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Netherlands: Counter-terrorism bills would violate human Rights and undermine rule of law

Proposed counter-terrorism legislation currently pending in the Dutch Senate threatens to violate a range of human rights, including freedom of movement and association; the right to leave one's country and return to it; the right to privacy and family life; a wide range of fair trial guarantees (i.e. the presumption of innocence, principle of legal certainty and right to appeal); the prohibition of discrimination and the right to an effective remedy said Amnesty International today.

The two bills focus respectively on the application of temporary administrative orders (also known as "control orders") to restrict the freedom of persons suspected of being associated with acts of terrorism as defined by Dutch law, and the stripping of Dutch citizenship for dual nationals who travel outside the country and who are suspected of having joined armed groups operating in foreign countries. The Dutch authorities justify both sets of measures on the basis of protecting national security.

Neither of the two bills requires that an individual in question be charged with any crime or even reasonably suspected of involvement in a specific criminal offence. The authorities are not required to seek prior judicial authorization for the application of the restrictive measures that both bills envisage, nor do they provide for ongoing judicial or other independent supervision of the measures.

Both bills have been proposed in the context of the Dutch government's "Comprehensive Action Programme to Combat Jihadism." Thus, the bills threaten to fuel stereotypes that certain people – Muslims, foreigners, dual nationals – are more inclined to be associated with terrorism-related acts. Such associations contribute to discrimination and hostility toward such groups.

A number of international and national organizations -- including the Council of Europe's Commissioner for Human Rights, the Netherlands Institute for Human Rights, the Dutch section of the International Commission of Jurists and the national bar association -- have criticized the two bills based on human rights concerns and have warned of their potential stigmatizing effect on Muslims, foreigners, and migrant communities.¹

¹ Nils Muižnieks, Council of Europe Human Rights Commissioner, Letter: The Netherlands urged to strengthen human rights safeguards in its response to terrorism, 29 November 2016, <http://www.coe.int/en/web/commissioner/-/the-netherlands-urged-to-strengthen-human-rights-safeguards-in-its-response-to-terrorism?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fcounter-terrorism>. See also, Netherlands Institute for Human Rights: 'Aanpak terrorisme vooral symptoombestrijding' [terrorism approach mostly fighting symptoms'], 30 April 2015, <https://www.mensenrechten.nl/berichten/aanpak-terrorisme-vooral-symptoombestrijding>, and the NIHR response to the Temporary Powers Act, in particular: <https://mensenrechten.nl/publicaties/detail/35614>. For a response to this

The Dutch Senate is expected to vote on the bills by the end of January 2017.

Temporary Administrative Powers Counter-Terrorism Act

The “Temporary Administrative Powers Counter-Terrorism Act” (Temporary Powers Act) targets those who the government claims “can be associated with” “terrorist” activities or the support thereof. The proposed Act envisages imposing far-reaching administrative control orders on such individuals that would restrict a person’s access to certain places and areas; contact with specific people; ability to travel outside the Schengen area; and/or would impose a duty to report regularly to the police.² The bill also provides for the use of ankle tags to ensure compliance.

Local administrative authorities would also be empowered to reject or revoke subsidies, permits and exemptions to such individuals when there is an alleged serious risk that these would be used to commit or support terrorism-related activities.³ The bill does not define or list what actions might bring a person under suspicion and thus vulnerable to the application of a control measure.

An administrative order banning travel outside the Schengen Area is a key feature of the Temporary Powers Act. If the government has a “grounded suspicion” that a person plans to leave the Schengen area with the purpose of joining a group deemed to be engaged in acts threatening national security,⁴ a travel ban would be imposed and would automatically lead to the confiscation and revocation of a person’s passport.⁵

An administrative order mandating the application of a control measure -- which would initially last for a six-month period but could be extended *indefinitely* under the bill -- would be issued by an executive-level actor, that is, the Minister of Security and Justice at national level or in the case of ending a subsidy, for example, another (local) administrative authority.

bill by the Dutch section of ICJ: <http://www.njcm.nl/site/newsposts/show/350> and the Bar association: <https://www.rijksoverheid.nl/documenten/rapporten/2015/12/01/tk-advies-nova-inz-tijdelijke-wet-bestuurlijke-maatregelen-terrorismebestrijding>. See for the comments made on the nationality stripping proposal by the Netherlands Institute for Human Rights, the Dutch Section of the International Commission of Jurists, the National Bar Association, the Council for the Judiciary and the Advisory Committee on Migration Affairs: <https://zoek.officielebekendmakingen.nl/blg-635950.pdf> (all in Dutch only).

² Temporary Rules on the Imposition of Restraints on Persons Constituting a Threat to National Security or Intending to Join Terrorist Groups to Fight and on the Refusal and Withdrawal of Decisions [on applications for a grant, license, etc.] at Serious Risk of Being Used for Terrorist Activities (Temporary Administrative Powers Counter-Terrorism Act), Parliamentary Papers I 2015-2016, 34359, A, 17 May 2016. It passed the House of Representatives (the parliament) on 17 May 2016.

