

**Commentary on the Fourth Periodic Report of the Netherlands on  
the International Covenant on Civil and Political Rights  
(ICCPR)**

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## Introduction

This document contains the comments of 14 Dutch NGOs (hereinafter the Dutch NGOs) on the Fourth Periodic Report of the Kingdom of the Netherlands on the implementation of the International Covenant on Civil and Political Rights.<sup>1</sup> The Fourth Periodic Report of the Netherlands covers the period from 2001 to 2005. The Dutch NGOs welcome the opportunity provided by the Human Rights Committee (hereinafter the Committee or HRC) to submit their report for consideration during this session. The present NGO report focuses on the European part of the Kingdom of the Netherlands. In this report, the Dutch NGOs first would like to make three general observations, followed by comments and recommendations on an article-by-article basis. Finally, an overview is given of all recommendations in the light of the various articles. The Dutch NGOs sincerely hope that the findings in this report will lead to an open debate and a fruitful dialogue between the Committee members and the Government delegation.

First, the Dutch NGOs would like to know which status the Government of the Netherlands accords to the Concluding Observations of the Committee, since the NGOs doubt whether the Government feels obliged to implement these Observations. Also in general, the Dutch Government fails to give proper attention to the Committee's work. So far, none of the Committee's General Comments have been translated into Dutch, nor does the Government make them widely available.

Second, as in their previous reports, the Dutch NGOs would like to point out that the Netherlands still has not withdrawn its reservations to Articles 10, 12, 14, 19 and 20 of the Covenant.<sup>2</sup>

Third, the Dutch NGOs have been reporting to various UN Committees about their concerns regarding the role of the Netherlands in human rights protection at the national level. It is thus with great pleasure that the Dutch NGOs have taken notice of the recent Government decision to establish a National Institute for Human Rights according to the Paris Principles.<sup>3</sup> The Dutch Government has also stated in its pledge to the Human Rights Council that "[t]he Netherlands is firmly committed to the promotion and protection of human rights, both at home and worldwide."<sup>4</sup> The Dutch NGOs sincerely hope that the Government, through the establishment and finalization of this National Institute for Human Rights, will guarantee the overall protection of human rights in national legislation. Furthermore, the NGOs hope that public access to this Institute (which will be based at the Dutch National Ombudsman) for all citizens of the Netherlands with questions about human rights issues will be ensured at all times.

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<sup>1</sup> *Fourth Periodic Report submitted by the Kingdom of the Netherlands under Article 40 of the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/NET/4 (May 2007).

<sup>2</sup> Particular mention should be made of the reservations by the Netherlands with regard to Article 10, paragraphs 2 and 3 (juveniles in detention) and Article 20, paragraph 1 (prohibition of propaganda for war). The text of all Dutch reservations to the Covenant is online at [www2.ohchr.org/english/bodies/ratification/4\\_1.htm](http://www2.ohchr.org/english/bodies/ratification/4_1.htm).

<sup>3</sup> See Government press release dated 11<sup>th</sup> July 2008, *Nederland krijgt Nationaal Instituut voor de Rechten van de Mens*; available (in Dutch) at [www.regering.nl/Actueel/Persberichten\\_ministerraad/2008/juli/11/Nederland\\_krijgt\\_Nationaal\\_Instituut\\_voor\\_de\\_Rechten\\_van\\_de\\_Mens](http://www.regering.nl/Actueel/Persberichten_ministerraad/2008/juli/11/Nederland_krijgt_Nationaal_Instituut_voor_de_Rechten_van_de_Mens). The *Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights* (Paris Principles) were adopted by UN General Assembly Resolution 48/134 of 1993.

<sup>4</sup> *The Netherlands: a committed candidate for the Human Rights Council* (Dutch Ministry of Foreign Affairs, March 2007), at 2; available at [www.minbuza.nl/binaries/en-pdf/nl-human-rights-council-candidacy-pledges-2007.pdf](http://www.minbuza.nl/binaries/en-pdf/nl-human-rights-council-candidacy-pledges-2007.pdf).

## Commentary in the Light of the Provisions of the ICCPR

### Article 2: Non-Discrimination and the Right to an Effective Remedy

The Dutch NGOs would like to draw attention to developments in the field of asylum law which give rise to serious doubts as to whether the right to non-discrimination and to an effective remedy is still guaranteed in the Netherlands.

#### Judicial Review in Asylum Procedures

With the coming into force of new asylum legislation in 2001, the Administrative Jurisdiction Division of the Council of State (the Dutch court of last instance in asylum cases) has narrowed in its case law the scope of judicial review in asylum procedures. It has judged that, on appeal, asylum seekers are not permitted to bring forward information relating to claims regarding their alleged fears of persecution, unless such information was previously raised with the Dutch Immigration and Naturalization Service (INS). Because of this rule, Dutch courts may only review the substance of matters which formed part of the original INS decision to reject the application for asylum. Furthermore, it has ruled that, contrary to an administrative body like the INS, Dutch courts do not have a discretionary competence in this regard. Therefore, according to the Administrative Jurisdiction Division, the courts should limit their scrutiny to a marginal test, thus only assessing the 'reasonableness' of an asylum decision. This is particularly relevant in the light of the criticism of the Dutch NGOs regarding the accelerated asylum procedure (discussed in relation to Article 7 below). The case law of the Administrative Jurisdiction Division has led Human Rights Watch (HRW), in a very critical report issued in 2003,<sup>5</sup> to observe that in the Netherlands "judicial review does not always ensure that the merits of the case are being examined. Denial of a meaningful appeal opportunity is particularly egregious where it follows such an excessively accelerated procedure as the Dutch accelerated asylum procedure, and where the Government itself justifies the very broad use of that procedure by reference to the fact that appeal is available to catch any mistakes."<sup>6</sup> This criticism is also supported by organizations such as the UN Committee Against Torture (CAT),<sup>7</sup> and the United Nations High Commissioner for Refugees (UNHCR).<sup>8</sup>

#### The Salah Sheekh Case

In January 2007, the European Court of Human Rights (ECtHR) issued its judgment in the case of *Salah Sheekh v. The Netherlands*.<sup>9</sup> The application had been lodged with the ECtHR on 15 January 2004 against the rejection by the Minister of Immigration of Mr. Sheekh's request for asylum on 26 June 2003 and the subsequent rejection of his appeal to the administrative court of first instance. In its judgment, the ECtHR ruled that Sheekh, a Somali national and member of the minority group Reer Hamar, had exhausted all national legal remedies in the Netherlands, despite the fact that he had not lodged a further appeal with the Administrative Jurisdiction Division of the Council of State. This judgment is remarkable, since the ECtHR is usually rather strict on admissibility requirements, given its extensive case load. The ECtHR considered that the obligation to exhaust domestic remedies is limited to making use of those remedies which are likely to be effective. In this particular case, it judged that "although the Administrative Jurisdiction Division may in theory have been capable of reversing the decision of the Regional Court, in practice a further appeal would have had virtually no prospect of success."<sup>10</sup> In this context the ECtHR noted that Sheekh's arguments against the rejection

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<sup>5</sup> HRW, *Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy*, April 2003; available at [www.hrw.org/reports/2003/netherlands0403](http://www.hrw.org/reports/2003/netherlands0403).

<sup>6</sup> *Ibid.*, at 15.

<sup>7</sup> See CAT, *Concluding Observations (Netherlands)*, UN Doc. CAT/C/NET/CO/4 (August 2007), para. 7.

<sup>8</sup> See UNHCR, *Implementation of the Immigration Act 2000, UNHCR's Observations and Recommendations*, July 2003; available at [www.rechten.vu.nl/dbfilestream.asp?id=1358](http://www.rechten.vu.nl/dbfilestream.asp?id=1358).

<sup>9</sup> *Salah Sheekh v. The Netherlands*, ECtHR 11 January 2007, Appl. No. 1948/04.

<sup>10</sup> *Ibid.*, para. 123.

of his asylum request were bound to fail, given the Administrative Jurisdiction Division's consistent case law at the time with respect to individual members of (minority) groups to whom organized, large-scale human rights violations had been committed and with respect to the existence of a 'relatively safe' area in Somalia where members of such groups would allegedly find abode. The ECtHR concluded that Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) had been violated.

*Notwithstanding the acknowledgement of the independence of the judiciary, the Dutch NGOs would like to bring the above-mentioned critique of international organizations to the attention of the Committee, as it may place the recommendations of the Dutch NGOs with regard to Articles 7 and 13 in a wider perspective.*

## **Article 7: Prohibition of Torture and Inhuman or Degrading Treatment**

In its report, the Government has not mentioned its obligations under Article 7 in relation to the prohibition of *refoulement*. The Dutch NGOs nevertheless believe that a number of developments are particularly relevant in relation to this prohibition and Article 7.

### The Accelerated Asylum Procedure

In the Dutch 'accelerated asylum procedure', asylum cases are evaluated within 48 working hours, i.e. within some 3.5 working days. Due to time pressure, procedural safeguards and a fair review of the application by the INS are under significant pressure (see also Article 13, discussed below). This procedure makes it difficult for asylum seekers to properly substantiate their claims and may place them (in particular the most vulnerable groups such as children and traumatized persons) at risk of being expelled to a country where they may face torture or inhuman or degrading treatment, in breach of Article 7 ICCPR.<sup>11</sup>

The narrowed possibilities for judicial review of asylum cases further restrict the right of asylum seekers to be heard and to seek refuge outside one's home country. Not only has the Administrative Jurisdiction Division of the Council of State limited judicial scrutiny to a marginal test, the Dutch NGOs also notice a focus in asylum appeals on procedural regulations. Thus the Administrative Jurisdiction Division stated in a decision of March 2002 that even in cases of forced returns to countries where the person in question may be at risk of cruel, inhuman or degrading treatment or punishment, domestic rules of procedure should, as a rule, be respected.<sup>12</sup> This focus on procedure and efficiency within the whole asylum procedure instead of on the person and the merits of the case gives rise to serious concern on the part of the Dutch NGOs.

### Judgments of the European Court of Human Rights

The Dutch NGOs express their deep concern about the unwillingness of the Dutch Government to bring its asylum legislation and policies in line with international human rights law and jurisprudence. In recent years, the ECtHR has held that the forced return of an asylum seeker by the Dutch authorities after a rejection of his or her asylum request would constitute a breach of Article 3 ECHR, which prohibits torture and inhuman or degrading treatment. For example, in 2003 the ECtHR held that an Eritrean national's asylum motives which had been found 'not credible' by the INS were sufficient to prove a real risk of exposure to torture or inhuman or degrading treatment upon return to Eritrea.<sup>13</sup> Thus the rejection of his appeals against the Minister's decision, both by the first instance court and by the Administrative Jurisdiction Division, violated Article 3 ECHR. The above-mentioned case of

<sup>11</sup> See also the above-mentioned reports by CAT, UNHCR and HRW, *supra* notes 5-8.

<sup>12</sup> See Administrative Jurisdiction Division 5 March 2002; available (in Dutch) at [www.rechtspraak.nl/ljn.asp?ljn=AE1165](http://www.rechtspraak.nl/ljn.asp?ljn=AE1165).

<sup>13</sup> See *Said v. The Netherlands*, ECtHR 5 July 2005, Appl. No. 2345/02.



*Salah Sheekh* in 2007 constitutes another example. In this case, the ECtHR held that the expulsion of Sheekh would be in breach of Article 3 ECHR. The ECtHR reasoned that a court could not require from an asylum seeker, who belonged to a minority and who for that reason was bereft of protection in his country of origin, that he establish further special distinguishing features about him personally in order to show that he ran a real risk of violation of Article 3 ECHR.<sup>14</sup> Such a requirement as consistently practised by the Administrative Jurisdiction Division renders the protection of Article 3 ECHR illusory. The ECtHR also noted that the risk of a violation of Article 3 ECHR was underestimated by the Netherlands. According to the ECtHR, the assessment should be made in the light of “domestic materials as well as other reliable and objective sources.”<sup>15</sup>

The Dutch State Secretary for Justice has announced in a letter to Parliament that the specific application of Article 3 ECHR in such cases would be reconsidered in the light of the *Salah Sheekh* judgment.<sup>16</sup> However, so far the Dutch Government has not clearly brought its asylum legislation and policies in line with this decision. It has issued a policy guideline in which a distinction is made between ‘groups at risk’ and ‘vulnerable minorities’.<sup>17</sup> However, it is unclear when a person belongs to one of these groups and which guarantees are given to persons belonging to either of these groups.

#### Return of Asylum Seekers to Greece under the Dutch Asylum Procedure and the Dublin Regulation

Special attention is needed, in the light of Article 7 and the Dutch asylum procedure, with regard to the return of asylum seekers to Greece under the European Dublin Regulation.<sup>18</sup> It has been reported that asylum seekers who are returned to Greece under the Dublin Regulation might have access neither to a fair asylum procedure nor to adequate protection. There is a risk that these asylum seekers will be expelled from Greece to their country of origin in violation of Article 7. (It should also be noted here that, under European law yet within the same context, the European Commission has recently initiated an infringement procedure against Greece.) As long as Greece does not comply with its obligations under international refugee law, returning asylum seekers to Greece could amount to a violation of Article 7 ICCPR.<sup>19</sup>

#### Safety in Youth Custodial Centres

The Dutch NGOs are increasingly concerned about the safety of children in detention in youth custodial institutions, including their protection against violence and aggression (see also Article 10). The rules for the treatment of juveniles in youth custodial institutions are laid down in the Youth Custodial Institutions Act and several regulations. Some of these rules are not in conformity with international human rights standards. For example, all disciplinary measures constituting cruel, inhuman or degrading treatment or punishment should be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment which may compromise the physical or mental health of the juvenile concerned. Nevertheless, measures of confinement and isolation are permitted by Dutch law and are frequently used in youth custodial

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<sup>14</sup> See also *Vilvarajah et al. v. United Kingdom*, ECtHR 26 September 2007, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87.

<sup>15</sup> *Salah Sheekh v. The Netherlands*, *supra* note 9, para. 136.

<sup>16</sup> See *Kamerstukken (Parliamentary records) II*, 2006-2007, 29 344, no. 64; available (in Dutch) via <http://parlando.sdu.nl/cgi/login/anonymous>.

<sup>17</sup> See *Vreemdelingencirculaire 2000*, Chapter C14/4.5: *Landgebonden asielbeleid*; available (in Dutch) via <http://cmr.jur.ru.nl/cmr/vc/vc00>.

<sup>18</sup> The Dublin Regulation (European Council Regulation 343/2003 of 18 February 2003) is an agreement between the European Union (EU) Member States which ensures that an application for asylum submitted in an EU Member State is handled by only one country. The Regulation establishes rules as to which Member State is responsible for handling the application. If an asylum seeker moves to another Member State while his/her application is still being processed or if he/she files a second application in another Member State, he/she is returned to the (first) responsible State.

<sup>19</sup> See also *X v. Finland*, ECtHR 20 June 2008 (interim measure prohibiting expulsion to Greece), Appl. No. 29565/08; The Hague District Court (location Zwolle) 3 July 2008; available (in Dutch) at [www.rechtspraak.nl/ljn.asp?ljn=BD6344](http://www.rechtspraak.nl/ljn.asp?ljn=BD6344).

institutions in the Netherlands. Depending on the circumstances, they are used either as a disciplinary sanction or preventive, as a means of securing compliance with rules.

#### Human Rights Education for Police Officials

The Dutch NGOs would like to draw attention to the recommendation made by CAT on the occasion of its visit to the Netherlands in April and May 2007. CAT noted that there are no data available on the effect of the human rights training which Dutch police and prison officials receive. It recommended to assess the effectiveness of the training programmes on the incidence of torture, violence and ill-treatment and to register complaints related to such cases allegedly committed by law enforcement officials.<sup>20</sup>

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Reconsider its current asylum legislation in view of Article 7, which should at least lead to amendment of the accelerated asylum procedure in order to enable a more thorough and adequate assessment of the asylum application;*
- *Suspend all pending expulsion cases to Greece, awaiting the outcome of the European Commission's infringement procedure;*
- *Make sure that children in youth custodial centres are not at risk of torture and inhuman or degrading treatment;*
- *Assess the effectiveness of the human rights training programmes for police and prison officials, and register complaints on torture and inhuman or degrading treatment allegedly committed by law enforcement officials.*

### **Article 8: Prohibition of Slavery, Servitude and Forced Labour**

#### Assistance and Protection for Victims of Trafficking in Human Beings

The Dutch NGOs are concerned about the limited protection the special B9-regulation<sup>21</sup> in the immigration law offers to victims of trafficking in human beings and forced prostitution. According to the Dutch B9-regulation, victims of trafficking and forced prostitution are entitled to a temporary or long-term residence permit during criminal proceedings on the condition that they cooperate with the authorities. In other words, the victims only have access to residence, assistance and protection on the condition that they are able and willing to act as witnesses against their own traffickers. However, they are often unable or unwilling so to testify for fear of retaliation and due to the lack of protection after the conclusion of the criminal proceedings.<sup>22</sup> According to the Dutch NGOs, this regulation, which is predominantly based on State interests rather than victims interests, is incompatible with the Dutch Government's obligation to provide protection and assistance to *all* victims of trafficking as victims of serious human rights abuses, independent of their usefulness in criminal proceedings.

Moreover, in addition to the objection as a matter of principle to the B9-regulation, there are also problems with regard to the implementation of this regulation which lead to further exclusion of the victims from the possible rights attached to pressing charges. These include:

- inadequate identification of (possible) victims in the asylum procedure and in detention centres for aliens;

<sup>20</sup> See CAT, *Concluding Observations (Netherlands)*, *supra* note 7, paras. 13-14.

