

**AMICUS BRIEF**

Presented by:

**The UN Special Rapporteur on contemporary forms of racism, racial discrimination,  
xenophobia and related intolerance**

Before:

**The Dutch Immigration and Naturalisation Service**

In the case of:



Date:

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## I. INTRODUCTION

1. The United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume, submits this brief as *amicus curiae* to the Dutch Immigration and Naturalisation Service (IND). The case before the IND concerns the revocation of Dutch citizenship of persons with dual nationality convicted of terrorism-related crimes by final decision on the basis of Article 14, paragraph 2, sub b, of the Dutch Nationality Act (“DNA”) taken together with Article 14, paragraph 8, DNA.
2. This submission by the Special Rapporteur is provided on a voluntary basis without prejudice to, and should not be considered as a waiver of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with her independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

## II. THE INTEREST OF THE SPECIAL RAPPORTEUR IN THE RESOLUTION OF THIS MATTER

3. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the Kingdom of the Netherlands ratified on December 10, 1971, establishes the obligations of State parties to respect and ensure racial equality and the right to be free from racial discrimination. Several other human rights treaties also contain prohibitions on racial discrimination and other forms of discrimination, including the International Covenant on Civil and Political Rights (ICCPR), which the Netherlands ratified on December 11, 1978.
4. The Human Rights Council, the central human rights institution of the United Nations (“UN”), has affirmed that “racism, racial discrimination, xenophobia and related intolerance condoned by governmental policies violate human rights, as established in the relevant international and regional human rights instruments, and are incompatible with democracy, the rule of law and transparent and accountable governance.”<sup>1</sup> The Human Rights Council has also urged “[g]overnments to summon the necessary political will to take decisive steps to combat racism in all its forms and manifestations.”<sup>2</sup>
5. As a State party the Kingdom of the Netherlands is bound to uphold its human rights obligations under ICERD, ICCPR, and other international human rights law treaties “in good faith”<sup>3</sup> and may not invoke “the provisions of its internal law as justification for its failure to perform a treaty.”<sup>4</sup>
6. With regard to all issues and alleged violations falling within the purview of her mandate, UN Human Rights Council resolution 7/34 mandates the Special Rapporteur “to investigate and make concrete recommendations, to be implemented at the national, regional and international

<sup>1</sup> A/HRC/RES/38/19.

<sup>2</sup> A/HRC/RES/7/33.

<sup>3</sup> Vienna Convention on the Law of Treaties, art. 26.

<sup>4</sup> Vienna Convention on the Law of Treaties, art. 27.

levels, with a view to preventing and eliminating all forms and manifestations of racism, racial discrimination, xenophobia and related intolerance.”<sup>5</sup> Under the mandate, these recommendations are based on an analysis of international human rights law, including relevant jurisprudence, standards, and international practice, as well as relevant regional and national laws, standards, and practices.

7. The laws at issue in this case raise critical issues concerning their compatibility with international human rights law and the degree to which they infringe upon fundamental rights to racial equality and to be free from racial discrimination. Since assuming the mandate, the Special Rapporteur has reported on numerous manifestations of xenophobia and racial discrimination against migrants, racial, ethnic and religious minorities, and populations otherwise perceived as “foreign.”<sup>6</sup> Previous mandate holders and the current Special Rapporteur have documented racial discrimination that States have perpetrated or tolerated through reliance on distinctions based on citizenship status and other allegedly neutral distinctions.<sup>7</sup> The mandate has also documented numerous practices of racial discrimination in counterterrorism context.<sup>8</sup> The present case raises concerns in this general vein.
  
8. In this brief, the Special Rapporteur explains that the Netherlands’ policy of stripping dual nationals of citizenship in the national security context is inconsistent with the Netherlands’ international human rights law obligations. The Netherlands’ citizenship revocation policies discussed in this brief bifurcate Dutch citizenship such that mono and dual nationals are *de facto* accorded differential rights on the racialized bases of national origin and descent. Stripping dual nationals convicted of terrorism-related crimes of their Dutch citizenship thus raises the credible concern that doing so is in violation of the Netherlands’ obligations not to discriminate on the basis of race, ethnicity, national origin, or descent and not to rely on distinctions that have racially disparate effects.
  
9. The Special Rapporteur also wishes to call attention to previous findings within the UN human rights system that serve as an important reminder that historically, citizenship stripping has been a favoured political tool of ethnonationalist governments wishing to isolate, marginalize or exclude certain racial, ethnic, religious, and national groups.<sup>9</sup> This dark historical and contemporary practice has no place in a liberal democracy founded on human rights principles.

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<sup>5</sup> A/HRC/RES/7/34.

<sup>6</sup> A/HRC/38/52.

<sup>7</sup> See e.g., A/HRC/38/52; A/HRC/32/50.

<sup>8</sup> See e.g., A/72/287; A/HRC/35/41.

<sup>9</sup> See A/HRC/7/23, paras. 20-27 (in which the then-UN Independent Expert on Minority Issues explains the discriminatory history of citizenship-stripping and denial of citizenship); Lawrence Preuss, *International Law and Deprivation of Nationality*, 23 GEO. L.J. 250, 274-75 (1934) (concluding that “[l]egislation imposing the loss of nationality as a penalty is primarily dictated by political motives, and is designed to rid the state of citizens whose conduct is deemed inconsistent with their obligations of loyalty to the state, or, more accurately, to the government in power.”). For specific examples, see A/HRC/RES/34/22, para. 5 (calling for Myanmar to review its 1982 Citizenship Law because the law results in human rights deprivations and contributes to “systematic and institutionalized discrimination against members of ethnic and religious minorities”); E/CN.4/RES/1987/14 (denouncing Apartheid South Africa’s practices of denationalizing and forcibly removing Black South Africans, and noting that Apartheid denied Black South Africans full citizenship rights); A/HRC/WG.6/12/SYR/3, para. 60-64 (discussing the effects of Syria’s denial of citizenship to its Kurdish minority); CERD/C/SDN/CO/12-16 (noting that Sudan’s citizenship revocation policies discriminated against South Sudanese populations); CCPR/C/NLD/QPR/5, paras. 10-11 (noting that the Netherlands counterterrorism measures, which include revocation of citizenship for certain offenses, may perpetuate discrimination against minority populations).

