



**Forced to leave but nowhere to return to:
Rights of *non-returnable* stateless Palestinians in the Netherlands**

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1. Introduction

This expert opinion was written on the request of Flip Schüller of law firm Prakken D'Olivera in Amsterdam, who has several stateless Palestinians as clients. Their asylum applications are rejected and they are therefore required to leave Dutch territory. However, they claim that they are not able to get the required documents in order to be able to return to their countries of habitual residence. As a result they remain in the Netherlands without legal residence, with very limited rights. This expert opinion examines whether stateless Palestinians can in practice return to Lebanon, Jordan and the Palestinian territories. Furthermore it assesses which rights stateless Palestinians can claim in the Netherlands by virtue of their non-removability and regardless of their lack of a legal residential status.

As a consequence of politics and policies from Israel as well as other Middle Eastern countries, many Palestinians, who were living in that region, became stateless. The UN identifies two categories of stateless persons. The first category of *de jure* statelessness means persons who are not nationals of any state, either because at birth or subsequently they were not given any nationality, or because during their lifetime they lost their nationality and did not acquire a new one.¹

The second category of *de facto* stateless persons are

persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of the national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals.²

More than half of the eight Million Palestinians are *de jure* stateless.³ This makes them the biggest group of stateless people in the world.

In 1948, the areas that have been widely recognised as the boundaries of the new Israeli State⁴ (previously part of the British Mandate), and the laws that were consequently adopted, excluded hundreds of thousands of the formerly resident Palestinians. These laws include a number of so-called 'Basic Laws' that became the foundation of the Israeli legal System, namely:

- **The Law of Return** (1950), which creates the exclusive 'nationality right' for Jews from anywhere to come to the lands Israel occupies to claim – as 'nationals' – a superior legal status and full rights which are denied to the indigenous minority of Palestinian citizens;
- **The Law of Citizenship** (1948), which establishes eligibility for citizenship status; but citizenship without 'Jewish nationality' offers no basis for many fundamental rights;
- **The Status Law** (1952), which recognises 'national' entities serving 'the Jewish people' exclusively as part of the government of Israel (the World Zionist Organisation/Jewish Agency-which include the Jewish National Fund-and its subsidiaries); and
- **The Basic Law: Knesset (Amendment No. 7)** (1985), which prevents a candidate from participating in an election on a platform which does not coincide with the exclusionary definition of the state of Israel as 'the state of 'the Jewish people.'"⁵

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¹ Badil, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (February 2015) www.badil.org/en/publication/handbook-on-protection.html accessed 06 February 2016, p 21.

² Ibid.

³ A Shiblak, 'Stateless Palestinians', *Forced Migration Review* (2006), pp 8-9 www.fmreview.org/FMRpdfs/FMR26/FMR2603.pdf accessed 11 January 2016.

⁴ Israel officially does not recognize specific territorial boundaries.

⁵ J Schechla, 'Ideological Roots of Population Transfer', *Third World Quarterly* (1993), pp 239-275, at 261.

In 1949, the United Nations General Assembly passed Resolution 194, which provided that Palestinian refugees had a right to return, restitution and compensation as a result of events taking place in 1948, but these have not been heeded.⁶

The situation was further aggravated in 1967 when Israel occupied the remaining Palestinian territories of the West Bank and Gaza as well as the Sinai Peninsula of Egypt (which Israel retreated from in 1979) and Golan region of Syria.

To protect the Palestinian refugees, the United Nations established a new agency, the United Nations Conciliation Commission on Palestine (UNCCP), which documented Palestinian properties confiscated in 1948 and whose operations were discontinued a couple of years later.⁷ To provide humanitarian assistance for Palestinian refugees, the United Nations also created the UN Relief and Works Agency (hereafter: UNRWA), tasked with providing assistance to Palestinians, and operating in Jordan, Lebanon, Syria as well as the West Bank and Gaza. One of the main tasks of UNRWA is to register displaced Palestinians and provide them with a form of identification called an 'UNRWA-card.'

In the decades following 1948, many of the displaced Palestinians have left the Middle East for various reasons. Some of them came to the Netherlands, but failed to acquire a residence permit based on a refugee status. Currently, they are residing illegally in the Netherlands, since – as stateless persons lacking a nationality – they cannot be sent back to any particular country.

Under international law, there is a well-respected right to return to one's country of former habitual residence, that Palestinian refugees, including stateless Palestinians can refer to.⁸ In order to assess whether this principle holds true in reality, this expert opinion will scrutinise whether stateless Palestinians can factually return to their countries of former habitual residence. These are the countries and territories that fall under the operational zone of UNRWA, namely Lebanon, Jordan, the West Bank (including East Jerusalem) and Gaza. Syria is excluded from the scope of this expert opinion due to the current crisis situation, which makes it impossible to expel stateless Palestinians who had been previously residing in Syria.

This expert opinion will establish in Chapter 2, that the return of stateless Palestinians to Lebanon, Jordan and the Palestinian territories is in practice impossible. Chapter 3 focuses on the rights that stateless Palestinians can claim in the Netherlands. In particular, it will discuss the right to receive documentation; the right to basic welfare provision and the right not to be detained.

Methodology of this expert opinion

In order to discuss this question on the possibility of return practical legal research methods were used by interviewing various experts on the topic via emails, phone or in person. Reports by international organisations and academic writings substantiate the findings of the interviews. Most academic research focuses on the political issues in the region and on the question whether stateless Palestinians should have the right to return to the countries of their former habitual residence and to move freely around the region. Other research has explored the feasibility of temporary protection as an instrument for implementing Palestinian refugees' right of return.⁹ Some academic research has explored whether the possibility of return is feasible.¹⁰ In addition to interviews, reports and academic literature, information available on the different embassies' websites has been taken into account. These methods were found to be the most

⁶ United Nations General Assembly Resolution 194 (III) of 11 December 1949, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/65/IMG/NR004365.pdf?OpenElement>, Article 11.

⁷ L Takkenberg 'UNRWA and the Palestinian Refugees After Sixty Years: Some Reflections' *Refugee Survey Quarterly* (2010), pp 253-259, at 254.

⁸ K Lawan, 'The Right to Return of Statelessness Palestinians in International Law', *International Journal of Refugee Law* (1996), pp 532-568 at 533.

⁹ S Akram and T Rempel, 'Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees' *Boston University International Law Journal* (2004), p 1-163.

¹⁰ M Kagan, 'Do Israeli Rights Conflict with the Palestinian Right of Return? Identifying the Possible Legal Arguments', BADIL Resource Center for Palestinian Residency & Refugee Rights, Working Paper No. 10, (2005) <http://zochrot.org/uploads/uploads/62f551083f6e095d45c271a93b2f1166.pdf> accessed 7 April 2016 and S Abu Sitta, 'The Implementation of the Right of Return', *Palestine-Israel Journal of Politics, Economics and Culture* (2008-2009), pp 29-30.

effective in investigating whether stateless Palestinians can return to the countries of their former habitual residence, because information on the issue is not in all cases freely available.

As for the second part, in order to answer the question what rights non-returnable stateless Palestinians in the Netherlands have under national, European and international law, legal research drew on an abundance of existing jurisprudence and legislation. Analysis of legislation in combination with case law has been necessary in order to produce a comprehensive overview of the rights of the stateless Palestinians, while academic legal articles fill in some of the gaps and have been used to confirm the results.

Due to the politically-sensitive nature of the subject, it has been extremely difficult to gather official information from relevant sources. This includes embassies that refuse to be quoted and data that is not accessible to the public. This expert opinion is the only report that has taken it upon itself to compile and obtain all the scattered information and different policies concerning stateless Palestinians.

This expert opinion is potentially relevant for any case involving stateless Palestinians as well as other undocumented migrants in the Netherlands.

2. Can stateless Palestinians return to the countries of their former habitual residence?

2.1 Introduction

This part of the expert opinion focuses on the possibility for stateless Palestinians to return to the countries of their former habitual residence. The persons concerned are stateless Palestinians residing in the Netherlands, who have a duty to leave the Netherlands ('*vertrekplicht*'), according to Dutch law. The question that arises is whether it is practically and legally possible for stateless Palestinians to return to Lebanon, Jordan, the West Bank (including East Jerusalem) and Gaza, regardless of their personal (un)willingness.

The current practice and policies of the Lebanese and Jordanian laws will be scrutinised with regard to the requirements for stateless Palestinians to return to those countries. Also, the possibilities of return to the Palestinian Territories through Jordan and Egypt will be assessed. This part will also take into account Israeli laws and practices concerning aliens.

Having investigated the written policies as well as the current practice of the aforementioned countries and territories (especially regarding travel documents and border controls), it is concluded that the return or the expulsion of stateless Palestinians to Lebanon, Jordan and the Palestinian Territories is factually impossible.

A request has been made with the Returns and Removal Department (DT&V) with the Ministry of Security and Justice under the Freedom of Information Act (*Wet Openbaarheid Bestuur, WOB*) with regard to the possibilities of return for Palestinians. According to the information provided, there have indeed been Palestinians who have left the Dutch territory successfully, either voluntarily or through deportation. Based on this practice, it seems that one could conclude that there is indeed a possibility for Palestinians to return to the countries of their former habitual residence. However, the information provided by the authorities does not actually state this, as the DT&V does not register information concerning arrival in other countries. This means that it is unknown, as far as the information of the DT&V is concerned, where the Palestinians that have left the Netherlands are currently residing and whether their stay in the new territory is legal. The information that is provided is sparse and therefore, it is unclear whether the Palestinians were actually readmitted to the countries of their former habitual residence. The information provided by DT&V does, therefore, not contradict the main statement of this expert opinion, namely that it is impossible for stateless Palestinians to re-enter the countries of their former habitual residence.

2.2 Lebanon

This subchapter deals with the question whether stateless Palestinians can legally return to the place of their former habitual residence, namely Lebanon. A closer look at the Lebanese written policy on technical conditions surrounding the issuing of travel documents and on expulsion to Lebanon is necessary to answer this question. In addition, practical impediments to the return of stateless Palestinians have been taken into account.

2.2.1 Legal background

The Ministry of Interior at the Directorate of Political and Refugees Affairs (DPRA) in Lebanon issues ID Cards for Palestinians who are registered at the DPRA. However, only Palestinian Refugees who entered Lebanon in 1948 and 1967 were allowed to register, and therefore to hold an ID card (e.g. a travel document) and have the possibility to apply for a 'KAID AL DARS' laissez-passer.¹¹ Problems can occur for example, if a DPRA-registered Palestinian woman marries an unregistered Palestinian man. Their child will receive the nationality of his father and therefore no DPRA registration.¹² Moreover, many of the

¹¹ Danish Immigration Service, *Stateless Palestinian Refugees in Lebanon* (2014) www.refworld.org/docid/558421344.html accessed 1 December 2015, p 40.

¹² Ibid.

Palestinian refugees who arrived in Lebanon with the Palestinian Liberation Organisation in 1982, after the DPRA registration process took place, were left without any form of legal identification.¹³

2.2.2 Legal return to Lebanon

The website of the Lebanese embassy in the Netherlands provides information on the conditions for expulsion of a stateless Palestinian from the Netherlands to Lebanon.¹⁴ According to the available information, the Lebanese authorities distinguish between two forms of expulsion: 'immediate *Refoulement*' and 'non-immediate Expulsion'. Lebanon is willing to take the person back 'without the approval of the General Directorate of the General Security' only in case of 'immediate *Refoulement*' under the condition that 'the deportation process were to be completed on the same plane or in the next trip' and only for 'passengers who left Lebanon to the expelling country directly or via a third country by transit and stayed inside the airport's premises in both countries'.¹⁵ For example, if a stateless Palestinian flies from Lebanon to the Netherlands and that person is expelled right after arrival, meaning that the person is sent back with the same or the next plane, thus not entering the Netherlands, then Lebanese authorities would be willing to take that person back regardless of whether that person has the required documents.

For persons who do not fall under the scope of the condition mentioned above, the 'non-immediate expulsion'-requirements applies. Here, the Lebanese authorities refer especially to Palestinians who are holding a Lebanese travel document or a Lebanese 'KAID AL DARS' laissez-passer, valid for several trips. The person who is to be deported must show, in particular, a travel document. This has to be a document proving the person's citizenship, the date of the departure from Lebanon, the arrival in the expelling country, a justification for the period of the time between departure and arrival, the name of the town of origin in Lebanon, an address, and telephone numbers.¹⁶

As mentioned above, a stateless Palestinian can only apply for a travel document or laissez-passer if that person holds an ID card issued for Palestinians. However, only Palestinian refugees who arrived in Lebanon in 1948 and 1967 were allowed to registered with the DPRA and therefore to hold this ID card. Hence, the 'non-immediate Expulsion' does not apply to Palestinians without such documents. Examples of such persons are those who arrived in Lebanon after the DPRA registration process and persons who only hold an UNRWA-Registration. Therefore, it can be assumed that stateless Palestinians falling outside this scope are not able to apply for return and are therefore not able to legally return from the Netherlands back to Lebanon.

