

**Deprivation of nationality as a national security measure:
An assessment of the compliance of the Netherlands with
international human rights standards**

EXPERT REPORT

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This Expert Report was drafted by the Institute on Statelessness and Inclusion (ISI), an independent non-profit organisation, committed to promoting inclusive societies by realising and protecting the right to a nationality for all. From 2017-2020, ISI led an extensive research and consultation process – in collaboration with Open Society Justice Initiative, the T.M.C. Asser Institute and Ashurst LLP, and involving over 60 leading experts – to examine global law and policy trends in relation to deprivation of nationality, explore the effectiveness of this measure and study the international standards and norms which limit and shape state action in this era. This led to the publication of [*Principles on Deprivation of Nationality as a National Security Measure*](#), which have been endorsed by leading international experts and human rights organisations and which articulate the international law obligations of states and apply to all situations in which states take or consider taking steps to deprive a person of nationality as a national security measure. ISI also prepared an extensive draft [*Commentary*](#), providing the international law base for each provision contained in the *Principles*. This Expert Report offers an analysis of Dutch law and practice on the basis of the *Principles* and its accompanying *Commentary*.

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1. Introduction

In its original form, as promulgated in 1984, Article 14 of the Dutch Nationality Act only provided for deprivation of nationality in cases where nationality had been obtained or granted based on the provision of fraudulent information or deception, or by omission of any fact relevant to the acquisition or granting of the Dutch nationality (currently Art. 14(1)).¹ Since 2010, there has been a gradual expansion of the powers to revoke nationality under the Dutch Nationality Act, with new grounds added in 2010, 2016 and 2017. Through these amendments, the possibility of using the revocation of nationality as a national security or counter-terrorism measure was introduced – initially only following a criminal conviction but with the 2017 amendment also in the absence of such a conviction.

In light of the far-reaching and often permanent consequences of nationality deprivation, it is important to closely scrutinise such legislative powers and their use, to ensure compliance with international law, including the following standards:

- The duty to avoid statelessness;
- The prohibition of discrimination;
- The prohibition of arbitrary deprivation of nationality;
- The rights to a fair trial, effective remedy and reparation;
- The obligations and standards deriving from human rights, humanitarian, and refugee law.

In March 2020, the *Principles on Deprivation of Nationality as a National Security Measure*² were published with a view to articulating and unpacking these limitations imposed by international law on states' freedom to use nationality deprivation as a national security or counter-terrorism measure. The *Principles* were developed over a 30-month research and consultation period, with input from more than 60 leading experts in the fields of human rights, nationality and statelessness, counter-terrorism, refugee protection, child rights, migration and other related areas. The *Principles* restate or reflect international law and legal standards under the UN Charter, treaty law, customary international law, general principles of law, judicial decisions and legal scholarship, regional and national law and practice. They enjoy the endorsement of 70 leading international experts³ and 39 civil society organisations working in the field of human rights.⁴ In July 2020, an accompanying draft *Commentary* was published,⁵ elaborating in detail the international law base for each provision contained in the *Principles*.

By collating the international law standards and related guidance that is relevant to assessing the use of deprivation of nationality as a national security measure in one place, the *Principles* and accompanying *Commentary* enable a closer evaluation of national legislation and practice. This Expert Report offers an analysis of Dutch law and practice on the basis of the international law standards set out in the recently published *Principles* and its accompanying *Commentary*. It also draws on the “Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness” that were issued in May 2020 by the UN High Commissioner for Refugees (UNHCR).⁶

¹ For instance, when a person fails to declare in their naturalisation process that they have been convicted in the past, this would constitute an omission of a fact relevant to the naturalisation process, and would provide a ground for deprivation of nationality under Art. 14(1)). See the Handbook Netherlands Nationality Act 2003. Available at: <https://wetten.overheid.nl/BWBR33099/2019-01-01>

² Available at: <https://www.institutesi.org/year-of-action-resources/principles-on-deprivation-of-nationality>.

³ These include seven (current or former) UN Special Rapporteurs; two former Council of Europe Commissioners for Human Rights; six current or former members of UN Treaty Bodies and regional Human Rights Commissions; parliamentarians (including Members of the European Parliament), judges, distinguished diplomats and leading international law professors.

⁴ The *Principles* remain open for further endorsement. A full list of individual and institutional endorsements can be found at: <https://www.institutesi.org/pages/principles-endorsements>.

⁵ Available at: https://files.institutesi.org/PRINCIPLES_Draft_Commentary.pdf.

⁶ Available at: <https://www.refworld.org/docid/5ec5640c4.html>. The Guidelines provide authoritative guidance on the interpretation of Articles 5 – 9 of the 1961 Convention on the Reduction of Statelessness. They draw on the Summary Conclusions of the Expert Meeting on Interpreting the 1961 Statelessness Convention and

The Expert Report was drawn up at the request of mr. P.J. Schüller, for the purposes of informing the Dutch Council of State on points of law and the position of ISI regarding this issue. It complements, updates and builds on the analysis provided in the Expert Opinion by the Migration Law Clinic⁷ and the Amicus Brief by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (SR Racism).⁸

2. Deprivation of nationality under the Dutch Nationality Act

As mentioned in the introduction, since 2010, there has been a gradual expansion of the powers to revoke nationality under the Dutch Nationality Act, with new grounds added in 2010, 2016 and 2017. Deprivation of nationality as a national security or counter-terrorism measure is now provided for under the Dutch Nationality Act as follows:⁹

- **Art. 14(2)** – introduced on 17 June 2010¹⁰: Revocation of nationality *following conviction* for various criminal offences, including the commission terrorist offences, joining foreign armed forces, and offences under the Rome Statute.
- **Art. 14(2b)** – introduced on 5 March 2016¹¹: Revocation of nationality *following conviction* for assistance in or preparation of the commission terrorist offences.
- **Art. 14(3)** – introduced on 10 February 2017¹²: Voluntarily entering the foreign military service of a State involved in hostilities against the Netherlands.
- **Art. 14(4)** – introduced on 10 February 2017¹³: Joining an organization that is listed as constituting a threat to national security.¹⁴

A key distinction between article 14(2) and articles 14(3) and 14(4) is that the former require a criminal conviction by way of a final and conclusive court judgement in order to be invoked, while the latter can be invoked by the Minister of Justice and Security without a criminal conviction. There are therefore different procedural standards at play in the application of these nationality deprivation powers. All of these provisions are, however, subject to the terms of article 14(8) of the Dutch Nationality Act, which provides

Avoiding Statelessness Resulting from Loss and Deprivation held in Tunis, Tunisia on 31 October-1 November 2013 (“Tunis Conclusions”) and the Expert Meeting on Developments related to Deprivation of Nationality held in Geneva, Switzerland on 5-6 December 2019.

⁷ Migration Law Clinic, “The legality of revocation of Dutch nationality of dual nationals involved in terrorist organizations”, 2018, available at: <https://migrationlawclinic.files.wordpress.com/2018/09/mlc-nationality-case-final-version.pdf>.

⁸ UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Amicus Brief before the Dutch Immigration and Naturalisation Service, 23 October 2018, available at: https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/DutchImmigration_Amicus.pdf.

⁹ A detailed chronology of these amendments is provided in Annex 1.

¹⁰ Act of 17 June 2010, amending the Netherlands Nationality Act with regard to multiple nationality and other nationality issues. Available at: <https://zoek.officielebekendmakingen.nl/stb-2010-242.html>

¹¹ Act of 5 March 2016, amending the Netherlands Nationality Act to broaden the possibilities for deprivation of Dutch nationality in the event of terrorist crimes. Available at: <https://zoek.officielebekendmakingen.nl/stb-2016-121.html>

¹² Act of 10 February 2017, amending the Netherlands Nationality Act in relation to deprivation of Dutch nationality in the interest of national security. Available at: <https://zoek.officielebekendmakingen.nl/stb-2017-52.html>

¹³ Act of 10 February 2017, amending the Netherlands Nationality Act in relation to deprivation of Dutch nationality in the interest of national security. Available at: <https://zoek.officielebekendmakingen.nl/stb-2017-52.html>

¹⁴ The following organizations have been listed as constituting a threat to national security: (1) Al-Qaeda and organizations affiliated with Al-Qaeda; (2) Islamic State in Iraq and al-Sham (ISIS) and organizations affiliated with ISIS; and (3) Hay’at Tahrir al-Sham. Decision of the Minister of Security and Justice of 2 March 2017 (No. 2050307), establishing the list of organizations that pose a threat to national security. Available at: <https://zoek.officielebekendmakingen.nl/stcrt-2017-13023.html>

that “the loss of Dutch nationality shall not occur if it would result in statelessness”. As such, these deprivation powers can only be exercised against Dutch citizens who also hold another nationality.

It is also important to note that article 14(4) is temporary in nature: a “sunset clause” (‘horizonbepaling’) was included in the legislation such that this provision will be automatically repealed five years after its entry into force. Unless further legislative action is taken to extend these deprivation powers, they will therefore lapse on 10 February 2022. The Research and Documentation Centre (WODC) of the Ministry of Justice and Security has been tasked with undertaking an evaluation of article 14(4), the results of which are expected later in 2020.¹⁵ Article 14(4) has also been the subject of a separate evaluation by the Dutch Review Committee on the Intelligence and Security Services (CTIVD), published in June 2020, which focused in particular on the role and functioning of the General Intelligence and Security Service (AIVD). Where relevant, this Expert Report will also refer to the findings of this CTIVD evaluation.¹⁶

3. International law standards relating to deprivation of nationality

The use of deprivation of nationality as a national security or counter-terrorism measure implicates a specific set of international (human rights) standards. The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Combatting Terrorism (SR Human rights and CT) explains:

*“International law has a well-established role in limiting States’ regulation of nationality. Even though the definition and conferral of nationality is within the sovereign domain of States, international courts and tribunals have long recognised that international law imposes express limits on States’ powers, both through customary international law (“CIL”) and treaty obligations. As the International Law Commission put it, “the competence of States in this field may be exercised only within the limits set by international law”. With the rapid development of international human rights law and the advent of nationality as a human right, the limitations on the State’s exercise of these powers have become greater”.*¹⁷

As articulated in the *Principles* and elaborated in the accompanying *Commentary*, there are four key international norms that limit states’ freedom to deprive a citizen of their nationality as a national security measure: the right to a nationality (Principle 3), the prohibition of arbitrary deprivation of nationality (Principle 7); the prohibition of discriminatory deprivation of nationality (Principle 6); and the avoidance of statelessness (Principle 5). The *Principles* also distil the cumulative standards that are set out under international law to one ‘Basic Rule’ (Principle 4).

Please note: as this Expert Report discusses different aspects of the evaluation of the Netherlands nationality deprivation policy and practice, (extracts from) the text of these and other relevant *Principles* are provided in boxed texts alongside the analytical narrative for ease of reference.

¹⁵ See https://www.wodc.nl/onderzoeksdatabase/3107-evaluatie-wijziging-van-de-rijkswet-op-het-nederlandschap-in-het-belang-van-de-nationale-veiligheid.aspx?refTitle=zZjOHO_iVWr-1PMSIzl-N7nnPS4_lj0dSq5GxB4boXUKXMqu89082I9gIYITBNu3CIW1Q2D64ra8g0MgGbD7qCi6-vCfCn86tHcSAMdJduc1&refId=RxEc2sm8zNL3sne3PPWrGjDi2UYoY9e85EojuY5_oQBUiD45z0ScJcQ53aPzr7klaDIJNwvXGCKOgH_TYremQQ2.

¹⁶ See also the separate report by the Institute on Statelessness and Inclusion that looks in detail at the outcomes of this evaluative exercise, available at: https://files.institutiesi.org/Analysis_CTIVD_Report_2020_ISI.pdf.

¹⁷ UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Combatting Terrorism, Intervention in the case of *Shamima vs. Secretary of State for the Home Department*, UK Court of Appeal (2020) available at: https://www.ohchr.org/Documents/Issues/Terrorism/SR/2020_05_29_FINAL_Begum_Intervention.pdf.

Principle 3. The right to a nationality

- 3.1. Every person has the right to a nationality.
- 3.2. No one shall be arbitrarily deprived of their nationality nor denied the right to change their nationality.

Principle 4. Basic rule

- 4.1. States shall not deprive persons of nationality for the purpose of safeguarding national security.
- 4.2. Where a State, in exception to this basic rule, provides for the deprivation of nationality for the purpose of safeguarding national security, the exercise of this exception should be interpreted and applied narrowly, only in situations in which it has been determined by a lawful conviction that meets international fair trial standards, that the person has conducted themselves in a manner seriously prejudicial to the vital interests of the state.
- 4.3. The exercise of this narrow exception to deprive a person of nationality is further limited by other standards of international law. Such limitations include:
 - 4.3.1. *The avoidance of statelessness;*
 - 4.3.2. *The prohibition of discrimination;*
 - 4.3.3. *The prohibition of arbitrary deprivation of nationality;*
 - 4.3.4. *The right to a fair trial, remedy and reparation; and*
 - 4.3.5. *Other obligations and standards set forth in international human rights law, international humanitarian law and international refugee law.*
- 4.4. This basic rule also applies to the deprivation of nationality for other purposes, which serve as proxies to the purpose of safeguarding national security, as well proxy measures, which do not amount to deprivation of nationality but are likely to have a similarly adverse impact on individual rights.

