Terrorism, Counter-terrorism measures and human rights in the Netherlands

Background briefing on the occasion of the ICJ Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights

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CONTENT

1. Introduction

In this background briefing we will give an overview of the measures taken by the Dutch government after the terrorist attacks on the World Trade Center on 11 September 2001.

The counter-terrorism policy of the Netherlands not only focuses on dealing with terrorists in a criminal procedure. Measures have been taken and are being prepared on different levels and regarding different aspects of society. These measures include new legislation as well as measures of more factual and organizational nature. This briefing will not look into the latter, but first and foremost discuss the new legislation that has been enacted by the Dutch government. Furthermore, the briefing will address some international obligations that the Netherlands has to abide by and the manner in which the Dutch government deals with these international obligations.

We will start by giving an overview of the Dutch Law and policy. In doing so, we will mainly focus on the Acts that have entered into force and the Bills that have been proposed since 9/11. This legislation mostly concerns criminal law, but some developments that have taken place in other areas of law should be mentioned as well. It must be noted that we do not claim to an exhaustive overview, but we do believe to have addressed Dutch Law and policy that is of most significance.

On many occasions the possible violations of human rights by this new legislation have been discussed. The NJCM believes that most of the new laws balance on the edge of violating and not violating human rights. In this briefing we will limit ourselves to merely stating the possible infringement of human rights in relation to some of the new laws, while looking more comprehensively into the subjects of administrative measures, migration and counter-terrorism measures and freezing of assets.

With regard to the latter, we would like to take this opportunity to give our thanks to Maarten den Heijer and Pieter Boeles of the Institute of Immigration Law at the University of Leiden for writing the part on migration and counter-terrorism measures. Also we would like to thank Ingeborg Doves of the NJCM for her large contribution to the part on freezing of assets.

2. An overview of Dutch Law and policy on terrorism, counter-terrorism measures and human rights since 9/11.

2.1. Crimes of Terrorism Act (Wet Terroristische Misdrijven)[1]

The Crimes of Terrorism Act entered into force on 10 August 2004 and entails the implementation of the EU Framework Decision on combating terrorism of 13 June 2002.[2] It introduces amendments tot the Dutch Criminal Code on the following issues.

A definition of terrorist crimes
A new article has been added to the Criminal Code defining terrorist crimes. Article 83 sums up crimes that constitute a terrorist crime when they have been committed with a terrorist aim. Article 83a provides that a terrorist aim means the aim to seriously intimidate the population or part of the population of a country, and/or to unlawfully force a government or international organization into acting, to refrain from acting or to tolerate, and/or to seriously destroy or disrupt the political, constitutional, economical or social structure of a country or international organization.

Alteration of the maximum sentences
When crimes summed up in Article 83, such as manslaughter, serious assault, hijacking and abduction are committed with a terrorist aim, the maximum duration of the prison sentence will be increased by 50%. However, for offences that are sentenced with a maximum of 15 years, the sentence will be increased to a maximum of 20 years or life imprisonment.

Separate criminal offences
With this Act certain crimes have been separately defined as a terrorist crime. This includes the recruitment of fighters (Article 205), conspiracy to commit a terrorist crime, membership of a terrorist organisation, leadership or support (both financially and materially) of a terrorist organization and threatening to commit a terrorist crime. Article 205 is amended in such a way that it now provides that the recruitment for the armed fight is a punishable act. This means that it is possible to hold a person criminally responsible without knowing whether his recruiting activities resulted into the effect that the recruited actually is willing to participate in the armed struggle. The maximum penalty is increased from one year to four years. Also, the act of conspiring to commit a terrorist crime is considered an offence.

Extension of jurisdiction
An amendment has been made to Article 4a in order to declare that persons, against whom a request for extradition related to a terrorist crime is made, can now be criminally prosecuted in the Netherlands.

[1] Stb. 2004, 290.
[2] European Framework Decision on the combat of terrorism, 13 June 2002, LPB 164/3.

2.2. Act on the authority to collect data (Wet bevoegdheden vorderen gegevens)[3]

This Act entered into force on 16 July 2005 and amends the Criminal Code and some other Acts in order tot create an expansion of the possibilities to claim data. Whereas before, in order to demand certain data, it was required that there was a suspect in criminal sense, now there need only be indications that a terrorist attack is in preparation.

