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To: "'registry@ohchr.org'" <registry@ohchr.org>
Date: 20/09/2016 16:19
Subject: FW: OHCHR-office :

Dear Ms Pouvez,

In response to your letter of 25 July in which you make a request for input concerning best practices and major challenges in addressing the negative effects of terrorism on the enjoyment of all human rights and fundamental freedoms, I hereby inform you of the following:

• ***Annual Rapport NIHR 2015***
The Netherlands Institute for Human Rights extensively addresses the subject of security in relation to human rights in its annual status report on human rights in the Netherlands in 2015:
While the Netherlands have not themselves recently been struck by acts of terror, events in other countries do impact the country. The situation requires a government that acts decisively. But it remains important that human rights are still guaranteed. Many measures taken by the government arise from agreements concluded on the European and international levels. This chapter provides a short overview thereof. Many of the agreements focus on the necessity of acting decisively against violent extremism, as well as to other measures that may help prevent extremism.

Various measures limit individual freedoms. This is the case, for instance, when a restraining order is imposed on someone, if a person's Dutch nationality is withdrawn, if a person is not allowed to speak in public in connection with previous utterances and when a ban on demonstration applies. Implementation of such measures is allowable only if a certain requirements have been met.

It has become almost reflexive: the occurrence of a serious events has the government adopt a new piece of legislation granting more powers to the authorities. One cause for concern is the fact that, in multiple cases, a decision was made to implement administrative measures featuring limited legal protection. The imposition of an administrative measure means that the person involved can only object to it once the decision has already been made, as no obligation exists to have the court assess the necessity of imposing the measure beforehand. Another problem is that various legislative bills grant extensive powers to governmental agencies, the limits of which are couched in vague terms, leaving a lot of room for interpretation. This carries the risk of arbitrariness. For a number of these legislative bills, no convincing evidence has been presented showing that the restriction of civil rights involved is really necessary or that it will have the intended effect. The chapter discusses a number of legislative bills and other measures, including the possibility of imposing measures on a family that is at risk of becoming radicalised.

The Institute considers the role played by human rights in the drive towards a secure society. The main conclusion is that the two fit well together: protecting national security not only is possible while enforcing compliance with human rights, but is even impossible without it. The Institute argues for a re-orientation of the concept of security. The concept of security not only refers to the 'physical' security of people, to protecting citizens' lives and possessions, but it also includes a spiritual freedom component, the room to be yourself. Politicians often refer to acts of terror as 'attacks on our free way of life'. If that is true, in countering terrorism, the government should also protect the values under the rule of law and the fundamental rights that safeguard spiritual freedom and self-determination. This prevents security and individual freedom from becoming opposites.

The focus in the fight against violent extremism is sometimes strongly on the radicalisation of religious views. This focus on religion may result in other factors not being given enough attention. Radicalisation to the point of committing acts of terror is usually a process depending on far more factors than just religious views. A policy aimed at countering religiously inspired violence should give centre stage to respect for the people subscribing to certain religious views. This does not mean that no criticism can be levelled at these religious views; what it does mean is that one

should respect and recognise the human dignity of people subscribing to these views. The state governed by the rule of law should function equally for everyone. An approach of having a policy in place aimed specifically at adherents of a certain religion and providing fewer constitutional safeguards to this group may be counterproductive. Stigmatisation may lead to further polarisation in society, to the point that certain completely harmless religiously inspired behaviours are marked as being expressions of radicalisation. If the 'blame' for the threat against public security is placed too strongly on one particular group in society, like persons with a migrant background or adherents of Islam, this gives rise to certain risks. In particular, it presents the risk of that group becoming increasingly distrustful of the rest of society, which actually ferments radicalisation. Hence, promotion of security is essential in a policy aimed at tackling discrimination and exclusion.

Should fundamental freedoms be sacrificed in exchange for nothing but the veneer of security, and should the promotion of security involve social polarisation and division or involve government interventions on uncertain grounds and in response to harmless behaviour, both human rights and the democratic state based on the rule of law lose out.

