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AMNESTY
INTERNATIONAL



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1. INTRODUCTION

This submission is prepared in advance of the United Nations (UN) Human Rights Committee's (hereinafter, "the Committee") review of the fifth periodic report of The Netherlands at its 126th Session in July 2019. It provides an overview of Amnesty International's main concerns under the International Covenant on Civil and Political Rights (hereinafter, "the Covenant"). These include the use of force by the Dutch police, the Dutch special high-security detention units that hold people suspected and convicted of terrorism offences, administrative counter-terrorism measures, government surveillance and intelligence sharing, refugee rights in the Kingdom of The Netherlands and increased risks of refoulement, immigration detention, structural flaws in the Dutch National Preventive Mechanism, violence against women, ethnic profiling and freedom of peaceful assembly.

This overview is based on Amnesty International's most recent research and is not an exhaustive list of issues of concern in The Netherlands.

Amnesty International welcomes the government's initiative in 2013 to launch the country's first National Human Rights Action Plan (NHRAP). It encourages the government to make the next NHRAP a more encompassing and comprehensive NHRAP than the previous plan, with concrete goals and timelines to ensure proper and effective implementation. Amnesty International also welcomes the positive steps that the government has taken to ensure that human rights education is provided to pupils at primary and secondary schools.

The organization remains concerned, however, that the government does not properly monitor the implementation of recommendations of international human rights treaty bodies. While a wide range of national oversight and advisory bodies exists, Amnesty International believes that they should be strengthened to ensure they can effectively and independently monitor and assess the compliance with international human rights of all areas of government policy and practice.

2. USE OF FORCE BY DUTCH POLICE

2.1 TASER IN DAY-TO-DAY POLICING (ART. 6, 7)

The Police has requested the government to introduce electro-shock weapons in day to day policing ('Basispolitiezorg') and has advised the Minister of Justice to equip some 17,000 patrol officers with a Taser X2.¹ The Minister of Justice and Security is preparing a policy proposal, which will be sent to Parliament for approval in the summer of 2019.

A one-year pilot project with electro-shock weapons in day to day policing ran from 1 February 2017 to 31 January 2018.² The official evaluation of the pilot showed that police have used these weapons in situations where there was no imminent threat to life or risk of serious injury.³ In over half of the situations where the weapon was discharged, persons were given electric shocks with these weapons in direct contact mode (drive-stun mode)⁴, including when already handcuffed, inside a police cell or vehicle, and in a separation cell in a psychiatric hospital. This usage is likely to amount to cruel, inhuman or degrading treatment or punishment (ill-treatment) and in certain circumstances to torture.⁵ Although the evaluation period ended, the four pilot teams are still authorized – and still use – electro-shock weapons.

All police officers who participated in the pilot initially received two days of training and during the pilot another day of training was added. The evaluation report however concluded: "Training was deficient both in its duration and content. The technical complexity of the Taser, the use of this weapon in combination with other weapons and equipment and its health risks imply that high demands must be made on training."⁶ It is generally acknowledged that police training is currently insufficient.⁷ Given this situation, Amnesty is concerned that the (possible) introduction of electro-shock weapons to a total of around 17,000 officers in the country will not be provided with the necessary training capacity this requires.

¹ Dutch Police, 'Police advises introduction of electro-shock weapon', Press release, 15 November 2018, <https://www.politie.nl/nieuws/2018/november/15/politie-adviseert-voeg-stroomstootwapen-aan-uitrusting-toe.html>

² Four teams were selected to carry out the pilot project: Two ordinary patrolling police units (in Amersfoort and Zwolle), a dog unit in Rotterdam, and a support unit in the police region of North-Netherland. The four units participating in the 2017 pilot have been equipped with – and are still using – the Taser X2. Special units (in particular: arrest teams) started using electro-shock weapons in May 2011 and are equipped with the Taser X26.

³ O. Adang et al., 'Het stroomstootwapen in de basispolitiezorg? Een evaluatie van de pilot' [Electro-shock weapons in day-to-day-policing? An evaluation of the pilot], May 2018. Hereafter: Evaluation Report, https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2018Z10240&did=2018D31630

⁴ A mode in which the weapon is held against the body of an individual without firing the projectiles, and which is intended to cause pain without incapacitating the target/individual.

⁵ See Amnesty International The Netherlands, *A Failed Experiment: The Taser-Pilot of the Dutch Police*, February 2018, <https://www.amnesty.nl/actueel/use-of-taser-by-the-dutch-police-unacceptable>. Also, the UN Committee Against Torture (CAT) expressed its concerns about the use of tasers in situations when there was no real or imminent threat to life or risk of serious injury. UN Committee against Torture (CAT), *Concluding Observations on the Seventh Periodic Report of the Netherlands*, 18 December 2019, p. 10 (hereinafter CAT, 2019), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1237&Lang=en

⁶ Evaluation Report, p. 58.

⁷ Executive police officers have a mandatory 32-hours general training annually, though a 42-hours training has been agreed with the unions. Still, some officers do not even get the mandatory 32 hours.

2.2 REVISION OF THE USE OF FORCE INSTRUCTIONS (ARTS. 6, 7)

On May 2018, the Minister of Justice and Security presented a draft revised version of the 'Ambtsinstructie'⁸, a legal instruction that regulates the use of force and equipment available to the Dutch Police, the Royal Netherlands Marechaussee⁹ and other law enforcement officers. A slightly amended draft was published in December 2018.¹⁰ Amnesty International is concerned about both the content of the revised Ambtsinstructie and the process behind its drafting.

The draft expands the scenarios in which firearms and other weapons and equipment, such as electro-shock weapons, various kinetic weapons (i.e. "rubber bullets") can be used. Although the stated aims of the draft revision are to clarify the existing criteria and address shortcomings and weaknesses in the current Ambtsinstructie, it is in effect an even vaguer document than the current Ambtsinstructie. It fails to establish clear criteria and thresholds as to when different methods, and degrees, of force may be used.

Also, the revised draft Ambtsinstructie continues to allow the use of a service weapon, for scenarios that do not meet the key threshold criterion under international law (that is: an imminent threat to life or risk of serious injury). Also worrying are the changes made to the provision regulating the use of automatic firearms. The revised draft Ambtsinstructie, for instance, does not contain any additional caution or threshold to take into account the particular high risks that these weapons pose, including for bystanders.¹¹ Amnesty sees similar problems with the criteria set for the use of precision fire ("sniper", intentional lethal fire).¹²

Further, the revised draft Ambtsinstructie gives the rules for the use of electro-shock weapons. Although the proposed rules differentiate between the use in dart-fire and drive-stun mode¹³, use of the latter is not entirely ruled out. The threshold for the use of the electro-shock weapon in dart-fire mode is too low as it provides for the use 'against a person who has fled or is fleeing arrest, detention or other form of deprivation of liberty'.¹⁴

Amnesty believes that the current draft of the revised Ambtsinstructie neither provides a clear framework on the use of force in compliance with the Covenant¹⁵ and other international human rights law and standards more generally, nor the principles of necessity and proportionality set out in the Dutch Police Act.¹⁶

2.3 AMNESTY INTERNATIONAL RECOMMENDS THAT THE STATE PARTY:

- Brings the proposed use of force guidelines for Dutch law enforcement officers in line with the principles of necessity and proportionality as well as with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and refrain from the introduction of electro-shock weapons in day to day policing.

⁸ Ambtsinstructie voor de politie, de Koninklijke marechaussee en andere opsporingsambtenaren [use of force instructions for law enforcement officials], 1994: <https://wetten.overheid.nl/BWBR0006589/2018-07-01>. The Act has been slightly amended over the year.

⁹ The Royal Netherlands Marechaussee is a Dutch police force with military status.

¹⁰ Minister of Justice and Security, Ontwerpbesluit wijziging Ambtsinstructie tweede tranche [Revised Use of Force Instruction], 20 December 2018. <https://www.rijksoverheid.nl/documenten/rapporten/2018/12/20/tk-bijlage-ontwerpbesluit-wijziging-ambtsinstructie-tweede-tranche>; A first draft which was published for consultation in May 2018, <https://www.internetconsultatie.nl/ambtsinstructie>

¹¹ To the contrary, the threshold required for their use has even been lowered, from using them in cases of an imminent threat to life, to now being legitimate to use also in case of a threat of serious injury. Revised draft Ambtsinstructie, §2 Article 8.

¹² Revised draft Ambtsinstructie, §2 Article 9.

¹³ The use of dart-firing mode is to temporarily incapacitate a person from a distance. In dart-firing mode the weapon is used directly on the body which causes extreme pain but does not lead to incapacitation.

¹⁴ Revised draft Ambtsinstructie, 12.c.b.