Full details of the relevant legal standards under the UN Charter, international and regional treaty law, customary international law, general principles of law, judicial decisions and legal scholarship are provided in the *Commentary*. What follows here is a brief summary of specific standards applicable to the Netherlands:

- The **right of everyone to a nationality** was first affirmed in Article 15 of the Universal Declaration of Human Rights (UDHR).¹⁸ The right of every individual to a nationality, including the right to retain and change nationality has since been enshrined in various international human rights treaties and regional instruments, including the following that have been ratified by the Netherlands: Convention on the Elimination of All Forms of Racial Discrimination (CERD), Art. 5(d)(iii); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art. 9; Convention on the Rights of the Child (CRC), Arts. 7 and 8; and European Convention on Nationality (ECN), Art. 4.
- The **prohibition of arbitrary deprivation of nationality** is set out in Article 15(2) of the UDHR and is subsequently enshrined in different international and regional legal instruments, including the following that have been ratified by the Netherlands: Convention of the Rights of Persons with Disabilities (CRPD) Art. 18(1)(a); CEDAW, Art. 9(2); CRC, Art. 8(1); and ECN, Art. 4(c). The

¹⁸ The UDHR is recognized as part of customary international law. See ACtHPR, *Anudo v Tanzania* (2018), Application no. 012/2015.

UN General Assembly has reiterated the importance of the prohibition of arbitrary deprivation of nationality by noting that it constitutes a “fundamental principle of international law”.¹⁹ Furthermore, the European Court of Human Rights (ECtHR) has held that arbitrary denial or revocation of citizenship might, in certain circumstances, raise an issue under Article 8 of the ECHR because of the impact of such a denial on the private life of the individual.²⁰

- The **prohibition of discriminatory deprivation of nationality** is derived from the prohibition of arbitrary deprivation of nationality and the prohibition of discrimination, which is one of the foundational tenets of international human rights law. Any deprivation of nationality on discriminatory grounds is considered arbitrary for the purposes of international law.²¹ This is affirmed across different international conventions, soft law instruments, jurisprudence, and enjoys broad consensus in doctrinal writings. Specific treaty standards that are relevant to this issue and to which the Netherlands is bound include: International Covenant on Civil and Political Rights (ICCPR), Art. 26; CERD, Art. 5(d)(iii); 1961 Convention on the Reduction of Statelessness (1961 Convention), Art. 9; and ECN, Art. 5 and Art. 17.
- The **duty to avoid statelessness** is considered to be “a fundamental principle of international law”²² and has been acknowledged as an obligation of customary international law.²³ This duty exists “as a corollary to” the right to nationality itself and “states must make every effort to avoid statelessness through legislative, administrative and other measures”.²⁴ Specific treaty standards to which the Netherlands is a party that prescribe the avoidance of statelessness in the context of deprivation of nationality as a national security measure include: 1961 Convention, Art. 8; and ECN Art. 4 and 7.

Moreover, states must also comply with **procedural safeguards and the right to a fair trial** (Principles 7.6 and 8). Furthermore, in view of the various potential outcomes of nationality deprivation and the potential for consequential human rights violations in certain contexts, states must also ensure compliance with **further human rights obligations and standards** (Principle 9). States must also avoid undermining their duty of **international cooperation and responsibility for their citizens** (Principle 11).

Principle 11. International cooperation

- 11.1. States have a duty to cooperate and to act responsibly and in accordance with international law to maintain international peace and security and to promote and encourage respect for human rights and fundamental freedoms.
- 11.2. States must not undermine the principle of reciprocity or commitments to international cooperation, by stripping a person of nationality, expelling a person to a third country or subjecting a person to removal proceedings, thereby exporting the stated security risk to a third country and failing to take responsibility for their own nationals.
- 11.3. States are obligated to take responsibility for their own citizens and to investigate and prosecute crimes and threats to national security through their national criminal justice frameworks in accordance with international standards.

¹⁹ UN General Assembly, Resolution 50/152; Office of the United Nations High Commissioner for Refugees (9 February 1996), para. 16

²⁰ eg ECtHR, *Karashev v Finland* (1999), Application no. 31414/96; ECtHR, *Genovese v Malta* (2011), Application no. 53124/09, para 30; ECtHR, *Ramadan v Malta* (2016), Application no. 76136/12, para 85.

²¹ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/13/34 (2009), available at: <http://www.refworld.org/docid/4b83a9cb2.html>, paras. 18 and 26.

²² UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), p. 3.

²³ Explanatory Report to the ECN, para 33.

²⁴ UN Secretary-General (UNSG), ‘Guidance Note of the Secretary General: The United Nations and Statelessness’ (November 2018), available at: <https://www.refworld.org/pdfid/5c580e507.pdf>, p. 4.

In the introduction or review of legislation that provides for deprivation of nationality as a national security measure, and in taking individual decisions to use these powers to deprive a citizen of nationality, **states must adhere to all of the above standards**. Cumulatively, the numerous international law standards at play, articulate an extremely high threshold to be met for a State to deprive nationality while satisfying its international obligations.²⁵ The following sections of this Expert Report present an analysis of Dutch law and practice as to its compliance with these international standards.

4. The prohibition of discrimination and the avoidance of statelessness

In keeping with the duty to avoid statelessness, article 14(8) of the Dutch Nationality Act, provides that “the loss of Dutch nationality shall not occur if it would result in statelessness”. This rule applies to all of the deprivation powers that relate to national security and counter-terrorism, as set out in Section 2 above.²⁶ The obligation is on the competent authorities of the depriving State to ensure and prove that the person concerned holds another nationality.²⁷ States are required to examine whether the person possesses another nationality at the time of loss or deprivation, not whether they could acquire a nationality at some future date.²⁸

However, although the avoidance of statelessness is one of the core standards set by international law, it is not the only standard to be met. Deprivation of nationality that does not result in statelessness is still subject to the full scrutiny of other relevant norms and principles. As the *Principles* help to clarify, the body of international standards that impose limits on states freedom to deprive nationality as a national security measure must be treated holistically: interpreting or applying any of the individual standards in isolation or relying primarily on an international treaty which addresses one of them, may lead to a violation or

Principle 5. The avoidance of statelessness

- 5.1. States must not render any person stateless through deprivation of nationality.
- 5.2. An assessment of whether deprivation of nationality will render a person stateless, is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of deprivation, the individual is considered by the competent authority of any other State, as a national under the operation of its law.

Principle 6. The prohibition of discrimination

- 6.1. A State must not deprive any person or group of persons of their nationality as a result of direct or indirect discrimination in law or practice, on any ground prohibited under international law, including race, colour, sex, language, religion, political or other opinion, national or social origin, ethnicity, property, birth or inheritance, disability, sexual orientation or gender identity, or other real or perceived status, characteristic or affiliation.
- 6.2. Each State is bound by the principle of non-discrimination between its nationals, regardless of whether they acquired nationality at birth or subsequently, and whether they have one or multiple nationalities.

²⁵ As explained in the *Commentary* to the *Principles*: “A holistic and purposive analysis and application of international law standards, led the experts involved in drafting the *Principles* to extract the norm that “states shall not deprive persons of nationality for the purpose of safeguarding national security” (Principle 4.1). See the *Commentary*, para 25.

²⁶ The only exception under Dutch law in which deprivation of nationality may result in statelessness is in cases of fraud, i.e. in the context of article 14(1) of the Dutch Nationality Act.

²⁷ UNHCR Guidelines No. 5 (2020), para. 82

²⁸ *Ibid.*, paras. 80 - 81.

undermining of others international norms to which the state is also bound. It is “a generally accepted principle that when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations”.²⁹ In taking this holistic approach, the highest protective standard derived from the full body of international obligations held by the state must always apply.³⁰

These considerations are relevant, in the context of the Netherlands, to the use of the avoidance of statelessness as a justification for nationality deprivation that is discriminatory in its effect. Under the Dutch Nationality Act, only Dutch citizens who also hold another nationality may be subject to deprivation of nationality as a national security or counter-terrorism measure. This creates a distinction between ‘mono’ nationals and those with dual or multiple nationality that is problematic under international law. Such discrimination between different classes of citizen is contrary to the principle of equality before the law and equal protection of the law, enshrined in Article 26 of the ICCPR and a number of other instruments. The jurisprudence and guidance of UN treaty bodies and Special Procedures situates such differential treatment as a form of direct discrimination. For example, the CERD Committee has raised concern about making distinctions between dual and mono-nationals,³¹ as they “could give rise to discriminatory practices contrary to (CERD)”.³² [...] At the European regional level, the ECN specifies that this inequality between nationals is discriminatory, stating that “[e]ach State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently” (Article 5(2)). The European Court of Human Rights has also held that any arbitrary distinctions between those who acquired citizenship through naturalisation and those who acquired citizenship through birth can result in a violation of the prohibition of discrimination under the European Convention on Human Rights.³³

With the introduction of new nationality deprivation powers as a national security and counter-terrorism measure, the Government argued that:

*“Not withdrawing Dutch nationality if it would result into statelessness is one of the Kingdom’s core obligations in countering statelessness. This results in a divide between Dutch citizens that hold one nationality and Dutch citizens with multiple nationalities, whereby the former cannot be denationalised. This is a legitimate divide. Preventing statelessness is the reason to revoke nationality in some cases and to not revoke nationality in other cases”.*³⁴

However, this is not an accurate understanding of the international obligations of the Dutch state. As the SR Racism correctly explains in her Amicus Brief:

*“That Dutch mono nationals require protection against statelessness is indisputable. However, protection of mono nationals from statelessness cannot be a legal justification or defence for exposing dual nationals to citizenship stripping. [...] By failing to treat mono and dual nationals as equals in this respect, the Netherlands citizenship stripping policies far exceed a simple affirmation of protection against statelessness. Rather, these policies recast dual nationals’ citizenship as contingent in a manner that cannot be reconciled with obligations of equal citizenship”.*³⁵

²⁹ ILC, ‘Conclusions of the Work of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (2006) 2 Yearbook of the International Law Commission, Part Two, 178; UN Doc A/61/10, para 251.

³⁰ See further the *Commentary*, paras. 22-25.

³¹ CERD/C/75/D/42/2008; CERD/C/RWA/CO/18-20.

³² CERD/C/RWA/CO/18-20, paras. 8-9.

³³ *Biao v. Denmark*, Judgment (Merits and Just Satisfaction) of May 5, 2016, App. 38590/10.

³⁴ Kamerstuk 34 356 (R2064), Wijziging van de Rijkswet op het Nederlanderschap in verband met het intrekken van het Nederlanderschap in het belang van de nationale veiligheid, Nr. 3 Memorie van Toelichting, 9 December 2015, available at: <https://zoek.officielebekendmakingen.nl/kst-34356-3.html>.

³⁵ SR Racism, Amicus Brief before the Dutch Immigration and Naturalisation Service, 23 October 2018, para. 40.

The prohibition of discrimination is not in conflict with and cannot be made subservient to the principle of the avoidance of statelessness. Both must be respected and the highest protective standard for the individual concerned must always apply. This is because international human rights law is obligatory and not aspirational, setting out a floor or minimum standards to be adhered to, and States are obligated to give effect to their treaty obligations and international customary obligations in good faith (*pacta sunt servanda*).³⁶ If there is (potential) inconsistency among different treaties or standards, it is the highest protective standard that should serve as this ‘floor’. If deprivation of nationality would lead to either statelessness or to (indirect) discrimination against a sub-set of citizens, the state cannot proceed.

Principle 1.3. Interpretation

- 1.3.1. In all circumstances, the Principles should be interpreted in accordance with international human rights law and standards, applying the most favourable provision of protection.
- 1.3.2. The Principles set out minimum standards. Nothing in these Principles shall be invoked as a reason to apply a lower level of protection against deprivation of nationality than that currently provided in national laws.
- 1.3.3. Where permitted, any exceptions stated in the Principles should be interpreted in the narrowest possible manner.

The Dutch Nationality Act not only discriminates between mono- and dual citizens, in the specific context of the Netherlands it also disproportionately affects dual nationals of “non-Western origin” – in particular Dutch-Moroccan and Dutch-Turkish dual nationals.³⁷ Indeed, according to Statistics Netherlands (CBS), these two groups together make up half of all Dutch citizens who also hold one or more other nationalities.³⁸ The Netherlands has been asked to review, without delay, the policy of nationality revocation as a counterterrorism measure, in light of the credible evidence that it is in violation of ICERD and other international legal obligations because it has “the effect of creating or perpetuating racial discrimination”.³⁹ Likewise, as acknowledged in the Migration Law Clinic’s *amicus brief* of July 2018, “direct discrimination on the basis of nationality may lead to indirect discrimination on the grounds of religion”.⁴⁰

The Netherlands also risks perpetuating “stereotypes resulting in discrimination, hostility and stigmatisation of certain groups such as Muslims, foreigners and migrants”.⁴¹ This has enabled an environment in which further initiatives have been presented in parliament to again expand legislative powers to deprive citizens of their Dutch nationality, with a view to targeting the Dutch-Moroccan community. In October 2019, PVV MP Markuszower proposed a motion relating to ‘youth criminality’ which observes that “Moroccan youths (ages 12-18) are 3.5 times more likely to be suspected of a crime than Dutch youths” and requests the government to revoke nationality from youths with dual citizenship who commit a violent crime and their family members, after they have completed their sentence and to deport them.⁴² This and other similar initiatives also by other political parties demonstrate the risk of further instrumentalization of (debate about) citizenship as a privilege or as conditional by particular political parties with the effect of perpetuating discrimination and stigmatisation.