Information from other Lebanese embassies in Europe, more specifically those in Germany, France, Belgium, Switzerland and Sweden, substantiate this assumption. According to a German court, a stateless Palestinian needs to hold a *Document de voyage* (hereafter *DDV*) for the return.¹⁷ For the *DDV* application, the Palestinian needs to be DPRA-registered in Lebanon and hold the so-called 'blue ID card' (DPRA ID card) for Palestinians. In addition to that, the person must be registered with UNRWA or hold verification that he is in fact not registered. Furthermore, the person must possess a residence permit in Germany or has to verify that the person will surely get resident permit.¹⁸ Consequently, a stateless Palestinians who is unable to show the required documents cannot legally return from Germany to Lebanon. Moreover, German case law shows that the Lebanese authorities forestall voluntary or forced expulsion of stateless Palestinians by

¹³ I refer to the email conversation with Ms. Lina Hamdan who works at the Council of Ministers in the Lebanese Palestinian Dialogue Committee as LPDC's Communication officer. See www.lpdc.gov.lb/HomeLPDC.aspx?lang=en-us for more information.

¹⁴ See www.lebanonembassy.nl/expulsion_to_lebanon.htm accessed 1 December 2015.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ OVG Saarlouis 2 A 484/09 [2011]; Niedersächsisches OVG Az. 11LC 312/10 [2011], para 26; VGH Baden Württemberg Az. 13 S 2483/07 [2008], para 27.

¹⁸ See www.libanesische-botschaft.info/index.php/de/konsulardienste/paessee/reisedokument-fuer-palaestinenenser accessed 1 December 2015.

not handing out a *DDV*, even if the requirements have been complied with in practice.¹⁹ Information from the Lebanese embassies in France, Belgium, Switzerland and Sweden contains the same requirements.²⁰

Ms. Linda Hamdan has confirmed this practice.²¹ According to her, only Palestinians who are registered with the DPRA, and are therefore holding an ID card of the DPRA, are allowed to return to Lebanon.²²

Therefore it can be concluded that stateless Palestinians can only legally return to Lebanon if they are in possession of the documents mentioned above. These documents can, however, only be acquired legally by Palestinians who arrived in Lebanon in the period between 1948 and 1967, and were registered with the DPRA.

2.3 Jordan

This subchapter deals with the question whether stateless Palestinians can legally return to Jordan. To answer this question, Jordanian written policy on technical conditions concerning the issuance of travel documents and of expulsion back to Jordan has been examined. Additionally, practical obstacles stateless Palestinians face in their return to Jordan will be discussed.

2.3.1 Legal background

Jordan severed its ties with the West Bank in July 1988. Since then, different colours of passports indicate different -unequal- degrees of citizenship within the nation.²³ In 1983, Jordan introduced colour-coded travel cards for Jordanians of Palestinian origin in the West Bank, in order to facilitate their travel to and from the Israeli occupied West Bank: a green card for West Bank residents, and a yellow card for West Bankers who had moved to the East Bank. Jordanians residing in the West Bank sometimes lost their right to live in the East Bank.²⁴ This colour differentiation was initially intended to facilitate travel across the Allenby Bridge crossing²⁵, but came to be the basis of determining nationality in the post 1988 period.²⁶ Only those who held yellow cards maintained their Jordanian citizenship.²⁷ Any other person would need a valid travel document or visa issued by the Jordanian government in order to be allowed to travel to Jordan.

According to Human Rights Watch²⁸, 'the Jordanian government has quietly and without notice been withdrawing Jordanian nationality from its citizens of Palestinian origin, effectively rendering them

¹⁹ VG Berlin Az. 35 K 202.11 [2011], paras 21,22; OVG Saarlouis 2 A 484/09 [2011]; Niedersächsisches OVG Az. 11LC 312/10 [2011], para 26; VGH Baden-Württemberg Az. 13 S 2483/07 [2008], para 33.

²⁰ See www.ambassadeliban.fr/passeports.php accessed 1 December 2015; libaneurope.be/fr/non-categorise/passeports accessed 1 December 2015; ambassadeduliban.ch/consulaires/passeport/#pal accessed 1 December 2015; www.lebanonembassy.se/new-palestinian-travel-document/ accessed 1 December 2015.

²¹ I refer to the email conversation with Ms. Lina Hamdan who works at the Council of Ministers in the Lebanese Palestinian Dialogue Committee as LPDC's Communication officer. See www.lpdc.gov.lb/HomeLPDC.aspx?lang=en-us for more information.

²² Ibid.

²³ M Ababsa and RF Daher, *Cities, Urban Practices and Nation Building in Jordan* (Beyrouth, Presses de l'Ifpo, 2011) <http://books.openedition.org/ifpo/1724> accessed 4 December 2015, pp 39-64.

²⁴ Human Rights Watch, *Stateless again. Palestinian-origin Jordanians deprived of their nationality* (2010) www.hrw.org/report/2010/02/01/stateless-again/palestinian-origin-jordanians-deprived-their-nationality accessed 4 December 2015.

²⁵ See further section 2.4.3.

²⁶ ARDD Legal Aid, *Mapping the Legal Obstacles Palestinians Face in Jordan* (2015) http://arddjo.org/sites/default/files/resource-files/mapping_the_legal_obstacles_palestinians_face_in_jordan_en.pdf accessed 4 December 2015,), p 3.

²⁷ Ibid.

²⁸ Human Rights Watch, *Stateless again. Palestinian-origin Jordanians deprived of their nationality* (2010) www.hrw.org/report/2010/02/01/stateless-again/palestinian-origin-jordanians-deprived-their-nationality accessed 4 December 2015.

stateless again'. This policy was motivated by various political reasons. This is done not only in an arbitrary manner, but also in breach of the Jordanian 1954 Nationality Law.²⁹

2.3.2 Legal return to Jordan

With regard to Palestinians from Syria, the Jordanian Prime Minister Abdullah Ensour stated in an interview that the official policy of the Jordanian government vis-à-vis Palestinian refugees from Syria is to deny them entrance. Moreover, he stated in an interview with the newspaper Al-Monitor 'The Pulse of the Middle East', that:

There are those who want to exempt Israel from the repercussions of displacing the Palestinians from their homes. Jordan is not a place to solve Israel's problems. Jordan has made a clear and explicit sovereign decision to not allow the crossing to Jordan by our Palestinian brothers who hold Syrian documents. Receiving those brothers is a red line because that would be a prelude to another wave of displacement, which is what the Israeli government wants. Our Palestinian brothers in Syria have the right to go back to their country of origin. They should stay in Syria until the end of the crisis.³⁰

Therefore, any (stateless) Palestinian with Syrian travel documents will be denied access at the border of Jordan. This is confirmed by a 2014 Human Rights Watch report.³¹

For all other (stateless) Palestinians, it is likely they will need to follow the normal procedures to acquire Jordanian travel documents or visas. See to this effect the report by the Canadian Immigration service³², which indicates that there was no relevant specific information pertaining to procedures for stateless Palestinians to obtain Jordanian travel- or other documents. According to this report, Palestinian refugees who held Jordanian passports before 1988 (when Jordan severed administrative ties with the West Bank) can request a two or five-year Jordanian passport which functions as a travel document. From this it can be deduced that others, who did not hold a passport, are not entitled to any other form of documents. New travel documents that are not tourist visa or visa for Jordanian nationals, can only be requested in the event the Jordanian passport is lost or stolen, implying that a travel document on any other ground will not be granted³³. Besides this, to request a travel document, one must also possess a passport, a residence card, or otherwise legal document, confirming the legal stay of the person concerned in the host state. This is to ensure that the person concerned will not permanently stay in Jordan.

To be able to apply for a visa, the person concerned must, among other things, have a valid passport or other identification document.³⁴ Therefore, stateless Palestinians who do not have any valid passport or residence permit cannot obtain a visa. This is confirmed by Jordanian embassies around the world, such as the Jordanian embassy in Germany, which requires a passport as well³⁵, as does the Jordanian embassy in the US.³⁶

2.4 Palestinian territories

This part of the expert opinion scrutinises the current practice and policies concerning the possibility for stateless Palestinians to enter the Palestinian occupied territories through the Jordanian border while also

²⁹ Art 3(2), 18 and 19, Law No. 6 of 1954 on Nationality (last amended 1987), 1 January 1954 www.refworld.org/docid/3ae6b4ea13.html accessed 6 December 2015.

³⁰ Al-Monitor, 'The Pulse of the Middle East', Interview with Jordanian Prime Minister (2013) www.al-monitor.com/pulse/politics/2013/01/jordanian-pm-we-cannot-receive-palestinian-refugees-from-syria.html# accessed 6 December 2015.

³¹ Human Rights Watch, Jordan: Palestinians Escaping Syria Turned Away (2014) www.hrw.org/news/2014/08/07/jordan-palestinians-escaping-syria-turned-away accessed 6 December 2015.

³² Immigration and Refugee Board of Canada, Jordan, *Palestine and Israel: Passports issued to stateless Palestinians; procedures; entitlements; differences between Jordanian passports issued to Jordanian nationals and those issued to stateless Palestinians* (2009) www.refworld.org/docid/4e426ab42.html%20 accessed 4 December 2015, p 2.

³³ See http://embassyofjordan.ca/eng/?page_id=78 accessed 6 December 2015.

³⁴ Ibid.

³⁵ See www.jordanembassy.de/consular_section.htm accessed 6 December 2015.

³⁶ Ibid.

briefly referring to the Israeli practices and policies regarding East Jerusalem. The possibility of return to Gaza through the Egyptian border is also examined. Additionally, the documents which are necessary to cross those borders, are addressed.

2.4.1 Background

Before turning to the practice and policies, a short and non-exhaustive overview of the relevant Israeli legislation and resolutions will be given, in order to demonstrate how the Israeli government deals with Palestinian refugees.

In the UN General Assembly Resolution 194 Paragraph 11 (reaffirmed 110 times³⁷), the UN stated that:

The [Palestinian] refugees wishing to return to their homes and live at peace with their neighbours, should be permitted to do so at the earliest practicable date and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.

With regard to the West Bank, Israel Defence Forces Order No 1650 amending order No 329 named 'Prevention of infiltration' is of special importance.³⁸ It criminalises the movement of displaced persons to the West Bank³⁹ by defining an 'Infiltrator' as a person who entered the Area⁴⁰ unlawfully, or a person who is present in the Area and does not lawfully hold a permit and making them liable for imprisonment.⁴¹

Closely connected to the Military Order, is the 1954 Prevention of Infiltration Law.⁴² In the amendment from 2013⁴³, the law defines all irregular border-crossers as 'infiltrators'. Consequently, this law allows Israeli authorities to detain all irregular border-crossers, including asylum seekers and their children, before their deportation. Moreover, it explicitly refers to a 'Palestinian resident without nationality or citizenship or whose nationality or citizenship was doubtful and who, during said period, left his ordinary place of residence in an area which has become a part of Israel for a place outside Israel' as an 'infiltrator'.⁴⁴

The Absentee Property Law of 1950 defines any Palestinian who 'left his ordinary place of residence' for a place outside the nascent state as an 'absentee'.⁴⁵

2.4.2 The Israeli population registry and the possibility of return

Whether a person can cross a border from any of the neighbouring countries, Lebanon, Jordan or Egypt⁴⁶, into Israel or the Occupied Palestinian Territories, depends heavily on the registration of that person in the population registry run by the Israeli authorities.⁴⁷

³⁷ See www.prc.org.uk/portal/index.php/faq/key-facts/789-the-palestinian-right-of-return#sthash.q9sXRqKM.pdf, accessed 25 November 2015.

³⁸ Available at www.hamoked.org.il/items/112301_eng.pdf accessed 4 December 2015.

³⁹ Badil, *Forced Population Transfer: The Case of Palestine* (2014) www.badil.org/en/publication/press-releases/28-2014/4200-press-eng-7.html accessed 04 December 2015, p 18.

⁴⁰ The Judea and Samaria Area together constitute the West Bank.

⁴¹ Human Rights Watch, *Forget about him, He's not here* (2012) www.hrw.org/report/2012/02/05/forget-about-him-hes-not-here/israels-control-palestinian-residency-west-bank-and accessed 04 December 2015,), p 31.

⁴² See www.israelawresourcecenter.org/emergencyregs/fulltext/preventioninfiltrationlaw.htm accessed 04 December 2015.

⁴³ International Human Rights Initiative, *I was left with nothing* (2015) www.refugee-rights.org/Publications/Papers/2015/IWasLeftWithNothing.pdf accessed 10 January 2016, p 11.