The Law distinguishes between 5 categories of data:
1) Data for identification (new Article 126nc and new Article 126uc Criminal Code)
Data for identification, such as name, address, birth date, can be demanded by police officers in any situation where a 'normal' crime is at hand. It is not required to notify the claim of data.
2) Data other than necessary for identification (new Article 126nd and new Article 126ud Criminal Code)
Examples of this category are location, nature of services and traffic data. The public prosecutor is authorized to demand these data, in case there is a suspicion of a crime that is sanctioned with a detention sentence of a minimum of 4 years. Prior to the entering into force of this law it was required that a judge had given permission to demand these data.
3) Future data (new Article 126ne and new Article 126ud Criminal Code)
The Law also creates the possibility to demand data that are not yet available but will be in the future.
4) Special/sensitive data (new Article 126nf and new Article 126uf Criminal Code)
Special data are for example data on religion, philosophy of life and political conviction. In order to claim these data a judge must have given an order to do so. A judge can only give such an order where it involves a crime that seriously threatens the legal order and that is sanctioned with a detention sentence of a minimum of 4 years.
5) Encoded data (new Article 126nh and new Article 126uh Criminal Code)
When data are demanded, they should be provided without a code. Already there is an article on the decoding in the present Act. However, with this new Law the public prosecutor is permitted to demand cooperation from people involved to assist in decoding the data.

Aside from the expansion of the categories of data that may be collected, the Act provides for the possibility to search places and objects in order to collect data. Before this Act, the authority to search was withheld for the purpose of confiscation.

This Law touches upon the right to respect ones private life as laid down in Article 8 of the European Convention on Human Rights (ECHR). Restrictions to this right must be in accordance with the law and are bound by requirements of foreseeability, necessity and proportionality according to the case law by the European Court of Human Rights (ECourtHR).

The criterion, on the basis of which the government can claim personal data, has been vaguely formulated. The fact that an 'indication' is sufficient creates a very wide range for the use of this restrictive power and could be incompatible with the requirement of foreseeability.[4]

Whether the expansion of powers is necessary is also questionable. The Dutch Data Protection Authority stipulated that the government already has enough powers to collect data, but that they are not used effectively. The Government did not give any concrete examples of situations in which the existing powers were not sufficient.[5] The necessity to expand the power to claim data therefore remains uncertain.

[3] Stb. 2005, 390.
[4] Humanist committee on Human Rights (HOM), Briefing-paper on the effects of five Bills/Acts on counter-terrorism and human rights, November 2005, p. 9.
[5] Ibid.

2.3. Act on expanding the scope for investigating and prosecuting terrorist crimes (Wet ter verruiming van de mogelijkheden tot opsporing en vervolging van terroristische misdrijven)[6]

This Act entered into force on 1 February 2007. With this Act the scope of investigative powers and prosecuting powers has been largely expanded;

1. In order to use special investigative powers – such as observation, infiltration, wire-tapping and undercover purchase – it is no longer required that the requirement of a reasonable suspicion is met. It now suffices that there are 'indications' (aanwijzingen) that a terrorist attack is being prepared. Such indications are deemed to exist when facts and circumstances arise that indicate that a terrorist attack is being prepared.
2. This Act grants more special investigative powers to the authorities. These powers involve the possibility to collect information in an exploratory investigation on groups of people that are possibly planning a terrorist attack. The collected information may be shared through the conjunction of databanks. Another power is that of preventive frisking operations. The Act authorizes the public prosecutor to appoint an area or situation where a preventive frisking operation may held. Currently this power belongs to the Burgomaster. In this regard the public prosecutor may also investigate means of transportation and other objects.
3. The process of authorization to use the expanded powers has been simplified.
4. In order to detain a possible suspect of terrorism it is no longer required that there be serious grounds for considering that terrorist attacks are planned. A reasonable suspicion will be enough to detain a person. Besides that, the maximum period of pre-trial detention may now be extended to a maximum of two years instead of the 90 days it was before.
5. In addition, this law allows for the authorities to withhold the suspect access to his file, when there is the chance that it might compromise the preparation of the case or the preparation of cases of co-suspects. This situation can be postponed up until a maximum of two years.

The expansion of powers provided for by this Act may lead to a violation of the right to privacy (Article 8 ECHR), the right to liberty and security of a person (Article 5 ECHR), and the right to a fair trial (Article 6 ECHR) in individual cases. With regards to Article 5 and 8 ECHR, the European Court has stipulated on various occasions that restrictions are allowed provided that they are in accordance with the law and that they meet the requirements of foreseeability, necessity and proportionality. In this context the NJCM is mainly concerned with the vague terminology that is used in this Act. One might wonder whether terms such as 'indications' or 'group' are sufficiently foreseeable.

The NJCM also questions the necessity and proportionality of this Act. Before this Act many authorities already existed and we wonder whether they were used to their full capacity. Especially the cumulative effect of the combination of these new powers gives rise to concern. Because of this Act, more investigative powers can be used while on the other hand it is easier to put someone in pre-trial detention and for in longer period of time. At the same time, the suspect may be withheld access to the information in the process file during a maximum period of two years. This might lead to an disproportionate use of powers. Furthermore, this touches upon the right to a fair trial as laid down in Article 6 ECHR, now that it infringes the principle of equality of arms. The NJCM believes that the Act reaches the minimum of the required safeguards and the NJCM therefore fears that in practice the use of powers, especially when they are used in combination might lead to a violation of one or more of the rights as mentioned before.

