on 15 February 2022.

[529] Cour d'Appel de Bruxelles Procureur Général v. M.N.– Arrêt Définitif of 10 August 2018 – 2017/AR/701, para. 25.

[530] Cour d'Appel de Bruxelles, Procureur Général v. M.N.– Arrêt Définitif of 10 August 2018 – 2017/AR/701, para. 17 (translated by PF and SR from the original judgment in French).

at least eighteen years old and has had his or her principal residence in Belgium during the twelve months preceding the declaration."[531]

Most important for the analogy with former Dutch citizens is the reasoning by the Court to the effect that to exclude Belgians with 'Congolese status' from the scope of application of article 24 of the Nationality Code, when they had previously failed to make use of the temporary and transitional laws, while other former Belgians do not face such limitations, would amount to unjustified discrimination between 'persons who have lost Belgian nationality' depending on whether they have a Congolese background or not. The Court proceeded by noting that it is not 'reasonably tenable' to prevent Congolese Belgians from recovering Belgian nationality under article 24, which is a general provision, 'under the mere pretext' that they have not made use of facilities they had in the past to opt for Belgian nationality, which were granted by purely temporary or transitional laws. It is not justifiable to exclude them from the application of the general provisions of article 24 when there is no longer any other specific provision allowing them to recover Belgian nationality.[532]
The current impact of colonial legislation drew some attention in Belgian media.[533]

In paragraph 5.4, we examine whether there were specific provisions for the admission of former nationals in the international agreements between Belgium and the DRC, and between France and Algeria.

5.4 The International Agreements for the former colonies' citizens

5.4.1 France

According to Article 55 of the French Constitution, treaties or agreements duly ratified or approved have a higher authority than national law.[534] On 27 December 1968, an agreement on the "movement, employment and residence in France of Algerian nationals and their families"

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[531] Article 24 of the Belgian Nationality Code, see further B. Renauld, « Les "Belges de statut congolais" étaient Belges », Cahiers de l'EDEM, septembre 2018. https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/bruxelles-10-aout-2018.html. Last accessed on 19 November 2021.

[532] Cour d'Appel de Bruxelles Procureur Général v. M.N.– Arrêt Définitif of 10 August 2018 – 2017/AR/701, para. 26 (« Exclure de son champ d'application les belges de statut congolais qui n'ont pas fait application des lois temporaire et transitoire, reviendrait à opérer une discrimination injustifiée entre « personnes qui ont perdu la nationalité belge » selon qu'elles soient congolaises ou non. Empêcher les Congolais (Belges de statut congolais) de recouvrer la nationalité belge en application de l'article 24 du Code de la nationalité, qui est une disposition générale, alors qu'ils ont eu autrefois des facilités pour opter pour la nationalité belge, sous le seul prétexte qu'ils n'ont pas fait usage de ces facilités octroyées par des lois purement temporaires ou transitoires, n'est pas raisonnablement soutenable. Les exclure de l'application des dispositions générales de l'article 24 du Code de la nationalité, alors qu'il ne subsiste plus aucune autre disposition particulière leur permettant de recouvrer la nationalité belge, n'est pas justifiable. »

[533] Agentschap Integratie en Inburgering, 'Personen geboren uit Congolese ouders in "Belgisch-Congo" waren Belg', 23 november 2018 Personen geboren uit Congolese ouders in "Belgisch-Congo" waren Belg | Agentschap Integratie en Inburgering (agii.be); Zie ook Ambassade en Consulaten van het Koninkrijk België in de Democratische Republiek Congo, Afstamming en nationaliteit, Afstamming en nationaliteit | België in de Democratische Republiek Congo (belgium.be); Frank Caestecker, Bernadette Renauld, Nicolas Perrin en Thierry Eggerinckx, *Belg worden. De geschiedenis van de Belgische nationaliteitsverwerving sinds 1830*, Mechelen: Wolters Kluwer, 2016; see further Cedric Lagast, 'Ik ben door België ontvoerd en nadien aan mijn lot overgelaten' Vijf vrouwen, geboren onder het Belgisch koloniaal bestuur in Congo, dienen een klacht in tegen België wegens misdaden tegen de menselijkheid. 'Als kleuter ben ik door de Belgische staat van de ene dag op de andere bij mijn familie weggehaald.' De Standaard 27 juni 2020 'Ik ben door België ontvoerd en nadien aan mijn lot overgelaten' | De Standaard

