

Dutch NGOs contribution pertaining to the Seventh Periodic Report by the Netherlands to the UN Committee against Torture

This report is submitted on behalf of the following NGOs:

- Dutch section of the International Commission of Jurists (NJCM)
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- Liga voor de Rechten van de Mens
- Meldpunt Vreemdelingendetentie
- Privacy First
- Redress
- Stichting Landelijk Ongedocumenteerden Steunpunt (Stichting LOS)
- Tiye International
- Vereniging Asieladvocaten & Juristen Nederland (VAJN)

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INTRODUCTION

This document contains comments, concerns, and questions pertaining to the Seventh Periodic Report by the Kingdom of the Netherlands to the UN Committee against Torture (hereafter: the Committee). It was created with input and effort of a variety of organizations (hereafter: the NGOs).

The NGOs aim to provide the Committee with information for an effective dialogue with the Dutch government. Since the NGOs are all based in the European part of the Kingdom, this document exclusively deals with the situation in this part of the Kingdom.

The NGOs are grateful to the members of the Committee for the opportunity to contribute to the Committee's work and to voice our concerns.

Article 2

(Child) Trafficking

There is an issue with the registration of victims of trafficking. Despite there being a proper system for registration there is always an unknown amount of victims who remain under the radar. It has been estimated however that 6.250 people were trafficked per year in the period between 2010 and 2016.¹ It is estimated that 80% of the victims is female and 20% of the victims is male. According to research by the Dutch Ministry of Health, Welfare and Sport in 2017, the actual percentage of male victims could be much higher, as trafficked men live under the radar more often, since professionals are more alert in case of women.²

In relation to the total amount of victims of trafficking, it appears that children are nine times more likely to be victimized than adults.³ The Dutch National Rapporteur on Trafficking and Sexual Violence against Children (National Rapporteur) estimates that in the years 2014 and 2015 combined, 2.014 children were trafficked.⁴ In their annual report on Children's rights in the Netherlands, Unicef the Netherlands and Defence for Children International – the Netherlands stated that there were 283 children who were registered as victims of trafficking in 2014 and 292 who were registered in 2015.⁵ This would mean that a large amount of child victims is living under the radar. A reason for this is the fear the victims have for the traffickers and their network.⁶

This brings us to the second issue that we want to address: the lack of awareness of (child) trafficking within the general public, but also professionals. Examples hereof can be found in Dutch case law. For example, there was a recent case before The Hague Court of Appeal, concerning a young girl that was separated from her family in Morocco and brought to the Netherlands for the sole purpose of performing household chores and caring for the disabled daughter of her exploiters.⁷ Even though the suspicious relationship between the girl and the family had been noticed by a hair dresser, the family's doctor and fellow residents of the building she lived in, it took years before her case got discovered.⁸

The National Rapporteur noted in her report on 2012-2016 that most Dutch municipalities do not know whether trafficking is a problem in their region.⁹ Furthermore, only 27,4% of the medical professionals indicated to be familiar with signals of trafficking, while 77,8% was never trained in the recognition hereof. In addition, one in five medical professionals indicated that they did not contact a third party, when they suspected there was trafficking in play.¹⁰

¹ Nationaal rapporteur mensenhandel en geweld tegen kinderen, *Slachtoffermonitor mensenhandel 2012-2016*, The Hague: Nationaal rapporteur 2017, par. 2.2.1.

² *Kamerstukken II 2017/18*, no.1185 (answers by the Dutch government to questions from Parliament).

³ Nationaal rapporteur mensenhandel en geweld tegen kinderen, *Slachtoffermonitor mensenhandel 2012-2016*, The Hague: Nationaal rapporteur 2017, par. 2.2.1.

⁴ Nationaal rapporteur 2017 (*Slachtoffermonitor*), par. 2.2.2.

⁵ Unicef the Netherlands and Defence for Children International – the Netherlands, *Jaarbericht Kinderrechten 2018*, June 2018, p. 26.

⁶ Defence for Children International – the Netherlands, *Angst grootste drempel bij het doen van aangifte mensenhandel*, 13 June 2018. (*available at:* defenceforchildren.nl/actueel/nieuws/seksuele-uitbuiting/2018/angst-grootste-drempel-bij-het-doen-van-aangifte-mensenhandel)

⁷ The Hague Court of Appeal 6 July 2017, ECLI:NL:GHDHA:2017:2232.

⁸ She worked in servitude for 7 years before she was able to escape.

⁹ Nationaal rapporteur mensenhandel en geweld tegen kinderen, *Mensenhandel. Tiende rapportage van de Nationaal Rapporteur*, The Hague: Nationaal rapporteur 2017, p. 11.

¹⁰ Nationaal rapporteur 2017 (*Tiende rapportage*), par. 4.5.

There is a clear need for mandatory reporting of suspected (child) trafficking cases by and necessary training for professionals, accompanied by awareness campaigns for the general public.

National Prevention Mechanism (NPM)

The Dutch National Prevention Mechanism (NPM) is scattered over a number of organisations.¹¹ The National Ombudsman, who was part of the NPM as an observer, resigned his position in 2014, declaring the NPM to be dysfunctional. The Ombudsman refused to share responsibility any longer.¹²

In his report the Ombudsman found that the structure of the NPM leads to futile discussions leaving no time for actual work.¹³ In addition, he found that the NPM does not guarantee the necessary independence, since two of the main participants are ministerial organizations. Those organisations tend to block any initiative (and cooperation) outside the scope of their work, seeming to fear the establishment of a new inspectorate.¹⁴ Finally, the Ombudsman found that after three years of the establishment of the NPM it was still lacking a vision for the mechanism to fulfil its tasks based on wording and intention of the OPCAT.¹⁵

In addition to these internal rumblings, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter: the SPT) found, after a visit to the Dutch NPM in 2015, that the mechanism is, on the whole, ‘largely invisible’.¹⁶ Furthermore, the SPT noted that, in spite of the legal foundation for the separate institutions which form the NPM, the lack of a separate legal basis for the NPM itself contains a striking weakness.¹⁷ The SPT also noted that the Dutch NPM primarily focuses on its monitoring functions, leaving the other NPM functions underdeveloped.¹⁸

The secretariat of the NPM is led by the Inspectorate of Justice and Security (IVJ). Besides, the Health and Youth Care Inspectorate (IGZ) is also part of the NPM network. Both being ministerial organizations, it is hard to qualify the Dutch NPM as an independent body. Both inspectorates use ministerial writing papers, and the IVJ is even accommodated within the Ministry of Justice and Security, adding to the appearance of governmental bias. The SPT and the Ombudsman also recognize these concerns in their report.¹⁹

In reply to the SPT’s report the Dutch government repeated its argument that all NPM members and observers are completely independent.²⁰ However, the inspectorates mentioned above are financially dependent on their respectable ministries and do not receive a separate budget to fulfil their tasks within the NPM.²¹ Contrary to the SPT’s recommendation, the government has stated it does not find it necessary to provide NPM members with a separate

¹¹ See: inspectie-jenv.nl/english.

