

# Submission to the Committee on Enforced Disappearances in relation to the review of the Additional Information Report of the Netherlands (CED/NLD/AI/1)

Presented by ODRI - Office against discrimination, racism and intolerance

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(1446 words)

## Section I: Introduction

ODRI - Office against discrimination, racism and intolerance expresses its gratitude to address the Committee on Enforced Disappearances. Our intention is that this document aids the Committee in its efforts to prevent enforced disappearances within the Netherlands and to further enhance the safeguarding of the victims involved.

## Section II: Non-refoulement (article 16)

1. Asylum regulations precede the entry into force for Netherlands of the United Nations International Convention for the Protection of All Persons from Enforced Disappearance in 2011. The Aliens Act of 2000 (*Vreemdelingenwet – Vw 2000*) determines the conditions to apply the general principle of non-refoulement<sup>i</sup>. Article 29(1) outlines that a refugee under the 1951 Refugee Convention can obtain a temporary residence permit. In addition, Article 29.2 extends the protection to asylum seekers facing three specific situations: “death penalty or execution”, “torture, inhuman or degrading treatment or punishment”, or “serious and individual threat to the life or person of a civilian as a result of indiscriminate violence in the context of an international or internal armed conflict”. Additionally, Article 30(a) identifies conditions under which asylum can be forfeited. Despite these provisions, immigration legislation does not expressly encompass enforced disappearance as a potential risks leading to serious danger, as prescribed by Article 16 of the Convention for the Protection of All Persons From Enforced Disappearances.

2. ODRI voices concern that in the Netherlands, the principle of non-refoulement remains unapplicable in national security cases as determined by administrative bodies within the Ministry of Justice and Security, and the State Department, and by appellate judicial bodies. These administrative and judicial bodies justify their actions by referring to Articles 18(1)(e) and 66(a)(7) of the Aliens Act of 2000 and Article 86(1) of Dutch Decree of 23 November 2000 implementing the Aliens Act 2000 (*Vreemdelingenbesluit 2000 – Vb*). These references serve as the basis for revoking temporary residence permits, issuing return decisions, and imposing entry bans on individuals deemed threatening to national security or having committed offenses under the broadly interpreted legal term "threat to public order or national security" (*gevaar voor de openbare orde*).

3. During the reporting period, authorities overseeing immigration cases have often overlooked the non-refoulement principle after identifying perceived risks related to specific individuals. When evaluating claims from defendants regarding potential threats to their personal safety, judicial reviews commonly dismiss such claims by arguing that these individuals pose a societal threat, are likely to continue criminal activities, and will not exhibit improved behavior. In response to these observations, the Kingdom of the Netherlands has taken actions such as revoking temporary residence permits, issuing return orders, and imposing entry bans on nationals from Albania, Algeria, Armenia, Afghanistan, Bulgaria, Brazil, Congo, Colombia, Eritrea, Ghana, Iraq, Libya, Morocco, Nigeria, Pakistan, Türkiye, Russia, Syria, Yemen, among other countries. The justification for these actions stems from domestic law exclusion clauses enumerated in Article 1F of the United Nations Convention relating to the Status of Refugees.

4. Furthermore, since the United Nations Convention for the Protection of All Persons From Enforced Disappearances came into effect for Aruba on December 21, 2017, it is noteworthy that asylum seekers frequently encounter obstacles when seeking international protection. Aruba's national ordinances lack a comprehensive framework for protecting against refoulement through the assessment of substantial risks of enforced disappearances in the asylum seekers' transit or destination country.

5. ODRI respectfully proposes that CED make the following recommendation to the Kingdom of the Netherlands:

Incorporate into Dutch law, including Aruba's national ordinances, an explicit prohibition of non-refoulement in cases of expulsion, return, surrender, or extradition, even when entry is denied at airports or borders. Ensure a consistent and comprehensive individual assessment to determine and validate the risk of enforced disappearance for each person.

## **Section II: Definition of victim and right to receive reparation and prompt, fair and adequate compensation (article 24)**

6. Despite the different amendments to the Criminal Code (*Wetboek van Strafrecht*) and the Code of Criminal Procedure (*Wetboek van Strafvordering, Sv*), the existing definition of "victim" falls short of full compliance with the Convention. This definition might not encompass all individuals who have suffered harm due to enforced disappearance, as outlined in Article 24(1) of the United Nations Convention for the Protection of All Persons From Enforced Disappearances. Article 51(a) of the Code of Criminal Procedure defines a victim as someone who has suffered financial loss or other disadvantages directly resulting from a criminal act. Legal persons who have suffered such losses or disadvantages are also considered victims. Additionally, family members up to the fourth degree and those dependent on the victim can be included in this definition. Article 51(a)(2) allows for the exclusion of certain family members "In the interest of due process" and the determination of priority among kin. Various articles in the Code of Criminal Procedure, including Articles 51(a)(a), 51(a)(c), 51(b), 51(c), 51(c)(a), 51(e), 151(d), 151(e), provide safeguards for victims, including the right to be informed, access to the case file, the right to submit documents, the right to speak, the right to claim compensation, access to free legal representation, among others.