¹⁵ As explained in the General Comment no. 36 on the Right to Life, paragraphs 12 and 14, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

¹⁶ The 2012 Police Act authorizes police officers to use force, see article 7.1 and article 7.7. Politiewet 2012: <https://wetten.overheid.nl/BWBR0031788/2019-02-01> Although the words 'necessity' and 'proportionality' are not explicitly used in the Police Act, the wording of the articles do cover these key principles. The current Ambtsinstructie and the revised draft, however, do not explicitly mention these key principles, nor sufficiently reflect the spirit of the law.

3. COUNTER-TERRORISM AND INTELLIGENCE GATHERING AND SHARING

3.1 DUTCH HIGH-SECURITY PRISONS IN THE CONTEXT OF COUNTER-TERRORISM¹⁷ (ARTS. 2, 7, 9, 10, 17)

Amnesty International is concerned that The Netherlands is failing to respect its human rights obligations at its two special high-security detention units that hold people suspected and convicted of ‘terrorism’ offences (Terroristenafdelingen, or TAs).

In the TAs, detainees are subjected to security measures that on their own, or in combination, may constitute torture or other cruel, inhuman, or degrading treatment. These measures have included the routine and frequent administration of humiliating, invasive, full-nudity body searches, and confining detainees alone in a cell for 19 to 22 hours a day, and with limited contact with other detainees (maximum three from their own unit) when they were outside their cells. In three cases, we documented conditions of isolation that amounted to prolonged solitary confinement. In the limited amount of time detainees were permitted outside their cells, including during family visits, they have been under constant monitoring, thus producing limited relief from the general conditions of isolation.

International human rights standards permit the use of high-security detention measures, such as body searches, isolation and monitoring, only under exceptional circumstances¹⁸ and only in a necessary and proportionate manner based on an individualized risk assessment.¹⁹ Despite this, the TAs’ legal framework allows authorities to automatically place individuals suspected or convicted of terrorism related offences in a high-security prison, where they are then subjected to routine and frequent security measures in the absence of any individual proportionality or necessity assessment. As a result, a person posing no actual risk, and those who have never been convicted of a crime, can be held under the TAs’ strict high-security regime. There is also no legally required periodic review process and only very limited ways to ever transfer detainees out of the TA.²⁰ Thus, the exposure to these

¹⁷ This section is based on the findings from the Open Society Justice Initiative and Amnesty International report *Inhuman and Unnecessary: Human Rights Violations in Dutch High-Security Prisons in the Context of Counterterrorism*, October 2017, <https://www.amnesty.org/en/documents/eur35/7351/2017/en/>

¹⁸ Rule 53 of Recommendation 2006 (2) of the Committee of Ministers of the Council of Europe to Member States on the European Prison Rules (adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies) (hereinafter European Prison Rules).

¹⁹ For example, the European Prison Rules explain that “restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed” and that “security measures applied to individual prisoners shall be the minimum necessary to achieve their secure custody”. Rules 3 and 51.1 of the European Prison Rules.

²⁰ Authorities responsible for the operation of the TA are not legally required to conduct periodic reviews to determine whether it is necessary for a person to remain in the TA. When the CPT criticized the government for this, the Dutch authorities were dismissive, and responded, in part: “A regular review has little to no added value” because the TA placement criteria were “static” and therefore there was nothing substantive to review. The law provides only one category of TA detainees a periodic review after 12 months: detainees transferred to the TA after being assessed and suspected of spreading “radicalising” messages and recruiting in an ordinary detention facility. TA detainees are not eligible to be transferred to a less secure unit, save for a very narrow rule that permits them to be transferred to a such a prison after having served one-third of their sentence and when a minimum of four months and a maximum of one year is left of their sentence. See more details, Amnesty International and Open Society Justice Initiative, *Inhuman and Unnecessary: Human Rights Violations in Dutch High-Security Prisons in the Context of Counterterrorism* (October 2017), p. 24-26.

conditions can last for prolonged periods of time.²¹ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its 2008 and 2017 reports and UN Committee Against Torture (CAT) in its 2018 concluding observations have criticized the Dutch government for automatically assigning people to TAs based solely on the category of their offence, as well as for not regularly reviewing the necessity and proportionality of such placement.^{22 23}

Another major failing of the TA is that people held there do not have effective ways to challenge the rules and procedures when they result in allegations of torture or other ill-treatment²⁴, such as the initial automatic decision-making process that placed them in the TA, their ongoing detention in the TA, and the routine high-security measures used against them. Moreover, no statistical data is available on the number of complaints, or the nature of the complaints, lodged by TA detainees.²⁵ Additionally, institutional oversight bodies are not sufficiently independent and lack effectiveness (see also section on the NPM below).²⁶

The Netherlands over time has demonstrated a willingness to undertake several reforms. Most significantly, on 31 October 2017 prison authorities have issued a new in-house regulation that significantly narrows the circumstances in which authorities can perform full-nudity body searches. Authorities are also beginning to use individualized risk assessment tools to differentiate between categories of detainees, which may result in more out-of-cell time and re-integration opportunities for some detainees, depending on their category.²⁷

These risk assessment tools are, however, insufficient and undermined by the fact that The Netherlands applies these tools only *after* a person is initially placed in a TA, thus exposing them to conditions of confinement that may violate the prohibition on torture and other ill-treatment. Moreover, authorities have indicated that the maximum time out of cell under the most lenient circumstances would not exceed 4.5 hours a day. It is also unclear how prison authorities conduct risk assessments and to what extent the person concerned can effectively participate in the process and challenge the use of the “individualized” security measures.

²¹ The absence of a meaningful process to get transferred out of the TA meant that people were held in the TA under these conditions for extended periods of time. As of May 2017, the average length of time a person had been detained in the TA was approximately five and a half months. Email correspondence with policy makers from the Ministry of Security and Justice, 12 May 2017. The median was 49 days. These numbers are based on all 168 detainees held in the TA between 2006 and April 2017. The government has not published more recent figures on the average length of detention time.

²² CPT, *Report to the authorities of the Kingdom of The Netherlands on the visits carried out to the Kingdom in Europe, Aruba, and The Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in June 2007* (made publicly available on 30 January 2008), para. 42, https://rm.coe.int/168069780d%22%20t%20%22_blank. For the government’s justification see CPT, *Response of The Netherlands to Country Report*, 2009, p. 14, <https://rm.coe.int/1680697810>; CPT, *Report to the Government of The Netherlands on the visit to The Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 May 2016* (made publicly available 19 January 2017), para. 47, <https://rm.coe.int/16806ebb7c>. For the government’s justification see CPT, *Response of The Netherlands to Country Report*, 2017, p. 17, <https://rm.coe.int/pdf/168074bf06>

²³ UN Doc. CAT/C/NLD/CO/7, paras. 28-29.

²⁴ For detailed factual and legal references to this section see sub-sections “Challenging placement in the TA” (pp. 24-26) and “Deficient complaints process” (pp. 34-35 and 44) in Amnesty International and Open Society Justice Initiative, *Inhuman and Unnecessary: Human Rights Violations in Dutch High-Security Prisons in the Context of Counterterrorism* (October 2017)

²⁵ See See Amnesty International and Open Society Justice Initiative Submission to the UN Committee against Torture, Ill-Treatment in the Context of Counterterrorism and High-Security Prisons in The Netherlands, 12 October 2018, p. 14-15, <https://www.amnesty.org/en/documents/eur35/9231/2018/en/>

²⁶ Our report explained in detail that currently operating inspection bodies, such as The Netherlands’ National Preventive Mechanism (NPM) and the Inspectorate of Justice and Security (JenV), are not sufficiently independent, lack effectiveness and relevant human rights expertise, have avoided focusing on the TA, or inspect the TA but not on a regular basis with the aim to prevent human rights abuses, and without carefully analyzing possible conflicts with international human rights law and standards. For detailed factual and legal references to this section see “Institutional Oversight” in Amnesty International and Open Society Justice Initiative, *Inhuman and Unnecessary: Human Rights Violations in Dutch High-Security Prisons in the Context of Counterterrorism* (October 2017), pp. 57-59.

²⁷ At the time of writing, Amnesty International had not assessed the implementation of this new in-house regulation, how risk assessments are being made, or to what extent individual detainees can effectively appeal the risk assessment or the subsequent decision on the applicable body search policy.

3.2 AMNESTY INTERNATIONAL RECOMMENDS THAT THE STATE PARTY:

- Amends all relevant laws, regulations, and policies to ensure that the placement of persons in a TA is based on a prior effective individualized risk assessment and is subject to periodic reviews. The initial placement and ongoing detention in the TA can occur only if it involved no torture or other ill-treatment, is absolutely necessary and proportionate, and based on an assessment of a person's individualized behavior.
- Ensures that TA detainees are not subjected to conditions equivalent to prolonged solitary confinement, and never impose other security measures without assessing whether they are absolutely necessary and proportionate.
- Reforms the TA individualized complaint procedures to ensure detainees can effectively challenge their initial placement, ongoing detention, and any of the high-security measures used against them, including the underlying risk assessment profiles, to ensure those measures comply with the Convention.

