Institute on Statelessness and Inclusion

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Comments on Draft Law introducing a statelessness determination procedure in the Netherlands

28 November 2016

I. Introduction

1. The Institute on Statelessness and Inclusion (ISI)[1] is grateful to the Ministry of Security and Justice of the Netherlands, for its invitation to comment on the Netherlands' Draft Law introducing a statelessness determination procedure.[2] ISI is an independent non-profit organisation, headquartered in the Netherlands, committed to ending statelessness and disenfranchisement through the promotion of human rights, participation and inclusion. It is the global civil society focal point for action to address statelessness and has a strong international reputation for its specialised expertise on this issue. ISI's publications and analysis are widely used by government, civil society, UN and academic actors.

2. In this commentary, the Institute looks at the international and regional obligations of the Netherlands to identify and protect stateless persons and prevent statelessness, and relates these obligations to the provisions of the Draft Law. It is hoped that this process will clarify how the Draft Law can be improved and brought fully in line with the Netherland's obligations. We are aware that other civil society, academic and UN actors are also submitting comments on the Draft Law to the Ministry, and believe that the ISI submission will complements these. We are confident that collectively, the comments presented by all actors working in the field of statelessness will provide the Ministry with adequate objective legal analysis and information, to amend aspects of the law that require improvement.

3. In preparing these comments, ISI consulted with national actors and international partners. The content of this response also draws directly on ISI's expertise with respect to the 1954 and 1961 Statelessness Conventions – ISI co-Directors participated in the development of UNHCR's guidance on these instruments – and on its extensive analytical work on States obligations in respect of statelessness under international human rights work. Furthermore, these comments are informed by a joint submission on the Netherlands to the UN Human Rights Council for the 27th Session of the Universal Periodic Review.[3]

4. This submission begins by setting out the international and regional law obligations of the Netherlands (Section II). It then provides a brief overview of the developments which led to the preparation of the Draft Law (Section III). Having thus set the context, the submission proceeds to comment on the proposal for a statelessness determination procedure (Section IV) and the proposal for amending the right of option for stateless children (Section V). Finally, the submission raises a number of additional concerns which can be flagged with respect to the Draft Law in its present form (Section VI) and concludes by urging the Ministry to reconsider and revise the Draft Law to being it in line with the Netherlands international obligations (Section VII).

II. International and regional law obligations of the Netherlands

5. The Netherlands has ratified nearly all the core international and regional human rights treaties. Stateless persons should be protected through the general application of international human rights

[1] For more information about the Institute on Statelessness and Inclusion, please see the website http://www.institutesi.org/.
[2] Rijkswet vaststellingsprocedure staatloosheid, hereinafter Draft Law.
[3] The Institute on Statelessness and Inclusion, ASKV Refugee Support, the European Network and Statelessness and Defence for Children – The Netherlands, *Joint submission to the Human Rights Council at the 27th Session of the Universal Periodic Review (UPR) in relation to statelessness, access to nationality and human rights in the Netherlands*, 22 September 2016, available at: http://www.institutesi.org/NetherlandsUPR2016.pdf

standards found in these core treaties, including non-discrimination, adequate standard of living and equality before the law.[4]

6. The right to a nationality is affirmed by multiple human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR, Article 24), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, Article 9), and the Convention on the Rights of the Child (CRC, Article 7) to which the Netherlands is a Party. While not explicitly protecting the right to a nationality, the European Convention on Human Rights (ECHR) also contains important standards which protect stateless persons right to privacy and family life (Article 8), right to non-discrimination (Article 14) and other fundamental rights.

7. The Netherlands has also ratified dedicated treaties which specifically address statelessness and the right to nationality, namely: the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention), the 1961 Convention on the Reduction of Statelessness (1961 Convention) and the European Convention on Nationality (ECN). Through ratifying these Conventions, the Netherlands has committed to upholding specific international obligations with respect to the protection of stateless persons and the avoidance of cases of statelessness.