¹² Letter National Ombudsman to the Head of the Inspectorate of Security and Justice, 24 July 2014 (No. 2014 0273).

¹³ Letter National Ombudsman, 24 July 2014, p. 2.

¹⁴ Letter National Ombudsman, 24 July 2014, p. 2.

¹⁵ Letter National Ombudsman, 24 July 2014, p. 2.

¹⁶ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to the Netherlands for the purpose of providing advisory assistance to the national preventive mechanism: recommendations and observations addressed to the State party*, 3 November 2016, par. 33.

¹⁷ SPT 3 November 2016, par. 24.

¹⁸ SPT 3 November 2016, par. 25.

¹⁹ SPT 3 November 2016, par. 36-39.

²⁰ SPT, *Visit to the Netherlands for the purpose of providing advisory assistance to the national preventive mechanism: replies of the Netherlands*, 4 November 2016, par. 15.

²¹ R. Fernando, *Het Nederlandse nationaal preventie mechanisme: herstructureren gewenst?*, *NTM* 2016, p. 439.

budget to fulfil NPM tasks. The explanation for this is that the tasks fulfilled by their members within the NPM are so closely intertwined with their own tasks, that it would not be useful to distinguish between the two.²²

The unwillingness of the government to clearly distinguish between the tasks that they fulfil by their ministerial organizations within and outside the NPM is problematic.

The lack of vision and development with respect to NPM's tasks outside of monitoring disrupts the whole functioning of the NPM.

Article 11

Police custody

In the Netherlands a child oriented approach is lacking during arrest and police custody of minors. Research shows that minors who are arrested, interrogated and held in police custody are treated in a similar way to adults.²³ Looking at cases and signals from the Social Legal Defence Centre on Children's Rights (by Defence for Children), and signs from Dutch youth lawyers, it appears that minors are currently held in police cells overnight, even in cases where this is not actually necessary.²⁴ In addition there is a lack of a uniform working method with respect to minors in police custody and a lack of regard for the age and level of development of minors.²⁵

The NGOs are concerned with the detention of minors in police cells for longer periods of time than appropriate, and the lack of a uniform working method with respect to minors.

In particular there needs to be special consideration for the age and the level of development of the minor in question in all police interactions.

Pre-trial detention

The Dutch legislation on pre-trial detention meets the relevant standards of the European Court of Human Rights (ECtHR). However, the alternatives to pre-trial detention, such as bail and electronic monitoring, are underused.²⁶ Compared to other European Union countries the amount of pre-trial detainees in the Netherlands is high, and a recent research report raised the question whether pre-trial detention is really used as a measure of last resort.²⁷ The Netherlands explained, in its annex to its response to the List of Issues of the Committee, that the Public Prosecution Service and the judiciary are exploring the use of alternatives to pre-trial detention.²⁸ The basic principle will be that courts in the Netherlands will examine

²² SPT: replies of the Netherlands, 4 November 2016, par. 26.

²³ Unicef Nederland and Defence for Children International – the Netherlands, *Jaarbericht Kinderrechten 2018*, June 2018, p. 40-41.

²⁴ Examples can be found in: Vereniging Nederlandse Jeugdrecht Advocaten & Defence for Children, *De aanhouding en inverzekeringstelling van minderjarige en jongvolwassen verdachten*, August 2017, p. 13-14.

²⁵ Vereniging Nederlandse Jeugdrecht Advocaten & Defence for Children, *De aanhouding en inverzekeringstelling van minderjarige en jongvolwassen verdachten*, August 2017, p. 12.

²⁶ J.H. Crijns, B.J.G. Leeuw & H.T. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality*, The Hague: Eleven International Publishing 2016, p. 28 (hereafter: Crijns et al. 2016).

²⁷ Crijns et al. 2016, p. 38.

²⁸ Kingdom of the Netherlands, *Annex to the Response of the Kingdom of the Netherlands to the list of issues (CAT/C/NLD/QPR/7) transmitted to the State Party under the optional reporting procedure*, 28 June 2017 p. 37.

whether alternative measures can be as effective as deprivation of liberty.²⁹ The NGOs wonder if using pre-trial detention as the standard is in accordance with the case law of the ECtHR, which states that it is the State that bears the burden of proof of showing that pre-trial detention should be applied because a less intrusive alternative would not serve the same purpose.³⁰

With respect to minors in custodial youth institutions 80% of the total amount of minors (aged 12-18yrs) have not yet been convicted, but are placed in pre-trial detention.³¹ Two extensive research studies concerning pre-trial detention in the Dutch juvenile justice system, published in January 2018, show that minor suspects are confronted with arbitrary decisions.³² What judges deem pedagogically desirable can strongly differ amongst judges, as Dutch legislation does not provide any guidelines on how to deal with the 'best interests of the child'-principle.³³ There are no guarantees that pre-trial detention and deprivation of liberty of minor suspects are being applied as a measure of last resort, for the shortest appropriate period of time.

The NGOs are concerned with the fact that public prosecutors do not critically assess whether pre-trial detention is strictly necessary in a specific case. We argue that public prosecutors should be more active in proposing alternatives to pre-trial detention (for instance, suggesting specific conditions for the suspension of pre-trial detention to the court), especially with regard to minors.