2.4. Protected witnesses Act (Wet afgeschermde getuigen)[7]

On 28 September 2006 the Act on Protected Witnesses entered into force. This Act enacts an expansion of the possibilities to use intelligence information in criminal procedures. With the adoption of this Act an alteration of the Criminal Code and its rules of evidence is made. In the past, official

[6] Stb. 2006, 580.
[7] Stb. 2006, 460.

documents of intelligence where not easily accepted as evidence in a criminal procedure. Government now created a special procedure in which the investigating judge is allowed to question an official on the intelligence document at hand, without the presence of the defense. If national security prevails such a procedure might be followed. Additionally, in most cases the witness remains anonymous. In such cases, the defence is only allowed to question the witness through the intervention of the investigating judge.

Furthermore, the questioned intelligence official has a decisive say in the decision whether the official report of the investigating magistrate will become part of the case file.

Finally, the intelligence documents will equally be accepted as evidence, while before this Act came into force, such information would only have been accepted as evidence when other evidence supports it.

The necessity of giving the witness a decisive say in the decision whether the official report of the investigating magistrate will become part of the case file, is questionable. More in particular, the necessity tot leave such a decision to the witness instead of the investigating magistrate is not shown.

The rules in this law as a whole constitute a weakening of the rights of the defence. The question arises whether enough 'counterbalances'[8] are offered to compensate the defence.

2.5. Bill concerning criminalisation of training in a terrorist training camp (Wetsvoorstel strafbaar stellen deelname terroristisch trainingskamp)

In March 2007, a Bill has been sent to various advisory bodies.[9] The Bill proposes a number of amendments to criminal legislation on various topics.

In relation to terrorism, the Bill proposes to criminalise the attending of a terrorist training camp to acquire knowledge or the skills needed to carry out an attack. When a person attends a camp outside of the Netherlands, but his objective is to carry out attacks in the Netherlands it should be possible to hold such as person criminally responsible. Also the act of assisting in a training camp will be considered an offence. Such an offence will be penalized with a maximum prison sentence of 10 years. With this criminalisation the Dutch governments implements the obligation of article 7 of the Council of Europe Convention on the prevention of terrorism.[10]

The Bill also expands the scope for removing someone from their profession if they are misusing their position by inciting or encouraging hatred or violence, insulting a group of people or recruiting for an armed struggle.[11]

2.6. Bill on Administrative Measures for National Security (Wetsvoorstel Bestuurlijke Maatregelen)

This Bill proposes to expand the possibilities to administrative measures for the aim of preventing activities related to terrorism. In March 2007 the Bill passed the House of Representatives (Tweede Kamer) and has now been sent to the Senate (Eerste Kamer).[12] The NJCM is concerned with a few

[8] EU Council of Ministers, Guidelines on human rights and the fight against terrorism, 11 July 2002, p. 28.
[9] http://english.nctb.nl/preventing_terrorism/legislation/nationaal/bill_criminalisation_training_camp/.
[10] http://www.minjus.nl/actueel/persberichten/archief-2007/opleiding-in-terroristisch-trainingskamp-strafbaar.aspx.
[11] http://english.nctb.nl/preventing_terrorism/legislation/nationaal/bill_criminalisation_training_camp/.
[12] Kamerstukken *II* 2005/06, 30566, nrs. 1-5, Kamerstukken *II* 2006/07, 30566, nrs. 6-13 and Kamerstukken *I* 2006/07, 30566, nrs. A-B (parliamentary documents).

aspects of this Bill and therefore we discuss the Bill and our points of concern more thoroughly in chapter 3.

2.7. Immigration Law and terrorism

The Dutch government aims at combating terrorism by, among other things, preventing terrorists from entering the Netherlands. The Immigration and Naturalisation Service (IND) is authorised to cancel the residence permit of a permit holder who constitutes a threat to public order and/or national security. An assessment that a person constitutes a threat to national security is made on the basis of an individual report from the General Intelligence and Security Service (AIVD). Other options under aliens' law include: a recommendation to refuse entry, cancellation of a residence permit, removal from the Netherlands, declaring a person to be an undesirable alien, placing them on an alert list and refusing to grant Dutch nationality (or its withdrawal if it has already been granted).[13]

On international level Dutch government has obliged itself to cooperate in the use and storage of immigrant data. We will have a closer look at this in paragraph 5.1.

A matter of concern is the expulsion of aliens that are considered to commit terrorist acts, to countries where they might be subjected to torture or other inhuman or degrading treatment as prohibited by Article 3 of the European Convention of Human Rights. We hereby refer to paragraph 5.2.

[13] http://english.nctb.nl/preventing_terrorism/legislation/nationaal/#alinea5.

3. Bill on Administrative Measures for National Security (Wet bestuurlijke maatregelen nationale veiligheid) [14]

3.1. Introduction

In this Bill the Government uses administrative law to create measures that are aimed specifically at preventing terrorism related activities. In its Explanatory Memorandum, the Government states that this Bill will enable the authorities tot act against terrorism at a moment when criminal measures against certain persons are (still) not or no longer possible.[15]

More specifically, the Bill aims at limiting the freedom of movement of persons in order to protect national security. The Bill also provides for the authority to reject - as well as withdraw - subsidies, licenses or dispensations in the light of preventing terrorism. The content and range of these measures will be discussed briefly, followed by an overview of human rights aspects.

