

**Commentary on the Seventeenth and Eighteenth Periodic Reports
of the Netherlands on the International Convention on the
Elimination of all Forms of Racial Discrimination (CERD)**

The Netherlands, 5 October 2009

The report is submitted on behalf of the following NGOs:

- Dutch section of the International Commission of Jurists (NJCM)
 - Dutch National Association Against Discrimination (Art.1)
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 - Justitia et Pax Netherlands
 - Netwerk VN-Vrouwenverdrag (Dutch CEDAW network)
 - Overlegorgaan Caribische Nederlanders (OCaN) ~ Dutch Caribbean Consultative Body relating to the integration of Dutch Caribbean citizens in the Netherlands
 - Samenwerkingsverband van Marokkaanse Nederlanders (SMN) ~ Cooperation Association of Moroccans in the Netherlands
 - TIYE international ~ platform of 21 National Organisations of black, migrant and refugee women in the Netherlands

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TABLE OF CONTENTS

1	INTRODUCTION.....	6
2	GENERAL REMARKS	6
3	COMMENTARY IN THE LIGHT OF THE PROVISIONS OF THE CERD.....	9
	ARTICLE 2 (1): NON-DISCRIMINATION	9
	<i>Policies against racial discrimination</i>	<i>9</i>
	Recognition of Roma and Sinti as national minorities.....	9
	Repressive measures against Aruban and Antillean youths	9
	Recognition of Africans and people of African descent.....	10
	<i>National Action Plan against racism</i>	<i>10</i>
	<i>Personal data protection.....</i>	<i>11</i>
	ARTICLE 2 (2): SPECIAL AND CONCRETE MEASURES	12
	<i>Migration and Integration.....</i>	<i>12</i>
	Integration measures	12
	Racial discrimination and gender.....	13
	Modernisation of Dutch migration policy.....	13
	Integration policy and participation of ethnic minority women.....	14
	<i>Prostitution and trafficking in women.....</i>	<i>15</i>
	Illegal and prohibited forms of prostitution	15
	No insight in the position of foreign women engaged in prostitution.....	16
	No improvement of the position of prostitutes.....	16
	Position of victims of trafficking in women (B9-regulation).....	16
	Lack of protection against trafficking of unaccompanied minor asylum seekers	17
	<i>Human rights of women and children of so called ‘1F’-asylumseekers in the Netherlands</i> <i>.....</i>	<i>18</i>
	Background: general pardon and 1F-exception.....	18
	Women and children of ‘1F-asylum seekers’	18
	Policy change by the Dutch government.....	18
	<i>Prohibition of expulsion without legal guarantees</i>	<i>19</i>
	Traumatised female asylum seekers.....	19
	Access to shelters and safe houses for (undocumented) migrant victims of gender-based violence	20
	New requirements for family formation and family reunification disproportionately affect women	20
	ARTICLE 4.....	22
	<i>Implementation of laws and policy in the criminal field.....</i>	23
	ARTICLE 5 (E) (I): THE RIGHT TO WORK	25
	<i>The new approach to labour market policies after 2005</i>	25
	<i>Discrimination in the labour market.....</i>	26
	<i>Positive discrimination / Affirmative action / Preferential treatment.....</i>	27
	ARTICLE 5 (E) (III): HOUSING.....	27
	<i>Housing allocation</i>	27
	<i>Redlining in mortgages</i>	28
	<i>Living situation.....</i>	28

ARTICLE 5 (E) (V): EDUCATION.....	28
<i>The situation of migrants and minorities in education</i>	29
<i>Language level</i>	29
<i>Statistical data and tables on racist or religiously motivated incidents</i>	29
ARTICLE 5 (F): ACCESS TO PLACES OF ENTERTAINMENT	30
ARTICLE 6: LEGAL PROTECTION.....	30
4 LIST OF RECOMMENDATIONS	33

1 INTRODUCTION

This document contains the comments of 7 (hereinafter the Dutch NGOs) on the seventeenth and eighteenth Periodic Report of the Kingdom of the Netherlands on the implementation of the International Convention on the Elimination of all forms of Racial Discrimination. The Periodic Report of the Netherlands covers the period July 2002 up to December 2006. The Dutch NGOs have elaborated on several issues with information published in the period after December 2006. In this way the Dutch NGOs hope to give the Committee an updated and correct overview on the questions concerning racial discrimination in the Netherlands.

The Dutch NGOs welcome the opportunity provided by the Committee on the Elimination of Racial Discrimination (hereinafter the CERD Committee) to submit their shadow report for consideration during the upcoming 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 a number of 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.

2 GENERAL REMARKS

The Dutch government has evidently made an effort to meet some of the recommendations expressed by the CERD Committee in the 2004 report.¹ The Dutch NGOs note with approval that combating discrimination is on the agenda of both the government and of civil society.

We however note that such scenario must be placed against the backdrop of heightened tension between the native Dutch population and immigrants of foreign descent and other ethnic minorities. In the current social context, racism no longer stems from alleged biological superiority of some racial groups. Instead it rather takes the form of contempt towards cultures and identities that are portrayed as different, and often perceived as being therefore backward. The debate on multiculturalism/integration thus plays a central role in determining what can and should be done in order to respect the provisions of the International Convention on the Elimination of all forms of Racial Discrimination.

In the current situation, migration and minority participation in Dutch socio-political life are the main areas of concern when dealing with racial discrimination. Problems are particularly compounded for women, who are often additionally victims of gender-based discrimination.

We note that Dutch policies underwent a progressive shift. Thus in the 1980s there was a focus on minorities whilst at the same time highlighting the special responsibility of the state. See, for example, the 1983 Minority Policy, which aimed to promote equality before the law, multiculturalism and the emancipation of ethnic communities, and to improve the social and economic situation of minorities. This focus has given way to a focus on the identity of minority communities. On the one hand, this new policy acknowledges minority rights and sees minority communities as bearers of rights. On the other hand, partly as a result of the policy shift, there is increasingly broad feeling that minorities bear sole responsibility for their integration in Dutch society. Thus, a failing integration policy and increasing segregation are often blamed on the minority communities. Increasingly, political parties either develop or support this anti-immigrant sentiment. NGOs are of the view that this position fails

¹ UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Netherlands*, 10 May 2004, CERD/C/64/CO/7, available at: www.unhcr.org/refworld/docid/411765b34.html [accessed 12 September 2009].

to understand that successful integration requires a two-way approach. (as will be explained below in this report)

We are pleased to note that, while assessing the Dutch implementation of the international convention, the Dutch government, in the development of its policies, takes into account:

- 1) racist and xenophobic incidents,
- 2) discrimination on the internet,
- 3) racial segregation,
- 4) employment of minorities,
- 5) Aliens Act 2000,
- 6) ethnic composition of the police,
- 7) international convention on the protection of the rights of all migrants workers and members of their families,
- 8) consulting civil society organisations.

The Dutch NGOs dealing with racial discrimination are concerned that some areas may have been overlooked or neglected. One theme of particular relevance is the treatment of migrants. For example, detention of undocumented migrants is in practice racially discriminatory, yet it goes unmentioned in the Dutch government report.² Some groups are the object of our particular concern, such as the Surinamese and the Roma, who tend to be detained even longer than other ethnic groups. This is due to the absence of collaboration by their embassies in providing the necessary documents. Detention of undocumented migrants is characterized by even harsher conditions than those suffered by inmates who have committed criminal activities.

Dutch NGOs welcome the Dutch attempt to expand the representation of different ethnic groups in the national police. Another positive development is the registration of discrimination cases by the police forces under the POLDIS programme. Analysed data show that racist-motivated violence is decreasing in general, but on the other hand, racist violence specifically aimed at Muslims and Islamic institutions is on the rise.³ Further, racist practices in national prisons also deserve more investigation (and are missing in the government report).

Another cause for concern is the possible closing down of the National expertise centre on discrimination (*LECD-OM*) in the Public Prosecutor's office in 2010. The expertise and support for prosecutors at the district level has been extremely valuable for the successful prosecution of racist cases.

Issues that are also missing in the government report concern government policies targeting specific groups. Two policy fields need to be mentioned here: the restrictive effects on immigration due to compulsory integration measures and the creation of databases containing information about the ethnic origin of the persons registered. An example of the first is the introduction of a compulsory language and culture test exclusively for non-western migrants. This test must be taken and passed in the country of origin, and therefore provides a barrier to family reunification. An example of the second is the apparent drive felt by policy makers to set up a database of young people of Antillean origin. Political and legal pressure led to the withdrawal of the database, but, as explained below, in another bill which was passed by the second chamber of parliament in June 2009 strong pressure was mounted to allow other forms of ethnic registration. Both are discussed in the report below.

Finally, some areas of general concern are the delay in ratifying and implementing certain international legal instruments, such as the Additional protocol to the Cybercrime Treaty and the EU Framework decision on racism and xenophobia. In the past, the Netherlands have been at the forefront of transposing international non-discrimination norms into Dutch legislation and policy. The delays undermine the exemplary and leading role hitherto asserted by the Netherlands.

² Available in Dutch at www.minbuza.nl/binaries/kamerbrieven-bijlagen/2009/april/159dwm-bijlage-kabinetsreactie.pdf, [accessed 22 July 2009].

³ Concept of the forthcoming Monitor Racial Discrimination, final text available in December at www.monitorracisme.nl.

The Dutch NGOs regret the decision of the Minister of Foreign Affairs not to attend the Durban Review Conference in April 2009. As a member of the United Nations community, the Netherlands has a duty to be represented at important conferences such as these. In 2001, the Netherlands ratified the Durban declaration and therefore took upon itself the responsibility to discuss the state of affairs at the follow-up event in Geneva in 2009. The fact that others might try to misuse the conference for other purposes, does not discharge the Dutch government of its responsibility.

Areas of general concern to the NGO community fighting racial discrimination and xenophobia are financial developments in the Netherlands. Whereas the Dutch government, through its subsidy policies, used to stimulate the development of an independent NGO structure, the latest trend seems to be to allocate money to governmental organisations and to divert funds from the NGO sector. It is understandable that the financial crisis has negative consequences for the size of the government budget, but there seems to be a political development to give preference to governmental institutions to carry out human rights tasks. The establishment of the long-awaited National Institute for Human Rights (NIRM) serves as an example. This institute is scheduled to start operations by the beginning of 2011 in close collaboration with the Equal Treatment Commission. In the Cabinet Letter to Parliament of 10 July 2009, with the details of establishment of the institute, the cabinet concludes that subsidies to certain existing NGOs may be cut, because the NIRM will carry out some tasks of these NGOs.⁴ This approach overlooks the fact that NGOs represent broad civil society interests and is independent of the government whereas the mandate of the NIRM, in character more closely linked to government activities is restricted to certain statutory tasks.

⁴ Available in Dutch at www.minbzk.nl/asp/download.aspx?file=/contents/pages/100315/nirmeindversietkbief.pdf, [accessed 12 September 2009].