³ Subsidies for local youth associations, for example, could be temporarily withheld and stopped all together if there were a suspicion that the association’s directors could be linked to specified groups and if subsequently there were a risk that the association might use government subsidies to organize or support terrorism-related activities. Also, government subsidies for education or research could be withheld from groups and organizations for the same reason.

⁴ According to the bill, if a person plans to leave the Schengen Area “with the purpose of joining an organization that, in agreement with the feelings of the Cabinet, has been placed on a list of organizations that participate in a national or an international armed conflict and that pose a threat to national security”. The list will be made public but a group cannot appeal a listing. The Minister has explained that it includes Al Qaeda and Islamic State.

⁵ The Dutch Senate will vote on an amendment to Article 23 of the Passport Act at the same time it will vote on the Temporary Powers bill. That amendment would empower the Ministry of Security and Justice to order the immediate confiscation and revocation of a person’s passport and identification card if a travel ban is imposed.

The bill contains no requirement for judicial authorization prior to the application of the administrative control measure, consolidating power to issue and apply an order solely in the executive.

An affected person would be able to appeal the ministerial order directly to an administrative court and an administrative judge would be able to consider any facts and circumstances that would have become relevant after the date of the order. However, this judicial review is only available on procedural grounds and not on substance, and only after the control order has been imposed.

It is extremely problematic that the ministerial decision to issue a control order could be based on secret information from the Dutch intelligence and security services, which would not be subject to disclosure to the person affected by the order or the person's lawyer. The UK House of Lords (now the UK Supreme Court) ruled in June 2009 that control orders based on secret information violated the right to a fair trial and essentially struck down the UK's control order regime.⁶ A person must be able to access enough information to effectively challenge the application of a control measure.

The proposed procedure is in clear violation of the European Convention on Human Rights. In *Klass and others v Germany* the European Court of Human Rights (ECtHR) observed that "an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and proper procedure".⁷

On a number of occasions the ECtHR has criticized the executive's power to restrict individual's rights without judicial oversight. For example, in *Szabo and Vissy v Hungary* it observed that measures authorized by the executive are "eminently political" and "incapable of ensuring the requisite assessment of strict necessity with regard to the aims and means at stake".⁸

If a person failed to comply with a control measure, such noncompliance would itself be a criminal offence punishable with up to one year in prison or a fine up to 8200€. Such penalties raise concerns that sanctions for noncompliance would be disproportionate. Amnesty International calls on the Dutch Senate to reject the draft Temporary Administrative Powers Counter-Terrorism Act because it runs afoul of the Netherlands' international human rights obligations. In specific, it fails to delineate precise criteria regarding which behaviours, including associations, could lead to the application of an administrative control measure; fails to provide narrowly tailored definitions of what constitutes "terrorist" activity or the support thereof; fails to include a provision for a person to access sufficient information in order to be able to effectively challenge the application of a specific control; provides an

⁶ Amnesty International, "UK Law Lords Rule Control Orders Based on Secret Information Violate Right to Fair Trial," 10 June 2009, <https://www.amnesty.org/en/latest/news/2009/06/uk-law-lords-rule-control-orders-based-secret-information-violate-right-fair-tri/>. Control orders were replaced by Terrorism Prevention and Investigative Measures in 2011. The Law Lords were undoubtedly influenced by the European Court of Human Rights February 2009 judgment in the case of *A and Others v United Kingdom*, which had concluded, among other things, that the use of secret evidence in internment cases was in violation of fair trial rights enshrined in the ECHR. See *A and Others v United Kingdom*, Application no. 3455/05, European Court of Human Rights, Grand Chamber Judgment of 19 February 2009.

⁷ *Klass and others v Germany*, European Court of Human Rights, Application no. 5029/71, Judgment of 6 September 1978, para 55.

⁸ *Szabo and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14, Judgment of 12 January 2016, para 75.

appeal only on procedural grounds, not on substance, and fails to expressly provide for suspensive effect of a control measure while an appeal is pending; and does not provide for independent judicial oversight of the application and implementation of such orders.

The bill's deficiencies heavily compromise fair trial guarantees; severely undermine the right to an effective remedy; risk violating the prohibition of discrimination; and would threaten an affected person's rights to freedom of movement, expression, and association; and right to privacy and family life.

Proposed Amendments to the Dutch Nationality Act

A bill to amend the Dutch Nationality Act was introduced in May 2016 and is also currently pending in the Senate.⁹

The amendments would only affect persons already outside the Netherlands and provide for the revocation *in absentia* of a dual national's Dutch nationality.¹⁰ An affected person would be deemed a threat to national security on the basis of government claims that they had left the country to voluntarily "join" a foreign state's military service¹¹ or a "terrorist Organization."¹² It remains unclear what precise actions would constitute "joining" such a group (e.g. marrying a member). The Cabinet would maintain a list of such organizations.¹³ Persons subject to this deprivation of nationality could include minors (persons 16 years and older)¹⁴ and would not need to have been charged or previously convicted of terrorism-related crimes. No prior judicial authorisation would be required. Upon the stripping of nationality, the affected individual would automatically be declared an "unwanted alien" and would be prohibited from re-entering the country, voting, or reuniting with family members.