3.3 ADMINISTRATIVE COUNTER-TERRORISM MEASURES: CONTROL ORDERS AND REVOCATION OF CITIZENSHIP (ARTS. 2, 14, 26)

Amnesty international continues to be concerned about the use of administrative measures in the Dutch counter-terrorism strategy, placing restrictions on individual liberties based on perceived risks rather than established criminal offences. The Temporary Administrative (Counter-Terrorism) Measures Act went into force in March 2017²⁸, together with the Amendment of The Netherlands Nationality Act to Revoke Dutch Citizenship in the Interest of National Security.²⁹ The former enables the Minister of Justice and Security to impose administrative control measures on individuals on the basis of indications that they may pose a risk to national security.³⁰ Between March 2017 and August 2018 six persons have been subjected to ten control orders, three of which have been extended.³¹ The latter Act provides for the revocation in absentia of the Dutch nationality of dual nationals, on national security grounds, on the basis of information that they had travelled outside the country to voluntarily “join” an armed group.³² It remains unclear what precise actions would constitute “joining” such a group (e.g. marrying a member). The person is declared an unwanted foreigner and not allowed access to Dutch territory. In March 2019, the Minister had revoked the Dutch nationality of thirteen individuals; six

²⁸ Wet van 10 februari 2017, houdende tijdelijke regels inzake het opleggen van vrijheidsbeperkende maatregelen aan personen die een gevaar vormen voor de nationale veiligheid of die voornemens zijn zich aan te sluiten bij terroristische strijdgroepen en inzake het weigeren en intrekken van beschikkingen bij ernstig gevaar voor gebruik ervan voor terroristische activiteiten (Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding), 10 February 2017, <https://wetten.overheid.nl/BWBR0039210/2017-03-01>

²⁹ Rijkswet van 10 februari 2017, houdende wijziging van de Rijkswet op het Nederlanderschap in verband met het intrekken van het Nederlanderschap in het belang van de nationale veiligheid, 10 February 2017, <https://zoek.officielebekendmakingen.nl/stb-2017-52.html>

³⁰ Administrative control orders under this Act include a travel ban, a duty to report regularly to the police, an area ban or a restraining order, when that person can be connected to terrorism related activities or the support of such activities. The government is also empowered to withhold requests for or to discontinue government subsidies, licenses or permits to prevent terrorism.

³¹ Gestel, B. van, Berkel, J.J. van, Kouwenberg, R.F. (2019), ‘Bestuurlijke vrijheidsbeperking van Jihadisten. Het gebruik van de ‘Tijdelijk wet bestuurlijke maatregelen terrorismebestrijding’ in de eerste periode na inwerkingtreding van de wet’, *Cahier* 2019-4, WODC. In addition, local authorities used in 185 cases existing administrative powers to invalidate a person's passport to prevent their travel abroad for counterterrorism purposes

³² Netherlands Nationality Act, Art. 14(4). Amendments to the Nationality Act adopted in April 2016 had already expanded the grounds in Art. 14(2b) for the Minister of Security and Justice to revoke a person's Dutch nationality if a person has been convicted of terrorism-related crimes. Such crimes now also include preparatory acts such as “training for violent jihad” in The Netherlands and/or abroad.

additional preliminary decisions were pending.³³ The available data on the use of administrative control measures are not disaggregated on the basis of the dual nationality and ethnic origin of the affected person. This impedes the assessment of any discriminatory impact of the measures used. Moreover, Amnesty is not aware of any statistics on the numbers of appeals lodged and of any control order decisions being overturned.

In Amnesty International's assessment, the rights to an effective remedy and a fair hearing are not guaranteed in both laws. First, neither the individuals affected, nor their lawyers have proper access to the classified information on the basis of which the allegations have been made against them. This undermines their ability to effectively challenge decisions against them in an appeal process. Second, the lodging of an appeal does not suspend the effect of the decision. Third, the right to a fair hearing is not guaranteed for dual nationals abroad who may not be aware of the decision to revoke their Dutch nationality or, in case they are, may not be able to return to The Netherlands to appeal it in person. While the Netherlands Nationality Act includes a special provision for an automatic judicial appeal in those circumstances, it is problematic for similar reasons, including: obvious obstacles to timely and effective notification and consequent potential lack of full and effective access and representation.³⁴

Amnesty International also wishes to draw the Committee's attention to the position of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on discrimination against dual nationals. In a recent amicus brief to the Dutch Immigration and Naturalisation Service, the UN Special Rapporteur expressed the view that distinctions between mono and dual nationals are incompatible with the prohibition of discrimination expressed in international human rights law, including Article 26 of the Covenant, and indirectly discriminates against citizens of migrant and/or ethnic minority backgrounds.³⁵

While the Temporary Administrative Counter-terrorism Act includes a sunset clause of five years (February 2022), Amnesty is concerned that the review will not assess any potential arbitrary and disproportionate restrictions of individual liberties or discriminatory impact of the control orders applied.³⁶ The Nationality Act is set to be reviewed in 2019. Amnesty International is not aware of civil society being involved in any of the two evaluation processes.

3.4 AMNESTY INTERNATIONAL RECOMMENDS THAT THE STATE PARTY:

- Amends the provisions in The Netherlands Nationality Act on the revocation of Dutch citizenship in the interest of national security to ensure effective safeguards against arbitrary loss of nationality and discriminatory effects.
 - In particular, takes all measures to ensure that dual nationals abroad, including those who may not be able to lodge an appeal within the statutory period, have access to sufficient information in order to be able to effectively challenge the revocation decision; can appeal on substance; continue to be considered nationals during the appeal procedure; and are able to represent themselves or via a lawyer of their choice.

³³ Eleven of the thirteen revocation decisions were based on Art. 14(4) and two on a prior conviction on the basis of Art. 14(2b). Six preliminary decisions on the basis of Art. 14(2b) were pending. Nationaal Coördinator Terrorismebestrijding en Veiligheid (NCTV), *Rapportage Integrale Aanpak Terrorisme, december 2017-april 2019*, April 2019, p. 11, <https://www.nctv.nl/actueel/nieuws/2019/rapportage-over-aanpak-terrorisme-naar-de-tweede-kamer.aspx>

³⁴ In mid-2018, the Court of The Hague ruled this provision invalid, because it would unlawfully restrict the right to an effective remedy by not allowing the affected persons affected to appeal the case in person or via a lawyer of their choice. Court of The Hague, 26 June 2018, case number: ECLI:NL:RBDHA:2018:7617. The Court of Appeal overturned this decision and ruled that the revocation decision was unlawful, because the Act could not be applied retroactively in those two cases. Council of State, 17 April 2019, case number: ECLI:NL:RVS:2019:990.

³⁵ Amicus Brief presented by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to the Dutch Immigration and Naturalisation Service, 23 October 2018, notably paras 41-42.

³⁶ An interim review of the Temporary Administrative Counterterrorism Act was published in March 2019. While it assessed the number of, and reasons for, control orders applied, as well as the efficiency of the application procedure, it did not draw any conclusions on the lawfulness or discriminatory effects of the measures used. Gestel, Berkel, and Kouwenberg (2019).

- Periodically publishes disaggregated statistical data on the use of administrative counter-terrorism measures, including the types of powers used, the duration of their application, and the number of nationality stripping decisions including the dual nationality and ethnic origin of the affected person, as well as on the number of appeals lodged and their outcomes.
- Ensures that the periodic review of both the amended Nationality Act and the Temporary Administrative Counterterrorism Powers Act and their application is more transparent and effective, involving civil society groups, to guarantee that provisions have not been imposed on individuals in an arbitrary or discriminatory manner.

3.5 INTELLIGENCE GATHERING AND INFORMATION SHARING (ARTS. 6, 7, 17, 19, 21)

The Intelligence and Security Services Act (hereafter: the Act) came into force in May 2018, despite major critique from human rights experts, civil society organizations and others.³⁷ After a public referendum held in March 2018 in which a majority of the Dutch population voted against the Act, the government has proposed minor changes to the Act, such as changing the retention period of data collected through bulk interception from one period of 36 months to 12 months with the possibility of two extensions. These extensions result in a 36 months retention period. These changes were formulated in a policy that took effect together with the Act,³⁸ some of which may lead to changes in the law pending amendments in Parliament (hereafter: the Bill).³⁹

Amnesty International is concerned that bulk interception and bulk hacking, among other widespread powers, fundamentally disturb the proper relationship between the individual and the state. The policy changes and the Bill do not take away Amnesty International's human rights concerns. The law will continue to enable the interception of communications of non-specified groups of individuals as long as the bulk interception is considered "case-specific". This limitation is vague and is not explained in the Act and Bill or explanatory memoranda, risking arbitrary interpretations. In December 2018, nine months after the introduction of the bill, the Dutch Oversight Board for the Intelligence and Security Services (CTIVD) published an interim review, including a risk assessment of the "case-specific" interception powers. It concluded that there was a "high risk" of unlawful collection of bulk data (via the ether) because the limitation had not yet been specified in internal work processes and policies of the services.⁴⁰ Such a broadly drawn provision and the absence of any requirement for reasonable prior individual suspicion will enable inherently disproportionate interference with the right to privacy, freedom of assembly, and freedom of expression.