States, including the Netherlands, have international human rights law obligations to eliminate racial discrimination in whatever form it takes. Judicial and administrative tribunals have an important role to play in the fulfilment of these obligations, including by upholding the law on equality and non-discrimination even in the face of political projects that exploit popular anxieties about national security to legitimize the *de facto* expulsion of certain racial, ethnic, or national groups.<sup>10</sup>

### III. THE NETHERLANDS' EQUALITY AND NON-DISCRIMINATION OBLIGATIONS UNDER INTERNATIONAL LAW AND THEIR APPLICABILITY TO NATIONALITY AND COUNTER-TERRORISM LAW AND POLICY

#### *Equality and Non-Discrimination in International Human Rights Law*

10. At the outset, the Special Rapporteur emphasizes that international human rights law is based on the premise that all persons, by virtue of their humanity, should enjoy all human rights without discrimination on any grounds. The principles of equality and non-discrimination are therefore codified in all core human rights treaties.<sup>11</sup> The Kingdom of the Netherlands is State party to several of these treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of Racial Discrimination (ICERD), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC).<sup>12</sup> These instruments impose legally binding obligations on the Netherlands with regard to the principles of equality and non-discrimination.
11. In their discussions of State obligations to ensure equality and non-discrimination, United Nations treaty bodies have frequently stated that the rights enshrined in international human rights treaties must generally be guaranteed to everyone, including persons belonging to national, religious, racial and ethnic minorities.<sup>13</sup> With very few exceptions, States must also ensure that non-nationals receive equal and non-discriminatory treatment.<sup>14</sup>
12. The most comprehensive prohibition of racial discrimination can be found in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 1(1) defines racial discrimination in broad terms as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the

<sup>10</sup> A/HRC/38/52, paras. 54-59, 63.

<sup>11</sup> See ICERD arts. 1 & 2; see also ICCPR arts. 2(1) & 26; ICESCR art. 2(2); CEDAW art. 1; CRC art. 2(1)-(2).

<sup>12</sup> Office of the United Nations High Commissioner for Human Rights, Ratification Status for Netherlands, available at [https://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=123&Lang=EN](https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=123&Lang=EN).

<sup>13</sup> See Human Rights Committee general comment No. 18; Committee on the Elimination of Racial Discrimination general recommendations Nos. 22, 23, 25, 27, 29, 30 & 34; Committee on Economic, Social and Cultural Rights general comment No. 20.

<sup>14</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 30; Human Rights Committee general comment No. 18.

recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>15</sup>

13. The Committee on the Elimination of Racial Discrimination has explained that discrimination on grounds that are not strictly listed in article 1(1) may still be considered as impermissible discrimination in contravention of ICERD. Where multiple forms of discrimination are concerned, the Committee will adopt an intersectional approach and extend the categories of impermissible discrimination if the unlisted ground of discrimination “appears to exist in combination with a ground or grounds listed in article 1 of the Convention.”<sup>16</sup> In line with this intersectional approach, the Committee held that the Convention may apply in cases involving discrimination on religious grounds. Although article 1(1) does not explicitly mention discrimination on the basis of religion, a violation of the Convention may be found where discrimination on religious grounds intersects with other forms of discrimination on any of the grounds that are specifically prohibited under article 1(1).<sup>17</sup> Similarly, the Committee has expressed concerns about distinctions on the basis of dual nationality<sup>18</sup> or citizenship status<sup>19</sup> because they “could give rise to discriminatory practices contrary to [ICERD].”<sup>20</sup>
14. The prohibition of racial discrimination applies to the enjoyment of all civil, political, economic, social and cultural rights.<sup>21</sup> The Committee on the Elimination of Racial Discrimination recalls this point in its general recommendation no. 20. Noting that the list of rights protected under article 5 of the Convention is non-exhaustive, the Committee emphasizes that States are required to eliminate racial discrimination and guarantee the right to equality before the law in the enjoyment of all human rights and fundamental freedoms.<sup>22</sup>

*International Human Rights Law Prohibits Racial Discrimination in Purpose or Effect*

15. The prohibition on racial discrimination in international human rights law aims at much more than a formal vision of equality. Equality in the international human rights framework is substantive, and requires States to take action to combat intentional or purposeful racial discrimination, as well as to combat *de facto* or unintentional racial discrimination.
16. This broad understanding of racial discrimination is enshrined in article 1(1) of the ICERD, which stipulates that any distinction, exclusion, restriction or preference based on prohibited grounds must be considered as racial discrimination when it has “*the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms [...]*”<sup>23</sup> In its general recommendation No. 32, the Committee on the

<sup>15</sup> ICERD, art. 1(1).

<sup>16</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 32, para. 7.

<sup>17</sup> See e.g., Committee on the Elimination of Racial Discrimination general recommendation No. 32, para. 7; P.S.N. v. Denmark (CERD/C/71/D/36/2006), para. 6(3).

<sup>18</sup> See e.g., CERD/C/75/D/42/2008; CERD/C/RWA/CO/18-20.

<sup>19</sup> CERD/C/AUS/CO/24, para. 14.

<sup>20</sup> CERD/C/RWA/CO/18-20, paras. 8-9.

<sup>21</sup> ICCPR art. 2; ICESCR art. 2(2); ICERD art. 5; see also Committee on the Elimination of Racial Discrimination general recommendation No. 20, para. 1.

<sup>22</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 20, para. 1.

<sup>23</sup> ICERD, art.1(1) (emphasis added).

Elimination of Racial Discrimination further reiterates that the prohibition of racial discrimination in the Convention cannot be interpreted restrictively.<sup>24</sup> According to the Committee, racial equality not only aims to achieve formal equality before the law and equal protection of the law, but also substantive (*de facto*) equality in the enjoyment and exercise of human rights. This means that States are required to eliminate purposive or intentional discrimination as well as discrimination in effect<sup>25</sup> and structural forms of discrimination.<sup>26</sup>