<sup>21</sup> The so-called B9-regulation refers to Chapter B9 of the *Vreemdelingencirculaire 2000*, *supra* note 17. More information on this regulation is available (in Dutch) at [www.b9-regeling.info](http://www.b9-regeling.info).

<sup>22</sup> According to estimates of the National Rapporteur on Trafficking in Human Beings, only 5% of the victims press charges. See *First and second report of the Dutch National Rapporteur on Trafficking in Human Beings*, The Hague 2002 and 2003; available at <http://english.bnrm.nl/reports>.

- inadequate information to the victims about their rights and the progress of criminal proceedings;
- summary dismissal of cases or discouragement of victims from making an official complaint.<sup>23</sup>

The Dutch NGOs find the procedure regarding the provision of a long term residence permit to victims of trafficking inadequate. Since 2006, only those victims whose complaint has led to a conviction or who have had a temporary residence permit for three years are entitled to a long-term residence permit. In all other cases, the application for a long-term residence permit on humanitarian grounds is judged on a case-by-case basis. However, the burden of proof which is borne by the victims is so heavy that they are seldom able to pass the test. Also the strict legal distinction between the asylum procedure and the “regular” procedure under the new Immigration Act 2000 poses problems (see Article 13).<sup>24</sup> Therefore, in the view of the Dutch NGOs the procedure should include a risk assessment before any decision about the expulsion of a victim is taken. This should include an assessment of the risk of reprisals, the willingness and ability of the authorities of the country of origin to provide protection against reprisals, the availability of adequate and confidential assistance, and the perspectives of the victim for social inclusion on return.

#### Risk of Trafficking of Minor Unaccompanied Asylum Seekers

Minor unaccompanied asylum seekers are a particularly vulnerable group, especially female minor asylum seekers whose application for asylum is rejected. Some enter the Netherlands requesting asylum and then disappear into prostitution shortly after registering at a refugee centre. Others are referred to or themselves seek refuge in an asylum centre after having become the victim of trafficking, without being identified as such. When they attain the age of 18, they lose their temporary residence permit and are expected to return to their home country. There are several cases in which young female asylum seekers were sent onto the streets on turning 18 without any protection or assistance or any realistic possibility to return to their home country, and who subsequently became the victim of trafficking, forced prostitution or rape. The Dutch Government fails to address the particularly high risk run by this category of asylum seekers of falling into the claws of traffickers.

#### Inadequate Protection and Care Services for Minors

The Dutch NGOs are concerned about the inadequate protection and care services with regard to trafficking and exploitation of both Dutch minors and minors from abroad who are either legally or illegally resident in the Netherlands. A Dutch study into the trafficking and exploitation of minors reported 230 cases during the period from 2003 to 2005.<sup>25</sup> 169 (73.5%) of these concerned exploitation in prostitution, 21 (9.1%) concerned exploitation in prostitution and in other sectors such as housekeeping, the hotel and catering industry, the cleaning sector, drug trafficking and crime; 17.4% of the cases solely concerned exploitation in these other sectors. The majority of the minors in question were girls between the ages of 12 and 18; the cases reviewed in this study related to both Dutch and foreign children. The victims originated from 31 different countries. In 2006, 130 child victims were reported to the Dutch Foundation against Trafficking of Women (STV) (18% of the total number of reported cases). The Fifth Report of the Dutch National Rapporteur on Trafficking in Human Beings (2007) cites children as a group which is particularly at risk. Factors which make children vulnerable to exploitation are their emotional dependency, lack of documents and family circumstances, as well as financial issues. Also children with a (slight) mental handicap are

<sup>23</sup> See *Position of victims of trafficking, First Trend Report 2006*, Adviesbureau Van Montfoort & Verwey-Jonker Instituut, commissioned by the WODC/Ministry of Justice (2007); available (in Dutch) at [www.verwey-jonker.nl/vitaliteit/publicaties/recht/positie\\_slachtoffers\\_mensenhandel](http://www.verwey-jonker.nl/vitaliteit/publicaties/recht/positie_slachtoffers_mensenhandel).

<sup>24</sup> In many cases, asylum related and ‘regular’ humanitarian grounds intermingle, for example when the victim already has a history of trafficking or forced prostitution in her home country before being trafficked to the Netherlands.

<sup>25</sup> See *Investigating Exploitation. Research into trafficking in children in the Netherlands*, ECPAT Nederland, Unicef & Defence for Children International Nederland (Amsterdam 2005); available at [www.unicef.nl/unicef/servlet/nl.gx.siteworks.client.http.GetFile/id=108188](http://www.unicef.nl/unicef/servlet/nl.gx.siteworks.client.http.GetFile/id=108188).

vulnerable. Unaccompanied minor aliens and former unaccompanied minor aliens are a specific group at risk.<sup>26</sup>

Although trafficking in human beings has been designated as one of the six spearheads for the police National Investigation Team and although politicians have also stated that the sale of children has priority, this policy is still insufficiently evident in practice. In 2004, the UN Committee on the Rights of the Child (CRC) urged the Dutch Government to ensure that all child victims of trafficking in the Netherlands have access to appropriate recovery and reintegration programmes.<sup>27</sup> Although there are improvements, the protection and care services provided are still inadequate.

The Dutch NGOs would like to see a more structural national approach to the prevention of sexual exploitation of children and child trafficking than is presently offered. Such an approach could entail:

- provision of more information about (sexual) exploitation and violence at schools;
- expansion of capacity as well as better training and instruction of police, public prosecution and judiciary and specific aid facilities for children;
- a uniform register of child trafficking, prostitution and pornography;
- greater safety in reception centres for unaccompanied minor aliens, as well as a safe return of child victims of cross-border trafficking to their countries of origin.

#### Lesser Protection of Migrant Prostitutes

The Dutch NGOs would further like to express their concern about the effects of the abolition of the ban on brothels (see paragraphs 100 and 111-112 of the Government report) to the position of (undocumented) migrant prostitutes. In particular, this gives rise to concerns in relation to the prohibition in the Foreign Nationals (Employment) Act (*Wet Arbeid Vreemdelingen*) on the issuance of a work permit for the sex industry to non-EU migrants.<sup>28</sup> This prohibition excludes non-EU migrants from working legally in the Dutch sex industry and makes them vulnerable to trafficking and other forms of exploitation and violence. Although the evaluation of the lifting of the ban on brothels in 2002<sup>29</sup> and 2007<sup>30</sup> does not show a significant shift to the illegal sex sector, it is observed that in particular the position of minor, illegal and trafficked prostitutes has worsened. In this respect, the Dutch NGOs are also concerned about illegal transgender prostitutes, who form another vulnerable category.<sup>31</sup> One of the effects of the change of the law on brothels is a growing cleft between, on the one hand, a legal and regulated sex sector where the position of (Dutch / EU) prostitutes is slowly improving, and, on the other hand, an illegal, unregulated and unprotected sex sector, in which in particular minor, illegal and trafficked prostitutes work who do not enjoy the rights which are enjoyed by legal prostitutes.<sup>32</sup> The Dutch NGOs are of the opinion that the prohibition to issue work permits to non-EU migrants only exacerbates this effect.

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<sup>26</sup> See *Fifth Report of the Dutch National Rapporteur on Trafficking in Human Beings* (The Hague, 2007); available at <http://english.bnrm.nl/reports>.

<sup>27</sup> See CRC, *Concluding Observations (Netherlands)*, UN Doc. CRC/C/15/Add.227 (February 2004), para. 57.

<sup>28</sup> Notably, prostitution is the *only* kind of work for which the issuance of a work permit is prohibited by law.

<sup>29</sup> See A.L. Daalder, *Lifting the ban on brothels. Prostitution in 2000-2001* (WODC 2002); available at [www.wodc.nl/onderzoeksdatabase/01.035g-lifting-the-ban-on-brothels.aspx?cp=44&cs=6799](http://www.wodc.nl/onderzoeksdatabase/01.035g-lifting-the-ban-on-brothels.aspx?cp=44&cs=6799).

<sup>30</sup> See A.L. Daalder, *Prostitution in the Netherlands since the lifting of the brothel ban* (WODC 2007); available at [www.wodc.nl/onderzoeksdatabase/1204e-engelse-vertaling-rapport-evaluatie-opheffing-bordeelverbod.aspx](http://www.wodc.nl/onderzoeksdatabase/1204e-engelse-vertaling-rapport-evaluatie-opheffing-bordeelverbod.aspx).

<sup>31</sup> See P. Vennix *et al.*, *Klanten van transgenders. HIV-preventie, seksueel gedrag en seksuele netwerken van klanten van transgenders op de tippelzones van Amsterdam en Rotterdam* (NISSO, Utrecht 2001).

<sup>32</sup> See T.P. Spijkerboer, *The Women's Treaty and Dutch Immigration law* (Amsterdam, 2002), at 47; available (in Dutch) at [www.acvz.com/index.php?id=18,225,0,0,1,0](http://www.acvz.com/index.php?id=18,225,0,0,1,0).

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Ensure that all victims of trafficking have access to assistance and protection, regardless of their capacity or willingness to act as witnesses in proceedings against their oppressors, and to carry out a risk assessment before any decision on a long-term residence permit or on return to the victims' home country;*
- *Take measures to improve the implementation of the B9-regulation;*
- *Take measures to protect unaccompanied minor asylum seekers against the risk of falling into the clutches of traffickers, in particular the ones who are not granted asylum after they attain the age of 18;*
- *Ensure a more structural national approach to the prevention of sexual exploitation of children and child trafficking than is presently offered;*
- *Lift the prohibition on the issuance of work permits for prostitution, in order to reduce the number of undocumented migrant prostitutes and their vulnerability to violence, abuse and exploitation by brothel keepers and clients.*

## **Article 9: Right to Liberty and Security of Person**

### Aliens in Detention

The Dutch NGOs are greatly concerned about the number of aliens in detention and the duration of their detention. They include persons detained as a form of border control (some of whom must await their asylum or immigration procedure in detention) as well as persons who have been arrested for staying in the Netherlands illegally. Although illegal stay in the Netherlands is not a crime as such, illegal aliens are held in detention under a stricter regime than the one imposed on convicted persons. Compared to persons in criminal detention, illegal aliens have fewer possibilities to work, to read books and to undertake other leisure activities or to receive visitors. The Dutch NGOs are concerned that their detention numbers have doubled in the period between 2003 and 2007.<sup>33</sup> The average duration of their detention has also increased. There is no maximum to their period of detention. In addition, no special consideration is given to the fact that some countries do not (or only after a long period of time) issue identification or travel documents to their nationals.

### The Closed Reception Centre Procedure

Although the Dutch Government has recently limited the duration of detention upon deportation for children under the age of 18 to a maximum of two weeks, no improvement has been reached for unaccompanied minors: they can still be in migration detention for months. Between January and November 2007, 160 unaccompanied minors were held in migration detention.<sup>34</sup>

In its report, the Government has failed to mention its responsibilities under Article 9 regarding the Dutch Closed Reception Centre (CRC) Procedure. The CRC Procedure applies to asylum seekers who are refused entry at the Dutch border and who are henceforth detained. Based on research commissioned by UNHCR there are several objections to the CRC Procedure.<sup>35</sup> The primary objection is that, in these cases, the Dutch Government provides insufficient explanation as to why detention and further examination are required. Although the Dutch NGOs have concerns about the accelerated asylum procedure (see Articles 7 and 13) and thus do not recommend easy referral to that procedure, they note that the Government does not seem to base its decision on a real need for further

<sup>33</sup> See Amnesty International, *The Netherlands: The Detention of Irregular Migrants and Asylum-Seekers* (June 2008); available at [www.amnesty.org/en/library/info/EUR35/002/2008/en](http://www.amnesty.org/en/library/info/EUR35/002/2008/en).

<sup>34</sup> See Defence for Children International & Unicef Nederland, *Jaarbericht Kinderrechten 2008* (January 2008), at 10; available at [www.unicef.nl/unicef/show/id=53926/contentid=3374](http://www.unicef.nl/unicef/show/id=53926/contentid=3374).

<sup>35</sup> See Dutch Council for Refugees, *Closed Reception Centre Procedure for Asylum Seekers* (study commissioned by UNHCR, September 2007); available (in Dutch) at [www.vluchtelingenwerk.nl/bibliotheek.html](http://www.vluchtelingenwerk.nl/bibliotheek.html).



investigation but instead randomly applies the CRC Procedure to asylum seekers. This implies that the decision is made arbitrarily. Secondly, the length of detention gives rise for concern. Asylum seekers are held in detention for a minimum period of 42 days. A survey carried out by the Dutch Council for Refugees and UNHCR shows that this form of detention takes nearly a hundred days on average.<sup>36</sup> According to the Dutch NGOs, this exceeds what is reasonable as to the purpose pursued. This view by the Dutch NGOs is supported by the ECtHR. In the *Saadi v. United Kingdom* case, the ECtHR judged that although detention of an asylum seeker is permitted under Article 5 ECHR (which is comparable with Article 9 ICCPR), this detention should be compatible with the purpose of that article.<sup>37</sup> The European Court accordingly held that “[t]o avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate (...); and the length of the detention should not exceed that reasonably required for the purpose pursued.”<sup>38</sup> It is doubtful whether Dutch asylum law regarding the CRC Procedure complies with these requirements.

### Children in Alien Detention

Aside from the many adults in alien detention, many children without residence permits are similarly detained in the Netherlands while waiting to return to their countries of origin. The Dutch NGOs are concerned that their detention and forced return have a severe negative effect on the health of these children.<sup>39</sup>

### Children in Criminal Detention

The number of children deprived of their liberty in the Netherlands has grown exponentially in the last ten years. Between 1997 and 2007, the capacity for minors in detention in youth custodial institutions increased from 1,410 to 2,753. In 2007, over the whole year, a total of 4,726 children in conflict with the law were deprived of their liberty. There are growing concerns that the arrest, detention or imprisonment of children is not being used, as required by Article 40(3)(b) and (4) of the Convention on the Rights of the Child, as a measure of last resort, nor for the shortest appropriate period of time. Alternatives for detention as well as methods for diversion are available, but only on a very limited scale. Evidence-based research and information on the effect of existing programmes for diversion and the use of alternatives for detention are lacking. The Dutch NGOs are also concerned that children of all ages can be arrested and heard by the police without the presence of their parents or a lawyer.<sup>40</sup>

### Expanding Criminal Law

A statute significantly expanding State powers to investigate and prosecute terrorist acts came into effect in the Netherlands in February 2007 (*Wet ter verruiming van de mogelijkheden tot opsporing en vervolging van terroristische misdrijven*). In order to use such investigative powers it is no longer required, where terrorist activities are thought to be afoot, that the requirement of a reasonable suspicion is met. It now suffices that there are mere ‘indications’ that a terrorist attack is being prepared. Also, the law increases the maximum period of pre-trial detention from 90 days to two years. The Dutch NGOs believe this statute to be in breach of the right to liberty and security of person.

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<sup>36</sup> See *ibid*, at 42.

<sup>37</sup> *Saadi v. United Kingdom*, ECtHR 29 January 2008, Appl. No. 13229/03.

<sup>38</sup> *Ibid*, para. 74.

<sup>39</sup> See also Artsen Jeugdgezondheidszorg Nederland, *Detineren en uitzetten asielzoekerskinderen in strijd met de rechten van het kind*, 22 April 2008; available at [http://jgz.zorgmediatheek.nl/Portals/0/PDF/standpunt\\_AJN\\_uitzetten\\_kinderen\\_22-4-2008.pdf](http://jgz.zorgmediatheek.nl/Portals/0/PDF/standpunt_AJN_uitzetten_kinderen_22-4-2008.pdf).

<sup>40</sup> See Defence for Children International Nederland, *Violence against Children in Conflict with the Law: A study on Indicators and Data Collection in Belgium, England and Wales, France and the Netherlands* (Amsterdam, March 2008); available at [www.crin.org/violence/search/closeup.asp?infoID=16582](http://www.crin.org/violence/search/closeup.asp?infoID=16582).

### 100% Drugs Control at Schiphol Airport: No Body Scan Alternative for Pregnant Women

In order to repress drug trafficking via Schiphol national airport, for a number of destinations a body scan is mandatory for every passenger (so-called '100% control'). Pregnant women who are suspected of drug trafficking and who cannot undergo a body scan because of the risks of radiation, are locked in until they have proven their innocence by producing clean faeces three times. A complaint is pending with the National Ombudsman, submitted by a Dutch pregnant nurse of Surinamese origin who was innocently kept detained at Schiphol for five days (report no. 2006/001). The Dutch Government refuses to provide the possibility of an echo to pregnant women as an alternative. In response to questions in Parliament, the Government answered that this would cost too much time and capacity.<sup>41</sup>

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Reconsider its asylum legislation with respect to the CRC Procedure;*
- *Not to place any children in detention on the grounds of their migration status but to allow minors to stay with their parents at shelter locations;*
- *Not to detain unaccompanied minor aliens but to allow them to stay in communal accommodation;*
- *Develop a national action plan to reduce the number of children behind bars;*
- *Reconsider its statute expanding State powers to investigate and prosecute terrorist acts;*
- *Provide pregnant women who are 'suspected' of drug trafficking at the 100% drugs control at Schiphol airport with an echo as an alternative for a body scan.*

## **Article 10: Treatment of Persons Deprived of Their Liberty**

### Safety of Children in Detention

The Dutch NGOs are concerned about the safety of children in detention in youth custodial institutions, including their protection against violence and aggression. Four National Inspectorates (on youth care, education, health care and the execution of sanctions) concluded in their report of September 2007 that none of the fourteen youth custodial institutions provides a safe environment for children or staff.<sup>42</sup> Accordingly, some of the rules for the treatment of juveniles in youth custodial institutions as laid down in the Youth Custodial Institutions Act and several regulations are not in conformity with international human rights standards. Measures such as confinement and isolation are used frequently as disciplinary sanctions or order measures. Moreover, albeit under strict conditions, the use of (instruments of) force by staff is also authorized. The Dutch NGOs find that such measures not only violate Article 10, but also constitute cruel, inhuman or degrading treatment or punishment which compromises the physical and/or mental health of the juveniles concerned (see also Article 7 as discussed above).

