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of the Netherlands

Mr Ard VAN DER STEUR
Minister of Security and Justice
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Strasbourg, 2 November 2016

Dear Ministers,

I take the opportunity to follow up on the constructive discussions that I had with your authorities during my official visit to the Netherlands in May 2014, and to share with you some preliminary observations on three Bills that have been prepared in the context of your government's efforts to counter terrorism: the Temporary Administrative (Counter-Terrorism) Measures Bill (*Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding*); the amendment of the Netherlands Nationality Act (*Rijkswet op het Nederlanderschap*); and the Intelligence and Security Services Bill (*Wet op de inlichtingen- en veiligheidsdiensten*).

Certain major issues arising from the Temporary Administrative Measures Bill

I have noted that certain provisions of the above Bill impact directly on rights enshrined in the European Convention on Human Rights (ECHR). This includes restrictions on the freedom of movement by imposing reporting obligations on a person or bans on their presence in certain areas or near certain objects. The possibility of a ban on being in the vicinity of certain persons is also foreseen, having potential ramifications for one's right to private and family life. All these measures may be accompanied by electronic tagging to ensure compliance. Additionally, the Bill allows for the imposition of an international travel ban, impacting on one's right to leave a country, including their own, as well as having potential consequences for the maintenance of one's family life for those who have family members abroad.

As you are aware, under the ECHR states are bound to ensure that laws restricting human rights and fundamental freedoms are accessible and sufficiently precise so that persons concerned must reasonably be able to foresee the consequences of their actions. I have taken note of the fact that the activation of the aforementioned measures will be dependent on whether the person concerned "on the basis of his behaviour can be connected to terrorist activities or the support thereof". This wording is open to a very expansive interpretation. I would therefore appreciate hearing from you how this provision is or can be brought in line with the aforementioned ECHR standards.

Under the same Bill, the measures described above can be imposed by ministerial decision, without any prior judicial approval. Across Europe I have seen how, in the context of the fight against terrorism, states have circumvented judicial review safeguards by adopting administrative measures which are often very far-reaching. These include particularly the right to a fair trial and the associated safeguards contained in Article 6 ECHR.

Given the seriousness of the above human rights restrictions provided for by the Bill, and that intentional non-compliance is punishable by a custodial sentence of up to one year, I would like to ask you for information on how you intend to safeguard "fair trial" standards in this context. In particular, I would appreciate receiving more information on how "fair trial" standards are preserved in the face of the use of evidence from the security services that cannot be disclosed to the person concerned, which will presumably be the case when the provisions in this Bill are applied. This can put the individual at a very significant disadvantage when challenging the legitimacy of these measures. According to the Strasbourg Court's case law, such proceedings must ensure a sufficient counterbalance to the difficulties that the use of secret evidence poses for the individual (see *A. and others v. the United Kingdom*, judgment of 19 February 2009, paragraph 205). Finally, I would also like you to reflect on comments made by my predecessor, who considered the implications of a proposal very similar to the one now on the table in 2008. He noted, in his 2009 report following his visit to the Netherlands, that a custodial sentence of up to one year in case of non-compliance with reporting duties or area bans was disproportionate.

Revocation of nationality under the amended Nationality Act

The Bill seeks to amend the Nationality Act so as to make possible the revocation of nationality of Dutch citizens, if on the basis of their behaviour it is apparent that they have joined an organization that the government has put on a list of organizations that are party to an internal or international armed conflict and pose a threat to national security. Revocation can take place by ministerial decision.

Under the 1997 European Convention on Nationality, by which the Netherlands is bound, revocation of nationality is foreseeable in certain cases that are *exhaustively listed* in Article 7, including when a person voluntarily joins a foreign military service or when they engage in a conduct *seriously prejudicial* to the vital interests of the state. However, such revocation should occur in a manner that prevents statelessness and is non-discriminatory on, inter alia, religious or ethnic origin grounds. The principle of non-discrimination also applies to distinctions between nationals, such as those who have acquired nationality by birth and those who have acquired it later.

I have noted that this Bill, like the other one discussed above, has been put forward in the context of your government's Action Programme to combat Jihadism. Although the Bill is formulated in ostensibly neutral terms, relating to persons who have joined any group meeting the above criteria, the context of the Bill would suggest that the actual focus is on those joining islamist extremist groups. The Bill only foresees the revocation of nationality of those possessing dual citizenship, in order to ensure that statelessness is prevented. However, the most recently available data from the Central Bureau of Statistics show that half of all persons with dual nationality hold, in addition to Dutch citizenship, the nationality of only two countries, Morocco and Turkey. These groups are thus likely to be, de facto, primarily affected by the Bill than others. In this light, I would like to ask you for clarification how the Bill can be implemented in a way that would have no adverse repercussions on social cohesion and certain religious or ethnic groups whose members are bound to be affected by these measures.