3.2. Limiting the freedom of movement

Article 2 paragraph 1 of the Bill enables the Minister of the Interior and Kingdom Relations, in accordance with the Minister of Justice, to limit the freedom of movement of a person:

- when that person can be connected to terrorist activities or the support of such activities, based on the behaviour of that person, and
- if imposing such a measure to the person concerned, is necessary in the light of safeguarding national security.

The Law distinguishes between three forms of limiting the freedom of movement:

- the prohibition to be in the surroundings of certain objects or in certain parts of the Netherlands (area prohibition);
- a prohibition to be in the immediacy of certain persons (person prohibition);
- an obligation to report periodically to the police (reporting duty).

The Bill does not contain a further description of the term terrorist activities or the support of such activities. In the Explanatory Memorandum the government states that a further description is undesirable and that the Minister should have a margin of appreciation. The Government states that Article 83a of the Criminal Code – which defines the term "terrorist aim" – can be used as a guideline. However, the Government stipulates that the concerning term in the Bill is broader than the definition in article 83a of the Criminal Code. Article 83a provides that a terrorist aim means the aim to seriously intimidate the population or part of the population of a country, and/or to unlawfully force a government or international organization into acting, to refrain from acting or to tolerate, and/or to seriously destroy or disrupt the political, constitutional, economical or social structure of a country or international organization.

The Government also notes that supporting terrorist activities indicates: being helpful to the performance of terrorist activities by others by providing the occasion, resources or information.

[14] This Bill passed the House of Parliament on 3 March 2007, *Kamerstukken II* 2005/06, 30655 nr. 2 (parliamentary documents).
[15] Explanatory Memorandum to the Bill, *Kamerstukken II* 2005/06, 30655, nr. 3 (parliamentary documents).

The following examples which can lead to the conclusion that a person engages in terrorist activities or is supportive of such activities are given by the Government:
Stopping in the immediacy of objects which form a possible target for terrorist attacks (like the Parliament in The Hague) without clear reasons, visiting extremist internet sites or chat rooms on a regular basis, participating in meetings which are characterised by their extremist character, visiting countries which are known to attract persons who sympathise with terrorism without clear reasons, and similar behaviour. According to the Government one of these actions alone will not easily lead to the use of a measure, but a combination of these actions will.

All the aforementioned measures can be imposed cumulative on one person. The duration of the measure is three months and can be extended up to a maximum period of two years. The Bill stipulates abrogation of the imposed measure whenever the measure is no longer necessary in the light of protecting national security. The person who is imposed with an administrative measure can appeal against the measure at the administrative section of the Regional Court of the Hague.

Furthermore, the Bill provides for the sanctioning of persons who ignore the abovementioned measure imposed upon them. Ignoring such measures, constitutes an offence, on which a one year detention or a fine may be imposed. Additionally, the Bill enables pre-trial detention for this offence.

3.3. Rejecting and withdrawing subsidies, licences or dispensations

The second power this Bill gives to the Minister of the Interior and Kingdom affairs, consists of rejecting and withdrawing subsidies, licences or dispensations. Article 5 and 6 of the Bill provide that the local governing body is competent in taking such a measure, after consulting the Minister of the Interior and Kingdom Affairs and after the Minister has given a so called "declaration of no objection". The following conditions have to be met in order to impose this administrative measure:

- the person can be connected to terrorist activities or the support of such activities, based on the behaviour of that person, and
- serious danger exists that the subsidy/license/dispensation will be (partly) used for the purpose of terrorist activities or the support of such activities.

When the degree of danger is less serious, the governing body can decide to grant the subsidy, however under imposing certain regulations. These regulations should aim at removing or limiting that danger.

3.4. Human rights aspects

The so-called area prohibition, person prohibition and reporting duty, constitute restrictions of the right to freedom of movement (Article 2, 4th Protocol ECHR, Article 12 International Covenant on Civil and Political Rights) and the right to respect ones private life (Article 8 EHCR). Restrictions to this right must be in accordance with the law and are bound by requirements of foreseeability, necessity and proportionality (according to the case law by the ECourtHR).

The measures form a serious interference in the private life of a person and therefore must be based on law that is precise.[16] The rule is foreseeable if it is formulated with sufficient precision to enable any individual to regulate his conduct.[17]

In realizing this Bill some of the objections concerning the foreseeability have already been met by the Government and resulted in amendments to the Bill. For instance, the term "facts and circumstances"

[16] ECourtHR 25 March 1998, Kopp v. Switzerland.
[17] ECourtHR 2 August 1984, Malone v. the United Kingdom.

has been replaced for the term “behaviour”. This amendment was necessary in order to prevent that the measures were to be imposed on persons solely on the basis of circumstances that lay outside their sphere of influence. The Bill now requires actual actions of that person.