[534] Constitution De La Ve République Française. Legifrance.gouv.fr. https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000571356/. Last accessed on 19 November 2021.

was concluded between France and Algeria. In it, the conditions of entry, stay and residence of Algerian nationals in France is more advantageous given the common history. Yet the third amendment to the agreement, signed on 11 July 2001,which came into force on 1 January 2003, essentially aligned the regime for Algerians with the law applicable to other foreigners.[535] Meanwhile other legislation has been adopted regarding other third country nationals and sometimes these are more advantageous than the current legislation is for former French nationals from Algeria.[536] Next to the 1968 agreement between France and Algeria, there is a Franco-Tunisian Agreement dating from 17 March 1988 amended by the amendment of 8 September 2000 and by the concerted management of migration of 28 April 2008. This agreement facilitates family reunification among other things.[537] The Franco-Moroccan agreement concluded on 9 October 1987 exclusively governs the situation of Moroccans wishing to obtain a temporary residence permit marked "employee". It does not concern the families in themselves but the Moroccan workers.[538]

In addition, the other former French colonies, Benin, Burkina Faso, Cameroon, the Central African Republic, the Republic of Congo Brazzaville, Côte d'Ivoire, Gabon, Mali, Mauritania, Niger, Senegal and Togo have signed agreements with France on the movement and residence of persons. The agreements allow them to obtain the same residence permit as the person they are joining. In addition, they obtain a 10-year residence permit after 3 years of living in France.[539]

Recently, the admission of Algerians in particular has become more difficult. As noted, the Franco-Algerian agreement was last revised in 2001. In 2006 the general code on the entry and residence of foreigners and the right to asylum was heavily reformed by the law on Immigration and Integration. The new provisions do not apply to Algerian nationals, since they are ruled by the international bilateral agreement which has priority over domestic provisions in the hierarchy of norms, and have a special regime due to this agreement.[540] At the same time, the revision of 2001 brought the situation of Algerian nationals closer to those of foreigners in general.. In any case, the inapplicability to Algerian nationals of the 2006 Code appears to be detrimental to them in some respects, but not in others.[541] In light of the object and purpose of

[535] Ministère de l'Intérieur. L'accord Franco-Algérien. https://www.immigration.interieur.gouv.fr/Europe-et-International/Les-accords-bilateraux/Les-accords-bilateraux-en-matiere-de-circulation-de-sejour-et-d-emploi/L-accord-franco-algerien. Last accessed on 19 November 2021.

[536] MEGHERBI, Fayçal. L'accord Franco-Algérien du 27 Décembre 1968 : Un Accord Dépassé ! Actualité Maître Fayçal MEGHERBI | L'accord franco-algérien du 27 décembre 1968 : Un accord dépassé ! 10 May 2021. https://www.juritravail.com/Actualite/l-accord-franco-algerien-du-27-decembre-1968-un-accord-depasse/Id/355234. Last accessed on 19 November 2021.

[537] Ministère de l'intérieur. L'accord Franco-Tunisien. https://www.immigration.interieur.gouv.fr/Europe-et-International/Les-accords-bilateraux/Les-accords-bilateraux-en-matiere-de-circulation-de-sejour-et-d-emploi/L-accord-franco-tunisien. Last accessed on 19 November 2021.

[538] Ministère de l'Intérieur. L'accord Franco-Marocain. https://www.immigration.interieur.gouv.fr/Europe-et-International/Les-accords-bilateraux/Les-accords-bilateraux-en-matiere-de-circulation-de-sejour-et-d-emploi/L-accord-franco-marocain. Last accessed on 19 November 2021.

[539] Ministère de l'Intérieur. Les accords Bilatéraux Avec Certains Etats D'Afrique Subsaharienne. https://www.immigration.interieur.gouv.fr/Europe-et-International/Les-accords-bilateraux/Les-accords-bilateraux-en-matiere-de-circulation-de-sejour-et-d-emploi/Les-accords-bilateraux-avec-certains-Etats-d-Afrique-subsaharienne. Last accessed on 19 November 2021.

[540] Ministère de l'Intérieur. L'accord Franco-Algérien. https://www.immigration.interieur.gouv.fr/Europe-et-International/Les-accords-bilateraux/Les-accords-bilateraux-en-matiere-de-circulation-de-sejour-et-d-emploi/L-accord-franco-algerien. Last accessed on 19 November 2021.

