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STOP AND SEARCH POWERS POSE A RISK TO HUMAN RIGHTS

Acknowledging and tackling ethnic profiling in the Netherlands

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INTRODUCTION

In October 2013, the Dutch section of Amnesty International published a report on ethnic profiling in the Netherlands: *Stop and search powers pose a risk to human rights. Acknowledging and tackling ethnic profiling in the Netherlands*.

This is an English summary of the conclusions and recommendations of the report.

The full report (in Dutch) can be downloaded at:

<http://www.amnesty.nl/nieuwsporaal/rapport/nederland-proactief-politieoptreden-vormt-risico-voor-mensenrechten-in-nederla>

With this report, Amnesty International seeks to contribute to the debate on respect for human rights in the exercise of stop and search powers and on measures to counter ethnic profiling in the Netherlands. The report focuses mainly on ethnic profiling in the use of stop and search powers: that is, the exercise of powers arising from the police's general supervisory powers, in which members of the public may be stopped or checked without being suspected of any criminal offence. In particular, the report examines the human rights safeguards against ethnic profiling in the implementation of the Compulsory Identification (Extended Scope) Act, the Road Traffic Act, preventive body searches (*preventief fouilleren*) and immigration control (checks for illegal stay).

In the view of Amnesty International, the practice of ethnic profiling in the Netherlands goes beyond the level of isolated incidents. Amnesty has analysed and put together existing studies of the implementation of police duties, policy on security and safety and discrimination, and concludes that ethnic profiling takes place. In addition, diverse experts and international human rights bodies, including the Human Rights Committee of the United Nations and the European Commission against Racism and Intolerance (ECRI), have expressed their concern about ethnic profiling in the Netherlands in recent years. They have called on the Dutch government to make more strenuous efforts to suppress ethnic profiling, inter alia by monitoring the way police duties are carried out. To date, however, the Dutch government has paid little heed to these recommendations.

The report contains recommendations for safeguarding human rights more effectively in proactive police work such as the exercise of stop and search powers. These recommendations to the Dutch government and police are based to a large extent on the recommendations issued by the ECRI and the European Union Agency for Fundamental Rights, and on studies and initiatives on tackling ethnic profiling. Amnesty International calls on the Dutch government and police to:

- acknowledge the existence of ethnic profiling and to reject this practice;
- make a more determined effort to prevent ethnic profiling; and to
- improve monitoring of the way proactive police duties are carried out.

WHAT IS ETHNIC PROFILING AND WHAT ARE ITS CONSEQUENCES?

Amnesty International Netherlands defines ethnic profiling as 'the use by the police, without any objective justification, of criteria or considerations relating to race, colour, ethnicity, nationality, language or religion in investigative work and law enforcement, whether at operational or organisational level'. The principles of equality and non-discrimination, as enshrined in international, European and national law, provide a clear basis for defining ethnic profiling as a form of discrimination.

Ethnic profiling manifests itself explicitly when police officers discuss migrants or certain ethnic minorities in terms of negative stereotypes, or when police officers openly cite someone's colour or ethnic origin as a reason for stopping or checking him or her. However, ethnic profiling is often based on unconscious assumptions or common stereotypes relating to certain ethnic minorities.

Ethnic profiling may also take the form of indirect discrimination. This is when a provision, measure or mode of conduct that appears neutral on the surface puts certain ethnic minorities at a particular disadvantage without there being any objective justification for it.

The consequence of ethnic profiling is that ethnic minorities are subjected disproportionately often to stop and search checks by the police, without there being any reasonable suspicion of guilt or individualised evidence prompting the check. Ethnic profiling is a form of discrimination that contributes to stigmatisation and serves to reinforce negative views of ethnic minorities. Ethnic profiling damages the legitimacy of the police, besides which studies carried out in other countries have shown that it does not enhance the effectiveness of police work in the fight against crime.

WHY THE CONCERN ABOUT ETHNIC PROFILING?

There is nothing new about ethnic profiling; nor is it a specifically Dutch practice. However, a range of social and political developments have deepened concerns about the practice of ethnic profiling in the Netherlands. The political and social climate has changed since the 1990s; attitudes to the position of ethnic minorities in Dutch society have shifted. There is less reluctance than in the past to express generalisations linking migration and ethnic minorities to crime and security issues. These changes in the social and political debate influence the way the police force performs its duties.