3 COMMENTARY IN THE LIGHT OF THE PROVISIONS OF THE CERD

ARTICLE 2 (1): NON-DISCRIMINATION

Policies against racial discrimination

Recognition of Roma and Sinti as national minorities

In 2005, the Dutch government ratified the Framework Convention for the Protection of National Minorities of the Council of Europe. In the initial proposal, the definition of national minority would include all ethnic minorities and migrant communities under the Dutch Minority Policy. After a political debate, however, the Cabinet decided only to include the Frisians under the definition of national minority. The Frisians, inhabitants of the province of Fryslân, are bound by a common language and customs. The Frisian language is officially recognised as a language and is used in the administration of the Province, in education and in culture.

A motion tabled in the Parliament during the ratification procedure in 2005, aimed at bringing Roma and Sinti under the definition, was rejected by a parliamentary majority. The approximately 6,000 Roma and Sinti in the Netherlands - more commonly referred to as "gypsies" - experience considerable social disadvantage and exclusion. Despite this, the Roma and Sinti hardly ever report incidents of discrimination. The lost ground among this population group in participation in education and the job market exceeds that of other ethnic minorities. Efforts of the Dutch government to improve the position of Roma and Sinti according the Dutch NGOs leave much to be desired.⁵

On his visit to the Netherlands in 2008, the Commissioner for Human Rights, Mr. Hammarberg, expressed his concern about the non-recognition of Roma and Sinti under the Framework Convention. He recommended the Dutch government to recognise the Roma and Sinti as a minority under the Framework Convention and to involve Roma and Sinti in all levels of political decision making.⁶

In a recent letter to the Parliament, the minister for Housing, Communities and Integration, Van der Laan, responded to this recommendation.⁷ He presented a policy proposal towards Roma in the Netherlands. Municipalities have the main responsibility to solve problems with Roma communities at the local level, the minister argues. However, the government intends in the course of 2010 to facilitate a support centre for Roma and Sinti. The Minister's letter centres on problems concerning crime, school absence and nuisance. Municipalities argue that more structural measures and more investment from the national government are required.⁸ Roma organisations protested vociferously against the Minister's allegation that many of the community leaders had been involved in illegal activities and for this reason were not suitable to act as spokespersons for the communities.⁹

Repressive measures against Aruban and Antillean youths

The Dutch NGOs would like to elaborate on a specific penal measures as proposed by the Dutch national government which are a form of specific racial discrimination towards first and second generation youngsters from Aruba and the Netherlands Antilles (autonomous parts of the Kingdom of the Netherlands) living in the Netherlands. Arubans and Antilleans are Dutch citizens/nationals. Within the framework of an administrative arrangement between the central government and 21

⁵ Centraal Bureau voor de Statistiek *Van Keij 2000; Van Meurs, 2002.*

⁶ Report by the Commissioner for Human Rights, mr. Thomas Hammarberg on his visit to the Netherlands, 21-25 September 2008, Strasbourg: March 2009, p. 34, available at www.commissioner.coe.int and at www.minbuza.nl/binaries/kamerbrieven-bijlagen/2009/maart/159dwm-bijlage.pdf, [accessed 22 July 2009].

⁷ *Kamerstukken II* 2008/09, 31 700 XVIII, nr. 90.

⁸ Available in Dutch at www.vrom.nl/docs/20090629-aanpak-voor-Roma-in-Nederland.pdf, [accessed 12 September 2009].

⁹ Available in Dutch at www.trouw.nl/nieuws/nederland/article2846235.ece, [accessed 12 September 2009].

municipalities with a large number of Antillean and Aruban inhabitants, measures were put in place to reduce criminality among these communities. A number of repressive measures were taken. Examples are the establishment of so-called ‘urban mariners’, municipal officials with extensive powers to search homes and properties. These ‘mariners’ collaborate with social security, tax and housing officials in the investigation of compound problems. These activities are targeted mainly at the Antillean and Aruban community in Rotterdam. In other cities, specific policing teams aimed at Antilleans were established, such as the Vespula –team in Zwolle and the AntAR team in Groningen. In some cities (Leeuwarden, Nijmegen, Rotterdam) ethnic data about the Antillean/Aruban origin are being collected, often notwithstanding the absence of an explicit waiver of the data protection authority (College Bescherming Persoonsgegevens). This waiver should normally be provided. Another example of such selective repression is the pre-flight checks for flights to the Antilles and Aruba at Schiphol airport. These checks are intended to curb smuggling of drugs from the Antilles to the Netherlands. They are carried out by the Koninklijke Marechaussee (Royal Constabulary, responsible for border security). If the person is considered(to be a risk of smuggling drugs upon return to the Netherlands, the Marechaussee issues a negative travel advice to the airline.

At the legislative level, the Dutch government is preparing a proposal for a Kingdom Act on personal travel. The legislation will make it possible to limit the free movement of persons with a Dutch passport within the Kingdom. The Minister of Justice investigates the legal possibilities that a Dutch person who has been expelled from a part of the Kingdom because of reasons of fundamental interest of the society, public order or public security can not re-enter that specific part of the Kingdom again (“persona non grata”). Both Antillean organisations and the Government and parliament of the Netherlands Antilles are concerned about the legal position and equal treatment of Antilleans and Arubans in the Netherlands, because this legislation can be used to banish Dutch citizens/nationals *only* with a Antillean or Aruban descent from the Netherlands.

Recognition of Africans and people of African descent

Organisations representing Africans and people of African descent in the Netherlands have been pleading for recognition as a specific group. They wish to benefit from policy measures aimed at preventing racial discrimination. According to these organisations, subtle forms of racism are not being dealt with adequately.

➤ *The Dutch NGOs request the Committee to urge the Dutch government to recognise the Roma and Sinti as a minority under the Framework Convention for the Protection of National Minorities and to involve Roma and Sinti in all levels of political decision making; and to refrain from introducing and maintaining administrative and other measures specifically aimed at the Antillean and Aruban community in the Netherlands.*

National Action Plan against racism

After the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in 2001, the Dutch government developed a National Action Plan against Racism (in Dutch: ‘Nationaal Actieplan Tegen Racisme’)¹⁰ which was promulgated in December 2003. This plan included concrete action measures against racism in the fields of education, employment and criminal matters. The plan spanned a period of four years and was concluded in 2007.

The government which took office in 2007 announced that a new action plan against racism would be launched. At the date of writing of this report (September 2009), a new plan has not yet been presented. The NGOs are disappointed about the long delay.

In 2009, the Dutch government decided not to attend the Durban Review Conference in Geneva. NGOs expressed their concern about this decision, stating that as a member of the United Nations community, the Netherlands has a duty to be represented at important conferences such as

¹⁰ *Kamerstukken II, 29 200 IV, no. 62.*

these. In 2001, the Netherlands ratified the Durban declaration and therefore took upon itself the responsibility to discuss the state of affairs at the follow-up event in Geneva in 2009. The fact that others might try to misuse the conference for other purposes, does not discharge the Dutch government from that responsibility.

➤ *The Dutch NGOs request the Committee to recommend the Dutch government to include the outcome of the Durban Review Conference in the development of its national anti-racism policies.*

Personal data protection

In 2006, with the aim of identifying Antillean and Aruban youths deemed to be "at-risk" of committing crimes or experiencing social problems, the Dutch government decided to establish a database, known as the Reference Index of Antilleans. For registration in the database, any young person of Antillean or Aruban origin satisfying specific criteria, one of them being of Antillean or Aruban descent would be included. The database would be accessed by 'case managers', social workers in various municipalities. Police and criminal rehabilitation service would also have access to the database. Individuals included in the database would be placed under enhanced scrutiny, including preventive law enforcement interventions. Because the proposed Index was to include ethnic data, the government was required by Dutch law (Dutch Data Protection Act (WBP)) to apply for a waiver from the Dutch Data Protection Authority. This waiver was needed to include information which normally should not be included in a public database. The Dutch Data Protection Agency granted the waiver in December 2006.¹¹ In reaction, the Dutch Caribbean Consultative Body (Overlegorgaan Caribische Nederlanders, OCaN), an organization representing the Antillean and Aruban population in the Netherlands, challenged the waiver before The Hague Regional Court. The Court ruled in favour of the Dutch Caribbean Consultative Body, concluding that "processing data in that reference index regarding Antillean origin of at-risk youths is not an appropriate method to reach the intended purpose."¹² The government, together with the 21 municipalities intending to use the database, appealed to the highest administrative court in the Netherlands, the Administrative Jurisdiction Division of the Council of State. This court reversed the previous decision of The Hague court and maintained the waiver.¹³ The court's decision invoked critical reviews by academics and legal professionals, who argued that the court interpreted the exception provided for in the WBP to register ethnicity too widely.¹⁴ The fear was that this decision would open the door to registration of other 'problematic' ethnic minority groups. In the current political debate, NGOs are concerned that registration of ethnicity will be viewed as an acceptable policy measure for the prevention of both social problems and criminal activities. NGOs strongly feel that the use of ethnic registration should be absolutely limited to exceptional, particular situations where there is no breach of the personal data protection legislation and of non-discrimination principles.

After sustained protest by Antillean organisations, the Antillean community and the government and parliament of the Netherlands Antilles and Aruba, and after a renewed advice by the Council of State, the Cabinet decided to withdraw the Reference Index for Antilleans.¹⁵ A number of members of the Second Chamber of Parliament, however, still support the development of ethnic profiles. This emerged during the parliamentary debates on the Act to introduce a Referral Index for Young

¹¹ See www.cbweb.nl/documenten/uit_z2006-00036.shtml, [accessed 23 September 2009].

¹² Court of The Hague, 26 July 2007, available (in Dutch) at: www.rechtspraak.nl/ljn.asp?ljn=BB0711 [accessed 23 September 2009].

¹³ Administrative Jurisdiction Division 3 September 2008; available (in Dutch) at www.rechtspraak.nl/ljn.asp?ljn=BE9698, [accessed 12 September 2009].

¹⁴ See E. Brouwer and D. Houtzager, De Verwijsindex Antillianen. Registratie naar etniciteit en een (te) beperkte uitleg van het discriminatieverbod door de Afdeling bestuursrechtspraak, in: *NJB* 2009 no. 5, p. 302-308.

¹⁵ Parliamentary Documents II 2008/09, 31 855, no. 4.

People.¹⁶ The referral index is a warning system by which professionals are warned that another professional has picked up a signal that a child may for some reason be at risk. The system does not register any information about the child, apart from the social registration number and the fact of a signal. But it enables professionals to collaborate when two or more signals are made about a child. It emerges from the reactions by the Minister for Youth and Family in the debates in the second chamber on this bill that ethnicity as such will not be a specific heading for signalling that a child is at risk. Some members of parliament argued that the bill should be amended to include ethnicity as a specific heading.¹⁷ The minister replied, however, that such amendment was not necessary because ethnicity may already be brought under another heading of risk giving rise to the making of a signal.¹⁸ It seems that although the use of ethnicity as a signal is not included in the legislative scheme, there is nevertheless a risk that it will in practice give ground for a signal to be made.

➤ *The Dutch NGOs request the CERD Committee to give its opinion about the compatibility with the Convention of registration of the ethnicity of Antillean/Aruban or other non-western minorities in databases.*

ARTICLE 2 (2): SPECIAL AND CONCRETE MEASURES

Migration and Integration

Integration measures

The 2006 parliament passed the Act on Integration Overseas. The Act imposes a duty on a person wanting to live in the Netherlands for specific reasons (e.g. family formation or reunification), to pass a test on basic knowledge of the Dutch language and Dutch culture. The test is compulsory for those applying for a provisional residence permit (*'machtiging tot voorlopig verblijf'* or *'MVV'*). The test must be taken at a Dutch consular mission in the country of origin or in a neighbouring country if there is no Dutch Consulate in the country of origin. The test is taken on a computer, which same assesses the results. If the applicant fails the test, he or she cannot obtain the MVV.