8. Over the past decade, important progress has been made to clarify states' international obligations towards stateless persons and in respect of the right to a nationality, as contained in the aforementioned instruments. This includes authoritative guidance issued by the UNHCR, in the exercise of the mandate bestowed upon it by the UN General Assembly, on the interpretation and application of the 1954 and 1961 Conventions.[5] It also includes jurisprudence of, among others, the European Court of Human Rights (ECtHR), affirming nationality to be a protected element of a person's social identity, and commentary by the UN Committee on the Rights of the Child elucidating the content of Article 7 CRC. As a result, today, states across Europe and around the globe are in a far stronger position to understand and undertake what is required of them under their international statelessness obligations.

9. Two clear principles which emerge from the above obligations and which are of central relevance to the Draft Law, are the duty to identify and protect stateless persons on the territory of a state, and the obligation of every state to protect every child's right to acquire a nationality.

10. This first principle – of identifying and protecting stateless persons - is implicit to the 1954 Statelessness Convention and to international human rights law. According to the UNHCR Handbook on Protection of Stateless Persons, state parties to the Convention (such as the Netherlands) have a duty to identify stateless persons in their territories to "provide them appropriate treatment in order to comply with their Convention commitments."[6] Furthermore, all states (including those not party to the Convention) have a more general human rights obligation to identify and protect stateless persons from discriminatory or arbitrary treatment in certain contexts. For example, as statelessness is a juridically relevant fact in relation to removal and immigration detention proceedings, statelessness should be identified in order to protect against discrimination and arbitrariness in relation to the right to liberty and security of the person (Article 9(1) ICCPR) in such situations.[7]

11. The second principle – of every child's right to acquire a nationality *"in particular where the child would otherwise be stateless"* – is enshrined in Article 7 CRC. Furthermore, according to Article 1 of the 1961 Statelessness Convention, *"a contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless."* This principle is explicit and unambiguous under international law. It has also been authoritatively interpreted by the Committee on the Rights of the

[4] There are a few exceptions under international human rights in which stateless persons are restricted, such as in the right to vote or to be elected to political office.
[5] See for example, the UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 2014.
[6] UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 2014, para 8.
[7] Ibid, para 122.

Child, in accordance with other guiding principles of the CRC (including the principle of non-discrimination and the principle of the best interests of the child), setting out with clarity, the resultant state obligations.

12. Sections IV and V of this Commentary elaborate further on the provisions of the Draft Law which relate to these two principles.

III. Developments leading up to the preparation of the Draft Law

13. It is against this background of strong and clear international obligations, that the Netherlands' statelessness policy has been the subject of scrutiny in recent years. Various detailed research, mapping and consultation initiatives conducted since 2011 uncovered a number of significant gaps in the country's law and policy framework that are affecting the ability of stateless persons residing in the Netherlands to exercise the rights accorded to them by international law as well as the realisation of the right of every child to acquire a nationality.[8] National and international human rights monitoring bodies also commented on the deficiencies of the Netherlands' statelessness policy. In 2014 and 2015 respectively, the Council of Europe High Commissioner for Human Rights and the UN Committee on the Rights of the Child, issued recommendations to the Netherlands on how to bring its law and policy in line with its international commitments.

14. On 28 September 2016, a Draft Law was presented for internet consultation by the Ministry for Security and Justice. This law seeks to address the gaps and inaccuracies in the Netherlands' law and policy framework, with a view to securing the rights of stateless persons and protecting the right of every child to acquire a nationality. As set out below, the Draft Law does not conform to international and regional standards, and so would benefit from further review and amendment.

IV. Comments on the proposal for a Statelessness Determination Procedure

15. As elaborated in paragraph 10 above, the state obligation to identify and protect stateless persons is clearly established under international law, particularly in relation to state parties to the 1954 Convention. Importantly, international law dictates that the implicit obligation of identification serves the deeper and explicit obligation of protection. The central purpose of the 1954 Convention, as stated in the instrument's preambles, is "to regulate *and improve* the status of stateless persons by an international agreement".[9] It is in accordance with this purpose that its provisions must be interpreted and applied. In other words, identification of statelessness – for the sake of identification – which does not result in protection is at best meaningless. It is likely to lead to violations of human rights including the fundamental principles of equality and non-discrimination. This is because the label 'statelessness', if not accompanied with a protection status, can single out already vulnerable individuals for targeted action which is arbitrary and discriminatory.