Pre-trial detention should be a measure of last resort rather than the standard from which can be deviated, especially when alternatives to pre-trial detention become more available.

Closed youth care settings

In 2017 a record number of 2.710 children (under 18 years) were held in a closed facility for youth care.³⁴ Staying in a closed setting can be damaging for children and returning to society afterwards is difficult. They face delays in their development and are not prepared for future challenges, such as housing and managing their finances.³⁵ It is worrisome that in closed youth care and custodial youth institutions the use of force and coercion and deprivation of liberty, such as placement in rooms and isolation cells, are still applied regularly.³⁶ Exact data on how often and for what reason these measures are being used are not available nationally. Because of differences in law pertaining to closed youth care settings and, for example, youth penitentiary settings there's no obligation to keep such data. According to Unicef and Defence for Children in their annual rapport on children's rights, harmonisation of these law systems has been on the agenda for years for the government of the Netherlands.³⁷ In order to determine the exact scope of this practice, NGOs would need access to such data.

²⁹ Kingdom of the Netherlands, *Annex to the Response of the Kingdom of the Netherlands to the list of issues (CAT/C/NLD/QPR/7) transmitted to the State Party under the optional reporting procedure*, 28 June 2017 p. 37.

³⁰ For example: ECtHR 9 January 2003, no. 38822/97, (Shishkov/Bulgaria) para. 66; ECtHR 21 December 2000, no. 33492/96 (Jablonski/Poland) para. 83.

³¹ *Jaarbericht Kinderrechten 2018*, p. 42.

³² Y.N. van den Brink, *Voorlopige hechtenis in het Nederlandse jeugdstrafrecht: wet en praktijk in het licht van internationale en Europese kinder- en mensenrechten*, in: Y.N. van den Brink, H.T. Wermink, K.G.A. Bolscher, C.M.M. van Leeuwen, M.R. Bruning, T. Liefwaard, Universiteit Leiden and WODC, Nijmegen: Wolf Legal Publishers 2017, p. 219.

³³ Van den Brink 2017, p. 219-220.

³⁴ *Jaarbericht Kinderrechten 2018*, by Defence for children and Unicef, p. 18.

³⁵ *Jaarbericht Kinderrechten 2018*, by Defence for children and Unicef, p. 19.

³⁶ *Jaarbericht Kinderrechten 2018*, by Defence for children and Unicef p. 20.

³⁷ *Jaarbericht Kinderrechten 2018*, by Defence for children and Unicef p. 20.

Legislation and legal safeguards concerning the use of force and coercion differ within the different settings of custodial youth institutions, youth-GGZ-institutions and closed youth care centres. In May 2018, 500 youth lawyers stated in a letter to the Minister of Health, Welfare and Sport that too many children are being locked up in closed youth care centres, whilst they do not belong there and should be given appropriate care.³⁸ The Minister announced in his Action Programme on Youth Help 2018 to reduce the number of placements in closed settings and to abolish the use of the isolation room. New laws are being prepared to guarantee and harmonise the rights of children in all types of closed settings.³⁹ These are promising developments that will be monitored by the NGOs.

Research by the Dutch National Rapporteur on Human Trafficking and Sexual Violence against Children, published in June 2018, shows that 85% of girls in closed youth care centres, receive help for trauma caused by sexual violence. 13% of the girls who have experienced sexual abuse are placed in a closed youth care centre.⁴⁰ The Rapporteur recommended that the Minister of Health create the obligation to keep data that clarifies why these girls (who are victims) are staying in closed settings and what help is needed and appropriate.⁴¹ The NGOs look forward to the response of the Minister.

It is worrisome that there is no data on the deprivation of liberty in closed youth care settings. There's currently no obligation under national law to keep such data.

Ethnic profiling

In 2013 Amnesty International, the Netherlands published a report on pro-active police action in relation to human rights, stating that:

'Proactive policing is a risk for human rights in the Netherlands. In particular, it can lead to ethnic profiling: the use of criteria or considerations about ethnicity or ethnicity in tracing and law enforcement while there is no objective justification for this. Ethnic minorities, for example, are more often subjected to proactive police checks without them being a suspect or without there being an individualized indication for the police check. It is a form of discrimination that contributes to stigmatization and negative perception of ethnic minorities.'⁴²

Persons over the age of 14 are required to provide proof of identification if requested by the police in the execution of police tasks.⁴³ Identification checks mostly take place in connection with minor infringements and these checks, as well as other forms of stops and searches, often happen in public places.⁴⁴ The people subjected to these checks are aware of the fact that they

³⁸ Brandbrief VNJA, 'Tekort aan passende jeugdhulp voor minderjarigen!', 31 May 2018, see: vnja.nl/brandbrief-tekort-aan-passende-jeugdhulp-voor-minderjarigen/.

³⁹ *Actieprogramma zorg voor de jeugd*, 1 april 2018, rijksoverheid.nl/documenten/rapporten/2018/04/01/actieprogramma-zorg-voor-de-jeugd.

⁴⁰ 'Meeste meisjes in gesloten jeugdhulp ontvangen hulp voor seksueel geweld', 26 June 2018, see: nationaalrapporteur.nl/actueel/2018/meeste-meisjes-in-gesloten-jeugdhulp-ontvangen-hulp-voor-seksueel-geweld.aspx.

⁴¹ Nationaal Rapporteur Mensenhandel en Seksueel Geweld tegen Kinderen (2018).

Slachtoffermonitor seksueel geweld tegen kinderen 2016, p. 95 see:

nationaalrapporteur.nl/binaries/Nationaal%20Rapporteur%20-%20Slachtoffermonitor%20seksueel%20geweld%20tegen%20kinderen%202016_tcm23-335177.pdf

⁴² Amnesty International – the Netherlands, *Proactief politieoptreden vormt een risico voor mensenrechten: Etnisch profileren onderkennen en aanpakken*, October 2013.

⁴³ Open Society Justice Initiative & Amnesty International – the Netherlands, *Equality under pressure: the impact of ethnic profiling*, November 2013, p. 6.