Nevertheless, the NJCM still finds the formulation in the Bill very open and vague in the light of the far-reaching effect that these measures impose on individuals. Admittedly, the Government did narrow down the scope of the term ´terrorist activities or the support of such activities´ in the Explanatory Memorandum by giving examples. However, the Bill itself still constitutes the unspecified phrasing that a person who is “connected to terrorist activities or the support of such activities” can be submitted to the administrative measures. No further definition or criteria is given in the Bill so that it remains unclear what kind of (terrorist) activities are aimed at and under what conditions a person can be connected to these activities.

The explanation the Government gives for the term “support of terrorist activities” – being helpful to the performance of terrorist activities by others by providing the occasion, resources or information – is identical to the criminal act of complicity to a terrorist attack. This does not correspond with the statement of the Government that the scope of the term terrorist activities in this Bill is wider then in the Criminal Code, as well as that the administrative measures are meant to be imposed in situations where criminal measures against certain persons is (still) not or no longer possible. This discrepancy does not contribute to the clarity of the text of this Bill.

Resuming, lack of defining or specifying what is understood under these terms, that give competence for imposing serious measures, raises the question if the Bill meets the requirement of foreseeability.

Another concern is the fact that the measures can be imposed on a person, without preceding authorization of a magistrate. Only if the person itself appeals at the Court, a magistrate will review the legitimacy of the measure. Since the information that lead the authorities to impose a measure on a person, is often information from the General Intelligence and Security Agency, the person involved will not be acquainted with this information.

According to the Explanatory Memorandum, the United Kingdom is the only country with similar legislation. The English Prevention of Terrorism Act 2005 (PTA) provides in so-called non derogative control orders. This order can be imposed by the Secretary of State for a maximum period of twelve months and can be extended. The Secretary of State is obliged to ask the judge for authorisation in advance, except in case of emergency, in which case the order must be presented to the judge for ratification after the order is imposed. The judge refuses authorisation if the order contains an "obvious flaw".
With this Bill, the Netherlands does not coincide with other countries and it would be recommendable to require preceding authorisation of the judge. This is also logical, since all kinds of restriction in criminal law (interception of calls, observation etc.) in general do require preceding authorisation of the investigating magistrate. The fact that we are dealing with administrative law instead of penal law is not a reason to leave out such an important procedural guarantee. Such highly restrictive administrative measures should not only be reviewed by a magistrate afterwards and on instigation of the person involved.

Another worrisome aspect is the fact that the underlying information that leads to these measures often consists (secret) intelligence information, which is almost never accessible for the person involved.

Finally, the NJCM does welcome the fact that the Bill is restricted in time. Article 11 paragraph 2 and 3 decides that the Bill will expire on January 1, 2012, unless a decree is passed after consulting the Senate and the Second Chamber. We also welcome the fact that the effectiveness of this law will be investigated, three years after the law comes into force.

3.5. Disturbance of an individual (Persoonsgerichte maatregel)

Another counter-terrorism instrument is the so-called disturbance of an individual. This measure aims at preventing terrorism by disturbing a person in his daily life. The measure is carried out by police officers and can consist of making house calls, inviting the person to the police station, approaching acquaintances (family, friend, colleagues) of the person involved, visiting public spaces where that person is present, spreading cards in the neighbourhood saying that reporting to the police can be done anonymously etc. In short, all kinds of explicitly public actions of the police to let that person know that he is being watched and scrutinized, in order tot prevent him from taking part in terrorism related activities.

Disturbing a person in such a way is undoubtedly an interference in the right to respect ones private life. The question immediately rises if this interference is justified and therefore if the measure has a legal basis in Dutch law.

The Government[18] states that the measure is not based on penal law and refers to Section 172 paragraph 2 of the Municipality Act, Section 2 and Section 12 of the Police Act as the legal basis for these actions under supervision of the Burgomaster.

Section 172 paragraph 2 of the Municipality Act reads:
The Burgomaster is empowered to prevent or to end offences against statutory provisions relating to public order. In doing so he avails himself to the police under his authorisation.

Sections 2 and 12 of the Police Act 1993 provide as follows:
2.
The duty of the police shall be to ensure, in subordination to competent authority and in conformity of the law in force, the actual maintenance of the legal order and to provide help to those who need it.

12.
1. If the police act in a municipality to maintain public order and to carry out their task of assisting the public, they shall be under the authority of the Burgomaster.
2. The Burgomaster shall be empowered to give the police officers directions in carrying out the tasks referred to in the first paragraph.

According to the Government the aforementioned articles give the Burgomaster the power to impose a measure of disturbance on a person who resides in his community.