⁴⁴ Art. 1 of the 1954 Prevention of Infiltration Law, www.israelawresourcecenter.org/emergencyregs/fulltext/preventioninfiltrationlaw.htm accessed 04 December 2015.

⁴⁵ D C Jefferis, 'Institutionalizing Statelessness: The Revocation of Residency Rights of Palestinians in East Jerusalem' *International Journal of Refugee Law* (2012), p 202-230 at 208.

⁴⁶ Syria will not be considered in this report due to the current situation there.

⁴⁷ Gisha, *The Gaza Cheat Sheet, Real Data on the Gaza Closure* (2015) www.gisha.org/UserFiles/File/publications/Info_Gaza_Eng.pdf accessed 04 December 2015.

In 1967, Israel conducted a census after their occupation of the West Bank (including East Jerusalem) and Gaza. The circa 1 million Palestinians⁴⁸ who were in the occupied territories at that moment were issued an Israeli residency card⁴⁹, including an Israeli ID number. These Israeli residency cards were colour-coded: blue for residents of annexed East Jerusalem, green for residents of the rest of the West Bank, and orange for residents of the Gaza Strip. These residents had an entry in the population registry. After the Oslo Agreement in 1993, passports were issued to those persons who had an ID number from 1967.⁵⁰

It has to be considered that the Israeli population registry has not always been open to changes. The opening and, respectively, the freezing of the registry, often reflected the political situation. After 1967, only newborn children and some PLO leaders were issued Israeli ID numbers.⁵¹ Between 1995 and 2000 the registration and documentation of the population was accorded to the Palestinian authority. They had, - during that period, - the right to grant permanent residency permits, but only with an approval of the Israeli authorities. However, in practice it was only a nominal right, as the population registry stayed under effective control of the Israelis.⁵² Due to the second intifada, Israel froze the registry at the end of the year 2000 and changes to the registry were not possible any more.⁵³

As stated above, the Palestinian Authority only issues passports to Palestinians in the occupied territories, who are registered on the population registry, and who therefore hold Israeli approved ID cards.⁵⁴ Statelessness Palestinians do not hold an Israeli ID number, otherwise they would not be considered stateless.

The Palestinian Mission in Den Haag issues passports to stateless Palestinians in the Netherlands in cooperation with the Palestinian Authorities in Ramallah.⁵⁵ However, these passports are not connected to an Israeli ID number, and can therefore not be used to facilitate the entry into the Palestinian Territories.⁵⁶ They serve as a travel document. Stateless Palestinians can use it, for example, to travel from the Netherlands to Spain. However, the whole region around the Palestinian Territories, including Lebanon, Jordan and Egypt, does not recognise this passport as a valid travel document, nor an identification document.⁵⁷

2.4.3 Entry into the West Bank through the border with Jordan

In order to enter the West Bank through the border with Jordan, one has to use the Allenby Bridge/King Hussein Bridge, which is the only crossing point.⁵⁸ At the Allenby Bridge, Israeli and Jordanian personnel are

⁴⁸ Badil, *Forced Population Transfer: The Case of Palestine* (2014) www.badil.org/en/publication/press-releases/28-2014/4200-press-eng-7.html accessed 04 December 2015, p 18.

⁴⁹ Ibid.

⁵⁰ Dr Abuznaid, ambassador of the Palestinian Territories in Den Haag, interview in persona, 23 November 2015 (see Annex).

⁵¹ Dr Abuznaid, ambassador of the Palestinian Territories in Den Haag, interview on telephone, 03 December 2015.

⁵² Human Rights Watch, *Forget about him, He's not here* (2012), www.hrw.org/report/2012/02/05/forget-about-him-hes-not-here/israels-control-palestinian-residency-west-bank-and accessed 04 December 2015, Interim Agreement, Annex III Appendix I Art. 28 (1).

⁵³ Human Rights Watch, *Forget about him, He's not here* (2012) www.hrw.org/report/2012/02/05/forget-about-him-hes-not-here/israels-control-palestinian-residency-west-bank-and accessed 04 December 2015, p 24.

⁵⁴ UK Upper Tribunal (Immigration and Asylum Chamber), case no UKUT 124 (IAC), *HS (Palestinian – return to Gaza) Palestinian Territories CG* [2011], paras 70, 111.

⁵⁵ Since 2009 the authorities in Gaza were not in a position to provide passports and everything was issued in Ramallah: UK Upper Tribunal (Immigration and Asylum Chamber), case no UKUT 124 (IAC), *HS (Palestinian – return to Gaza) Palestinian Territories CG* [2011], para 94.

⁵⁶ Immigration and Refugee Board of Canada, *Jordan, Palestine and Israel: Passports issued to stateless Palestinians; procedures; entitlements; differences between Jordanian passports issued to Jordanian nationals and those issued to stateless Palestinians* (2009) www.refworld.org/docid/4e426ab42.html%20 accessed 4 December 2015, p 2; Dr Abuznaid, ambassador of the Palestinian Territories in Den Haag, interview in persona, 23 November 2015 (see Annex).

⁵⁷ Dr Abuznaid, ambassador of the Palestinian Territories in Den Haag, interview in persona, 23 November 2015 (see Annex).

⁵⁸ Jordanian Government www.kinghussein.gov.jo/facts2.html accessed 23 January 2016.

in charge of the border control. For the crossing, a person needs an Israeli ID number and a green card issued by Jordan. As mentioned above, Jordan issues the green card only to Palestinians, who reside in the West Bank and who are included in the Israeli population registry.⁵⁹ This additional card serves as a proof to the Jordanian authorities that the person is from West Bank and not from Gaza, because the passports of the inhabitants of West Bank and Gaza look alike.⁶⁰ This way, Jordanian authorities make sure that no persons from Gaza access the West Bank by means of the King Hussein Bridge, which is only allowed for West Bank residents.⁶¹

Under these conditions, a crossing over the bridge without an Israeli ID number is impossible. Stateless Palestinians do not hold an Israeli ID number. Thus, it is impossible for them to enter the West Bank through Jordan.

2.4.4 Entry to Gaza through the border with Egypt

In order to get from Egypt to Gaza, a Palestinian would have to use the Rafah Crossing. Even though the Israeli authorities are not physically present at the border crossing, they are involved intimately in the border crossing procedure, more specifically the openings and closures of it.⁶²

When a stateless Palestinian requests an entrance permit into Egypt in order to use the Rafah Crossing, an Egyptian transit visa is required for that purpose.⁶³ In order to receive that visa, a Palestinian needs to possess an Israeli ID number. According to this policy it is clear that through its control of the population registry, Israel has indirect control over the issuing of Egyptian transit visas, which are required for the travel through the Rafah Crossing.⁶⁴

Furthermore, even if a person has been issued an Egyptian visa, this does not constitute an automatic possibility to actually cross into Gaza. This is because the Rafah Crossing is only open a few days every other month, and the opening times are very unpredictable.⁶⁵ From January to September 2015, the Rafah Crossing was open on 27 days only.⁶⁶ Due to this practice people often strand at the Rafah Crossing, their Egyptian transit visa frequently expires during that period, rendering it useless for the crossing.⁶⁷ Moreover, because the Egyptian authorities consider Hamas, the governing authority in the Gaza Strip, as a branch of the Muslim Brotherhood, the situation at the Rafah crossing has tightened up since Abdel Fatah El-Sisi took up the Presidency of Egypt, ousting former president Mohamed Morsi of the Muslim Brotherhood.⁶⁸

⁵⁹ Immigration and Refugee Board of Canada, *Jordan, Palestine and Israel: Passports issued to stateless Palestinians; procedures; entitlements; differences between Jordanian passports issued to Jordanian nationals and those issued to stateless Palestinians* (2009) www.refworld.org/docid/4e426ab42.html%20 accessed 4 December 2015, p 1.

⁶⁰ Dr Abuznaid, ambassador of the Palestinian Territories in Den Haag, interview on the telephone, 3 December 2015.

⁶¹ Ibid.

⁶² United Nations, Human Rights in Palestine and other occupied Arab territories, Fact Finding Mission on the Gaza Conflict, A/HRC/12/48 (2009), www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf; UK Upper Tribunal (Immigration and Asylum Chamber), case no UKUT 124 (IAC), *HS (Palestinian – return to Gaza) Palestinian Territories CG* [2011], paras 18, 61, 153 ff.

⁶³ UK Upper Tribunal (Immigration and Asylum Chamber), case no UKUT 124 (IAC), *HS (Palestinian – return to Gaza) Palestinian Territories CG* [2011], para 18.

⁶⁴ Gisha, *The Gaza Cheat Sheet, Real Data on the Gaza Closure* (2015) www.gisha.org/UserFiles/File/publications/Info_Gaza_Eng.pdf accessed 04 December 2015.

⁶⁵ Ibid; UK Upper Tribunal (Immigration and Asylum Chamber), case no UKUT 124 (IAC), *HS (Palestinian – return to Gaza) Palestinian Territories CG* [2011], paras 8, 61.

⁶⁶ During this period, a monthly average of 2,479 entrances and exits through Rafah was recorded.

⁶⁷ UK Upper Tribunal (Immigration and Asylum Chamber), case no UKUT 124 (IAC), *HS (Palestinian – return to Gaza) Palestinian Territories CG* [2011], para 8, compare also para 101; Dr Abuznaid, ambassador of the Palestinian Territories in Den Haag, interview in persona, 23 November 2015 (see Annex).

⁶⁸ Immigration and Refugee Board of Canada, *Egypt and Palestine: The status of a Palestinian with an Egyptian Travel Document for Palestinian Refugees in Egypt, including rights to residency, employment and education; ability to travel between Gaza and Egypt with this document* (2009-2014) (2014) www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=55dec5094&skip=0&query=re-entry+permit+for+palestinians&coi=EGY accessed 23 November 2015; Dr George, interview on the telephone, 24 November 2015.

A Palestinian failed asylum seeker claimant without documents can only cross into the Gaza Strip if he/she is still registered with the Israeli population registration.⁶⁹ That is the reason why a stateless Palestinian is not able to return to Gaza via Egypt.

2.4.5 Return to East Jerusalem

The conditions to enter East Jerusalem are even stricter than the ones for entering the West Bank because the Israeli government considers East Jerusalem to be part of Israel. Therefore, the regulations for stateless Palestinians regarding entry into Israel also apply to East Jerusalem.⁷⁰

Even those who are included in the population registry face difficulties. Persons who move from East Jerusalem to Ramallah in the West Bank, for example because of work, cannot return to East Jerusalem.⁷¹ Palestinian residents of East-Jerusalem need an Israeli travel document (Laissez-Passer) in case they want to travel abroad. These travel documents only guarantee the right to re-enter the country if they are combined with a valid re-entry permit, issued by Israel.⁷² Moreover, the residence status is automatically revoked once the person decides to reside outside of East Jerusalem.⁷³

To conclude, stateless Palestinians wanting to return to East Jerusalem are facing impossible practical impediments, as they do not possess an Israeli ID number.

2.5 Conclusion

To summarise the answers to the first research question, stateless Palestinians can theoretically return to Lebanon if they possess a Lebanese travel document, including the DPRA ID card for Palestinians, and a proof of their citizenship. According to Ms. Lina Hamdan, this only occurs if the Palestinians are registered with the DPRA, which was legally only possible in 1948 and 1967. Palestinians who do not possess a Lebanese travel document can apply for a *document de voyage* if they hold a residence permit of the host country, a Lebanese DPRA ID card for Palestinians, and a registration with UNRWA. However, German case law shows that in practice, the Lebanese authorities are not willing to issue such a document.⁷⁴ Therefore, stateless Palestinians, not in possession of a DPRA registration and ID, cannot legally return to Lebanon, as they are unable to acquire the relevant documents mentioned above.

In the case of Jordan, stateless Palestinians can return to Jordan if they used to possess Jordanian nationality before 1988. If this requirement is not fulfilled, the only other option to obtain a Jordanian visa is through presenting a valid identity document, such as a passport from another state. In any other case, it is impossible for a stateless Palestinian to return to Jordan.

Regarding the return of stateless Palestinians to the Palestinian Territories, the outcome of this expert opinion has been that it is impossible to enter without an Israeli ID number, which has only been issued to Palestinians who were present in the Palestinian territories during the census of 1967. This holds true for the crossing between Jordan and West Bank as well as between Egypt and Gaza.

Therefore it can be concluded that it is indeed in practice impossible for stateless Palestinians, to return to their aforementioned countries of their former habitual residence, if the above requirements are not met.

⁶⁹ Immigration and Refugee Board of Canada, *Palestine/Israel: Whether a failed refugee claimant who is a stateless Palestinian from the Gaza Strip can return to the Gaza Strip without a valid travel document* (2001) www.refworld.org/docid/3df4be900.html accessed 04 December 2015; UK Upper Tribunal (Immigration and Asylum Chamber), case no UKUT 124 (IAC), HS (Palestinian – return to Gaza) Palestinian Territories CG [2011], paras 8-11; Dr George, interview on the telephone, 24 November 2015.