[541] See e.g. MEGHERBI, Fayçal. L'accord Franco-Algérien du 27 Décembre 1968 : Un Accord Dépassé ! Actualité Maître Fayçal MEGHERBI | L'accord franco-algérien du 27 décembre 1968 : Un accord dépassé ! 10 May 2021.

the Franco-Algerian Agreement (1968), it could have been imagined that the least restrictive measures would be implemented for Algerian citizens, to facilitate their entry and stay in France.[542]

According to the bilateral agreements, the Algerian nationals have a special status comparing to the other third-country nationals. Certain rules are more satisfactory than those of citizens from other countries including for other "former subjects", even if most of the former colonised countries that have become independent have made agreements on the movement of their citizens in France. This can be explained by the closer ties of Algeria during the colonial period with the French central power, compared to the other colonies. Nevertheless, the rules agreed upon between France and Algeria regarding Algerian citizens are not always applied, and this issue may become more publicized in the coming years.

5.4.2. Belgium

We have not found any bilateral agreements between Belgium and the Democratic Republic of Congo regarding nationality rights signed after the independence of the Belgian Congo. Therefore, within Belgium, Belgian law is the law on this matter, and therefore the laws already mentioned are those that are applied regarding the right to Belgian nationality for people born in Belgium Congo before independence. Furthermore, we have also mentioned the case law that plays an important role in the application of the Belgian law. The understanding of who could invoke regulations for former nationals, which was adhered to up until the judgment of the Brussels Court of Appeal in 2018 could explain the relatively small number of DRC nationals in Belgium, which is only the 8th largest foreign community in the country.[543]

5.5. Conclusion

As shown in the different parts of the analysis concerning the situation in France and Belgium, there are great similarities with the Netherlands. Indeed, colonisation treated subjects and citizens of colonial empires differently, starting with slavery and exploitation. Since the independence of the former colonies, the populations formerly considered as belonging to European countries have been treated as foreigners, without any real recognition of the fact that they were born as nationals of the colonising countries.

However, in Belgium, case law has recently changed, recognising that colonized populations were part of the population of European states, although under a different regime. The Brussels Court of Appeal found that distinguishing between Belgians with 'Congolese status' and other former Belgians would amount to unjustified discrimination.[544]

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https://www.juritravail.com/Actualite/l-accord-franco-algerien-du-27-decembre-1968-un-accord-depasse/Id/355234. Last accessed on 19 November 2021.

[542] Ministère de l'Intérieur. L'accord Franco-Algérien. https://www.immigration.interieur.gouv.fr/Europe-et-International/Les-accords-bilateraux/Les-accords-bilateraux-en-matiere-de-circulation-de-sejour-et-d-emploi/L-accord-franco-algerien. Last accessed on 19 November 2021.

[543] Immigration En Belgique, Wikipedia (Wikimedia Foundation, 2022), https://fr.wikipedia.org/wiki/Immigration_en_Belgique#Les_années_1980_et_1990. Last accessed on 19 February 2022.

[544] Cour d'Appel de Bruxelles Procureur Général v. M.N.– Arrêt Définitif of 10 August 2018 – 2017/AR/701, para. 26 (« Exclure de son champ d'application les belges de statut congolais qui n'ont pas fait application des lois temporaire et transitoire, reviendrait à opérer une discrimination injustifiée entre « personnes qui ont perdu la nationalité belge » selon

This recognition in case law, and in particular the finding of discrimination, shows how a Belgian court has recently confronted colonial remnants in legislation. This judgment may serve to inspire in the context of Surinamese born before 1975 living in the Netherlands and not having a regularized situation in the country and the compatibility with the principle of non-discrimination of article 3.51 (1) (d) or (e) Aliens Decree.

Additionally, it important to note that France has made several bilateral agreements with former colonies, which provide the inhabitants of those countries with more lenient provisions regarding the obtainment of a residence permit in France. This shows that there are former colonisers who, in response to independence of former colonies, have chosen to treat their former nationals more favourably in terms of admittance. While not perfect in its aftermath, the 1968 Agreement as such appears to represent a better treatment of former French nationals born in Algeria than the 1975 nationality agreement between Suriname and the Netherlands and its aftermath provides to former Dutch nationals born in Suriname.

qu'elles soient congolaises ou non. Empêcher les Congolais (Belges de statut congolais) de recouvrer la nationalité belge en application de l'article 24 du Code de la nationalité, qui est une disposition générale, alors qu'ils ont eu autrefois des facilités pour opter pour la nationalité belge, sous le seul prétexte qu'ils n'ont pas fait usage de ces facilités octroyées par des lois purement temporaires ou transitoires, n'est pas raisonnablement soutenable. Les exclure de l'application des dispositions générales de l'article 24 du Code de la nationalité, alors qu'il ne subsiste plus aucune autre disposition particulière leur permettant de recouvrer la nationalité belge, n'est pas justifiable. »).