⁴⁴ Open Society Justice Initiative & Amnesty International – the Netherlands, *Equality under pressure: the impact of ethnic profiling*, November 2013, p. 6 & 11.

are being watched by passers-by and these experiences can oftentimes be very humiliating for them.⁴⁵

Both government and police authorities have recently recognized the problem of ethnic profiling. They have taken initial measures, e.g. through the programme ‘The power of difference’ and the publication of a so-called ‘Handelingskader proactief controleren’ (‘Action Frame for Pro-Active Police Checks’).⁴⁶ For one, police authorities now use a broader definition of ethnic profiling. Before, one was ethnically profiled only if the police check was solely based on race, while in practice it is often a combination of factors. Now the police follows the broader definition, as recommended by ECRI: ‘The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities’.⁴⁷ Nonetheless, there has been little progress beyond these first steps and there is no data available on the effect of these measures.⁴⁸

A recent incident showcased that the new broader definition of ethnic profiling is not used by all organizations that are tasked with police duties. On 30 April 2018 a former city council member for the city of Eindhoven, of Congolese descent, and two other people of colour were singled out for additional checks at Eindhoven Airport after a flight back from Rome. The Royal Netherlands Marechaussee, who perform military and civil police tasks, explained to the people in question that this is the law and this way of working helps stopping terrorists and criminals.⁴⁹ Replying to questions from parliament, the Minister of Defence, who is responsible for the Marechaussee, stated that profiling is an important tool for the Marechaussee and that the profiles are based on historical experiences, data, information, intelligence and risk-indicators. A persons external appearance, including ethnicity can be part of this but always in combination with other objective indicators and information.⁵⁰

The NGOs would like to see that the government sets up a list with fixed standards on how the police should determine the effects of the measures on the reduction of ethnic profiling, since the effectiveness and unforeseen side effects (such as discrimination) cannot be properly determined nor justified, when only focusing on registered checks.

The NGOs are concerned with the fact that the Royal Netherlands Marechaussee still uses the old, narrow definition of ethnic profiling, allowing ethnicity to be part of a risk profile.

⁴⁵ Open Society Justice Initiative & Amnesty International – the Netherlands, *Equality under pressure: the impact of ethnic profiling*, November 2013, p. 11. Several interviews in this report detail experiences of people subjected to these checks as a consequence of ethnic profiling.

⁴⁶ A pro-active police check is a police check of a selected citizen without detection of a violation or criminal offense. Police The Netherlands, *Handelingskader proactief controleren* (version 1.9), 27 October 2017.

⁴⁷ See a report by Controle Alt Delete, *Kies een kant*, December 2017, Chapter 6: controlealtdelete.nl/blog/politie-kiest-een-kant-tegen-etnisch-profileren. ECRI General Policy Recommendation N° 11, *On combating racism and racial discrimination in policing*, 29 June 2007.

⁴⁸ Controle Alt Delete, *Kies een kant*, December 2017, p. 45.

⁴⁹ Controle Alt Delete, ‘*Flying while black*’, 4 June 2018: controlealtdelete.nl/blog/flying-while-black.

⁵⁰ Tweede Kamer der Staten-Generaal, *Aanhangsel van de handelingen*, vergaderjaar 2017-2018, nr. 2340, p. 3.

The 'boaster approach'

Groups of youth that cause nuisance on the streets (e.g. making noise with scooters or by shouting, drinking on the street, being annoying to passers by, littering) are approached with repressive measures by municipalities, such as area bans, 'mosquito' noise systems, curfews and other injunctions.⁵¹

The police use various tactics in dealing with these 'annoying' but not criminal groups, e.g. by deploying neighbourhood fathers or neighbourhood watch groups to create a sense of safety. Large municipalities like Rotterdam are known to use more aggressive pro-active methods, e.g. the so called 'patseraanpak' ('boaster approach'), by which means the Rotterdam police will take away expensive clothing and accessories from young people if they cannot provide credible information about how these items have been paid for.⁵²

The NGOs want to stress that these adolescents, mostly living in urban areas, have a right to play, a right to be present in the public space and in their own neighbourhoods, a right to meet, without automatically being criminalized, a right to property, and should be presumed innocent until proven otherwise.

The 'boaster approach' is worrisome because of the ease with which it seems to dismiss these rights. Furthermore, the NGOs wonder to what extent ethnic profiling plays a part in this approach. As has been expressed above under the header 'ethnic profiling': ethnic profiling may play a part in proactive policing activities. The NGOs fear that the so-called 'boaster approach' may fall under this category.

The methods to regulate 'annoying' but not criminal youth groups should be evaluated.

Regulative methods should have built in safeguards to protect the rights of these minors.

Life imprisonment

In the Netherlands life imprisonment literally means imprisonment for the rest of a person's life. Someone who is sentenced to life imprisonment can only be released through a Royal Pardon, which is very rarely granted.⁵³

In recent years, the European Court of Human Rights (ECtHR) has ruled in several cases that, under certain circumstances, life sentences can violate article 3 of the European Convention on Human Rights (ECHR). The ECtHR's reasoning can be summarized as follows: if there is no right to review, no mechanism to ensure the right to review, and no realistic prospect of release, then human rights violations are imminent.⁵⁴ A pardon procedure can be permissible under the ECHR, but it must encompass both a *de jure* and a *de facto* prospect of release for the prisoner.

⁵¹ Information on *Hangjongeren*, politie.nl/themas/hangjongeren.html.

⁵² Rasiit Elibol, 'De Rotterdamse patseraanpak is een volgende blamage', *De Groene Amsterdammer*, 10 January 2018, groene.nl/artikel/de-rotterdamse-patseraanpak-is-een-volgende-blamage.

⁵³ Since 1986 there has only been one person that was granted a royal pardon. He was very ill and passed away shortly after his release. See: Els Akker, *Vijf vragen over levenslange gevangenisstraffen in Nederland*, 19 December 2017. (Available at: <https://eenvandaag.avrotros.nl/item/vijf-vragen-over-levenslange-gevangenisstraffen-in-nederland/>).

⁵⁴ ECtHR 9 July 2013, nos. 66069/09, 130/10 and 3896/10 (Vinter and others/UK); ECtHR 26 April 2016, no. 10511/10, (Murray/The Netherlands).