⁷⁰ See section 2.4.2.

⁷¹ Dr Abuznaid, ambassador of the Palestinian Territories in Den Haag, interview in persona, 23 November 2015 (see annex); Dr George, interview on the telephone, 24 November 2015.

⁷² Badil, *Forced Population Transfer: The Case of Palestine* (2014) www.badil.org/en/publication/press-releases/28-2014/4200-press-eng-7.html accessed 04 December 2015, p 20.

⁷³ Ibid, p 21.

⁷⁴ VG Berlin Az. 35 K 202.11 [2011], paras 21,22; OVG Saarlouis 2 A 484/09 [2011]; Niedersächsisches OVG Az. 11LC 312/10 [2011], para 26; VGH Baden-Württemberg Az. 13 S 2483/07 [2008], para 33.

3 What rights are stateless Palestinians entitled to in the Netherlands?

3.1 Introduction

The second part of this expert opinion investigates what rights undocumented stateless Palestinians are entitled to in the Netherlands, if they cannot return to their former place of habitual residence. To examine this, international (Human Rights) law, European Union law and Dutch law are taken into account. The persons concerned are stateless Palestinians residing illegally in the Netherlands, who, according to Dutch law have an obligation to leave the Netherlands ('*vertrekplicht*').

Illegal stateless Palestinians who cannot return to their place of former habitual residence find themselves in a legal limbo. They do not have any right to stay in the Netherlands, nor can they invoke any residency rights elsewhere. The 'lack of cooperation' of third-country nationals with the return process is in general for many countries an important consideration in determining what rights they should have.⁷⁵ However, it is doubtful whether personal motivations should be held against the subjects of this expert opinion, as the research in the first part shows that stateless Palestinians originating from the UNRWA area do not have any possibility to obtain the necessary documents which would enable them to legally leave and return to the countries of their former habitual residence.

Questions that arise in this context are therefore whether stateless Palestinians in the Netherlands have a right to receive some form of documentation of their non-returnable status, whether they can be detained, and whether they are entitled to basic or additional welfare provisions in the Netherlands.

First, the UN Convention relating to the Status of Stateless Person (hereafter: the Statelessness Convention)⁷⁶ will be discussed in general (section 3.2). It is difficult to determine any claim to concrete rights based on this convention due to greatly varying practices among the different member states. Then, Dutch law providing illegally staying aliens with a residence permit, based on inability to leave the Dutch territory, will be dealt with (section 3.3). It will be explained why it is in practice very hard to receive a permit based on this policy.

Second, the Statelessness Convention, the Return Directive⁷⁷ and Dutch law will be examined with regard to the question whether stateless Palestinians who are illegally staying in the Netherlands have a right to receive documentation of their status (3.4). It is concluded in this section that these persons have the right to written confirmation of their status under the Return Directive. Third, the right to detain aliens under the European Convention on Human Rights and under the EU Return Directive will be analysed (section 3.5). It is contended that, once the identity of the stateless Palestinians has been established, the Dutch government no longer has the right to detain such a person. The fourth and final part reviews International, EU and Dutch law on social rights to determine whether illegally staying Palestinians have a right to basic social assistance or whether they are entitled to additional welfare rights (section 3.6). It argues that the Return Directive and Human Rights law entitle stateless Palestinians to claim social rights and housing facilities whereas Dutch law only provides social rights to stateless Palestinians under specific circumstances.

3.2 UN Convention relating to the Status of Stateless Persons

The Statelessness Convention is the international legal framework for the protection of stateless persons. The Statelessness Convention contains, inter alia, the definition of stateless persons. Article 1(1) of the Statelessness Convention defines stateless persons as persons who are not considered as a national by any

⁷⁵ Flemish Refugee Action (Belgium), Detention Action (UK), France terre d'asile (France), Menedék (Hungary), and The European Council on Refugees and Exiles (ECRE), *Point of no return Factsheet* (2014) http://pointofnoreturn.eu/wpcontent/uploads/2013/12/PONR_Factsheet_EU_2_HR.pdf accessed 6 January 2015, p 7.

⁷⁶ UN General Assembly, *Convention relating to the Status of stateless Persons* (28 September 1954) www.unhcr.org/3bbb25729.html accessed 07 January 2016.

⁷⁷ Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

State under the operation of its law.⁷⁸ However, to determine who will be recognised as a stateless person is at the Member States' discretion and falls under their national law.

Article 2(1) of the Convention provides who is excluded from the definition of a stateless person laid down in Article 1(1).⁷⁹ The first ground for exclusion mirrors Article 1D of the Convention relating to the Status of the Refugees (hereafter: Refugee Convention).⁸⁰ Article 2(1)(i) of the Convention states:

this convention shall not apply to persons who are at present receiving from organs and agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance as long as they are receiving such protection or assistance.

This clause was designed, inter alia, for the mandate of UNRWA. Today, UNRWA is the only UN agency falling under the exclusion of Article 1(2)(i) of the Statelessness Convention. As a result, stateless Palestinians who are at present receiving protection or assistance from UNRWA are excluded from the scope of the Statelessness Convention.⁸¹ Therefore, to conclude whether illegally staying Stateless Palestinians in the Netherlands are excluded from the rights of the Statelessness Convention, it must be determined whether those stateless Palestinians fall under the phrase 'at present'.

The interpretation of 'at present receiving protection' of Article 1(2)(i) of the Convention is confronted with similar difficulties as Article 1D of the Refugee Convention. However, Article 1(2)(i) of the Statelessness Convention has as of yet not been approached as much by UNHCR or national jurisprudence as Article 1D of the Refugee Convention.⁸² Only a few jurisdictions of the Member States of the European Union have interpreted Article 1(2)(i) of the Convention.⁸³

The German *Bundesverwaltungsgericht* ruled that stateless Palestinians fall under the phrase 'at present', and therefore are excluded, if they are registered with UNRWA and are themselves directly responsible for the impossibility of their return to an UNRWA area.⁸⁴ For example, it falls under the responsibility of a Stateless Palestinian if that person leaves his/her UNRWA state of former habitual residence although he is not allowed to return. Moreover, the stateless Palestinian is also responsible for the impossibility of his/her return if that person had the authorisation to leave and to return to his/her UNRWA state of former habitual residence but did not respect the validity period and rules of that UNRWA state. A German court stated that only the responsibility of the person concerned is to be taken into account and *not* the reaction of the UNRWA state of former habitual residence, even if that UNRWA state denies the return of the stateless Palestinian.⁸⁵ However, stateless Palestinians fall under the Convention if the person concerned has to leave or cannot return to the UNRWA area due to a well-founded fear of being

⁷⁸ UN General Assembly, *Convention relating to the Status of Stateless Persons* (28 September 1954) published by UNHCR <http://www.unhcr.org/3bbb25729.html> accessed 07 January 2016, Art 1 (1).

⁷⁹ Ibid, Art 1(2).

⁸⁰ See Guy S. Goodwill-Gil 'Introductory Note to the Convention Relating to the Status of Stateless Persons' United Nations Audiovisual Library of International Law (2010) <http://legal.un.org/avl/ha/cssp/cssp.html>, p 4; Badil, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (2015) www.badil.org/en/publication/handbook-on-protection.html accessed 06 February 2016, p 334; BverwG, Az. 1C 18.90 [1992] www.jurion.de/Urteile/BVerwG/1992-01-21/1-C-1890 accessed 7 April 2016, para 12-14.

⁸¹ UNHCR, *The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation* (2003), para 40.

⁸² Badil, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (2nd Edition, February 2015) <http://www.badil.org/en/publication/handbook-on-protection.html> accessed 06 February 2016, p 334.

⁸³ UNHCR, *The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation* (October 2003) para 41; Badil, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (2nd Edition, February 2015) <http://www.badil.org/en/publication/handbook-on-protection.html> accessed 06 February 2016, p 333.

⁸⁴ BverwG, Az. 1C 18.90 [1992] www.jurion.de/Urteile/BVerwG/1992-01-21/1-C-1890 accessed 7 April 2016, para 20.

⁸⁵ BverwG, Az. 1C 18.90 [1992] www.jurion.de/Urteile/BVerwG/1992-01-21/1-C-1890 accessed 7 April 2016, para 20, 30; UNHCR, *The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation* (October 2003) www.unhcr.org/4039fbb2.html accessed 7 April 2016, para 41.

persecuted in their country of formal habitual residence and if the person concerned is not directly responsible for the impossibility of their return to an UNRWA area.⁸⁶

Case law in France concluded that stateless Palestinians who are residing outside the UNRWA area do not fall under the phrase 'at present' because these persons do not longer enjoy protection or assistance from UNRWA. This approach mirrors the UNHCR Notes of interpretation of Article 1D Refugee Convention of 2009.⁸⁷

The United Kingdom authorities apply the Statelessness Convention to stateless Palestinians who have not yet received the assistance or have ceased to receive the assistance of UNRWA for reasons 'beyond their control and independent of their volition'. This view of Article 2(1)(i) of the Statelessness Convention follows the interpretation of the CJEU *El Kott* case⁸⁸ interpreting Article 12(1)(a) of the Qualification Directive⁸⁹ which reflects Article 1D of the Refugee Convention. In *El Kott* the CJEU held that residence outside the UNRWA area is not sufficient for a stateless Palestinian to avoid exclusion under Article 12(1)(a) the Qualification Directive. The CJEU held that stateless Palestinians are eligible for the protection of the Qualification Directive if *beyond* their control or violation the protection or assistance has ceased for any reasons. For example, if a stateless Palestinian was forced to leave the UNRWA area because the

person's personal safety was at serious risk and it was impossible for that organ or agency to guarantee that his living conditions in that area would be commensurate with the mission entrusted to that organ or agency.⁹⁰

The Netherlands, as a party to the Convention on Statelessness, has of yet no interpretation guidance for Article 1(2)(i) of the Convention.⁹¹ However, Dutch asylum policy⁹² states that the second paragraph of Article 1D of the Refugee Convention applies to stateless Palestinians who were personally in 'a situation of serious insecurity' or with regard to whom 'UNRWA is not able to provide living conditions which are in conformity with its mandate'. In this context the Immigration Service should consider whether the Palestinian concerned within the UNRWA areas has a well-founded fear of persecution or serious harm⁹³ and whether he can ask UNRWA for protection or still obtains this protection against the actors of persecution or serious harm.

It may be argued that due to the similarities between Article 1(2)(i) of the Statelessness Convention and Article 1D of the Refugee Convention, the Dutch interpretation of Article 1D of the Refugee Convention mentioned above, can also be used to interpret Article 1(2)(i) of the Statelessness Convention. Moreover, the fact that the interpretation of Article 1(2)(i) of the Statelessness Convention by the UK and France are also derived from interpretations of Article 1D Refugee Convention supports this argumentation.

To conclude, the practice of granting stateless Palestinians the protection of the Statelessness Convention varies greatly within the Member States of the European Union. The Convention does not

⁸⁶ BverwG, Az 1C 18.90 8 [1992] para 25-28; Badil, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (2015) www.badil.org/en/publication/handbook-on-protection.html accessed 06 February 2016, p 334.

⁸⁷ Badil, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (2015) <http://www.badil.org/en/publication/handbook-on-protection.html> accessed 06 February 2016, p 334.

⁸⁸ Ibid, p 217 f.f.

⁸⁹ Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9. The judgment concerned the Art. 12(1)(a) of the former Qualification Directive 2004/93/EC, which had the same text as Art. 12(1)(a) of Directive 2011/95/EU.

⁹⁰ CJEU Case C-364/11, *El Kott* [2012] para 65.

⁹¹ Badil, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (2015) <http://www.badil.org/en/publication/handbook-on-protection.html> accessed 06 February 2016, p 172.

⁹² Wijzigingsbesluit Vreemdelingen circulaire (WBV) 2013/20 <https://zoek.officielebekendmakingen.nl/stcrt-2013-27027.html> accessed 7 April 2016, included in paragraph C2/3.2 of the Aliens Circular. <http://wetten.overheid.nl/BWBR0012288/2016-04-01> accessed 7 April 2016.

⁹³ See Art. 15 of Directive 2011/95/EU.

provide protection to most stateless Palestinians due to two reasons. First, stateless Palestinians are not eligible for the protection of the Statelessness Convention due to the exclusion clause. Secondly, the lack of a statelessness determination procedure leads to difficulties in establishing whether a person is stateless and, hence, whether a person falls under the Convention.