The Dutch government maintains that the test aims at ensuring that immigrants already have a basic knowledge of the Dutch language and society before they arrive in the Netherlands. This should, claims the government, enable the process of integration to take place efficiently and effectively. The test costs a fee of € 350 each time it is taken. All foreign nationals from the age of 18 to 65 years are required to take the test, with the exception of nationals from certain countries believed to have levels of economic, social and political development comparable to Dutch ones (such as people from various countries in Asia, Africa and the Americas). The government created an exemption for citizens of those countries for which an MVV is not required, i.e. citizens of all EU member States, Australia, Canada, Iceland, Japan, Liechtenstein, New Zealand, Norway, South Korea, Switzerland and United States. More specific exemptions are given to persons of Surinamese nationality who have completed primary education in the Dutch language in Surinam or in the Netherlands.

National and international organisations have criticized the exemption, as it discriminates on grounds of race and nationality.¹⁹ There is no evidence that the level of a *country's* economic or social

¹⁷ E.g. Mrs Sterk (CDA) Parliamentary Documents II 2008/2009, 31 855, nr. 27.

¹⁸ Parliamentary debates, second chamber 102-8173 rk (Rouvoet) 'Mijn vraag aan mevrouw Sterk blijft of zij een casus kan geven die niet al onder een van de risico's te vatten is, want het toevoegen van nieuwe risico's heeft alleen zin als je de overtuiging hebt dat je een risico aandraagt – een risico dat bovendien niet door hulpverleners is aangedragen – dat iets toevoegt waardoor meldingen mogelijk zijn die dat nu niet zijn.'

¹⁹ I. Andriessen et al., Discriminatiemonitor niet-westerse allochtonen op de arbeidsmarkt 2007, Sociaal en Cultureel Planbureau and Art.1, Den Haag/Rotterdam, November 2007, available at

development is an indicator of a *person's* willingness or ability to integrate in the Netherlands. Besides, the test affects some groups more than others: better-educated people stand a better chance of passing than lower-educated people. The financial element implies that people with a lower income are more affected than more affluent applicants. Also there is a correlation between affluence and better or lower education. The measure also affects women more than men, as elaborated below. According to the Immigration and Naturalisation Service (IND), the significant drop in the number of applicants for family reunification since 2006 is to a large extent a result of the introduction of the test.

Concerns have also been expressed that this measure, coupled with the high requirements for family reunification and in financial terms, might lead to a violation of the right to marry and to establish a family life, as enshrined in Article 5 d (iv) of the Convention and in Article 8 of the European Convention on Human Rights.²⁰

➤ *The Dutch NGOs requests the CERD Committee to urge the Dutch government to re-consider the above-mentioned discriminatory elements in the Act on integration overseas.*

Racial discrimination and gender

We will pay special attention to the implementation of the Convention by the Netherlands from a women's rights perspective. The commentary highlights some of the most poignant matters that, in our view, constitute serious shortcomings of the Dutch government in fulfilling its obligation to respect and ensure the rights as they are laid down in the Convention *for all*.

Modernisation of Dutch migration policy

This policy of restricting family formation and reunification is also part of the "modernisation of migration policy" currently developed by the Dutch government. Labour migration, especially of 'high skilled migrants' (kennismigranten) is stimulated, whilst family migration and asylum migration is to be further restricted.

The government maintains that the new policy pays sufficient attention to the specific situation of women, which means there is a possibility to issue special (temporary) residence permits to victims of human trafficking, prostitution and slavery, domestic violence and honour related violence. We observe that from this list it is possible to conclude that women only attract the special attention of the government when they are victims of crimes.

However, women are not exclusively victims of crime. They are also labour migrants. Research indicates that also in regular labour migration to the Netherlands, there are specific gender differences: women often migrate for lower skilled labour; they earn less and are more frequently excluded from rights than men²¹. In consequence of increased labour participation of women in combination with general population developments, there is an increasing demand for work in the care-sector (domestic work, child care, care of the elderly), which is increasingly met by female migrants. However, this type of work is illegal, takes place outside the official circuits?) and does not give access to a regular labour permit. Their work is not recognised as fulfilling 'a Dutch interest'. When it comes to the policy on high skilled migrants, the government has set a (high) minimum to the

www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2007/Discriminatiemonitor_niet_westerse_allochtonen_op_de_arbeidsmarkt_2007, [accessed 22 July 2009]. Human Rights Watch; The Netherlands: Discrimination in the Name of Integration, Migrants' Rights under the Integration Abroad Act, May 2008, available at www.hrw.org/legacy/backgrounder/2008/netherlands0508/, [accessed 22 July 2009]. See also: Report by the Commissioner for Human Rights mr. Thomas Hammarberg on his visit to the Netherlands, 21-25 September 2008. Strasbourg: March 2009, p. 20, available at www.commissioner.coe.int and at www.minbuza.nl/binaries/kamerbrieven-bijlagen/2009/maart/159dwm-bijlage.pdf, [accessed 22 July 2009].

²⁰ Women and Immigration Law: New Variations on Classical Feminist Themes, 2006.

²¹ T. de Lange, Staat, markt en migrant. De regulering van arbeidsmigratie naar Nederland 1945-2006. (PhD-thesis) The Hague: Boom juridische uitgevers, 2007.

salary a migrant must earn in order to be granted access to the Netherlands. Given the persistent gap in payment between women and men, this policy has a disadvantageous effect on women.

Finally, recent research of the Ministry of Justice (WODC/INDIAC) shows that new policies on family formation and reunification, in particular the increased income requirement, disproportionately affect women.²²

The Dutch NGOs respectfully suggests that some of these points would be clarified if the government were to be willing to submit the new migration policies to a Gender Impact Assessment.

The Dutch NGOs invites the CERD Committee to request the following:

- *is the government willing to submit its Blueprint for a modern immigration policy to a Gender Impact Assessment?*

Integration policy and participation of ethnic minority women

In its report the government fails to address the issue of discrimination of black, migrant and refugee women and, in particular, Muslim women. Research shows that discrimination is one of the reasons why the labour participation of migrant women is lagging behind.²³ It is, for example, more difficult for a Muslim woman wearing a head-scarf to find a place as trainee,²⁴ and employers frequently refuse job applicants wearing a head-scarf. As a consequence, Muslim women lack *de facto* equal rights to employment.²⁵ In the political debate Muslim women tend to be systematically presented as ‘backward’, ‘suppressed’ and ‘in need of liberation’ (if necessary, against their will).

The increasing discrimination against Muslim women is connected to the general political climate, in which one Member of Parliament feels free to compare the prophet Mohammed with Hitler. Significantly, the current debate about freedom of religion seems to be fought out over the heads of women. Remarkable in this respect is the recent cabinet decision to submit a bill prohibiting the wearing of a burka in schools to the second chamber and to ‘encourage’ public transport companies to refuse entry to public means of transport to women wearing a burka.²⁶ If transport companies do not comply voluntarily, the cabinet has stated that it is prepared to introduce a legal prohibition. The government argues that the burka would hinder ‘open communication’, as well as the emancipation and participation of Muslim women. Moreover, it would cause ‘an uncomfortable feeling’ with others. An estimated two hundred women in the Netherlands wear a burka. The decision to submit such a bill is against the advice of the advisory Commission that was established on this issue. According to the commission, such a prohibition would be ‘discriminatory, in violation with norms on equality and undesirable because of its stigmatising effect and the polarisation of social relations that it might cause’, apart from questions of necessity, proportionality and subsidiarity.

²² Internationale gezinsvorming begrensd? Een evaluatie van de verhoging van de inkomens en leeftijdseis bij migratie van buitenlandse partners naar Nederland, (“International family formation restricted? An evaluation of the raised income- and age requirements with regard to the migration of foreign partners to the Netherlands”), in Dutch with a summary in English, Wetenschappelijk Onderzoek en Documentatiecentrum (WODC) en Immigratie- en Naturalisatiedienst, Informatie- en Analysecentrum (INDIAC), WODC Cahier 2009-4, available at www.wodc.nl/onderzoeksdatabase/de-gevolgen-van-de-aanscherping-van-het-gezinsvormingsbeleid.aspx, [accessed 22 July 2009].

²³ Ethnic minorities on the labour market, Ministry of Social Affairs and Employment, 2005.

²⁴ The SBO, the organisation of employers and employees in education, notes for instance an alarming number of students from ethnic minorities that drop out from teacher training colleges and blames this to the difficulties in finding a place as trainee (“Scholen weren allochtone stagiair”, de Volkskrant 10 June 2006, available at www.volkskrant.nl/binnenland/article328673.ece/Scholen_weren_allochtone_stagiair, [accessed 19 July 2009].

²⁵ In 2004, 60% of the complaints submitted to the Dutch Equal Treatment Commission (ETC) about discrimination on the ground of religion concerned discrimination against Muslim women wearing a head-scarf.

²⁶ Notwithstanding its earlier opinion, expressed in the 4th periodic report, that the laying down of regulations governing clothing which may express religious views, is undesirable.

The Dutch NGOs pose the following questions to the CERD Committee:

- *The Dutch NGOs would like to know the opinion of the Committee on prohibitions which exclusively affect one type of citizen, in this case orthodox religious Muslim women. More in general, the Dutch NGOs would like to know how the government sees its own role in relation to the increasing xenophobia and anti-Islamic sentiments respectively. the protection of the freedom of religion and the safety of the Muslim minority.*

Prostitution and trafficking in women

Trafficking in women can be seen as the consequence of the intersection between racial and gender discrimination. Both create dynamics of power in which women are extremely vulnerable. Women from certain racial and ethnic groups, as well as indigenous and migrant women may frequently be targeted and more vulnerable to trafficking, sexual slavery or prostitution. Racial discrimination may constitute not only a risk factor for trafficking, but it may also determine the treatment that the women receive at their destination. Trafficked women can face triple discrimination: as women, as foreigners and as prostitutes.²⁷

Women are vulnerable to trafficking because of the limited avenues for legal migration, which are affected by their lower education and employment opportunities.

Victims of trafficking and prostitution often have little access to legal protection and may find themselves prisoners in brothels and other establishments. Trafficked women are beaten and raped to punish them for trying to escape and for refusing to have sex with customers. They are also subject to starvation, forced use of drugs and alcohol, burning with cigarettes, and isolation in dark rooms. They are effectively kept in captivity through threats to themselves or their families.²⁸

In 2007 a second evaluation of the lifting of the ban on brothels took place.²⁹ The evaluation focused on three aspects: municipal policies, illegal and prohibited forms of prostitution (including involuntary prostitution and prostitution by minors) and the social position of prostitutes. Below we comment on the second and third aspect.

Illegal and prohibited forms of prostitution

The researchers of the evaluation report conclude that the number of prostitutes without the required residence and work permit that working in the regulated and licensed sector has decreased. There are no indications of a growing illegal circuit. It was also noted that the awareness of brothel keepers of the risks of trafficking and their unwillingness to be involved in such practices had increased. Moreover, hardly any underage prostitutes were found working in the licensed sector. There was a slight increase of the number of reports of (victims of) trafficking, but this increase was mainly attributed to intensified attention for trafficking in human beings.