³⁶ Art 26 Vienna Convention on the Law of Treaties; Human Rights Committee, ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) CCPR/C/21/Rev.1/Add.13, para 3.

³⁷ SR Racism, Amicus Brief before the Dutch Immigration and Naturalisation Service, 23 October 2018.

³⁸ This is according to data as of 1 January 2014, after which time this information was no longer being registered by the state and so further updates are not available. See <https://www.cbs.nl/en-gb/news/2015/32/1-3-million-people-in-the-netherlands-hold-dual-citizenship>.

³⁹ Ibid, citing ICERD Article 2(1)(c).

⁴⁰ Migration Law Clinic, ‘The Legality of Revocation of Dutch Nationality of Dual Nationals Involved in Terrorist Organizations’ (July 2018), pp. 20-21.

⁴¹ CCPR/C/NLD/QPR/5, para. 10. See also SR Racism, Amicus Brief before the Dutch Immigration and Naturalisation Service, 23 October 2018, para. 56. See also concerns raised by the Council of Europe High Commissioner for Human Rights when the nationality law amendment was being debated: [https://rm.coe.int/ref/CommDH\(2016\)40](https://rm.coe.int/ref/CommDH(2016)40).

⁴² <https://zoek.officielebekendmakingen.nl/kst-28741-64.html>.

With regards to the existing powers in Dutch legislation, in August 2019, the UN Human Rights Committee identified the non-compliance of the Netherlands with the principle of non-discrimination as protected under the ICCPR, recommending that the state:

*“should revise the Dutch Nationality Act with a view to ensuring effective safeguards against arbitrary loss of nationality and discriminatory effects as well as the effective exercise of the right to appeal”.*⁴³

In July 2020, the SR Racism presented the report of her visit to the Netherlands to the UN Human Rights Council. In it, she reiterated her concern that:

*“although being neutral on the face of it, the Netherlands citizenship-stripping legislation, policies and procedures apply only to citizens with dual nationality and therefore disproportionately affects Netherlands of Moroccan and Turkish descent. Because of its limited applicability, citizenship-stripping legislation in the Netherlands aggravates stereotypes of terrorism by associating terrorism with people of certain ethnic and national origins. The associated policies and their effects are incompatible with international human rights principles of equality and non-discrimination”.*⁴⁴

Among the recommendations issued by the SR Racism in this report is that the government “must ensure that its carceral, counter-terrorism and asylum practices are non-discriminatory and in compliance with international human rights law obligations”.⁴⁵ As the SR Racism previously pointed out in her 2018 Amicus Brief, “the Dutch government has found alternative means of punishing and deterring national security threats posed by mono nationals, and it should do the same for dual nationals”.⁴⁶

On the basis of the foregoing analysis, it must be concluded that by maintaining a policy and practice of deprivation of nationality that is discriminatory in effect, notwithstanding the duty to avoid statelessness, the Netherlands is failing to comply with its international human rights obligations. Invoking Article 14 of the Dutch Nationality Act to deprive a dual citizen of their nationality amounts to a violation of the international law prohibition of discrimination and the right to equality before the law. This is particularly so given the context in which a quarter of all dual nationals are Dutch-Moroccans who also, in fact, experience difficulties renouncing their Moroccan citizenship and so may be unable to become mono Dutch nationals.⁴⁷

5. The prohibition of arbitrary deprivation of nationality

As set out in Section 4, deprivation of nationality as a national security or counter-terrorism measure that results in statelessness or is discriminatory in purpose or effect is prohibited international law and would be considered to amount to *arbitrary* deprivation of nationality. The prohibition of arbitrary deprivation of nationality is broader, however, as explained in a Report of the UN Secretary General: “*deprivation of nationality must meet certain conditions in order to comply with international law, in particular the*

⁴³ Emphasis added. UN Human Rights Committee, Concluding Observations: The Netherlands, CCPR/C/NLD/CO/5, 22 August 2019, para. 51.

⁴⁴ SR Racism, Visit to the Netherlands, A/HRC/44/57/Add.2, 2 July 2020, available at:

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A_HRC_44_57_Add2_AdvanceEditedVersion.docx, para. 60.

⁴⁵ Ibid, para. 98(c).

⁴⁶ SR Racism, Amicus Brief before the Dutch Immigration and Naturalisation Service, 23 October 2018, para. 40. See further on how to reconcile the combined enforcement of the duty to avoid statelessness and the prohibition of discriminatory deprivation of nationality S. Jaghai and L. van Waas, “All Citizens are Created Equal, but Some are More Equal Than Others” *Netherlands International Law Review* (2018) 65:413–430.

⁴⁷ See also the CJEU in the *Tjebbes* case which confirms that “the fact that the person concerned might not have been able to renounce the nationality of a third country” and as a result falls within the scope of application of provisions on loss or deprivation of nationality is a relevant factor to consider. CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17, para. 46.

*prohibition of arbitrary deprivation of nationality. These conditions include serving a legitimate purpose, being the least intrusive instrument to achieve the desired result and being proportional to the interest to be protected.*⁴⁸

Similarly, when assessing whether deprivation of nationality is contrary to Article 8 of the ECHR, the European Court of Human Rights (ECtHR) has adopted the following approach:

*“In determining arbitrariness, the Court has had regard to whether the revocation was in accordance with the law; whether it was accompanied by the necessary procedural safeguards, including whether the person deprived of citizenship was allowed the opportunity to challenge the decision before courts affording the relevant guarantees; and whether the authorities acted diligently and swiftly.”*⁴⁹

The *Principles* establish that any deprivation of nationality on national security grounds is “presumptively arbitrary” (Principle 7.1) – a conclusion drawn by the international law experts involved in developing the *Principles* on the basis of the cumulative effect of the full ecosystem of international standards that apply to this measure and synthesised in the Basic Rule (Principle 4, see Section 3). In order to override this presumption of arbitrariness, the deprivation of nationality must: (1) have a legitimate purpose; (2) have a firm legal basis; (3) be necessary; (4) be proportionate; and (5) be governed by sufficient procedural safeguards (see Section 6). If a measure or decision of nationality deprivation falls short in any of these areas, it must be understood to be arbitrary. This test of (non-)arbitrariness is therefore a cumulative one.

Principle 7.1. Arbitrary deprivation of nationality

The deprivation of nationality of citizens on national security grounds is presumptively arbitrary. This presumption may only be overridden in circumstances where such deprivation is, at a minimum:

- 7.1.1. Carried out in pursuance of a legitimate purpose;
- 7.1.2. Provided for by law;
- 7.1.3. Necessary;
- 7.1.4. Proportionate; and
- 7.1.5. In accordance with procedural safeguards.

5.1. Legitimate purpose

Deprivation of nationality must be carried out in pursuance of a legitimate purpose “that is consistent with international law and, in particular, the objectives of international human rights law”.⁵⁰ Deprivation of nationality that does not serve a legitimate aim is arbitrary under international law, and therefore prohibited.⁵¹ In order to assess whether the purpose is legitimate, it has been held that the purpose must also be clearly defined.⁵² The measure of nationality deprivation must also be “the least intrusive instrument to achieve the desired result and [...] proportional to the interest to be protected”⁵³ (see further below).

⁴⁸ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), para. 4.

⁴⁹ ECtHR, *K2 v United Kingdom* (2017), Application no. 42387/13, para 50.

⁵⁰ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/13/34 (2009), para. 25.

⁵¹ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), para. 40.

⁵² Glion Recommendation (2019), p. 9.

⁵³ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), para. 4.

The administering of punishment does not constitute a legitimate purpose: *A Study of Statelessness* by the UN⁵⁴ and the later absence of any language in the 1961 Convention permitting sanction or punishment to be used as a purpose for nationality deprivation indicate that this cannot constitute a legitimate purpose for deprivation of nationality of a citizen. Nationality is an “inherent attribute” of every person and should never be withdrawn as a punishment or reprisal.⁵⁵ Deprivation of nationality as a punishment for terrorist acts (or any criminal acts), may also breach the legal principle to ensure that no one is prosecuted twice for the same acts (*ne bis in idem*), where it is imposed in addition to a criminal sentence.⁵⁶ Regardless of the stated purpose and even if implemented as an “administrative measure”, the *punitive impact* of deprivation of nationality renders the measure untenable under international law. Deprivation of nationality renders an individual an alien with regard to their former state of nationality, meaning that they no longer hold the rights they held as nationals, which “places the affected persons in a more disadvantaged situation concerning the enjoyment of their human rights because some of these rights may be subjected to lawful limitations that otherwise would not apply, but also because these persons are placed in a situation of increased vulnerability to human rights violations”.⁵⁷

Principle 7.2. Legitimate purpose

- 7.2.1. The following, among others, do not constitute legitimate purposes for deprivation of nationality:
 - 7.2.1.1. *Administering sanction or punishment;*
 - 7.2.1.2. *Facilitating expulsion or preventing entry; or*
 - 7.2.1.3. *Exporting the function and responsibility of administering justice to another State.*
- 7.2.2. Regardless of the stated purpose, any punitive impact incurred by deprivation of nationality is likely to render this measure incompatible with international law.

Depriving a national of their nationality, thus making the national an alien, *for the purpose of expelling them*, is also not legitimate.⁵⁸ This is explicitly affirmed in Article 8 of the Draft Articles on the Expulsion of Aliens, adopted by the International Law Commission in 2014, which provides that: “A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her”.⁵⁹ It is not relevant, in this regard, whether the decision to deprive nationality and the decision to expel or deny re-entry are formally taken as two separate acts because of the clear causal link between the two: i.e. deprivation of nationality is the “formal act or conduct attributable to a State”⁶⁰ by which the person is rendered an alien, subject them to immigration rules as a prelude to the possibility of expulsion.⁶¹

⁵⁴ UN Economic and Social Council, *A Study of Statelessness* (August 1949) UN Docs E/1112; E/1112/Add.1, p. 146: “Deprivation of nationality should not be applied as a punishment”.

⁵⁵ Inter-American Commission on Human Rights, ‘Third Report on the Situation of Human Rights in Chile’ (1977) OEA/Ser.L/V/II.40, Chapter 9, para. 10.

⁵⁶ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013) para 20; CoE Committee on Legal Affairs and Human Rights (AS/Jur), ‘Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach? Report’, AS/Jur (2018) 49, para 6.

⁵⁷ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/19/43 (2011), available at: <https://undocs.org/en/A/HRC/19/43>, para 47; see also UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), para 23.

⁵⁸ This is widely recognised in early international law scholarship and in discussions at the 1930 League of Nations Hague Conference, as set out in Guy Goodwin-Gill, ‘Deprivation of Citizenship, Statelessness, and International Law’ (5 May 2014). He cites, among others, Lauterpacht’s work from 1933 which sets out that “The indiscriminate exercise by a State of the right of denationalizing its subjects, when coupled with the refusal to receive them when deported from a foreign country, constitutes an abuse of rights which could hardly be countenanced by an international tribunal”. H. Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933; repr’d 2011), 309 as cited in G. Goodwin-Gill, ‘Deprivation of Citizenship, Statelessness, and International Law’ (5 May 2014) p. 7.

⁵⁹ These Draft Articles were welcomed by the UN General Assembly in Resolution 69/119 of 10 December 2014 (UN Doc A/RES/69/119). See also the preparatory work of the International Law Commission in which it was agreed that “States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of aliens”. Emphasis added, *Yearbook of the International Law Commission 2008* Volume II Part Two, Chapter VIII, para. 171.

⁶⁰ Art. 2(a) ILC, *Draft Articles on the Expulsion of Aliens* (2014).

⁶¹ See also the CJEU in *Tjebbes*, that found that following loss or deprivation of nationality “the person concerned would be exposed to limitations when exercising his or her right to move and reside freely within the territory”, identifying the clear causal link. CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17, para. 46.