16. This protection imperative is alluded to in the explanatory memorandum to the Draft Law, which states that the Netherlands is establishing its statelessness determination procedure to do more for stateless persons who often find themselves in a vulnerable position.[10] However, a key element of the procedure – that recognition of statelessness will not give rise to the right of residence for the individual – betrays a narrower ambition, which unless rectified, will result in a procedure which does not bring the Netherlands any closer to meeting its international obligations of identification and protection of stateless persons. Furthermore, this will be the first statelessness determination procedure in the world, which does not serve a wider protection purpose through granting residence status.

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[8] Among others, the 2011 UNHCR report "Mapping Statelessness in the Netherlands" and the 2013 ACVZ report "No Country of One's Own".
[9] Preamble to the 1954 Convention relating to the Status of Stateless Persons.
[10] Draft explanatory memorandum statelessness determination procedure, p. 1. see www.internetconsultatie.nl/staatloosheid

17. The Draft Law states that neither the submission of an application for statelessness determination,[11] nor the resultant establishment of statelessness,[12] will give rise to a right of residence in the Netherlands. It reiterates that statelessness is not now and will not become a relevant factor in Dutch immigration law and explicitly indicates that applicants for statelessness status will remain subject to any deportation proceedings initiated against them, during the determination procedure.

18. The Netherlands government has acknowledged that the de-linking of identification from the granting of residence goes against independent expert legal advice, disregards the recommendations made by the Advisory Council on Migration Affairs and is likely to be seen as controversial. As this commentary aims to provide the Ministry with independent analysis with the intention of improving the Draft Law's compliance with international standards, we feel it important therefore, to further explore this question.

19. An isolated analysis of the 1954 Convention can lead to the conclusion that both the identification of statelessness and the granting of residence status to stateless persons are not Convention obligations. There are no provisions of the Convention (or under any human rights treaty) which explicitly require that stateless persons are identified and granted residence status. However, an analysis which takes cognisance of the full scope of the Convention – its object and purpose[13] – leaves no doubt that statelessness should be identified and should result in a protective legal status which includes residence rights. To quote the UNHCR Handbook on Protection of Stateless Persons:

    Although the 1954 Convention does not explicitly require States to grant a person determined to be stateless a right of residence, granting such permission would fulfil the object and purpose of the treaty. This is reflected in the practice of States with determination procedures. Without a right to remain, the individual is at risk of continuing insecurity and prevented from enjoying the rights guaranteed by the 1954 Convention and international human rights law.[14]

20. This assertion is based on the fact that the Convention explicitly obligates states to treat stateless persons in a particular manner and protect their rights, including in relation to the acquisition and transaction of property (Article 13), right of association including trade unions (Article 15), employment (Article 17), self-employment (Article 18), practicing a profession (Article 19), housing (Article 21), education (Article 22), public relief (Article 23), labour rights and social security (Article 24), freedom of movement (Article 26), travel documents (Article 28) and facilitated naturalisation (Article 32). It is not possible to give meaning to any of the above obligations, without having first granted residence status to the intended beneficiaries. In the Dutch legal context specifically, access to most socio-economic rights for non-nationals residing in the Netherlands is tied to possession of a residence status – through the "Koppelingswet" – and so a person who is identified as stateless and yet unable to regularise his or her residence will be left in an extremely vulnerable position, contrary to the object and purpose of the 1954 Convention.[15]

21. A counter argument may be made that states are only obligated to grant many of the above rights to stateless persons who are lawfully staying in their territory. However, as stated in the UNHCR Handbook:

    Recognition of an individual as a stateless person under the 1954 Convention also triggers the "lawfully staying" rights, in addition to a right to residence.[16]

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[11] Article 2(5) of the Draft Law.
[12] Article 4(3) of the Draft Law.
[13] See also n9 above.
[14] UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (2014), para 147.
[15] See also ACVZ, *No country of one's own*, December 2013, p. 79.
[16] UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 2014, para 150.