17. In its jurisprudence, the Committee on the Elimination of Racial Discrimination also emphasizes that prohibited racial discrimination can occur even in the absence of discriminatory intent. In *Laurent Gabre Gabaroum*, the Committee recalled that “presumed victims of racial discrimination are not required to show that there was discriminatory intent against them”. The Committee ultimately held that the persistence of national courts “in requiring the petitioner to prove discriminatory intent runs counter to the Convention’s prohibition against any and all behaviour that has a discriminatory effect.”<sup>27</sup>
18. The Special Rapporteur stresses that this substantive, non-formalistic approach to equality applies even in the context of laws, policies, and practices concerning citizenship, nationality, expulsion, counter-terrorism and national security. Such laws and policies may be considered discriminatory even if they are formulated in neutral terms and without explicit discriminatory animus.
19. The Committee on the Elimination of Racial Discrimination has frequently recognized this point in its general recommendations, jurisprudence, and concluding observations. In its general recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee expresses concern about the “potential indirect discriminatory effects of certain domestic legislation, particularly legislation on terrorism, immigration, nationality, banning or deportation of non-citizens from a country as well as legislation that has the effect of penalizing without legitimate grounds certain groups or membership of certain communities.”<sup>28</sup> In this context, the Committee urges States to eliminate the discriminatory effects of such legislation and recalls that the principle of proportionality must be respected when such laws are applied to persons belonging to racial or ethnic groups, non-citizens, or individuals belonging to other vulnerable groups that are particularly exposed to exclusion, marginalization and non-integration in society.<sup>29</sup> Similarly, in its general recommendation No. 30, the Committee calls upon States to ensure that immigration policies and counter-terrorism measures do not have the effect of discriminating on any of the grounds prohibited under the Convention.<sup>30</sup> This includes the duty to ensure that the administration of justice does not result in harsher punishments solely because a person accused of terrorism offences belongs to a specific racial or ethnic group.<sup>31</sup>

<sup>24</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 32, paras. 6-10.

<sup>25</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 32, paras. 6-7.

<sup>26</sup> See e.g., Committee on the Elimination of Racial Discrimination general recommendation No. 34, paras. 5-7.

<sup>27</sup> CERD/C/89/D/52/2012, para. 7(2).

<sup>28</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 31, para. 4(b).

<sup>29</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 31, para. 4(b).

<sup>30</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 30, paras. 9-10.

<sup>31</sup> See Committee on the Elimination of Racial Discrimination general recommendation No. 31, para. 34.

The same must be true of national origin and descent, as discrimination on both these grounds constitutes prohibited racial discrimination under ICERD.

*The Prohibition of Racial Discrimination in International Human Rights Law is Absolute*

20. Although international human rights law allows for legitimate limitations, derogations, and reservations, States may only exercise these restrictions under strict circumstances. Even in exceptional situations, certain human rights must apply at all times as they impose immediate and absolute obligations on States.<sup>32</sup> The prohibition of racial discrimination clearly falls within the category of rights that cannot be restricted under any circumstances.<sup>33</sup> Indeed, the prohibition of racial discrimination is widely recognised as part of customary international law, meaning that discrimination on grounds of race or ethnicity is never permissible and that States' obligations in this area do not permit limitations or derogations,<sup>34</sup> even in a state of emergency or in exceptional situations that may arise in the context of national security or the fight against terrorism.<sup>35</sup>
21. The Committee on the Elimination of Racial Discrimination has emphasized that any restriction on human rights will be illegitimate if it entails racial discrimination. States that impose such restrictions must ensure that "neither in purpose nor effect is the restriction incompatible with article 1 of the Convention as an integral part of international human rights standards."<sup>36</sup> Even where the restriction of human rights does not involve racial discrimination per se, States must demonstrate the necessity of any restriction made, only take measures that are proportionate to the pursuance of legitimate aim, and ensure that the essence of the concerned right is not impaired.<sup>37</sup>
22. Where evidence of racial discrimination exists, States have an obligation to investigate any credible claims<sup>38</sup> and to review its laws to ensure their compliance with international human rights law.<sup>39</sup> With regard to non-criminal proceedings, a credible claim from a victim is enough to require the defending party to justify that its distinctions are permissible and non-discriminatory under international human rights law.<sup>40</sup> The Committee on the Elimination of

<sup>32</sup> See Human Rights Committee general comment No. 29.

<sup>33</sup> Human Rights Committee general comment No. 29, para. 8.

<sup>34</sup> See A/72/287, para. 47; see also *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, 32 ("[E]rga omnes . . . obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.").

<sup>35</sup> See e.g., A/HRC/7/23, para. 35; ICCPR art. 4(1).

<sup>36</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 20, para. 2.

<sup>37</sup> See e.g., Human Rights Committee general comment No. 31, para. 6.

<sup>38</sup> A/HRC/34/30, para. 53.

<sup>39</sup> See CERD/C/AUS/CO/24, para. 14 (recommending that Australia "review its policies, taking into consideration the fact that, under the Convention, differential treatment based on citizenship or immigration status would constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."); see also A/HRC/14/43/Add.2 (recommending Germany review restrictions on wearing religious symbols because it potentially discriminates against Muslim women).

<sup>40</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 32, para. 8; general recommendation No. 30, para. 24.



Racial Discrimination observed that differential treatment will “constitute discrimination if the criteria for such differentiation, judged in the light of the objective and purpose of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”<sup>41</sup> The Committee noted that “to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.”<sup>42</sup>

23. The Committee further clarified that differential treatment may be permissible only if there is an objective and reasonable justification for such differential treatment i.e. when there are significant differences in situation between one person or group and another. In this connection, the Committee concluded that “to treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same.”<sup>43</sup>

*States’ Nationality Decisions and Counterterrorism Measures, Which Often Entail Interference with Individuals’ Human Rights, Are Not Exempt from International Human Rights Law Prohibitions on Racial Discrimination*

24. The Special Rapporteur wishes to reiterate that a State may not rely on either the general domestic character of nationality decisions or the urgency of implementing counterterrorism measures to justify its discriminatory practices or tolerance of racial discrimination. Similarly, a State must not overlook the significant human rights harms that these policies may entail.

25. Any deprivation of citizenship entails considerable interference with one’s enjoyment of human rights;<sup>44</sup> some members of the UN human rights system have suggested that this interference is so substantial that any deprivation of citizenship is per se incompatible with international human rights law.<sup>45</sup> Although loss of citizenship resulting in statelessness is considered especially severe,<sup>46</sup> any such deprivation of nationality threaten the security of that individual’s enjoyment of their human rights. Along with the human rights to be free from discrimination and to due process, the myriad human rights law violations stemming from citizenship-stripping include:

- the right to an effective remedy and to equality before the law;
- the right to be free from exposure to risk of torture or ill-treatment;
- the right to freedom of movement, including the right to return to one’s own country;

<sup>41</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 32, para. 8; general recommendation No. 30, para. 4; *see also* general recommendation No. 14, para. 2.

<sup>42</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 14, para. 2.

<sup>43</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 32, para. 8.