The Act and Bill also provide insufficient safeguards against abuse. While a Review Board⁴¹ has been established to assess the lawfulness of the Minister's decision to authorize the use of these special powers, it does not have adequate guarantees to ensure its independence. On top of this, the recommendations of the CTIVD⁴² on the (un)lawfulness of the Security Services' activities are not binding

³⁷ See also Council of Europe Commissioner for Human Rights, *Letter 'The Netherlands urged to strengthen human rights safeguards in its response to terrorism'*, 29 November 2016, <https://www.coe.int/en/web/commissioner/-/the-netherlands-urged-to-strengthen-human-rights-safeguards-in-its-response-to-terrorism?desktop=true>

³⁸ Besluit van de Minister van Binnenlandse Zaken en Koninkrijksrelaties en de Minister van Defensie van 25 april 2018, no. 2018-0000251025, houdende vaststelling van beleidsregels met betrekking tot de uitvoering van de Wiv 2017 (Beleidsregels Wiv 2017), <https://zoek.officielebekendmakingen.nl/blg-840300>; See also the letter of the Minister in which changes are listed: *Parliamentary Papers*, TK 34588, no. 76, 25 April 2018, <https://zoek.officielebekendmakingen.nl/kst-34588-76.html>

³⁹ The amendments were subjected to an internet consultation in August 2018 and have been sent to the Dutch Council of State for an advice before they will be debated in Parliament [date unknown]. See: <https://www.internetconsultatie.nl/wiv2017/document/3813> Amnesty has responded to the internet consultation. See: <https://www.internetconsultatie.nl/wiv2017/reactie/103618/bestand>

⁴⁰ See *Voortgangsrapportage CTIVD, De werking van de Wiv 2017 [Progress report CTIVD, implementation of the Wiv 2017]*, no. 59, p. 10-11. <https://www.ctivd.nl/documenten/rapporten/2018/12/04/index> The government has promised improvement: *Parliamentary Papers*, TK 34588, no. 80, 4 December 2018, <https://zoek.officielebekendmakingen.nl/kst-34588-80.html>

⁴¹ In Dutch: Toetsingscommissie Inzet Bevoegdheden (TIB).

⁴² For the AIVD – the general intelligence and security services – it is the Minister for the Interior and Kingdom Relations. For the MIVD – the military intelligence and security services – it is the Minister for Defence

and can be overruled by the relevant Minister. The Board cannot end surveillance operations nor provide for redress. Additionally, the Act and Bill lack specific safeguards, such as prior authorisation by an independent judicial authority on the selection and use of filters and selectors for the further analysis of content and metadata that is collected by other means than bulk interception, including bulk hacking.⁴³

Finally, Amnesty International continues to be concerned that under the Act the Dutch government remains able to share private communications with authorities of other states, including those engaged in serious human rights violations.⁴⁴ The oversight committees of five states (The Netherlands, Belgium, Denmark, Norway and Switzerland) also identified a loophole in oversight when data is shared amongst intelligence agencies in different jurisdictions. The minister shares these concerns but has said not to be willing to act.⁴⁵

3.6 AMNESTY INTERNATIONAL RECOMMENDS THAT THE STATE PARTY:

- Amends the Law on the Intelligence and Security Services to bring it in line with international human rights standards, including by:
 - requiring that the interception of communications is based on individual reasonable suspicion of wrongdoing and authorised by an independent judicial authority, only when strictly necessary to meet a legitimate aim and conducted in a non-discriminatory and proportionate manner;
 - implementing proper safeguards, such as prior authorisation by an independent judicial authority on the collection as well as the selection and use of filters and selectors that are used in further analysis of the collected data, regardless of the collection or analysis method.
 - providing a clear and accessible framework governing data sharing with foreign agencies to prevent the sharing of information that could lead to or result in serious human rights abuses, and the receipt of data obtained by indiscriminate mass surveillance.
 - taking all measures necessary to address the gap in oversight in international data exchanges between intelligence agencies, including by supporting international cooperation between national oversight committees of states with whom data is shared to ensure human rights standards are met.

⁴³ The Review Board (TIB) expressed its concern on the lack of these safeguards for the analysis of data that is collected via bulk hacking operations. TIB, *Letter to the Minister with Reaction on the Intelligence and Security Services Bill*, 23 August 2018, p. 3, <https://www.tib-ivd.nl/binaries/tib/documenten/brieven/2018/08/23/reactie-wijzigingsvoorstel-wiv-2017/Reactie+wijzigingsvoorstel+Wiv+2017+definitief.pdf>

⁴⁴ See *Voortgangsrapportage CTIVD, over de wegingsnotities van de AIVD en de MIVD voor de internationale samenwerking met de Counter Terrorism Group- en sigint-partners [Progress report CTIVD on the evaluation criteria for the AIVD and MIVD for the international cooperating with the CTG]*, no. 60, <https://www.ctivd.nl/binaries/ctivd/documenten/rapporten/2019/02/06/index/CTIVD+Toezichtsrapport+nr.+60.pdf>

⁴⁵ *Parliamentary Papers* TK 2018-2019, 34588 no. 82, <https://zoek.officielebekendmakingen.nl/kst-34588-82.html>

4. TREATMENT OF ALIENS, INCLUDING REFUGEES AND ASYLUM SEEKERS

4.1 CURAÇAO: IMMIGRATION DETENTION AND RISK OF REFOULEMENT (ARTS. 2, 6, 7, 9-10, 13)

Amnesty is concerned that human rights differ in the different constituent countries of the Kingdom of the Netherlands, as is exemplified by the lack of rights that Venezuelans seeking protection in Curaçao face.⁴⁶ Although the Kingdom of the Netherlands is responsible for ‘guaranteeing’ human rights in the entire Kingdom⁴⁷, the protection of Venezuelans in Curaçao is consistently considered by representatives of the Netherlands government a ‘country affair’ of the separate constituent countries.⁴⁸

In July 2017, without any prior consultation with the UN Refugee Agency (UNHCR), the Curaçao authorities took over the asylum registration process from UNHCR. Although the Curaçao government claims there is an asylum procedure in place based on Article 3 of the European Convention on Human Rights, Amnesty International is not aware of any individual who has been granted international protection. Furthermore, the published procedure requires people to seek international protection immediately upon arrival.⁴⁹ Instead of assessing individual protection needs, the Curaçao government in 2017 designed an “active removal strategy” to deport those with irregular migration status, in breach of Article 13 of the Covenant.⁵⁰

People who ask for asylum and/or are due to be deported are held in closed detention centres and police cells. The conditions in these detention centres are appalling, including overcrowding, a lack of privacy, poor hygiene in shower and bathroom areas, and a lack of suitable bedding. Several cases of ill-treatment upon arrest or in detention were reported to Amnesty International, including those of guards sexually abusing women detainees by asking them for sexual acts in exchange for soap and sanitary towels.⁵¹

⁴⁶ Aruba, Curaçao, Sint Maarten and the Netherlands are the four countries making up the Kingdom of the Netherlands. In June 2018, the Advisory Council on International Affairs (AIV) came up with the report ‘Fundamental rights in the Kingdom: Unity in protection’. The AIV concludes that within the Kingdom of the Netherlands, human rights differ – with human rights treaties signed by the Kingdom often only being valid in the Netherlands. Citizens in the Caribbean part of the Kingdom therefore have fewer rights than their European fellow citizens. The same applies to the human rights of migrants and asylum seekers.

⁴⁷ The Charter for the Kingdom of the Netherlands regulates the constitutional relationship between the four constituent countries. Article 43 of the Charter for the Kingdom of the Netherlands states that: 1. “Each of the Countries shall promote the realization of fundamental human rights and freedoms, legal certainty and good governance.” 2. “The safeguarding of such rights and freedoms, legal certainty and good governance shall be a Kingdom affair.”