### Long Waiting Lists in PIJ Juvenile Treatment

With regard to sentences for treatment in a juvenile institution (the so-called *PIJ-maatregel*), the Dutch NGOs are particularly concerned about the existence of long waiting lists which *de facto* prolong the sentence of the juvenile in question. While the effectiveness of institutional treatment is of itself contentious, the waiting lists for places of treatment are not infrequently more than a year long. In some of these cases, the children concerned have obtained damages for psychological damage

<sup>41</sup> See Answers to Questions by Members of Parliament Van Bommel and De Wit, 19<sup>th</sup> May 2008, parliamentary record no. 2275 (*Tweede Kamer 2007-2008*).

<sup>42</sup> See Inspectie Jeugdzorg *et al.*, *Veiligheid in Justitiële Jeugdinrichtingen: Opdracht met Risico's* (Utrecht, September 2007); available at [www.inspectiejeugdzorg.nl/content/ijz\\_publicaties.asp?hr\\_id=14#](http://www.inspectiejeugdzorg.nl/content/ijz_publicaties.asp?hr_id=14#). It should be noted that regular and independent inspections of youth custodial institutions by national inspectorates are not provided for by law and do not take place on a regular basis.

caused by such delays,<sup>43</sup> while in others the lower courts have ordered the State to provide the diagnosed facility.<sup>44</sup> Such shortcomings were judged by the courts concerned to violate, *inter alia*, Article 5(1)(d) ECHR and Article 37 of the Convention on the Rights of the Child. These Dutch cases are not dissimilar to the cases of *Bouamar v. Belgium*<sup>45</sup> and *D.G. v. Ireland*,<sup>46</sup> in which the ECtHR found violations of Article 5(1)(d) ECHR due to overlong detention of minors without provision of the treatment which had been prescribed to address the minor's problems. In the meantime, children as young as 12 who have been sentenced to institutional treatment are held in regular detention in youth prisons.

#### Juveniles in Adult Prison Facilities

The Dutch NGOs are concerned about juvenile suspects and offenders being held in custody in adult prison facilities. Cases have been reported where, during police hearings, children were locked up in cells together with adults. As sixteen- and seventeen-year-olds can be tried and sentenced under adult criminal law, they are consequently often imprisoned in adult prisons. In line with this policy, a number of adult prisons now come to include youth divisions in which juvenile offenders are separated from adults. Although this is an improvement, juvenile offenders are still compelled to share the same facilities with adults.

#### Health Care in Places of Alien Detention

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) recently visited the Netherlands. In its report, it comments (*inter alia*) on the accessibility of medical staff for aliens in places designated especially for alien detention during out-of-office hours.<sup>47</sup> These places are floating prisons (detention boats) and Rotterdam Airport Expulsion Centre. In reaction to the recommendation of the CPT, the Dutch Minister of Justice denied the need for the presence of medical staff in these facilities during out-of-office hours, as the non-medical staff present should, in the Minister's view, be well able to deliver first aid or call an emergency service.<sup>48</sup> Shortly afterwards, two persons died in one of these detention centres.<sup>49</sup> Although natural deaths may occur in prison and therefore cannot be excluded, the Dutch NGOs are concerned that the Government has not ordered an independent investigation, including a forensic examination to investigate whether this accident could have been prevented. Instead, only the National Agency of Correctional Institutions will perform an investigation into the causes of death.

#### Health Care for Aliens Involuntarily Admitted to a Forensic Psychiatric Hospital

The Dutch NGOs are further concerned that migrants, refugees and asylum seekers who do not have Dutch nationality and who, after having been found not guilty of a serious criminal offense by reason of insanity and who are placed in a forensic psychiatric hospital at the disposal of the State (a so-called *TBS-maatregel*), do not receive the same level of medical care, treatment and facilities as similar patients with Dutch nationality. A recent report by several medical organizations indeed states that, although aliens and Dutch nationals should receive the same care, aliens under a *TBS-maatregel* are placed in special detention centres where adequate staff and facilities are lacking.<sup>50</sup>

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<sup>43</sup> See e.g. Groningen District Court 20 December 2006, available at [www.rechtspraak.nl/ljn.asp?ljn=AZ5794](http://www.rechtspraak.nl/ljn.asp?ljn=AZ5794).

<sup>44</sup> See e.g. Groningen District Court 17 November 2006, available at [www.rechtspraak.nl/ljn.asp?ljn=AZ3510](http://www.rechtspraak.nl/ljn.asp?ljn=AZ3510).

<sup>45</sup> *Bouamar v. Belgium*, ECtHR 29 February 1988, Appl. No. 9106/80.

<sup>46</sup> *D.G. v. Ireland*, ECtHR 16 May 2002, Appl. No. 39474/98.

<sup>47</sup> See CPT, *Report to the Authorities of [the Netherlands] on the Visits Carried out to [the Netherlands] by the [CPT] in June 2007* (Strasbourg, February 2008), CPT/Inf (2008) 2, at 35; available at [www.cpt.coe.int/en/states/nld.htm](http://www.cpt.coe.int/en/states/nld.htm).

<sup>48</sup> See Letter by the Minister of Justice dated 29<sup>th</sup> January 2008, *Kamerstukken II, 2007-2008*, 24587, no. 245.

<sup>49</sup> See, e.g., “*Wie hielp de stervende illegaal?*”, *Vrij Nederland*, 16 February 2008; available at [www.vn.nl/Verhalen/DossierDetentieboot.htm](http://www.vn.nl/Verhalen/DossierDetentieboot.htm).

<sup>50</sup> See *Arts en Vreemdeling*, Commissie Medische Zorg (dreigend) uitgeprocedeerde asielzoekers en illegale vreemdelingen (Utrecht, December 2007); available at [www.ggd.nl/ggdnl/46963](http://www.ggd.nl/ggdnl/46963).



Furthermore, aliens placed involuntarily in a forensic psychiatric hospital are nearly always declared ‘undesirable’. This means that their residence permit is withdrawn and any application for a residence permit will be rejected. It also means that they lose the right to stay in or to re-enter the Netherlands for a number of years. As a consequence, these people cannot re-socialize in the course of their treatment. As re-socialization into society forms an integral and indivisible part of regular treatment, they cannot be treated effectively. In the case of *Maslov v. Austria* the ECtHR has recently held that particular attention must be addressed to the detrimental effects upon the rehabilitation of a minor who is subjected to an exclusion order following the serving of a criminal sentence.<sup>51</sup> The reasoning of the ECtHR is certainly not confined only to minors; many of the considerations mentioned by the Court should weigh heavily in the case of a mentally ill person. Also the case of *Dickson v. United Kingdom* reveals how the ECtHR is distancing itself from punitive measures and rather turning to the modern approach to offenders, which focuses on their rehabilitation.<sup>52</sup>

Another consequence of the ‘declaration of undesirability’ (exclusion order) is that the alien in question can only be sent back to his or her country of origin or stay in prison or in a special *TBS* treatment centre for life. The Dutch NGOs believe that forced return to the country of origin is only possible if this causes no violation of the prohibition of *refoulement* and if adequate psychiatric treatment is available in the country in question. A recent report commissioned by the Government<sup>53</sup> shows that some aliens cannot be sent back, either because there are no relatives in the country of origin who can provide care or because the authorities in these countries refuse to cooperate with repatriation. Long-term residence of such patients in a specially designated centre for aliens with a *TBS-maatregel* (which the Government set up in 2005 for aliens who have (nearly) finished the intramural part of their treatment, in order to prepare them for return to their country of origin) is deemed to be no option in this report, as this centre cannot provide for a meaningful daytime programme. Transfer to a regular treatment centre for persons with a *TBS-maatregel* is no option either, given the shortage of available places in these centres. At this moment, these aliens are either placed in a long-stay department of a *TBS* treatment centre or they are returned to their home country without any guarantees as to the availability of care. The Dutch NGOs consider this to be a highly undesirable situation.

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Ensure greater safety in youth custodial institutions by developing a better and consistent policy towards juveniles, taking into account their age, vulnerability of the child and the aim of juvenile justice to work towards reintegration of the child;*
- *Evaluate treatment programmes in closed institutions in a more detailed and regular manner, and end the waiting lists for treatment in closed institutions;*
- *Ensure separate detention of juveniles and adults;*
- *Provide for independent professional investigations of all deaths in (alien) detention centres;*
- *Provide information on the number of aliens with a *TBS-maatregel* as of 2000. Assess the treatment of this particular group of aliens and possible alternatives for lifelong imprisonment if return to their home country is not an option. Provide information on the number of these aliens who have been repatriated to their home countries and on the care which was provided to them in these countries.*

<sup>51</sup> See *Maslov v. Austria*, ECtHR 23 June 2008, Appl. No. 1638/03, paras. 70-71. See also the landmark cases of *Boultif v. Switzerland*, ECtHR 2 August 2001, Appl. No. 54273/00 and *Üner v. The Netherlands*, ECtHR 18 October 2006, Appl. No. 46410/99.

<sup>52</sup> See *Dickson v. United Kingdom*, ECtHR 4 December 2007, Appl. No. 44362/04, para. 75.

<sup>53</sup> See Regioplan Beleidsonderzoek, *Ongewenst verklaarde vreemdelingen in de TBS*, study commissioned by WODC (Amsterdam, March 2008); available at [www.wodc.nl](http://www.wodc.nl).

## Article 12: Freedom of Movement

### Restrictive Measures on Persons in the Interest of National Security

In May 2006, the Dutch Government proposed a new law entitled the ‘Act on Administrative Measures for National Security’ (*Wet Bestuurlijke Maatregelen Nationale Veiligheid*). The proposed Act was adopted by the Second Chamber of Parliament and is currently pending before the Senate.<sup>54</sup> The Act is intended to expand the possibilities for administrative bodies to prevent activities associated with (the support of) terrorism. It purports to do so by enabling the Minister of the Interior and Kingdom Relations (together with the Minister of Justice) to ban individuals from approaching certain places or persons in any part of Dutch territory. The Act also introduces the power to put citizens under an obligation to report periodically to the police. These administrative measures could be imposed on persons “who, based on their behaviour, may be associated with terrorist activities or the support of terrorist activities.”<sup>55</sup>

In the view of the Dutch NGOs, the description “associated with terrorist activities or the support of terrorist activities” is far too broad and too vague. According to the Government during the Parliamentary reading of the Act, such behaviour could (*inter alia*) consist of hanging about near possible terrorist targets without a clear reason to do so.<sup>56</sup> According to the Dutch NGOs this constitutes an obvious infringement of both the right to freedom of movement (Article 12) and the right to privacy (Article 17) which is insufficiently foreseeable. It remains after all unclear what kind of (terrorist) activities are aimed at and what kind of behaviour could be “associated with terrorist activities”.

What concerns the Dutch NGOs most, however, is the fact that these measures can be imposed when powers based on criminal law cannot (yet) be exercised. The Dutch Government itself has indeed stated that these measures may be imposed on the basis of facts and circumstances that, in themselves, are or appear to be insufficient for criminal prosecution, but which are of such a nature that measures would seem justified.<sup>57</sup> Since Dutch criminal law has already been highly expanded, such administrative measures will thus take effect at a very early stage when clear indications of any terrorist activity are absent. The Government has argued that there is a pressing need for these measures in order to protect the lives of its citizens. The Dutch NGOs acknowledge the fact that it is an important concern of the Government to protect its citizens against terrorist acts. However, in the view of the Dutch NGOs this cannot mean that the regular framework for balancing the need for public action against fundamental rights is irrelevant and can be dispensed with. The Government has not argued why it needs these powers in addition to the powers it already has under regular criminal law. In the opinion of the Dutch NGOs, the Government has rightly admitted that terrorists who are willing to sacrifice their lives are unlikely to be discouraged by these measures. It should further be stressed that the legal protection against these measures will be far less adequate than in regular criminal proceedings since judicial review will only be possible after an administrative appeal by the person(s) concerned.

### Interregional Transport for Persons with Disabilities

Neither the Equal Treatment Act nor the Equal Treatment of Disabled and Chronically Ill Persons Act are (yet) applicable to public transport. Public transport in the Netherlands in general is not accessible or not suitable to be used by persons with disabilities. Local authorities are accountable to provide possibilities for persons with disabilities to travel within the municipal boundaries (*Wet Voorzieningen*

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<sup>54</sup> All parliamentary documents concerning the Act can be viewed online (in Dutch) at <http://parlando.sdu.nl/cgi/login/anonymous>; parliamentary file no. 30566.

<sup>55</sup> See current art. 2(1) of the Act. See also, e.g., *Answers of the Netherlands to the questionnaire of the European Commission on the legal framework for combating terrorism*, 9 April 2008.

<sup>56</sup> See *Kamerstukken II*, 2005-2006, 30566, no. 3.

<sup>57</sup> See e.g. *Answers of the Netherlands to the questionnaire of the European Commission on the legal framework for combating terrorism*, 9 April 2008.

*Gehandicapten*). For interregional travelling, special transport (TraXX) was made available by the national Government. On April 1<sup>st</sup> 2004, a new scheme for interregional transport (Valys) entered into force. Contrary to TraXX transportation, Valys transportation entails a rigid yearly maximum on the kilometres to be travelled of initially 350 km (the so-called ‘low personal kilometre budget’). A relatively small group of severely disabled persons for whom transport by train is impossible due to medical or ergonomic reasons was initially allowed to travel 700 km per year (the so-called ‘high personal kilometre budget’).<sup>58</sup> Within these limits, a rate per kilometre is charged which exceeds the regular public transport rates. Once the budget is exhausted, a prohibitive rate of €1.25 per kilometre has to be paid. The regulation of Valys does not allow any exceptions. The District Court in The Hague deemed it not unlikely that these limitations imposed on persons with disabilities with regard to their possibilities to travel were to be considered as constituting an infringement of their human rights.<sup>59</sup> However, the District Court held that it was the Government’s responsibility to put an end to this breach of the human rights of disabled persons, considering that a change of the interregional transportation scheme was a matter of a political nature beyond its judicial power. Both The Hague Court of Appeal and the Supreme Court neglected the individual circumstances of the individual claimants.<sup>60</sup> The Dutch Government persisted in the use of the rigid limitations for budgetary reasons.

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Refrain from adopting the Act on Administrative Measures for National Security, or, at least, to pay regard to the uncertainties that the Act will cause and to the possible infringements it may therefore cause on the right to freedom of movement;*
- *In the absence of public transport suitable for use by persons with disabilities, abstain from imposing any arbitrary limitations to their transportation facilities. With regard to transportation, persons with disabilities are to be brought in a position equal to persons without disabilities, i.e. the possibility to travel (i) without limitation and (ii) at regular public transport fees.*

## **Article 13: Prohibition of Expulsion without Legal Guarantees**

### The Accelerated Asylum Procedure

Although the Dutch ‘accelerated asylum procedure’ was initially created as a special procedure for screening applications which were manifestly unfounded, in 2002 it was already being applied to at least 60% of all asylum cases.<sup>61</sup> The criterion for referral to the accelerated asylum procedure is now even extended to all applications deemed not to require time-consuming investigation. The Dutch NGOs consider this requirement to be vague and highly self-serving.

The Dutch NGOs are concerned that the 48-hour time frame of the accelerated asylum procedure is too short for most asylum seekers to bring their claims forward in a proper manner. These 48 hours start right after the asylum application has been filed, which means there is little possibility for asylum seekers to rest and get over the first shock of being in a new country and in an unfamiliar procedure. In its 2003 report, HRW documented several stories of asylum seekers who suffered from illness or trauma, but in whose procedures no pause was allowed in order to give them time to recover.<sup>62</sup>

<sup>58</sup> In 2005, these budgets were 450 and 900 kilometres, respectively. In 2006, the budgets were upgraded to 750 and 2,250 kilometres.

<sup>59</sup> See The Hague District Court 9 July 2004, para. 3.7; available at [www.rechtspraak.nl/ljn.asp?ljn=AP9816](http://www.rechtspraak.nl/ljn.asp?ljn=AP9816).

<sup>60</sup> See The Hague Court of Appeal 31 March 2005, available at [www.rechtspraak.nl/ljn.asp?ljn=AT2882](http://www.rechtspraak.nl/ljn.asp?ljn=AT2882); Supreme Court 22 December 2006, available at [www.rechtspraak.nl/ljn.asp?ljn=AY8050](http://www.rechtspraak.nl/ljn.asp?ljn=AY8050).

<sup>61</sup> See HRW 2003, *supra* note 5.

<sup>62</sup> See *ibid*.

The speed of the procedure is also problematic, for the asylum seekers in question could (only) produce evidence of their claims if given more time. The 48 hours of the accelerated procedure will often be too short for this. Furthermore, if a piece of evidence arrives after the end of the 48 hours, it will not be taken into account any more. This is due to the restrictions imposed by the Administrative Jurisdiction Division on the submission of documentation and information, as mentioned in the discussion of Article 2 above.

For especially vulnerable groups, the combination of the speed of the procedure and the limitation of the possibility to come up with relevant information or documentation at a later stage is particularly detrimental to their cases. These especially vulnerable groups include physically or mentally ill persons, people having suffered traumatic experiences such as sexual abuse or torture, inhuman or degrading treatment, or children. This means for example that if a woman is not able or unwilling to talk about sexual violence during the one interview in which she has to bring her claim forward, she neither has the possibility of doing so later on in the procedure nor the option of submitting a second application.