Expulsion of nationals is also expressly prohibited in several international and regional human rights instruments, including Article 9⁶² and 13(2) of the UDHR and Article 12(4) of the ICCPR.⁶³ The same principle is referred to in the Explanatory Report to Protocol 4 to the ECHR.⁶⁴ Even though this principle was not included in the text of Article 3 of Protocol 4, the ECtHR held in *Naumov v. Albania* that: “[...] in some cases the revocation of the citizenship followed by expulsion may raise potential problems under Article 3 of Protocol No. 4 [...]”.⁶⁵ The right of a national “to live in his or her own country is commonly considered an essential element of the relationship between a State and its nationals”.⁶⁶ The duty of a State to (re)admit its own nationals is understood to constitute a “vital means of regulating the coexistence of sovereign entities while also being a necessary corollary thereof”.⁶⁷ It is a duty that the State does not owe to the individuals concerned, but rather “it is an international duty which it owes to its fellow-states”.⁶⁸ As such, the principle of non-expulsion of nationals is “indisputable in international law”.⁶⁹

The SR Human Rights and CT has affirmed the application of this principle in the specific context of nationality deprivation as a national security or counter-terrorism measure:

*“The State is not justified in depriving a person of nationality for the sole purpose of expelling him or her. Nor would deprivation for the purpose of denying a national entry into the territory be permissible, given that nationals have the right, enshrined in Article 13(2) of the UDHR, to return to their country of nationality”.*⁷⁰

Depriving nationality of a national while abroad, for the purpose of prohibiting them from (re-)entering, is therefore also prohibited.⁷¹

Furthermore, the practice of depriving persons of their nationality for national security reasons can lead to the export of the function and responsibility of administering justice to another State or even to the international community as a whole. This is contrary to UN Security Council Resolution 2178,⁷² as it undermines the principle of international cooperation in combatting terrorism and the State’s obligation to investigate and prosecute terrorist offences.⁷³

“[Deprivation of nationality] can also make more difficult or impossible the monitoring and prosecution of [supposed terrorists]. Therefore, States neglect and escape their obligation to investigate and prosecute terrorist offences at the cost of a durable and worldwide security.

⁶² Note that deprivation of nationality has been characterised as ‘banishment’ or ‘exile’, e.g. A. Macklin and R. Bauböck (eds), ‘The return of banishment: do the new denationalisation policies weaken citizenship?’ (2015) EUI Working Paper RSCAS 2015/14, available at: https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf; A. Macklin, ‘Citizenship revocation and the privilege to have rights’ (December 2014) (Podcast, part of the RSC Michaelmas term 2014 Public Seminar Series) available at: <https://www.rsc.ox.ac.uk/news/citizenship-revocation-and-the-privilege-to-have-rights-professor-audrey-macklin>.

⁶³ Note that Article 13 ICCPR sets further standards with regard to the expulsion of aliens. See also Article 22 of the Draft articles on the expulsion of aliens adopted by the International Law Commission in 2014 which states that “An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law”; Annex 9 to the Convention on International Civil Aviation that provides in paragraph 5.22 that “A Contracting State shall admit into its territory its nationals who have been deported from another State”; and Article 6 of the *Convención sobre condiciones de los extranjeros* [Convention regarding the status of Aliens in the respective Territories of the Contracting Parties], adopted in Havana on 28 February 1928.

⁶⁴ This Protocol was ratified by the Netherlands in 1982.

⁶⁵ ECtHR, *Naumov v. Albania* (2005), Application no. 10513/03, para 5. See also the case of *Hadž Boudellaa et al v Bosnia and Herzegovina* CH/02/8679, 192-3 (Human Rights Chamber of Bosnia and Herzegovina): The Chamber declared denationalisation a violation of the ECHR, Protocol 4, Article 3, if undertaken for the “sole purpose” of expulsion. The Chamber reached this conclusion based on reading the absolute prohibition on the expulsion of nationals in conjunction with Art. 17 ECHR. Otherwise, the Chamber argued, “if States could simply withdraw the citizenship of one of their citizens in order to expel him without being in violation of Article 3 of Protocol No. 4 to the Convention, then the protection of the right enshrined in that provision would be rendered illusory and meaningless”.

⁶⁶ International Law Commission, ‘Third report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur’, A/CN.4/581 (19 April 2007), para 48.

⁶⁷ *Ibid.*, para 19.

⁶⁸ Sir J. F. Williams, ‘Denationalization’ (1927), 8 *British Yearbook of International Law* 45, 55-6 (emphasis supplied) as cited in G. Goodwin-Gill, ‘Deprivation of Citizenship, Statelessness, and International Law’ (5 May 2014), available at: <https://www.kaldorcentre.unsw.edu.au/sites/default/files/gsgg%204-deprivationcitizenship-moreauthority.pdf>, p. 4.

⁶⁹ A conclusion reached after canvassing treaty law, state practice, jurisprudence and doctrinal writings in International Law Commission, ‘Third report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur’, A/CN.4/581 (19 April 2007), para 39.

⁷⁰ SR Human rights and CT, Intervention in the case of *Shamina vs. Secretary of State for the Home Department*, UK Court of Appeal (2020), para. 19.

⁷¹ See also Human Rights Committee, ‘General Comment No. 27: Freedom of movement (article 12)’ (1999) CCPR/C/21/Rev.1/Add.9, para 21.

⁷² UN Doc S/RES/2178 (24 September 2014), paras 4, 6.

⁷³ cf CoE Committee on Legal Affairs and Human Rights (AS/Jur), ‘Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach? Report’, AS/Jur (2018) 49, para 49. See further also Principle 11, as cited in Section 3 of this Expert Report.

National security is only protected in the short-term and the main threat is moved abroad, exposing local populations to violations of international human rights and humanitarian law.”⁷⁴

Also, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States emphasizes the duty of States to cooperate with each other in accordance with the UN Charter. In particular, “States shall co-operate with other States in the maintenance of international peace of security [...] and] shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all [...]”⁷⁵ Depriving persons of their nationality for national security reasons, leading to the export of the function and responsibility of administering justice to another State or to the international community as a whole, runs counter to these principles of co-operation among States in maintaining international peace and security.

At the European regional level, the 2005 Council of Europe (CoE) Convention on the Prevention of Terrorism – ratified by the Netherlands in 2010 – also includes the obligation for States Parties to prevent terrorist offences and, “if not prevented, to prosecute and ensure that they are punishable by penalties which take into account their grave nature”.⁷⁶ In particular, the Convention demonstrates in Article 14(1)(c) – “when the offence is committed by a national of that Party” - and 14(3) that a State has a responsibility in this regard when it concerns a national of that State or someone who is present in its territory.⁷⁷ States Parties should therefore prosecute the alleged terrorist instead of depriving a person of nationality and deporting this person or preventing him from re-entering the country. States are under the obligation to prosecute persons suspected of terrorist acts if they have jurisdiction and “the deprivation of nationality on grounds related to terrorism may not serve as a pretext for doing away with the State’s responsibility to prosecute a terrorist”.⁷⁸

- **Article 14(2) of the Dutch Nationality Act and legitimate purpose**

There is very little clarity on the exact purpose of deprivation of nationality under article 14(2) of the Dutch Nationality Act. The Explanatory Memoranda to the legislative amendments that introduced and later expanded this article do not clarify the purpose. There is a general statement that “the reason for proposing this amendment originates from the desire to take measures against Dutch nationals who participate in terrorist activities abroad”.⁷⁹ To this is added that the extension of nationality deprivation powers in this manner “expresses that Dutch nationality should not in any way be facilitative of the commission of terrorist offences abroad or of the preparation of such offences”⁸⁰ – suggesting that deprivation of nationality aims to have a preventative effect with regard to future involvement in acts of international terrorism, perhaps by removing the possibility of travel using a Dutch passport. However, it is later stated that “revocation of Dutch nationality is not intended to reduce the threat posed by the person concerned, but rather expresses

⁷⁴ cf CoE Committee on Legal Affairs and Human Rights (AS/Jur), ‘Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach? Report’, AS/Jur (2018) 49, para 49.

⁷⁵ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 26/25 (XXV) (adopted 24 October 1970) UN Doc A/RES/2625(XXV), p. 123.

⁷⁶ Preamble to the CoE Convention on the Prevention of Terrorism (adopted 16 May 2005, entered into force 01 June 2007) CETS No. 196.

⁷⁷ Article 14 Convention on the Prevention of Terrorism: “1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in this Convention: [...] c. when the offence is committed by a national of that Party. [...] 3. Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in this Convention in the case where the alleged offender is present in its territory and it does not extradite him or her to a Party whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested Party.”

⁷⁸ CoE Bureau of the European Committee on Legal Co-Operation (CDCJ-BU), ‘Nationality issues and the denial of residence in the context of the fight against terrorism. Feasibility study’, CDCJ-BU (2006) 22, available at: <https://rm.coe.int/168070029a>, para 4.4.

⁷⁹ Tweede Kamer der Staten-Generaal, Memorie van Toelichting: Wijziging van de Rijkswet op het Nederlanderschap ter Verruiming van de Mogelijkheden voor het Ontnemen van het Nederlanderschap bij Terroristische Misdrijven, 9 September 2014, available at: <https://zoek.officielebekendmakingen.nl/kst-34016-3.html>, p. 1-2.

⁸⁰ Ibid, p.4.

that those who turn against the essential interests of the State are no longer entitled to Dutch nationality”.⁸¹ This suggests a punitive purpose for deprivation.

Finally, it is stated that “it is not the *primary* purpose of deprivation of nationality to proceed with expulsion”,⁸² indicating that paving the way for subsequent expulsion may be one of the aims sought, even if not the only or main one. Indeed, when nationality is revoked on the basis of Article 14(2), the person concerned becomes an ‘alien’ in line with the 2000 Aliens Act. Consequently, they will no longer have an automatic or absolute right of residence and will have to request a residence permit.⁸³ It has been set out in relevant Parliamentary documents that “in principle, no right of residence will be granted due to the threat the person poses to public order”.⁸⁴ In such cases, the person then has an obligation to leave the Netherlands and there exists a possibility to impose an entry ban or declare the person an undesirable alien.⁸⁵

The lack of a clearly stated purpose and the indication that deprivation of nationality is used to pursue the aims of punishment and potentially expulsion provide serious reasons for questioning whether article 14(2) of the Dutch Nationality Act have a legitimate aim. Should the aim be preventative of further, future involvement in terrorist activity, by preventing international travel on a Dutch passport, then this also raises an issue as to whether it is the least intrusive means with which to pursue this aim – key to meeting the condition of necessity (see further section 5.3). Such a purpose could also be served through, for instance, a travel ban or withdrawing validity of a passport, which can be imposed only for as long as there is a real and imminent security threat, thereby ensuring the least intrusive restriction of rights.

- **Article 14(3) and 14(4) of the Dutch Nationality Act and legitimate purpose**

The subsequent inclusion of articles 14(3) and 14(4) in the Dutch Nationality Act is described in the accompanying Explanatory Memorandum as having “a different purpose” to the deprivation grounds that were already included in article 14(2), namely “as a preventative measure” in the counter-terrorism context.⁸⁶ The stated aim of article 14(3) and 14(4) is to “remove the terrorist threat to the Netherlands [...] posed by persons who have joined a terrorist organization abroad”.⁸⁷ It is furthermore noted that, to remove the terrorist threat posed by the aforementioned persons, “their return *must* be prevented”⁸⁸ and indeed “because revocation of Dutch nationality is effective only insofar the person concerned is simultaneously declared an undesirable alien, Dutch nationality will not be revoked in cases where it is clear that such declaration is not possible”.⁸⁹

It is evident from this that the purpose that this measure aims to serve is the prevent (re-)entry to the Netherlands of a citizen, by removing their nationality. As outlined above, this does not constitute a legitimate purpose under international law. Moreover, this approach of “exporting of risks [...] goes against the principle of international co-operation in combating terrorism”.⁹⁰ Already at the time that these new deprivation powers were being debated, the General Intelligence and Security Service (AIVD) was also

⁸¹ Eerste Kamer der Staten-Generaal, Memorie van Antwoord: Wijziging van de Rijkswet op het Nederlanderschap ter Verruiming van de Mogelijkheden voor het Ontnemen van het Nederlanderschap bij Terroristische Misdrijven, 18 September 2015, available at: <https://zoek.officielebekendmakingen.nl/kst-34016-C.html>, p. 6.

⁸² Emphasis added. Ibid, p. 11.

⁸³ See also Section 5.1 above, including at footnote 61.

⁸⁴ Eerste Kamer der Staten-Generaal, Memorie van Antwoord: Wijziging van de Rijkswet op het Nederlanderschap ter Verruiming van de Mogelijkheden voor het Ontnemen van het Nederlanderschap bij Terroristische Misdrijven, 18 September 2015, available at: <https://zoek.officielebekendmakingen.nl/kst-34016-C.html>, p. 10.

⁸⁵ Ibid.

⁸⁶ Tweede Kamer der Staten-Generaal, Memorie van Toelichting: Wijziging van de Rijkswet op het Nederlanderschap in Verband met het Intrekken van het Nederlanderschap in het Belang van de Nationale Veiligheid, 9 December 2015, available at: <https://zoek.officielebekendmakingen.nl/kst-34356-3.html>, p. 2.

⁸⁷ Ibid, p. 2.

⁸⁸ Emphasis added. Ibid, p. 4.

⁸⁹ Ibid, p. 7.