The conclusions on trafficking in the regulated sector were called into question by a recent criminal investigation into a large trafficking network.³⁰ The majority of the victims of that network

²⁷ United Nations Office of the High Commissioner for Human Rights, *Gender Dimensions of Racial Discrimination*, 2001, p. 15.

²⁸ Issues around women and trafficking have been explored extensively at the Asia-Pacific Seminar of Experts in Preparation for the World Conference against Racism: Migrants and Trafficking in Persons with Particular Reference to Women and Children, 5-7 September 2000, Bangkok, Thailand.

²⁹ A.L. Daalder, *Prostitutie in Nederland na opheffing van het bordeelverbod (Prostitution in the Netherlands after the abolition of the ban on brothels)*, WODC 2007, available at www.wodc.nl/onderzoeksdatabase/overkoepelend-rapport-evaluatie-opheffing-bordeelverbod.aspx, [accessed 19 July 2009].

³⁰ *Uitgebuut en in de bak, slachtoffers van mensenhandel in vreemdelingendetentie (Exploited and detained, victims of trafficking in aliens detention)*, Amsterdam: Bonded Labour in The Netherlands 2009. See also United States Department of State, *Trafficking in Persons Report 2008 - The Netherlands*, 4 June 2008, available at: www.unhcr.org/refworld/docid/484f9a2f3c.html [accessed 25 September 2009].

worked in the licensed sector. At the same time, this underlines one of the problems identified in the evaluation, notably that policies predominantly are directed at brothel owners and the regulation of sex businesses, whereas a major part of the violence and coercion are exercised by pimps operating on the background outside the business, without the knowledge of the operator of the sex business. In conclusion, it is to say that there is still just as much prostitution going on, but this is out of the view of the public authorities.

No insight in the position of foreign women engaged in prostitution

Whereas the evaluation provides a good insight in the developments in the regulated sex sector, much less insight exists in the unregulated and illegal sectors. The evaluation does not give insight into the impact of the change of law on the position of migrant prostitutes, the health risks³¹ for female of specific racial groups (e.g. from Suriname, Ukraine, Russia) and their vulnerability to violence and exploitation. Also the effects of the exclusion of migrant prostitutes from working legally have not been evaluated. The sex sector is the only sector for which it is prohibited by law to issue working permits.

In a letter to Parliament, dated 16 May 2008, the responsible minister justifies the exclusion of migrant prostitutions from the legal prostitution sector by referring to the risks of foreign prostitutes becoming a victim of trafficking. However, it has not been investigated whether their exclusion and the subsequent lack of legal protection does not increase, rather than decrease, their vulnerability to trafficking and other forms of exploitation and violence. In this regard, the evaluation observes that the more strict controls of the regulated sector lead to the use of false passports, as a result of which migrant women are more dependent on traffickers. It is also noted that part of the migrant women previously working in the Netherlands, probably moved to neighbouring countries as a result of the change of law and the increased control.

No improvement of the position of prostitutes

According to the evaluation study the position of foreign prostitutes has hardly or not improved since the change of law. The labour relationships in the sex industry are still unclear and the legal (labour) position of prostitutes is still as poor as it was. The researchers expect that this will not improve of its own accord., Active policies are needed. They note that such policies are blatantly lacking: little has been done to improve the labour and social position of foreign prostitutes and no measures have been taken to inform and educate foreign prostitutes on labour law, social security, tax legislation and the risks of exploitation.

Other sources confirm that the introduction of the licensing system has hardly taken into account the needs and interests of prostitutes, such as the protection of their privacy. Moreover, as a result of the way the licensing system is implemented, it has become more difficult instead of more easy for prostitutes to work independently and/or run their own business. This obviously also undermines the other aims of the change of law, notably the regulation of consensual adult prostitution and the combat of involuntary prostitution and other abuses.

Position of victims of trafficking in women (B9-regulation)

Since 2008 (foreign) victims of trafficking also qualify for a temporary residence permit and the attached assistance and protection when they do not press charges but are willing to cooperate with the (criminal) authorities in other ways. Also the possibilities for granting victims of trafficking permanent residence on humanitarian grounds have been extended. These are definitely positive developments, along with other measures to more effectively combat trafficking.

However, access to assistance and protection continues to depend on the capacity and willingness of the victim to cooperate in the investigation and prosecution of their traffickers (art. 273f of the Dutch Criminal Code). Many victims are not able or willing to do so for various reasons. This means that a considerable number of victims of trafficking are still excluded from assistance and protection. The failure of authorities to act without a complaint by the victim in cases of domestic

³¹ Contrary to what the government's 5th report suggests (p. 61), only the health situation of prostitutes in the licensed sector was investigated, which excludes foreign women engaged in prostitution/ women without a residence permit as they are excluded from working in the licensed sector.

violence has recently been castigated by the European Court of Human Rights as discriminatory in the case of *Opuz v Turkey*. The authorities were well aware of the danger which the applicant and her mother faced from a violent partner, but the actions by the courts and police were ineffective to protect them. The applicant's mother was eventually killed by the applicant's partner. She complained to the European Court. The European Court classified the inaction as discriminatory, as the only victims of domestic violence in that region of Turkey were women. The European Court said that the authorities were not always entitled to make the bringing of prosecution dependent upon the victim maintaining a complaint.³² Similar arguments appear highly applicable to the case of trafficking.

Moreover, recent research³³ shows that the police fail to adequately identify victims and that a considerable number of victims are illegally and in violation of the B9-regulation held in alien's detention, without access to the assistance and protection to which they are entitled and this only concerns foreign women. In a considerable number of cases the police refused to take down the victim's report, refused to grant the reflection period or let the victim wait in detention for weeks or even longer before coming into action.

Lack of protection against trafficking of unaccompanied minor asylum seekers

Minor unaccompanied asylum seekers are a particularly vulnerable group. 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 victim of trafficking. The fate of many of these young people is not followed by the authorities. An especially vulnerable group consists of female minor asylum seekers whose application for asylum is rejected. When they attain the age of 18 years they lose their temporary residence permit and are expected to return to their home country. In several cases young female asylum seekers were sent onto the streets on attaining the age of 18 years without any protection or assistance or any realistic possibility to return to their home country, and who subsequently became victim of trafficking, forced prostitution or rape. This problem is not addressed in the government report.³⁴

In February 2008 a Task Force was installed with the assignment to develop more effective policy and actions against trafficking (as was recommended by the Dutch National Rapporteur on Trafficking in Human Beings, 5th report, 2007). All relevant actors are represented in this Taskforce, except NGOs, despite the fact that the Rapporteur stressed the importance of NGO membership in her 6th Report of 2008.

The Dutch NGOs asks the CERD Committee to request the following:

- *Can the government explain which measures it will take to improve the social and labour position of foreign prostitutes, to support their (labour) emancipation and to enable them to work on a self employed basis and/or to run their own business, independent of brothel keepers or other third parties, while taking into account the protection of their privacy and safety?*
- *Is the government willing to carry out an assessment of the impact of the proposed Prostitution Act on the position of (foreign) prostitutes, their possibilities to work independently and the protection of their privacy and safety?*
- *Is the government willing to carry out an assessment of the impact of the exclusion of migrant prostitutes from the legal sex sector, on the position of foreign women, their health risks and their vulnerability to violence and exploitation?*
- *Does the government intent to amend the current B9-regulation on victims of trafficking in order to extend temporary protection visas, reintegration and support services to all victims of*

³² Europees hof voor de rechten van de mens 9 juni 2009, zaaknr. 33401/02 (*Opuz t. Turkije*).

³³ B. Boermans, *Uitgebuut en in de bak, slachtoffers van mensenhandel in vreemdelingendetentie* (Exploited and detained, victims of trafficking in aliens detention), Humanitas & Oxfam Novib program Bonded Labour in Nederland (BLinN), Amsterdam 2009, available in Dutch at www.blinn.nl/images/uploads/Reports/Uitgebuut_en_in_de_bak.pdf, [accessed 19 July 2009].

³⁴ A. van den Borne and K. Kloosterboer, *Investigating Exploitation. Research into trafficking in children in the Netherlands*, ECPAT Nederland, Unicef & Defence for Children International Nederland, Amsterdam 2005, available www.ecpat.nl/p/30/529/ecpat-nl, [accessed 22 July 2009].

trafficking, including those unable or unwilling to cooperate in the investigation and prosecution of traffickers?

- *Is the government willing to take measures to protect unaccompanied minor asylum seekers against the risk of trafficking? In particular the NGOs would like to know which measures the government is willing to take to prevent unaccompanied minor asylum seekers who are not recognised as asylum seekers, from becoming victim of trafficking after they turn 18.*

Human rights of women and children of so called '1F'-asylumseekers in the Netherlands

Background: general pardon and 1F-exception

In 2001, a new Asylum Law came into effect in the Netherlands, to improve the previously slow and complicated asylum procedures. There was a long and intense political debate on the status of asylum seekers who entered the Netherlands before the new Asylum Law came into effect and who were still in the asylum procedure. In February 2007, the newly elected Dutch government agreed on a general pardon for asylum seekers who entered the Netherlands before 2001.

The general pardon is not applicable to asylum seekers who may have been involved in a crime against the peace, a war crime, or a crime against humanity (article 1F of the Geneva Convention). All asylum seekers from Afghanistan who had been employed by the Afghan military secret police *Khad-e-Nezami* were excluded from the general pardon because of the '1F-exception'. They cannot be returned to Afghanistan because there is a real risk of torture. To return them the Netherlands would violate human rights rules, in particular Article 3 European Convention on Human Rights. At the same time it is difficult for the government to prosecute the people subject to the 1F-exception for the alleged crimes. There is usually insufficient evidence. In consequence of this dilemma approximately 700 people are currently staying in the Netherlands indefinitely without a residence permit.³⁵

Women and children of '1F-asylum seekers'

Some of the asylum seekers concerned were joined by family members when they entered the Netherlands. Most of these women and children learned Dutch, went to schools and found jobs and consider themselves to be Dutch. Because of the '1F-exception' of their husband/parent, the general pardon does not apply to them and they are not given a residence permit. There are approximately 100 women and 200 children in this situation in the Netherlands. The insecurity about their future and their current living conditions pose a threat to their health and development.

Policy change by the Dutch government

In November 2008, the government of the Netherlands came with a formal Policy change concerning family members and children of the so called 1F-asylumseekers. The changed policy now contains the following: family members (wives and children) of alleged war criminals who have lived in the Netherlands for ten years or more will be given a residence permit under the general pardon. In this context the government has stipulated a number of cumulative conditions.³⁶

The 1F-exception does not apply to family members:

- a. who have resided continuously in the Netherlands for at least ten years from the day of the first residence application;
- b. this is an uninterrupted residence, and

³⁵ De eigen rechtspositie van kinderen met een 1F-ouder, "Ik heb recht op mijn eigen rechten", 2008; A. van Kalmthout, "Ook de illegaal heeft een verhaal" 2006.