I have noted that several of the terms in the Bill which are key to triggering the revocation of nationality may be perceived as vague. This includes the phrase "based on his behaviour" and the definition of "joining" an organization posing a threat to national security, which appears broader than that the person participates in the commission or preparation of violent acts or receives training for that purpose. I would like to ask you for your reflection whether the use of such concepts meets the Strasbourg Court's aforementioned criteria in relation to precision and foreseeability, and whether this sufficiently captures the requirement in the European Convention on Nationality that a person has engaged in conduct that is seriously prejudicial to vital interests of the state. In this context it is recalled that under the explanatory report to the 1997 Convention on Nationality "such conduct notably includes treason and other activities directed against the vital interests of the State concerned (for example work for a foreign secret service) but would not include criminal offences of a general nature, however serious they might be".

Furthermore, I recall that under Article 12 of the 1997 Convention on Nationality all decisions must be subject to an administrative or judicial review. Individuals concerned must enjoy a right of appeal against decisions relating to nationality. Thus, I would appreciate receiving more information on how the right to an effective remedy, enshrined also in Article 13 ECHR, can be adequately guaranteed especially in cases where the person concerned has left the Netherlands and will be unable to return to appeal a revocation decision in person, which may present obstacles to a fair hearing. Could you also reflect on the above-mentioned problem of the use of secret evidence and the need for sufficient counterbalances in the context of a fair trial? (see *A. and others v. UK*, judgment of 19 February 2009, paragraph 220).

Major issues arising from the Intelligence Services Bill

During my visit to the Netherlands in May 2014 I had the occasion to discuss the 2002 Intelligence and Security Services Act (*Wet op de inlichtingen- en veiligheidsdiensten* 2002). I have noted with interest that a Bill for a new Intelligence and Security Services Act was presented to the Lower House of Parliament on 30 October.

I am concerned to learn that the draft Bill seems to expand the powers of the intelligence services to engage in online surveillance of large groups of people at once, including those who are in no way connected to crimes or activities endangering national security. Given the expansive natures of the powers involved, strong oversight is crucial.

In my 2015 *Issue Paper on the democratic and effective oversight of national security services*, I set out what such oversight in compliance with Council of Europe standards might look like. I take note of the proposal to set up a Review Board for the Use of Powers (*Toetsingscommissie Inzet Bevoegdheden*, TIB), consisting of legal experts who will have the authority to review the legality of ministerial decisions to initiate surveillance activities prior to these taking effect. The TIB is specifically introduced as a response to criticism that an earlier draft, which lacked a prior review, would not be compliant with the case law of the Strasbourg Court. I would be grateful to receive more information about how extensive the scope of the review the TIB will be, and how it will be ensured that the TIB operates fully independently.

The TIB's role would appear to focus on the initiation of surveillance activities. Human rights issues, however, are also likely to occur at later stages, for example when gathered data are stored and analysed. I would be interested in hearing from you how effective oversight is organized throughout these stages. In this context, I would like to remind you of my recommendation, made on the occasion of my 2014 visit, that the role of the Review Committee for the Intelligence and Security Services (*Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten*, CTIVD) and the authority of its decisions be expanded. In the Bill, the Committee's findings on individual complaints will be binding, which is a positive step forward. Outside of the individual complaints procedure, however, findings remain non-binding. I again refer you to my above-mentioned Issue Paper and the recommendations therein, which I believe will assist you in making the necessary improvements to oversight practices.

Impact of counter-terrorism measures on certain social groups

In various countries I have warned that repressive counter-terrorism measures, when not applied in a very restrictive, proportionate and precise manner, lead to stigmatization and alienation of particular social groups, who might be disproportionately affected.

I would like to stress that the fight against terrorism may not be won solely by repressive measures. Prevention is key. Article 3 of the 2005 European Convention on the Prevention of Terrorism requires states parties to promote tolerance, including by encouraging systematic, inter-religious and cross-cultural dialogue in order to prevent tensions that contribute to the commission of terrorist offences. This is particularly necessary in modern multicultural societies like the one in the Netherlands. Such policies should also provide for the effective elimination of discrimination, especially on ethnic or religious grounds, in law and practice, and for everyone's access to inclusive, quality education.

Therefore, I would appreciate further information on how your authorities engage or plan to engage in prevention in order to safeguard social cohesion, and how application of the aforementioned legislative measures will be monitored effectively.

Since the Bills on administrative measures and on revocation of nationality are currently awaiting approval of the Senate, and your government submitted the Bill on the intelligence services to the Lower House of Parliament last Friday, I am sharing a copy of this letter with the chairpersons of both Houses for their information.

I look forward to receiving your reply and continuing a constructive dialogue.

Yours sincerely

Nils Muižnieks