<sup>44</sup> *See* A/HRC/25/28, para. 4 (“Any interference with the enjoyment of nationality has a significant impact on the enjoyment of rights.”).

<sup>45</sup> E/CN.4/Sub.2/1988/35, para. 107 (“In view of Human Rights law, denationalization should be abolished. It constitutes a breach of international obligations, in particular, if it is based on racial or religious discrimination. . . . The recognition of the right to nationality as a basic human right, in effect, limits the power and freedom of a State arbitrarily to deprive its citizens of nationality.”).

<sup>46</sup> U.N. Doc. A/HRC/25/28, para. 4.

- the enjoyment of a citizen's political rights, including right to vote;
  - a range of socioeconomic rights, including rights to work, social security, adequate housing, and health; and
  - the right to family life.<sup>47</sup>
26. International human rights law also recognizes the impermissible human rights harms that citizenship stripping inflicts upon families. Often, States use revocation of an individual's citizenship as the basis to revoke the citizenship of the individual's spouse and children. In cases where expulsion accompanies citizenship revocation, States routinely expel entire families; such practices violate international human rights law.<sup>48</sup> Of particular concern in these cases are the gross violations of children's explicit, independent rights to preserve their identity and nationality.<sup>49</sup> International human rights law does not permit States to discriminate against or punish a child for "the past opinions or activities of the child's parents."<sup>50</sup> Notably, the Netherlands does not provide sufficient protection against this type of violation of children's rights.<sup>51</sup>
27. The European Court of Human Rights has similarly recognized the vulnerability arising from arbitrary decisions about nationality. The Court has previously concluded that arbitrary denial or deprivation of nationality can violate the right to respect for private and family life,<sup>52</sup> and that arbitrary distinctions between naturalized citizenship and citizenship acquired through birth can give rise to a violation of the European Convention's prohibition of discrimination.<sup>53</sup>
28. Although the regulation of nationality is generally considered to be within the domestic jurisdiction of States, international law provides that the right of States to decide who their nationals are is not absolute and must be exercised in compliance with relevant provisions of international human rights law, including those relating to non-discrimination.<sup>54</sup> ICERD article 1(1) prohibits discrimination on the basis of race, ethnicity, descent or national origin, and where state law and policy on nationality intentionally or as a matter of effect discriminates on

<sup>47</sup> See generally A/HRC/19/43.

<sup>48</sup> A/HRC/25/28, para. 24.

<sup>49</sup> A/HRC/25/28, para. 24.

<sup>50</sup> A/HRC/31/29, para. 8; see also CRC/C/15/Add.196, para. 29(d).

<sup>51</sup> Compare Dutch standards on the loss and revocation of Dutch citizenship, *Loss and the revoking of Dutch nationality*, IMMIGRATIE EN NATURALISATIEDIENST, <https://ind.nl/en/dutch-citizenship/Pages/Loss-and-the-revoking-of-Dutch-nationality.aspx> (last accessed Oct. 21, 2018), with guidance from the UN human rights system, A/HRC/31/29, para. 8; A/HRC/25/28, para. 24; CRC/C/15/Add.196, para. 29(d).

<sup>52</sup> See *Karashev v. Finland*, decision of 12 January 1999 (finding that arbitrary denial of citizenship can affect the right to respect for private and family life); *Genovese v. Malta*, judgment of 11 October 2011 (same). In *K2 v. the United Kingdom* (application no. 42387/13), the Court explained that arbitrary deprivation of nationality in the terrorism context can interfere with the right to respect for private and family life. Although the application in *K2* was ultimately deemed inadmissible, that inadmissibility finding is heavily fact-contingent. See Shaheed Fatima Q.C., *Keeping K2 (European Human Rights Court Decision on Citizenship-Stripping) in Perspective*, JUST SECURITY (May 10, 2017), <https://www.justsecurity.org/38647/keeping-k2-european-human-rights-court-decision-citizenship-stripping-perspective/> ("At first glance this admissibility decision might seem to be of general significance but it is actually highly fact-specific and does not substantively address the single material general issue of principle raised by the applicant, i.e. the potentially discriminatory effect of the relevant citizenship-stripping laws.").

<sup>53</sup> *Case of Biao v. Denmark*, Judgment (Merits and Just Satisfaction) of May 5, 2016, App. 38590/10.

<sup>54</sup> See A/HRC/13/34, paras. 20, 57.

any of these bases, such law and policy are prohibited. ICERD article 1(3) stipulates that the Convention applies to legal provisions of States Parties concerning nationality and citizenship when such provisions discriminate against any particular nationality. Furthermore, ICERD article 5(d)(iii) explicitly obliges States parties to guarantee the right of everyone to equality before the law, including in the enjoyment of the right to nationality.

29. A similar right to equality before the law and equal protection of the law is enshrined in article 26 of the ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>55</sup>

The Human Rights Committee has explained that rights under article 26 are autonomous from article 2 of the ICCPR and other anti-discrimination provisions.<sup>56</sup> Instead of ensuring freedom from discrimination in individuals' enjoyment of ICCPR rights, article 26 "prohibits discrimination in law or in fact in any field regulated and protected by public authorities."<sup>57</sup>

30. In its general recommendations, the Committee on the Elimination of Racial Discrimination has reiterated that the deprivation of citizenship on the basis of race, colour, descent or national or ethnic origin violates States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality.<sup>58</sup> The Special Rapporteur highlights that States' obligations to ensure equality and non-discrimination with regards to the enjoyment of nationality apply with regard to all citizenship deprivation decisions, not only in cases where deprivation of citizenship might result in statelessness.
31. The Committee on the Elimination of Racial Discrimination regularly expresses concerns about the deprivation of nationality, including of dual nationals, in its concluding observations.<sup>59</sup> In its 2015 concluding observations to Sudan, for example, the Committee recommended the amendment of the Nationality Act so as to ensure that "rules governing citizenship acquisition and deprivation apply equally to all without discrimination based on, *inter alia*, ethnicity and protect against statelessness."<sup>60</sup> Other treaty bodies have expressed similar concerns, noting that the revocation of nationality must comply with international human rights standards, including those relating to due process safeguards.<sup>61</sup> As part of its forthcoming review of the Netherlands' compliance with the ICCPR, the Human Rights Committee has asked the Netherlands to justify its citizenship-stripping policies and their likely

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<sup>55</sup> ICCPR, art. 26.

<sup>56</sup> Human Rights Committee general comment 18, para. 12.