3.3 Dutch law providing residence status based on inability to leave

Dutch law provides for the possibility for aliens to receive a residence permit based on the inability to leave Dutch territory. This inability-to-leave policy (*buitenschuldbeleid*) was originally created especially for stateless persons. It was assumed that it could not be required of them to leave Dutch territory since they did not have a country of origin. However, in 2005 this category has opened up to include all persons who claim to be unable to leave Dutch territory.⁹⁴ It needs to be noted though, that the authorities responsible for granting this residence permit have always stressed that there is currently no country that structurally fails to fulfil its obligations under International law with regard to voluntary taking back its citizens.⁹⁵

Article 3.48(2) of the Aliens Decree (*Vreemdelingenbesluit*, hereinafter: Vb), in accordance with Article 14 of the Aliens Act (*Vreemdelingenwet*, hereinafter: Vw), contains the provision detailing the requirements aliens need to fulfil to prove inability to return to one's former country of residence, or former habitual residence. Article 3.48(2) Vb is further specified by Paragraph B8/4 of the Aliens Circular (*Vreemdelingen-circulaire*, hereinafter: Vc), which sets out four requirements for aliens to prove inability to leave the territory:

1. The alien has independently tried to effectuate his departure. He can prove that he has turned to the authorities of his country of nationality, or his country of former habitual residence, and/or other countries of which it can be assumed based on facts and circumstances that he will receive permission to enter;
2. There is no reasonable doubt as to his nationality or identity;
3. The alien has sought the assistance of the Return- and Departure Services (hereinafter: DT&V) in requesting (replacement of) travel documents from the authorities of his country of nationality and other countries of which it can be assumed based on facts and circumstances that he will receive permission to enter, but this request has not provided the hoped-for results.
4. Based on objective, verifiable facts and circumstances that are supported by proof that sees upon the person concerned, the DT&V declares that the alien is unable to leave the Netherlands through no fault of his own. This holds true in any case when:
 - The Diplomatic Representation states, orally or in writing, that the alien will not be provided with replacement travel documents, even though the authorities of his country of origin or his former habitual residence have no doubts as to his identity or nationality; or
 - It has appeared that the authorities of the alien's country of origin or his former habitual residence will not provide the alien with replacement travel documents, and have stated they have no doubt as to the identity or nationality the alien has provided them with.
5. The alien resides in the Netherlands without a valid residence permit.
 - He does not qualify for other requirements for a residence permit; and
 - He has not requested a residence permit based on other grounds.

To prove to the DT&V an inability to leave, all above mentioned -cumulative- requirements, must be met as well as supported by concrete evidence.⁹⁶ The threshold to prove factual impossibility to leave the Netherlands is very high. Proof is supposed to comprise of more than just country of origin information; it also compasses very far-reaching cooperation with the Return- and Departure Services and assistance from

⁹⁴ Wijzigingsbesluit Vreemdelingen-circulaire (WBV) 2005/11 van 3 April 2005

⁹⁵ Letter from the State Secretary of Security and Justice to the Chair of the Second Chamber of 18 December 2012 (*Kamerstukken II*, 29 344, nr. 109), <https://zoek.officielebekendmakingen.nl/kst-29344-109.html>.

⁹⁶ Administrative Jurisdiction Division of the Council of State 3 July 2013, ECLI:NL:RVS:2013:183 [2013], <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2013:183> accessed 7 April 2016, para 2.2.

the various relevant Diplomatic Missions. This makes it almost impossible for stateless Palestinians to obtain a residence permit on the basis of the inability-to-leave policy.

1. The country of origin/former residence does not cooperate

First of all the person concerned needs to prove that his country of origin or former residence does not provide him with the necessary travel documents. This proof can consist of correspondence with the Diplomatic Mission of this country. If the Diplomatic Representation of the alien's country of origin or former habitual residence states orally or in writing that the alien will not be provided with the required documents to leave the Netherlands, this will be seen as particularly strong evidence. However for stateless Palestinians this proof is extremely hard if not impossible to acquire. Most embassies are in general reluctant to provide this kind of proof, orally or in writing. Due to the politically sensitive situation of Palestinians, it becomes even more unlikely that the embassy would provide any proof.⁹⁷

2. No doubts about identity and nationality

Secondly there must be no doubts as to the identity and nationality of the persons in question. An important ground for refusal of a residence permit based on the inability-to-leave policy is that an asylum application is rejected on the basis of the imputable failure to provide the necessary documents to prove one's identity and nationality.⁹⁸ For stateless Palestinians it is in most cases impossible to satisfy the requirement to prove identity, as they usually lack the necessary documentation and are unable to receive passports or travel documents, as has been demonstrated in part I of this expert opinion.

3 and 4. The alien sought assistance of the DT&V and it is not his fault that he cannot return

The person concerned needs to provide an official statement from the DT&V, addressed to the IND⁹⁹. This statement proves that the alien has indeed turned to the DT&V for help, but without success and that this is not his fault.¹⁰⁰ A situation of inability to leave (*buitenschuld situatie*) will not be assumed in two circumstances.¹⁰¹ The first is when, during the request for (replacement) travel documents, the alien has refused to draft a handwritten statement declaring to the authorities of the country of origin or country of former habitual residence that he will voluntarily return. The second is that the alien has, in person, towards the authorities of the country of origin or country of former habitual residence, orally stated that he is unwilling to return voluntarily. Palestinians who refused to write a written statement or once declared that they did not want to return will therefore not be provided with a residence permit even if it is clear that, also if they would have written the statement or refrained from this declaration, would not have been provided with a travel document. Another problem is that it is unclear when the person concerned has complied with his obligation to cooperate with the DT&V. As a result the DT&V may continue to require him to do new attempts to get travel documents.¹⁰²

The restrictiveness of the inability-to-leave policy is reflected in the low (and declining) number of residence permits granted on the basis of this policy. In 2008, 460 requests for a residence permit based on the inability-to-leave policy had been filed, of which 70 permits were granted. For 2009, there were 550 requests of which, again, 70 were granted. For 2010, there were 470 requests of which 60 were granted.

⁹⁷ See also VluchtelingenWerk Nederland, *Als terugkeer niet mogelijk is* (2012)

http://www.vluchtelingenwerk.nl/sites/public/Vluchtelingenwerk/Publicaties/images/DEF_VWN%20Rapport%20Buiten%20Schuld_LR.pdf accessed 7 April 2016, pp 4, 14-15.

⁹⁸ Art 31(2)(f) Vw.

⁹⁹ The Dutch Aliens Services Department.

¹⁰⁰ Aliens Circular 2000, Art B8/4 (4) (3).

¹⁰¹ Aliens Circular 2000, Art B8/4 (4) (1) (4) (2).

¹⁰² VluchtelingenWerk Nederland, *Als terugkeer niet mogelijk is* (2012)

http://www.vluchtelingenwerk.nl/sites/public/Vluchtelingenwerk/Publicaties/images/DEF_VWN%20Rapport%20Buiten%20Schuld_LR.pdf accessed 7 April 2016, p 5 and Adviescommissie voor vreemdelingen zaken, *Waar een wil is maar geen weg* (2012) http://acvz.org/wp-content/uploads/2015/05/01-07-2013_Advies38-ACVZweb1.pdf accessed 7 April 2016, pp 73-74, at 88.

For 2011, there were 290 requests of which 30 were granted. For 2013, there were 80 requests of which 15 were granted. For 2014, there were 80 requests of which 20 were granted.¹⁰³ There has thus been a sharp decrease in the number of requests that have been made under the inability to leave clause. However, since the numbers are not elucidated, no real explanation can be given for this decline. It can be theorised, however, that the number of requests increased after opening up the provision to allow all those finding themselves unable to return able to claim a residence permit under this provision. Following this line of thinking, the decline in the number of requests is due to the adoption of a new policy in 2012 regarding the granting of the permit.

3.4 The right to receive documentation

This section evaluates the question whether stateless Palestinians in the Netherlands have a right to receive documentation of their status. Since this right has been established most clearly in the Return Directive, this instrument will be discussed in this section.

Stateless Palestinians who are illegally staying in the Netherlands fall under the Return Directive.¹⁰⁴ The Return Directive does not distinguish between stateless persons and other irregular migrants such as rejected asylum seekers. The recitals of the Return Directive state that the situation of non-returnable third-country nationals should be addressed.¹⁰⁵ However, the Directive hardly ever addresses those people directly and therefore this problem remains to be solved mainly on the national level.¹⁰⁶ Nevertheless, the national legislation must adhere to the requirements laid down in the Return Directive.¹⁰⁷ Article 9(2) and Article 14 of the Directive need to be addressed because they are relevant for a postponement of the removal of stateless Palestinians.

3.4.1 Articles 9 and 14 Return Directive

Article 9(1) Return Directive describes cases in which the removal of a person must be postponed; none of them specifically applies to stateless Palestinians. In all other cases, Article 9(2) of the Return Directive states that postponement of removal is subject to the Member States' discretion. The Directive lists circumstances that Member States must in particular take into account when issuing expulsion postponements: the third-country national's physical state or mental capacity, and technical reasons for postponing the removal.

This latter circumstance is of particular relevance for stateless Palestinians. As examples of such technical reasons the Return Directive mentions, non-exhaustively, the lack of transport capacity or the failure of the removal owing to lack of identification.¹⁰⁸ From the English translation it is not clear what is meant by the expression 'identification'. The German and the Dutch language versions of the Directive offer one interpretation: 'uncertainty concerning the identity', respectively 'insufficient identification'.

For stateless Palestinians the most important 'technical' problem is that they cannot travel due to a lack of travel documents. As the examples to be taken into account, listed in Article 9(2) of the Return Directive, are non-exhaustive, the list can be extended to other technical reasons. Therefore, reasons that are beyond the control of the alien can be included, such as the fact that the country of origin refuses to

¹⁰³ These numbers are rounded up/down towards numbers of five, and deal exclusively with lodged and processed appeals. *Aanhangsel Handelingen II* 2014/15, 2134; *Kamerstukken II*, 29 344, nr. 109.

¹⁰⁴ Art 2 (1) of Directive 2008/115/EC.

¹⁰⁵ Recital 12 of the Preamble to Directive 2008/115/EC.

¹⁰⁶ Flemish Refugee Action (Belgium), Detention Action (UK), France terre d'asile (France), Menedék (Hungary), and ECRE, *Point of no return Factsheet* (2014), http://pointofnoreturn.eu/wpcontent/uploads/2013/12/PONR_Factsheet_EU_2_HR.pdf accessed 6 January 2016, pp 1- 5.

¹⁰⁷ CJEU Case C-562/13 *Abdida* [2014], para 54.

¹⁰⁸ Flemish Refugee Action (Belgium), Detention Action (UK), France terre d'asile (France), Menedék (Hungary), and ECRE, *Point of no return Factsheet* (2014), http://pointofnoreturn.eu/wpcontent/uploads/2013/12/PONR_Factsheet_EU_2_HR.pdf accessed 6 January 2016, p 3.

recognise the alien as a national of that country.¹⁰⁹ This would apply to the situation in Israel and the Palestinian territories due to Israel's denouncing of illegal immigrants as infiltrators and the fact they would not accept a newly arriving Palestinian as their citizen (see part I of this expert opinion). Moreover, 'other' reasons in the sense of Article 9(2) Directive may also include the logistical and physical impossibility of transporting a person to the country of return due to e.g. the lack of functioning airports,¹¹⁰ which also implies technical problems in returning. The lack of travel documents can therefore also be considered as technical and as out of the influence of the individuals concerned. There is no indication why the non-returnability of stateless Palestinians should be excluded from the scope of Article 9(2) Directive. However, the legal consequence is within the States' discretion. It is up to the government of the Netherlands to decide whether removal should be postponed, and if so, which period could be considered as 'appropriate'.

If the Netherlands would apply Article 9(2) Directive and postpone the removal, there is no obligation to regularise the stay of the person concerned. However, under Article 14(2) of the Return Directive the supply of a written confirmation of their situation is mandatory.¹¹¹

3.4.2 Interpreting the Return Directive: Recital 12 and the Mahdi case

Recital 12 of the Preamble to the Return Directive states:

The situation of third-country nationals who stay illegally but who cannot yet be removed should be addressed. Their basic conditions of subsistence should be defined according to national legislation. In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive.¹¹²

Like Article 9 and Article 14 of the Return Directive, this recital requests Member States to provide aliens who are staying illegally but cannot be removed with a written confirmation of their situation. However, unlike Article 9 and Article 14, this recital implies a written confirmation for *all* migrants who cannot be removed and not only for those migrants whose removal is officially postponed.

In the *Mahdi* case the CJEU decided that Member States must provide a third-country national 'who has no identity documents and has not obtained such documentation of his country of origin' with a written confirmation of his situation after 'a national court has released the person concerned on the ground that there is no longer a reasonable prospect of removal within the meaning of Article 15(4) of that Directive'.¹¹³ Therefore, a Member State must provide an illegally staying third-country national who was released from detention with a written confirmation that confirms his situation.