³⁶ Wijziging Vreemdelingencirculaire 2000 [via www.overheid.nl]; Stc 2008/232, Besluit van 18 november 2008, nr. 2008/29, (1F) B1/4.4Vc, C2/6.3 Vc, C4/3.11.4Vc.

- c. the applicant has not frustrated the asylum procedure.

Some of the women and children have crossed the Dutch border (because of reason for example of medical grounds) and now cannot apply for asylum under the changed procedure.

Cases are known of women and children who have lived in the Netherlands for more than ten years but their husband/father took them over the border for a family visit for a couple of hours. In other cases women and children have been to hospitals in neighbouring countries for urgent medical care because hospitals and doctors in the Netherlands refused to treat ill women and children who were unable to show their residence permits.

In these specific cases the women and children cannot comply with the cumulative conditions of the Dutch government.

The Dutch NGOs are concerned for the wives and children of so called 1F-asylumseekers for a residence permit who are held not to comply with the cumulative conditions set by the government, for no other reason than because during their stay in the Netherlands they crossed the Dutch border to obtain necessary medical care.

The Dutch NGOs request the CERD Committee to pose the following questions:

- *How many women and children fall outside the new 1F-exception because they crossed the Dutch border for medical or other serious reasons?*
- *Can the cumulative conditions of the new asylum policy be adjusted in order that in case of medical or other serious reasons (for crossing the Dutch border), women and children could be considered for a residence permit?*

Prohibition of expulsion without legal guarantees

Traumatised female asylum seekers

In 2003 Human Rights Watch (HRW) issued a very critical report on Dutch asylum procedure under the new Aliens Act 2000.³⁷ HRW stipulates as its main points of concern the ‘accelerated procedure’ in asylum seekers centres (the so-called 48-hour procedure); the policy regarding repeated asylum requests; and the policy on (unaccompanied) minors.

Within the ‘accelerated procedure’ (para 182 and 183) the asylum seeker or her or his lawyer has only two hours to prepare for the interview with the immigration and naturalisation service (IND) and 3 hours to read and comment on the report of the interview. In the case of asylum seekers who have been victims of sexual violence, this is extremely short, especially since these women (and men) commonly originate from cultures in which people generally do not easily talk about this kind of experience. Moreover, a second asylum request is only taken into consideration when there are ‘new facts’ (*nova*), i.e. facts that were not known and could not be known during the first procedure. This means that when a woman is not able or willing to talk about the sexual violence during the first interview, she has no possibility to submit a second application. This led HRW to the observation that ‘asylum seekers are not always provided with an adequate opportunity to present their claim for asylum and judicial review does not always ensure that the merits of the case are being examined’.³⁸ According to HRW the Dutch policy is too formal, barely leaves space for traumatised female asylum seekers who were not able to speak about their traumas in the first procedure, and risks violating the principle of *non-refoulement*.

Since HRW’s criticism, the government has slightly adapted its policy³⁹. In the case of a repeated asylum request the IND now has the possibility to take into account new aspects if it is

³⁷ Human Rights Watch, *Fleeting Refuge: the triumph of efficiency over protection in Dutch asylum policy*, (2003) p.15, available at www.hrw.org/reports/2003/netherlands0403/nether0403.pdf, [accessed 19 July 2009]

³⁸ *Ibid.*

³⁹ Tussentijds Bericht Vreemdelingencirculaire (TBV) 2003/24) of 5 August 2003.

plausible that these aspects were not put forward by the asylum seeker due to trauma. However, judicial review is still not possible since the highest court in asylum matters (the Administrative Jurisdiction Division of the Council of State) has held that, in contrast to an administrative body like the IND, the judge does not have a discretionary competence. There is thus no independent court that can review the enforcement of the new policy, a fundamental requirement of the rule of law. This is the more important since an incorrect decision of the IND can lead to a violation of the prohibition of extradition (refoulement). In addition, Dutch NGOs are of the opinion that indications of the existence of trauma should, per definition, exclude any possibility of referral to the 48-hour procedure, as was recommended by the Advisory Committee on Migration Affairs (ACVZ) in its report.⁴⁰

The Dutch NGOs request the CERD Committee the following:

- *The Dutch NGOs would like to know which measures the government 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.*

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 reluctant to receive migrant women who do not have a permanent residence permit. Some shelters limit the number of migrant women without an independent residence permit they are willing to take in.

According to the new Immigration Act (Art. 10, which followed up the 1998 Linkage Act) undocumented migrants have no access to healthcare and 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 or 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 is obliged to protect *all* women on its territory against gender based violence, and to provide shelter and protection when needed.

The Dutch NGOs request the CERD Committee the following:

- *The NGOs would like to know if the government is willing to take measures to provide shelter and protection to undocumented women who are victim of gender-based violence and in need of protection.*

New requirements for family formation and family reunification disproportionately affect women

In para. 36-52 of its report, entitled “Relevant changes in legislation -Aliens Act 2000- since the previous report” the government refers to the new requirements with regard to family formation and family reunification. Since the introduction of the new Aliens 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) resp. 100 % (family reunification) of the nett minimum wage in a fixed job with a labour contract for at least a year. Until April 2004 this was 70 %;

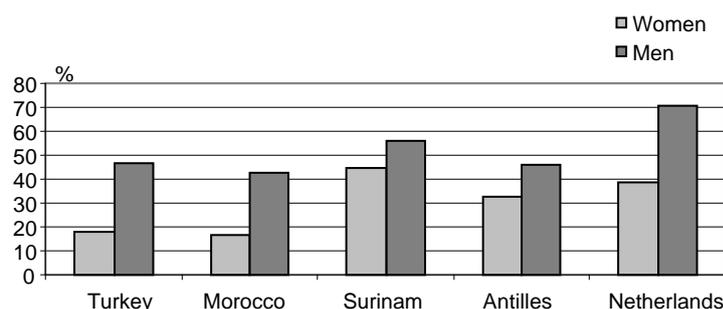
⁴⁰ The Advisory Committee on Migration Affairs (ACVZ), *VN-Vrouwenverdrag in relatie tot de positie van vreemdelingen vrouwen in het Nederlandse vreemdelingenrecht en vreemdelingenbeleid* (The UN Women’s Treaty in relation to the position of female foreign nationals in Dutch immigration law and policies), The Hague 2002, p. 17, available at www.acvz.org/nl/archief-2002, [accessed 19 July 2009].

- 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;
- As of 15 March 2006, non-EU partners from non-Western countries are obliged to do an examination in their home country to test their knowledge of Dutch language and culture, even if all other requirements are met (the so called ‘civic integration exam abroad’)⁴¹, which poses an additional financial burden⁴²;
- The costs (*leges*) to obtain or renew a residence permit are substantially raised.

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, there is a persistent pay gap of 19% between men and women.⁴³ In 2004, 42% of the women were economically independent, compared with 68% of the men. About 60% of all women in the Netherlands earn less than 70% of the legally defined minimum wage.⁴⁴

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. These restrictions apply 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 (see figures below).

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.⁴⁵



Moreover, newcomers have to pass a mandatory civic integration examination 3,5 years after their arrival in order to qualify for a permanent or independent residence in the Netherlands.⁴⁶ For immigrants with a dependent residence permit – the majority of whom 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 increasing 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.

Article 8 ECHR does not guarantee non-residents to settle in the country of their choice. (e.g. *Abdulaziz, Balkandali en Cabales t. V.K.*) Exceptions are made where the person has sufficient links with the country of choice – and has no significant links with the country of origin. See e.g. *Sen t.*

⁴¹ Interesting is that when trying out this exam even highly educated Dutch nationals and students from Teacher Training Colleges failed the test.

⁴² Costs include: the exam (350 €), preparation of the exam, travel and staying costs to go to the Dutch Embassy to do the exam.

⁴³ According to the figures of the labour inspection, in 2002 the average pay-gap (difference in hourly wage) between men and women was 19%; the corrected percentage was still 7%.

⁴⁴ W. Portegijs, A. Boelens en L. Oltshoorn, *Emancipation Monitor 2004*, Sociaal en Cultureel Planbureau (SCP) and Centraal Bureau voor de Statistiek (CBS), 2004.

⁴⁵ M. Gijsberts & A. Merens (red.), *Emancipation in Estafette*, the position of women from ethnic minorities, The Hague: SCP 2004.

⁴⁶ For immigrants who arrived before the introduction of the new law (‘oldcomers’) this is 5 year.

Nederland. The new requirements raise an extra hurdle, one which is possibly not compatible with the requirements of Article 8 ECHR, at least not where one or more of the family members has very strong links with the country of choice. Though in 2007 the Minister of Justice promised a study on the effects of the raise of the income requirement, no gender impact assessment has been made.⁴⁷

The Dutch NGOs request the CERD Committee the following:

- *The Dutch NGOs would like to know the results of the study on the effects of the raising of the income requirement. They would also like to know if the government is willing to evaluate the joint impact of the range of new requirements for family formation and reunification on the possibilities for women, and in particular women from ethnic minorities, to be (re) united with their foreign partner and/or children and to take adequate measures if it appears that the Dutch civic integration policy indirectly discriminates against women.*

ARTICLE 4

The Internet is a powerful tool for combating racism and intolerance on a worldwide scale. It offers an unprecedented means of facilitating the cross-border communication of information on human rights issues related to anti-discrimination. However, alongside these positive uses, the Internet also represents a source of concern, in that it is being used by individuals and groups to disseminate racist messages, inciting to intolerance and racial and ethnic hatred.⁴⁸

In the legal approach of combating racism on the internet the Dutch NGOs would like to address and correct several flaws on this issue mentioned in the state report submitted to the CERD-committee. In response to Concluding Observation no. 11 of the Committee the Government of the Netherlands state in section B:

- **No. 12.** ‘The (Meldpunt Discriminatie Internet =)MDI’s annual report for 2005 registered 1289 postings expressing discrimination.’
 - This should be: The MDI registered 466 discriminatory utterances in breach of the Dutch penal code. This number has risen to 1078 in 2007, while the number of complaints dropped slightly from 1289 in 2005 to 1049 in 2007.
- **No. 13.** ‘With regard to the groups targeted, there was a notable rise in utterances directed against Muslims, and for the first time in the MDI’s history, Muslims became the most hated category (371 utterances).’
 - This should be rephrased as follows: With regard to the groups targeted, there was a notable rise in complaints about utterances directed against Muslims. For the first time in MDI’s history the largest number of complaints regarded utterances in the ‘Muslim hate’ category.
- **No. 14.** ‘This high percentage and the fact that site managers removed a great deal of offensive material before it was noticed by the MDI (14% of the total) indicates a high level of commitment to keep websites free of discriminatory material.’
 - However, these numbers should be treated with care. The MDI has sent requests for removal for 261 out of a total of 466 discriminatory utterances. 96 percent of these requests have resulted in a removal. This means that no requests have been sent regarding the remaining 205 discriminatory utterances. Most of the time this is because the website has prominently advertised that it refuses to remove any utterance. In most of these cases the MDI files a complaint with the Public Prosecution Service and adds the additional utterances to the case file. In most these cases the MDI files a complaint with the Public Prosecution Service and adds the additional utterances to the case file.