<sup>57</sup> Human Rights Committee general comment 18, para. 12.

<sup>58</sup> See Committee on the Elimination of Racial Discrimination general recommendation No. 30, para. 14; general recommendation No. 34, para. 48.

<sup>59</sup> See *e.g.*, CERD/C/SDN/CO/12-16; CERD/C/KEN/CO/1-4; CERD/C/TKM/CO/8-11; CERD/C/RWA/CO/18-20.

<sup>60</sup> CERD/C/SDN/CO/12-16.

<sup>61</sup> See *e.g.*, CAT/C/JOR/CO/3; CAT/C/JOR/CO/3; CCPR/C/DNK/CO/6.

perpetuation of “stereotypes resulting in discrimination, hostility and stigmatization of certain groups such as Muslims, foreigners and migrants.”<sup>62</sup>

32. State decisions to deport individuals or non-citizens from its territory are similarly not exempt from non-discrimination prohibitions in international human rights law. Among other safeguards, the Committee on the Elimination of Discrimination has called on States to ensure that domestic legislation concerning deportations or other forms of removal do not discriminate, in purpose or effect, among non-citizens on the basis of race, colour, national or ethnic origin.<sup>63</sup> The Committee has also called on States to ensure that their deportation or expulsion practices: respect the principle of non-refoulement;<sup>64</sup> do not preclude individuals' equal access to effective remedies;<sup>65</sup> and do not disproportionately interfere with individuals' rights to family life.<sup>66</sup>
33. The applicability of non-discrimination obligations to the fight against terrorism is similarly beyond dispute.<sup>67</sup> United Nations Security Council and General Assembly resolutions acknowledge the potential adverse impact of counter-terrorism measures on human rights and racial equality,<sup>68</sup> and note that any measure taken to prevent and combat terrorism must comply with international law, including the Charter of the United Nations, human rights law, refugee law and international humanitarian law.<sup>69</sup>
34. In avoiding racial discrimination in the context of counterterrorism, States are obligated to ensure that race, ethnicity, national origin, descent or other distinctions do not interfere with equality before the law or result in the unequal administration of justice.<sup>70</sup> The current Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has emphasized that “[t]he principle of non-discrimination must always be respected and special effort must be made to safeguard the rights of vulnerable groups. Counter-terrorism measures targeting specific ethnic or religious groups are in breach of States' human rights obligations.”<sup>71</sup> Furthermore, human rights law prohibits racial profiling for counterterrorism purposes and requires States not to undertake acts that increase xenophobia or reinforce stereotypes about race, religion, ethnic or national origin and terrorism.<sup>72</sup>

<sup>62</sup> CCPR/C/NLD/QPR/5, para. 10.

<sup>63</sup> Committee on the Elimination of Racial general recommendation No. 30, paras. 25–28.

<sup>64</sup> Committee on the Elimination of Racial general recommendation No. 30, paras. 25–28.

<sup>65</sup> Committee on the Elimination of Racial general recommendation No. 30, paras. 25–28.

<sup>66</sup> Committee on the Elimination of Racial general recommendation No. 31, paras. 37, 40.

<sup>67</sup> A detailed analysis of the legal framework on the prohibition of racial discrimination in the context of counterterrorism can be found in reports published by the previous Special Rapporteur on racism, racial discrimination, xenophobia and related intolerance. *See* A/72/287, paras. 46–47; A/HRC/35/41, paras. 76–86.

<sup>68</sup> *See e.g.*, A/RES/60/288, Annex-Plan of Action, para. 3; S/RES/2178.

<sup>69</sup> *See e.g.*, A/RES/60/288, Annex-Plan of Action, para. 3; S/RES/2178.

<sup>70</sup> *See generally* ICERD art. 5; Committee on the Elimination of Racial Discrimination general recommendation No. 31; A/HRC/4/26, para. 41.

<sup>71</sup> A/HRC/37/52, para. 49.

<sup>72</sup> A/HRC/4/26, paras. 40, 50.

*Conclusion*

35. In sum, these standards require the Special Rapporteur to conclude that

- Laws, policies and practices concerning citizenship and nationality constitute a violation of international human rights law when they discriminate, in purpose or effect, on the basis of race, colour, descent, national or ethnic origin. Discrimination on the basis of other grounds may constitute racial discrimination when it intersects with any of the prohibited grounds. Relatedly, all citizens must be equal before the law.
- Laws, policies, and practices that disproportionately exclude or negatively affect a particular racial, ethnic or national group should also be considered as a breach of the prohibition of racial discrimination;
- Due to the absolute nature of the prohibition of racial discrimination, national security interests and the fight against terrorism can never serve as a justification for discrimination on the basis of race, colour, descent, national or ethnic origin;
- The prohibition of racial discrimination applies to discrimination in purpose and effect. This means that laws and policies may violate the prohibition of racial discrimination even if they appear neutral, if they discriminate on the basis of perceived race, and if they rely on a proxy for race or any distinction that serves as a pretextual justification for racial discrimination.

**IV. THE NETHERLANDS' CITIZENSHIP STRIPPING POLICIES ESTABLISH UNEQUAL CITIZENSHIP BETWEEN DUTCH MONO NATIONALS AND DUAL NATIONALS IN VIOLATION OF ITS INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS**

36. The Netherlands' policy to subject Dutch citizens to differential punishment on the basis of their mono or dual citizenship is inconsistent with its international human rights law. The Netherlands' policy to use individuals' status as Dutch mono or dual nationals to determine eligibility for citizenship revocation results in discriminatory tiers of citizenship: full citizenship for Dutch mono nationals and less-secure citizenship for Dutch dual nationals. Because this result contradicts its international human rights law obligations to guarantee equality before the law and equal protection of the law to all of its citizens, the Netherlands must not rely on any mono-/dual-nationality distinction in determining permissibility of citizenship revocation.

*The Netherlands Must Ensure that Dutch Mono and Dual Citizens Receive Equality Before the Law and Equal Protection of the Law, and Ensure that Dutch Mono and Dual Citizens Are Equally Able to Enjoy Their Human Rights*

37. Equality before the law and equal protection of the law provisions in human rights law, along with other provisions on equality and non-discrimination, significantly limit the Netherlands' discretion in establishing differential treatment or legal protection regimes for its citizens. Special measures to remedy discrimination excepted,<sup>73</sup> human rights law does not permit the Netherlands any meaningful discretion in differentiating between groups of its citizens in ways that restrict the rights of some, including on the basis of their national origin, descent and ethnic origin. Instead, the Netherlands must realize its ICERD and ICCPR commitments to ensure that all of its citizens equally enjoy their human rights, including protection of those

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<sup>73</sup> See generally Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (discussing States' obligations to undertake special measures to remedy discrimination).

rights must closely associated with citizenship<sup>74</sup> and protections against the severe harms caused by citizenship stripping.