Advocate General Szpunar explained, in his opinion to the *Mahdi* case, why the obligation to provide a written confirmation is an absolute necessity.¹¹⁴ He stated that the obligation of the Member States to provide such a written confirmation is the logical result of the Return Directive, because 'such a document would prevent that person from being arrested once again by the [...] authorities,' and would 'prove his specific situation in the event of a check or administrative control'.¹¹⁵

¹⁰⁹ Flemish Refugee Action (Belgium), Detention Action (UK), France terre d'asile (France), Menedék (Hungary), and ECRE, *Point of no return Factsheet* (2014), http://pointofnoreturn.eu/wpcontent/uploads/2013/12/PONR_Factsheet_EU_2_HR.pdf accessed 6 January 2015, p 7.

¹¹⁰ European Council on Refugees and Exiles, *The Way Forward: Europe's Role in the Global Refugee Protection System. Towards a European Resettlement Programme* (2005), paragraph 2.6 <http://www.refworld.org/docid/42ba8d754.html> accessed 9 January 2016.

¹¹¹ Ibid.

¹¹² Ibid, Recital 12 in the preamble to the Directive.

¹¹³ Ibid, paragraph 89; Art 15(4) of the Returns Directive 'when it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately'.

¹¹⁴ CJEU Case C-146/14 *Bashir Mohamed Ali Mahdi* [2014], Opinion of the AG Szpunar, paras 93-97.

¹¹⁵ Ibid, para 96.

As shown in the last paragraphs, the Court of Justice of the European Union (hereinafter: CJEU) ruled in the *Mahdi* judgment aliens should be provided with a written confirmation of their status after release of detention, to avoid situations of repetitive detention. Hence, the essence of this ruling is the prevention of repetitive detention. It could be argued that the right to a written confirmation after release of detention also comprises the right to receive the written confirmation *before* being detained. This, because it is not justifiable to create a system that links the prevention of detention to the release of detention, i.e. a system in which unreturnable aliens are provided with a written confirmation to avoid detention once again *only* after the alien's detention.

The scope of the *Mahdi* judgment should, in this line of reasoning, be considered as also including the prevention of detention *at all*. Therefore, unreturnable migrants should receive a written confirmation of their status after their status was determined by the authorities to prevent being detained. This expert opinion has established in the first part that stateless Palestinians cannot return to their former place of habitual residence. Hence, they should be provided with a written confirmation of their situation immediately after the asylum status determination process to avoid detention.

3.4.3 Conclusion

In sum, Article 9(2)(b) of the Return Directive read in conjunction with Article 14(2) of that Directive obliges Member States to provide a written confirmation of the situation of the third-country national only in cases where the Member State formally postponed the removal of the person, whereas recital 12 requests Member States to provide all third-country nationals who are illegal staying but cannot be removed with a written confirmation of their situation. Furthermore, the CJEU decided in the *Mahdi* case that a third-country national who has no identity documents and who has not received such documents of his country of origin has a right to obtain a written confirmation of his situation after he was released from detention. Advocate General Szpunar stated that this follows from the logic of the Returns Directive because such a document prevents third-country nationals to be detained once again.

The Netherlands, as a part of the European Union and Member State of the treaties of the European Union, is bound by the CJEU's *Mahdi* judgment and should take recital 12 of the Preamble to the Return Directive into account. Hence, the Netherlands should provide stateless Palestinians, who are staying illegally but cannot be removed with a written confirmation of their situation after the release from detention to avoid the situation, described by the Advocate General Szpunar, of being repeatedly (or, 'cyclically') detained.¹¹⁶ In light of the essence of the *Mahdi* judgment, namely the prevention of repetitive detention, it can be argued that the Netherlands should provide all stateless Palestinians who cannot return with a written confirmation of their status right after their asylum status determination, to avoid detention *at all*.

3.5 The right not to be detained

This section evaluates the question whether stateless Palestinians in the Netherlands have a right not to be detained. For that purpose, EU law and the case law of the European Court of Human Rights (hereinafter: ECtHR) are taken into account.

3.5.1 The European Convention on Human Rights

Article 5(1)(f) of the European Convention of Human Rights (hereinafter: ECHR) concerns protection against arbitrary detention of migrants. It reads:

- '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
[...]
- f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'

¹¹⁶ For more on 'cyclical' detention see section 3.5 of this expert opinion.

This Article is formulated rather broadly and therefore offers little protection in itself. However, the Court's case law widens the protective scope of the Article considerably. The most important cases for the purposes of this expert opinion are *Amie v Bulgaria*¹¹⁷ and *Kim v Russia*.¹¹⁸ These, and other judgments, will be discussed below.

In *Auad v Bulgaria* the ECtHR interpreted Article 5(1)(f) as follows.

Article 5(1)(f) of the ECHR, which permits the State to control the liberty of aliens in the immigration context, does not demand that detention be reasonably considered necessary, for example, to prevent the individual from committing an offence or fleeing.

The detention therefore does not need to be necessary with a view to deportation. However, the ECtHR's case law makes clear that any deprivation of liberty will only be justified under Article 5(1)(f) ECHR for as long as deportation or extradition proceedings are actually in progress. If a Member State doesn't execute such proceedings with due diligence, the detention will cease to be permissible under that provision.¹¹⁹

Article 5(1)(f) ECHR does not mention maximum time-limits of the detention. The question whether the length of deportation proceedings could have an impact on the lawfulness of detention under this provision depends completely on the particular circumstances of each case.¹²⁰ The Court has found periods of three and six months unlawful before when coupled with inappropriate conditions.¹²¹

In *A and others v. UK* the Court summarises the criteria under Article 5(1)(f) ECHR as follows:

'To avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued.'¹²²

The legality under national law is not sufficient to establish that the detention is not arbitrary. The length of the detention must also be taken into account, which

should not exceed that reasonably required for the purpose pursued.'¹²³ 'Deprivation of liberty under Article 5 § 1 (f) is justified only for as long as deportation proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under this subparagraph.'¹²⁴

In *Amie v Bulgaria*¹²⁵, the Court singled out the statelessness of the applicant as a determining factor, invalidating the Article 5(1)(f) ground of detention for the whole period of the applicant's detention. This was due to 'the lack of a realistic prospect of his expulsion, his statelessness, and the domestic authorities' failure to conduct the proceedings with due diligence.' The most important consideration by the Court was given in paragraph 77, where the Court stated:¹²⁶

However, if the authorities are -as they surely must have been in the present case- aware of [the difficulties of expelling refugees and stateless persons in particular], they should consider whether removal is a realistic prospect, and accordingly whether detention with a view to removal is from the outset, or continues to be, justified.

¹¹⁷ ECtHR 12 February 2013, *Amie v Bulgaria*, Appl no 58149/08.

¹¹⁸ ECtHR 17 July 2014, *Kim v Russia*, Appl no 44260/13.

¹¹⁹ ECtHR 11 October 2011, *Auad v Bulgaria*, Appl no 46390/10, paras 127-128.

¹²⁰ *Ibid*, para 128.

¹²¹ ECtHR 23 July 2013, *Suso Musa v Malta*, Appl no 42337/12, para 102.

¹²² ECtHR 19 February 2009, *A and Others v the United Kingdom*, Appl no 3455/05, para 164.

¹²³ *Ibid*.

¹²⁴ ECtHR 8 October 2009, *Mikolenko v Estonia*, Appl no 10664/05.

¹²⁵ ECtHR 12 February 2013, *Amie v Bulgaria*, Appl no 58149/08.

¹²⁶ *Ibid*, para 77.

This seems to imply that the detention of stateless persons with the aim of expelling them is, in the majority of cases, not justified from the outset under Article 5(1)(f) ECHR. In *Amie v Bulgaria*, the ECtHR ruled that due to the lack of efforts by the Bulgarian authorities to make contact with the Lebanese embassy, and the fact they did not investigate the possibility of a third state which would be willing to take in the applicant, the detention was not justified under Article 5(1)(f). The ECtHR therefore found a violation of that provision.

In *Kim v Russia*¹²⁷, the Court valued the vulnerable position of Kim as a stateless person, and took this into account when analysing whether there was indeed a violation of Article 5(1) ECHR. In this case, the ECtHR went much further in recognising the difficulties stateless persons face, such as cyclical detention, than it did in *Amie v Bulgaria*. It devoted a considerable amount of attention in detailing the specific vulnerable position of stateless persons: 'Statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess.'¹²⁸ According to a commentator:

The Court expressed particular concern in *Kim v. Russia* over how Kim's lack of identity documents exposed him to another round of prosecution and detention and highlighted so-called repeated, 'cyclical' detention.'¹²⁹ 'This cycle causes significant mental distress.'¹³⁰

In sum, based on *Amie v Bulgaria* and *Kim v Russia*, the stateless status of a person is a significant factor in determining whether detention of a person is justified under Article 5(1) of the Convention. Detention is justified only under this Article for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under that provision. Moreover, in *Amie v Bulgaria* and *Kim v Russia*, the Court considered that the statelessness of a person has a significant impact on whether there is a realistic prospect of removal. Considering the fact that, as explained above, stateless Palestinians are unable to be deported back to their former country of habitual residence, deportation proceedings cannot possibly be executed with due diligence and there is no realistic prospect of removal. Therefore, based on the ECHR and Article 5(1) ECHR in particular, the Dutch government does not have the right to detain stateless Palestinians. In particular to prevent so-called 'cyclical detention', according to the Court in *Kim v Russia*.

3.5.2 The Return Directive

Detention may, according to the Return Directive, only be applied in order to prepare return and/or carry out the removal process and only if no other sufficient but less coercive measures can be applied in the specific case. This is particularly the case where there is a risk of absconding or where the third-country national concerned avoids or hampers the preparation of return or the removal process. Moreover, any detention measure shall be applied for as short a period as possible, and only maintained as long as removal arrangements are in progress and executed with due diligence.¹³¹ Detention shall be maintained for as long a period as these conditions are fulfilled and it is necessary to ensure successful removal.¹³²

If it appears that a reasonable prospect of removal no longer exists for legal or other considerations, or the other conditions are no longer fulfilled, detention ceases to be justified, and the person concerned must be released immediately.¹³³ There are two important judgments on detention which are relevant in the context of this expert opinion: the *Kadzoev* judgment and the *Mahdi* judgment.

In *Kadzoev*¹³⁴ the CJEU made clear that detention ceases to be justified in the case that, for legal or other reasons, a reasonable prospect of removal no longer exists. This situation occurs when it seems unlikely that the person concerned will be admitted to a third country. Moreover, when the maximum

¹²⁷ ECtHR 17 July 2014, *Kim v Russia*, Appl no 44260/13.

¹²⁸ ECtHR 17 July 2014, *Kim v Russia*, Appl no 44260/13.

¹²⁹ M Seet, 'Strengthening the Protection of Stateless Persons from Arbitrary Detention in Immigration Control Proceedings', *European Journal of Migration and Law* (2015), pp 273-286.

¹³⁰ *Ibid*, p 283.

¹³¹ P Boeles et al, *European Migration Law* (Antwerp, Intersentia 2014), p 394. See also Art 15(1) Return Directive.

¹³² *Ibid*. See also Art 15(5) Return Directive.

¹³³ *Ibid*. See also Art 15(4) Return Directive.

¹³⁴ CJEU Case C-357/09 [2009] *Kadzoev*, paras 63-67.

duration of detention has been reached,¹³⁵ it is no longer relevant whether there is still a reasonable prospect of removal,¹³⁶ and the person concerned must be released immediately.

In *Mahdi*,¹³⁷ the CJEU reaffirmed the absolute nature of the maximum duration of detention as laid down in Article 15(5) and (6) of the Return Directive. Secondly, the CJEU stated that Article 15(6) of the Return Directive should be read in conjunction with Article 15(4) Directive which makes clear that,

when it appears that a reasonable prospect of removal no longer exists for legal or other considerations or when the conditions laid down in Article 15(1) of the directive no longer exist, detention of the third-country national concerned ceases to be justified and that person must be released immediately.

In *Mahdi* the CJEU then also reiterated its position in *Kadzoev*. Furthermore, it emphasised the importance of the principles laid down in the Return Directive, namely that the authorities should take into account whether:

1. other sufficient but less coercive measures than detention can be applied effectively in a specific case;
2. there is a risk of the third-country national absconding; and
3. the alien is avoiding or hampering the preparation of his return or the removal process.¹³⁸

The CJEU made clear that the simple fact that the third-country national concerned has no identity documents, cannot in itself be a ground for extending detention¹³⁹, and that any national legislation which allows the absence of identity document as grounds to extend the six month detention period is in violation of Article 15(1) and (6) of Directive 2008/115.¹⁴⁰

On the basis of *Kadzoev* and *Mahdi*, it should be concluded that the moment it is established that a person is a stateless Palestinian, the reasonable prospect of removal no longer exists due to it being unlikely that the person will be admitted by a third country, and detention ceases to be justified. Once detention ceases to be justified, the person concerned must be released immediately.¹⁴¹ Therefore, according to the Return Directive, the Dutch government does not have the right to detain stateless Palestinians after their identity has been established.