In addition, the limited period of five hours which is allocated to legal aid within the procedure must be regarded as inappropriate to provide meaningful legal advice.

#### Gender-Related Aspects in the Asylum Procedure

Although the EU has recommended the recognition of domestic violence as a ground for asylum, Dutch policy does not offer the possibility of being granted refugee status because of belonging to the social group of ‘women’ or ‘battered women’. The threshold for female asylum seekers to prove that they are not protected against domestic violence in their own country is extremely high and is seldom being met. This leaves the women concerned in the impossible position in which it is not disputed that they are victims of domestic violence, but are nevertheless sent back because they cannot prove that they will not be protected by their own authorities.

Only recently has female genital mutilation been recognised as a ground for asylum (see paragraph 191 of the Government report). This is not the case, however, with fear of honour killings. As in the case of domestic violence, a woman fearing to become the victim of an honour killing in her own country has to prove that she is not being protected by the authorities there, evidence of which is often difficult – if not impossible – to obtain. Another complicating factor in these cases is the strict legal distinction between ‘regular immigration procedures’ and ‘refugee procedures’. According to the new Immigration Act, it is not permitted to submit an application under both procedures. However, while the Administrative Jurisdiction Division does not regard sexual violence as a ground for asylum, it also holds that if in an immigration procedure a woman states that she cannot return to her home country because of fear of being the victim of an honour killing or domestic violence, this motivation is refugee-related and therefore cannot be taken into account in the immigration procedure. The result is that victims of sexual violence neither qualify for refugee status nor for a regular residence permit.

Moreover, statistics are lacking on the number of women applying for asylum on the grounds of gender-based violence and the percentage of applications in which asylum status (or residence status on another ground) is granted. Another problem is posed by the country reports written by the Dutch Ministry of Foreign Affairs, which are used to decide on asylum requests. These country reports still do not systematically deal with the position of women in the country concerned and information is often inconsistent and incomplete.<sup>63</sup>

In its report, the Dutch Government states that the policy rules on gender-related persecution are in line with the UNHCR Gender Guidelines.<sup>64</sup> However, contrary to these Guidelines, it is not standard

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<sup>63</sup> See Spijkerboer 2002, *supra* note 32, at 22.

<sup>64</sup> UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/02/01 (May 2002), available at [www.unhcr.org/publ/PUBL/3d58ddef4.pdf](http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf).

procedure that if a request for a female official and interpreter is not met, the lawyer can ask for an additional or new interview in case of gender-related asylum claims. The same goes for the presence of children. Although the policy holds that they are preferably not present during the interview with their mother, this is not always guaranteed. In the view of the Dutch NGOs, children should never be present at the interview with their mother.

#### Children in the Asylum Procedure

Children are often being interviewed without a guardian or a lawyer present. In its 2003 report, HRW noted that it had received a number of reports about asylum interviews with children which focused on detailed questions inappropriate in light of the children's age and maturity.<sup>65</sup>

#### The Position of Lesbian, Gay, Bisexual and/or Transgender Asylum Seekers

While in theory asylum seekers in the Netherlands will be granted an asylum status if they face prosecution because of their sexual orientation in their country of origin, this theory meets a number of problems which hamper its use in practice.

In general, asylum seekers are unaware of the right to asylum on the ground of fear for prosecution for being homosexual. Asylum seekers with lesbian, gay, bisexual and/or transgender (LGBT) feelings form part of the above-mentioned especially vulnerable groups which are most disadvantaged by the speed of most asylum procedures and by the impossibility to bring their particular problems forward in a later stage in the procedure or in a new procedure. The embarrassment and often traumatic experiences with their own authorities will in many cases, even if their sexual orientation has been an official ground for prosecution in their country, prevent LGBT asylum seekers from talking frankly about their sexual orientation to an INS officer. The rejection of homosexuality in most countries in the world and the presence of a translator from the (non gay-friendly) country of origin will only add to this. Like conversations about sexual abuse and torture, conversations about homosexuality require a situation of trust, which is not guaranteed during the asylum procedure.

Also, many asylum seekers face problems proving their fear for persecution on the ground of homosexuality. Persecution on the ground of homosexuality is often based on ambiguously formulated articles of laws. For example such articles can relate to public chastity. LGBT asylum seekers often do not have a formal conviction on grounds of homosexuality because they fled their country of origin before a formal conviction was issued. In addition, many LGBTs leave their country because of threatening social circumstances, in which (among others) their own family may play a role. Such threats are often not put to writing and are hard to demonstrate. Furthermore, it is sometimes held against an asylum seeker that his or her country of origin has repealed the article of law on the basis of which he or she feared persecution. The changing of the law, however, does not always entail social differences towards LGBTs.

A last problem which LGBT asylum seekers meet is the result of the Dublin Regulation. Due to this Regulation, LGBT asylum seekers who have entered the European Union in a Member State which does not grant a right to asylum on the ground of prosecution based on sexual orientation, cannot apply for asylum in the Netherlands. The Dutch NGOs are concerned that, due to this Regulation, they simply lose their right to apply for asylum on this ground in the Netherlands.<sup>66</sup>

In recent years, the position of homosexual asylum seekers has frequently been a matter of concern in the Netherlands. Homosexual asylum seekers were on the verge of being deported to countries which are infamous for their persecution of homosexuals. The Dutch NGOs believe that the information contained in the so-called Country Reports which are issued by the Ministry of Foreign Affairs may have led to this policy towards LGBT asylum seekers. Until recently, the information in these Country Reports was often incomplete, too optimistic or even false. The Advisory Commission on Alien Affairs (*Adviescommissie voor Vreemdelingenzaken*) has stated in a recent report that economic and

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<sup>65</sup> See HRW 2003, *supra* note 5, at 18-22.

<sup>66</sup> See also MOVISIE, *Informatieblad over homoseksuele asielzoekers*, available at [www.homoemancipatie.nl](http://www.homoemancipatie.nl).



political interests often influence the reflection of ‘facts’ in the drafting of general and individual Country Reports by the Ministry of Foreign Affairs. The Advisory Commission also based its conclusions on the criticism from human rights organisations with regard to these Country Reports. It noted, for example, the criticism in March and April 2006 with regard to the Country Report on Iran because too positive an image was depicted of the human rights situation of homosexuals and Christians in that country.<sup>67</sup>

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Reconsider the duration of the accelerated asylum procedure and the possibilities for asylum seekers to bring their cases forward, for instance by providing the opportunity for especially vulnerable groups to have an additional hearing;*
- *Ensure that victims of sexual violence qualify for asylum status and/or a residence permit on humanitarian grounds;*
- *Procure statistics on the number of asylum requests on the basis of domestic violence, female genital mutilation, fear of honour killings and other forms of sexual violence, and the percentage of applications in which asylum status (or residence status on another ground) is granted;*
- *Take measures to bring asylum procedures in line with the UNHCR Gender Guidelines;*
- *Ensure that in the evaluation of asylum applications, the special needs and limitations of children are being met.*
- *bring Country Reports with regard to homosexuality up to date;*
- *Realise that LGBT asylum seekers may apply for asylum in the Netherlands after being refused by a European country that does not recognise (the fear for) persecution on the ground of sexual orientation.*

## **Article 14: Right to a Fair and Public Hearing**

### Lack of Special Protection for Children

In criminal proceedings against children, child offenders need special protection. However, children who come into contact with the Dutch police are in practice treated the same way as adults and are sometimes detained in police cells without the possibility of urgent contact with their parents and without a lawyer assisting them during police interrogations. The Dutch NGOs find that such practices violate Article 14(4) of the Covenant, which stipulates that “in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Guarantee a special procedure for children who are heard by the police, taking into account their age and including access to a lawyer and the presence of a relative during the hearing.*

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<sup>67</sup> See Adviescommissie voor Vreemdelingenzaken, *Transparant en Toetsbaar. Een advies over landeninformatie in het vreemdelingenbeleid* (July 2006), at 42; available at [www.acvz.com/index.php?id=16,196,0,0,1,0](http://www.acvz.com/index.php?id=16,196,0,0,1,0)

## **Article 16: The Right to Recognition as a Person before the Law**

### Rights of Transgender Persons

The Dutch Civil Code (Article 28 of Book 1) provides for the possibility to have one's gender formally changed on one's birth certificate. The provision in question stipulates that this can only be done by a court order and only after a person has transformed into a member of the other sex as far as psychologically and medically possible. In order to obtain this court order, a statement by medical experts must show that this person can no longer reproduce. Many transgender persons have not had gender reassignment surgery, either because they have not met the requirements involved or because they have moral objections to an imposed sterilisation. As a result, they cannot have their gender changed in their official documents.

The consequences of having a different gender in one's passport than the one which is experienced in real-life are alarming, especially when the gender in the official documents does not correspond with the gender appearance. As a result, many transgender persons experience discrimination at the workplace, during travelling and with social insurances.

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Grant transgender persons the right to bring the gender listed in their identity papers in accordance with their gender expression without going through a full sterilisation procedure.*

## **Article 17: Right to Privacy**

The Dutch NGOs are concerned that the Dutch Government, in its efforts to safeguard its citizens from terrorist attacks and other criminal activities, limits the right to privacy to too great an extent in a variety of areas.

### Recording of Telephone Conversations

The Netherlands is the second European record holder when it comes to telephone taps. In the second part of 2007, some 1681 taps were in place every day. These are only the taps placed by the police; the taps placed by the security services are not included. In 2000, the Act on Special Investigative Measures (*Wet Bijzondere Opsporingsbevoegdheden*) came into force. This Act permits the recording of telephone conversations of persons who are not suspected of a crime, but who are known to have contacts with a suspect. Also, the Act allows for the placing of telephone taps without prior approval of an investigative judge. In 2002, the Dutch General Intelligence and Security Service (AIVD) was given the power to place telephone taps without prior judicial approval too. The Dutch NGOs consider this a grave breach of the right to privacy, especially since the police – it is unknown how many conversations are being recorded by the AIVD – makes such great use of these powers.<sup>68</sup> In this context, the Dutch NGOs also note that a recent investigation by the Data Protection Authority (*College Bescherming Persoonsgegevens*) shows that recordings of conversations with professionals who have a duty (and corresponding right) of confidentiality, such as lawyers and doctors, are not being destroyed immediately, as is laid down in the legislation.

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<sup>68</sup> Due to illegal telephone-tapping, yet in a different context, the Netherlands was recently convicted by the ECtHR for violating Article 8 ECHR; see *Van Vondel v. The Netherlands*, ECtHR 25 October 2007, Appl. No. 38258/03.

### Data Collection

The number of laws granting Dutch investigative authorities the power to collect and retain data has severely increased in the reporting period. For example, in 2004, a statute permitting the requisition of financial data (*Wet Vorderen Gegevens Financiële Sector*) came into force, as well as a statute permitting the requisition of telecommunications data (*Wet Vorderen Gegevens Telecommunicatie*). In 2005, a statute granting the power to requisition data from public institutions was enacted (*Wet Bevoegdheid Vorderen Gegevens*). Also, a bill is currently pending before the Senate on the implementation of European legislation on data retention. While the relevant European Directive requires telecommunications data to be retained for a maximum of half a year, the Dutch Minister of Justice has proposed to retain such data for a period of 1.5 years. The Government has not demonstrated, however, that a longer retention period will lead to a more effective fight against crime. The combination of these and other statutory provisions gives the police the possibility to requisition data on almost all aspects of life. The Dutch NGOs understand that many of the powers laid down in the above-mentioned laws may be necessary for an effective investigation and prosecution of criminal acts. However, they believe reflection is needed by the Government on the effect of all these different laws together with regard to the right to privacy.

### The Act on Administrative Measures for National Security

The Dutch NGOs are concerned about the bill currently pending before the Senate on Administrative Measures for National Security (see also Article 12) as they fear that the Act, once adopted, may interfere with the right to freedom of movement and the right to respect for one's private life. The latter may occur when persons are prohibited from visiting certain people or places on the basis of vague suspicions which are insufficient to meet the criminal law requirement of 'reasonable suspicion of having committed a criminal offence'. In addition, judicial supervision of the imposed measures will only be triggered after the person concerned appeals.

### Disturbance of an Individual

So-called 'disturbance of an individual' (*Persoonsgericht verstoren*) aims at preventing terrorism by disturbing a person in his daily life. This measure is carried out by police officers and can consist of making house calls, inviting the person in question to the police station, approaching acquaintances (family, friends, colleagues), visiting public spaces where that person is present, spreading cards in his neighbourhood saying that people can report to the police anonymously, etc. The aim of such measures is to let the person concerned know that he or she is being watched and scrutinized.

The Dutch NGOs believe that these measures constitute an interference with the right to privacy. The Government states that the disturbance measures can be based on sections in the Dutch Municipality Act and the Police Act which determine that the mayor is empowered to maintain public order and which divides the powers between the mayor and the police force. The Dutch NGOs are of the opinion that such an unclear and unspecified general term as 'maintaining public order' cannot serve as a legal basis for such far-reaching measures, especially since it remains totally unclear under what conditions a mayor can impose these measures. Moreover, no prior judicial approval is necessary and judicial scrutiny after a measure has been imposed will only be triggered if the person concerned appeals against it.

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Increase judicial scrutiny on the necessity of recording telephone or electronic communications as well as data collection and retention, either prior to such recording, collection or retention or afterwards;*
- *Reflect on the interference caused by (new) legislative measures with the right to privacy, both by the specific laws or measures and by the legislative body as a whole.*



## Article 18: Freedom of Religion and Belief

In its foreign policy, the Government of the Netherlands emphasizes the importance of freedom of religion and belief. The Dutch Government wants to play a pioneer role in promoting this freedom within the European Union. It is therefore essential that the Dutch Government shows this same attitude within her own country. However, in the Dutch public debate on freedom of religion and belief, the Government is largely silent.

### Religious Clothing

The Dutch NGOs are concerned about the great lack of certainty about the scope for wearing religious clothing. While the Government memorandum on Fundamental Rights in a Multiform Society (*Grondrechten in een pluriforme samenleving*)<sup>69</sup> established that limitations can be imposed on the wearing of religious clothing, the circumstances and factors which can justify such limitations are far from clear. For instance, there is an ongoing discussion on the substance and scope of the State neutrality principle. The Dutch Government seems to do very little to shed light on these discussions, thus leaving room for an arbitrary application of this neutrality principle. Moreover, the Government does not always follow the line set by the Dutch Equal Treatment Commission (*Commissie Gelijke Behandeling*, CGB). For instance, in 2001, a female Muslim student was not accepted for the position of court clerk because she wore a headscarf. When she complained with the CGB that she was discriminated against on the ground of religion, the CGB held that the decision of the court indeed constituted unjustified discrimination.<sup>70</sup> Nevertheless, the then Minister of Justice overruled this opinion and insisted on the prohibition of the wearing of religious clothing in court by court staff, which was accordingly included in the above-mentioned memorandum. This decision was all the more striking since, in some courts, court clerks were already wearing headscarves. A different example pertains to social workers in Amsterdam. They were not willing, for religious reasons, to shake hands with someone of the opposite sex. The Minister of Integration Affairs stated publicly that these social workers have to shake hands. She did not explain why, however. These two examples cast doubt as to whether the State really is neutral on the question of religious clothing, thus also illustrating the growing uncertainty with regard to the protection of freedom of religion.

### Public Debate on Headscarves and Facial Veils in the Context of Rising Islamophobia

The Dutch NGOs are further concerned about the far-reaching politicization of some issues involving religion. The public debate on freedom of religion and belief in the Netherlands has become intertwined with the debate on immigration. Certain religions, most particularly the Islamic religion, are increasingly criticised because they supposedly restrict the individual rights of believers. Islamophobia has increased dramatically in the Netherlands since 2001. Muslims have been and continue to be the subjects of stereotyping, stigmatising and “sometimes outright racist political discourse and of biased media portrayal and have been disproportionately targeted by security and other policies.”<sup>71</sup> The expression of anti-Muslim sentiment has also been voiced by the Freedom Party (PVV), whose political leader called for a ban on the Koran. Also, anti-Semitic actions continue to occur incidentally.

In 2007, two bills have been submitted to the Second Chamber, both aiming at a general prohibition of facial veils.<sup>72</sup> In addition, the Government has had discussions with public transport companies in order to explore the possibilities for a prohibition of facial veils in public transport. Furthermore, the Government has indicated its intention to introduce legislation to prohibit facial veils in public functions and at schools.<sup>73</sup> While solid arguments to justify all these actions are lacking, it can also be

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<sup>69</sup> See *Kamerstukken II, 2003-2004*, 29 614, no. 2. See also *ibid*, Annex 1.

<sup>70</sup> CGB 22 June 2001, Opinion 2001-53; available (in Dutch) at [www.cgb.nl/opinion-full.php?id=453054834](http://www.cgb.nl/opinion-full.php?id=453054834).

<sup>71</sup> European Commission against Racism and Intolerance (ECRI), *Third report on the Netherlands* (February 2008), para. 135; available at [www.coe.int/t/e/human\\_rights/ecri](http://www.coe.int/t/e/human_rights/ecri).

<sup>72</sup> See *Proposal of Wilders and Fritsma* (PVV), *Kamerstukken II, 2006-2007*, 31 108, no. 2; *Proposal of Kamp* (VVD), *Kamerstukken II, 2007-2008*, 31 331, no. 2.

<sup>73</sup> See Cabinet Letter dated 8 February 2008, *Kamerstukken II, 2007-2008*, 31 200 VII, no. 48. This despite its

questioned whether such prohibitions would be proportionate, considering the fact that there are probably no more than 150 women in the Netherlands wearing such clothing.