38. Recent UN human rights jurisprudence suggests that States' differentiated and unequal protection regimes for dual nationals is a form of direct discrimination. The Working Group on Arbitrary Detention—a UN body tasked with reviewing arbitrary deprivation of liberty allegations—has issued several opinions confirming that dual nationality-based discrimination “aims towards or can result in ignoring the equality of human beings.”<sup>75</sup> In particular, the Working Group has concluded that Iran's targeting of dual nationals constitutes direct discrimination on the basis of “national or social origin,”<sup>76</sup> categories of discrimination explicitly proscribed in ICERD article 1,<sup>77</sup> ICCPR articles 2 and 26, and other international human rights instruments. Applying the Working Group's finding to the citizenship-stripping context mandates that States never use a mono-/dual-citizen distinction, as this distinction prevents dual nationals from enjoying equal treatment before the law and equal enjoyment of their human rights.<sup>78</sup>

*In Contravention of the Netherlands' International Human Rights Law Obligations, the Netherlands' Distinction Between Mono and Dual Citizens in Its Citizenship Stripping Policies Establishes a Regime of Discriminatory and Unequal Citizenship Rights for Dual Citizens*

39. The Netherlands' current citizenship revocation policies fail to satisfy these obligations. Instead of guaranteeing equality between its citizens, the Netherlands' mono-/dual-nationality distinction establishes two classes of Dutch citizenship, one secure and one contingent. The distinction between mono and dual nationals leaves undisturbed the rights of Dutch citizens who do not hold a second citizenship. In doing so, the law of the Netherlands treats mono nationals more favourably than their dual national counterparts in a manner that violates international human rights law. This disparate result on the basis of mono/dual nationality establishes unequal citizenship classes: whereas the Netherlands respect, protects and ensures the human rights of Dutch mono nationals, Dutch dual nationals enjoy only a second-class,

<sup>74</sup> Human rights law associates citizenship closely with the right to a nationality; the right to remain in and return to one's country; and the right to participate in elections. *See* Human Rights Committee general comment No. 18 para. 8 (explaining that States may distinguish between citizens and non-citizens with regard to voting rights); Committee on the Elimination of Racial Discrimination general recommendation 30 No. para. 3 (“Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.”); *see generally* Human Rights Committee general comment No. 27 (explaining the ICCPR art. 12 right to movement and to return to one's country, including the expansive concept of these rights that States owe to citizens).

<sup>75</sup> Working Group on Arbitrary Detention opinion No. 49/2017, paras. 3(e), 43-45.

<sup>76</sup> *See* Working Group on Arbitrary Detention opinion No. 7/2017, 39-40; opinion No. 49/2017, 43-45; opinion No. 28/2016, paras. 45-49.

<sup>77</sup> ICERD art. 1(1) (“In this Convention, ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”).

<sup>78</sup> This conclusion also reflects concerns expressed by the Human Rights Committee, which has specifically asked the Netherlands to explain its justification for its citizenship stripping policies, noting that this extreme measure is likely to perpetuate “stereotypes resulting in discrimination, hostility and stigmatization of certain groups such as Muslims, foreigners and migrants.” CCPR/C/NLD/QPR/5, para. 10.

conditional form of citizenship. The Netherlands' use of the mono-/dual-nationality distinction therefore prevents Dutch dual nationals from enjoying equality in citizenship, rights and legal protections, a result that violates, inter alia, ICCPR article 26 and ICERD articles 5(a) and 5(d)(iii).

40. That Dutch mono nationals require protection against statelessness is indisputable. However, protection of mono nationals from statelessness cannot be a legal justification or defence for exposing dual nationals to citizenship stripping. The Dutch government has found alternative means of punishing and deterring national security threats posed by mono nationals, and it should do the same for dual nationals. By failing to treat mono and dual nationals as equals in this respect, the Netherlands citizenship stripping policies far exceed a simple affirmation of protection against statelessness. Rather, these policies recast dual nationals' citizenship as contingent in a manner that cannot be reconciled with obligations of equal citizenship.

### *Conclusion*

41. The Netherlands has an international human rights law obligation to ensure that citizens enjoy equal status before the law and equal protection of the law. The Netherlands also has an obligation to ensure that its citizens are equally able to exercise their human rights. The mono-/dual-nationality distinction in its citizenship revocation policies establish unequal classes of citizenship that prevent the Netherlands from upholding these human rights obligations. Accordingly, the Netherlands must abandon its use of this distinction.

## **V. BECAUSE THE NETHERLANDS' MONO-/DUAL-NATIONALITY DISTINCTION IN EFFECT EXCLUDES ON THE BASIS OF NATIONAL ORIGIN, ETHNICITY AND DESCENT, THE NETHERLANDS CITIZENSHIP STRIPPING POLICIES ARE RACIALLY DISCRIMINATORY IN VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW**

42. The Netherlands' mono-/dual-nationality distinction not only results in unequal classes of citizenship, but does so on a racially discriminatory basis. Although ICERD does not extend to every aspect of nationality and citizenship law, States must not discriminate on the basis of race, ethnicity or national origin when deciding whether to deprive an individual of their citizenship.<sup>79</sup> Accordingly, the Netherlands' mono-/dual-nationality distinction is incompatible with the Netherlands' international human rights obligations.

*As Several UN Human Rights Bodies Have Previously Emphasized, the Netherlands Has a Human Rights Obligation to Ensure that Its Policies Do Not Directly or Indirectly Result in Racial Discrimination*

43. International human rights law prohibits both *de jure* and *de facto* discrimination.<sup>80</sup> The prohibition of *de facto* discrimination helps to protect individuals from State policies that use a neutral or otherwise non-discriminatory distinction under human rights law but that nevertheless operate to discriminate on the basis of race, ethnicity, national origin or other grounds.

<sup>79</sup> ICERD art. 1(2)-1(3).

<sup>80</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 32 paras. 6-7; ICERD art. 1(1) (explaining the impermissibility of purposeful discrimination and *de facto* discrimination); Human Rights Committee, general comment No. 18, paras. 7, 9 (same).