⁴⁸ The argument that the admission and expulsion of aliens is a “country affair” of Curaçao rather than a “Kingdom affair” comes up repeatedly in public statements by representatives of the Netherlands’ government. Amnesty International, *Detained and Deported: Venezuelans denied protection in Curaçao*, September 2018, p. 22, <https://www.amnesty.org/en/documents/eur35/8937/2018/en/>

⁴⁹ Amnesty International, *Detained and Deported: Venezuelans denied protection in Curaçao*, September 2018, p. 28, Procedure for 3 ECHR Protection <https://www.gobiernu.cw/nl/documenten/beslissingen/procedure-voor-bescherming-op-grond-van-artikel-3-evrm/>

⁵⁰ In 2017, the Curaçao authorities removed 1,203 Venezuelans from the island, while in the first four months of 2018 they deported another 386.

⁵¹ Amnesty International, *Detained and Deported: Venezuelans denied protection in Curaçao*, September 2018, p. 39, 46.

4.2 AMNESTY INTERNATIONAL RECOMMENDS THAT THE STATE PARTY:

The Kingdom of the Netherlands

- Ensures that human rights of migrants, asylum-seekers and refugees are guaranteed in all constituent countries of the Kingdom of the Netherlands.

The Government of Curaçao

- Guarantees the rights of the asylum-seekers and refugees in need of international protection.
- Ensures that the detention of asylum seekers is exceptional and only used as a last resort, as set out in international human rights law, and ensures that the conditions of detention are in line with human rights law and standards.
- Ensures that allegations of ill-treatment, excessive use of force or any other form of abuse is investigated promptly, thoroughly and impartially by an independent body.

4.3 REFOULEMENT (ARTS. 2, 6, 7, AND 13)

Amnesty International is concerned about increasing focus by the Dutch government on forced returns of rejected asylum seekers, return agreements and accelerated asylum procedures, and the increased risk of refoulement associated with these. Amnesty International has documented several cases of forced returns from The Netherlands where the treatment upon return to the country of origin amounted to torture or to cruel, inhuman or degrading treatment or punishment. Included below are examples of refoulement to Afghanistan, Sudan and Bahrain.

Due to the worsening security and humanitarian situation, Amnesty International considers all returns to Afghanistan a violation of the principle of non-refoulement.⁵² Since 2015, The Netherlands has returned over 160 Afghans, including families with children, people who claim to be Christian and individuals with mental health problems.⁵³

Amnesty International collected the testimony of a Sudanese man who was forcibly returned from The Netherlands at the end 2017.⁵⁴ He describes being detained incommunicado by the National Intelligence and Security Service (NISS) for 13 days immediately after his forced return, being beaten and verbally abused, including by being accused of giving Sudan a bad name. No investigation was carried out by the Dutch authorities about the link between (the manner of) his forced return from The Netherlands and the abuse he faced.

A Bahraini asylum seeker deported from The Netherlands in October 2018 was immediately detained upon arrival and has since been subjected to an unfair trial, sentenced to life imprisonment and stripped of his nationality based on vaguely formulated terrorism grounds. Amnesty International believes The Netherlands has breached the principle of non-refoulement in this case too.⁵⁵

⁵² Three examples of forced return from The Netherlands are included in Amnesty's report *Forced back to danger: Amnesty International, Afghanistan: Forced back to danger, asylum-seekers returned from Europe to Afghanistan*, October 2017, <https://www.amnesty.org/en/documents/asa11/6866/2017/en/>

⁵³ De Groene, *Ik ga nog voor geen 200.000 euro terug [I won't return, not even for 200.000 Euro]*, 3 april 2019, <https://www.groene.nl/artikel/ik-ga-nog-voor-geen-200-000-euro-terug>

⁵⁴ Amnesty International The Netherlands, *Risico's bij Gedwongen Terugkeer naar Sudan [Risks with forced returns to Sudan]*, March 2019, https://www.amnesty.nl/content/uploads/2019/03/AMN_19_05_Rapport-gedwongen-terugkeer-Sudan.pdf?x43474

⁵⁵ Amnesty International USA, *Urgent action: Deported Bahreini at Risk of Ill-Treatment* (Bahrain: UA 209.18), March 2019, <https://www.amnestyusa.org/urgent-actions/urgent-action-deported-bahraini-at-risk-of-ill-treatment-bahrain-ua-209-18/>

4.4 AMNESTY INTERNATIONAL RECOMMENDS THAT THE STATE PARTY:

- Investigates all reports of ill-treatment, torture or other human rights violations after deportation and ensure that this information is used in new deportation decisions.
- Takes all necessary measures to prevent refoulement.
- Does not return rejected asylum seekers to countries where there is a volatile, deteriorating security situation and/or severe human rights and/or humanitarian crisis.

5. LIBERTY AND SECURITY OF PERSONS AND TREATMENT OF PERSONS DEPRIVED OF THEIR LIBERTY

5.1 IMMIGRATION DETENTION (ARTS. 2, 7, 9, 10, 26)

Amnesty International is concerned about the recent rise of people, including children, in immigration detention in the Netherlands. After a period of decline, in the past three years the number of people in immigration detention rose from 2,176 in 2015 to 3,558 in 2018.⁵⁶

The Netherlands launched a new detention regime for unaccompanied children and families with children awaiting removal in Zeist in October 2014.⁵⁷ While the regime in this *family immigration detention centre* (Gesloten Gezinsvoorziening) has no locked cells and less restrictions, it still constitutes detention. Moreover, since the opening of this center, the number of detained families (awaiting deportation) has increased from 44 families in 2014 to 67 families in 2017.⁵⁸ The number of unaccompanied children in detention increased by almost 77 per cent between 2016 (26) and 2017 (46).⁵⁹ In 2016, 11 young adults (18- and 19-year-olds) were detained, in 2017 the number rose to 30.⁶⁰

Amnesty International appreciates that in September 2014, a policy was introduced that put an end to the automatic detention of families with children at Schiphol International Airport border.⁶¹ However, Amnesty International remains concerned about the automatic detention of asylum-seekers other than families with children at Schiphol International Airport.⁶² This contrasts sharply with the Dutch policy and practice for asylum-seekers who arrive in the Netherlands by land, who are placed in open centers.

The average duration of immigration detention in The Netherlands is 44 days.⁶³ This raises questions to what extent The Netherlands uses detention as a measure of last resort and – when used – for the shortest possible time necessary to achieve a legitimate result. Amnesty International has received a number of testimonies about individual cases in which repeated detention exceeds the absolute time limit of 18 months under the EU Returns Directive.⁶⁴

⁵⁶ Ministry of Justice & Security, *DJI in Getal 2013-2017 [Custodial Institutions Agency in Numbers 2013-2017]*, August 2018, https://www.dji.nl/binaries/DJI%20in%20getal%202013-2017%20definitief_tcm41-350484.pdf, p. 48. Hereafter referred to as: *Custodial Institutions Agency in Numbers 2013-2017*. In 2013: 3,668, in 2014: 2,728, in 2015: 2,176, in 2016: 2,570, in 2017: 3,181. For the figures of 2018, see: DJI Factsheet, *Vreemdelingenbewaring*, April 2019.

⁵⁷ State Secretary of Security & justice, *Letter to the Members of Parliament 28 May 2014: Screening families at the border and the opening of the closed family detention center*, <https://zoek.officielebekendmakingen.nl/kst-19637-1827.html>

⁵⁸ *Custodial Institutions Agency in Numbers 2013-2017*, p. 51

⁵⁹ In 2018 the average duration of unaccompanied children in detention was 21 days. See: Ministry of Justice and Security, *Kinderen in vreemdelingendetentie / alternatieve toezichtmaatregelen [Children in alien detention/ alternative control measures]*, 22 februari 2019. In the first half of 2018: 20 unaccompanied children were detained.

⁶⁰ *Custodial Institutions Agency in Numbers 2013-2017*, p. 53

⁶¹ State Secretary of Justice and Security, *Letter to the Members of Parliament 28 May 2014: Screening families at the border*.

⁶² Article 6 of the Aliens Act 2000. See also: UNHCR & Dutch Council for Refugees, *Pas nu weet ik: vrijheid is het hoogste goed – Gesloten Verlengde Asielprocedure 2010-2012 [It is only now that I realise: freedom is the greatest good – the closed extended asylum procedure 2010-2012]*, April 2013, <https://www.unhcr.org/nl/wp-content/uploads/Rapport-Gesloten-Verlengde-Asielprocedure.pdf> and *Custodial Institutions Agency in Numbers 2013-2017*, p. 486

⁶³ DJI Factsheet, *Vreemdelingenbewaring*, April 2019.

⁶⁴ The lack of aggregated statistics on the occurrence of repeated migration-related detention makes it difficult to monitor the necessity and effectiveness of migration-related detention.

Amnesty International notes that there is a distinct disparity in access to a judicial review of the lawfulness of detention for individuals in migration detention, compared to persons in prison. While in a criminal law context, a suspect will see an examining magistrate within three days and fifteen hours⁶⁵ there is no automatic check by a judge in migration cases. If asylum seekers or migrants do not submit an appeal of their own accord, the court will be informed by the authorities no later than 28 days after the deprivation of liberty.