⁴⁷ *Kamerstukken II 2007/08, 30 573, nr.7 and Kamerstukken II 2006/07, nr. 5.*

⁴⁸ Legal instruments for combating racism on the internet, Council of Europe 2009

- **No. 15.** ‘Following consultations between the MDI, the Public Prosecution Service’s National Discrimination Expertise Centre (OM-LECD) and the police’s National Bureau for Discrimination Cases (LBD), the participating institutions concluded further agreements on monitoring and processing cases of online discrimination.’
 - Although the handling of complaints of online discrimination cases by the Public Prosecution Service’s is steadily progressing, the effect of this measure lags behind. There is still a lack of judicial judgments on online discrimination, because the Public Prosecution Service has not been able to prosecute cases regarding cyber hate efficiently. Successful prosecution is essential for the work of the MDI. The jurisprudence functions as a guideline in reviewing the complaints it receives. Moreover, an effective and efficient prosecution process shows to the public at large that discrimination is not tolerated whether it is offline or online.

- **No. 19:** ‘On 16 November 2006, the Netherlands ratified the Convention on Cyber crime of the Council of Europe, which entered into force for the Netherlands on 1 March 2007. At the time of reporting, the Netherlands have not yet ratified the Additional Protocol, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.’
 - The Netherlands has still not ratified the Additional Protocol, which is rather peculiar since the Netherlands has introduced the protocol itself. For the elimination it is essential that governments ratify this Additional Protocol because it underlines the importance of ‘finding a proper balance between freedom of expression and an effective fight against acts of a racist and xenophobic nature’ online as well as offline.

Having read the Dutch response to the concluding observations of the CERD on discrimination on the Internet, the Dutch NGOs note that the Dutch authorities have solely based their replies on the MDI’s annual report of 2005. Despite the quality of these reports we recommend the Dutch authorities to have regular consultations on discrimination on the internet. The Dutch NGOs believes that for the government to be able to effectively combat discrimination and racism on the Internet, a thorough and up to date understanding of these issues is important.

The Dutch NGOs ask the CERD Committee to request the Dutch Government to specify:

- *Why has the Netherlands not ratified the Additional Protocol to the Convention on cybercrime?*
- *When is the Netherlands going to ratify the Additional Protocol to the Convention on cybercrime?*
- *What is the Netherlands going to do to make the process of prosecution more effective?*

Implementation of laws and policy in the criminal field

For years most of the problems with the deployment of criminal law in the fight against discrimination have been identified and addressed in policy and regulations. The question that needs to be answered is why *implementation* of these regulations had not yet taken place. Is it due to capacity, priority or mentality-issues at the police and the Public Prosecution Service? Some obligations such as the one concerning registration are claimed to be awaiting the proper IT-systems before compliance is possible. In practice however, it has been shown that there are ways to in fact *use* a system that is not *designed* for a certain type of registration.

Four main bottlenecks can be identified:

1. Due to incomplete registration by both the police and the Public Prosecution Service there are no data available on offences under the general criminal law with discriminatory aspect. This is unsatisfactory as the obligation to register these offences – in addition to prohibited

discriminatory acts – can be traced back to one of the first *Discrimination Instructions* from the 1980's.⁴⁹

- A persistent misconception about these offences (e.g. assault, art. 300 or arson, art. 157 Criminal Code) is that the discriminatory intent needs to be proven. Under the *Discrimination Instruction* it is only necessary to show the discriminatory aspect of an offence, such as throwing a Molotov-cocktail at a mosque,⁵⁰ due this building's quintessential religious denomination.
- The *Discrimination Instruction* also prescribes that the Prosecutor demands a 25% increase in the sentence for the aggravating discriminatory factor when these offences are brought before court. It is not possible to check whether this instruction is complied with, since it is not explicitly mentioned in the Public Prosecutor's indictment nor in the ruling of the judge. Given that this instruction is meant to have a deterrent effect, visible enforcement of this instruction is important and in line with the Framework Decision on combating Xenophobia.⁵¹

2. The available data is limited to the specific articles under criminal law dealing with discrimination (such as discriminatory defamation and incitement to hatred as laid down in arts. 137c -137g and 429quater Criminal Code). These figures however, are neither uniform, complete nor transparent.

- The police registers *suspects* (where one suspect may cause more than one incident), the Public Prosecution Service registers *incidents* and the courts register *cases* (which may comprise various incidents). It is therefore rather challenging to draw unequivocal conclusions about the whole legal chain. An integrated database is therefore highly recommended.⁵²
- Despite the lack of consistency in registration methods, it is puzzling to see an approximate 50% decrease in the amount of discrimination figures at every step of the chain. At the police only about half of civilians manage to obtain an official report with official record (instead of merely a report on which usually no further investigatory action is taken). Of these official reports again only half can be found in the Public Prosecution Service's registration.
- The Public Prosecution Service's annual report has no consistent format. In addition, the statistics they provide on discrimination are inconsistent with those of the Ministry of Justice and those of the National Expertise Centre for Discrimination (LECD). The LECD is the Landelijk Expertise Centrum Discriminatie operating under the auspices of the Amsterdam public prosecutor's office and is the expertise centre for the entire Public Prosecution Service.
- The LECD's denominations for registering victims and perpetrators are not always appropriate (e.g. registering offences "Against investigating officer" in the table on locations, rather than victims; the use of the term "negroids" and registering offences by and against different ethnic groups as a single entity such as 'Surinamese/Antillean' and 'Turkish/Moroccan').

3. An even closer look at the chain leads to an observation about the dismissal of cases (Dutch: *sepot*). Up until now it has been the practice not to register dismissals if they are decided upon

⁴⁹ For an explicit reference to the offences under general criminal law with discriminatory aspect see *Richtlijn Discriminatiezaken*, 1 Juli 1993 – 1997, Staatscourant 1993, 171, the predecessor of the *Discrimination Instruction*. See also M. Davidović and P.R. Rodrigues, *Racism and Extremism Monitor, investigation and prosecution in 2006*, p. 27, available at:

www.annefrank.org/upload/Downloads/InvestigationProsecution2006.pdf, [accessed at 13 September 2009].

⁵⁰ District Court Haarlem 31 May 2007, LJN BA6136 and LJN BA6137, available at: www.rechtspraak.nl/ljn.asp?ljn=BA6136 and www.rechtspraak.nl/ljn.asp?ljn=BA6137.

⁵¹ OJ C 75 E of 26 March 2002, available at: eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2002:075E:SOM:EN:HTML [accessed 13 September 2009].

⁵² See also: Ch. Brants, R. Kool, A. Ringnalda, *Strafbare discriminatie*, Willem Pompe Instituut voor Strafrechtswetenschappen en Universiteit Utrecht 2007, p. 176, available at www.wodc.nl/onderzoeksdatabase/strafmaat-discriminatiezaken.aspx [accessed 13 september 2009].

by an official from the Public Prosecution Service who is stationed at the police office. But registering only dismissals by the Public Prosecution Service does not benefit transparency.

- For the police it can be similarly recommended that they too should register cases which they treat as *de facto* dismissals (the above mentioned reports on which the police takes no further investigatory action).
- One reason to dismiss a case may be because it is too old (but not yet statute-barred). It is however not uncommon that this is due to the time the Public Prosecution Office itself allows to elapse before taking up a case. Cases that are seen as ‘complicated’, such as discrimination on the Internet, are prone to this kind of dismissal, which is not in line with the priority as designated in the *Discrimination Instruction*.

4. Discrimination based on race or ethnicity (including religion) occurs most frequently compared to other protected grounds and the numbers keep rising each year. This trend needs recognition in the sense of suitable allocation of means, follow-up and public relations management. When implementation of the *Discrimination Instruction* has been achieved, campaigns aimed at raising willingness to report may serve their proper auxiliary purpose.

The Dutch NGOs request the Committee to ask the Dutch government to:

- *closely adhere to the definitions and other requirements of the Discrimination Instruction;*
- *develop a consistent and comprehensive registration system for discrimination-related crimes on short notice;*
- *to duly follow the requirements of the Discrimination Instruction and to register the dismissals consistently;*
- *allocate sufficient resources to preventive and curative measures to counter discrimination based on race or ethnicity.*

ARTICLE 5 (E) (I): THE RIGHT TO WORK

The new approach to labour market policies after 2005

The Dutch NGOs feel it's important to readdress the issue participation of ethnic minorities in the Netherlands as they did as well in the previous shadow report. The Employment of Minorities (Promotion) Act was set up for the purpose of reaching proportional participation of ethnic minorities in the labour market. After discontinuing the Employment of Minorities (Promotion) Act (the so-called ‘Wet SAMEN’) from January 2004 the Government of the Netherlands started setting up a policy of diversity of workforces (called ‘generic policies’ in par. 115 of the present Government report).

In its comments on the previous Government report, the NJCM noted that equal participation by ethnic minorities in the labour market will be difficult to achieve if every four years existing policies are abandoned and new policies set up from scratch.⁵³

There has been some improvement with regard to the level of participation in the labour market by members of ethnic minority groups over the last four years. However, as the Government itself states in its report, since 2003 the level fell after it had improved.⁵⁴ The same may happen again because of the current economic depression. Therefore even with an improved level of labour market

⁵³ Commentary on the 15th and 16th periodic report of the Netherlands on the implementation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/452/Add.3) by NJCM, 18 December 2003, p.12, available at www.njcm.nl/site/treaty_reports/list_all.

⁵⁴ Par.118 of the Government report.

participation for ethnic minorities it is essential to continue paying attention to this group, if only because unemployment figures are still significantly higher for them than they are for native Dutch people.⁵⁵ One of the ways to get a more structural improvement of the labour market position of ethnic minorities is to set concrete targets. This however is difficult if there is no registration of employment of ethnic minorities. The discontinuation of the ‘Wet SAMEN’ therefore is to be regretted; whatever its disadvantages this Act at least helped to monitor the actual employment situation of ethnic minorities.

Discrimination in the labour market

In its previous commentary, the NJCM asked whether the Netherlands’ Government will continue to pay special attention to possible forms of discrimination in the labour market.⁵⁶ The NJCM welcomes the description in the current Government report of various projects and campaigns in this respect. However most of these do not go much further than ‘awareness raising’. The effectiveness of the projects described may therefore be called into question. Also once again, as in previous reports, the problem of (directly or indirectly) discriminatory dismissal is not considered. The only reference to this matter is to be found in par.111 of the Government report, where it says members of ethnic minorities leave civil service in relatively high numbers but that it is not clear yet why this happens. Moreover, the Government report tells us in par. 121 that ‘The principle underlying many projects is to encourage the ethnic minority community itself to strive for equal opportunities’. As the NJCM remarked in its commentary on the latest report of the Netherlands concerning the application of the ICCPR, it may be considered common knowledge that ethnic minorities will not lose their disadvantaged position in the labour market in this way.

Research in the framework of monitoring the situation of non-western ethnic minorities in the labour market⁵⁷ has shown that:

- Minorities encounter obstacles in their search for work, which can not be related to a lower level of education, less work experience or lower language skills;
- Ethnic minority job seekers strongly feel they need to prove themselves more than native Dutch job seekers,
- Ethnic minority job seekers prepare themselves for possible discrimination and therefore often do not mention their country of birth or do not send a picture with their application letter,
- Anti discrimination agencies received around 400 complaints per year about labour market discrimination between 2004 and 2006. Persons of Moroccan origin submitted most of the complaints (31 per cent), followed by Turkish (14 per cent) and Surinamese (14 per cent).
- The Equal Treatment Commission gave 93 opinions about discrimination on the labour market. In more than half of these cases, the Commission established discrimination.