Certain developments in policy on security and public safety have also heightened concerns about the existence of ethnic profiling. In particular, the expansion of the discretionary powers of the police, the trend towards an 'intelligence-led police' and the policy priority of reinforcing the public's safety perception. The risk of ethnic profiling is particularly acute when the police has wide-ranging discretionary powers: when police officers are given a substantial degree of freedom in deciding when to stop or check people, without having any reasonable suspicion of a criminal offence. The discretionary powers of the Dutch police have been expanded considerably since the 1990s. This is in part a consequence of the introduction of preventive body searches (*preventief fouilleren*) in 2002, the introduction of the Compulsory Identification (Extended Scope) Act in 2005, and the growing priority in policy on security and safety accorded to a proactive approach to maintaining public order, most notably as related to 'youth nuisance' problems.

Dutch antidiscrimination policy does not accord specific priority either to tackling racial discrimination or to combating any possible discrimination on the part of the police. This makes it difficult in general to raise the issue of ethnic profiling. The importance of acknowledging and combating discrimination by the police is laid

down in several of the police's own policy documents. In policy, measures and training courses on diversity and ways of approaching it, the subject of ethnic profiling is raised obliquely and rarely addressed explicitly.

THE EXPLICIT ACKNOWLEDGMENT AND DISCUSSION OF ETHNIC PROFILING AS PART OF POLICE TRAINING

It is acknowledged within the Dutch police that basing the use of stop and search powers on the professional intuition of police officers is problematic. There is also recognition for the importance of suppressing discrimination by the police, and initiatives around the subject of diversity and multicultural expertise are being developed.

The following steps are recommended:

- The fact that ethnic profiling takes place should be acknowledged explicitly;
- More emphatic attention should be paid to the subject of ethnic profiling in the training of police officers. This should include discussions of the conscious or unconscious effects of thinking in terms of stereotypes, indirect discrimination, and the pitfalls of 'professional intuition'.

ETHNIC PROFILING TAKES PLACE: FURTHER INVESTIGATION IS NEEDED

Little research has been done to date in the Netherlands on the ways in which police officers decide who to stop and check during proactive checks. A research carried out within the Amsterdam-Amstelland of the selection mechanisms used by police officers was the first study of proactive police actions to deal explicitly with the considerations that play a role in the minds of police officers when they are deciding who to stop and check. It emerged from this study that police officers base these decisions on profiles of 'suspicious citizens'. These profiles are based to a large extent on characteristics such as age, colour, and ethnic origin. The study concluded that these stereotypes are dominant within the police force concerned. The result is that young men (more so than women) from ethnic minorities are subjected to more frequent checks than others. The police force management team at that time stated that it would take the study's conclusions and recommendations seriously and announced measures to tackle the problem.

Several studies have been carried out on proactive law enforcement by the police in response to 'youth nuisance'. Although these studies do not focus specifically on the selection of those subjected to checks, they do reveal that police officers frequently harbour stereotypes and prejudices regarding ethnic minorities that influence the chosen style of policing and decisions on which young people to stop and check. These studies do not in general contain assessments of the scale on which prejudices of this kind are present and influence police actions, but they do contain evidence that ethnic profiling takes place.

Ethnic profiling calls for a combined research approach

To gain a clear picture of the incidence of ethnic profiling, a combined research approach is needed. This means a combination of: targeted research on police actions (consisting, for instance, of observation research and in-depth interviews with police officers), research on experiences of discrimination, analyses of complaints alleging discrimination by the police, and an analysis of quantitative data on police checks.

More quantitative data on stop and search checks

To gain a clear picture of whether certain measures and powers have a disproportionate impact on ethnic

minorities, quantitative data are needed on the total number of occasions on which the police stop or check individuals, including cases that do not culminate in official reports or arrests. However, scarcely any statistics of this kind are available in the Netherlands: there is no systematic registration of the numbers of checks carried out on the basis of the Compulsory Identification (Extended Scope) Act, the Road Traffic Act or the Aliens Act. As for quantitative data regarding the persons subjected to checks, broken down by colour, age and sex, such data are not available at all.

The introduction of 'stop forms'

Studies conducted in other countries show that the use of 'stop forms' can be a useful instrument in identifying and dealing with ethnic profiling. In the stop form, police officers register facts such as the reason and statutory basis for the control, as well as the results, and relevant personal details of the person checked are registered, such as colour and ethnic origin. The use of stop forms can influence police officers, for instance to weigh carefully a decision to check someone. Aggregated data can shed more light on the question of whether ethnic minorities are being subjected to police checks more frequently than others.

The use of stop forms can also help to enhance the effectiveness of police work from the vantage point of crime prevention. Studies conducted in other countries show that basing police checks on ethnic profiles does not lead to higher 'hit rates': that is, the percentage of police checks that leads to an arrest or evidence that someone has broken the law. In contrast, such studies show that the use of stop forms can lead to higher 'hit rates'.