⁹⁰ CoE PACE Resolution 2263 (2019) para 8.

doubtful of the practical utility of the measure and of the effect that deprivation of nationality would have on national security:

*“While the measure may raise a barrier to return to the Netherlands, it does not remove the (potential) threat posed by the individual. The AIVD would still have to continue to investigate the threat that a person potentially poses, even if that person has lost their Dutch nationality. Terrorist activities can continue, whereby citizens or objects abroad can also be or become the target. People can also secretly return to the Netherlands”.*⁹¹

In its evaluation of article 14(4) of the Dutch Nationality Act, published in June 2020, the Dutch Review Committee on the Intelligence and Security Services (CTIVD) reiterates that it is “uncertain whether the measure will have the desired effect of preventing return of *uitreizigers*”.⁹² Therefore, in addition to the use of nationality deprivation for a stated purpose that is not legitimate under international law, the lack of effectiveness of this measure for that purpose also raises issues in respect of the condition of *necessity*, as discussed further in section 5.3 below.

5.2. *Legality*

In order for any deprivation of nationality to not to be arbitrary, the measure must be applied in accordance with a clear and clearly articulated legal basis. This principle flows from the general principle of legal certainty and the way in which human rights are normally regulated in international human rights law: such restrictions should (inter alia) be provided by law⁹³ to provide legal certainty with regard to the application of such provisions.

This is confirmed in, for instance, Art. 8(4) of the 1961 Convention, which provides that a State should not exercise the power of deprivation as permitted in that instrument except in accordance with the law. The Explanatory Report to the ECN provides with regard to arbitrary deprivation of nationality as provided for in Art. 4(c) that “the deprivation must in general be foreseeable, proportional and prescribed by law” for it not to be arbitrary.⁹⁴ Relatedly, in the context of the right to private and family life, as codified in Art. 8 ECHR, any restrictions to this right – which may occur as a result of, for instance, (arbitrary) deprivation of nationality – should be based on a legal norm that is clear, accessible, and foreseeable.⁹⁵

The principle of legality requires a review of the quality of the law and compliance with the principle of legitimate expectations. A legal standard on deprivation of nationality may not be enacted with retroactivity

Principle 7.3. Legality

There must be a clear and clearly articulated legal basis for any deprivation of nationality. This requires inter alia that:

- 7.3.1. The powers and criteria for deprivation of nationality are provided in law, publicly accessible, clear, precise, comprehensive and predictable in order to guarantee legal certainty;
- 7.3.2. The power to deprive nationality must not be enacted or applied with retroactive effect; and
- 7.3.3. Deprivation of nationality must only be considered lawful if it is carried out by an appropriate and legally vested competent authority whose deprivation powers are clearly established by law.

⁹¹ CTIVD, “Toezichtsrapport. Over het handelen van de AIVD in het kader van intrekking van het Nederlanderschap in het belang van de nationale veiligheid”, 2020, available at: <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/06/16/aanbieding-ctivd-rapport-intrekking-nederlanderschap>, p. 10.

⁹² Ibid, p. 18. Moreover, the CTIVD pointed out that according to the assessment of the AVID, only a very small percentage of Dutch nationals who travelled to Iraq or Syria pose a potential threat to national security. The powers under article 14(4) of the Dutch Nationality Act are overly wide, allowing the mere fact of any connection to a terrorist group in one of these states to be grounds for nationality deprivation.

⁹³ For example, Arts. 12(3) and 19(3) ICCPR; Arts. 8-11 ECHR.

⁹⁴ Explanatory Report to the ECN, para 36.

⁹⁵ This follows from case law of the European Court of Human Rights, with regard to Article 8 for instance in *Silver and Others v United Kingdom* (1983), Application no. 7136/75 et al, para 86-88; *Lebois v Bulgaria* (2017), Application no. 67482/14, para 66-67.

(‘nulla perditio, sine praevia lege’). As with all legislation that restricts the rights of people, the power to deprive a person of his nationality must furthermore not be applied with retroactive effect:

“[...] a legal provision regarding loss or deprivation of nationality may not be enacted or applied with retroactivity, nor may a provision regarding the acquisition of nationality be repealed or restricted with retroactivity. [...] Where a new ground for loss or deprivation of nationality is introduced in national law, the State must include a transitional provision to avoid an individual losing his or her nationality due to acts or facts which would not have resulted in loss or deprivation of nationality before the introduction of the new ground.”⁹⁶

This means that “the legislation has to be applied which was in force at the moment when [relevant] acts or facts took place”.⁹⁷

In its practice, the Netherlands has not always complied with the principle of legality, in particular due to the application of deprivation powers with retroactive effect. In 2019, two cases on this matter reached the Council of State, which confirmed that deprivation powers cannot be applied with retroactivity.⁹⁸ This precipitated the reversal of a number of further decisions to revoke Dutch nationality, all of which were similarly based on evidence of acts that took place *before* entry into force of the relevant deprivation provision,⁹⁹ correcting the initial failure to comply with the principle of legality in the application of article 14(4) of the Dutch Nationality Act.

Nevertheless, in order to comply with the international law principle of legality and the jurisprudence of the Council of State, it remains critical to review the circumstances of each individual deprivation decision. Article 14(2) can only be invoked for a conviction for *offences that were committed after* entry into force of the relevant amendment (17 June 2010 and 5 March 2016 respectively). Articles 14(3) and 14(4) can only be invoked for action in which the person has engaged *after* the entry into force of the amendment (10 February 2017). The date of the (criminal) act and not of the conviction or decision to deprive nationality is decisive in all cases because this is the date on which the question as to foreseeability of the consequences and legitimate expectations is pertinent. Even in such cases, the requirement of foreseeability and the principle of legitimate expectations may present a barrier to invoking nationality deprivation powers if the person in question *left the Netherlands* before these requisite dates, given that they may have been unaware of the changing legislative framework.

5.3. Necessity

The deprivation of nationality as a national security measure must be strictly necessary for achieving a legitimate purpose (see also section 5.1 above). This requirement flows from the principle of necessity as commonly applied to restrictions to human rights, which is articulated in legal instruments at both international and

Principle 7.4. Necessity

The deprivation of nationality as a national security measure must be strictly necessary for achieving a legitimate purpose, which is clearly articulated.

⁹⁶ Emphasis added. UNHCR, ‘Tunis Conclusions’ (2014), para16-17.

⁹⁷ ILEC Guidelines (2015) I.6.

⁹⁸ Dutch Council of State 17 April 2019, ECLI:NL:RVS:2019:990; Dutch Council of State 17 April 2019, ECLI:NL:RVS:2019:1246.

⁹⁹ Brief van de Staatssecretaris van Veiligheid en Justitie aan de Voorzitter van de Tweede Kamer der Staten-Generaal Den Haag, 24 september 2019, available at: <https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/v1281b9mrgt/>.

regional levels.¹⁰⁰ This means that deprivation of nationality “must be the least intrusive instrument of those that might *achieve the desired result* [and] proportional to the interest to be protected.”¹⁰¹ Accordingly, “when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued”.¹⁰²

For nationality deprivation to be “strictly necessary”, the state should have fully explored all other, less intrusive options before resorting to this measure. The state must consider whether deprivation of nationality is effective to achieve the stated aim and substantially contribute to that purpose. Furthermore, “necessity” implies that the conduct of the person concerned must create an imminent, ongoing and permanent risk to the vital interests of the state because citizenship deprivation is permanent. In this way, necessity should be taken into account at both the policy and decision level. The question of effectiveness of deprivation of nationality:

*“[...] relates to the expected effectiveness of the measure to serve the national security interests or public order interest of the State or community. Both the rights of the individual that might be limited as a result of the implementation of the administrative measure and the interests of the State or community should be considered. The appropriate authority should henceforth justify that the measures taken are necessary to serve the legitimate aim. Authorities should therefore assess the facts available concerning the behavior of the individual and question whether these facts contribute to a serious threat to national security, and subsequently whether the measures taken will effectively curb that threat.”*¹⁰³

Assessing the “necessity” of the deprivation powers under the Dutch Nationality Act is complicated by the absence of a clearly stated and/or a legitimate purpose for revocation (see section 5.1). Moreover, at the level of decision-making on nationality deprivation, a full assessment of necessity as it relates to the threat posed by the individual appears to be absent. The effectiveness of counter-terrorism measures, including deprivation of nationality, should be monitored and progress towards expected results should be tracked and “states should also consider whether the person still poses a terrorist threat and include any new facts, information or current assessments”,¹⁰⁴ showing that the necessity of a measure must be based on current threat. In relation to article 14(2) of the Dutch Nationality Act, the explanatory memorandum asserts that it is not necessary to individually test whether or not the vital interests of the state have been damaged but rather that such damage is “assumed to exist whenever a person has been criminally convicted for a severe crime against the interests of the state”.¹⁰⁵ This approach does not align with the need to establish that the individual decision is “strictly necessary” because the conduct of the person concerned creates an imminent, ongoing and permanent risk to the vital interests of the state (see further also section 5.4 on proportionality).

Serious questions have also been raised as to the effectiveness of nationality deprivation as a national security or counter-terrorism measure. Both in the Netherlands and more generally, there is a lack of evidence to support the assertion that it positively benefits (inter)national security, either in the short or the longer term. There is no evidence of an impact assessment preceding the promulgation of the deprivation powers in 2010, 2016 or 2017. As noted in section 5.1, the General Intelligence and Security Service

¹⁰⁰ For example, Art. 12(3) ICCPR; Art. 2(1) ICCPR; Human Rights Committee, ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) CCPR/C/21/Rev.1/Add.13.

¹⁰¹ Emphasis added. UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/13/34 (2009), para 25. See also UNHCR Guidelines No 5 (2020), para 94.

¹⁰² CJEU, *United Kingdom v Commission* (1998), Case C-180/96, para 96.

¹⁰³ Glion Recommendations (2019), p. 9.

¹⁰⁴ Glion Recommendations (2019), p. 12.

¹⁰⁵ Eerste Kamer der Staten-Generaal, Memorie van Antwoord: Wijziging van de Rijkswet op het Nederlanderschap ter Verruiming van de Mogelijkheden voor het Ontnemen van het Nederlanderschap bij Terroristische Misdrijven, 18 September 2015, available at: <https://zoek.officielebekendmakingen.nl/kst-34016-C.html>, p. 8-9.

(AIVD) expressed early scepticism as to the practical utility of the measure and of the effect that deprivation of nationality would have on national security.¹⁰⁶

In June 2020, the CTIVD acknowledged that it “remains uncertain” whether this measure – addressing specifically article 14(4) of the Dutch Nationality Act – has the desired effect on national security.¹⁰⁷ According to data provided by the CTIVD in its report: in the three years since these powers were introduced and even after redirecting resources within the AIVD specifically to the task of gathering evidence in support of the deprivation of nationality under article 14(4) – through the establishment of a dedicated ‘Taskforce’ that was in place from June to September 2019¹⁰⁸ – only eleven decisions to revoke nationality under this provision were implemented. Five of these were later reversed¹⁰⁹ and as of September 2019, the remaining six cases were reportedly still in appeals proceedings.¹¹⁰ As a measure to respond to the phenomenon of ‘uitreizigers’, the very limited utility adds to concern as to the failure of this measure to comply with the principle of necessity. A total of 300 Dutch nationals left the Netherlands to join jihadist groups in Syria and Iraq yet the sum result of this measure to date appears to have been the deprivation of nationality from only six of these ‘uitreizigers’. Moreover, in one of these cases, the person in question was deported back to the Netherlands from Turkey despite being deprived of Dutch nationality¹¹¹ – in spite of the stated purpose of the measure being to prevent return.¹¹² For those deprived of their nationality under article 14(2) of the Dutch Nationality Act, it is similarly unclear what the practical utility of this measure is and whether there is a real prospect of subsequent deportation to the (other) country of nationality – e.g. of Morocco allowing entry – if that is indeed the intended purpose. In light of this analysis of the Dutch law and practice and in view of the legitimate concern that “deprivation of nationality is an ineffective anti-terrorism measure and may even work against the goals of counter-terrorism policy”¹¹³, there is insufficient evidence to support the view that this measure is *necessary* and is the least intrusive *means to achieve* a legitimate purpose.

¹⁰⁶ CTIVD, “Toezichtsrapport. Over het handelen van de AIVD in het kader van intrekking van het Nederlanderschap in het belang van de nationale veiligheid”, 2020, available at: <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/06/16/aanbieding-ctivd-rapport-intrekking-nederlanderschap>, p. 10.

¹⁰⁷ Ibid, p. 18.

¹⁰⁸ For which purpose other activities within the AIVD had to be put on hold. Ibid, p. 12.

¹⁰⁹ Brief van de Staatssecretaris van Veiligheid en Justitie aan de Voorzitter van de Tweede Kamer der Staten-Generaal Den Haag, 24 september 2019, available at: <https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vl28lb9mrgtf>.

¹¹⁰ The current status of these cases is not mentioned in the CTIVD report.

¹¹¹ See further <https://www.trouw.nl/binnenland/twee-syriegangers-melden-zich-in-ankara-een-is-net-geen-nederlandse-meer~b4d0354c/>.