6. General Conclusion

Based on our assessment of the compatibility of the regulations and practice regarding article 3.51 (1) (d) Vb with the non-discrimination obligations of the Netherlands under CERD, ICCPR and ECHR, we conclude that article 3.51 (1) (d) Vb may come to be considered directly discriminatory because of the distinction made between two groups of former Dutch citizens on the bases of place of birth. This results in indirect discrimination based on race and descent. Since Surinamese (and other people from the former colonies) are being excluded from the policy on former Dutch nationals, this comes down to mostly non-white people of African or Asian descent being affected. This conclusion is based on our findings regarding the migratory and legal history, the development of article 3.51 (1) (d) Vb, the case law concerning this provision and other case law concerning the admission of former Dutch nationals.

In answering the question whether the discrimination in the provision is objectively justifiable, we have tried to find a reason or motivation. Yet, neither in an Explanatory Memorandum nor in other official documents, were we able to find an explicit reason. It is therefore not exactly clear whether the discrimination is objectively justifiable or not. We were, however, able to draw conclusions from Explanatory Memorandums, oral proceedings and judgments from different courts of other provisions that (in)directly affected Surinamese people. A motivation that was often used was the inability of Surinamese people to integrate well into Dutch society. Yet those documents or judgments did not refer to any scientific research to this effect. In conjunction with the described (wishes for) restriction of migration from Suriname, we consider that this has been an unmentioned motivation for drafting article 3.51 (1) (d) Vb. In legally addressing the problems faced by the group of undocumented Surinamese people who were born as Dutch citizens before 1975, we consider that there is a strong argument that their situation, as well as the existence of article 3.51 (1) (d) Vb constitutes both direct and indirect discrimination based on suspect grounds for which there do not appear to be very weighty reasons.

Article 8 ECHR does offer a legal path that can be successful in individual cases. It is unclear what kind of influence the latest ABRvS case on article 8 ECHR concerning Surinamese people will have in the future, but we expect that it is still very hard to prove the exceptional individual circumstances to succeed in an appeal to article 8 ECHR. Moreover, it means that each former Dutch citizen who has been present in the Netherlands undocumented would have to go through this procedure individually.

France and Belgium have been grappling with a distinction between ‘subjects’ and ‘citizens’. While formally the Netherlands has abolished the distinction much earlier, it does appear that this distinction is a ghost of the past that is still present in our regulations and practice. Moreover, it appears that the bilateral agreement between Suriname and the Netherlands is less forthcoming than the one made between Algeria and France some years before. Moreover, especially the Netherlands seems to have failed to meet the promises made during the independence talks.

Similarities between the UK and the Netherlands with regard to the unjust treatment of ‘colonial subjects’, whether citizenship is acquired or not, are striking. However, important contextual – legal, administrative, mediatic, political – differences also stand out and may be

useful in order to understand what mistakes not to repeat. They may also inspire as to how to effectively avoid such irregularities and to offer effective reparation.

As colonial states, these previous Empires invited people from their former territories to rebuild post Second World War society in Europe. As colonial subjects, European citizenship was automatically granted to Surinamese and Caribbean people until Suriname's independence from the Netherlands as well as that of Caribbean countries from the UK. Therefore, many Surinamese, and people of Caribbean descent, resided legally for a period of time in their European homelands. Ties between the individuals at stake and the European countries involved are not difficult to prove, with many family members already settled legally in these countries, the knowledge of the national language, working experiences and many other factors of attachment.

Litigation based on articles 8 and 14 ECHR has taken place with regard to the protection of family and private life and their relationship with discrimination under "other status" enshrined in article 14 ECHR. However, as mentioned above, this litigation avenue is difficult and only suitable to individual cases.