3.6 The right to social assistance

In this section, it will be examined whether stateless Palestinians can claim any social rights without a valid residence permit. Irregular migrants in the Netherlands can receive basic reception in locations where their freedom is restricted, only as long as they cooperate in their return. In November 2015, two different high administrative courts examined this policy. The judgments from the Central Appeals Tribunal (*Centrale Raad van Beroep*)¹⁴² and the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*)¹⁴³ have come about in an unprecedented dialogue and cooperation between the two reviewing bodies. In short, the judgments affirm that, save in some

¹³⁵ Each Member State shall set a limited period of detention, which may not exceed six months. (Art 15 (5) Return Directive). Member States may not extend this period except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to: (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries. (Art 15(6) Return Directive). Article 59 Vw transposes Art 15 Return Directive and sets the limited period of detention allowed at six months, with a possible extension of a further twelve months.

¹³⁶ CJEU Case C-357/09 [2009] *Kadzoev*, para 60.

¹³⁷ CJEU Case C-146/14 [2014] *Mahdi*, paras 58-61.

¹³⁸ *Ibid*, paras 58-61, Art 15 Return Directive.

¹³⁹ *Ibid*, para 73.

¹⁴⁰ *Ibid*, para 74.

¹⁴¹ CJEU Case C-357/09 [2009] *Kadzoev*, paras 63-67.

¹⁴² Central Appeals Tribunal 26 November 2015, ECLI:NL:CRVB:2015:3803.

¹⁴³ Administrative Jurisdiction Division of the Council of State 26 November 2015, ECLI:NL:RVS:2015:3415.

exceptional circumstances, the Government can indeed provide shelter on the condition of cooperation on voluntary return.

For the stateless Palestinians addressed in this expert opinion, the willingness to return makes no difference because they cannot return as a matter of fact, as has been demonstrated in part I of this expert opinion. To make their willingness to cooperate a condition for the provision of basic needs, does not only contravene a decision of the European Committee on Social Rights¹⁴⁴ but, arguably, also renders the concept of willingness to cooperate meaningless. Individuals who cannot cooperate as a matter of fact because their return is impossible, must not be asked to cooperate in order for them being supported by the government.

This section will review this Dutch policy and case law under the Return Directive and under the fundamental right to human dignity, as laid down in the Charter on Fundamental Rights of the European Union (hereinafter: the Charter). Another question that could have been examined in this section is to what extent the application of this Dutch policy to stateless Palestinians is in violation with the principle of non-discrimination. Discrimination occurs when equal groups are treated unequally, but also when unequal groups are treated similarly. The stateless Palestinians in the Netherlands are treated equally to other illegal migrants who have a duty to leave the Dutch territory. As this expert opinion has proven, stateless Palestinians cannot return, nevertheless they are treated equally to those who are unwilling to leave. This could violate non-discrimination provisions. However, the scope of this paper does not allow for a full in-depth research into this subject.

3.6.1 The Return Directive

As elaborated above, the removal of stateless Palestinians can be postponed under Article 9(2) of the Return Directive. If their removal is in fact postponed, Member States have to grant several safeguards which are laid down in Article 14(1) of the Directive: family unity, emergency health care and essential treatment of illness, access to the basic education system for minors and special needs of vulnerable persons. Unreturnable Palestinians should indeed be entitled to these very basic rights. The enumerated principles have to be taken into account only as far as possible, which makes the margin of appreciation given to the Member States wide.

In *Abdida*, the CJEU provided for an interpretation of Article 14 Return Directive. This case involved a seriously ill migrant who claimed social assistance and access to medical care during the continuance of the judicial procedure under Article 14 Return Directive. In *Abdida* the proceedings had suspensive effect and thus Article 9(1)(b) of the Return Directive applied, the margin of appreciation being narrower than in Article 9(2) cases. The removal of Mr Abdida was postponed with the consequence that his situation fell within the scope of Article 14 of the Return Directive. The conclusions drawn in *Abdida* can be applied to stateless Palestinians for the interpretation of Article 14 of the Return Directive. Even though the people this expert opinion is taking into account are not seriously ill, the stateless Palestinians are in a comparable situation, because they cannot leave the Netherlands due to compelling reasons that they have no influence on. *Abdida* could not leave because the proceedings had suspensive effect, whereas the Palestinians cannot return due to factual reasons, which were of no fault of their own.

In *Abdida*, the CJEU ruled that the basic needs of a third country national had to be satisfied in order to render effective the right to emergency health care, granted in Article 14(1)(b) of the Return Directive.¹⁴⁵ The generally applicable conclusions in this decision are that the principles listed in Article 14(1) of the Directive must not be interpreted in an isolated way but must always be seen in the context of the fundamental rights and dignity of the persons concerned.¹⁴⁶ Assuming that the Palestinians fall under Article 9(2) Directive and are equipped with the safeguards pending return, all their basic needs have to be covered in order not to render meaningless those special rights. It remains within the Member States'

¹⁴⁴ The European Committee of Social Rights has stated that 'the provision of emergency assistance cannot be made conditional upon the willingness of the persons concerned to cooperate in the organisation of their own expulsion. European Committee of Social Rights 1 July 2014, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No 90/2013 <http://www.refworld.org/docid/54e363534.html> accessed 7 April 2016, para 117.

¹⁴⁵ CJEU Case C- 562/13 *Abdida* [2014], para 60.

¹⁴⁶ Compare CJEU Case C- 562/13 *Abdida* [2014], para 42 referring to Recital 2 of Preamble to the Return Directive.

discretion to decide which form the provisions for basic needs shall take.¹⁴⁷ They have to underpin their interpretation with the Charter, especially Article 1 which guarantees the right to human dignity.

3.6.2 Human dignity

According to Article 51(1) of the Charter, its provisions are binding not only for Union bodies, but also for Member States when they are implementing Union law. This means that they have to be taken into account in the context of the Return Directive.

It has been debated if the provision on human dignity in the Charter is an independent fundamental right.¹⁴⁸ However, the CJEU stated 'It is for the Court of Justice [...] to ensure that the fundamental right to human dignity and integrity is observed'.¹⁴⁹ Therefore, it is at least not contrary to its rulings to regard Article 1 of the Charter as an independent fundamental right. Human dignity is an absolute right, meaning that no balancing of interests takes place. That implies that once an infringement took place, no justification is possible.¹⁵⁰ For the interpretation of fundamental rights, the CJEU draws inspiration from constitutional traditions common to the Member states.¹⁵¹ Article 1 Charter is based on the German provision on human dignity, as phrased in the German basic law (*Grundgesetz*).¹⁵² The interpretation and elaborations with regard to the scope of human dignity of the Federal Constitutional Court (*Bundesverfassungsgericht*) play a crucial role for the interpretation of Article 1 of the Charter.¹⁵³

The German Federal Constitutional Court ruled that according to Article 1(1) in conjunction with the principle of the social welfare state, contained in Article 20(1) of the Basic Law, everyone is entitled to an existence worthy of human dignity in case of material needs - a 'subsistence minimum' or 'dignified minimum existence'- regardless of their status.¹⁵⁴ This idea is also reflected by Article 34(3) of the Charter.¹⁵⁵ This subsistence minimum encompasses among other things the satisfaction of basic needs including shelter, food and clothing and it has to be granted *unconditionally*.¹⁵⁶ This interpretation of

¹⁴⁷ CJEU Case C- 562/13 *Abdida* [2014], para 61.

¹⁴⁸ M Breuer, 'Fundamentalgarantien' in: C Grabenwarter (ed) *Europäischer Grundrechtsschutz* (Nomos, 2014) www.dreske.de/WebRoot/DreskeDB/Shops/Dreske/ProductImages/Samples/9783832972325_inh.pdf accessed 7 April 2016.

¹⁴⁹ CJEU Case C-377/98 *Netherlands v Parliament and Council* [2001], para 70.

¹⁵⁰ W Heyde, 'Human Dignity' in: Commentary of the Charter of Fundamental Rights of the European Union (EU Network of Independent Experts on Fundamental Rights, 2006) http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf, p 25.

¹⁵¹ Preamble to the Charter. See CJEU Case C-36/02 *Omega* [2004], para 33.

¹⁵² W Heyde, 'Human Dignity' in: Commentary of the Charter of Fundamental Rights of the European Union (EU Network of Independent Experts on Fundamental Rights, 2006) http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf, p 23.

¹⁵³ *Ibid*, p 26.

¹⁵⁴ German Federal Constitutional Court (GFCC), Judgment of the First Senate of 09 February 2010 - 1 BvL 1/09 – first headnote,

www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/Is20100209_1bvl000109en.html;jsessionid=BA94ADB5AD2C43AEF45764A12D7F4B18.2_cid361 (accessed 10 February 2016), paras 135, 166; GFCC, Order of the First Senate of 23 July 2014 - 1 BvL 10/12 – first headnote

www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/07/Is20140723_1bvl001012en.html

(accessed 10 February 2016), para 74 f; GFCC, Judgment of the First Senate of 18 July 2012 - 1 BvL 10/10, third headnote,

www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/Is20120718_1bvl001010en.html

(accessed 10 February 2016), paras 90, 93.

¹⁵⁵ W Heyde, 'Human Dignity' in: Commentary of the Charter of Fundamental Rights of the European Union (EU Network of Independent Experts on Fundamental Rights, 2006) http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf, p 27; GFCC, Decision of the Second Senate of 10 November 1998 - 2 BvR 1057/91 (limitation of taxation)

¹⁵⁶ GFCC, Judgment of the First Senate of 09 February 2010 - 1 BvL 1/09, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/Is20100209_1bvl000109en.html;jsessionid=BA94ADB5AD2C43AEF45764A12D7F4B18.2_cid361 (accessed 10 February 2016), paras 135, 166; GFCC, Order of the First Senate of 23 July 2014 - 1 BvL 10/12, www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/07/Is20140723_1bvl001012en.html

human dignity points into the direction of a positive obligation to provide basic care for people who cannot return to their country.¹⁵⁷

According to Article 1 of the Charter in the light of the judgments of the German Constitutional Court, at least the basic needs of stateless Palestinians must be satisfied unconditionally.

Administrative Court Darmstadt court order

The Administrative Court (*Verwaltungsgericht*) Darmstadt ordered a suspensive effect of an action in the case of an expulsion to the Netherlands in the course of Dublin proceedings with regard to a rejected asylum seeker, because the expulsion would infringe the human dignity granted in Article 1 (1) of the German basic law.¹⁵⁸ After having established Germany's co-responsibility with regard to Article 1 (1) GG when the migrant is about to be expelled to a country like the Netherlands, where he/she is in danger of having to live without any shelter, food or governmental support while not being allowed to work, the court expresses its disagreement with the Dutch system by stating:

*'Even if one would make this state's co-responsibility conditional on the fact that the foreigner has done everything that is within his power to maintain his minimum of existence and didn't jeopardise it through his own behaviour, in this case it does not lead to the conclusion that the expulsion to the Netherlands is lawful.'*¹⁵⁹

This means that the court, under human dignity aspects, opposes the Dutch approach that the state's co-responsibility only comes into play when the foreigner cooperates in his return. In the light of this interpretation, making the provision of support conditional on cooperation in cases where the individuals, like the stateless Palestinians, cannot cooperate would infringe their human dignity.

Further rights

These arguments can be extended. Even if stateless Palestinians would be granted the unconditional right to live in facilities where their freedom is restricted, the prospect of living there for the rest of their lives could contravene the human dignity of stateless Palestinians.

Human Dignity encompasses both the physical existence of a human being as well as the possibility to maintain interpersonal relationships and a minimal degree of participation in social, cultural and political life.¹⁶⁰ The German Constitutional Court has established this especially with regard to rejected asylum seekers.¹⁶¹ Human dignity is based on the idea of the human being as a moral subject who, in freedom, can

(accessed 10 February 2016), para 75 f; GFCC, Judgment of the First Senate of 18 July 2012 - 1 BvL 10/10 www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/Is20120718_1bvl001010en.html

(accessed 10 February 2016), paras 90, 93.

¹⁵⁷ In the light of the ECHR case law, which acknowledges positive obligations, one could even argue for a positive obligation of the state to satisfy basic needs unconditionally. Concerning the positive obligations with regard to the right to life f. ex.: ECtHR, 28 October 1998, *Osman v. United Kingdom*, Appl No 87/1997/871/1083; *Breuer, Marten* in *Europäischer Grundrechtsschutz* (Christoph Grabenwarter (Hrsg.)) in *Enzyklopädie Europarecht*, Armin Hatje, Peter-Christian Müller-Graph (Hrsg.), Nomos 2014, 1st edition, § 7 Fundamentalgarantien, para 30.