These Sections can hardly form a sufficient legal basis for the interference in the private life. The articles solely determine the tasks and divide the powers between Burgomaster and police force. That such an unclear, unspecified and general term as "maintaining *public order* " can serve as a legal basis, is highly unlikely, let alone that this legal basis could meet the standard of foreseeability. It remains completely unclear under what conditions the Burgomaster can impose the measure and which activities the person involved has to engage in, in order to impose this measure.

Disturbing a person shows similarities to observation. The Dutch law provides for the investigating power of observation but only after an investigating magistrate grants authorization to do so. The fact that a magistrate reviews the request for observation, is an important procedural guarantee, which is absent for the disturbing measures.

In the Netherlands there are two cases brought before the Court. In one of the cases[19], the judge ruled that the measure of disturbance had to be ended. The case involved a woman whose three children where brought to school by a person with alleged connections to a terrorist group in the Netherlands,

[18] *Kamerstukken II* 2005/06, 29754, nr. 64, p. 7.
[19] Court of Amsterdam 1 December 2005, AB 2006, 284.

the so called “Hofstadgroep”. The woman had converted to Islam and lived by the rules of Islam. The police suspected the woman of having explosives and documents involving the jihad, but after searching her house none of these things where found. The woman was released shortly after she had been arrested. After the police searched her house, the Burgomaster decided that the measure of disturbance should be imposed on the woman because of the following circumstances:
1. changing from Christian to Islamic belief,
2. changing of clothes,
3. engaging in an Islamic marriage,
4. refusing to shake the hand of a man,
5. changing mosque because the doctrine wasn’t strict enough,
6. finding a cassette with a call for Jihad,
7. having contact with a person who is connected to the Hofstadgroep,
8. possible presence of explosives.

The measure imposed, consisted of systematically keeping the woman under surveillance; the police drove by her house, three to five times a day, also at night, with a vehicle of the police force. Furthermore, the police called the woman and made house visits on a regular basis. The police tried to stay in contact with her in order to convince her not to become more radical in her religion.

In the procedure before the Court, the woman successfully disputed the circumstances named in 6 and 7. The Court ruled that the circumstances named under 1, 2, 3, 4 and 5 are purely based on the religious belief of the woman and that those circumstances itself could not be the basis of a disturbing measure. The possible presence of explosive could also not be taken into account since no explosives where found in her house. The court found it not necessary to determine whether there was a legal basis for the measure because the circumstances on which the Burgomaster decided to impose the measure did no longer exist, or consisted purely of the religious beliefs of the woman.

The NJCM would like to stress the fact that the measure itself, the possible variety of methods of disturbing and the conditions under which the measure can be imposed on a person, is not in accordance with the law as required to justify an infringement on the right for respect of ones private life.

4. Intermezzo; The cumulative effect of criminal and administrative law and measures

The aforementioned changes in criminal law and administrative law mount to a broad range of powers for the authorities. These powers mostly affect the right to respect ones private life. The new measures all have in common that they create the power to intervene in the private life of a person in an earlier stage then was possible before. An “indication” in stead of “reasonable suspicion” and being “connected to terrorist activities or the support of such activities” give rise to multiple powers that intervene in the private life. The worrisome aspect of these measures is that they can also take effect on persons who never intended to actually engage in violent actions, but are merely attracted to the ideology and the theories of extremist religion.

The use of administrative law, in addition or, instead of, the already highly expanded criminal law, is also worrisome. Criminal law is in general surrounded with procedural guarantees in order to protect the equality of arms. The NJCM does not dispute that also in administrative law procedural guarantees exist, but the task of an administrative judge differs. In general, the administrative judge can only review if the measure imposed by the authorities is reasonable in the light of all the relevant factors. Furthermore, the administrative judge mostly comes in to play after the measure has already been imposed and only if the person involved appeals to the measure.

It is not said that each of the discussed measures should raise criticism. However, a broad variety of powers already exist and those powers already enable the authorities to intervene in the private life of individuals in many ways. Without necessarily disputing the necessity of the new measures, it must be recognised that the new measures and powers do put more and more pressure on the balance between interventions by authorities and fundamental rights.

In finding the balance between counter-terrorism and protection of fundamental rights, the cumulative impact of the measures must be taken into account.

5. Migrants and counter-terrorism measures[20]

5.1. EU migration databases and their use for counter-terrorism purposes

On EU level, large scale reforms are taking place with regard to the use and storage of immigrant data. These reforms concern the set up of a Visa Information System (VIS), the replacement of the current Schengen Information System (SIS) by its successor SIS II, efforts to increase the effectiveness of the Eurodac system, and proposals on the enhancement of interoperability and availability of data stored in the various databases. In general, one can observe a trend by which databases which were originally set up for immigration control purposes only, are increasingly used, or foreseen to be increasingly used, for intelligence and other police purposes, with a notable emphasis on counter-terrorism measures.