In addition, other measures could be considered, such as restitution in kind, in the sense of restoring people to their rights, and other forms of satisfaction as well as guarantees, such as establishing a trust fund for affected communities, but also an improvement in the general educational curriculum, and finally financial compensation schemes that should not be too difficult or long for victims to apply for and obtain. The Inter-American system of protection of human rights includes interesting reasoning on guarantees of non-repetition and real apologies, as well as on substantive reparation, including trust funds, which deserves to be looked into further. Regarding reparations' complexity and length, the scandal regarding the so-called taxation fraud in The Netherlands and the ensuing failure to address this on a systemic level, and problems now with processing the compensation claims can serve as a fresh lesson for the Dutch system of reparation.

The UK seems to have left out of the Compensation Scheme's scope individuals who are members of the Windrush generation and have faced immigration injustice. In this sense, it would be important to monitor the categorisation of the potential groups at the centre of future litigation or other mobilisation so that they indeed include as many persons as possible who have been negatively affected by the specific form of colonial injustice to be addressed.

Moreover, we believe that the societal discussion, after the media uncovered the Windrush scandal, triggered involvement of political, legal, and to some extent also judicial actors already, in discussing the scandal and the role of the law therein. Equally, in The Netherlands the possibilities a real conversation is finally starting involving the wider political and societal spectrum, wherein politicians and civil society raise concerns about systemic racism, the flawed dealing with the past of slavery and colonialism, including the injustice involved in the treatment of Surinamese in The Netherlands who were Dutch citizens before 1975, exactly in light of the colonial past.

Additionally, the distinction that several colonisers made between subjects and citizens, and the way this still plays out in France, and has recently appears to have been remedied, through the court, in Belgium, indicates different manifestations of similar colonial ways of thinking. There appears to be some movement, now that within some of these States research has been commissioned by the state and there are some verbal expressions of regret by

governments (as discussed in the context of France), and a court lifted the discriminatory distinction between subject and citizen (as discussed in the context of Belgium). Therefore, coupled with international expert observations on the failure of former colonisers to deal with their past, and the need to take remedial measures, there appear to be openings for further discussion and societal change.

It should also be noted that we came across information about legislation opening the possibility of regaining Spanish nationality for victims of Francoism, and also Spanish and Portuguese legislation in response to the historic wrongs committed against Jewish citizens in the 1600s.[545] Thus, these are examples of attempts to respond to historic wrongs by providing a remedy that comes down to opening the possibility of victims and their descendants to live in Spain or Portugal in a regularized manner, if they so wish. In this case through regaining nationality. Further investigation may well show obstacles in effectuating this, especially for former nationals who are now nationals of previously colonised states. Yet the fact that this issue has been debated and that legislation has been put in place and to some extent implemented to address previous wrongs in this manner, appears to serve as an interesting example for the Dutch situation that may be worth looking into further.

Previous colonial empires have an enhanced responsibility when drafting immigration laws and policies considering their past. Apologies may be an independent example of a substantive remedy in itself, namely moral satisfaction. As well as in a sense, a sign that the State is serious in guaranteeing non-repetition of wrongs. Yet this sign is only convincing when accompanied with an adaptation of the regulations, and providing material relief to the undocumented former Dutch nationals including a regularization of their stay.

The apparent incompatibility with article 1 of Protocol 12 and of article 14 read in conjunction with article 8 ECHR is a structural one that applies to all former citizens born in former colonies. It also appears to contain a message that is not lost on current Surinamese Dutch citizens and other citizens with ties to countries that have been colonised. While in practice the actual group of former citizens with such ties who are present in the Netherlands undocumented, does not appear to be very large (data on this should be provided by the state), we consider that the persons concerned should not have to be put through a case by case approach. Instead a practical as well as symbolic measure is needed to regularize their presence in the Netherlands. This would also be in line with the recent approaches by Belgium and France, and seemingly in a different context also those of Portugal and Spain, as well as with the recommendations by UN experts.

[545] See Kerem, Y. (2021) 'Portugal's Citizenship for Sephardic Jewry: A Golden Fountainhead' in: *Contemporary Jewry* 2021 Apr 26 : 1–24 doi: 10.1007/s12397-021-09364-4 and see Law 52/2007, 26 December 2007 (recognition and rights of those who have suffered from persecution or violence during the civil war and the dictatorship), article 18; "Los Descendientes De Exiliados Pueden Pedir Desde Este Sábado Ser Españoles," El País, 27 december2008, https://elpais.com/elpais/2008/12/27/actualidad/1230369422_850215.html.

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