Recommendations

- Only adopt new antiterrorism laws that have a limited duration, for instance by including a sunset provision.
- When proposing new antiterrorism laws and measures, always consider whether its implementation is truly necessary and whether existing legislation does not already provide sufficient powers.
- When proposing antiterrorism laws deeply affecting private life or the freedom of movement, always include a provision that prior judicial review is required.
- Ensure that all antiterrorism measures are based on a concrete decision. All citizens have to be familiar with this decision, allowing them to defend against its imposition by recourse to law.

• □ □ □ □□***Advices NIHR on Draft legislation***

At the moment two bills on counter terrorism are pending before the Senate. The NIHR has submitted critical comments on these bills to parliament (see attached).

- The Legislative proposal to allow the withdrawal of Dutch citizenship from jihadists fighting alongside a terrorist organisation abroad without there having been any prior criminal conviction.Advice of 24-02-2015,https://mensenrechten.nl/publicaties/detail/35355)-
- The legislative proposal for a *temporary act for administrative powers* to reduce the risks and to prevent serious crimes from being committed by terrorist fighters. This could include temporary measures such as a periodic duty to report, contact bans, cooperation with relocation, et cetera to prevent further radicalization of the returnee, to prevent him from spreading his radical ideas and to prevent recruitment. Advice of 28-04-2015:https://mensenrechten.nl/publicaties/detail/35614

Further, the Intelligence and Security Services Act 2002 is currently being revised.The NIHR has published a critical advisory opinion on the draft law on security services. The Council of State is now preparing its advice. After the advice of the Council of State has been received, the legislative proposal will be sent to parliament.

The most important proposal in this draft bill is the extension of the power of intelligence and security services to use untargeted interception of telecommunications.

In short, the main concerns of the NIHR are:

- The necessity of the extension of interception powers has been insufficiently demonstrated;
- No sufficient and clear legal basis exists: the target criterion of ‘in the interest of additional security’ is insufficiently clear;
- The bill provides for the prior authorisation of interception and other surveillance measures by a cabinet minister instead of authorisation by an independent body or judge;
- The supervisory body is not granted the power to take binding decisions on the legality and proportionality of ongoing surveillance and interception operations.

If there are any further questions, please do not hesitate to contact me.

Yours sincerely,

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NETHERLANDS INSTITUTE FOR HUMAN RIGHTS

RECOMMENDATIONS
Draft legislative proposal on the amendment of the Netherlands Nationality Act to allow for the withdrawal of Dutch nationality in the interests of national security, February 2015

SUMMARY
By withdrawing Dutch nationality and automatically linking this to the designation as an undesirable alien the authorities deprive the persons involved from their access to a number of essential rights, including the right to freedom of movement and the active and passive right to vote.

The necessity of the proposed expansion of powers for the withdrawal of Dutch nationality embodied in the draft legislative proposal has not been demonstrated to an adequate extent, and there are serious doubts about the practicability and about the suitability of this measure for the objective it is designed to achieve.

The explanation of the criterion 'affiliation with a Jihad terrorist organisation' in the draft legislative proposal and the Explanatory Memorandum does not form a sufficiently clear and precise legal basis for the withdrawal of Dutch nationality.

The draft legislative proposal does not offer adequate legal protection. The court does not carry out a priori review of the withdrawal of Dutch nationality and the envisaged system of legal protection does not offer the person involved any truly effective legal remedy, as no provisions have been made for the effective participation of the person involved in administrative law proceedings.

The legislative proposal has a discriminatory effect. It results in a distinction between Dutch citizens who have or do not have dual nationality, with risks for the stigmatisation of groups of the population with an immigrant background, without providing sufficiently weighty reasons for making this distinction.

NETHERLANDS INSTITUTE FOR HUMAN RIGHTS

RECOMMENDATIONS
Draft legislative proposal on the *tijdelijke wet bestuursrechtelijke maatregelen terrorismebestrijding* ('Temporary administrative (counterterrorism) measures Act') to the Minister of Security and Justice and the Minister of the Interior and Kingdom Relations in connection with the Internet consultations from 17 March 2015 to 29 April 2015, 28 April 2015

SUMMARY
The Institute recognises and endorses the need to protect the Dutch democracy, rule of law and population from terrorist violence. Implementing measures to improve the protection of the population from terrorist attacks is logical in the current societal conditions. Nevertheless, the Institute establishes that all the legislative proposals formulated to date in connection with the Integral Approach to Jihadism action programme, of which this draft legislative proposal is one, primarily create powers to implement measures that impair specific human rights. This draft legislative proposal relates to measures that will affect citizens in areas including their right to respect for their private and family life and their right to freedom of movement. Moreover, the impairment of the rights to freedom of thought and to freedom of expression looms in the background.