22. In addition to the 1954 Convention, human rights law principles also obligate states to take action to protect stateless persons. The principle of non-discrimination is especially relevance. Jurisprudence of the European Court of Human RIghts has clearly established that the situation of a stateless person is distinct from that of other non-nationals: to be without any nationality creates a "particularly vulnerable situation"[17] and creates a duty on the part of the state to accord to the person treatment which is appropriate to that status.[18] This obligation may extend to the grant of residence rights, especially in view of the likely lack of documentation and difficulties associated with removing stateless persons to other countries, given that they are *"not considered as a national by any state under the operation of its law".*[19] In the case of *Kuric and Others v. Slovenia* for example, the ECtHR held that:

    the failure to pass appropriate legislation and to issue permanent residence permits to individual applicants, constitutes an interference with the exercise of the applicants' rights to respect for their private and/or family life, especially in cases of statelessness.[20]

23. Accordingly, the denial of residence status to recognised stateless persons can exacerbate, instead of mitigating these vulnerabilities. That this can furthermore result in situations where stateless persons are subject to arbitrary detention and removal proceedings reinforces the obligation on the part of the state to provide for the possibility of regularising residence. In the case of *Kim v. Russia,* the ECtHR held that:

    it is incumbent upon the […] Government to avail itself of the necessary tools and procedures in order to prevent the applicant from being re-arrested and put in detention for the offences resulting from his status of a stateless person.[21]

24. From the above, it is evident that there are strong legal reasons for the Netherlands to amend its Draft Law and grant a protection-based residence status (similar to what refugees receive) to those identified as being stateless.[22] UNHCR recommends that such residence status be granted for at least two years (though preferably longer) and "*be renewable, providing the possibility of facilitated naturalization as prescribed by Article 32 of the 1954 Convention.*"[23]

25. In addition to these legal reasons, there are also practical reasons to link a residence status to the statelessness determination procedure. This will ensure that the procedure is actually used, because it brings tangible benefits to both stateless persons and to the state. Stateless persons, many of whom are likely to be living on the margins of society, will have good reason to apply under the procedure, with the resultant legal status giving them security and making them more visible to the state. Furthermore, this will provide a solution to persons who cannot be removed from the Netherlands because they are stateless, allowing the state to resolve these cases and focus its resources elsewhere.[24]

V. Comments on the proposal for amending the right of option for stateless children

[17] European Court of Human Rights, *Kim v. Russia,* Application No. 44260/13, 17 July 2014, para. 54.
[18] See also European Court of Human Rights, *Andrejeva v. Latvia,* Application No. 55707/00, 18 February 2009.
[19] Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons.
[20] European Court of Human Rights, Kuric and others v. Slovenia, Application No. 26828/06, 13 July 2010, paragraph 361.
[21] European Court of Human Rights, *Kim v. Russia,* Application No. 44260/13, 17 July 2014, para. 74.
[22] In practical terms, this would not necessarily require the creation of a new ground for the issuance of residence under the Dutch foreigners' act, but could be achieved through an adjustment to the existing "no fault" (buitenschuld) policy, whereby the establishment of statelessness creates a presumptive right to a residence permit that can be countered by the state if it can demonstrate that the person "is able to acquire or reacquire nationality through a simple, rapid, and non-discretionary procedure, which is a mere formality; or enjoys permanent residence status in a country of previous habitual residence to which immediate return is possible". UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 2014, para. 154.
[23] UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 2014, para 148.
[24] See, European Network on Statelessness and ASKV, *Protecting Stateless Persons from Arbitrary Detention in the Netherlands*, November 2015.

26. As indicated in paragraph 11 above, every child has the right to acquire a nationality, and both the CRC and the 1961 Convention, obligates states to ensure that no child will be born stateless. International law also sets out rules and timeframes for the acquisition of nationality by children who would otherwise be stateless. Both the ECN and the 1961 Convention set out various criteria according to which nationality should be acquired by such children, either at birth or later in life.[25] Guiding principles of the CRC including the right to non-discrimination and the best interests of the child, further dictate the manner in which these provisions are to be implemented.[26]

27. Despite these clear obligations, at present, the Netherlands only provides the 'right of option' for stateless children to access Dutch nationality, if they are legally residing in the Netherlands. This prompted the Commissioner for Human Rights of the Council of Europe to state in 2014 that:

    the Commissioner strongly recommends that the Dutch authorities find solutions for stateless children born in the Netherlands, notably by rescinding the requirement of lawful stay for their acquisition of Dutch nationality.[27]

28. Responding to these criticisms, in November 2014, the Dutch government proposed a provisional amendment to the Dutch Nationality Act[28] that aims to enable stateless children born in the Netherlands with no legal residence to opt for Dutch citizenship.[29] The proposed amendment only partially addressed the above concerns, retaining certain problematic conditions, including that