The Dutch NGOs emphasize that although some may find it obvious to limit the wearing of facial veils, a solid, convincing, argumentation is always necessary. This is even more so, as the opinions of the Equal Treatment Commission show that women wearing facial veils can be accommodated in some cases, as illustrated by the case of the organization of social workers.<sup>74</sup> Moreover, a Dutch court has decided that a decision to curtail a woman wearing a *burka* on her social allowance was disproportional.<sup>75</sup>

Although, in general, educational institutions are not yet allowed to prohibit the wearing of headscarves by pupils, in recent years schools increasingly issue prohibitions on this. This prevents some Muslim women from following the form of education they would otherwise choose. Research shows that discrimination in such matters is also one of the reasons why the labour participation of migrant women is lagging behind.<sup>76</sup> It is, for example, more difficult for a Muslim woman wearing a headscarf to find a place as a trainee,<sup>77</sup> and employers frequently refuse job applicants wearing a headscarf. As a consequence, Muslim women *de facto* lack equal rights to employment.<sup>78</sup> In the political debate, Muslim women tend to be systematically presented as ‘backward’, ‘suppressed’ and ‘in need of liberation’ (even against their own will, if needed). The Dutch NGOs therefore submit that the Dutch Government in its report disproportionately emphasizes instrumental issues and ignores the lack of social cohesion (diversity) in society.

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Promote freedom of religion and belief as much within the Netherlands itself as in its foreign policy. More generally, the Dutch NGOs would like to invite the Government to be more transparent regarding its views on its own role in relation to increasing xenophobia and anti-Islamic sentiments and to the protection of freedom of religion and the safety of the Muslim minority;*
- *Support initiatives of civil society organisations which aim to achieve a climate of mutual understanding, tolerance and respect between religious believers of different communities, as well as between such believers and non-believers;*
- *Provide more clarity on the principles of State neutrality and the separation between church and State in order to guarantee legal certainty for individuals relying on their right to religious freedom;*
- *Prevent the formulation of prohibitions which disproportionately burden one type of citizen, in particular orthodox religious Muslim women.*

earlier opinion, expressed in the Fourth Periodic Report, that the laying down of regulations governing clothing which may express religious views is undesirable.

<sup>74</sup> CGB 20 May 2005, Opinion 2005-86; available (in Dutch) at <http://cgb.nl/opinion-full.php?id=453055584>.

<sup>75</sup> See Amsterdam District Court 24 May 2007; available at [www.rechtspraak.nl/ljn.asp?ljn=BA6917](http://www.rechtspraak.nl/ljn.asp?ljn=BA6917). The local authority had cut her benefit with the argument that, by persisting in wearing the burka, the woman was deliberately impairing her potential to find work, which was a condition for continuing to receive the benefit.

<sup>76</sup> See *Ethnic Minorities on the Labour Market* (Ministry of Social Affairs and Employment, 2005); available (in Dutch) at [www.art1.nl/scripts/download.php?document=143](http://www.art1.nl/scripts/download.php?document=143).

<sup>77</sup> The SBO (the Dutch organisation of employers and employees in education) notes for instance an alarming number of students from ethnic minorities who drop out from teacher training colleges and blames this on the difficulties in finding a place as a trainee. The SBO supports the presumption that employers select trainees on ethnic origin and notes that in particular Muslim students suffer from this type of discrimination. See *CGB Annual Report 2006*, at 19; available (in Dutch) via [www.cgb.nl/downloadables.php](http://www.cgb.nl/downloadables.php). See also *Scholen weren allochtone stagiaires*, *Volkskrant* 10 July 2006; available at [www.volkskrant.nl/binnenland/article328673.ece/Scholen\\_weren\\_allochtone\\_stagiair](http://www.volkskrant.nl/binnenland/article328673.ece/Scholen_weren_allochtone_stagiair).

<sup>78</sup> In 2004, 60% of complaints submitted to the CGB about discrimination on the ground of religion concerned discrimination against Muslim women wearing a head-scarf.

## Article 19: Freedom of Opinion and Expression

### Prohibition of Blasphemy

The Dutch NGOs express their concern about the Dutch Government's plans concerning the crime of blasphemy as incorporated into Article 147 of the Dutch Criminal Code. Although the offence of blasphemy is hardly ever invoked in Dutch criminal law, the Minister of Justice has on several occasions declared his intention to reinforce and/or extend the scope of this offence. Recently, the Minister's plans to extend the blasphemy law appeared in a leaked letter by the Ministry of Justice (6<sup>th</sup> May 2008). This letter showed that the Minister's plans include an extension of the blasphemy law to the defamation of any philosophy of life (instead of only religion), and to extend protection to the defamation of holy books and to defamation of the key values of the religions and philosophies concerned. In addition, the relevant criterion for liability will no longer be the subjective intention of the speaker; instead, liability will be incurred in cases where it is probable that the defamation in question will seriously affect public order. These proposed changes would enlarge the crime of blasphemy to such an extent that freedom of expression will be seriously endangered. Protection against defamation of the 'key values' of any religion or philosophy of life means that no discussion of such values can take place any more. Although protection of *people or groups* against incitement to hatred or defamation can be justified under international human rights law, protection of particular *viewpoints* is at odds with freedom of expression.<sup>79</sup> In this respect, the Dutch NGOs consider that Recommendation 1805 of the Council of Europe is also noteworthy. In this Recommendation, it is stated that "the Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence."<sup>80</sup>

### Non-Disclosure of Journalistic Sources

The Dutch NGOs are furthermore concerned about the Dutch position as regards the protection of sources used by journalists, and related to that, the use of coercive powers against journalists in order to make them disclose their sources. Several journalists have been detained by investigative judges for failure to comply with a judicial order to disclose their sources, such as freelance crime journalist B. van Hout (2006), two journalists of the daily newspaper *De Telegraaf* (2006) and K. Voskuil of daily newspaper *Spits* (2000). The latter successfully disputed the Government's interference with his right to non-disclosure before the ECtHR; the Netherlands was convicted for violation of Article 10 ECHR.<sup>81</sup> Furthermore, the Dutch General Intelligence and Security Service (AIVD) has been found eavesdropping on the communications of two journalists of *De Telegraaf* in 2006, as well as a journalist of weekly magazine *Nieuwe Revu* in 2007.

The right to non-disclosure of journalistic sources is essential if freedom of the press and thereby freedom of information in a democratic society is to be guaranteed. The role of the press as a public watch-dog is made very difficult when the fear of disclosure deters sources from working together with the press. Although the right to freedom of information needs to be weighed against other interests such as public order, practices such as detention and eavesdropping of journalists are far-reaching means which should be used only in exceptional circumstances. Journalists' right to non-disclosure is not yet incorporated in Dutch law; it finds its basis in case law. Legal regulation of this right is necessary, because the ECtHR's judgment in the *Voskuil* case shows that judges' weighing of interests as regards non-disclosure does not always comply with human rights standards (in particular with the right to freedom of speech). Moreover, reform of the rules of criminal procedure concerning

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<sup>79</sup> As argued by Maurice Berger, Professor of Islam in Western Societies, Leiden University, at the NJCM Symposium, 8<sup>th</sup> May 2008. The position of the Dutch Government on the issue of blasphemy is also different from the position of foreign governments. In the United Kingdom, for instance, the House of Lords has recently (8<sup>th</sup> July 2008) abolished the British law on blasphemy; see [www.publications.parliament.uk/pa/ld200708/ldbills/016/amend/ml016-iiic.htm](http://www.publications.parliament.uk/pa/ld200708/ldbills/016/amend/ml016-iiic.htm).

<sup>80</sup> Parliamentary Assembly of the Council of Europe, Recommendation 1805 (June 2007), para. 4; available at <http://assembly.coe.int/main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

<sup>81</sup> See *Voskuil v. The Netherlands*, ECtHR 22 November 2007, Appl. No. 64752/01.

detention of journalists for non-disclosure of their sources should be reconsidered. Currently such detention can be ordered by a single-operating investigative judge, without a possibility for appeal.

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Refrain from reinforcing and/or expanding the scope of the crime of blasphemy;*
- *Enact a law on journalists' right to protect their sources which incorporates at least the same level of protection as afforded by international human rights law;*
- *Reconsider the procedural rules for journalists' detention.*

## **Article 22: Freedom of Association**

### The Case of the Dutch Reformed Political Party (SGP)

In paragraphs 268-269 of its report, the Government discusses the case of the Reformed Political Party (*Staatkundig Gereformeerde Partij*, SGP), the Dutch political party which excludes women from (full) membership on religious grounds. In 2001, the CEDAW Committee recommended in its Concluding Observations that the Dutch Government take urgent measures to address this situation, including the adoption of legislation which brings the membership of political parties into conformity with its obligations under Article 7 CEDAW.<sup>82</sup> In its reaction, however, the Government took the position that current legislation was in conformity with its obligations under CEDAW, because “individual women were free to invoke this provision before the courts” (notwithstanding the fact that in a subsequent court case, the Government argued that Article 7 had no direct legal effect). This caused a number of NGOs to bring this situation before the judiciary.

In its judgment of 7 September 2005,<sup>83</sup> the civil chamber of the District Court of The Hague judged that the funding of the SGP under the Political Parties (Funding) Act (*Wet financiering politieke partijen*) by the Netherlands violated its obligations under CEDAW and ordered the State to stop such funding immediately. In the Court’s opinion, the failure of the State to take adequate measures could not “be justified by the need to protect another fundamental right and the State could not take the position that it had already sufficiently met its obligations under the Women’s Treaty”. On the contrary, “by its funding, it actively facilitated the SGP”. The Court noted that the case not only touched on the interests of SGP women in being able to become members of the SGP, but “the interests of all persons, in particular women, to live in a democratic society in which discrimination on the basis of gender – with the consequence of exclusion from the right to be eligible – is not tolerated and in which the State acts to uphold this.” As pointed out in the Fourth Periodic Report, the Dutch Minister of Internal Affairs decided to appeal against the judgment. On 20 December 2007, the Court of Appeal confirmed the judgment of the District Court.<sup>84</sup> According to the Court of Appeal, the distinction the SGP makes between men and women is prohibited on the basis of, amongst others, Article 7(a) CEDAW, which obliges State Parties to guarantee women the right to be elected on the same footing as men. It notes that “the issue directly affects the right to equal treatment, as protected by Article 1 of the Dutch Constitution, the 12<sup>th</sup> Protocol of the ECHR and Article 26 ICCPR, which is not the case with the right to freedom of religion and the right of association.” Like the lower court, the Court of Appeal considers it unlawful that the State does not take action against this discrimination against women and held that it has not taken adequate legislative measures to comply with its obligations: “It is a fundamental infringement of democracy and the rule of law if the representative organs of the State – even if only partially – have come about in a manner which violates a

<sup>82</sup> See CEDAW, *Concluding Observations (Netherlands)*, UN Doc. A/56/38 (July 2001), at 67, paras. 219-220; available via [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf).

<sup>83</sup> The Hague District Court 7 September 2005; available at [www.rechtspraak.nl/ljn.asp?ljn=AU2088](http://www.rechtspraak.nl/ljn.asp?ljn=AU2088).

<sup>84</sup> The Hague Court of Appeal 20 December 2007; available at [www.rechtspraak.nl/ljn.asp?ljn=BC0619](http://www.rechtspraak.nl/ljn.asp?ljn=BC0619).

fundamental right, notably the prohibition of discrimination against women.” In taking measures to ensure SGP women the right to be elected, the State, however, has a margin of appreciation. Contrary to the lower court, the Appeal Court is of the opinion that it cannot judge on the requested stop of funding, as this falls within the competence of the administrative judge.

Meanwhile, the SGP lodged an appeal with the administrative court against the decision of the State to stop its funding. On 5th December 2007, the Administrative Jurisdiction Division of the Council of State came to an opposite conclusion from the civil court.<sup>85</sup> According to the Administrative Jurisdiction Division, the State is not obliged not to apply the Political Parties (Funding) Act to the SGP, as it is up to the legislative body to strike a fair balance between, on the one hand, the prohibition of discrimination and ensuring the participation of women in public and political life on the same footing as men, and, on the other hand, ensuring the adequate functioning of political parties and their ensuing rights. Moreover, “it is guaranteed in the Netherlands that women can become members of political parties which represent the entire political spectrum and which nominate women for representative functions on an equal footing with men.” This leads to the situation in which there are two conflicting judgments: one of the highest civil court and one of the highest administrative court.

The issue of the SGP figured again in the recent 2007 CEDAW reporting procedure. Contrary to the arguments given in its Fourth Periodic Report under the ICCPR (paragraphs 268-269), the Government on that occasion stated to the Committee that it was of the opinion that none of the CEDAW provisions have direct effect within the Dutch legal order.<sup>86</sup> In its Concluding Observations of 2 February 2007, the CEDAW Committee consequently recommended that “the State party adopt legislation to bring the qualification for seeking political office into conformity with its obligations under Articles 1, 2 and 7 [CEDAW], as well as to consider withdrawing its appeal and acknowledging the direct effect of [CEDAW] in the domestic legal order.”<sup>87</sup>

The Dutch NGOs find both sets of arguments of the Dutch Government – no direct effect of CEDAW provisions and a conflict of fundamental rights, respectively – unsatisfactory. It is our understanding that the funding of a political party which excludes women from (full) membership is not only contrary to the right to equal treatment and the principle of equality, but also constitutes a violation of Article 25 which stipulates that every citizen shall have the right and the opportunity, without any of the distinctions as mentioned in Article 2 of the Covenant and without unreasonable restrictions, to take part in the conduct of public affairs, to vote and to be elected, and to have access to the public service. The fact that there is a conflict of fundamental rights moreover still means that the State must make the correct balancing of the conflicting interests. In our submission the correct balance has not been made. According to fixed case law of both the European Court of Human Rights and the European Court of Justice, ‘very weighty reasons’ are needed to justify discrimination on the ground of sex.<sup>88</sup>

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Desist in the violation of Articles 22, 25 and 26 by its funding of a political party which excludes women from (full) membership;*
- *Desist in invoking the freedoms of association and religion as a justification for discrimination against women, as is shown by the SGP case.*

<sup>85</sup> Administrative Jurisdiction Division 5 December 2007; available at [www.rechtspraak.nl/ljn.asp?ljn=BB9493](http://www.rechtspraak.nl/ljn.asp?ljn=BB9493).

<sup>86</sup> A remarkable position, since the Netherlands was one of the parties which actively supported the creation of the Optional Protocol to CEDAW.

<sup>87</sup> CEDAW, *Concluding Observations (Netherlands)*, UN Doc. CEDAW/C/NLD/CO/4 (February 2007), para. 26.

<sup>88</sup> See e.g. *Schuler-Zgraggen v. Switzerland*, ECtHR 24 June 1993, Ser. A-263, para. 67; *Karlheinz Schmidt v. Germany*, ECtHR 18 July 1994, Ser. A-291B, para. 24.



## Article 23: Protection of the Family

In its report, the Dutch Government does not mention its responsibilities under Article 23 towards families of immigrants, refugees and asylum seekers. Two aspects are of particular concern.

### Family Reunification

The Dutch NGOs believe that the Government does not display enough effort to actively protect the unity of families of refugees and asylum seekers in its family reunification procedures. Over the past few years, the Government has developed stringent policy measures on family reunification. The most important measures are:

- time limits within which refugees can apply for family reunification without having to meet income requirements have been reduced from six months to three months. Additionally, this time limit is fixed; there are no options for extensions due to individual circumstances;
- the income requirement for family reunification has been raised from 70% of the minimum income level to 100% or even 120% of the minimal income level, depending on the situation;
- several exemptions from the income requirement have been abolished, amongst others the exemption for single parent families with young children.

Although the Dutch Ministry of Justice has made some exemptions to this strict application, these have unfortunately only been applied to a limited group.<sup>89</sup>

### Return Policy

The Dutch NGOs are furthermore of the opinion that the Dutch return policy is not in conformity with Article 23, as the Government has not displayed sufficient effort to ensure that family unity prevails over other objectives. There have been several situations where a family was separated because its members did not simultaneously enter the country: those who arrived first received a residence permit and those who arrived later did not. Eventually this can lead to a situation where part of the family is obliged to return to its country of origin and the other members are allowed to remain.

### Respect for Family Life under the Dutch Aliens Act: Children

As a result of the stringent family reunification regulations under the Dutch Immigration Act, children in the Netherlands are often under threat of separation from their parents who are legally in the country. This is the case when children have arrived in the Netherlands without the necessary Authorisation for Temporary Stay (*Machtiging tot Voorlopig Verblijf*) or when children are legally in the country but their parents are not. The Dutch NGOs are extremely concerned about these violations of the right to family protection, and more in particular of the risk of disregard of the basic right of every child to live with his or her parents.<sup>90</sup> The separation of the child and the parents in this context violates Articles 23(1) and 24. A parent wishing to have his or her son or daughter come over to the Netherlands must meet a number of requirements: the parent must earn at least the minimum wage and must have a contract of employment for a minimum duration of one year. The amount of associated charges for the visa application also forms a barrier which is becoming increasingly difficult to surmount. Also, if a family is together in the Netherlands without an Authorisation for Temporary Stay, it is virtually impossible to come into consideration for a residence permit.<sup>91</sup>

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<sup>89</sup> See Letter by the State Secretary of Justice dated 19 December 2007, *Kamerstukken II, 2007-2008*, 19 637, no. 1181.