In response to issues raised among others in the Discrimination Monitor Ethnic Minorities, the government announced a series of measures to counter discrimination in employment. The measures involve three areas: creating a positive image of minorities, countering discrimination in recruitment and selection and countering discrimination on the work floor.⁵⁸ In general, Dutch NGOs welcome the initiatives announced in the letter to Parliament. The announcement that employers will be required to take preventive steps against discrimination, based on a change in the Labour Conditions Act, is especially appreciated. NGOs are, however, concerned that the outbreak of the economic crisis has a negative impact on the implementation of the announced measures.

⁵⁵ The most recent figures used by trade unions show 51.8% labour market participation in 2007 for ethnic minorities and more than 70% for autochthon Dutch people.

⁵⁶ See *supra* note 34, p.14.

⁵⁷ Andriessen et al, *Discriminatiemonitor niet-westerse allochtonen op de arbeidsmarkt 2007*, The Hague/Rotterdam: SCP/Art.1, 2008, available at: www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2007/Discriminatiemonitor_niet_westerse_allochtonen_op_de_arbeidsmarkt_2007, [accessed 19 July 2009].

⁵⁸ Parliamentary Documents II, 29544, no. 149.

Because of their generally weaker labour market position (working on temporary or flexible contracts, a lower average level of education and work experience etc.) and the applied principle of 'last in, first out', it is expected that the position of ethnic minority groups will deteriorate further. Their labour participation will decrease and their share in unemployment statistics will become larger. So far, the government has not announced plans that take this issue into consideration.

Positive discrimination / Affirmative action / Preferential treatment

One of the options for the improvement of the labour market position of ethnic minorities is affirmative action by employers: giving some kind of preferential treatment to job applicants from this group. This could be part of broader diversity management policies, which are increasingly applied by employers. Preferential treatment should meet certain criteria, the most important of them being a guarantee that the requirements of the job are not lowered. An objective selection should be made using criteria that are relevant for the job in question.⁵⁹ As long as those criteria are met the instrument of affirmative action may be rather useful. In practice however we find that many employers, including government as an employer, do not really use it. Some larger companies did set up affirmative action projects recently. The government could stimulate the use of affirmative action by applying the instrument for jobs in the public service whenever possible.

- *The labour market position of ethnic minorities requires structural attention. The discontinuation of the Employment of Minorities (Promotion) Act ('Wet SAMEN') therefore stays a matter of concern.*
- *The NGOs hopes the Netherlands' Government will work on measures against discrimination that are effective and do more than just awareness raising.*
- *The NGOs would like to see the Netherlands' Government stimulate the use of affirmative action to improve the labour market position of ethnic minorities.*

ARTICLE 5 (E) (III): HOUSING

Housing-related discrimination does not seem to be a structural problem in the Netherlands. In 2007 only 1,9 % of 4.307 complaints concerning discrimination that ADAs received were related to housing (in 2006 this figure was also 1,9%) .

Housing allocation

In the Netherlands, most municipalities have a transparent system of housing allocation that is closely regulated by the government. The housing supply is publicised in local and regional newspapers and selection of tenants takes place on the basis of objective criteria. Generally speaking this system gives landlords little opportunity to reject potential tenants on account of their origins. In addition, freedom of establishment is one of the basic principles of the Housing Allocation Act. Home seekers can be discriminated against during the process of housing allocation on account of their origins, such as during registration, in the granting of urgency and during mediations, but the equal treatment laws help combat this form of discrimination.

⁵⁹ This is in line with judgements by the Dutch Equal Treatment Commission, and also with judgements by the European Court of Justice, i.a. in its decision in the case of Kalanke v. Freie Hansestadt Bremen of 17/10/1995 (C-450/93) where it was stated that automatic priority for job applicants from a disadvantaged group is not allowed.

Although there is little room for direct discrimination on the grounds of origin, there is a possibility of indirect discrimination. The use of certain selection criteria can turn out to be disproportionately unfavourable to immigrants. For example, the length of time one has been registered at one's present address may play an important role in housing allocation. This residence criterion is problematic for immigrants who have not been living in the country for very long.

Redlining in mortgages

In the property ownership, housing market discrimination occurs in the granting of mortgages through 'redlining' or discrimination by postal code. The postal code reveals whether the person comes from an area known to be populated by persons of non-Dutch origin. In the past, mortgage lenders in the city of Rotterdam were accused of redlining. In 2006, banks were accused of redlining, although it was barely visible in the inventory of complaints of discrimination and case law. The Equal Treatment Commission began an investigation on the issue of redlining. The research report showed that some of the financiers discriminate on the basis of postcode. It emerged that banks demand extra conditions for mortgage applicants from specific areas within large cities, which make it difficult for many migrant groups to negotiate a mortgage. In addition, it was found that nearly every bank refuses to grant a mortgage to individuals with a temporary residence permit. The ETC concluded that this amounted to unjustified indirect discrimination. The ETC advised the banking and financial sector to make their criteria for mortgages more transparent and in some cases to adjust their criteria. In 2006 the Dutch Banking Association added a prohibition on mortgage discrimination to its code of conduct .

Living situation

In cities, ethnic minorities live mostly in districts that are regarded as problematic. These neighbourhoods struggle with structural problems such as criminality, poverty and pollution. A large number of ethnic minority residents depend on social housing for their housing needs, and partly as a result of this they live in homes of relatively lower quality and in districts with fewer services. Despite improvements in the housing position of ethnic minorities in recent decades, research carried out by the Ministry of Housing shows that ethnic minorities still lag behind as compared to the native Dutch. It goes without saying that ethnic minorities also prefer good quality housing in safe and liveable districts, but they are less able to realise their housing wishes. It is not known to what extent the relatively less favourable housing situation of ethnic minorities is caused by discrimination.⁶⁰

ARTICLE 5 (E) (V): EDUCATION

We express our concern that the government does not take action on the issue of segregation in the field of education. There still is an increase in the number of schools that enrol over 50% racial and ethnic minority pupils, so-called 'black schools'⁶¹. An important cause for the existence of 'black' and 'white' schools is the so-called 'white flight', caused by the Dutch school system that allows all parents to choose any school. Some parents of native Dutch background bring their children outside their neighbourhood to schools with a majority white population, thus increasing ethnic segregation. Furthermore we note that the Netherlands has ignored for many years that children of ethnic minorities are under-represented at higher education level (CERD Concluding observations 2004 para. 10).

⁶⁰ J. Kullberg and I. Kulu-Glasgow, *Building Inclusion. Housing and Integration of Ethnic Minorities in the Netherlands*. The Hague: SCP/WODC, pp. 56-59.

⁶¹ CERD General Recommendation 19 [1995], available at www1.umn.edu/humanrts/gencomm/genrexix.htm, [accessed 13 September 2009].

The situation of migrants and minorities in education

Dutch education has become ethnically and social-economically segregated. This is explained partly 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 of a mix in schools serves a good purpose. Recent research shows that significant advantages can accrue if a proper mix can be attained.⁶² 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 select the school of their choice.⁶³

Language level

The level of secondary school at which pupils will pursue their educational path is almost entirely determined by their performance in the test in the final year of primary school, combined with an assessment of learning ability given by the teacher. In February 2007, research findings by the city of Amsterdam attracted national attention: provisional findings suggested that migrant pupils often receive lower school recommendations than can be expected judging from their Cito test score.⁶⁴ On behalf of the Ministry of Education, the School Inspectorate investigated whether or not pupils of migrant origin in the Netherlands are structurally under-advised regarding their passage from primary to secondary education. The Inspectorate concluded that there are no indications of recommendations received by migrant pupils being substantially and systematically lower (or higher) than those of their native Dutch peers on the basis of similar test scores.⁶⁵

Statistical data and tables on racist or religiously motivated incidents

Early in 2007, 406 primary schools and 208 special needs (primary) schools participated in a survey on social safety, on behalf of the Ministry of Education. Discrimination was one of the forms of violence that was paid attention to. The number of schools in primary education that reported incidents of a discriminatory nature had declined in comparison to a similar survey in 2003 (in which special needs schools did not participate). In the first half of school year 2006/2007, primary schools in strongly urbanised areas reported discriminatory incidents more often (34.3 percent of the questioned schools) than in the Netherlands as a whole (21.1 percent).⁶⁶

⁶² Resultaten van de Veiligheidsmonitor Voortgezet (Speciaal) Onderwijs 2006 Prof. dr. T. Mooij, drs. R. Sijbers, & ing. M. Sperber 2006; Advies Commissie Gelijke Behandeling inzake gelijke behandeling in onderwijs. Naar een discriminatievrije school CGB-advies/2008/03, 2008.

⁶³ Bakens voor spreiding en integratie, Den Haag: Onderwijsraad 2005", "CGB-advies/2005/01: Gevraagd advies Commissie Gelijke Behandeling inzake spreidingsbeleid in het primair onderwijs op verzoek van de Onderwijsraad, Utrecht: CGB 2005"

⁶⁴ City of Amsterdam (2007), Memo 24th January 2007. Basisschooladviezen en etniciteit, available at: www.amsterdam.nl/aspx/download.aspx?file=/contents/pages/33500/adviseringonder-overadviseringmemo.pdf, [accessed 19 July 2009].

⁶⁵ Schools Inspectorate (2007) Onderadvisering in beeld. Utrecht: Schools Inspectorate, available at: www.onderwijsinspectie.nl/nl/home/naslag/Alle_publicaties/Onderadvisering_in_beeld, [accessed 19 July 2009].

⁶⁶ Research voor Beleid (2007) Monitor Sociale Veiligheid in het onderwijs 2007. Meting in het PO en SO. Leiden: Research voor Beleid, pp. 21-22, available at: www.minocw.nl/documenten/47301c.pdf, [accessed 19 July 2009].

- *The Dutch NGOs recommend the Committee to urge the Netherlands to (further) assess the issue of segregation in the field of education and to take up the task to have special attention in the curricula for language education at all levels.*
- *Furthermore the Dutch NGOs ask the Committee to recommend the government to promote general awareness on diversity and multiculturalism for all persons at all levels of education.*

ARTICLE 5 (F): ACCESS TO PLACES OF ENTERTAINMENT

In its third report, ECRI⁶⁷ was pleased to note that since then the Dutch authorities have devoted attention to the problem of racial discrimination in access to places of entertainment and funded a number of projects aimed at countering it. The approach adopted by the Dutch authorities combines a smoother, more preventative, approach with the possibility of taking legal action when appropriate. As part of this approach, they have supported the establishment of so-called ‘door policy panels’, an initiative piloted in Rotterdam which has since then been extended to other municipalities. Composed of representatives of the entertainment industry, the local authorities, the police, the Public Prosecutor Service and the local anti-discrimination bureaus, the panel examines customer complaints relating to entrance policies and takes the necessary action. ECRI recommended the Dutch authorities to monitor the effectiveness of measures taken to this end, including the impact of door policy panels.

ARTICLE 6: LEGAL PROTECTION

When it comes to the obligation to provide adequate protection in criminal cases, there are additional challenges with the investigation and in particular prosecution.