    I. The stateless child is required to have had a factual residence[30] in the Netherlands of five consecutive years, as opposed to three in the case of children with legal residence;
    II. At least one of the parents of the stateless child should not be able to resolve the statelessness of the child through his or her own actions, e.g. by reporting the child's birth to the country of origin's embassy so the child may acquire its nationality; and
    III. The residence of the child should be "stable": the parents should not have obstructed their departure or evaded supervision by the Immigration and Naturalisation Service *(IND)*, the Repatriation and Departure Service, the Central Agency for the Reception of Asylum Seekers or the Aliens Police *(Vreemdelingenpolitie)* in the context of any obligation to report to the relevant authorities.

29. Consequently, in its June 2015 Concluding Observations on the Netherlands, the CRC stated as follows:

    The Committee welcomes that the State party is in the process of amending the Nationality Act in order to extend the access to Dutch citizenship for stateless children born in the Netherlands without a legal residence permit. However, it notes that the proposed amendments do not extend such right to children whose parents did not cooperate with the State party's authorities.

    The Committee recommends that the State party ensure that ***all stateless children born in its territory, irrespective of residency status, have access to citizenship without any conditions****. In*

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[25] 1997 European Convention on Nationality, Article 2 (6) (b); 1961 Convention on the Reduction of Statelessness, Article 1 (2) (a) and (b).
[26] 1989 Convention on the Rights of the Child, Articles 2 and 3.
[27] Commissioner for Human Rights of the Council of Europe, *Report by Nils Muiznieks following his visit to the Netherlands from 20-22 May 2014* (October 2014).
[28] *Rijkswet op het Nederlanderschap.*
[29] Letter of the State Secretary for Security and Justice and Minister for Immigration [*Staatssecretaris van Veiligheid en Justitie*] to the House of Representatives [*Tweede Kamer*], *Kamerstukken II* 2014/15, 19637, no. 1917. Note that this is not a full-fledged legislative proposal, but it is a concrete plan to amend the Dutch Nationality Act as a reaction on one of the recommendations by *ACVZ*.
[30] The concept of 'factual residence' is comparable to 'habitual residence'. See also UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness* (21 December 2012) HCR/GS/12/04, para 41; UNHCR, *UNHCR's legal observations regarding the Proposal to amend the Nationality Act - Conditions to grant stateless children born in the Netherlands the right to apply for Dutch nationality* (30 January 2015) available online at http://www.refworld.org/docid/5617c2c74.html.

particular, it recommends the State party not to adopt the proposed requirement of parents' cooperation with the authorities.[31]

30. The subsequent Draft Law, presented in September 2016, directly disregards the recommendation of the CRC to desist from adopting a policy which makes the (otherwise stateless) child's access to nationality contingent on the parent's cooperation. The "stable" residence provision is retained in the Draft Law and according to the draft explanatory memorandum, will be interpreted such as to allow a stateless child born in the country to acquire Dutch nationality after 5 years' residence, without lawful stay, only if the parents have cooperated with the state at all times in removal proceedings. The explanatory memorandum seeks to justify this decision with the argument that "illegal stay cannot be rewarded" and the rule is needed to "maintain effective immigration control and prevent abuse of the safeguard".[32] This position, however, loses sight of the important fact that the child in question has no control over and can bear no responsibility for the parents' action. Moreover, the right to acquire a nationality and to be protected from statelessness is a right that attaches, very clearly, to the child and not to his or her parents. In imposing the condition of "stable" residence, as interpreted in the explanatory memorandum, the Netherlands will still fall short of its international obligations with respect to protecting the right of every child to acquire a nationality.

31. In the first place, the condition of stable residence contravenes the explicit and unambiguous terms of the 1961 Convention. This instrument provides for an exhaustive number of specific conditions that may be attached to granting nationality to otherwise stateless children born in the territory of States Parties. Only (one or more of) the following four conditions may be attached to an application for nationality of such a child: 1) a fixed period for lodging an application immediately following the age of majority; 2) *habitual* residence in the Contracting State for a fixed period, not exceeding five years immediately preceding an application nor ten years in all; 3) restrictions on criminal history; 4) the person has always been stateless.[33] The requirement of 'stable residence' as defined in the proposed amendment is therefore contrary to the 1961 Convention.