7. Moreover, provisions like Articles 14(c), 22(b), 36(e), 36(f), 77(ma), and 77(z) of the Criminal Code regulate potential sanctions for perpetrators and economic compensation for victims related to the crime's impact. Dutch law, however, does not explicitly address the different forms of reparation applicable to victims of enforced disappearances under the Convention. Notably, the Criminal Injuries Compensation Fund (*Schadefonds Geweldsmisdrijven*) allows victims to access economic compensation for physical and psychological harm by applying to the fund, meeting their conditions, and presenting evidence of material and moral damages, with the option to be assisted by a lawyer throughout the process. However, as of November 1, 2022, the list of injuries eligible for compensation under the Violent Criminal Injuries Compensation Fund does not encompass enforced disappearances covered in Article 2 or deprivations of liberty covered in Article 3 of the Convention for the Protection of All Persons From Enforced Disappearances.

8. ODRI respectfully proposes that CED make the following recommendation to the Kingdom of the Netherlands:

Amend the Dutch regulations of the Code of Criminal Procedure, the Criminal Code, and the Regulations of the Criminal Injuries, to include the definition of victims under the terms of Article 24 of the Convention.

### Section III: Measures to protect children against enforced disappearances (article 25)

9. The current deliberations within the House of Representatives of the Kingdom of the Netherlands pertain to regulations aimed at limiting family reunification opportunities for refugees, particularly children who are victims of armed conflicts. If approved, this proposal could disproportionately affect children who have suffered enforced disappearances. Although the proposal's advancement has been temporarily halted due to the resignation of Prime Minister Mark Rutte,<sup>ii</sup> there is a likelihood that it will receive approval in the foreseeable future, given previous similar initiatives. In December 2022, the Cabinet outlined plans to postpone family reunification by an additional six months if a holder of refugee status did not yet possess suitable accommodation or sufficient economic means. This proposal underwent judicial review in three separate cases, with the judiciary finding that the postponement lacked a solid legal foundation.<sup>iii</sup> ODRI raises concerns that ongoing policy discussions have not taken into account the implementation of Article 25 of the Convention for the Protection of All Persons From Enforced Disappearances. There is potential for these discussions to lead, in practice, to situations involving the wrongful removal of children, unauthorized adoptions, the imposition of guardianship, or other harmful actions through irregular channels.

10. ODRI respectfully proposes that CED make the following recommendation to the Kingdom of the Netherlands:

(a) Refrain from adopting regulations that could adversely affect the rights of children who are victims of enforced disappearances and their ability to be reunited with their families. Such regulations might inadvertently lead to the wrongful removal of children and give rise to actions outlined in Article 25 of the Convention.

(b) Review the existing criminal legislation with the objective of incorporating specific offences as described in Article 25(1) of the Convention. This process should also include the establishment of suitable penalties that take into account the gravity of these acts.

(c) Develop dedicated procedures to ensure the prompt and secure reunification of children who are victims of enforced disappearances, as detailed in Article 25(1)(a) of the Convention, with their families of origin.

**i** Aliens Act 2000 Section 4. The asylum residence permit (...)      Section 1. The temporary residence permit

Article 29. 1. A temporary residence permit as referred to in Article 28 can be granted to the foreign national: (a). who is a treaty refugee; or (b). who has made it plausible that he has well-founded reasons to believe that he runs a real risk of serious harm in the event of deportation, consisting of: 1°. death penalty or execution; 2°. torture, inhuman or degrading treatment or punishment; or 3°. serious and individual threat to the life or person of a civilian as a result of indiscriminate violence in the context of an international or internal armed conflict.

Article 30.a 1. An application for a temporary residence permit as referred to in Article 28 may be declared inadmissible within the meaning of Article 33 of the Procedures Directive, if: a. the foreign national enjoys international protection in another Member State of the European Union; b. the alien has been recognized as a refugee in a third country and he can still enjoy that protection or otherwise enjoys sufficient protection in that country, including the principle of non-refoulement, and is re-admitted to the territory of that country; c. a third country is regarded as a safe third country for the foreign national; d. the foreign national has submitted a subsequent application on which the foreign national has not based any new elements or findings or in which no new elements or findings have been discussed that may be relevant to the assessment of the application; or e. the foreign national has already been granted a residence permit pursuant to Article 29, first paragraph.

**ii** Letterlijke tekst persconferentie na ministerraad 7 juli 2023 <https://www.rijksoverheid.nl/documenten/mediateksten/2023/07/07/letterlijke-tekst-persconferentie-na-ministerraad-7-juli-2023>; Integrale persconferentie van minister-president Rutte na ministerraad van 7 juli 2023. <https://www.youtube.com/watch?v=Sg-ITdjmyd4>

**iii** <https://www.volkskrant.nl/nieuws-achtergrond/kabinet-op-een-dag-drie-keer-op-vingers-getikt-over-onwettig-uitstel-gezinshereniging~b50b7a43/>