¹¹² It is also unclear how many of the remaining five people who were stripped of nationality are, in fact, still alive. According to data from the AIVD, one in three Dutch *uitreizigers* has died in battle. See <https://www.aivd.nl/onderwerpen/terrorisme/dreiging/uitreizigers-en-terugkeerders>

¹¹³ CoE PACE Resolution 2263 (2019) para 8.

5.4. Proportionality

Deprivation of nationality is arbitrary when it is not proportionate. The consequences of a decision to deprive someone of their nationality must be assessed against the principle of proportionality. This requires that the state carry out an individual assessment to determine *inter alia* that the immediate and long-term impact of deprivation of nationality on the rights of the individual, their family, and on society is proportionate to the legitimate purpose being pursued.¹¹⁴ Deprivation of nationality must never serve to suspend the obligations of the State to respect and protect the human rights of the person who is the object of the deprivation. Moreover, in determining whether the deprivation of nationality is in accordance with the requirement of proportionality, attention must be dedicated to *inter alia* “the strength of the link of the person with the State in question” as well as the amount of “time that has passed since the act in question.”¹¹⁵

Principle 7.5. Proportionality

The decision to deprive someone of their nationality must respect the principle of proportionality. This requires that in any case of deprivation:

- 7.5.1. The immediate and long-term impact of deprivation of nationality on the rights of the individual, their family, and on society is proportionate to the legitimate purpose being pursued;
- 7.5.2. The deprivation of nationality is the least intrusive means of achieving the stated legitimate purpose; and
- 7.5.3. The deprivation of nationality is an effective means of achieving the stated legitimate purpose.

In light of the far-reaching consequences of nationality deprivation, it is imperative that the requirement of proportionality is not restrictively interpreted, nor the test of proportionality be restrictively applied. This is particularly important because the effect of nationality deprivation is absolute and very likely permanent, whereas other (administrative) measures adopted in the counter-terrorism context are generally of a temporary nature and subject to ongoing monitoring and oversight.¹¹⁶ The direct and indirect human rights impact on the person(s), their family members, in particular their children, must be taken into account where deprivation of nationality is sought (see further also section 7).

The immediate effect also on the enjoyment of EU Citizenship as a result of deprivation of Dutch nationality must also be considered when applying the principle of proportionality in the context of the Netherlands. The CJEU has confirmed that in cases where the deprivation of nationality is accompanied with the loss of EU citizenship, authorities need to carry out a full assessment based on the principle of proportionality.¹¹⁷ In the case of *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken*, the CJEU held the following:

*“That examination requires an individual assessment of the situation of the person concerned and that of his or her family in order to determine whether the consequences of losing the nationality of the Member State concerned, when it entails the loss of his or her citizenship of the Union, might, with regard to the objective pursued by the national legislature, disproportionately affect the normal development of his or her family and professional life from the point of view of EU law. Those consequences cannot be hypothetical or merely a possibility.”*¹¹⁸

¹¹⁴ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’, A/HRC/25/28 (2013), para 10.

¹¹⁵ UNHCR, ‘Tunis Conclusions’ (2014), para 21. See also the weighing of the legality of nationality deprivation and temporal questions, ECtHR, *Ghoumid and others v. France*, application nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16, 20 July 2020.

¹¹⁶ Glion Recommendations (2019) p. 12: “Generally, administrative measures are temporary measures imposed on an individual”.

¹¹⁷ CJEU, *Janko Rottmann v Freistaat Bayern* (2010), Case C-135/08, para 55-56; CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17.

¹¹⁸ CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17, para 44.

The competent national authorities or courts should furthermore ensure, as part of this assessment, that the loss of nationality is consistent with the Charter of Fundamental Rights of the EU, and in particular the right to respect for family life as stated in Article 7 of the Charter, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Art. 24(2) of the Charter.¹¹⁹ Indeed, with regard to minors, the Court says that authorities must also take into account, in the context of their individual examination, possible circumstances from which it is apparent that the loss of nationality by the minor concerned fails to meet the child's best interests as enshrined in Art. 24 of the Charter because of the consequences of that loss for the minor under EU law.¹²⁰

In the Netherlands, the proportionality test that takes place in the context of a decision to revoke nationality under articles 14(2), 14(3) and 14(4) of the Dutch Nationality Act is further elaborated on in the Decision on Acquisition and Loss of Nationality (DALN).¹²¹ The Minister for Justice and Security is required, in all cases, to weigh the consequences of the loss of EU Citizenship, should that apply. However, in invoking the power to deprive a citizen of their nationality under article 14(2), the only further balancing test required is that the Minister of Justice and Security take into account the “*extraordinary* personal circumstances of the person concerned, to the extent that these are relevant to the decision to withdraw nationality”.¹²² This is a very limited proportionality test that does not align with international standards. The same limited test is also to be applied in the context of a decision to deprive nationality under article 14(3) and 14(4), with the addition of the requirement to weigh in whether the person is a minor – although here it is further problematic that no explicit reference is made to the need to respect the best interests of the child in such cases. Only in relation to deprivation of nationality under article 14(4) are additional factors to be included in the proportionality test, including due consideration to the severity of the person's actions and the level of threat he or she poses to nationality security. As mentioned in section 5.3, there is an assumption under article 14(2) that there is such a threat in the case of a conviction for one of the specified crimes. This circumvents the required individual weighing of the necessity and proportionality of the measure – a factor that can result in situations where a person has completed their criminal sentence and is participating in a rehabilitation and reintegration programme being subjected to deprivation of nationality. This would be an evident violation of both the principles of necessity and proportionality. Overall, the DALN does not prescribe a rigorous, individualised proportionality test as required by international law.

6. Procedural safeguards and the right to a fair trial

Any administrative or executive process to deprive nationality must be in accordance with procedural safeguards and fair trial standards under international law. Indeed, “procedural safeguards are essential to prevent abuse of the law” and are “derived from the prohibition of arbitrary deprivation of nationality”.¹²³

¹¹⁹ Ibid, para 45.

¹²⁰ Ibid, para 47.

¹²¹ Articles 68(a) – 68(c), available at: <https://wetten.overheid.nl/BWBR0013605/2017-03-01#HoofdstukV>.

¹²² Art. 68(a), DALN.

¹²³ UNHCR, ‘Tunis Conclusions’ (2014), para 25.

Principle 7.6: Procedural Safeguards

Any administrative, executive or judicial process to deprive nationality must be in accordance with procedural safeguards under international law, including:

- 7.6.1. Deprivation of nationality for the purpose of national security must never be automatic by operation of the law.
- 7.6.2. The individual concerned must be notified of the intent to deprive nationality prior to the actual decision to do so, to ensure that the person concerned is able to provide facts, arguments and evidence in defence of their case, which are to be taken into account by the relevant authority.
- 7.6.3. Decisions on deprivation of nationality must be individual, as opposed to collective.
- 7.6.4. With regard to the principle of the avoidance of statelessness, the burden of proof in determining that the person concerned holds another nationality must lie with the competent authorities of the depriving state.
- 7.6.5. Individuals must be notified in writing of the decision to deprive nationality and of the reasons underlying the decision. This must be done so in a prompt manner and in a language that they understand.
- 7.6.6. Decisions on the deprivation of nationality must be open to effective judicial review and appeal to a court, in compliance with the right to a fair trial.
- 7.6.7. No person whose nationality has been withdrawn shall be deprived of the opportunity to enter and remain in that country in order to participate in person in legal proceedings related to that decision.

Principle 8: The rights to a fair trial, effective remedy and reparation

- 8.1 Everyone has the right to a fair trial or hearing. In any proceedings concerning the deprivation of nationality, the right to equal access to a competent, independent and impartial judicial body established by law and to equal treatment before the law must be respected, protected and fulfilled.
- 8.2 Everyone has the right to an effective remedy and reparation. States must provide those who claim to be victims of a violation with equal and effective access to justice and effective remedies and reparation, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The right to a fair trial, or its constituent elements, is a fundamental principle of international law, and is reflected in human rights instruments such as ICCPR (Articles 2(3) and 14) CEDAW (Article 15), CRC (Article 40) and the Charter of Fundamental Rights of the EU (Article 47). Article 8(4) of the 1961 Convention explicitly provides that those whose nationality has been revoked must be granted the right to a fair hearing by a court of law or another independent body, and Articles 10-13 of the ECN prescribe a number of specific procedural safeguards, including the right to an administrative or judicial review, in relation to the decision to deprive nationality.

These procedural safeguards require, *inter alia*, that deprivation of nationality as a national security measure must never be automatic by operation of the law, because any decision requires an individual assessment of the situation of the person concerned. Decisions on deprivation of nationality must always be individual, as opposed to collective.¹²⁴ As a basic feature of due process and fair trial standards, the individual concerned must be notified of the intent to deprive nationality prior to the actual decision to do so, to ensure that the person concerned is able to provide facts, arguments and evidence in defence of their case, which

¹²⁴ UNHCR, 'Tunis Conclusions' (2014), para. 61.

are to be taken into account by the relevant authority.¹²⁵ In the instance that nationality is withdrawn, individuals must promptly¹²⁶, and in a language that they understand, be notified in writing of the decision and of the reasons underlying the decision.¹²⁷ According to the Human Rights Committee, as expressed in General Comment No. 32, this right to a motivated decision must be respected in order for the person concerned to effectively exercise their right to have the decision taken by a judicial body, or a relevant administrative body, “reviewed by a higher tribunal according to law”.¹²⁸ The fairness of proceedings is further conditioned upon access to all relevant information and documents relating to the decision to deprive of nationality. In *McGinley and Egan v. The United Kingdom*, the ECtHR found that where the State, without good cause, prevents appellants from gaining access to documents in its possession that would have assisted in the defence of their case, it would have the effect of denying them a fair hearing under Art. 6(1) ECHR.¹²⁹ This must also be applied *vice versa*, in the sense that an appellant may not be prevented from putting forward evidence that would assist in the defence of their case. It follows from this principle that the reliance on secret evidence would prevent effective exercise of the right to a fair trial.

The possibility to bring action or to lodge an appeal before a court of law must arise from the moment the parties effectively become aware of a legal decision imposing an obligation on them or potentially harming their legitimate rights and interests.¹³⁰ The right to an effective remedy includes the right to appeal with suspensive effect. Indeed,

*“[w]here a person is subject to loss or deprivation of nationality and a review process is available, lodging an appeal should suspend the effects of the decision, such that the individual continues to enjoy nationality — and related rights — until such time as the appeal has been settled. Access to the appeals process may become problematic and related due process guarantees nullified if the loss or deprivation of nationality is not suspended and the former national, now alien, is expelled.”*¹³¹

The right to a fair trial furthermore requires that any person deprived of their nationality is able “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.¹³² This contains three distinct guarantees. Firstly, a person has a right to be assisted by a lawyer if he or she so desires. Secondly, if the person is unable to afford legal assistance, but nevertheless wishes to be represented by a lawyer, he or she shall be granted legal aid. Finally, and crucially, everyone has the right to be present during the proceedings in order to defend him or herself. According to the UN Human Rights Committee, this provision

*“[...] requires that accused persons are entitled to be present during their trial. Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3(d) [ICCPR] if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.”*¹³³

¹²⁵ As well as in view of Art. 14(3) ICCPR.

¹²⁶ See, Art. 10 ECHR; ECtHR, *K2 v United Kingdom* (2017), Application no. 42387/13, para. 50.

¹²⁷ In keeping with Art. 14(3)(a) ICCPR. See also, Art. 11 ECHR; ILEC Guidelines (2015), section III.1; Human Rights Committee, ‘General Comment No. 32’ (2007) CCPR/C/GC/32, para 49.

¹²⁸ Art. 14(5) ICCPR.

¹²⁹ ECtHR, *McGinley and Egan v United Kingdom* (1998), Applications nos. 21825/93 and 23414/94, paras 86 and 90.

¹³⁰ See e.g. ECtHR, *Miragall Escolano and Others v Spain* (2000), Application no. 38366/97 et al., para 37.

¹³¹ UN Human Rights Council, ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary General’, A/HRC/25/28 (2013), para. 33.

¹³² Art. 14(3)(d) ICCPR, see also Art. 6(3)(c) ECHR.

¹³³ Human Rights Committee, ‘General Comment No. 32’ (2007) CCPR/C/GC/32, para 36.

This rule also applies in the context of deprivation of nationality as a national security measure. As determined by the UK Court of Appeal in the Shamima Begum case: “notwithstanding the national security concerns about Ms Begum, I have reached the firm conclusion that given that the only way in which she can have a fair and effective appeal is to be permitted to come into the United Kingdom to pursue her appeal, fairness and justice must, on the facts of this case, outweigh the national security concerns.”¹³⁴ It must therefore be concluded that, regardless of the threat to national security posed by the person concerned, the right of presence must always be respected in full to ensure fulfilment of the right to a fair trial.