Use of isolation as punishment

Amnesty International is very concerned about the continued use of isolation as a punitive measure, safety measure or for medical reasons in migration detention. This affects hundreds of migrants each year, with potentially detrimental health effects.⁶⁶ People can be placed in an isolation cell for reasons such as aggression, resistance to deportation, but also punishment for disobeying orders given by detention center staff.⁶⁷ In the first half year of 2017, in 98 cases isolation was used as a (punitive) disciplinary measure, with the individuals concerned isolated for more than 22 hours a day without meaningful human contact.⁶⁸

No efforts are made in the draft Bill on immigration detention (see below) to abolish the use of isolation as a punitive measure. In conflict with the best interest of the child principle in Article 3 of the UN Convention on the Rights of the Child, the draft Bill allows coercive and seclusion measures for children above the age of twelve. An amendment against the placement of minors in isolation cells was rejected.⁶⁹

Developments in the framework regulating migration detention

Amnesty International is concerned about the strong resemblance between the detention regime in immigration detention centres and prisons. The current prison buildings and the penitentiary system used by the Netherlands to detain migrants do not comply with Article 18 of the European Returns Directive.⁷⁰ The draft Bill on immigration detention that was published in December 2013,⁷¹ makes no improvement to this. In particular Amnesty International is concerned about the introduction of a more restrictive regime under the new Bill, for migrants who are considered a risk to order and security.⁷² All newly arriving migrants are to be placed under this restrictive regime, for a maximum of one week. Considering immigration detention is intended to keep people available for expulsion, severe restriction and extensive cell confinement is not necessary and therefore disproportionate.⁷³

The Bill does not prescribe a vulnerability assessment to prevent the detention of vulnerable people. This means that The Netherlands continues to use the current norm of 'suitability for detention' (de-

⁶⁵ The Aliens Act 2000 gives the detainee the right to have his or her detention examined by the special 'Migration Chamber' at the administrative district courts. This is done following an application by the individual, which is then followed by a court procedure within 14 days. This is followed by another 7 days (maximum) for the court to decide on the appeal.

⁶⁶ Amnesty International The Netherlands, Médecins du Monde the Netherlands, LOS Foundation, *Isolatie in vreemdelingendetentie* [Isolation in Immigration Detention], March 2015, https://www.amnesty.nl/sites/default/files/public/rapport_isolatie_in_vreemdelingen_detentie19mrt.pdf

⁶⁷ Dienst Justitiele Inrichtingen (DJI), *Leidraad disciplinaire straffen & ordemaatregelen* [Guidelines on punitive and order measures], 2010. Available in Amnesty International The Netherlands, *Het Recht op Vrijheid – Vreemdelingendetentie: Het Ultimum Remedium-Beginsel* [The Right to Freedom – Immigration detention and the Ultimum Remedium principle], February 2018, https://www.amnesty.nl/content/uploads/2018/02/AMN_18_08_Rapport-het-recht-op-vrijheid_DEF_web.pdf?x73404

⁶⁸ Poonam, Bharatsingh, *Straf en ordemaatregelen binnen vreemdelingendetentie* [Punitive and order measures in immigration detention]. Master thesis for the department of forensic criminology of the University of Leiden, 30 November 2017. Written in cooperation with the Meldpunt Vreemdelingendetentie.

⁶⁹ Amendment by MP Van Ojik, *Parliamentary Papers 2017–2018*, 34 309 no. 22, 11 June 2018.

⁷⁰ The current prison buildings and the penitentiary system used by the Netherlands to detain migrants do not comply Article 18 of the European Returns Directive (2008/115/EC) or the standards of the Council of Europe's anti-torture committee (CPT/Inf/E (2002)1-Rev.2015, Art IV B.28; CPT/Inf/E (2002) 1 – Rev.2015)

⁷¹ In July 2018 this Bill was adopted by the House of Representatives and is currently pending in the Senate. TK 34 309 Regels met betrekking tot de terugkeer van vreemdelingen en vreemdelingenbewaring (Wet terugkeer en vreemdelingenbewaring) [Rules regarding the return of aliens and immigration detention [Law returns and immigration detention] https://www.eerstekamer.nl/wetsvoorstel/34309_wet_terugkeer_en

⁷² In the restrictive regime people can be locked up in a cell for maximum 17 hours a day, with only limited rights to receive visitors (two hours per week) and limited activities outside their cell (7.5 hours per week including sport: 2 x 45 minutes a week). The right to stay in the outside air is limited to one hour per day.

⁷³ See, for example, Council of Europe, *European Prison Rules*, 2006, <https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae>

tentiegeschiktheid), developed for the penal system. This norm only looks at the extent to which health care can be provided in detention and does not assess proportionality of the placement in detention.⁷⁴

5.2 AMNESTY INTERNATIONAL RECOMMENDS THAT THE STATE PARTY:

- Ensures that detention is only used as a last resort. Implements a comprehensive individual screening procedure to determine the necessity and proportionality of detention. Provides alternatives to detention. Takes additional measures to prevent the unnecessary detention of asylum-seekers at the international airport and the detention of unaccompanied children and young adults.
- Ensures guarantees are in place for a speedy, thorough judicial review of each decision to deprive an individual of his or her liberty on migration grounds.
- Clarifies which measures have been taken to reduce the average period for migration-related detention. Outlines which measures are, or will be taken, to prevent repeated detention.
- Develops a more open regime appropriate to the legal situation of irregular migrants and asylum-seekers. Ensures that immigration detention is not prison-like.
- Ensures by law or procedure that detention of vulnerable individuals, such as children, victims of torture and persons with serious physical or mental health problems, is prevented. Clarifies how the 'suitability for detention' standard is appropriate for immigration detention and how this standard relates to the proportionality of detention, as well provides sufficient safeguards to the prevention of unnecessary damage to the health of the individual caused by the detention. Guarantees that the distinction in terms of age between children over and under 12 in immigration detention is in line with the Convention on the Rights of the Child.
- Outlines which (legislative and/or policy) measures have been taken to prevent the use of isolation cells and solitary confinement. Takes additional measures to end the use of isolation and solitary confinement as a punitive measure in migration detention. In particular, takes measures to abolish the possibility to place children of 13 and older in isolation cells.

5.3 STRUCTURAL FLAWS IN THE DUTCH NATIONAL PREVENTIVE MECHANISM (NPM) (ART. 7)

Amnesty International is concerned about the failure of The Netherlands to take additional measures to ensure the effectiveness, pluralism and independence of the NPM.⁷⁵ This is required by article 18 (1) of the OPCAT and the guidelines on NPMs of the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT). In its 2016 report, the SPT made recommendations expressing concerns about the NPM.⁷⁶ In particular, the SPT has criticized the proximity of two central government inspectorates (the Inspectorate of Justice and Security (IJenV) and

⁷⁴ Amnesty International The Netherlands, Mediciens du Monde and LOS Foundation, *Geketende zorg [Healthcare in chains]*, May 2014, Appendix, p.51, https://www.amnesty.nl/content/uploads/2015/03/geketende_zorg_def.pdf?x74438

⁷⁵ Four bodies are designated as the NPM: the Inspectorate of Security and Justice (IVenJ), which also acts as coordinating body; the Health Care Inspectorate (IGZ); the Inspectorate for Youth Care (IJZ); and the Council for the Administration of Criminal Justice and Protection of Juveniles (RSJ).

⁷⁶ SPT, *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the National Preventive Mechanism of the Kingdom of The Netherlands*, 16 March 2016, CAT/OP/NLD/R.1, paras 36-38. In its response to the SPT, the Dutch government stated that the independence of the inspectorate was sufficiently safeguarded: 'Mensenrechten in Nederland: Reactie op het rapport van het Subcomité aangaande het Nederlandse NPM' ['Human Rights in The Netherlands: Reaction to the report of the Subcommittee regarding the Dutch NPM'], *Parliamentary Papers*, TK 33826, no. 18, 26 September 2016, p. 3.

the Inspectorate of Health and Youth (IGZenJ)) to their ministries, both in their establishment and their functioning. The CAT also has expressed concerns about the NPM's lack of resources and independence.⁷⁷

These concerns remain valid despite a ministerial regulation that came into force in 2016 that the government claims enhanced the IJenV's independence.⁷⁸ The regulation does not sufficiently address the inspectorate's lack of institutional and financial independence or its appearance of partiality. Amnesty International maintains that this continues to threaten the NPM's credibility as an autonomous and impartial body.

Moreover, in the absence of a separate legal basis for the NPM, the inspectorates continue to work on the basis of their own mandate, using their own monitoring frameworks⁷⁹ and rules of procedure. They lack separate NPM functions which can be performed autonomously from their regular functions as well as separate budgetary and human resources for such functions. In its monitoring work, the IJenV, which functions as the coordinator of the NPM, has insufficiently elaborated on how human rights standards, including recommendations of relevant international human rights bodies such as the CAT or the CPT, have been used to assess whether detention conditions amount to a violation of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.