¹⁵⁸ VG Darmstadt court order, 4 L 491/14.DA.A p. 5 <https://openjur.de/u/690571.html> (accessed 10 February 2015).

¹⁵⁹ Ibid. Emphasis added.

¹⁶⁰ GFCC, Judgment of the First Senate of 09 February 2010 - 1 BvL 1/09, paras 110, 166 http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/Is20100209_1bvl000109en.html;jsessionid=BA94ADB5AD2C43AEF45764A12D7F4B18.2_cid361 (accessed 10 February 2016); GFCC, Order of the First Senate of 23 July 2014 - 1 BvL 10/12, para 75 f, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/07/Is20140723_1bvl001012en.htm | (accessed 10 February 2016); GFCC, Judgment of the First Senate of 18 July 2012 - 1 BvL 10/10, paras 90, 93 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/Is20120718_1bvl001010en.htm | (accessed 10 February 2016).

¹⁶¹ GFCC, Judgment of the First Senate of 18 July 2012 - 1 BvL 10/10, paras 90, 93 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/Is20120718_1bvl001010en.htm | (accessed 10 February 2016).

show responsibility for him/herself and develop independently.¹⁶² Forcing a human being to live in an amenity where their freedom is restricted without the prospect of living in a house (not only shelter) or the possibility to work deprives stateless Palestinians of their social, cultural and political life. Even this treatment can thus amount to a violation of their human dignity, according to Article 1 (1) Charter.

Therefore, it would be in line with European values enshrined in the Charter to grant stateless Palestinians more than the basic rights that enable them to survive, such as access to the labour and housing market.

3.7 Conclusion

In the conclusion to this research question, a number of statements can be made with regard to the claim to certain basic rights in the Netherlands.

Under Directive 2008/115/EU stateless Palestinians, who cannot return to their place of former habitual residence, can only derive rights that are subject to the Member States' discretion. Article 9 (2) in conjunction with Article 14 (2) Directive advises and recital 12 in the preamble to the Directive requires the Netherlands to provide a written confirmation of their situation to unreturnable stateless Palestinians. The *Mahdi* case obliges Member States to give such written confirmation to a stateless Palestinian after that person was released from detention in accordance with Article 15 (4) of the Return Directive. This written confirmation is important to avoid situations of being repeatedly (or 'cyclically') detained.

Under Directive 2008/115 and Article 5 (1) (f) ECHR, the Dutch government does not have the right to detain stateless Palestinians once their identity has been established. As soon as the identity of the stateless Palestinian has been established, this expert opinion has proven that they will be unable to return to their country of former habitual residence.¹⁶³ Based on the CJEU *Kadzoev* judgment, the moment this happens, the reasonable prospect of removal no longer exists due to the fact that it is unlikely that the person will be admitted by a third country, and detention ceases to be justified. Once detention ceases to be justified, the person concerned must be released immediately. Therefore, under the Return Directive 2008/115, detention of stateless Palestinians cannot be justified. Also under Article 5(1)(f) ECHR detention is justified only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under that provision. Considering the fact that, as explained above, stateless Palestinians are unable to be deported back to their countries of former habitual residence, deportation proceedings cannot possibly be executed with due diligence. The vulnerable position of stateless persons needs also to be taken into account, as can be learned from case law of the ECtHR. Therefore, under Article 5 (1) (f) ECHR, detention of stateless Palestinians cannot be justified.

As for the basic social right, the only option the Dutch government provides is accommodation and care in a freedom restricting facility with the condition of cooperation on return. The Dutch Administrative High Courts have concluded that this policy is not in contradiction with International and European law. It could be argued, however, that this policy is in violation with article 1 of the EU Charter of Fundamental Rights, a provision that the Netherlands needs to take into account when implementing and interpreting the Returns Directive.

¹⁶² Wolfgang Heyde in Commentary of the Charter of Fundamental Rights of the European Union, June 2006, p 26; with reference to previous judgments: GFCC, Judgment of the Second Senate of 19 March 2013 - 2 BvR 2628/10 - para 54

http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/03/rs20130319_2bvr262810en.html (accessed 10 February 2016).

¹⁶³ When that country of former habitual residence is either Jordan, the Palestinian Occupied Territories (West Bank and Gaza including East Jerusalem), Israel or Lebanon.

4 Conclusion

As for the final conclusion, it has been proven that stateless Palestinians cannot return to their countries of former habitual residence in the case of Lebanon, Jordan or the Palestinian Territories (including West Bank, Gaza and East Jerusalem).

This is because stateless Palestinians can theoretically return to Lebanon if they meet the following requirements: holding a Lebanese travel document, which includes the DPRA ID cards for Palestinians and a proof of their citizenship. This only occurs if the Palestinians are registered with the DPRA, which was only possible in 1948 and 1967. Palestinians who cannot possess a Lebanese travel document can apply for a document de voyage if they hold a residence permit of the host country, a Lebanese DPRA ID card for Palestinians and a registration with UNRWA. But German case law determined that in practice the Lebanese authorities are not willing to issue such a document.¹⁶⁴ Therefore, stateless Palestinians can only legally return to Lebanon if they have the required documents mentioned above, which in practice is impossible to acquire.

In the case of Jordan, stateless Palestinians can return to Jordan if they had Jordanian nationality before 1988. If this requirement is unfulfilled, the only other option is a valid identity document such as a passport from another state to be able to obtain a Jordanian visa. In any other case, it is impossible for a stateless Palestinian to return to Jordan.

Regarding the situation of the return of stateless Palestinians to the Palestinian Territories, it is impossible to enter without an Israeli ID number, which has only been issued to Palestinians who were present in the Palestinian territories during the census of 1967. This holds true for the crossing between Jordan and West Bank as well as between Egypt and Gaza.

The conditions to enter East Jerusalem are even stricter than the ones for entering West Bank because the Israeli government considers East Jerusalem to be part of Israel, so the regulations for stateless Palestinians to enter Israel also apply to East Jerusalem. Residence status is automatically revoked once the person decides to live outside East Jerusalem. Palestinian residents of East-Jerusalem need an Israeli travel document (Laissez-Passer) when they want to travel abroad. These travel documents only guarantee the right to re-enter the country, if they are combined with a valid re-entry permit issued by Israel. Therefore, stateless Palestinians wanting to return to East Jerusalem are facing practical impossibility.

However, through research it has become apparent that being unable to return to one's country of origin or former place of habitual residence does not automatically constitute a right to a residence permit based on inability to leave the Dutch territory. The threshold to prove factual impossibility to leave the Netherlands is so high that it is hardly possible to receive a residence permit based on this policy. The requirements with regard to proof needs to comprise of more than just country of origin information; It also compasses very far-reaching cooperation with the Return- and Departure Services, as well as Diplomatic assistance and absolute certainty about the identity and nationality of the persons in question.

Therefore, it was necessary to ascertain which rights stateless Palestinians in the Netherlands are entitled to. As regards documentation, the Mahdi case obliges Member States to give written confirmation of their situation to a stateless Palestinian after that person has been released from detention in accordance with Article 15 (4) of the Return Directive.

Furthermore, stateless Palestinians have the right not to be detained. As soon as the identity of the stateless Palestinian has been established, this expert opinion has proven that they will be unable to return to their country of former habitual residence. Based on the CJEU *Kadzoev* judgment, the moment the identity is established, the reasonable prospect of removal no longer exists due to it being unlikely that the person will be admitted by a third country, and detention ceases to be justified. Once detention ceases to be justified, the person concerned must be released immediately. For the same reasons, detention of stateless Palestinians will also violate Article 5(1)(f) of the ECHR. Moreover, the ECtHR has paid particular importance to the vulnerable position of stateless persons.

As for basic social welfare rights, the only option the government provides is accommodation and care at a detention facility with the condition of cooperation on return. The Dutch Administrative High Courts

¹⁶⁴ VG Berlin Az. 35 K 202.11 [2011], paras 21,22; OVG Saarlouis 2 A 484/09 [2011]; Niedersächsisches OVG Az. 11LC 312/10 [2011], para 26; VGH Baden-Württemberg Az. 13 S 2483/07 [2008], para 33.

have concluded that this policy is not in contradiction with International and European law. This policy is, however, arguably not in conformity with the fundamental right to human dignity.

Annex:

Minutes of meeting with Dr. Nabil Abuznaid, ambassador of Palestinian Territories in The Hague, 23 November 2015

1) General information

- Oslo Agreement 1993.

Palestinians who resided in Gaza/West Bank in 1993, or with permits to come back, can return with their Palestinian passport/ID because they are registered in the Israeli population registry. The Israeli ID-number in occupied territories is needed to return. All others are denied entry into the Palestinian territories.

→ *clarification in an interview via telephone on 3 December 2015: only people who resided in Palestine during the census in 1967 could be issued a passport until 1993.*

- main concern of Israeli is the number in the passport (number of ID number of Israeli registry has to be in passport).
- If Palestinian has a document "for inside use" (= with Israeli ID number) he/she does not need visa to go to Jordan.
- Jordan issues Palestinians a passport (half of population in Jordan is Palestinian) which facilitates entry into Jordan, but not crossing Hussein bridge, unless the person is also registered in the Israeli registry proving that they resided in the West Bank (not Gaza) before 1993.
- all borders are controlled by Israeli authorities.

2) Documents issued by the Palestinian Delegation in the Hague

- They issue travel documents, which allow the Palestinians to travel wherever, apart from Palestinian Territories ("Outside use only").
- In order to return to the territories, they need approval from the Israeli authorities and they have to be part of the Palestinian population (see Oslo agreement).
- To enter Jordan and Lebanon (f. ex. after having studied in The Netherlands) with those documents is difficult as well, because those countries want a prove that the person only transits.
- Example: one mother wants to bring three daughters to The Netherlands, the daughters have a Palestinian passport and are living in Syria, they have to go to the Dutch embassy in Lebanon but they are not even allowed to enter Lebanon for the visit of the embassy for security reasons not allowed to go to the embassy in Turkey or Jordan either.

3) To Gaza from Egypt

- The Rafah border is closed for years now, crossing opens only a few times every other month (justified by security issues).
- The visa issued by Egypt for the purpose of crossing to Gaza is often too short and the people are afraid, that they will be stranded in Egypt.
- In order to receive a visa people from Gaza need a security permit to travel to Egypt. The Palestinian delegation suggests to place people in car to drive them to border at Rafah in order to make sure that they do not stay in Egypt.

4) To West Bank from Jordan

- Yellow card: residents in Jordan, entitles person to stay in Jordan.
- Green card: Palestinians who want to transit (sort of visa) to go to West Bank, valid usually one month have to leave phone number or address in Jordan in order to make sure that no one overstays visa visa are only issued to residents of West Bank.
- Earlier Jordanian authorities used to issue Palestinians passport with different number.

5) To Palestinian Territories from Lebanon

- *laissez passer* from Israel works for one trip to leave but not to return.

- need passport to leave Lebanon in order to enter Israel.
- not possible for those without Israeli ID.
- Issue with Lebanese embassy: security issues → denial to go to embassy.

6) Documents issued in Ramallah

- If Palestinian authorities in Ramallah issues a passport, they have to inform Israelis and the passport has to be connected to the number of the Israeli ID.
- Only those who resided in the territories in 1993 have this ID.
- it is impossible to receive ID number later/now.
- A new born is entitled to receive an Israeli ID within 6 years of the birth.

7) Population registry

- 1967 census → Israeli Population registry, only for residents who were present at that time of the registration were issued an Israeli number in the population registry.
- Even if one has a residence permit, it easily expires. When one studies abroad, every year or every other year one would have to return to renew the status.
- When ambassador himself wanted to go live in the US for his PhD in 1985, he had to sign a document which indicate that he would not come back for five years (temporary exile). He bargained, at the end signed a temporary exile for three years.
- Numbers in passport indicate, if it is for outside use only or if it entitles you to reside.

8) East Jerusalem

- considered part of Israel → aim: less Palestinian population
- If Palestinian moves to Ramallah for his/her job, he/she is not allowed to come back to Jerusalem.

9) Background information

- One person can have three different documents from three different countries
- Palestinians with travel documents from *Lebanon, Egypt, Syria*: if they exit, they need visa to get back; most of the time the visa is refused
- Problem arises already at the Dutch airport: Jordan airlines want to be sure that persons are not stranded in Jordan. So, Palestinians have to prove that they will definitely go to West Bank (airline otherwise has to pay a fine) Many officers at different airlines, are not familiar with the Palestinian passports and think it is a fraud, even if person holds ID allowing him/her to return to the West Bank.
- Earlier, the ambassador had Jordanian passport, security exit in Jordan had to be granted – with Palestinian Passport crossings are easier.
- Palestinians overstaying their visa, live illegally in West Bank (about 5000) Sometimes, the Israeli authorities granted 1000 Palestinians or more an ID number (sometimes to have a better standing in the negotiations).
- The last 4-5 years family reunification in the territories has been frozen.