Further investigations of experiences of discrimination

Questionnaires focusing on experiences of discrimination show that a large proportion of individuals from ethnic minorities in the Netherlands have the impression that they have been stopped or checked by the police because of their colour and ethnic origin. It has emerged from qualitative studies that young people from ethnic minorities frequently experience discrimination by the police in proactive responses to 'youth nuisance'. Ethnic minority youths have the impression that the police discriminate against them and that they are subjected to more frequent checks than their white Dutch peers.

Conducting research on people's experience of discrimination is important in gaining a better understanding of ethnic profiling. Studies facilitated by the government on experiences of police on safety and security and police conduct, such as the Security Monitor, have thus far yielded only limited information on the different experiences that may exist between different sections of the population.

Analyses of complaints and the registration of discrimination

Mechanisms exist in the Netherlands for submitting complaints on discrimination by the police. Every year, antidiscrimination services and police complaints commissions receive several hundred complaints about police discrimination. These constitute evidence for the existence of ethnic profiling. However, a targeted analysis of registered complaints could provide more insight into the nature and possible patterns of ethnic profiling. Ensuring the proper registration of complaints and reports of discrimination is therefore key to efforts to identify and tackle ethnic profiling.

The following steps are recommended:

- Quantitative data should be collected on the number of people checked by the police, broken down by colour, age and ethnic origin.
- A pilot experiment should be conducted with the use of 'stop forms'.

- A perception study should be carried out on the public's experience of police actions, distinguishing between the experiences of white Dutch persons and members of ethnic minorities. This may reveal differences in experiences of police actions, and hence provide more insight into the extent and patterns of ethnic profiling.
- In the government-facilitated reports on complaints and registered incidents of discrimination, such as the reports issued by police complaints committees and the police's own registration of incidents involving discrimination (the Poldis Report), it should be made clear how many of the complaints and registered incidents of discrimination relate to the police.

PROACTIVE POLICE WORK: STRONGER SAFEGUARDS AND GOVERNMENT MONITORING

This report dwells specifically on the implementation of the Compulsory Identification (Extended Scope) Act, the Road Traffic Act, preventive body searches, and immigration control (checks for illegal stay). Police officers have ample scope for exercising their own discretion in applying these powers and in deciding which individuals they wish to stop or check, without the presence of any reasonable suspicion of guilt. The discussion of the use of these four proactive powers of inspection have focused on shortcomings in the statutory safeguards and guidelines, and in the government's monitoring of implementation. These are inadequate for the purpose of preventing ethnic profiling.

The following steps are recommended:

- The circumstances in which police officers are entitled to use discretionary powers should be described with the utmost clarity. The use of characteristics such as race, colour, and ethnic origin should be explicitly prohibited or defined with the greatest possible clarity.
- There should be better government monitoring of the way proactive stop and search powers are used. This should include a specific, targeted investigation to discover whether ethnic profiling takes place, and if so to what extent.

MOTIVATING ID CHECKS

With the introduction of the Compulsory Identification (Extended Scope) Act (WUID) in 2005, police officers acquired far greater powers to perform ID checks. The WUID gave police officers the power to ask to see someone's ID if this is 'reasonably considered necessary for the performance of police duties'. The absence of any systematic registration of the way these powers are used, combined with the broad definition of these powers, increases the risk of arbitrariness and the discriminatory use of powers. Government monitoring of the implementation of the WUID does not contain any targeted analysis of the occurrence of ethnic profiling. The government-facilitated studies of the implementation of the WUID have been limited in scope: they do not include any perception research on experiences of discrimination, nor do they contain a quantitative analysis of the question of whether members of ethnic minorities are subjected to ID checks more frequently than others. Nonetheless, these studies do provide evidence that ethnic profiling takes place. They do not include any analyses of this phenomenon, however.

The following steps are recommended:

- It should be made obligatory for police officers to register their reasons for asking to see someone's ID, including cases in which those concerned respond to the request and are able to show their ID.
- The guidelines for using the power to ask to see people's ID should be clarified, inter alia in the context of proactive police responses to 'youth nuisance'.
- Government monitoring of the implementation of the WUID should be improved by carrying out a targeted analysis of the incidence of ethnic profiling. A pilot experiment with the use of 'stop forms' would be useful in this regard.

CLARIFICATION OF THE ROAD TRAFFIC ACT GUIDELINES

Under the terms of the Road Traffic Act, the police can check vehicles in the interests of road safety, for instance when a traffic violation has been observed or a vehicle displays some visible defect. However, it has become increasingly common for the powers of the police to perform checks on the basis of the Road Traffic Act to be used for the purposes of investigation, sometimes in relation to persons who are not suspected of having committed any criminal offence, or without any individualised evidence prompting the check. To date, there has been no government monitoring of this application of powers under the Road Traffic Act.