Disconcerted by the government's non-response to such concerns, the National Ombudsman decided to step down from its observer role in 2014 and the Council for the Administration of Criminal Justice and Protection of Juveniles (RSJ) also announced that it ceased its participation in the NPM in 2016.⁸⁰ Amnesty International believes that the remaining constituent organizations lack the human rights expertise and experience to effectively assess whether government law, conduct and detention conditions comply with international human rights law. Amnesty International is unaware of any structural engagement with or meaningful consultation of civil society organizations and institutions with a human rights mandate. In the absence of institutional change, it is unlikely that the Dutch NPM is able to effectively prevent torture and other ill-treatment in places of detention.

5.4 AMNESTY INTERNATIONAL RECOMMENDS THAT THE STATE PARTY:

- Takes additional steps to ensure the complete independence and effective functioning of the NPM, including by increasing its visibility as a separate, autonomous entity that actively involves civil society actors and other institutions in its work, to guarantee its full compliance with OPCAT and the NPM Guidelines, with due consideration to the Principles relating to the Status of National Institutions ("the Paris Principles").
- Increases the human rights expertise of the NPM network to ensure that it adequately and proactively reviews the compliance of Dutch law, policy and practice with the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol.

⁷⁷ CAT (2019), p. 6.

⁷⁸ *Regulation for determination of instructions on government inspections [Regeling vaststelling Aanwijzingen inzake de rijksinspecties]*, 30 September 2015, no. 3151041, <http://wetten.overheid.nl/BWBR0037073/2016-01-01>

⁷⁹ The monitoring framework of the Inspectorate of Justice and Security (IJ&V) distinguishes between so-called hard law and soft law and explains that the Inspectorate only considers hard law to be binding and determining its decisions.

⁸⁰ See *Brief van waarnemend Ombudsman [Letter of observing Ombudsman]*, no. 2014 0273, 24 July 2014. In November 2016 the RSJ sent a letter to the then state secretary of Security and Justice in which it announced that it terminated NPM-activities. The RSJ disagreed with the Dutch government's response to the SPT's report that all NPM bodies could continue to do business as usual to fulfil their NPM duties, arguing instead that the NPM network requires more than the 'sum of the parts', Parliamentary Papers, TK 33826 no. 18, 26 September 2016.

6. VIOLENCE AGAINST WOMEN (ARTS. 2, 3, 7, 26)

The Netherlands belongs to the vast majority of European countries that still has a legal definition of rape based on force, threat of force or coercion and not on lack of consent.⁸¹ The provision of rape falls under offences against “public morals” in the Dutch Criminal Code.⁸² It requires evidence of violence or threats of violence, coercion or other acts of force.⁸³ Similarly, sexual assault constitutes a criminal offence only in case of compulsion.⁸⁴ As a consequence, the current criminal provisions on sexual violence in the Dutch Criminal Code do not meet international human rights standards, in particular the requirements of article 36 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter: Istanbul Convention).

According to The Netherlands Human Rights Institute⁸⁵, the evidentiary requirement of violence or threats of violence and coercion for investigating, prosecuting and convicting acts of sexual violence, including rape, is too high to offer meaningful protection to victims.

The government is currently revising the Criminal Code, including the chapter on sexual offences. In February 2019, the Minister of Justice and Security said he recognized the protection gap between non-consensual sex and sexual acts committed with coercion and, contrary to an earlier statement⁸⁶, he indicated to be in favor of an amendment of the law to criminalize situations when “facts, circumstances or behavior of the other person are such that the perpetrator knew or should have known that there was no consent”.⁸⁷ On 22 May 2019, the Minister sent a policy letter to Parliament in which he announced his plans to introduce new criminal offences of “sexual acts without consent”. Instead of amending the forced-based definition of rape, a new offence would criminalize penetration without consent, carrying a lower maximum penalty of six years (as opposed to 12 years for rape).⁸⁸

Amnesty International welcomes the government’s recognition that there is a need to criminalize sexual acts without consent but remains concerned that, if this proposal is accepted, the definition of rape will continue to be based on coercion and force. Amnesty International also believes that it is highly problematic to classify sex without consent not as rape but as a lesser offence, damaging access to justice for survivors. The organization calls on the government to amend the Penal Code with a view to place the lack of consent at the center of the definition of rape. This should be accompanied with

⁸¹ See Amnesty International, *Right to be Free from Rape. Overview of Legislation and State of Play in Europe and International Human Rights Standards* (hereinafter: *Right to be Free from Rape*), 19 January 2018, <https://www.amnesty.org/en/documents/eur01/9452/2018/en/>

⁸² Criminal Code (The Netherlands), Act of 3 March 1881, Part XIV, available at: www.legislationline.org/documents/section/criminal-codes.

⁸³ ‘Any person who by an act of violence or any other act or by threat of violence or threat of any other act compels a person to submit to acts comprising or including sexual penetration of the body shall be guilty of rape and shall be liable to a term of imprisonment not exceeding twelve years or a fine of the fifth category.’ Criminal Code, Art. 242.

⁸⁴ ‘Any person who by an act of violence or any other act or threat of any other act compels a person to commit or tolerate sexual acts shall be guilty of factual assault of the integrity of honor and shall be liable to a term of imprisonment not exceeding eight years or a fine of the fifth category’. Criminal Code, Art. 246.

⁸⁵ Especially for victims in vulnerable situations (e.g. unequal power relations) or when the sexual assault causes a state of tonic immobility of the victim prosecution is likely to be unsuccessful. Netherlands Human Rights Institute, *Written Contribution to the Group of Experts on Action against Violence against Women and Domestic Violence*, 6 November 2018, <https://publicaties.mensenrechten.nl/file/7c4685f9-6600-4445-bdc5-54d4876eb631.pdf>

⁸⁶ Telegraaf, ‘Cabinet: no duty of consent before seks’, 19 juli 2018, <https://www.telegraaf.nl/nieuws/2324327/kabinet-geen-toestemmingsplicht-voor-seks>

⁸⁷ NOS, ‘Grapperhaus wants to address the level of proof for non-consensual sex’, 20 February 2019, <https://nos.nl/artikel/2272771-grapperhaus-wil-bewijslast-onvrijwillige-seks-aanpakken.html>

⁸⁸ ‘Nieuwe strafbaarstellingen van seks tegen de wil en seksuele intimidatie’ [‘new penalizations of sex against the free will and sexual intimidation’], policy letter of the Minister of Justice and Security Grapperhaus to the Parliament, 22 May 2019, TK 2574955.

additional steps, including additional training and awareness raising of police and first responders (for example, General Practitioners, nurses and other medical professionals) and introducing comprehensive sexual education, including on consent, as part of the school curriculum.

6.1 AMNESTY INTERNATIONAL RECOMMENDS THAT THE STATE PARTY:

- Brings the legal definition of rape and other sexual violence offences in line with international human rights standards, such as the Istanbul Convention. Amends the definitions of rape and other sexual violence offences in legislation so that they are based on the absence of consent;
- Ensures that rape and other forms of sexual violence are defined as crimes against bodily integrity and sexual autonomy as opposed to crimes against public morals.

7. ETHNIC PROFILING (ARTS. 2, 20 AND 26)

Since 2012 various academic studies into proactive policing powers, the police use of discretion and decision making in day to day policing are giving proof of ethnic profiling by the Dutch police and the Royal Netherlands Marechaussee.⁸⁹ These studies show that ethnic profiling is driven by broad and vaguely articulated policing powers, weak accountability mechanisms for stop-and-search operations (in particular those not leading to a fine or arrest), and (unconscious) bias in policies demonstrated by the behavior of law enforcement officers.