32. Secondly, this condition also stands in violation of the CRC. Article 2(2) of the CRC obligates states to "*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."* The stable residence requirement, however, solely concerns the actions or inactions of the parent(s) or guardians of the child. Restricting the application of a safeguard that is designed *specifically* to assure access to a nationality for a child who would otherwise be stateless, on the basis of immigration criteria, will result in that child remaining stateless, significantly impacting on his or her enjoyment of other child rights.[34] The denial of nationality rights to an otherwise stateless child on this basis, is therefore a violation of Article 2 and Article 7 of the CRC as well as the principle of the best interests of the child enshrined in Article 3(1). The Committee on the Rights of the Child made this position clear in its recommendation to the Netherlands, as well as in its review of other state parties to the CRC.[35]

33. Thirdly, imposing this condition, with the result of punishing the child for the parents' action, also undermines the right to private life protected under the ECHR. Nationality is an element of a child's social identity and must therefore be protected in accordance with article 8 ECHR.[36] Statelessness is

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[31] *CRC Concluding Obligations on the fourth periodic report of the Netherlands* (8 June 2015) CRC/C/NDL/CO/4, para 32 - 33.
[32] Draft explanatory memorandum, p. 24.
[33] 1961 Convention, Article 1(2). That this list is exhaustive is also clear from UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, HCR/GS/12/04, 21 December 2012, para. 36. See furthermore ENS, *Ending Childhood Statelessness: A Comparative Study of Safeguards to Ensure the Right to a Nationality for Children Born in Europe*, ENS Working Paper 01/16, which complements the earlier report on childhood statelessness by ENS: ENS, *No Child Should Be Stateless* (ENS 2015), available online at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf.
[34] UN General Assembly, *Secretary-General report on Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless*, A/HRC/31/29, 16 December 2015.
[35] See above, n31; and Committee on the Rights of the Child, *Concluding Observations: Czech Republic,* CRC/C/CZE/CO/3-4, August 2011, para. 38.
[36] European Court of Human Rights, Application No. 53124/09, *Genovese v. Malta*, 11 October 2011.

never in a child's best interests,[37] and the imposition of criteria which may lead a child to face uncertainty as to his or her entitlement to nationality creates a situation which is contrary to article 8 ECHR.[38] Specifically, according to the European Court of Human Rights, when laws which are aimed to penalise parents, also *"affect the children themselves, whose right to respect for private life […] is substantially affected […] a serious question arises as to the compatibility of that situation with the child's best interests, respect for which must guide any decision in their regard"*.[39]

34. Based on the above analysis, it is evident that the Draft Law would benefit from further amendment, to bring it in line with the Netherlands' obligations under the CRC, 1961 Convention and ECHR. This would also enable the Netherlands to join other European states – such as Norway, which amended its policy in October 2016[40] – in showing leadership with respect to protecting every child's right to a nationality. Such leadership is especially important and timely in the context of the UNICEF-UNHCR led global coalition for children's right to a nationality and the *#statelesskids* campaign of the regional civil society alliance, the European Network on Statelessness, aimed at ending childhood statelessness in Europe.

VI. Further comments

35. ISI has focused its commentary on the two core issues of the protection status accorded to stateless persons following recognition and the fulfilment of the right to acquire a nationality for stateless children born in the Netherlands. Repairing the gaps identified above is key to ensuring that the Netherlands meets the minimum standard required by virtue of the state's international obligations. Nevertheless, ISI would like to briefly flag a number of specific, further concerns with regard to the Draft Law and accompanying explanatory memorandum, as follows:

    a. The failure to regulate the status of the applicant during the procedure, including the non-suspension of expulsions proceedings,[41] which undermines the utility of the procedure for stateless persons who do not already have lawful residence in the Netherlands and is contrary to clear international guidance on the status of the applicant in statelessness determination procedures;[42]
    b. The requirement of "immediate interest" to initiate determination proceedings[43] and the possibility that this may be interpreted such as to restrict access - despite the explanatory memorandum recognizing in its opening paragraph that all stateless persons have an interest in the determination and recognition of their statelessness, not least for symbolic reasons;[44]
    c. The statement in the explanatory memorandum that a person who has been unable to establish his or her identity by presenting a valid document cannot complete the statelessness determination process,[45] in spite of the recognition elsewhere that it is inherent to the circumstance of statelessness that a person will have no or few documents;[46]