With regard to **Eurodac** (a central data unit in which fingerprints of asylum seekers and illegally residing third country nationals are stored), Germany has recently proposed to broaden the use of stored data 'for the purposes of preventing, detecting or investigating criminal offences, in particular terrorist offences'.[21] In a recent evaluation report, the European Commission expressed its concern relating to the surprisingly high number of "special searches" transmitted by some Member States to the Eurodac central unit. [22] With regard to **SIS II** (a database concerning third country nationals who must be refused entry), the original Commission proposal of May 2005 has been amended to not only allow data to be accessible for authorities responsible for border controls and for authorities issuing visas, but also for 'other police and customs checks carried out within the country, and the coordination of such checks by designated authorities', which includes an extremely wide category of officials and implies the use of SIS II for other purposes than only border control or visa applications.[23] And with regard to the **Visa Information System** (in which all decisions on the grant and refusal of visa will be stored), the Commission has proposed to grant access for consultation 'by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences.'[24]

It is far from clear whether the proposed reforms with regard to data storage will comply with the right to privacy and the principle of non-discrimination.[25] Moreover, a number of concerns with regard to data protection rules have been raised.[26] These concerns also relate to the proposed automatic inclusion in the Schengen Information System of persons listed on the 'terrorist lists' as drawn up by the EU and the UN Security Council. A comment of a more general nature is that the use of databases in which exclusively immigrant-related data are stored for police and intelligence purposes, will have the effect that immigrants are more prone to be subject to investigation and/or prosecution measures than EU nationals. This is a highly undesirable effect which could lead to a further stigmatization of minority groups.

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[20] Written by Maarten den Heijer and Pieter Boeles, Institute of Immigration Law, University of Leiden.
[21] Council document 16982/06 (ENFOPOL 225/EURODAC 19), 20 December 2006.
[22] Commission Staff Working Document, Annex to the communication on the evaluation of the Dublin system, COM(2007) 299 final, 6 June 2007, p. 46.
[23] Draft Regulation 6 June 2006, Article 17 (doc. 5709/6/06).
[24] COM (2005) 600, 24 November 2005.
[25] For further reading, see the various comments published by The Standing committee of experts on international immigration, refugee and criminal law; see esp. 'Notitie over de mogelijke consequenties van aanhangige Europese voorstellen over de opzet van grootschalige gegevensbestanden en de uitwisseling van persoonsgegevens', ref. no. CM0605-I, 13 April 2006; and 'Comments of the Standing Committee of experts in international immigration, refugee and criminal law on the development of the second generation Schengen Information System (SIS II)', ref.no. CM06-10, 10 July 2006.
[26] Ibid.

5.2. Expulsion of aliens for suspected involvement in terrorist activities

By multiple avenues, European States have tried to increase the effectiveness of expelling aliens suspected of involvement in terrorist activities. Practices of tacit European compliance with US-lead extraordinary renditions and the procurement of diplomatic assurances have been widely commented upon.[27]

Another worrisome way in which some European States have tried to increase their discretionary powers in removing unwanted aliens is by trying to downgrade the absolute character of the prohibition of torture. In the case of ***Ramzy v the Netherlands***, submitted to the European Court of Human Rights in 2005 (concerning the removal to Algeria of a man suspected of involvement in an Islamic extremist group in the Netherlands)[28], four governments intervened with the submission that notwithstanding the absolute character of article 3 of the European Convention, in the context of the removal of an alien, in the assessment of a risk of ill-treatment a proper weight needs to be afforded to the fundamental rights of the citizens of Contracting States who are threatened by terrorism.[29] The arguments presented by the intervening Governments affect the basis of the prohibition of refoulement developed under article 3 of the Convention. The Governments state that the prohibition of refoulement is only implied and not expressly set by article 3 and that the absolute character of article 3 in the context of treatment by a State party of people within its jurisdiction cannot automatically be transposed in the context of the removal of an alien in order to protect national security. Furthermore, the intervening Governments make a distinction between the forms of ill-treatment proscribed by article 3; torture being the most serious and severe form of ill-treatment and degrading treatment the least serious and severe one. In this regard the intervening Governments seem to favour a proportionality test in the sense that the seriousness or severity of the possible ill-treatment must be weighed against the level of threat posed to the State's national security. Interestingly, the intervening States also argue that exceptions to the prohibition of refoulement for reasons of national security are allowed under the Refugee Convention and therefore should equally be allowed under the European Convention.

The linkage between the exclusion clause of the Refugee Convention (Article 1(F)) and Article 3 of the European Convention has in fact already materialized in the **EU Qualification directive** (which lays down the criteria for qualification of asylum seekers as refugees or persons otherwise in need of international protection).[30] Article 17 and 19 of this Directive – which are applicable to persons who rely

and over which the administrative judge has no full judicial scrutiny. Secondly, aliens declared undesirable for reasons of public order cannot benefit from the presumption of innocence. The government enjoys discretionary power in declaring aliens undesirable; over which the administrative judge may not assert full scrutiny. Thirdly, expulsion proceedings fall outside the scope of Article 6 ECHR, which results in a lower standard of procedural guarantees.