The following steps are recommended:

- The guidelines for the use of powers conferred by the Road Traffic Act for investigative purposes should be clarified, so as to reduce the risk of the arbitrary and discriminatory application of these powers.
- Government monitoring should be carried out of the use of powers conferred by the Road Traffic Act for investigative purposes, including a targeted analysis of the incidence of ethnic profiling. In this respect too, an experiment with the use of 'stop forms' could make a useful contribution.

GUIDELINES FOR NON-SELECTIVE PREVENTIVE BODY SEARCHES

Within 'security risk areas', designated as such in advance for a specified period of time, members of the public can be subjected to a body search without being suspected of a criminal offence. The legal safeguards put in place to prevent ethnic profiling in this context are meagre. The statutory principle is that the police carry out such searches 'without discrimination'. Guidelines and instructions on how 'non-selective preventive body searches' should be operationalised are largely absent, however. In practice, police officers do in fact work selectively, and have considerable discretionary powers in deciding which persons to search. In addition, a practice has grown up of selective and 'intelligence-led' preventive body searches based on selection criteria drawn up in advance.

Government-facilitated studies of the way preventive searches are carried out in practice do not contain any targeted analysis of ethnic profiling. These studies do contain evidence that this practice exists, but they fail to subject this evidence to any analytical discussion.

The following steps are recommended:

- Clearer guidelines and instructions should be drawn up for the way powers to conduct non-selective preventive body searches should be applied in practice.
- When selection criteria are applied in preventive body searches, it must be ensured that these do not constitute indirect discrimination.
- Targeted research should be carried out on the occurrence of ethnic profiling in the practice of preventive body searches. Government monitoring of this practice should also focus on the possible occurrence of indirect discrimination, most notably in the light of the practice that has arisen of carrying out preventive body searches selectively, and the desire to do so as expressed by municipal authorities and the police.

MONITORING IMMIGRATION CONTROL PRACTICES

Under the terms of the Aliens Act, the police have the power to check individuals' residence status if they have an objectively justified 'reasonable suspicion of illegal stay'. The Aliens Act thus has a certain built-in safeguard to prevent ethnic profiling. Irregular migrants can also be stopped, however, on the basis of powers that are unrelated to aliens law; in such cases, there are fewer safeguards in place to prevent ethnic profiling.

The basic principle is that immigration control should be carried out with the 'minimum inconvenience to third parties'. In other words, it must be avoided, as far as is possible, that people who are lawfully resident in the Netherlands are checked for suspected illegal stay. Since there is no systematic registration of the number of police checks that are carried out, it cannot be verified to what extent these checks actually keep to the principle of causing 'minimum inconvenience to third parties'. In consequence, it is not known how many people who are lawfully resident in the Netherlands are checked for illegal stay.

In the context of analysing immigration control, Amnesty International analysed the 'Kennemerland bus project' (the detailed findings are enclosed as a supplement to the report). From 2009 to 2011, Kennemerland police observed 'women with a Negroid appearance' who travelled by bus from Amsterdam to the Kennemerland region. Aliens police officers waited for the women at Haarlem station and followed the buses in a covert operation. They suspected that the women were irregular migrants who were working illegally as domestic workers. The Council of State eventually ruled that this use of the power to stop and check individuals was unlawful. There is no evidence that the 'bus project' is typical of the way in which immigration control is carried out in the Netherlands. However, this case does shed light on ethnic profiling processes, and illustrates a number of concerns about its occurrence in the context van checks for illegal stay.

The Dutch government has not commissioned an evaluation of immigration control since 2004. The findings of this report clearly demonstrate the need for strong government monitoring of current practices in immigration control.

The following steps are recommended:

- Government monitoring procedures should be carried out that will shed light on the following: (1) How many people who are lawfully resident in the Netherlands are subjected to checks on the suspicion of illegal stay (whether under the terms of the Aliens Act or on the basis of powers unrelated to aliens law); (2) The use of powers unrelated to aliens law for checks for illegal stay, in particular the

Compulsory Identification (Extended Scope) Act and the Road Traffic Act. A pilot experiment with 'stop forms' could shed light on the extent to which this takes place.

- The guidelines for the application of an objectively justified reasonable suspicion of illegal stay should be clarified, to prevent people being checked for illegal stay wholly or partly on the grounds of their colour or ethnicity.
- The guidelines for the way in which police units and police officers are expected to implement a number of the policy priorities laid down in policy on irregular migrants should be clarified. These policy priorities include that of stopping irregular migrants who are responsible for criminal offences or causing a public nuisance.



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