[37] African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality"*, ACERWC/GC/02, 16 April 2014.
[38] See also European Court of Human Rights, *Mennesson v. France,* Application No. 65192/11, 26 June 2014, paras. 97-99.
[39] European Court of Human Rights, *Mennesson v. France,* Application No. 65192/11, 26 June 2014, para 99.
[4040] The Norwegian Ministry of Justice and Public Security issued instruction G-08-2016, on 28 October 2016, according to which lawful stay requirement is rescinded and stateless persons born in Norway will be entitled to apply for nationality if they meet the condition of three years of factual residence.
[41] Explanatory memorandum, page 13.
[42] "An individual awaiting a decision is entitled, at a minimum, to all rights based on jurisdiction or presence in the territory as well as "lawfully in" rights. Thus, his or her status must guarantee, inter alia, identity papers, the right to self-employment, freedom of movement and *protection against expulsion* […]The status of those awaiting statelessness determination must also reflect applicable human rights such as *protection against arbitrary detention* and assistance to meet basic needs". UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 2014, paras. 145-146.
[43] Article 2(1) of the Draft Law.
[44] Explanatory memorandum, page 1.
[45] Ibid, page 7.
[46] Ibid, for instance, page 11.

d. The possibility that in the determination of statelessness, credibility issues that may have arisen in a prior asylum procedure can be taken into account,[47] whereas this has no bearing on the fact of statelessness – a matter which relates simply to whether a person is "considered as a national by any state under the operation of its law"[48];
e. The use of information in the explanatory memorandum to justify the non-regulation of residence for stateless persons – including that according residence would lead to abuse of the procedure and create an immigration pull factor – that disregards evidence and analysis relating to the practical operation of existing statelessness determination procedures in other countries which shows such concerns to be unfounded.
f. The restriction of appeals proceedings for statelessness determination cases to a single instance, which will consider only points of law and not of fact,[49] contradicting international guidance which states explicitly that "appeals must be possible on both points of fact and law as the possibility exists that there may have been an incorrect assessment of the evidence at first instance level".[50]

36. ISI would like to take this opportunity to express its support for the more detailed commentaries provided on some of these and other issues which are offered in the submissions on the Draft law by the Netherlands Institute for Human Rights; by the European Network on Statelessness and ASKV/Refugee Support; and by Amnesty International, ASKV/Refugee Support, Defence for Children, NJCM, Vluchtelingenwerk and others; and by UNHCR. It is ISI's hope and recommendation that the Ministry closely review the further details of the Draft Law and explanatory memorandum in accordance with these submissions to ensure full compliance with international obligations and consistency with relevant guidance.

VII. Conclusion

37. Through this commentary, ISI has attempted to draw on the Netherland's international and regional obligations to present an objective analysis of its Draft Law on introducing a statelessness determination procedure. This analysis has unearthed two fundamental concerns, which require urgent attention:

    a. The Draft Law should grant protection status and residence rights to those who are identified as stateless, as well as provide for an appropriate legal status for the applicant during the procedure (with, at a minimum, suspensory effect on expulsion proceedings); and
    b. Children born in the Netherlands who would otherwise be stateless, should acquire Dutch nationality without discrimination, including on the basis of the actions or inactions of their parents, and in compliance with the principle of the best interests of the child.

38. Without addressing these two core issues, ISI is of the opinion that the reform will fall short of meeting the minimum requirements of the Netherlands under international law. Furthermore, in practice, little will change in the position of stateless persons, including stateless children, in the Netherlands. The Institute on Statelessness and Inclusion urges the Ministry to reconsider its position on these two points, to refrain from adopting legislation that would still fall substantially short of the Netherlands' international obligations in the area of statelessness and to revise the Draft Law in accordance with these international commitments. We welcome the opportunity to further discuss any of the issues raised in this commentary should this be of interest to the Ministry.

[47] Ibid, page 8.
[48] Article 1 of the 1954 Convention relating to the status of stateless persons.
[49] Ibid, page 5.
[50] UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 2014, page 30.