In the Netherlands, according to Article 66(1) of the Decision on Acquisition and Loss of Nationality, the Minister of Justice and Security is required to send a written notice of intent to withdraw nationality under Article 14(2) or 14(3) of the Dutch Nationality Act to the person directly concerned. In case the Minister deems it necessary, the notice will furthermore be issued publicly, published in the official journal of the Netherlands, and/or be published in one or more local journals.¹³⁵ In the intent to withdraw, the Minister will state at least: (a) the reasons for withdrawal; (b) the possibility for those involved to submit written objections to the decision and the way and the timeframe in which this can be done; and (c) that those submitting writing objections may request that his personal details be kept confidential.¹³⁶ This appears to be in line with the requirements posed by the principle of procedural safeguards. Yet, if the Minister thereafter decides to proceed with withdrawing nationality, there is no explicit obligation to individually notify the person concerned, but rather the Minister must “send a copy of the decision to the person whose nationality has been revoked, to the authority responsible for maintaining the basic registration of the personal information of the person concerned, **or** to the Dutch Minister of Foreign Affairs.”¹³⁷ Thus, while a personal notification of the withdrawal is provided for by law, the Minister is not obligated to notify the person. This has the potential of violating the requirement of a prompt notification in writing.

Deprivation of nationality under Article 14(4) of the Dutch Nationality Act is governed largely by a different set of procedures, which raises several issues regarding procedural safeguards and the right to a fair trial. The Minister of Justice and Security is not obliged to provide a written notice of intent to withdraw nationality, when such nationality is deprived on grounds of Article 14(4).¹³⁸ This effectively prevents the person concerned from providing facts, arguments and evidence in defence of their case, which might be relevant for the decision (not) to deprive of nationality. Furthermore, as noted above, there exists no obligation to notify the person concerned of the decision to withdraw nationality.

As noted earlier, the aim of Article 14(4) is to prevent the (re-)entry into the Netherlands by means of deprivation of nationality. This is achieved by simultaneously declaring the person an “undesirable alien” under Dutch law so as to prevent (re-)entry to the country. In light of this, an automatic appeals procedure was to made available with a view to guaranteeing due process: upon receiving notice of the Minister of Justice, in cases where the person concerned does not personally lodge such an appeal within four weeks after the decision, an appeal is automatically initiated anyway.¹³⁹ As a result of being declared an undesirable alien, however, the person whose nationality has been revoked under Article 14(4) NNA is unable to return to the Netherlands to attend court hearings, obstructing the right to be present and thereby to a fair and effective appeal. As elaborated above, the position in the Explanatory Memorandum that “because there is no criminal procedure, the right of presence does not apply in full”¹⁴⁰ does not accord with relevant international obligations. The further reasoning put forward by the Netherlands that “in the specific

¹³⁴ Available at: <https://www.judiciary.uk/wp-content/uploads/2020/07/WP-Begum-Judgment-NCN.pdf> (para 121).

¹³⁵ See, Arts. 66(3) and (4), DALN, respectively.

¹³⁶ Art. 66(6), DALN.

¹³⁷ Art. 70(1), DALN.

¹³⁸ Art. 69(1), DALN, states: “Our Minister takes a decision to revoke on grounds of Article 14, first, second or third paragraph, of the Netherlands Nationality Act (1984) within sixteen weeks after sending a written notice of intent.”

¹³⁹ Art. 22a(3) NNA.

¹⁴⁰ Tweede Kamer der Staten-Generaal (2015, December 9). Memorie van Toelichting: Wijziging van de Rijkswet op het Nederlanderschap in Verband met het Intrekken van het Nederlanderschap in het Belang van de Nationale Veiligheid. Retrieved from <https://zoek.officielebekendmakingen.nl/kst-34356-3.html> (pp. 10).

case of withdrawal of Dutch nationality on grounds of national security, there is strong justification for disallowing the presence of the person involved in the legal proceedings” because “allowing for return [...] would thwart the objective of the provision and nullify the justification of revocation”¹⁴¹ does not lead to a different conclusion. Rather, this points again to the use of nationality deprivation in pursuit of a purpose that is not legitimate under international law (see section 5.1) and raises further questions about effectiveness and thereby the necessity of the measure (see section 5.3).

Under the General Administrative Law, parties are under an obligation to share all intelligence with the court. However, information can be kept classified on grounds of so-called “important interests”. According to the Minister of Justice and Security, such interests include those of national security.¹⁴² The Explanatory Memorandum to Article 14(4) of the Dutch Nationality Act explicitly acknowledges that revocation of nationality will partially be based on information provided by the intelligence- and security services, which cannot be made public in all cases.¹⁴³ As recognized by the Human Rights Committee, this may be problematic for the enjoyment of the right to a fair trial:

*“The Committee is concerned about the amendments to the Dutch Nationality Act, which provide for the revocation, in absentia, of the Dutch nationality of dual nationals based on information that they have left the country to voluntarily join the military service of a foreign State or a terrorist organization, and the implications that this would have for their family members. It is particularly concerned about the barriers faced by affected persons who are outside the country to appeal such a decision, which is based on classified information to which they or their legal representatives have no access”.*¹⁴⁴

There is furthermore a lack of suspensive effect for an appeal against the decision to revoke Dutch nationality, rendering the person immediately in a vulnerable situation as to their rights and legal status. It follows from the above that the deprivation of nationality under Articles 14(2) - 14(4) of the Dutch Nationality Act, does not fully satisfy the required procedural safeguards or the right to a fair trial.

¹⁴¹ Ibid, pp. 10-11.

¹⁴² Tweede Kamer der Staten-Generaal (2015, December 9). Memorie van Toelichting: Wijziging van de Rijkswet op het Nederlanderschap in Verband met het Intrekken van het Nederlanderschap in het Belang van de Nationale Veiligheid. Retrieved from <https://zoek.officielebekendmakingen.nl/kst-34356-3.html> (pp. 13).

¹⁴³ Ibid, pp. 14.

¹⁴⁴ UN Human Rights Committee, Concluding Observations: The Netherlands, CCPR/C/NLD/CO/5, 22 August 2019, para. 50. See further also SR Racism, Visit to the Netherlands, A/HRC/44/57/Add.2, 2 July 2020, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A_HRC_44_57_Add2_AdvanceEditedVersion.docx, para. 60.

7. Further human rights obligations and standards

Where deprivation of nationality would directly lead to a violation of other fundamental rights, in particular where it concerns non-derogable rights, it is arbitrary and therefore prohibited. Therefore, the consequences of nationality deprivation must be considered as an integral part of the assessment of the proportionality and lawfulness of any decision to deprive nationality. What follows below is not an exhaustive discussion of the consequential human rights impact of nationality deprivation but an overview of selected norms, the protection of which raises the greatest concern in the context of the Netherlands.

Principle 9. Further human rights, humanitarian and refugee law obligations and standards

Deprivation of nationality is also limited by other obligations and standards set forth in international human rights law, international humanitarian law and international refugee law.

- 9.1. Right to enter and remain in one's own country;
- 9.2. The prohibition of *refoulement*;
- 9.3. Prohibition against torture and cruel, inhuman or degrading treatment or punishment;
- 9.4. Liberty and security of person;
- 9.5. Legal personhood;
- 9.6. Right to private and family life;
- 9.7. The rights of the child;
- 9.8. Derivative loss of nationality.

7.1. *The right to enter and remain in one's own country*

As already set out in section 5.1, depriving a person of nationality and thus making them an alien exposes them to expulsion or denial of (re)admission to their own country. Nationality deprivation executed for this purpose is not legitimate, but even in cases where the direct purpose is not expulsion or non-readmission, this can still be the effect of the deprivation decision. This impacts the enjoyment of the right to enter and remain in one's own country, protected under Article 12 ICCPR as well as Article 5(d)(iii) CERD, Article 10(2) CRC and Article 3 of Protocol 4 ECHR. The rights contained in this Principle can be exercised even by those who have been deprived of a nationality, as is in line with the definition of 'one's own country'. The concept of 'one's own country' is not synonymous with the concept of 'one's country of nationality', but rather is broader in scope. According to the HRC, "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 a mere alien".¹⁴⁵ This means that the concept also applies to nationals who have been stripped of their nationality, as they can have special ties to the country

Principle 9.1. The right to enter and remain in one's own country

- 9.1.1. All persons have the right to enter, remain in and return to their own country.
- 9.1.2. States are prohibited from expelling their own nationals.
- 9.1.3. In no situation, including where a person has been deprived of their nationality, may a person be arbitrarily expelled from their own country or denied the right to return to and remain in their own country.
- 9.1.4. The scope of the term "own country" is broader than the term "country of nationality". It includes a country of former nationality that has arbitrarily deprived the individual of its nationality, regardless of the purpose of the measure and whether or not this deprivation causes statelessness.

¹⁴⁵ Human Rights Committee, 'General Comment No. 27' (1999) CCPR/C/21/Rev.1/Add.9, para. 20.

whose nationality they have been deprived of. According to the UN Human Rights Committee in *Nystrom v. Australia*:

*“[...] there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words ‘his own country’ invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.”*¹⁴⁶

Dual nationals should therefore not be expelled from their ‘own country’. If they are deprived of the nationality of the country which is their ‘own country’ due to ‘close and enduring connections’, they should nonetheless retain the right to enter and remain in that country.

In the context of the Netherlands, the clear linking of deprivation of nationality to the possibility of expulsion (in the case of article 14(2)) or revoking nationality for the stated purpose of preventing return (in the case of articles 14(3) and 14(4)) shows that a violation of the right to enter and remain in one’s own country will indirectly or directly follow from the decision to deprive nationality – rendering the decision problematic in light of international law because it violates the prohibition of arbitrary deprivation of nationality. This instrumentalised use of nationality deprivation to extra-territorialise a potential threat to national security is also arbitrary in a number of other respects, as discussed in sections 5.1, 5.3 and 6 above. It can furthermore precipitate a violation of other fundamental rights, as set out in the following paragraphs.

7.2. The prohibition of refoulement; the prohibition against torture and cruel, inhuman or degrading treatment or punishment; and liberty and security of the person

The prohibition of *refoulement* and the prohibition against torture and cruel, inhuman or degrading treatment or punishment are absolute and non-derogable norms¹⁴⁷ – part of customary international law and also protected explicitly in an array of treaties. The right to liberty and security of the person is also contained in other international and regional instruments, including the CRC (Article 37), the ECHR (Article 5) and the Charter of Fundamental Rights of the EU (Article 6). According to the Working Group on Arbitrary Detention, the prohibition of arbitrary detention is also a “non-derogable norm of customary international law”.¹⁴⁸ In situations of deprivation of nationality as a national security or counter-terrorism measure, there is a risk that the person concerned may consequently be exposed to a violation of one or more of these non-derogable international obligations due to the concurrent loss of an automatic right of residence and subsequent (attempts at) expulsion or refusal of (re)admission to the territory of the former country of nationality. When the country of second nationality is unable or refuses to cooperate in expulsion proceedings, this may result in prolonged or indefinite detention, that is prohibited as arbitrary; or leave the person without any legal status and in degrading conditions, causing a level of mental anguish and uncertainty that constitutes torture.¹⁴⁹

The prohibition of *refoulement* and of torture apply “to all persons, irrespective of their citizenship, nationality, statelessness, or migration status, and it applies wherever a State exercises jurisdiction or

¹⁴⁶ Human Rights Committee, *Nystrom v Australia*, Communication no. 1557/2007 (18 July 2011) CCPR/C/102/D/1557/2007, para. 7.4.

¹⁴⁷ See, among others, See also ECtHR, *Al Husin v Bosnia and Herzegovina* (2012), Application no. 3727/08; CAT, ‘General Comment No. 2: Implementation of article 2 by States parties’ (2008) CAT/C/GC/2.

¹⁴⁸ UN Human Rights Council, ‘Report of the Working Group on Arbitrary Detention’ A/HRC/22/44 (December 2012), on Deliberation No. 9 (p. 16), para 51.

¹⁴⁹ ¹⁴⁹ IACtHR, *Maritza Urrutia v Guatemala* (2003), Series C No. 103, para 94; ACmHPR, *Amnesty International v Zambia* (1999), Communication 212/98. See also ACmHPR, *John K. Modise v Botswana* (2000), Communication 97/93_14AR.

effective control, even when outside of that State's territory".¹⁵⁰ They also cover situations where there is a risk of ill-treatment from non-state actors and situations in which the person has been deemed a threat to national security: "since the prohibition of torture or inhuman or degrading treatment or punishment is absolute, the conduct of applicants, however undesirable or dangerous, cannot be taken into account."¹⁵¹ Ill-treatment can include violations relating to prison conditions,¹⁵² solitary confinement and incommunicado detention, including depriving an individual of contact with their family.¹⁵³ Refusing to repatriate and/or blocking the right to (re)admission through deprivation of nationality leaves persons trapped in such detention conditions. The UN Human Rights Committee has also held explicitly that a risk of a violation of the right to life, which includes the imposition of the death penalty without guarantees of a fair trial, is a bar to removal from the territory.¹⁵⁴

In the context of the Netherlands, where deprivation of nationality directly impacts the person's right to continue to reside in or to be (re)admitted to the territory, it is critical to consider the implications of this for these non-derogable rights. It is not evident from the relevant national legal frameworks or practice that this is given due consideration in the context of nationality deprivation under article 14 of the Dutch Nationality Act.