1. The use of the competence for more far-reaching investigatory powers and to request a higher sentence in court in case of structural discrimination has been virtually unused, while the legal possibility to do so has already been created in 2004.
2. Adequate protection against discrimination may also falter when the law is read too restrictively. The Public Prosecution Service operates on the assumption that discriminatory defamation needs to address a *group* of people in its literal sense in order to come within the ambit of article 137c Criminal Code. There is no requirement that every member of the group should be addressed. It is clear that if one person is insulted based on features of the ethnic group to which the person is perceived to belong, any other person belonging to that group will feel defamed as well. The perception of belonging to a group which is subject to defamatory remarks is what triggers the insult.⁶⁸ Such perception should therefore trigger the proper protection provided by law as well, especially since ‘ordinary’ defamation (art. 266 Criminal Code) has a nine months lower maximum penalty.
3. In the case of prosecuting online discrimination the Prosecutor seems to display an even greater restraint than in non-virtual cases. This can be illustrated by the fact that only one judgement from a court can be found in 2007, while there were 13 and 22 incidents registered

⁶⁷ Council of Europe: European Commission Against Racism and Intolerance (ECRI), *Third Report on the Netherlands, Adopted on 29 June 2007*, 12 February 2008, CRI(2008)3, available at: www.unhcr.org/refworld/docid/47b19c582.html [accessed 13 September 2009].

⁶⁸ See also A.L.J.M. Janssens, *Strafbare belediging*, Amsterdam: Thela Thesis 1998, p. 394 and a case in which the Dutch Supreme Court considered an insult addressed at one Jewish woman an insult for the entire group, HR 26 juni 1984, *RR* 1995, 69.

by the Public Prosecutor's Office in respectively 2006 and 2007.⁶⁹ Statistics from the period 2001-2004 also show an above average dismissal-rate for internet cases.⁷⁰ Because courts register cases (which can be comprised of several incidents) and the Prosecutor registers incidents, there are no conclusive findings yet, but it seems this trend is continuing.⁷¹ This trend is not in line with the policy of stepping up the fight against 'hate-sites' as announced by the Ministry of Justice.

4. In the so-called nightlife and catering industry (hotels, restaurants, cafes and clubs) discrimination occurs frequently, despite being prohibited under art. 137g (intent required) and art. 429quater Criminal Code (the misdemeanour-variant which requires no intent). The numbers of offences registered by the Public Prosecutor are very low (16 in 2007) compared to the frequency reported by media and research.⁷² The number of judgements is even lower, while the local anti-discrimination-bureau's statistics show that complaints about nightlife and catering-discrimination comprise 4,6% of the complaints they received in 2007 (a number of 195).⁷³
5. Discrimination based on gender is virtually invisible in the registration kept by police and Prosecutor. One reason may be that discriminatory defamation (art. 137c Criminal Code) produces the biggest volume of discrimination (while not covering the ground gender).
The reason behind excluding this ground was that the legislator feared a frustration of the emancipation-debate.⁷⁴ It is unclear why gender emancipation would be frustrated by creating the possibility for persons to be protected against such discrimination. Noticeably, there were no worries expressed about emancipation when the grounds sexual orientation and more recently disability were brought under the protection of art. 137c Criminal Code.
Even before reconsidering bringing the ground gender under the scope of the article, the question needs to be addressed whether the 0% discrimination-statistics on gender can be accounted for by another reason than merely its absence from one of the *four* discrimination-articles.⁷⁵
6. A decision of the Equal Treatment Commission has the same authority as a finding by the National Ombudsman. A court is not allowed to set such decision aside without giving reasons for doing so. This obligation not always fully complied with, as illustrated by the judgement of the Court of Rotterdam regarding the legitimacy of turning down an applicant for refusing to shake hands.⁷⁶
7. It is difficult to find a proper balance between the freedom of expression and the prohibition on discrimination. From policy as expounded by the government and case-law an imbalance seems to have reared its head in favour of freedom of expression for one group of society, namely the majority. An array of measures has been created aimed at putting an end to islamic radicalism. At the same time islamic radicalism is subject to a higher standard of scrutiny than for example the extreme-right.

⁶⁹ See chapter 'Jurisprudence' in: J. van Donselaar, P.R. Rodrigues (eds.). *Monitor Racism and Extremism*. Eighth report. (2008) Amsterdam/Leiden: Anne Frank Stichting/University Leiden, available at: www.monitorracisme.nl/content.asp?PID=251&LID=1 and www.annefrank.org/content.asp?PID=867&LID=2 [accessed 13 September 2009].

⁷⁰ Presentation P.R. Rodrigues at the ten-year anniversary of the MDI (Reporting Centre for Discrimination on the Internet), 17 March 2008.

⁷¹ MDI, Annual Report 2007, p. 15.

⁷² See also the test conducted by Tofik Dibi MP, of Moroccan descent, who was turned down at four popular clubs in Amsterdam. This generated a lot of media attention (*Het Parool* 29 mei 2007) and even questions in Parliament were asked: *Aanhangsel Handelingen II* 2006/07, 2635.

⁷³ I. Boog & M. Coenders, *Kerncijfers 2007. Jaaroverzicht discriminatieklachten bij antidiscriminatiebureaus en meldpunten*. Rotterdam: Landelijk Bureau Art.1 2008, online available at: www.art1.nl/artikel/6881-Kerncijfers.

⁷⁴ See A.J. Molhoek, 'Gewijzigde anti-discriminatie bepalingen in het Wetboek van Strafrecht', *LBR-Bulletin* 1992, nr. 1, p. 5.

⁷⁵ Art. 137d, 137e, 137f en 429quater Criminal Code.

⁷⁶ District Court Rotterdam, 6 August 2008, LJN BD9643, available at www.rechtspraak.nl/ljn.asp?ljn=BD9643, [accessed 13 September 2009].

It is questionable whether there can be effective protection with these prevalent practices. Recently they also accumulated attention in the case of Geert Wilders, a Member of Parliament whose political party espouses strong anti-islamic rhetoric. Several civilians and organisations made official complaints in response to the activities of this party..

Despite the controversy and unrest in Dutch society due to Wilders' activities (and abroad), the prosecuting authority decided to not press charges and dismissed the cases.

Keeping cases like this from going to court not only frustrates the protection against racism which the treaty aims to facilitate, but is also contrary to a specific obligation mentioned separately in the treaty: not to permit public authorities to discriminate.

However, fortunately in an appeal procedure against the dismissal decision of the Public Prosecutor, the Appeals Court in Amsterdam⁷⁷ decided that Wilders should be prosecuted for incitement to discrimination and for defamatory remarks about Muslims and immigrants.⁷⁸ During the time of finalising this report (September 2009), it became clear that the Prosecutor has initiated the prosecution, and the first day of the trial is set for January 2010.⁷⁹ The NGOs will follow this trial with interest.

The NGOs would like to ask the Committee to insist that the Dutch government:

- *Actively initiates prosecution of racist and discriminatory incidents;*
- *Takes better note of the gender aspect in criminal offences;*
- *Takes care that the freedom of speech has the same protection for all citizens, be it with a broad or narrow scope, and at the same time that the prosecution for discrimination follows one standard for everyone, regardless of racial, religious or political signature.*

⁷⁷ Appeals Court Amsterdam, 21 January 2009, LJN BH0496, available at www.rechtspraak.nl/ljn.asp?ljn=BH0496, [accessed 13 September 2009].

⁷⁸ See www.nrc.nl/international/article2126874.ece, [accessed 13 September 2009].

⁷⁹ See www.volkskrant.nl/binnenland/article1288622.ece, [accessed 13 September 2009].

4 LIST OF RECOMMENDATIONS

ARTICLE 2 (1): NON-DISCRIMINATION

The Dutch NGOs ask the Committee to urge the Dutch government:

- *to recognise the Roma and Sinti as a minority under the Framework Convention for the Protection of National Minorities and to involve Roma and Sinti at all levels of political decision making; and*
- *to refrain from introducing and maintaining administrative and other measures specifically aimed at the Antillean or Aruban community in the Netherlands.*
- *The Dutch NGOs ask the Committee to recommend the Dutch government to include the outcome of the Durban Review Conference in the development of its national anti-racism policies.*
- *The Dutch NGOs request the CERD Committee to give its opinion about the compatibility with the Convention of registration of the ethnicity of Antillean, Aruban or other non-western minorities in databases.*

ARTICLE 2 (2): SPECIAL AND CONCRETE MEASURES

The Dutch NGOs ask the CERD Committee to request the Dutch Government to specify:

- *Why has the Netherlands not ratified the Additional Protocol yet?*
- *When is the Netherlands going to ratify the Additional Protocol?*
- *What is the Netherlands going to do to make the prosecution process more effective?*

The Dutch NGOs suggest that the Committee asks the Dutch government to:

- *closely adhere to the definitions and other requirements of the Discrimination Instruction;*
- *develop a consistent and comprehensive registration system for discrimination-related crimes at short notice;*
- *minimize dismissals of discrimination cases by the police and the Prosecutor, to duly follow the requirements of the Discrimination Instruction and to register the dismissals consistently;*
- *allocate sufficient resources for preventive and curative measures to counter discrimination based on race or ethnicity.*

ARTICLE 4

The Dutch NGOs recommend the CERD Committee to request the Dutch Government to specify:

- *Why has the Netherlands not ratified the Additional Protocol to the Convention on cybercrime yet?*
- *When is the Netherlands going to ratify the Additional Protocol to the Convention on cybercrime?*
- *What is the Netherlands going to do to improve the effectiveness of? the prosecution process?*

The Dutch NGOs suggest that the Committee asks the Dutch government to:

- *closely adhere to the definitions and other requirements of the Discrimination Instruction;*
- *develop a consistent and comprehensive registration system for discrimination-related crimes at short notice;*

- *to duly follow the requirements of the Discrimination Instruction and to register the dismissals consistently;*
- *allocate sufficient resources for preventive and curative measures to counter discrimination based on race or ethnicity.*

ARTICLE 5 (E) AND (I): THE RIGHT TO WORK

- *The labour market position of ethnic minorities requires structural attention. The discontinuation of the Employment of Minorities (Promotion) Act ('Wet SAMEN') therefore is a matter of concern.*
- *The Dutch NGOs hope the Netherlands' Government will work on measures against discrimination that are effective and do more than just awareness raising.*
- *The Dutch NGOs would like to see the Dutch Government stimulate the use of affirmative action to improve the labour market position of ethnic minorities.*

ARTICLE 5 (E) (V): EDUCATION

- *The Dutch NGOs recommend the Committee to urge the Netherlands to (further) assess the issue of segregation in the field of education and to take up the task to have special attention in the curricula for language education at all levels.*
- *Furthermore the Dutch NGOs would like to ask the Committee to recommend the government to promote general awareness on diversity and multiculturalism for all persons at all levels of education.*

ARTICLE 6: LEGAL PROTECTION

The NGOs would like to ask the Committee to insist that the Dutch government:

- *Actively initiates prosecution of racist and discriminatory incidents;*
- *Takes better note of the gender aspect in criminal offences;*
- *Takes care that the freedom of speech has the same protection for all citizens, be it with a broad or narrow scope, and at the same time that the prosecution for discrimination follows one standard for everyone, regardless of racial, religious or political signature.*