Police forces do not systematically monitor and record stop-and-search operations, therefore little is known about the size and scale of ethnic profiling and the number of people impacted. However, a government commissioned study, on proactive policing concluded that ethnic minorities are disproportionately subjected to proactive investigatory stops and 40% of such stops could not be objectively justified.⁹⁰ Moreover, comprehensive survey data published in January 2014 by the Netherlands Institute of Social Research indicate that significant numbers of people are directly affected by discriminatory stop-and-search operations. One third of Turkish and Moroccan Dutch, 25% of the Surinamese Dutch and 20% of people with roots in the Dutch Caribbean who had any contact with the police in the previous year reported feeling discriminated against.⁹¹ The survey data on discrimination collected and analyzed by the EU Fundamental Rights Agency (FRA), published in 2017, show very similarly worrying outcomes.⁹² A related FRA survey also shows that Dutch Muslims have – compared to Muslims in other European countries – the lowest level of trust in the police.⁹³ Data from the Dutch Central Bureau of Statistics show that ethnic minorities have lower levels of trust in the police compared to the white majority population, while there is no difference between majority and minority groups in the levels of trust in other state organs such as the judiciary and the army.⁹⁴

In response to public criticism, the Ministry of Justice and Security and the police have developed measures to prevent ethnic profiling by increasing diversity within the police, conducting training and awareness raising training for police officers, improving police-community relations, and helping individuals to file complaints against the police.⁹⁵ At the end of 2017 the police introduced a professional code (Handelingskader) to promote the fair and effective use of their stop-and-search

⁸⁹ Key academic studies on ethnic profiling include: Svensson et al., *Proactieve handhaven en gelijk behandelen*, 2012; Cankaya, *De controle van marsmannetjes en ander schorriemorrie*, 2012; Van der Leun et al., *Etnisch profileren in Den Haag? Een verkennend onderzoek naar beslissingen en opvattingen op straat*, 2014; Van der Woude et al., *Beslissen in grensgebieden, een onderzoek naar het Mobiel Toezicht Veiligheid zoals uitgevoerd door de Koninklijke Marechaussee*, 2016; Landman et al., *Boeven vangen: Een onderzoek naar proactief politieoptreden*, 2016; Amnesty International The Netherlands, *Proactief politiewerk een risico voor mensenrechten: etnisch profileren onderkennen en aanpakken*, Summary in English: *Stop and Search Powers Pose a Risk to Human Rights*: https://www.amnesty.nl/content/uploads/2016/11/amnesty_stopandsearchpowersposearisktohumanrights.pdf?x74438

⁹⁰ Landman et al., *Boeven vangen: een onderzoek naar proactief politieoptreden*, 2016. <https://www.rijksoverheid.nl/documenten/rapporten/2016/10/04/tk-bijlage-boeven-vangen>

⁹¹ Andriessen, et. al, *Ervaren discriminatie in Nederland*, 2014, https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Ervaren_discriminatie_in_Nederland

⁹² EU Fundamental Rights Agency, *Second European Union Minorities and Discrimination Survey*, 2017, <https://fra.europa.eu/en/publication/2017/eumidis-ii-main-results>

⁹³ EU Fundamental Rights Agency, *Second European Union Minorities and Discrimination Survey Muslims – selected findings*, 2017, <https://fra.europa.eu/en/publication/2017/second-european-union-minorities-and-discrimination-survey-eu-midis-ii-muslims>

⁹⁴ Centraal Bureau voor de Statistiek (CBS), *Meer vertrouwen in elkaar en in instituties [More trust in each other and in institutions]*, May 2018, <https://www.cbs.nl/nl-nl/nieuws/2018/22/meer-vertrouwen-in-elkaar-en-instituties>; CBS data set for 2019: <https://opendata.cbs.nl/statline/#/CBS/nl/dataset/82378NED/table?ts=1555603015770>

⁹⁵ Minister of Justice and Security, 'Policy Letter', 3 October 2016, *Parliamentary Papers* 2016/17, 30950, no. 105; Minister of Justice and Security, 'Policy Letter', 8 July 2014, *Parliamentary Papers* II, 2013/14, 29 628, no. 463.

powers.⁹⁶ Amnesty International welcomes these steps. However, the impact of the aforementioned interventions remains unclear, as there is no systematic monitoring and recording of how these stop-and-search powers are executed in practice and whether or not the interventions are indeed effective to combat ethnic profiling.⁹⁷ Measures taken have not been introduced in all teams and are focusing on patrol officers and not on managers and policy and other decision-making levels. Also, obvious interventions such as systematic monitoring and evaluation of stop-and-search powers have not been implemented or even seriously piloted.

7.1 AMNESTY INTERNATIONAL RECOMMENDS THAT THE STATE PARTY:

- Turns the existing professional code (Handelingskader) into a binding document and puts the requirement on the police to systematically record and monitor the use of all stop-and-search-powers.

⁹⁶ The Dutch Police, Handelingskader Proactief Controleren [Operating Framework Proactive Controls], December 2017, <https://www.politie.nl/nieuws/2017/december/11/00-handelingskader-helpt-bij-proactieve-controles.html>

⁹⁷ Although the police in Amsterdam is considered to be ahead of other regional units in tackling ethnic profiling an evaluation report of the policy approach and efforts contains serious critique. Kuppens et. al, *De politieaanpak van etnisch profileren in Amsterdam* [The Police approach of ethnic profiling in Amsterdam], Bekegroep, March 2019, <https://bureaubeke.nl/publicaties/de-politieaanpak-van-etnisch-profileren-in-amsterdam/>

8. PEACEFUL ASSEMBLY (ART. 21)

A government commissioned evaluation of the Public Assemblies Act (Wet openbare manifestaties) concluded that some legal provisions in the Act are inconsistent with international human rights standards.⁹⁸ The Act contains for example an article that allows mayors to end and prohibit an assembly when it has not been announced according to required procedures.⁹⁹ Nevertheless, the government has stated that it does not see a reason to amend the Act.¹⁰⁰

Following growing public concern around the arrest of peaceful protesters and the abuse of emergency powers to regulate peaceful protest, a handbook on peaceful protest was drafted in 2018 and was disseminated by the Ministry of the Interior. Also, various seminars for police and mayors were organized. These efforts however do not seem to be enough. For example, local authorities – mayors and police – did not manage to effectively facilitate peaceful protest against Black Pete¹⁰¹ on 18 November 2018 in the cities of Zwolle, Nijmegen, Eindhoven, Den Haag, Den Helder and Groningen. They prohibited peaceful protests against the arrival ceremonies of the Dutch Santa Claus following threats of pro-Black Pete groupings. They subjected other protests to far-reaching restrictions regarding the location. In several cities hostile audiences intimidated and used violence against peaceful protesters.¹⁰²

The use of photo and video surveillance and the resort to ID-checks can have a chilling effect on demonstrators. Police have demanded proof of identity from people joining peaceful protests on many occasions in recent years. During an Amnesty International protest in The Hague on October 2016, for instance, the police checked the ID of a peaceful protester.¹⁰³ His personal data were subsequently recorded in a police database.

8.1 AMNESTY INTERNATIONAL RECOMMENDS THAT THE STATE PARTY:

- Amends the Public Assemblies Act by removing the prohibition on demonstrations due to a lack of prior notification.
- Ensures that the new handbook on the right to peaceful assembly is widely disseminated to mayors and police throughout the country, the rules are observed, and the guiding principles are put in practice.

⁹⁸ Roorda, B. et al., *Evaluatie Wet openbare manifestaties [Evaluation Public Assemblies Act]*, 3 July 2015, https://www.rug.nl/research/portal/files/26756008/B._Roorda_J.G._Brouwer_A.E._Schilder_Evaluatie_Wet_openbare_manifestaties.pdf!null

⁹⁹ Public Assemblies Act (Wet openbare manifestaties), article 5.2.a and b.: <https://wetten.overheid.nl/BWBR0004318/2010-10-10>

¹⁰⁰ Minister of the Interior and Kingdom Relations, 'Policy Letter', 17 January 2017, Tweede Kamer, vergaderjaar 2016–2017, 34 324, nr. 2.

¹⁰¹ The figure of Black Pete is part of the Dutch Santa Clause tradition and increasingly considered a racist stereotype.

¹⁰² 'Tijdgebrek, argwaan, hooligans en de knieval voor geweld' ['Lack of time, suspicion, hooligans and a capitulation to the threat of violence'], NRC, 22 January 2019, <https://www.nrc.nl/nieuws/2019/01/22/tijdgebrek-argwaan-hooligans-en-de-knieval-voor-geweld-a3651314>

¹⁰³ Amnesty Netherlands, 'Demonstrant belaagd door aanhangers Chinese premier Li Keqiang' ['Protester intimidated by supporters Chinese premier Li Keqiang'], 16 October 2018, <https://www.amnesty.nl/actueel/demonstrant-protest-den-haag-belaagd-aanhangers-chinese-premier-li-keqiang>

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THE NETHERLANDS

SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

126TH SESSION, 1-26 July 2019

Amnesty International submits this briefing to the United Nations (UN) Human Rights Committee ahead of its examination of The Netherlands' fifth periodic report at its 126th Session in July 2019. It provides an overview of Amnesty International's main concerns under the International Covenant on Civil and Political Rights, based on the organization's most recent research. These include the use of force by the Dutch police, the Dutch special high-security detention units that hold people suspected and convicted of terrorism offences, administrative counter-terrorism measures, government surveillance and intelligence sharing, refugee rights in the Kingdom of The Netherlands and increased risks of refoulement, immigration detention, structural flaws in the Dutch National Preventive Mechanism, violence against women, ethnic profiling and freedom of peaceful assembly.