The High Council of the Netherlands has established some criteria to maintain life sentence as a possible sanction: there must be a real possibility of review, after no more than 25 years, which may lead to a reduction of the sentence or a (conditional) release. This review should preferably be carried out by a judge.⁵⁵ Following the rulings of the ECtHR and in order to maintain life sentence as a possible sanction in the Netherlands, the Dutch government codified a system of periodic review regarding the question whether or not to start reintegration activities in 2016.⁵⁶ This review takes place only after a prisoner has served 25 years of his or her life sentence. A ‘broad commission’ is set up to take the review under consideration and is expected to hear requests by prisoners for early release. This commission does not include a judicial partner.

This is worrisome because there is no independent judge that will review the requests. Instead the broad commission advises the State Secretary who in turn will decide whether or not to start reintegration activities. After, at most, two years after the first decision to start reintegration activities, the State Secretary must then decide whether or not a pardon will be granted.

The NGOs are concerned that the aforementioned adjustments to the right of review do not match the requirements of the ECtHR, article 3 ECHR, nor article 11 CAT. A review for reintegration does not measure up to a periodic review with a prospect of release in the view of the NGOs.

The NGOs find that reintegration activities should start from the moment of imprisonment, rather than after 25 years.

The NGOs are worried for the lack of a clear set of criteria for release, which would justify the submission of a case for possible pardon to the ‘broad commission’.

The involved government official should be obliged to motivate the decision made upon the request for clemency.

The Terrorist Wing

Detainees suspected or convicted of a terrorist offence in the Netherlands are automatically placed in the so called Terrorist Wings (*Terroristenafdeling*, hereinafter: TA) of a penitentiary, based on article 20a of the Regulation on Selection, Placement and Transfer of Detainees (*Regeling selectie, plaatsing en overplaatsing van gedetineerden*, hereafter: the Regulation). Detainees can also be placed in the TA if they proclaim or disseminate a message of radicalization before or during their detention, including recruitment activities.

There has been repeated criticism from national and international watchdogs.⁵⁷ Though the situation in the TAs has somewhat improved since its opening in 2006, there is still a lot of ground to be gained.⁵⁸

⁵⁵ Court of Appeal 5 July 2016, ECLI:NL:HR:2016:1325, par. 3.3.

⁵⁶ *Besluit Adviescollege levenslanggestraften*, available at: <http://wetten.overheid.nl/BWBR0038779/2017-07-01>.

⁵⁷ For example, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) urged the Netherlands to review this policy in 2007 and again in 2016. See also: Amnesty International Netherlands & Open Society Justice Initiative, *Inhumane and Unnecessary. Human Rights Violations in Dutch High-security Prisons in the Context of Counter-terrorism*, October 2017. (Available at: amnesty.org/en/documents/eur35/7351/2017/en/).

⁵⁸ Nederlandse Omroep Stichting, *Al veel verbetering op Nederlandse terroristenafdelingen*, 31 October 2010. (available at: nos.nl/artikel/2200703-al-veel-verbetering-op-nederlandse-terroristenafdelingen.html).

The European Committee for the prevention of Torture (CPT) visited the TA in 2007 and 2016. It reported that the placement of a detainee in an extra-secure facility should only take place after an extensive risk assessment, not automatically on the basis of the punishment imposed.⁵⁹

In addition, the placement must be regularly assessed.⁶⁰ Article 26a of the Regulation offers a possibility to re-assess the placement after a convicted detainee has served one third of his sentence, while at least 4 months to one year of the sentence remains. However, this article does not apply to detainees who are placed in a TA, because of proclaiming or spreading a message of radicalization. In addition, article 26a of the Regulation does not specify which circumstances should be considered by the Selection Officer when reassessing the placement.⁶¹ Still no objective criteria for the reassessment are provided for by law.⁶²

Furthermore, the Regulation does not differentiate between suspects and convicts. As a consequence, suspects are placed in a regime that publicly stigmatizes them, labelling them as 'terrorists', and 'heavy criminals'. This seriously undermines the presumption of innocence, a fundamental principle of Dutch Criminal Law. Under Dutch Criminal Law, the pre-trial detention of suspects of 'terrorist crimes' can amount to 27 months.⁶³ Suspects of a terrorist crime who have not yet been tried, are detained under the same strict conditions as convicts.

The strict regime in a TA concerns an individual regime with many limitations, such as screening of visitors, a possible partition of glass between detainee and visitors, interception of telephone conversations, checking mail, standard strip search and daily long-term detention in a cell (comparable to solitary confinement).⁶⁴ In a TA there are insufficient opportunities for education and rehabilitation, making it all the more difficult for detainees to prepare for their return to society.⁶⁵

Within a TA it is standard to place detainees in very restrictive confinement, which can then be adjusted at the discretion of the prison authorities. In addition, the new risk assessments only take place after someone has already been placed in the high-security TA prison. This is not in line with international human rights standards.⁶⁶ These stipulate that authorities must demonstrate that the restrictions are necessary and proportionate with an individual risk assessment before they are imposed.

⁵⁹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *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*, Strasbourg, 19 January 2017, p. 26.

⁶⁰ *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*, Strasbourg: 5 February 2008, CPT/Inf (2008) 2, par. 42 & *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*, Strasbourg: 19 January 2017 CPT/Inf (2017) 1, par. 47.

⁶¹ CPT 5 February 2008, par. 42.

⁶² Article 26a Regulation.

⁶³ *Memorie van Toelichting, Vaststellingswet Boek 2 van het nieuwe Wetboek van Strafvordering*, 7 februari 2017, from p. 130.

⁶⁴ House Rules TA De Schie and Vught (2014).

⁶⁵ CPT 5 February 2008, par. 49 and CPT 19 January 2017, par. 48.

⁶⁶ The CPT has indicated multiple times that a risk assessment needs to be the basis for placement in an extra-security facility. See: CPT 19 January 2017, p. 26.

The NGOs are concerned about the absence of an individual risk assessment regarding the Regulation and the lack of regularly assessment of the placement in the TAs.

In addition, the NGOs are worried about the lack of objective criteria for the reassessment, and not differentiating between suspects and convicts.