6. Prohibition of organisations and freezing of assets[32]

6.1 Basis in the law

On 27 December 2001 the Council of the European Union enacted a Regulation that obliged the member states to take measures to fight any form of terrorist activities.[33] The Regulation is a result of the EU Council Community Opinion regarding counter-terrorism of 27 December 2007 and the international obligations as laid down in United Nations Security Council Resolution 1373 of 28 December 2001. EU Regulations are directly applicable within the national jurisdictions of the member states and therefore also in the Netherlands.

On national level the authority to freeze assets is based on the Sanctions Act 1977. Article 2 of the Sanction Act 1977, which was newly incorporated into the Act only in 2000, opens the possibility to implement binding international agreements or directions given by international treaty bodies.[34] As a result UN Security Council Resolution 1371 is also implemented in Dutch Law.

6.2 Sanction lists

Measures to freeze assets will only be taken when an organisation or a person is put on the sanction lists of either the European Union or the United Nations. There are two EU sanction lists. The first list was drawn up in accordance with the UN Security Council Resolution 1267 (1999) and the second list was drafted in response to the UN Security Council Resolution 1373 (2001).[35] The sanction list that is drawn up by the UN is based on the UNSC Resolution 1267, which focused on the situation in Afghanistan. That Resolution was then incorporated in the UNSC Resolution 1373, which shifted the focus to a broader range, namely all persons, groups and entities that are guilty of committing terrorist activities.

Based on the direct applicability of the EU Regulation and the implementation by the Sanction Act 1977 of the (binding) UNSC Resolution 1373, the Dutch government is obliged to freeze assets of persons or organisation as soon as these persons or organisations are put on the EU or UN sanction lists.

6.3 The authority to freeze assets

According to the Sanction Act 1977, the Minister of Foreign Affairs is responsible for taking measures to freeze assets. The Sanction Act 1977 also provides that the Minister will take these measures in cooperation with the Minister that is also involved. However, the EU Regulation declares the Minister of Finance responsible for taking and upholding measures on freezing of assets. Thus, the Minister that is also involved will always be the Minister of Finance. Although the Minister of Justice is legally not appointed to participate in the decisionmaking process regarding the freezing of assets, it is only logical that he (as the responsible official for counter-terrorism measures) will be consulted before the decision is taken to freeze assets. The Minister of Justice will also co-sign a decision defining a measure on freezing of assets.

The Minister of Foreign Affairs is normally the one to initiate a proposal to put persons (or group, or entity) on one of the sanction lists. However, also the Dutch Intelligence Service and the Public

[32] By Ingeborg Doves and Lara Talsma of the NJCM.
[33] EU Council Regulation 2580/2001, 27 December 2001.
[34] Article 2 Sanction Act 1977.
[35] EU Community Opinion 2002/402; EU Council Regulation 881/2002; EU Community Opinion 2001/931/GBVB; EU Council Regulation 2580/2001.

Prosecutor’s Office may propose a placement on the sanction lists. Besides that, the Minister of Foreign Affairs may consider to freeze assets when third countries plan to freeze the assets of persons, groups or entities that are active in the Netherlands. In all cases where the Minister of Foreign Affairs plans to take measures on the freezing of assets, he will previously convene a meeting with the Minister of Finance, the Minister of Justice, the Dutch Intelligence Service (AIVD), the National coordinator on counter-terrorism (NCTb) and the Public Prosecutor. The placement of person, groups or entities on one of the sanction lists requires a thorough motivation.

The actual decision to put organisations and entities on the EU sanction list is made by the ‘clearing house’. This is an ad hoc forum of the European Council in which the Ministers of Foreign Affairs and some national representatives of intelligence and security services take place. The decision must be taken unanimously. In order to put persons on the EU sanction list the concerning EU Council groups will discuss the proposal first. After that the proposal to place someone on the EU sanction list goes to the Council for approval. The decision will be

based on the available information, it can be said that the organisation is guilty of committing terrorist activities. Now that the organisations that are put on one of the lists are automatically criminal, the persons that are active for this organisation are also automatically considered to commit a criminal offence. This means that a person can be hold criminally responsible for participation in an organisation of which no judge yet ruled that the organisation has the aim of committing terrorist crimes.

Aside from that, the information on which the placement is based, often comes from intelligence and security services. This information is usually not public and it cannot be easily traced where the information and the arguments come from. Although in the Netherlands it is now easier to verify information that is based on intelligence and security activities due to the Protected Witnesses Act (see paragraph 2.2.4), the question remains whether this Act suffices in individual cases.

Lastly, one might wonder to what extent the freezing of assets is really effective. To give an example, the Dutch government has frozen the assets of members of the so-called ‘Hofstadgroep’. The members of this group were convicted for participating in a criminal organisation and a terrorist organisation. However, they were never involved in facilitating the financing of terrorist activities. The question might be raised whether the freezing of a small bank account of a person that is not involved in the financing of terrorist activities, but convicted for participation in a terrorist organisation is very effective and whether it will contribute to the fight against terrorism.