Principle 9.2. The prohibition of *refoulement*

- 9.2.1. In line with principles of international refugee law, States must not expel or return ("refouler") any person, including one whom they have stripped of nationality, to a situation in which they face a threat to life or freedom or risk facing persecution, including on the grounds of race, religion, nationality, membership of a particular social group or political opinion.
- 9.2.2. In line with the principles of international human rights law, States must not expel or return ("refouler") any person, including one whom they have stripped of nationality, to a situation in which they face a real risk of serious human rights violations, including torture or cruel, inhuman or degrading treatment or punishment, enforced disappearances, capital punishment, flagrant denial of justice and the right to liberty, or arbitrary deprivation of life.

Principle 9.3. Prohibition against torture and cruel, inhuman or degrading treatment or punishment

- 9.3.1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- 9.3.2. Deprivation of nationality is likely to constitute cruel, inhuman or degrading treatment or punishment, particularly where it results in statelessness.
- 9.3.3. Attempted expulsion consequent to deprivation of nationality is likely to meet the threshold of cruel, inhuman or degrading treatment or punishment when this leads to:
 - 9.3.3.1. arbitrary detention;
 - 9.3.3.2. a violation of the principle of *non-refoulement*; or
 - 9.3.3.3. the forcible separation of families.

Principle 9.4. Liberty and security of the person

- 9.4.1. Everyone has the right to liberty and security of the person and no one shall be subject to arbitrary arrest or detention.
- 9.4.2. The arbitrary detention of persons who have been deprived of their nationality is prohibited.

¹⁵⁰ OHCHR, 'Global Compact for Migration – Technical note: The principle of non-refoulement under international human rights law'.

¹⁵¹ ECtHR, *Al Husin v Bosnia and Herzegovina* (2012), Application no. 3727/08.

¹⁵² See Human Rights Committee, 'General Comment No. 9: Article 10 (Humane treatment of persons deprived of liberty)' (1982) HRI/GEN/1/Rev.9 (Vol. I, p. 180), para 1.

¹⁵³ ACmHPR, *Law Office of Ghazi Suleiman v Sudan* (2003), Communication 222/98 and 229/99.

¹⁵⁴ Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) CCPR/C/21/Rev.1/Add.13, para 12; Human Rights Committee, 'General Comment No. 6: Article 6 (The right to life)' (1982) HRI/GEN/1/Rev.1 (p. 6), para 7.

7.3. *Right to private and family life*

The right to respect for private and family life is a firmly established principle in international and regional law, and is contained in, among others, ICCPR (Art. 17), CRC (Art. 16), ECHR (Art. 8) and the Charter of Fundamental Rights of the EU (Art. 7). The principle encompasses two distinct rights: the right to family life and the right to private life. Under Art. 8 of the ECHR, the right to family life must be interpreted as the right to live together as a family.¹⁵⁵ With regard to the term ‘family’, the UN Human Rights Committee noted in its General Comment No. 16 that this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.¹⁵⁶

Principle 9.6. Right to private and family life

- 9.6.1. Everyone has the right to private and family life.
- 9.6.2. This includes the right to live together as a family and not be separated as a result of a family member being deprived of their nationality and subject to detention or expulsion in violation of international law.

As deprivation of nationality of a family member increases the risk of that person being expelled, refused (re)admission or arbitrarily detained, this may result in a violation of the right to family life. It is important to note that this can have direct and indirect effects, in the sense that a measure of expulsion or detention impacts not only the right to family life of the person being deprived of his or her nationality, but also the right to family life of his or her family members as they are denied the possibility to live together with the entirety of the family or effectively enjoy family life.

Much like the right to family life, the right to private life is a broad concept, embracing multiple aspects of a person’s identity. It has been recognized by the ECtHR that nationality falls under the right to private life on multiple occasions. This was an important point in the case of *Genovese v. Malta*, in which it was held that arbitrary denial of nationality could raise an issue under the right to private life as it is part of a person’s social identity protected as part of this right.¹⁵⁷ This was subsequently broadened by the Court in *Ramadan v. Malta* to include situations of arbitrary revocation of nationality, arguing that the loss of nationality already acquired can have a similar or even bigger impact on the private and family life of a person.¹⁵⁸ In *K2 v. United Kingdom*, the ECtHR also held that in cases of nationality deprivation, the consequences of revocation for the person should be addressed - including an examination of the consequences thereof on private and family life.¹⁵⁹

As set out in section 5.4, the procedure established for decision making on nationality deprivation lacks a full proportionality test that would allow the consequences for the individual to be adequately taken into account. There is reference to the need to weigh in “the consequences of the loss of EU Citizenship”,¹⁶⁰ where this results from deprivation of Dutch nationality, but no reference to due consideration of the effect on private and family life. This results in a further gap in protection against consequential human rights violations in the context of the decision to revoke nationality.

¹⁵⁵ Directorate of the Jurisconsult, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (2016 - updated 2019), available at: https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

¹⁵⁶ Human Rights Committee, ‘General Comment No. 16: Article 17 (Right to privacy)’ (1988) HRI/GEN/1/Rev.9 (Vol. I, p. 191).

¹⁵⁷ ECtHR, *Genovese v Malta* (2011), Application no. 53124/09, para 30.

¹⁵⁸ ECtHR, *Ramadan v Malta* (2016), Application no. 76136/12, para 85.

¹⁵⁹ ECtHR, *K2 v United Kingdom* (2017), Application no. 42387/13, para 49.

¹⁶⁰ Articles 68(a) – 68(c), available at: <https://wetten.overheid.nl/BWBR0013605/2017-03-01#HoofdstukV>.

7.4. *The rights of the child*

In addition to the right to a nationality that is generally provided under international and regional law, that right is also specifically tailored to children in a number of international legal instruments, such as the CRC (Articles 7 and 8) and ICCPR (Article 24(3)). Furthermore, the principle of the best interests of the child is protected under the CRC (Article 3(1)) and the Charter of Fundamental Rights of the EU (Article 24(2)). Every child, defined in Article 1 CRC as any person under the age of eighteen, has the right to acquire a nationality (Article 7(1) CRC) as well as to preserve this

Principle 9.7. The rights of the child

- 9.7.1. Every child has the right to a nationality. States must protect the child's right to acquire and preserve their nationality and to re-establish their nationality when arbitrarily deprived of it.
- 9.7.2. States are required to treat all persons under the age of 18 in accordance with their rights as children.
- 9.7.3. States must protect the rights of the child and the best interests of the child must be a primary consideration in all proceedings affecting the nationality of children, their parents and other family members.
- 9.7.4. It can never be in the best interest of a child to be made stateless or be deprived of nationality.
- 9.7.5. States must take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

nationality. This latter right is clear from Article 8(1) of the Convention on the Rights of the Child, which provides that States are to “respect the right of the child to preserve his or her identity, including nationality”. This article is complemented by Article 8(2) to “provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity” in cases where “a child is illegally deprived of some or all of the elements of his or her identity”.¹⁶¹ Whenever a child is deprived of nationality, a State thus risks violating the provisions of the CRC, as well as other international standards.

In the Netherlands, the power to revoke nationality under articles 14(3) and 14(4) of the Dutch Nationality Act may be invoked if the person concerned is sixteen years of age or older. This means that children can also be deprived of their nationality if they engage in acts that fall within the scope of these provisions. In reaching the decision to deprive nationality, the Minister for Justice and Security is required to take into account whether the person concerned is a minor.¹⁶² However, no reference is made to the need to ensure that the best interests of the child is the primary consideration. As such, the specific protection provided for in the Netherlands with regards to the child's right to nationality in the wider context of nationality deprivation as a national security measure falls short of international legal standards.

¹⁶¹ Art. 8(2) CRC.

¹⁶² Articles 68(a) – 68(c), available at: <https://wetten.overheid.nl/BWBR0013605/2017-03-01#HoofdstukV>.

8. Conclusion

This Expert Report offered an analysis of Dutch law and practice on deprivation of nationality as a national security or counter-terrorism measure in light of human rights law and other international standards. The *Principles on Deprivation of Nationality as a National Security Measure*, endorsed by 70 leading international experts and 39 civil society organisations working in the field of human rights at the time of writing, provide the frame for the Expert Report because they collate and synthesise the international law standards and guidance relevant to this analysis.

As set out in detail in sections 4 to 7 of this Expert Report, Dutch law and practice on deprivation of nationality does not comply with international law on the following points:

1. Violation of the prohibition of discrimination, with regards to the difference in treatment of dual and mono nationals, in particular given the indirect discrimination against dual citizens with a particular national origin and the stigmatising effect of this policy.
2. Lack of legitimate purpose, including the lack of a clearly stated purpose for article 14(2) of the Dutch Nationality Act and the problematic use of deprivation to enable expulsion or deny (re)admission or as (additional) punishment.
3. Failure to comply with the principle of legality in all decision-making, in particular as regards ensuring that newly instated powers to deprive nationality are not applied with retroactive effect.
4. Lack of necessity of the measure, as demonstrated by the ineffectiveness of nationality deprivation in a counter-terrorism context and the availability of other, less intrusive means.
5. Inadequate proportionality test, that results in a failure to ensure a full, individualised weighing of the consequences of deprivation of nationality before proceeding with the decision to deprive.
6. Incomplete procedural safeguards and the failure to ensure the right to a fair trial in all cases, in particular due to reliance on secret evidence and the possibility of appeals being undertaken in absentia.
7. Failure to guarantee protection against consequential human rights violations, as part of the decision-making in cases to deprive nationality.

Annex 1: Chronology of amendments on revocation of nationality as a national security measure under the Dutch Nationality Act

17 June 2010¹⁶³

Article 14 of the Dutch Nationality Act was amended to allow for deprivation in cases of a criminal conviction for certain offenses (Art. 14(2)). As such, the Dutch Minister may revoke the Dutch nationality of a person who by a final and conclusive court judgment has been convicted for:

- Article 14(2)(a): “A criminal offence referred to in Titles I through IV of Book Two of the Dutch Criminal Code that carries a sentence of eight years or more”.¹⁶⁴
- Article 14(2)(b): “A criminal offence referred to in Articles 83 or 205 of the Dutch Criminal Code”.¹⁶⁵
- Article 14(2)(c): “A criminal offence similar to those referred to under (a) that carries a prison sentence of eight years or more according to one of the Criminal Codes of the countries forming the Kingdom, or a criminal offence similar to those referred to under (b) according to one of the Criminal Codes of the countries from the Kingdom”.
- Article 14(2)(d): “A criminal offence referred to in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court”.¹⁶⁶

5 March 2016¹⁶⁷

Article 14 of the Dutch Nationality Act was further amended to include conviction of a crime referred to in Art. 134(a) of the Dutch Criminal Code in Article 14(2)(b) as another ground for nationality deprivation. Based on this, a person convicted for assistance in the commission of a terrorist offence as well as the preparation of such offences could be deprived of their Dutch nationality.

10 February 2017¹⁶⁸

Two new paragraphs were inserted into Article 14 (paragraphs 3 and 4 respectively), and new grounds for deprivation were introduced which do not require a criminal conviction to be invoked:

¹⁶³ Act of 17 June 2010, amending the Netherlands Nationality Act with regard to multiple nationality and other nationality issues. Available at: <https://zoek.officielebekendmakingen.nl/stb-2010-242.html>

¹⁶⁴ Titles I through IV of Book Two of the Dutch Criminal Code refer to: Crimes Against the Safety of the State (title I), Crimes Against Royal Dignity (title II), Crimes Against Heads of Friendly States and Other Internationally Protected Persons (title III) and Crimes Related to the Exercise of State Duties and State Rights (title IV).

¹⁶⁵ Articles 83 or 205 of the Dutch Criminal Code relate to the commission of terrorist offences and recruitment of another person for foreign military service or armed combat.

¹⁶⁶ Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court relate to the acts of Genocide, Crimes against humanity and War crimes.

¹⁶⁷ Act of 5 March 2016, amending the Netherlands Nationality Act to broaden the possibilities for deprivation of Dutch nationality in the event of terrorist crimes. Available at: <https://zoek.officielebekendmakingen.nl/stb-2016-121.html>

¹⁶⁸ Act of 10 February 2017, amending the Netherlands Nationality Act in relation to deprivation of Dutch nationality in the interest of national security. Available at: <https://zoek.officielebekendmakingen.nl/stb-2017-52.html>

- Article 14(3): “Our Minister may revoke the Dutch nationality of a person who has reached the age of sixteen and who has voluntarily entered into foreign military service of a State involved in hostilities against the Kingdom [of the Netherlands] or union the Kingdom is a member of.”
- Article 14(4): “Our Minister may, in the interest of national security, revoke the Dutch nationality of a person who has reached the age of sixteen and is outside the Kingdom, if his conduct demonstrates that he has joined an organization included by Our Minister, in accordance with the advice of the Council of Ministers, in a list of organizations participating in a national or international armed conflict and pose a threat to the national security”.