Disproportionate regime

One of the most stringent security measures that authorities impose on detainees within the TA, without an individual assessment of whether it is necessary and proportionate, is daily long-term detention (22 hours a day) individually in a cell. During the hours that TA prisoners are allowed to leave their cell, they have only limited human contact of any significance.⁶⁷

Furthermore, prison authorities keep a close eye on what TA prisoners say and do outside their cell. They watch and listen along with visits and phone calls, and make recordings. This systematic and constant observation prevents many TA detainees from discussing personal and family issues during visits and telephone conversations. Other security measures in the TA also have a negative influence on family contact, such as the strip searches of detainees prior to visits and the prohibition of meaningful physical contact. This very strict regime results in visits that are no more than superficial encounters, with a very detrimental effect on the possibility of detainees to build and maintain family relationships, including with their children and it undermines their right to privacy and the right to respect for family life of detainees.

The NGOs are concerned about the conditions of the detention regime in the TA.

In general, the policy and laws should be in compliance with national, European and international standards.

Migrant Detention Centres

Undocumented migrants, including minors, and persons awaiting their expulsion after their asylum claim has been rejected, can be placed in special migrant detention centres.⁶⁸ The regime in these migrant detention centres has been criticised for its prison-like character.⁶⁹ The government of the Netherlands has proposed a new law on this issue: ‘Wet terugkeer en vreemdelingenbewaring’.⁷⁰

This new law aims to take the detention of undocumented migrants and people awaiting their expulsion (after their asylum claim has been rejected) out of the punitive law realm into the administrative law realm. Although this is a good development in itself, we have doubts about how much of an improvement in conditions this will actually provide.

⁶⁷ CPT 19 January 2017, par. 48.

⁶⁸ People arriving at Schiphol Airport without documents can be placed in ‘grensdetentie’, detention at the border before entering the Netherlands/EU, and people awaiting their expulsion can be placed in ‘vreemdelingenbewaring’, custody in order to ensure a quick expulsion.

⁶⁹ CPT 5 February 2008; Report by the Commissioner for Human Rights, Mr Thomas Hammarberg on his visit to the Netherlands, 21-25 September 2008, Strasbourg, 11 March 2009, 8 CommDH(2009)2.

⁷⁰ *Regels met betrekking tot de terugkeer van vreemdelingen en vreemdelingenbewaring (Wet terugkeer en vreemdelingenbewaring)*, proposed on 30 september 2015. Status: draft.

Starting with the positive changes: detainees are allowed to leave their cells twelve hours per day instead of five; they get (albeit limited) access to Internet; the minimum time in the open air is prolonged from one hour to two hours in every 24 hours, and the minimum time for meeting visitors is extended from two hours to four hours.

Unfortunately, there are also deteriorations of circumstances in detention by the proposed law. For example there will be a special stricter detention regime for the first week of the stay of undocumented migrants as laid out in articles 17 and 36 of the proposed law. In this regime detainees can be put in cells for up to seventeen hours a day, in the first week of their stay, as opposed to the aforementioned twelve hours. This practice can also occur in cases in which the detention authorities find it is required on grounds of security and preservation of order.⁷¹ We find these concepts too broad, allowing for arbitrary decisions.

Furthermore, the option to impose punitive measures remains basically unchanged. For example, administrative detainees can still be placed in isolation and the detainees are being shackled during transport, a practice the National Ombudsman reports is being experienced by administrative detainees as humiliating and degrading.⁷²

Previous comments of e.g. the European Committee for the Prevention of Torture (CPT) that foreigners suffering from the most serious cases of mental illness should not be placed in detention remain largely ignored by the proposed law.⁷³ Placing vulnerable groups, such as people in need of health care or psychiatric services, in detention centres regularly leads to an aggravation of their situation. For these people, detention is by definition disproportionate.⁷⁴ Placing psychiatric patients in psychiatric hospital Veldzicht, instead of a detention centre, is a recent improvement. This took place in January 2016, when this psychiatric hospital became a centre for ‘transcultural psychiatrics’.⁷⁵ However, it is unknown if this is the case with all people needing health care. Statistics are not available to us.

The detention regime with respect to undocumented migrants and persons awaiting their expulsion needs further improvement to meet human rights standards – the new proposed law does not suffice in all aspects.

The (to some extent) punitive character of this new administrative law is a matter of concern. It is unclear why the government of the Netherlands deems the stricter detention regime necessary and proportionate with regards to undocumented migrants.

The government of the Netherlands should formulate necessary safeguards with regard to the punitive measures that are taken.

⁷¹ The ‘beheersregime’, see article 36 Wet terugkeer en bewaring.

⁷² Nationale ombudsman, *Vreemdelingenbewaring: Strafre regime of maatregel om uit te zetten: Over respect voor mensenrechten bij vreemdelingenbewaring*, 2012, p. 19.

⁷³ These persons can be placed in psychiatric departments (PPC’s) of ordinary prisons used for punishment of criminal offences, albeit in a special wing reserved for detention of irregular migrants.

⁷⁴ Report Amnesty International - the Netherlands, *Dokters van de Wereld*, Stichting LOS & Meldpunt

Vreemdelingendetentie, *Opsluiten of beschermen? Kwetsbare mensen in vreemdelingendetentie*, 25 April 2016, p.13.

⁷⁵ Amnesty International e.o., 25 April 2016, p. 27 and footnote 91.

Article 16

Statelessness

The Netherlands is a party to the UN Conventions on Statelessness. Everyone who resides legally in the Netherlands for an extended period of time should therefore get registered in the population database through the local municipality. This database, the BRP, contains a number of obligatory entries, and nationality is one of them.

However, if individuals do not have documents indicating their nationality, then they are registered with a status 'nationality unknown' rather than stateless.⁷⁶ The category 'stateless' is used in a very restrictive way and must be proven via documents.⁷⁷ Individuals with the status 'nationality unknown' lack basic rights, such as the ability to legally recognize their children. One cannot become a Dutch citizen by virtue of being born in the Netherlands.⁷⁸ Therefore the status 'nationality unknown' has been passed on to children who are born in the Netherlands, while they are unable to 'return' to another country.