A person can appeal a stripping order, but the bill fails to expressly provide for suspensive effect of the order while an appeal is pending. If the person has been effectively notified – which could be extremely difficult given the fact that he or she would be abroad and/or would be in a conflict zone – and has managed to lodge an appeal, he or she would be able to appoint a lawyer and a person of choice (e.g. family member) to represent them in the

⁹Amendment of the Dutch Nationality Act in light of revoking Dutch Citizenship in the Interest of National Security (Withdrawal of Dutch Citizenship in the Interest of National Security), which will amend the Dutch Nationality Act. Parliamentary Papers I 2015-2016, 34356, A, 24 May 2016. It passed the parliament at 24 May 2016.

¹⁰ Amendments to the Nationality Act adopted in April 2016 had already expanded the grounds 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. The Netherlands does not permit the stripping of a person's nationality if such deprivation would leave him or her stateless.

¹¹ It has been possible since 2003 to deprive an adult of his or her Dutch nationality for voluntarily joining a foreign military service that has participated in an armed conflict against the Dutch state or one of its coalition partners (section 101 Criminal Code and Art. 15, para. 1(e) Nationality Act). The currently proposed amendment to the Nationality Act, if adopted, would move Art. 15, para. 1(e) to Art. 14, para. 3, and the deprivation of nationality would no longer be automatic but a result of a Ministerial decision.

¹² In conformity with the "Netherlands comprehensive action programme to combat Jihadism", "the [Netherlands Nationality] Act will be further amended to allow Dutch nationality to be stripped without prior criminal conviction when Dutch nationals voluntarily enlist in the armed forces of a terrorist militia" (p. 6, under 4b). The bill aims to include this new deprivation ground in Art. 14 of the Nationality Act, notably in case "the person in question has joined an organisation which is taking part in a national or international armed conflict and which has been placed by the Minister of Security and Justice on a list of organisations that constitute a threat to national security."

¹³ In the proposal's explanatory memorandum, the Minister focuses in particular on so-called "jihadist" groups because groups so labelled are perceived by the government as having the objective of disrupting Western societies and can thus constitute a threat to the national security of the Netherlands. See Proposal 2 and explanatory memorandum 2014, pp. 5 and 7. An individual cannot appeal the listing of an organization.

¹⁴ The Minister has stated that age can be a mitigating factor in the proportionality assessment regarding stripping of Dutch nationality.

appeals process. If the affected person does not personally lodge an appeal within the required timeframe, an automatic appeal at the District Court of The Hague would commence, with legal counsel appointed by the court to represent the affected person. An appeal of the District Court ruling could then be lodged at the Council of State (Administrative Jurisdiction Division, which is the highest general administrative court). Administrative courts typically review only on procedural grounds, not on substance.

It is important to note that ministerial decisions to strip a person of Dutch nationality are often based on secret information from the intelligence and security services, which is generally not accessible to the affected person or his representative, raising concerns about “equality of arms” in the course of the appeal.¹⁵ An affected person should have access to enough information to effectively challenge the stripping of his or her Dutch Nationality.

The Dutch proposal to strip nationality raises a number of pressing human rights concerns, not least of which is the problematic nature of a ministerial order issued in absentia, based on secret information and with no provision for the affected person to be heard or represented in the course of Ministerial deliberations to strip nationality. While an automatic appeal provides a safeguard, 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.

Moreover, in general nationality stripping measures in the context of counter-terrorism initiatives can be divisive, and buy into and promote false and xenophobic narratives about “true” citizens whose sole nationality is Dutch and those Dutch citizens of a second tier, possibly perceived to have divided loyalties due to their dual nationality. Nationality stripping can have a detrimental impact on the environment in which Dutch nationals of foreign origin/descent or certain racial/ethnic/religious groups are able to enjoy their human rights on the basis of equality. The ultimate risk is that in fuelling stereotypes of who is a “terrorist” the stripping measure helps to create a climate in which certain groups of immigrants and others of certain national origins may find themselves victims of discrimination, regardless of whether or not they come within the remit of the stripping provisions or whether they have dual nationality.

In light of these deficiencies Amnesty International calls on the Dutch Senate to refrain from adopting the pending proposed amendments to the Dutch Nationality Act, which run counter to the Netherlands’ human rights obligations.

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¹⁵ See also footnote 6: *A and Others v. United Kingdom*, Application no. 3455/05, European Court of Human Rights, Grand Chamber Judgment of 19 February 2009.