44. The Netherlands' obligation not to engage in intentional racial discrimination prohibits the use of *any* distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin that has the purpose or effect of inhibiting equal enjoyment of human rights.<sup>81</sup> These forms of racial discrimination are impermissible not only when they are the sole basis of discrimination but also when they contribute to forms of "multiple discrimination."<sup>82</sup>
45. Although much about racial discrimination in the Netherlands remains unknown due to the Government's failure to uphold its obligations to collect and disaggregate relevant data,<sup>83</sup> UN bodies have previously explained that Dutch policies might result in simultaneous discrimination against several ethnic or national origin groups. For example, the Human Rights Committee has begun to interrogate whether the Netherlands' expansion of citizenship revocation complies with its human rights law obligations. In preparation for its upcoming report on compliance with the ICCPR, the Human Rights Committee has asked the Netherlands to explain its justification for its citizenship stripping policies, especially because this extreme measure is likely to perpetuate "stereotypes resulting in discrimination, hostility and stigmatization of certain groups such as Muslims, foreigners and migrants."<sup>84</sup>
46. UN treaty bodies and expert groups have also observed forms of discrimination rooted in anti-foreign, anti-migrant, anti-Muslim, Afrophobic sentiment.<sup>85</sup> These bodies have also expressed concern over discrimination on the basis of actual or perceived nationality, ethnicity, immigration status, and descent.<sup>86</sup> The Committee on the Elimination of Racial Discrimination remarked that one Netherlands law showed "apparent discrimination on the basis of nationality, particularly between so-called 'Western' and 'non-Western' state nationals"<sup>87</sup>—a term capturing several of these overlapping, co-constituting racialized distinctions.

*Available Data About Dutch Dual Nationals Indicate that the Netherlands' Use of a Mono-/Dual-Nationality Distinction Leads to Racially Discriminatory Effects, Even If This Distinction is Not Intended To Do So*

47. As is the case with the Netherlands' concept of "Western" and "non-Western" state nationals, dual nationality in the Netherlands sits at the intersection of multiple characteristics of "race, colour, descent, or national or ethnic origin."<sup>88</sup> Compared to Dutch mono nationals, Dutch dual citizens are far more racially and ethnically diverse. Roughly 77% of the Netherlands' total

<sup>81</sup> ICERD art. 1(1).

<sup>82</sup> Committee on the Elimination of Racial Discrimination general recommendation No. 32, para. 7.

<sup>83</sup> The Netherlands no longer tracks citizens' dual citizenship or ethnic origin. *Basic Registration of Persons (BRP) Act*, CENTRAAL BUREAU VOOR DE STATISTIEK, <https://www.cbs.nl/en-gb/artikelen/nieuws/2015/32/1-3-million-people-in-the-netherlands-hold-dual-citizenship/basic-registration-of-persons--brp--act> (last visited Oct. 21, 2018). Ceasing to track dual nationalities may make certain forms of discrimination invisible. See CERD/C/NLD/Q/19-21, paras. 15-16.

<sup>84</sup> CCPR/C/NLD/QPR/5, para. 10.

<sup>85</sup> A/HRC/30/56/Add.1, para. 100; CERD/C/NLD/CO/19-21, paras. 11-16, 21-26.

<sup>86</sup> E/C.12/NLD/CO/6, paras. 18-19, 39-41, 46-47; CRC/C/NLD/CO/4, para. 24-25.

<sup>87</sup> CERD/C/NLD/CO/17-18, para. 5.

<sup>88</sup> ICERD art. 1(1).



population is of Dutch ethnicity.<sup>89</sup> However, nearly half of all of Dutch dual citizens hold and/or are descended from those with Moroccan or Turkish nationality.<sup>90</sup> Although overrepresented among Dutch dual citizens, Dutch-Moroccan and Dutch-Turkish dual citizens remain a small proportion of the total population in the Netherlands: neither ethnic group comprises more than 2.5% of the total Dutch population.<sup>91</sup> Because many dual nationals come from Muslim-majority countries, but only 5% of Dutch citizens identify as Muslim,<sup>92</sup> Dutch dual nationals are also more likely to belong to or be perceived to belong to ethnoreligious minority groups.

48. Due to the Netherlands' laws concerning acquisition of dual nationality and retention of non-Dutch nationality, Dutch dual citizens are disproportionately immigrants or descendants of immigrants of non-Dutch national origin.<sup>93</sup> Furthermore, many Dutch dual nationals born to immigrants of non-Dutch national origin are dual nationals because they cannot renounce a citizenship they inherited at birth.<sup>94</sup> As the Dutch government recognizes,<sup>95</sup> numerous governments prohibit renunciation of their citizenship. Some countries, such as Morocco, prohibit any of its citizens from renouncing Moroccan citizenship.<sup>96</sup> Other countries, like Argentina, only prohibit renunciation for those who received citizenship from birth.<sup>97</sup> Some countries, like Bahamas, Malaysia, and Pakistan, do not recognize citizenship renunciation before a certain age.<sup>98</sup> Many governments that theoretically allow renunciation of citizenship

<sup>89</sup> See *Netherlands, Ethnic Groups (2017 est.)*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html> (accessed Oct. 11, 2018).

<sup>90</sup> *1.3 million people in the Netherlands hold dual citizenship*, CENTRAAL BUREAU VOOR DE STATISTIEK (AUG. 6, 2015), <https://www.cbs.nl/en-gb/news/2015/32/1-3-million-people-in-the-netherlands-hold-dual-citizenship>.

<sup>91</sup> See *Netherlands, Ethnic Groups (2017 est.)*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html> (accessed Oct. 11, 2018).

<sup>92</sup> See *Population of the Netherlands from 2010 to 2017, by religion*, STATISTA <https://www.statista.com/statistics/527782/population-of-the-netherlands-by-religion> (last accessed Oct. 11, 2018).

<sup>93</sup> *1.2 million Dutch with dual nationality*, CENTRAAL BUREAU VOOR DE STATISTIEK (MAR. 20, 2012), <https://www.cbs.nl/en-gb/news/2012/12/1-2-million-dutch-with-dual-nationality>; *1.3 million people in the Netherlands hold dual citizenship*, CENTRAAL BUREAU VOOR DE STATISTIEK (AUG. 6, 2015), <https://www.cbs.nl/en-gb/news/2015/32/1-3-million-people-in-the-netherlands-hold-dual-citizenship>.