<sup>90</sup> Between January and November 2007, in 1800 cases an Authorisation for Temporary Stay for family reunification was refused. See Defence for Children International & Unicef Nederland, *Jaarbericht Kinderrechten 2008* (January 2008), at 10; available at [www.unicef.nl/unicef/show/id=53926/contentid=3374](http://www.unicef.nl/unicef/show/id=53926/contentid=3374).

<sup>91</sup> This is a complex area which requires some illustration. The inflexibility shown by the Dutch policy appears in its violations of Article 8 ECHR found by the ECtHR in the cases of *Rodrigues Da Silva and Hoogkamer v. The Netherlands* and of *Tuquabo-Tekle and Others v. The Netherlands*. In the first case, the Netherlands was convicted for denying a residence permit to the applicant mother, a woman of Brazilian origin who came illegally to the Netherlands and who admittedly had 'a cavalier attitude to the immigration

### Respect for Family Life and Domestic Violence

In paragraph 271 of its report, the Dutch Government refers to its 2002 policy document *Privé Geweld – Publieke Zaak* ('Private Violence, Public Issue') as the basis for its strategy to prevent and combat domestic violence. The Dutch NGOs would like to draw attention to the fact that, in particular, a number of recommended measures aimed at strengthening the position of victims in the legal process (which is important for the empowerment of victims) have not been followed up. In the Dutch legal system, suspects (under certain conditions) are entitled to free legal aid. Victims are not. The subsidized legal aid system does not provide for legal aid to victims in criminal proceedings. Following a number of successful pilot projects, the above-mentioned policy document recommended the provision of free legal advice by a lawyer to victims of domestic violence for a maximum of two hours, after which victims could make use of the regular legal aid system. As domestic violence can have many legal consequences (in the area of criminal proceedings, family law, housing rights and Immigration law), it is important that victims are informed about their rights and legal possibilities. Free legal advice by specialized lawyers therefore constitutes an important provision.

### Respect for Family Life of Persons with Intellectual Disabilities

In Article 23(2), the right of men and women of marriageable age to marry and to found a family is recognized. The Dutch NGOs strongly oppose the policy of the Dutch Government to discourage people with intellectual disabilities from founding a family.<sup>92</sup> This policy was communicated to Parliament in April 2004 by the Dutch State Secretary for Health, Welfare and Sports.<sup>93</sup> The policy does pursue a relevant goal, namely the protection of the interests of the unborn child. However, the question is raised whether the distinctions made regarding the discouragement of founding a family on the grounds of intellectual disability are discriminatory. The criteria for discouragement, found in the principles of responsible parenthood (*verantwoord ouderschap*), are solely applied in cases of parents with an intellectual disability.<sup>94</sup> Furthermore, it is questionable how far the State is entitled to have regard to the welfare of an as yet unborn child. In the case of *Dickson v. United Kingdom* the ECtHR, although accepting that the welfare of the child was a relevant consideration in general, rejected an argument that a convicted murderer should be denied the right to have artificial insemination services on the grounds of welfare of the child.<sup>95</sup>

### Lesbian, Gay, Bisexual and/or Transgender Families

In the Netherlands, civil marriage was opened to partners of the same sex in 2001. Unfortunately, although people can marry, they do not have the same rights as heterosexually married persons to form a family, because there are still problems with family rights in the Netherlands. A marriage between two persons of the same gender does not automatically entail family rights. A child who is born within a marriage between two women cannot be legally recognised by the non-biological mother in the same way as would have been the case if she had been a man. The non-biological mother will have to adopt the child of her spouse if she wants to become a legal parent of the child.

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requirements'. The denial of residence permit would separate her from her daughter Rachel, a Dutch citizen, born and bred in the Netherlands. See *Rodrigues Da Silva and Hoogkamer v. The Netherlands*, ECtHR, 31 January 2006, Appl. No. 50435/99. In the second case, the Netherlands was condemned for failing to allow the fifteen year old Mehret, who had been left behind with relatives in Eritrea, to join her mother and step-father in the Netherlands. See *Tuquabo-Tekle and Others v. The Netherlands*, ECtHR 1 March 2006, Appl. No. 60665/00. In neither case had a fair balance been made between the State's interest in a restrictive immigration policy and the right to respect for family life under Article 8 ECHR. Similar arguments would apply under Articles 23(1) and 24 ICCPR.

<sup>92</sup> See in particular the website of the Dutch Federation for the Advocacy of the Rights of People with Intellectual Disabilities (*Landelijke Federatie Belangenverenigingen Onderling Sterk, LFB Nederland*): [www.onderling-sterk.nl/index.php?id=1424](http://www.onderling-sterk.nl/index.php?id=1424).

<sup>93</sup> See Letter by the State Secretary for Health, Welfare and Sports dated 29<sup>th</sup> April 2004, *Kamerstukken II, 2003-2004*, 29 200 XVI, no. 228.

<sup>94</sup> See *ibid.*

<sup>95</sup> See *Dickson v. United Kingdom*, ECtHR 4 December 2007, Appl. No. 44362/04, para. 76.

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Abolish the three month time limit for family reunification;*
- *Exempt all refugees (including single parent families and elderly people) from the income requirement when applying for family reunification;*
- *Develop policy rules which guarantee that family unity is of primary importance within the context of return policies;*
- *Give children of parents with a Dutch residence permit an entitlement to residence without conditions;*
- *Provide free legal aid to victims of gender-related violence;*
- *Prevent the increased attention to the treatment of perpetrators of domestic violence from having a negative impact on the position of victims of such violence;*
- *Apply the criteria for responsible parenthood to people with intellectual disabilities only in order to protect them and/or their (future) children and not to discourage them to exercise their right to found a family;*
- *Give both LGBT parents full parental rights over their children from birth onwards.*

## **Article 24: Protection of the Child**

### Child Abuse

The Dutch NGOs are extremely concerned about the persisting high numbers of child abuse and the inadequate practice of reporting. A recently published study<sup>96</sup> has revealed that almost twice as many children in the Netherlands are abused than was previously supposed. It estimated that there is a minimum of between 106,000 to 160,000 child abuse cases per year, resulting in the death of between 50 to 80 children per year. The shocking difference with the previously supposed number is partly due to improper reporting. Although a reporting code has been introduced, no review has been carried out to determine whether the code is actually used within institutions. Accordingly, many professionals working with children every day, i.e. teachers, instructors, crèche leaders, doctors and social workers, still do not know what to do in the event of suspicions of child abuse. Failing to act by such institutions constitutes a violation of the children's right to the necessary measures of protection contrary to Article 24.<sup>97</sup>

The children's right to protection is further compromised by the considerable waiting lists of the Youth Care Centres (*Bureaus Jeugdzorg*) and the residential institutions of care providers. Children who must be removed from a threatening situation within their home and who are in need of a specific form of care often have to wait for months for help and the appropriate protection. Although alternative care is offered, this is usually not compatible with the child's problem.

Undocumented children, i.e. children who have no residence permit and are not allowed to wait for a decision in their residence procedure, can be protected with a child protection measure. However, in practice they do not have any access to specialised treatment institutions because they are excluded from having health insurance. Health insurance is necessary in order to receive specialised protection

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<sup>96</sup> See F. Lamers-Winkelmann & N.W. Slot, *Scholieren over mishandeling, Resultaten van een landelijk onderzoek naar de omvang van kindermishandeling onder leerlingen van het voortgezet onderwijs*, Vrije Universiteit Amsterdam (Faculteit der Psychologie en Pedagogiek) / PI Research, 2007. See also M.H. van IJzendoorn & P. Prinzie, *Kindermishandeling in Nederland Anno 2005: De nationale Prevalentiestudie Mishandeling van Kinderen en Jeugdigen (NPM-2005)*, Universiteit Leiden (Algemene en Gezinspedagogiek – Datatheorie), 2007.

<sup>97</sup> See C. Forder, 'Child Protection: Human and Children's Rights', *International Family Law* 2006, at 88-96; C. Forder, 'Child Protection in Accordance with Human Rights and Children's Rights', in: S. Meuwese, S. Detrick & S. Jansen *et al.*, *100 Years of Child Protection* (Nijmegen 2007), at 79-96.



and care or treatment. Moreover, their access to child care and child protection is more restricted than other children by virtue of regulations under the Immigration Act 2000.<sup>98</sup>

### Young Homosexuals

Young homosexuals from religious minorities are at risk to fall victim to honour related violence once their family knows about their sexual preference. This concerns mainly youngsters in so-called cultures of honour but it may also affect youngsters from Christian fundamentalist families. No data is yet available on how many youngsters are facing honour related violence. However, every year social workers in Amsterdam and Rotterdam receive many reports of young homosexuals who are in immediate danger of becoming victims of honour related violence.<sup>99</sup> In these cities, shelters are available for these youngsters. In other cities<sup>100</sup> such shelters will be made available soon.

Data is lacking on young homosexuals who live in homes for the mentally or physically disabled and on their possibilities to express their homosexual feelings. The Dutch NGOs are concerned about this as they receive some signals that these youngsters cannot experience their homosexuality and are in some cases forbidden to have contact with organisations for young homosexuals.

### Undocumented Children and Social Assistance

Children without a residence permit are excluded from the right to social assistance. The Dutch NGOs are extremely concerned about the fact that children in the Netherlands without an entitlement to (temporary) residence are thus excluded from the most basic provisions such as housing, but also from money for clothing and food. In so doing, children end up below subsistence level – and often on the streets.

### Children's Right to a Nationality

Considering the right of the child to acquire a nationality as listed in paragraph 3 of Article 24, the Dutch NGOs would like to bring to the Committee's attention the 1463 stateless children and an unknown number of children registered with an 'unknown' nationality<sup>101</sup> living in the Netherlands at the time of writing. The stateless children without a residence permit are not subject to any regulation to help them to acquire a nationality. Equally, children with an 'unknown' nationality have no recourse to a possible solution. Different members of Parliament have brought this violation of children's rights to the attention of the Dutch State Secretary for Justice. Until now, however, no measures have been taken to reduce the number of children without a nationality.

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<sup>98</sup> See 'Over de kern en de grensgevallen van het familierecht', in: V. Van den Eeckhout, C.J. Forder, E. Hooghiemstra, E. Nicolai & S.K. van Walsum, *Transnationale gezinnen in Nederland* (Nederlandse Gezinsraad/Meijers Instituut Leiden, The Hague 2005), at 21-116.

<sup>99</sup> See MOVISIE, *Dubbel en Dwars* (Utrecht, 2008); *Veilige Haven in Amsterdam en Rotterdam Verkeert*, 2004-2008.

<sup>100</sup> Enschede and The Hague.

<sup>101</sup> Children with an 'unknown' nationality are those whose nationality is disputed. For example, refugees who are granted a refugee status and who have children who are born in the Netherlands may have no possibilities to register their child in their home country. Then the child neither has his parents' nationality nor Dutch nationality.

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Lay down by law that reporting (suspicions of) child abuse is a professional obligation on all those who work with children within the context of their profession, and a civil obligation on all members of the public who observe or have serious suspicions of child abuse in their surroundings;*
- *Guarantee the right to youth care by increasing the effort to eliminate the existing waiting lists;*
- *Make sure that every child – including undocumented children – has full access to insurance for the costs of treatment under youth care or any other health care institution for children;*
- *Guarantee the right of LGBT youngsters to express their sexual orientation safely at all times: in school, in institutions and within the family;*
- *Take measures to ensure that all children, including undocumented children, have access to basic necessities, such as housing, food and clothing;*
- *Consider the possibility of providing the Dutch nationality to children who have not been able to acquire another nationality in a limited period of no more than three years.*

## **Article 25: Right to Take Part in Public Affairs**

### Political Participation of Women

The Government report (paragraph 287) notes that the political participation of women has increased slightly since the end of the 1990s. Although the Dutch NGOs welcome this slight increase, they argue that 24% of the total of political representatives is still far too low. The NGOs would like to know how the Government intends to increase the number of elected female representatives to 45% by 2010, including a fair representation of women from ethnic minorities. This is especially relevant since until the time of writing the Government has not taken any measures, apart from setting ‘performance standards’, to actively encourage political parties to place more female candidates in eligible positions and nominate women for political appointments, nor does it stimulate local or provincial Governments to do so. The percentage of women in municipal councils, for example, has stayed around 23% for years.

Furthermore, the Dutch NGOs want to point out that mayors and Queen’s Commissioners<sup>102</sup> are directly appointed by the Government. In particular the continuing low percentage of female Queen’s Commissioners, notably 8%, gives reason for concern. The percentage of female mayors is 19%. Also when it comes to other appointed positions, for example in advisory bodies, commissions, task-forces and managing boards of (semi-)public companies, the Government does not meet its own targets. In fact, the number of women appointed to temporary or permanent advisory bodies has decreased in recent years.

### Public Participation of Women

Apart from a small section regarding the political participation of women, the Government report does not address the participation of women in Dutch public life. Despite the formulation of targets and policies to increase the proportion of women in management positions, the percentage of women at the top of the public service has hardly increased in recent years (10%). In the international ranking list of women in the top of trade and industry, the Netherlands took last place, together with Pakistan: only 4% of the members of boards of directors and of managing boards are women. The percentage of female professors has only slightly increased from 5% in 1996 to 9% in 2005, despite the fact that the

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<sup>102</sup> Queen’s Commissioners are the heads of the provinces of the Netherlands.

percentage of female PhD students has increased from 30 to 40% over the last 10 years.<sup>103</sup> Moreover, many of those recently appointed female professors hold so-called ‘special’ – unpaid – chairs.

The number of women in the police force and in the fire service is still very low (in 2002: 18.5% women in executive posts in the police force; 4.4% in the fire service), amongst others due to the fact that many women who initially enter the police force or the fire service leave within a short period. The same goes for the military, in which the proportion of women is barely increasing and the percentage of women in higher ranks is staying extremely low (3.8% of women with the rank of Major; 1.3% with the rank of Colonel). The first female General was appointed in 2005.

Although the percentage of women in the public service as a whole may seem satisfactory, notably 46%, women are strongly overrepresented in lower-ranking positions and underrepresented in senior positions (16.7% in salary scales 14-16, and only 11% in salary scale 17 and higher, according to the 2004 Government report on the implementation of CEDAW). Women comprise only 14% of the employees in the higher paid salary scales of the Ministry of Foreign Affairs and 11% of the ambassadors, permanent representatives and consuls-general.

#### Equal Political Opportunities for Persons with Disabilities

The Government report fails to mention the (im)possibilities for people with disabilities to cast their vote. In December 2002, the National Bureau of Accessibility (*Landelijk Bureau Toegankelijkheid, LBT*) presented its report on the accessibility of Dutch voting equipment and voting locations. The Bureau concluded that the accessibility for people with disabilities generally needed to be improved.<sup>104</sup>

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Take measures to increase the number of women in both political functions and in (top) public functions;*
- *Ensure that persons with a disability can cast their vote on an equal basis with persons who do not have a disability.*

## **Article 26: Prohibition of Discrimination**

### Discrimination on the Ground of Race or Religion

As the discourse about ethnic and religious minorities has significantly hardened, the occurrence of discrimination has not diminished since the European Commission against Racism and Intolerance (ECRI) published its 2<sup>nd</sup> report on the Netherlands in 2000. Apart from the still existing discrimination on the base of colour or race, in particular Islamophobia has generally increased in the Netherlands throughout recent years. The political and public debate regarding the position of Muslims in Dutch society has led to societal polarization between migrants and non-migrants, Muslims and non-Muslims. In response to this, ECRI recently urged the Dutch Government to respond firmly to all instances of racially motivated crime, including violence, targeting Muslims. It also called on the Dutch authorities to oppose publicly and vigorously all manifestations of anti-Muslim sentiment in politics.<sup>105</sup> Yet even though the climate for Muslims in Dutch society has clearly hardened, only a relatively small percentage of all discriminatory offences registered by the Public Prosecution Service

<sup>103</sup> Figures from H. Mees, *Vrouwen zouden nu eindelijk eens écht aan het werk moeten gaan*, NRC Handelsblad, 21 January 2006; available at [www.women-on-top.nl/in-de-media/women-on-top-in-het-nieuws](http://www.women-on-top.nl/in-de-media/women-on-top-in-het-nieuws).

<sup>104</sup> See *Kamerstukken II, 2003-2004*, 29355, no. 1, Annex II: *Beschouwingen over specifieke door mensen met een handicap ervaren knelpunten*, para. 1.6.

<sup>105</sup> ECRI, *Third report on the Netherlands* (February 2008), available at [www.coe.int/t/e/human\\_rights/ecri](http://www.coe.int/t/e/human_rights/ecri).

have been related to Islamophobia. This may be due to a general lack of willingness among victims of such discrimination to report their cases.<sup>106</sup>

The increasingly negative perception of, in particular, persons with a Muslim migrant background has contributed to incidents of racial violence and increased difficulties of persons from that group to find traineeships and work. The incidences of mobbing and racism on the work floor are persistent, as is clear from the amount of complaints submitted to anti-discrimination agencies.