Infringements on the exercise of these rights are justifiable solely when they are founded on a sufficiently clear and precise legal basis, there is a compelling societal need to implement the measures, the measures are in proportion to the objective they are designed to achieve and the measures are accompanied by an adequate form of legal protection.

The draft legislative proposal's criterion ‘when that person can be connected to terrorist activities or the support of such activities, based on the behaviour of that person’ does not form a sufficiently clear and precise legal basis for the justification of the limitation of human rights.

The Institute has doubts about the decision to adopt administrative law measures rather than criminal law provisions. The Institute recommends an a priori review by the court.

The need for the draft legislative proposal has not been demonstrated to an adequate extent. It should be noted that criminal law already includes a number of provisions designed to prevent terrorism, and that the added value of the draft legislative proposal's supplement to these provisions is not clear.

The prohibition on leaving the country infringes the right to freedom of movement. Moreover, this prohibition on leaving the country can infringe the right of persons of non-Dutch nationality to travel to the country of which they are a subject and, when members of the person's family live in that country, their right to a family life.
In conclusion, the Institute draws attention to the potentially stigmatising effects of the legislative proposal on groups of migrants with Islamic religious beliefs

NETHERLANDS INSTITUTE FOR HUMAN RIGHTS

RECOMMENDATIONS AND PRESS RELEASE
Draft bill of the 20.. Intelligence and Security Services Act to the Prime Minister, the Minister of the Interior and Kingdom Relations, the Minister of Security and Justice and the Minister of Defence in response to the Internet consultation held from 2 July 2015 through 1 August 2015, August 2015

SUMMARY
The most important change to the powers of the intelligence and security services arising from the draft bill is the extension of the power of untargeted interception of telecommunications and other means of data transfer. This entails the intercepting of large amounts of information from an unlimited group of people not suspected of any offence. This may heavily impact the privacy of all Dutch citizens. The proposed provisions on the supervision performed by the security services also affect the right to have effective recourse to remedies.

Violations to the right to privacy are justified only if a clear and precise legal basis exists. This legal basis is also to contain guarantees against misuse. In addition, the necessity and proportionality of the proposed extension of powers are to be demonstrated.
The Institute is of the opinion that the draft bill in its current incarnation has shortcomings as concerns the parts detailed in the below and in this connection makes the following recommendations.

- The necessity
  The necessity of extending the powers of the services has been insufficiently demonstrated, also as various international studies have shown that there are serious doubts to the effectiveness of the large-scale monitoring of telecommunications from a perspective of national security.
  The Institute recommends that the necessity, and in particularly the effectiveness of the proposed extension of powers of interception, be further substantiated.

- Legal basis/foreseeability
  No sufficiently clear and precise legal basis exists. The target criterion of 'in the interests of national security' is insufficiently clear. In addition, the bill does not list the offences that may allow for using the power of interception, nor the categories of people the power of interception may be used against.
  The Institute therefore recommends that the nature of the (imminent) offence that may allow for using the power of interception of telecommunications be detailed and that a description is added of the categories of people the power of interception may be used against.

  The Institute finds that the powers to be created are discussed in highly abstract terms in both the wording of the bill and its explanatory memorandum. This phrasing results in the scope of the practical impact the powers have on privacy not being foreseeable. The technical data exchange facilities currently develop at such a tremendously rapid pace that the legislator cannot, at this point in time, know what forms of data transfer may be or become eligible for interception on the basis of the wording of the bill. This raises questions on the foreseeability of the legal

provisions, effectively rendering a test of the necessity and proportionality of the provision of powers impossible.
The Institute recommends that the nature and the essence of the special powers granted to the services be clarified in at least the explanatory memorandum, using a phrasing that can be understood by those less versed in the jargon of the services as well, and with a view to the means of exchanging data presently in development, so as to have the (potential) scope and impact be more readily comprehensible.