In cases where a stateless person has no right of residence, the fact that they are stateless is no ground for a right to residence.⁷⁹ The government refers to the no-fault procedure as a viable alternative.⁸⁰ This procedure used to be open only to stateless people but can now be used by people with a nationality as well.⁸¹ The government has indicated that whether or not the person in question is actually stateless is not a relevant criterion in obtaining a residence permit through the no-fault procedure.⁸² Since the no-fault procedure does not consider the particular needs and issues faced by stateless persons it is questionable whether it provides an adequate legal remedy for them.⁸³

A new law on determining statelessness is forthcoming however.⁸⁴ A draft version of the law puts the burden of proof to establish statelessness solely on the stateless person.⁸⁵ This is quite contradictory, as it requires a person to prove the absence of a nationality through documentation.⁸⁶ The NGOs would like to stress the unique and difficult situation that stateless persons find themselves in and would like to see this reflected in the new law on determining statelessness.

The NGOs are concerned with the fact that there is still no adequate procedure for determining statelessness and hope the draft bill will be enacted soon. The government

⁷⁶ Government information on statelessness: rijksoverheid.nl/onderwerpen/nederlandse-nationaliteit/staatloosheid.

⁷⁷ Rijksdienst voor Identiteitsgegevens, *Handleiding Uitvoeringsprocedures BRP versie 3.0*, 19 June 2018, p. 135.

⁷⁸ Dutch nationality law follows *ius sanguine* rather than *ius soli*.

⁷⁹ Adviescommissie voor Vreemdelingenzaken, 4 December 2013, p. 73.

⁸⁰ Adviescommissie voor Vreemdelingenzaken, 4 December 2013, p. 56.;

⁸¹ Adviescommissie voor Vreemdelingenzaken, *Waar een wil is maar geen weg: advies over de toepassing van het beleid voor vreemdelingen die buiten hun schuld niet zelfstandig uit Nederland kunnen vertrekken*, July 2013, p. 22

⁸² K. Hendriks, J. Klaas & M. van Dael, *Gebrekkig wetsvoorstel vaststellingsprocedure Staatloosheid*, *Asiel & Migrantenrecht* 2017, No. 2, p. 76.

⁸³ C.A. Goudsmit, *Bescherming van staatlozen in Nederland vraagt om een aparte vaststellingsprocedure*, *Nederlands Juristenblad* 2014/362, edition. 4, p. 464. (available at: njb.nl/blog/bescherming-van-staatlozen-in-nederland-vraagt-om.11434.lynx).

⁸⁴ Rijkswet Vaststellingsprocedure Staatloosheid. See for draft bill: internetconsultatie.nl/staatloosheid/document/2492.

⁸⁵ *Ontwerp Memorie van Toelichting voorstel Rijkswet Vaststellingsprocedure Staatloosheid*, p. 7.

⁸⁶ Adviescommissie voor Vreemdelingenzaken, *Geen land te bekennen: een advies over de verdragsrechtelijke bescherming van staatlozen in Nederland*, 4 December 2013, p. 72.

should share the burden of proof and help individuals to deal with foreign authorities in the determination of statelessness.

With respect to stateless people without a right to residence, the NGOs feel the no-fault procedure should offer a better and more sufficient protection, with consideration for their unique situation.

Solitary confinement

The Dutch authorities make use of isolation cells and solitary confinement as a corrective measure in case of unwanted behaviour and protests by detained migrants. In solitary detention, migrants have limited access to health care, education and legal aid and there is still no obligation of reporting the use of solitary confinement to a lawyer.

During a collective hunger strike of migrants in the detention centre at Schiphol Airport in 2013, protesters were placed in isolation cells as a reaction to the hunger strike.⁸⁷ At present there is no legal basis to use isolation cells as means of punishment in border detention at Schiphol Airport.

The new bill on return and immigration detention does not seem to change the use of solidarity confinement.⁸⁸ According to the National Ombudsman the use of solitary confinement is inappropriate as a means of punishment.⁸⁹

Stichting LOS (a national support point for undocumented people) reports that in the first half of 2017 isolation as a disciplinary measure has been imposed 98 times. In the Detention Centre of Rotterdam this constitutes 37% of all disciplinary measures. In the Detention Centre of Zeist this constitutes 62% of all disciplinary measures.⁹⁰

The VAJN (association for asylum lawyers and jurists in the Netherlands) registered five cases, and in two of the cases a complaint was made to the Complaints commission of the detention centre. While these complaints were considered as founded, it was not because it was considered that they violated the rights safeguarded under article 16 of the CAT, but because the use of camera-observation in those cases lacked a legal basis.⁹¹ The cases paint a picture of the situation in this detention centre. In addition it indicates that the use of solitary confinement in migrant detention centres is not regarded to be a violation of the detainees' rights.

After the collective hunger strikes in 2013, the use of isolation cells in case of a hunger strike are still being reported, according to VAJN. It is worth mentioning that the use of solitary confinement in cases of a hunger or thirst strike in immigration detention has a long history

⁸⁷ These hunger strikes took place in the *Justitieel Complex Schiphol* (JCS, the detention center at Schiphol Airport which is used for border detention) and the Detention Centre of Rotterdam. Two complaints were made: 2013-08-08, *Beklagcommissie Detentiecentrum Noord-Holland*, locatie Schiphol, DS2013/056.

⁸⁸ *Kamerstukken I 2017/18*, 34 309, A, *Voorstel van Wet, Wet Terugkeer en Bewaring* (Draft Bill on Return and Immigration Detention), Chapter 6, part 3.

⁸⁹ Nationale ombudsman: *Vreemdelingenbewaring: strafregime of maatregel om uit te zetten. Over respect voor mensenrechten bij vreemdelingenbewaring*, 7 augustus 2012, p. 35.

⁹⁰ Poonam Bharatsingh, 'Straf- en ordemaatregelen binnen vreemdelingendetentie' (Masters Thesis), Stichting LOS, *Meldpunt Vreemdelingendetentie*, p.7 see: meldpuntvreemdelingendetentie.nl/wp-content/uploads/Rapport-straf-en-ordemaatregelen-def-18-7.pdf.