More generally, Dutch education has become ethnically and social-economically segregated. This is partly explained by segregation in housing, but also by the so-called ‘white flight’ in mixed areas: higher and middle class parents of Dutch origin prefer a school for their child with a limited amount of children from ethnic minorities, even if this school is not in the direct neighbourhood. To oppose such segregation, schools and municipalities have made arrangements with separate waiting lists. In these lists a distinction has been made on the basis of social-economical status or (indirectly) on ethnicity. The Dutch NGOs believe that the policy of trying to achieve more mix in schools serves a good purpose. Recent research shows that significant advantages can accrue if a proper mix can be attained.<sup>107</sup> However, the means by which this policy is being pursued are not always proportionate, as they are not always related to the goal pursued and may more or less severely limit the right of children and their parents to go, respectively send, their children to the school of their choice.<sup>108</sup>

#### Discrimination on the Ground of Sexual Orientation

The Dutch NGOs express deep concern about the rights of gay and lesbian men and women in the Netherlands. The Dutch Government has shown commitment towards the rights of gays and lesbians by placing these rights prominently in the Government’s new Paper on Human Rights Strategy in Dutch Foreign Policy (*Naar een menswaardig bestaan – een mensenrechtenstrategie voor het buitenlandse beleid*).<sup>109</sup> Since 2000, there have been many legislative reforms in the field of family law in the interests of gay and – most particularly – lesbian parents. The rights of gays and lesbians in the Netherlands in other fields, however, lack the attention needed. For example, homosexual teachers and students have come to face an increased risk of becoming victims of discrimination and violence.<sup>110</sup> Furthermore, there is hardly any systematic registration by the Dutch police of discrimination against persons with a homosexual orientation, but also few complaints of incidents with a homophobic background. Only 9% of Dutch homosexuals is prepared to file a complaint. (Only after maltreatment or violence, a majority (61%) is prepared to file a complaint.)<sup>111</sup> This is all the more striking as almost every survey on discrimination and violence against LGBTs carried out in the last decades returns the same kind of result: about 70% of the LGBTs mention a lifetime occurrence of violence or derogatory

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<sup>106</sup> See e.g. Landelijk Bureau ter Bestrijding van Rassendiscriminatie, *Monitor Rassendiscriminatie 2005*, available at [www.art1.nl/artikel/5378-Monitor\\_Rassendiscriminatie\\_2005](http://www.art1.nl/artikel/5378-Monitor_Rassendiscriminatie_2005). See also Anne Frank Foundation, *Monitor Racisme & Extremisme. Opsporing en Vervolging in 2006*, available at [www.monitorracisme.nl/content.asp?PID=22&LID=1](http://www.monitorracisme.nl/content.asp?PID=22&LID=1).

<sup>107</sup> See R. Engberson *et al*, *Helpt de middenklasse? Op zoek naar het middenklasse-effect in gemengde wijken*, NICI Institute, April 2008, NRC Handelsblad 23 May 2008.

<sup>108</sup> See also Inspectie van het Onderwijs, *De staat van het onderwijs* (2007), available at [www.staatvanhetonderwijs.nl/pdf/onderwijsverslag2005-2006-kleur.pdf](http://www.staatvanhetonderwijs.nl/pdf/onderwijsverslag2005-2006-kleur.pdf).

<sup>109</sup> The Government’s Paper on Human Rights Strategy in Dutch Foreign Policy (November 2007) is available (in Dutch) at [www.minbuza.nl/binaries/kamerbrieven-bijlagen/2007/11/495dmvmr-bijlage.pdf](http://www.minbuza.nl/binaries/kamerbrieven-bijlagen/2007/11/495dmvmr-bijlage.pdf). See also the Government’s subsequent Action Plan (March 2008) for the implementation of its Human Rights Strategy; available (in Dutch) at [www.minbuza.nl/binaries/kamerbrieven-bijlagen/2008/mrt/021dmv-bijlage.pdf](http://www.minbuza.nl/binaries/kamerbrieven-bijlagen/2008/mrt/021dmv-bijlage.pdf).

<sup>110</sup> See *Discriminatie in en rond school: Rapport. Secundaire analyse van gegevens verkregen met de Veiligheidsmonitor V(S)O 2006* (ITS, July 2007). Analysis on request of the Dutch Equal Treatment Commission on the basis of a primary survey conducted by the Dutch Ministry of Education, Culture and Science, with a focus on discrimination on the ground of sexual orientation; available (in Dutch) at [www.cgb.nl/media/downloadables/discriminatie\\_school\\_veiligheidsmonitor.pdf](http://www.cgb.nl/media/downloadables/discriminatie_school_veiligheidsmonitor.pdf).

<sup>111</sup> See M. van San & J. de Boom, *Geweld tegen Homoseksuelen*, in: Politie & Wetenschap, P&W Verkenningen (Apeldoorn, 2006); available at [www.politieenwetenschap.nl/pdf/geweld\\_tegen\\_homoseksuelen.pdf](http://www.politieenwetenschap.nl/pdf/geweld_tegen_homoseksuelen.pdf).

remarks and behaviour. About 11% mention actual physical violence. A third to half of the people have adjusted their behaviour in order to prevent violence.

The Dutch Education Inspectorate reports annually about discrimination and incidents linked to extremism within schools. Its report of 2005-2006 states that in secondary education, mainly in VMBO (preparation for vocational training), there have been incidents linked to white extremism, incidents between pupils of different ethnic origin and incidents around (intolerance against) homosexuality (in VMBO, these incidents occurred in 36%, 39% and 10% of the schools, respectively). According to this report, discrimination and racism are mainly found in so-called *Praktijkonderwijs* (schools for practical vocational training: 73%) and in VMBO (61%). In primary education, discrimination and racism are especially found in special education (education for children with learning or behavioural problems). Research among high-school students in the Dutch province of Noord-Brabant showed that two thirds of the students would not talk openly about their homosexual feelings if they had them.<sup>112</sup> Other research shows that homosexuality is accepted by Dutch youth to a certain limit; 12% of boys and 4% of girls would break up their friendship if their best friend would be gay.<sup>113</sup> Research also shows that homosexual teachers feel equally satisfied in their jobs as heterosexual teachers, although one fourth of them have to deal with negative incidents related to their sexual orientation, such as jokes and slander.<sup>114</sup>

The Dutch NGOs are aware of the fact that a special division of the Ministry of Education focuses on the emancipation of gays and lesbians. In April 2008, the Dutch Government has also committed itself to continuing the promotion of awareness of diversity and multiculturalism at all levels of education by referring to the obligation by law<sup>115</sup> for Dutch schools to promote active citizenship and social integration in their curriculum and to let their students experience multiculturalism within their peer groups.<sup>116</sup> However, for both gay and lesbian teachers and students, the above-mentioned research unfortunately shows that the mere promotion of active citizenship and social integration is not sufficient to guarantee their freedom from discrimination in practice.

In the Equal Treatment Act (*Algemene Wet Gelijke Behandeling*) the principle of general prohibition of discrimination is defined. This general prohibition is without prejudice to the freedom of educational institutions based on religion or belief to demand specific extra requirements of those who work in these institutions. Those requirements may not be based on the 'single fact' of homosexuality. They may however be based on 'additional circumstances', although within the formulation of the text it is not made clear what these circumstances may be. Recently, some educational institutions based on religion or belief have put the requirement in their school principles that (potential) employees should have a lifestyle which is in accordance with Christian tenets. As they believe unmarried and gay couples do not live Christian lives, in this way they circumvent the 'single fact' construction, because (ostensibly) it is not homosexuality which they do not accept, but homosexual praxis. Over the years, the LGBT movement has protested many times against the injustice of this construction and has contended that if 'sexual orientation' would be an explicit ground for equal treatment under Article 1 of the Dutch Constitution, the position of this constitutional right would be much more defined than it is now. In the meantime, the Equal Treatment Commission has considered that the formulation of the 'single fact' construction is not in accordance with the EU Directive establishing a general framework for equal treatment in employment and education,<sup>117</sup> as the freedom for educational institutions is too broad. In February 2008, the European Commission wrote a letter to the Dutch Government stating the

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<sup>112</sup> See Outway Foundation, Noord-Brabant Student Survey, April 2005.

<sup>113</sup> See H. de Graaf, S. Meijer *et al.*, *Seks onder je 25<sup>e</sup>* (Rutgers Nisso Groep / Soa Aids Nederland, 2005).

<sup>114</sup> See H. de Graaf, B. van de Meerendonk *et al.*, *Beter voor de klas, beter voor de school. Werkbeleving en gezondheid van homo- en biseksuele mannen en vrouwen in het onderwijs* (Enabling Safety for Lesbian and Gay Teachers / Rutgers Nisso Groep, Utrecht 2003).

<sup>115</sup> See e.g. Article 8(3)(b) *Wet op het Primair Onderwijs* and Article 17(b) *Wet op het Voortgezet Onderwijs*.

<sup>116</sup> See *Response of the Kingdom of the Netherlands to the Recommendations it received during the Universal Periodic Review on April 15, 2008*, UN Doc. A/HRC/8/31/Add.2 (June 2008), response no. 20.

<sup>117</sup> European Council Directive 2000/78/EC of 27 November 2000.

same. To the disappointment of the Dutch NGOs however, the Government has replied that it does not expect any changes to the Equal Treatment Act in the near future.

#### Lack of Data on Various Forms of Gender-Based Violence

The Government report discusses domestic violence under Article 23 (paras. 271 and 272). The report, however, pays no or little attention to other forms of gender-based violence, such as rape, female genital mutilation, honour related crimes and sexual harassment at the work place. The report provides no data on gender-based violence disaggregated according to gender, let alone disaggregated by ethnicity, age or form of violence. Such information is necessary to monitor the prevalence of gender-based violence and the results of the measures taken by the Government. At this moment, such monitoring is absent.

#### Sexual Harassment

In its report, the Government pays very limited attention to sexual harassment. It only reports on the Act implementing Council Directive 2002/73/EC (see para. 304). The Dutch NGOs, however, would like to note that awareness about the new Act and its implications for employers with regard to the prevention of sexual harassment is lacking. The Government has hardly provided any training or information to either employers or employees on the matter and consequently many employers still have not established proper complaints procedures. Although employers are legally obliged to take measures to prevent sexual harassment, in particular small and medium-sized companies maintain that they do not have the financial means to do so. Moreover, the Government should ensure that laws and policies preventing and prohibiting sexual harassment are enforced by the various Inspectorates (Labour Inspectorate, Health Inspectorate and Education Inspectorate). The Dutch NGOs have a strong impression that the enforcement of legislation on sexual harassment is not a priority of these Inspectorates.

In addition, the State report lacks data, disaggregated by sex and ethnicity, on the prevalence of sexual harassment in different settings, which makes it impossible to evaluate the effectiveness of the measures taken to combat sexual harassment. Sexual harassment also occurs in fields which are not covered by the Act mentioned above, for example in sports and within centres for asylum seekers. Other fields in which sexual harassment is prevalent include the army and other settings in which women are extra vulnerable, either because they form a (small) minority or because of the relatively closed character of the setting, as is the case with the army. Recently, for example, a number of serious incidents, including rape, came to light in the navy. One of the striking aspects of these cases was that senior staff appeared to have been informed about these incidents without subsequently having undertaken any action. On the contrary, the complaints were played down and at least one of the women concerned had been fired. Other situations in which lesbian women are extra vulnerable are settings in which they are extremely dependent on others, such as detention centres for undocumented migrants or female prisoners.

#### Access to Shelters and Safe Houses for (Undocumented) Migrant Victims of Gender-Based Violence

The lack of capacity of shelters and safe houses for victims of gender-related violence is a structural problem. However, migrant women face extra obstacles, since many shelters are hesitant to receive migrant women without a secured residence permit or limit the number of migrant women without an independent residence permit they are willing to take in.

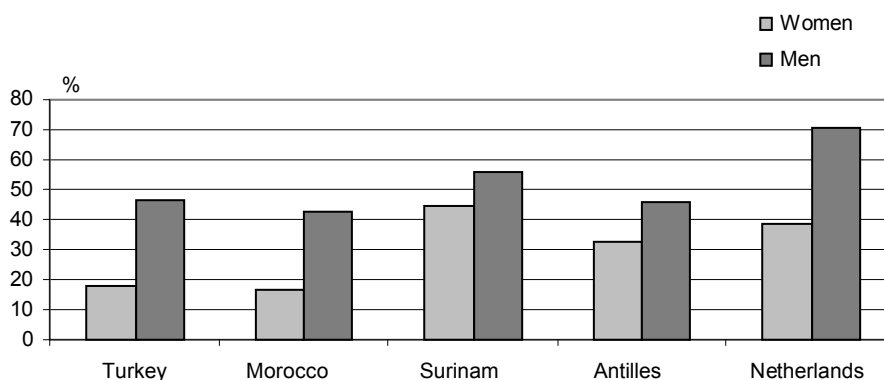
According to (Article 10 of) the Immigration Act 2000 (which followed the 1998 Linkage Act), undocumented migrants have no access to health care and to the social security system, with the exception of ‘medically necessary’ care. As a consequence, undocumented women who have become the victim of (sexual) violence (with the exception of victims of trafficking in women) are not entitled to social assistance and medical care and have no access to a safe shelter. Most shelters will not take in undocumented women because of the financial problems this poses. According to the Dutch NGOs, the State has the obligation to protect *all* women on its territory against gender-based violence and to provide shelter and protection when needed.

### Equal Pay for Men and Women

In paragraphs 320-321 of its report, the Government addresses the issue of equal pay. The pay gap between men and women presents a structural and persistent problem in Dutch society, which despite several measures hardly seems to decrease. Within the group of women, again there is a pay gap between white women and women from ethnic minorities. According to the figures of the Labour Inspectorate, the average pay gap (difference in hourly wage) between men and women in 2002 was 19%; the corrected percentage was still 7%. For that matter, it should be noted that the personal backgrounds which are used to correct the percentage can be gender-related, and therefore contain 'hidden discrimination'. This occurs, for example, when the part-time factor is used. Also female civil servants still earn less per hour than men. This has only marginally improved over the last years (from 79% of the hourly wage of men in 1995 to 82% in 2002).

When taking the civil service and profit sector together, in 2000 women still earned, on average, € 3.68 per hour less than men. According to the Government this is partly because women tend to work in professions that are paid less (or perhaps those professions are paid less because it is mainly women who work there) and partly because women work more in part-time and flexible jobs, which 'may hinder their career opportunities'. Obviously, the latter clearly constitutes a form of prohibited discrimination. In its report, the Government mentions the establishment in 2005 of the 'Equal pay pays' working group, the results of which are not discussed, however.

*Figure 1: Percentage of persons between 15-64 who are economically independent, i.e. earning 70% of the minimum income (2000), divided by country of origin.<sup>118</sup>*



### New Requirements for Family Formation and Reunification Disproportionately Affect Women

In paragraph 190 (requirement of independent income) and paragraphs 330-333 (Dutch civic integration policy) of its report, the Government refers to the new requirements with regard to family formation and family reunification. Since the introduction of the new Immigration Act in 2001, the Government has taken a series of measures to make family formation and reunification more difficult:

- the Dutch partner now has to earn 120% (family formation) or 100% (family reunification) of the net minimum wage in a fixed job with a labour contract for at least a year. Until April 2004 this was 70%;
- the age for family formation has been raised to 21 (for both partners), whereas for Dutch nationals wanting to marry this is 18;
- the existing exemption on the income requirement for single parents with children under the age of 5 has been abolished;

<sup>118</sup> See M. Gijsberts & A. Merens (eds.), *Emancipatie in Estafette; de positie van vrouwen uit etnische minderheden* (Sociaal en Cultureel Planbureau, Den Haag 2004), at 122 (table 6.6); available at [www.integratie.net/kiem/dossiers/socialecohesie/Emancipatie/4548\\_1021.html](http://www.integratie.net/kiem/dossiers/socialecohesie/Emancipatie/4548_1021.html).



- as of 15 March 2006, non-EU partners from non-Western countries are obliged to do an exam in their home country to test their knowledge of Dutch language and culture, even if all other requirements have been met (the so-called ‘civic integration exam abroad’),<sup>119</sup> which poses an additional financial burden,<sup>120</sup>
- the *leges* to obtain or renew a residence permit are substantially increased.

In general, women have a weaker position than men on the labour market in terms of participation, level of income and job security. More often than men, they have temporary, flexible and part-time labour contracts. They also, more often than men, work in low paid sectors, such as care for the sick and elderly, education and welfare work, and/or have the responsibility for young children. Moreover, as already explained above, there is a persistent pay gap between men and women. In 2004, 42% of women were economically independent, against 68% of men. About 60% of all women in the Netherlands earn less than 70% of the legally defined minimum wage.<sup>121</sup> This makes it more difficult for women than for men to meet the income requirement and to have a chance to actually be reunited with a non-EU partner. This is even more so for women from ethnic minorities who earn relatively lower wages (compared to Dutch women and ethnic minority men) and are less often employed on a permanent basis.

Furthermore, newcomers have to pass a mandatory civic integration examination 3.5 years after their arrival in order to qualify for permanent or independent residence in the Netherlands.<sup>122</sup> For immigrants with a dependent residence permit – the majority of which are women – this means that the acquisition of an independent residence permit is made dependent upon the (financial and otherwise) cooperation of their husbands/partners, thus promoting their dependence rather than their emancipation and integration. Moreover, it reinforces the traditionally unequal power relationship between husband and wife, of which domestic violence is one of the excesses.

If the new requirements indeed indirectly discriminate against women, in particular immigrant, refugee and minority women and women with small children, this would seriously affect their right to family life, one of the most fundamental human rights, and constitute a violation of the non-discrimination principle. However, no gender impact assessment has been made, though in 2007 the Minister of Justice promised a study on the effects of the raise of the income requirement.<sup>123</sup>

#### Gender-Based Discrimination in the Law on Names

The Dutch NGOs would like to draw attention to an aspect in the new Law on Names, which is, in their opinion, contrary to the right to equality of men and women before the law. The law stipulates that in the event that (married) parents cannot reach an agreement on the family name of a newborn child, it is the father who has the ultimate decision. This problem is the more urgent since the Government intends to introduce the same rule for non-married couples (instead of the present provision which states that, in case of disagreement, the child will have the name of the mother).<sup>124</sup> Moreover, an evaluation of the effects of the new law has not been carried out so far. Already in 2001, the CEDAW Committee considered the present Law on Names to contravene the basic principle of equality and recommended the Government to bring this law in accordance with CEDAW (a concern which it reiterated in its Concluding Observations of 2007).<sup>125</sup> However, no action has yet been undertaken by the Government with regard to this matter.