- Prior consent
  The bill provides for the prior consent to be given by a minister instead of by an independent organisation. However, the substance of the bill concerns large-scale data interception operations that may affect large groups of people. The Institute therefore is of the opinion that advance review by the court or an independent organisation would be preferable. Such independent review would provide a better guarantee that the various interests and the decision on the necessity, subsidiarity and proportionality of such an operation are properly considered.
  The Institute recommends that it be laid down by law that each use of the special powers of the services, in particular the targeted and untargeted interception of telecommunications data, be approved in advance by an independent body.

- Lawfulness review by CTIVD
  The minister is not, under the draft bill, obliged to follow the opinions of the Review Committee for the Intelligence and Security Services (CTIVD), the supervisory body for the services. Due to the covert nature of the actions performed by the services, the Institute deems it important that the CTIVD's opinions on the lawfulness of the actions by the services (independently of complaints) are given legally binding force. The Institute considers it incomprehensible that the draft bill and the explanatory memorandum in this connection ignore both the recent developments in ECHR case law and the broader international developments expressed in, *inter alia*, the recommendations and reports of UN and Council of Europe bodies, which are united in their consistent emphasis on the necessity of there being an independent supervisory body entitled to issue binding opinions on the lawfulness of an act outside of complaints procedures as well.
  The Institute recommends that the opinions on lawfulness issued by the CTIVD be made legally binding.

- Position of persons entitled to privilege
  The draft bill lacks a special provision on the use of special powers against persons entitled to privilege, like lawyers and doctors. This is a shortcoming, as the substance of the bill touches on special, vulnerable and dependent situations involving, in addition to the right to privacy, the right to accessible healthcare and the right to confidential communication with a lawyer.
  The necessity to have a guarantee in place ensuring the position of persons entitled to privilege reinforces the Institute's recommendation, provided in the above, to have the services only be allowed to intercept the communications of persons entitled to privilege following permission thereto by the court or by another independent body (as has already been provided in the draft bill with respect to journalists).

PRESS RELEASE - 1 SEPTEMBER 2015

Extension powers of security services out of balance

Should the new Intelligence and Security Services Act be adopted, the government would come to hold much more power over all information in the Netherlands. The bill allows for the untargeted interception of telecommunications by the Dutch security services. This means that the government would be able to listen in on all Dutch citizens. A strong violation of privacy, the Netherlands Institute for Human Rights argues. To make matters worse, the sole body supervising the application of this Act, the CTIVD, is not granted the power to force that same government to halt such interception. Human rights provide guarantees protecting us from violations of our privacy. And exactly those guarantees are lacking in the bill. The Institute therefore calls on the government to as yet embed these guarantees in the bill.

The most important point of criticism directed at the bill is that the security services are entitled to use these powers without requiring the permission of an independent body, like the court. The services only require permission of the minister involved. Sweden, Germany and Belgium do require the services to request permission from an independent body. No reason was provided why this would be impossible in the Netherlands.

Furthermore, the supervisory body, the CTIVD, is not granted enough power. This body is to review whether the actions by the services are lawful. But the minister is not obliged to comply with the CTIVD's opinion. This runs counter to the recommendations of the Dessens Committee, which, at the request of the government, reviewed the legislation currently in force and expressly recommended that the CTIVD's opinion be binding.

Why is the untargeted interception of information a problem?
The bill allows for the interception of large amounts of information of an unlimited group of people not suspected of any offence. This includes practices like tapping e-mails and social media messages. But the bill even goes beyond this. The bill would also allow the interception of all other sorts of digital data traffic. Should this bill enter into force, the security services would also be allowed to tap these new forms of data traffic. The developments in this field proceed at such a rapid pace that the scope and impact on privacy cannot be foreseen.

In brief: the security services are granted more powers, but there is no corresponding increase in supervision. Due to the enormous impact these new powers may have on the privacy of all Dutch citizens, this is unacceptable from a human rights position. Confidence and trust in governments and security services have globally been under pressure ever since the revelations by Edward Snowden showed that intelligence services exceeded their powers. The Dutch security services do not have a completely unblemished record in this connection, either. The bill does not improve public confidence in the performance of the security services. Rather, it only strengthens the mistrust already felt.