⁹¹ *Beklagcommissie Detentiecentrum Noord-Holland*, locatie Schiphol, DS2013/056, 8 August 2013. There were also two complaints about a preceding strip search, which were denied by the prison board and not further investigated.

and was protocol-based.⁹² Since there are no medical arguments for the use of isolation cells, it seems to be abuse of power and a violation of article 16 UNCAT.

The NGOs wonder to what extent solitary confinement is being used as a method of punishment in migrant detention centres, and in what way the use of solitary confinement will be embedded in the new bill.

The documents mentioned in footnote 90 (Werkwijze honger-, en dorststaking, which was replaced by the ‘Tijdelijke werkinstructie voedsel- en vochtweigering’) have not been made public. The NGOs would like to see these documents made public.

Tasers

From February 2017 to February 2018 tasers were used as part of a research-pilot project by the police in three regions in the Netherlands.⁹³ The Minister of Justice and Security provided two reasons for this pilot. Firstly, it aims to decrease the necessity to use more heavy measures, such as firearms. Secondly, tasers would help the police to deal with people that have a high threshold for pain, rendering the use of pepper spray or a baton unusable.⁹⁴

In their report on this pilot-project, Amnesty International distinguished two particular risks connected to the use of tasers by the police. First, the risk of underrating serious injuries, particularly with respect to people with medical conditions, pregnant women, the elderly, and people under the influence of drugs and alcohol. They are at risk of serious injuries when a taser is used on them.⁹⁵ According to the evaluation of the project by the national police, in half of the situations a taser was used on persons who were under the influence of drugs and alcohol.⁹⁶ It is unclear in which way the health of the people concerned was being safeguarded.

Secondly, Amnesty warns for the abuse of tasers. As the tasers are relatively easy to use, they leave nearly no traces on the skin, and the severe pain that is inflicted is not directly visible to the person using the taser, making them prone to abuse.⁹⁷ This could lead to a police officer using the taser in situations that do not necessarily warrant it or could be handled with less intrusive means.

This risk is acknowledged by the police in their own evaluation of the pilot.⁹⁸ In their evaluation the police indicated that in 9% of the instances the tasers were used against persons

⁹² ‘Werkwijze honger-, en dorststaking’, which was replaced by the ‘Tijdelijke werkinstructie voedsel- en vochtweigering’ (both documents are from the Ministry and unpublished). Official sources, such as a letter from the Minister for migrant detention and integration titled ‘Vreemdelingenbeleid; Brief minister over de hongerstaking van enkele asielzoekers’ published on 12 March 2009 (19637, nr. 964) mentions protocols about hunger- and thirst strikes.

De Commissie van Toezicht also speaks of these specific protocols in KC 2013/032. See:

commissievantoezicht.nl/uitspraken-zoeken/2653/?fldkeyword=&fldruling_year=&fldarticle=&fldfeature=KC+2013%2F032&fldinstitution_type=&sc=date&so=up.

⁹³ Politieacademie, *Het stroomstootwapen in de basispolitiezorg: evaluatie van de pilot*, May 2018, p. 4.

⁹⁴ Amnesty International – The Netherlands, *Een mislukt experiment: de Taser-pilot van de Nederlandse Politie*, February 2018, p. 5.

⁹⁵ Amnesty International 2018, p. 6.

⁹⁶ Politieacademie 2018, p. 33.

⁹⁷ Amnesty International 2018, p. 7.

⁹⁸ It is seen as a lighter weapon than a firearm or police dogs, and a more effective and less risky weapon to overpower someone than a baton or pepper spray. This could lead to situations being resolved by tasers as a compensation for a lack of (social) skills that could otherwise deescalate a situation, Politieacademie 2018, p. 40.

who were already in custody of the police or otherwise subdued. In addition, in at least 3,8% of the situations in which the taser was used in a situation where there was a violation being committed, rather than a crime, and the person committing the violation was resisting arrest without posing a direct threat to themselves or anyone else.⁹⁹ In 3,2% of the cases the electrical shock was applied for more than 15 seconds, which greatly increased the risk of serious injury and was contradictory to the advice given by the manufacturer of the tasers.¹⁰⁰

Another element of concern is the excessive use of the so-called stun mode on the taser. This mode is used to inflict pain and, through that, coerce cooperation.¹⁰¹ Whereas in other countries 1-4% of all uses of the taser was in stun mode, in the Dutch pilot project this was 22%.¹⁰² The use of the stun mode is often ineffective and counterproductive, and because it is unclear how long the electrical shock is being applied it has a higher risk of serious injury.¹⁰³

The taser has also been used on minors as young as 13 and 15 years old.¹⁰⁴ Several organizations have pointed out which risks are involved with the use of tasers on minors. For example Defence for Children International – the Netherlands have indicated that the risk of physical and mental harm is even larger with respect to minors.¹⁰⁵

The government will decide on the use of tasers by the police by the end of 2018.

The NGOs urge the government to refrain from adding tasers to the resources of the police.

If the government does decide to add tasers to the resources of the police, it is important to properly train the police on how to use them and to avoid the aforementioned risks.

Clear guidelines and rules with respect to the use of tasers should be set up if the use is permitted.

Proper safeguards and measures should ensure the protection of the health of persons on which the tasers are used. Exceptions to the use of the taser should be made for vulnerable groups (e.g. the elderly, pregnant women).

Tasers should not be used on minors.

⁹⁹ *Politieacademie* 2018, p. 29-30.

¹⁰⁰ *Politieacademie* 2018, p. 47-48. The manufacturer warns for prolonged application of electrical shocks as it greatly increases the risk of serious injuries.

¹⁰¹ Amnesty International 2018, p. 9.

¹⁰² *Politieacademie* 2018, p. 48. The use of the stun mode was compared to New Zealand, Finland, the United States, England & Wales and Australia. The use of stun mode in the Netherlands was higher than all these countries with the exception of Finland.

¹⁰³ *Politieacademie* 2018, p. 48.

¹⁰⁴ *Politieacademie* 2018, p. 26 & *Politieacademie, Tussenrapportage pilot stroomstootwapen* (September 2017), p. 25.

¹⁰⁵ See: <https://www.defenceforchildren.nl/actueel/nieuws/jeugdstrafrecht/2017/sta-gebruik-stroomstootwapen-op-minderjarigen-niet-toe>.