<sup>119</sup> Interestingly, when trying out this exam, even highly educated Dutch nationals and students from Teacher Training Colleges failed the test.

<sup>120</sup> Costs include: the exam (€ 350), preparation of the exam and travel and staying costs to go to the Dutch Embassy to do the exam.

<sup>121</sup> See Sociaal en Cultureel Planbureau & Centraal Bureau voor de Statistiek, *Emancipatiemonitor 2004*; available at [www.scp.nl/boeken/9037701906.shtml](http://www.scp.nl/boeken/9037701906.shtml).

<sup>122</sup> For immigrants who arrived before the introduction of the new law (‘old-comers’), this is 5 years.

<sup>123</sup> See *Kamerstukken II, 2007-2008*, 30573, no. 7, and *Kamerstukken II, 2006-2007*, 30573, no. 5.

<sup>124</sup> See Dutch parliamentary records, file no. 29 353.

<sup>125</sup> See CEDAW, *Concluding Observations (Netherlands)*, *supra* note 87, para. 33.



### The Equal Treatment of Disabled and Chronically Ill Persons Act

In its report (para. 298), the Government states the following: “The Equal Treatment of Disabled and Chronically Ill People Act (*Wet gelijke behandeling op grond van handicap of chronische ziekte*) implements Council Directive 2000/78/EC. This Act came into force on 1 December 2003, and gives disabled and chronically ill people the right to effective adaptations, which, in this context, mean suitable adaptations which are necessary to enable the disabled or chronically ill to take as full and active a part in society as anyone else. However, such modifications must not place a disproportionate burden on those responsible. The meaning of the term will be further developed through case law. The Act currently applies to leisure activities, vocational training and public transport. In the future this right will be extended to cover other areas, such as housing and, possibly, access to goods and services. Public authorities, businesses and organisations need to make effective adaptations in these areas if disabled or chronically ill people ask for them. People with a disability or chronic illness can address any complaints regarding failure to make effective modifications to the Equal Treatment Commission.” The Dutch NGOs have the following comments concerning this paragraph. First, it’s not clear why no reference is made to the internationally known concept of ‘reasonable accommodation’. The denial of a reasonable accommodation is an integral part of the prohibition of discrimination on the ground of disability (including chronic illnesses). Furthermore, the Act came into force for the areas covered by Council Directive 2000/78/EC. These are: employment, occupation and vocational training.<sup>126</sup> Leisure activities are not covered by the Act. Why are these mentioned in the report? Finally, Articles 7 and 8 of the Act regarding public transport have not yet entered into force. The report fails to mention this, but, more importantly: does the Government intend to have these articles come into force, and, if so, when?<sup>127</sup>

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Confront racial and religious discrimination, in particular Islamophobia, at all levels and in all its manifestations;*
- *Take specific measures to eliminate Islamophobia and reverse societal polarization;*
- *Take measures to increase the extremely low number of women in high ranking posts in the civil service, in academic life, in Government appointed high-ranking (international) positions and in top positions in trade and industry;*
- *Take more specific measures than at present to guarantee freedom from discrimination to gay and lesbian teachers and students;*
- *Extend the scope of the Equal Treatment Act to all areas relevant for the full participation of people with disabilities in society.*

*The Dutch NGOs recommend the Human Rights Committee to request the Dutch Government to specify:*

- *Which measures it intends to take to prevent and combat sexual harassment in sports, in the army, in centres for asylum seekers, and in detention centres for undocumented migrants or female prisoners;*
- *Which measures it intends to take in order to provide shelter and protection to undocumented women who are victims of gender-based violence and who are in need of protection;*
- *The results of the 2005 ‘Equal pay pays’ working group and whether or not this project led to a reduction of the pay gap between men and women. The Dutch NGOs would also be interested in figures on the current pay gap between men and women, compared to previous years;*
- *Bring the Law on Names in accordance with the principle of equality of men and women.*

<sup>126</sup> See European Council Directive 2000/78/EC of 27 November 2000, art. 3.

<sup>127</sup> Cf. UN Convention on the Rights of Persons with Disabilities (2006), arts. 3-5, 9 and 20. The Netherlands has signed this Convention and has recently announced its intention to ratify. See Letter by the State Secretary for Health, Welfare and Sports dated 17<sup>th</sup> March 2008, *Kamerstukken II, 2007-2008*, 24 170, no. 82.

## Article 27: Minorities

### Legislation on Integration

The Dutch NGOs are concerned that the Dutch Government has not taken into account the international non-discrimination provisions during the drafting of new legislation on integration of migrants. Due to this legislation, ethnic minorities still have a disadvantaged position in the labour market. While the Government report asserts that the new legislation on the integration of migrants promotes their position in Dutch society (paras. 330-333), the Dutch NGOs believe that the new legislation may better be seen as yet another limiting instrument within the policy on migrants.

First of all, the requirement of a preliminary test before one's arrival in the Netherlands, which is specifically intended only for non-Western migrants, hinders the migration opportunity. More importantly, the legislation imposes excessive obligations on potential migrants. The Government has failed to sufficiently assess this impact of the legislation in the light of its international treaty obligations regarding non-discrimination. With regard to the Act on Integration Abroad, treaty provisions were not mentioned at all during the legislative process. With regard to the Bill for an Act on Integration, relevant treaty provisions were mentioned but not effectively considered as to their implications for the new legislation. The Explanatory Memorandum merely referred to the need for compliance with Articles 2 and 26 ICCPR, ECHR or CERD, as differentiating between various groups is inherent to any policy concerning migration and integration. It also stated that the principle of equal treatment will not be involved when there are important and objective justifications, without specifying what these may entail, however.<sup>128</sup> Even after extensive criticism from the Dutch NGOs and other members of civil society,<sup>129</sup> the Government failed to handle the matter with proper consideration and precision. Without assessing its fulfilment of international treaty obligations, the Government simply referred to the possible justifications of the new legislation.<sup>130</sup>

Contrary to the Government report, which states that the new policy on integration will help migrants in creating opportunities for themselves in the labour market (para. 332), the Dutch NGOs believe that the new legislation actually fails to provide for effective measures to improve their disadvantaged position. This is supported by specific figures which show no improvement since 2003: on the contrary, there has actually been a slight decline. The Government report (para. 339) mentions 49% employment participation for non-Western migrants and 67% for non-immigrants in 2003. A recent report however, shows that in 2006 these figures were 46.7% for non-Western migrants and 66.9% for non-immigrants.<sup>131</sup> Considering its supposed efforts to improve the labour market position of ethnic minorities, the Dutch NGOs conclude that the Government is aware of the problem but fails to address it properly.

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- *Properly scrutinise its new legislation on integration in the light of relevant treaty provisions, in particular against Articles 2, 26 and 27 ICCPR;*
- *Consider more effective measures for the improvement of the labour market position of ethnic minorities, since the current ones are failing in this respect.*

<sup>128</sup> See *Kamerstukken II, 2005-2006*, 30 308 no. 3, at 35-36.

<sup>129</sup> See, e.g., Permanente commissie van deskundigen in internationaal vreemdelingen-, vluchtelingen- en strafrecht (Commissie Meijers), *Notitie inzake het voorstel van Wet inburgering*, 23 January 2006, available via <http://rechtennieuws.nl/6379/commissie-wet-inburgering-in-strijd-met-verdrag.pdf>; Equal Treatment Commission (CGB), Advisory Letter 2006-05 dated 23<sup>rd</sup> January 2006, available (in Dutch) at [www.cgb.nl/cgb215.php](http://www.cgb.nl/cgb215.php); Landelijk Bureau ter Bestrijding van Rassendiscriminatie, *Comments on the "Contourennota"*, 17 and 21 June 2004, available (in Dutch) at [www.art1.nl/artikel/1679-Commentaar-op-de-Contourennota-Herziening-van-het-inburgeringsstelsel](http://www.art1.nl/artikel/1679-Commentaar-op-de-Contourennota-Herziening-van-het-inburgeringsstelsel).

<sup>130</sup> The Government referred to the aim of having sufficient knowledge of the Dutch language and society; see *Kamerstukken II, 2005-2006*, 30 308, no. 16, at 61-63.

<sup>131</sup> See Centraal Bureau voor de Statistiek (*Statistics Netherlands*), 22 February 2008.

## List of Recommendations

### Article 7: Prohibition of Torture and Inhuman or Degrading Treatment

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Reconsider its current asylum legislation in view of Article 7, which should at least lead to amendment of the accelerated asylum procedure in order to enable a more thorough and adequate assessment of the asylum application;
- Suspend all pending expulsion cases to Greece, awaiting the outcome of the European Commission's infringement procedure;
- Make sure that children in youth custodial centres are not at risk of torture and inhuman or degrading treatment;
- Assess the effectiveness of the human rights training programmes for police and prison officials, and register complaints on torture and inhuman or degrading treatment allegedly committed by law enforcement officials.

### Article 8: Prohibition of Slavery, Servitude and Forced Labour

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Ensure that all victims of trafficking have access to assistance and protection, regardless of their capacity or willingness to act as witnesses in proceedings against their oppressors, and to carry out a risk assessment before any decision on a long-term residence permit or on return to the victims' home country;
- Take measures to improve the implementation of the B9-regulation;
- Take measures to protect unaccompanied minor asylum seekers against the risk of falling into the clutches of traffickers, in particular the ones who are not granted asylum after they attain the age of 18;
- Ensure a more structural national approach to the prevention of sexual exploitation of children and child trafficking than is presently offered;
- Lift the prohibition on the issuance of work permits for prostitution, in order to reduce the number of undocumented migrant prostitutes and their vulnerability to violence, abuse and exploitation by brothel keepers and clients.

### Article 9: Right to Liberty and Security of Person

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Reconsider its asylum legislation with respect to the CRC Procedure;
- Not to place any children in detention on the grounds of their migration status but to allow minors to stay with their parents at shelter locations;
- Not to detain unaccompanied minor aliens but to allow them to stay in communal accommodation;
- Develop a national action plan to reduce the number of children behind bars;
- Reconsider its statute expanding State powers to investigate and prosecute terrorist acts;
- Provide pregnant women who are 'suspected' of drug trafficking at the 100% drugs control at Schiphol airport with an echo as an alternative for a body scan.

### Article 10: Treatment of Persons Deprived of Their Liberty

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Ensure greater safety in youth custodial institutions by developing a better and consistent policy towards juveniles, taking into account their age, vulnerability of the child and the aim of juvenile justice to work towards reintegration of the child;

- Evaluate treatment programmes in closed institutions in a more detailed and regular manner, and end the waiting lists for treatment in closed institutions;
- Ensure separate detention of juveniles and adults;
- Provide for independent professional investigations of all deaths in (alien) detention centres;
- Provide information on the number of aliens with a TBS-maatregel as of 2000. Assess the treatment of this particular group of aliens and possible alternatives for lifelong imprisonment if return to their home country is not an option. Provide information on the number of these aliens who have been repatriated to their home countries and on the care which was provided to them in these countries.

#### **Article 12: Freedom of Movement**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Refrain from adopting the Act on Administrative Measures for National Security, or, at least, to pay regard to the uncertainties that the Act will cause and to the possible infringements it may therefore cause on the right to freedom of movement;
- In the absence of public transport suitable for use by persons with disabilities, abstain from imposing any arbitrary limitations to their transportation facilities. With regard to transportation, persons with disabilities are to be brought in a position equal to persons without disabilities, i.e. the possibility to travel (i) without limitation and (ii) at regular public transport fees.

#### **Article 13: Prohibition of Expulsion without Legal Guarantees**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Reconsider the duration of the accelerated asylum procedure and the possibilities for asylum seekers to bring their cases forward, for instance by providing the opportunity for especially vulnerable groups to have an additional hearing;
- Ensure that victims of sexual violence qualify for asylum status and/or a residence permit on humanitarian grounds;
- Procure statistics on the number of asylum requests on the basis of domestic violence, female genital mutilation, fear of honour killings and other forms of sexual violence, and the percentage of applications in which asylum status (or residence status on another ground) is granted;
- Take measures to bring asylum procedures in line with the UNHCR Gender Guidelines;
- Ensure that in the evaluation of asylum applications, the special needs and limitations of children are being met.
- bring Country Reports with regard to homosexuality up to date;
- Realise that LGBT asylum seekers may apply for asylum in the Netherlands after being refused by a European country that does not recognise (the fear for) persecution on the ground of sexual orientation.

#### **Article 14: Right to a Fair and Public Hearing**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Guarantee a special procedure for children who are heard by the police, taking into account their age and including access to a lawyer and the presence of a relative during the hearing.

#### **Article 16: The Right to Recognition as a Person before the Law**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Grant transgender persons the right to bring the gender listed in their identity papers in accordance with their gender expression without going through a full sterilisation procedure.

## **Article 17: Right to Privacy**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Increase judicial scrutiny on the necessity of recording telephone or electronic communications as well as data collection and retention, either prior to such recording, collection or retention or afterwards;
- Reflect on the interference caused by (new) legislative measures with the right to privacy, both by the specific laws or measures and by the legislative body as a whole.

## **Article 18: Freedom of Religion and Belief**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Promote freedom of religion and belief as much within the Netherlands itself as in its foreign policy. More generally, the Dutch NGOs would like to invite the Government to be more transparent regarding its views on its own role in relation to increasing xenophobia and anti-Islamic sentiments and to the protection of freedom of religion and the safety of the Muslim minority;
- Support initiatives of civil society organisations which aim to achieve a climate of mutual understanding, tolerance and respect between religious believers of different communities, as well as between such believers and non-believers;
- Provide more clarity on the principles of State neutrality and the separation between church and State in order to guarantee legal certainty for individuals relying on their right to religious freedom;
- Prevent the formulation of prohibitions which disproportionately burden one type of citizen, in particular orthodox religious Muslim women.

## **Article 19: Freedom of Opinion and Expression**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Refrain from reinforcing and/or expanding the scope of the crime of blasphemy;
- Enact a law on journalists' right to protect their sources which incorporates at least the same level of protection as afforded by international human rights law;
- Reconsider the procedural rules for journalists' detention.

## **Article 22: Freedom of Association**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Desist in the violation of Articles 22, 25 and 26 by its funding of a political party which excludes women from (full) membership;
- Desist in invoking the freedoms of association and religion as a justification for discrimination against women, as is shown by the SGP case.

## **Article 23: Protection of the Family**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Abolish the three month time limit for family reunification;
- Exempt all refugees (including single parent families and elderly people) from the income requirement when applying for family reunification;
- Develop policy rules which guarantee that family unity is of primary importance within the context of return policies;
- Give children of parents with a Dutch residence permit an entitlement to residence without conditions;
- Provide free legal aid to victims of gender-related violence;

- Prevent the increased attention to the treatment of perpetrators of domestic violence from having a negative impact on the position of victims of such violence;
- Apply the criteria for responsible parenthood to people with intellectual disabilities only in order to protect them and/or their (future) children and not to discourage them to exercise their right to found a family;
- Give both LGBT parents full parental rights over their children from birth onwards.

#### **Article 24: Protection of the Child**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Lay down by law that reporting (suspicions of) child abuse is a professional obligation on all those who work with children within the context of their profession, and a civil obligation on all members of the public who observe or have serious suspicions of child abuse in their surroundings;
- Guarantee the right to youth care by increasing the effort to eliminate the existing waiting lists;
- Make sure that every child – including undocumented children – has full access to insurance for the costs of treatment under youth care or any other health care institution for children;
- Guarantee the right of LGBT youngsters to express their sexual orientation safely at all times: in school, in institutions and within the family;
- Take measures to ensure that all children, including undocumented children, have access to basic necessities, such as housing, food and clothing;
- Consider the possibility of providing the Dutch nationality to children who have not been able to acquire another nationality in a limited period of no more than three years.

#### **Article 25: Right to Take Part in Public Affairs**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Take measures to increase the number of women in both political functions and in (top) public functions;
- Ensure that persons with a disability can cast their vote on an equal basis with persons who do not have a disability.

#### **Article 26: Prohibition of Discrimination**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Confront racial and religious discrimination, in particular Islamophobia, at all levels and in all its manifestations;
- Take specific measures to eliminate Islamophobia and reverse societal polarization;
- Take measures to increase the extremely low number of women in high ranking posts in the civil service, in academic life, in Government appointed high-ranking (international) positions and in top positions in trade and industry;
- Take more specific measures than at present to guarantee freedom from discrimination to gay and lesbian teachers and students;
- Extend the scope of the Equal Treatment Act to all areas relevant for the full participation of people with disabilities in society.

*The Dutch NGOs recommend the Human Rights Committee to request the Dutch Government to specify:*

- Which measures it intends to take to prevent and combat sexual harassment in sports, in the army, in centres for asylum seekers, and in detention centres for undocumented migrants or female prisoners;



- Which measures it intends to take in order to provide shelter and protection to undocumented women who are victims of gender-based violence and who are in need of protection;
- The results of the 2005 'Equal pay pays' working group and whether or not this project led to a reduction of the pay gap between men and women. The Dutch NGOs would also be interested in figures on the current pay gap between men and women, compared to previous years;
- Bring the Law on Names in accordance with the principle of equality of men and women.

#### **Article 27: Minorities**

*The Dutch NGOs recommend the Human Rights Committee to urge the Dutch Government to:*

- Properly scrutinise its new legislation on integration in the light of relevant treaty provisions, in particular against Articles 2, 26 and 27 ICCPR;
- Consider more effective measures for the improvement of the labour market position of ethnic minorities, since the current ones are failing in this respect.