<sup>94</sup> As Netherlands' Immigration and Naturalisation Service recognizes, not all individuals are able to renounce their previous citizenships or are unable to do so without significant hardship. See *Renouncing your current nationality*, IMMIGRATIE EN NATURALISATIEDIENST, <https://ind.nl/en/Pages/Renouncing-your-current-nationality.aspx> (last accessed Oct. 21, 2018). For example, the Netherlands Immigration and Naturalisation Service notes that Moroccan citizens cannot renounce their Moroccan citizenship. See *Landenlijst behoud nationaliteit*, IMMIGRATIE EN NATURALISATIEDIENST, <https://ind.nl/Paginas/Landenlijst-behoud-nationaliteit.aspx> (last accessed Oct. 21, 2018).

<sup>95</sup> *Landenlijst behoud nationaliteit*, IMMIGRATIE EN NATURALISATIEDIENST, <https://ind.nl/Paginas/Landenlijst-behoud-nationaliteit.aspx> (last accessed Oct. 21, 2018) (maintaining a list of which countries do not allow for citizenship renunciation).

<sup>96</sup> *Renouncing your current nationality*, IMMIGRATIE EN NATURALISATIEDIENST, <https://ind.nl/en/Pages/Renouncing-your-current-nationality.aspx> (last accessed Oct. 21, 2018).

<sup>97</sup> *Renouncing your current nationality*, IMMIGRATIE EN NATURALISATIEDIENST, <https://ind.nl/en/Pages/Renouncing-your-current-nationality.aspx> (last accessed Oct. 21, 2018).

<sup>98</sup> *Renouncing your current nationality*, IMMIGRATIE EN NATURALISATIEDIENST, <https://ind.nl/en/Pages/Renouncing-your-current-nationality.aspx> (last accessed Oct. 21, 2018).

effectively deny the practice by making renunciation impracticable.<sup>99</sup> For example, an individual cannot renounce their Turkish citizenship if they have failed to perform their military service or receive an exemption from that service.<sup>100</sup>

49. The Netherlands' failure to collect and maintain disaggregated information about ethnicity, dual nationality, and nationality of origin<sup>101</sup> prevents a more nuanced analysis of the discriminatory potential of Dutch dual citizens' respective inability to renounce their non-Dutch citizenship. However, several conclusions about the resulting discrimination remain obvious. First, because Dutch-Moroccan dual citizens represent nearly a quarter of all Dutch dual citizens, their inability to renounce their Moroccan citizenship places Dutch-Moroccan dual citizens at a disproportionately high risk of citizenship stripping. Secondly, the barriers that some Dutch-Turkish dual citizens would face in renouncing their citizenship likely would expose these individuals to a disproportionately high risk of citizenship stripping, on account of their second nationality.
50. The intersection of race, descent, and national or ethnic origin occurring within the concept of Dutch dual citizenship means that any distinction on the basis of mono or dual nationality will not be neutral in its effects. Rather, because dual nationality in the Netherlands incorporates and is shaped by ethnic or national origin, any Netherlands policy that utilizes a mono-/dual-nationality distinction will disparately affect minorities on the basis of ethnicity, national origin, and descent in violation of its international human rights law obligations. In this way, the Netherlands' citizenship stripping policies result in unequal classes of citizenship on these bases (national origin, ethnicity, and descent). This is indirect discrimination.

*Human Rights Law Does Not Permit the Netherlands To Use the Counterterrorism Context To Justify Direct or Indirect Racial Discrimination*

51. The Netherlands cannot maintain a policy of subjecting Dutch dual citizens to citizenship stripping without compromising its international human rights law obligations to attain racial equality and prohibit racial discrimination. Under ICERD, the Netherlands holds international human rights law obligations to "amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists,"<sup>102</sup> as well as to discourage anything which tends to strengthen racial division.<sup>103</sup>
52. In general, emergency counterterrorism laws heighten the risk of perpetuating racist and discriminatory societal divides. Even if laws are facially neutral, their implementation,

<sup>99</sup> For example, Egypt requires an individual to obtain a legalized declaration for the Egyptian government before it recognises renunciation of its citizenship. *Landenlijst behoud nationaliteit*, IMMIGRATIE EN NATURALISATIEDIENST, <https://ind.nl/Paginas/Landenlijst-behoud-nationaliteit.aspx> (last accessed Oct. 21, 2018).

<sup>100</sup> See *Renouncing your current nationality*, IMMIGRATIE EN NATURALISATIEDIENST, <https://ind.nl/en/Pages/Renouncing-your-current-nationality.aspx> (last accessed Oct. 21, 2018) (explaining that potential Dutch citizens who would have to pay a large sum of money to renounce their other citizenship are exempt from the Netherlands' requirements that individuals forfeit their previous citizenship).

<sup>101</sup> The Netherlands no longer tracks citizens' dual citizenship or ethnic origin. *Basic Registration of Persons (BRP) Act*, CENTRAAL BUREAU VOOR DE STATISTIEK, <https://www.cbs.nl/en-gb/artikelen/nieuws/2015/32/1-3-million-people-in-the-netherlands-hold-dual-citizenship/basic-registration-of-persons-brp-act> (last accessed Sept. 10, 2018). Ceasing to track dual nationalities may make certain forms of discrimination invisible. See CERD/C/NLD/Q/19-21, paras. 15-16.

<sup>102</sup> ICERD art. 2(1)(c).

<sup>103</sup> ICERD art. 2(e).

application, and surrounding societal narrative can result racial discrimination. The UN, and the UN human rights system in particular, has repeatedly highlighted this concern<sup>104</sup>:

- In its annual resolutions on the Protection of Human Rights and Fundamental Freedoms While Countering-Terrorism, the General Assembly has reaffirmed that States' "counter-terrorism measures should be implemented in full consideration of minority rights and must not be discriminatory on the grounds of race, colour, sex, language, religion or social origin."<sup>105</sup> In its most recent resolution on this topic, the General Assembly urged States to ensure that their efforts to counter terrorism "respect, protect and fulfil the human rights of all, including persons belonging to national or ethnic, religious and linguistic minorities, and to ensure that measures taken to counter terrorism are not discriminatory on any ground."<sup>106</sup>
- The former Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism has urged "states not to act in a manner which might be seen as advocating the use of race and religion for the identification of persons as terrorists."<sup>107</sup> He observed that "any terrorist-profiling practices that are based on distinctions according to a person's presumed 'race', ethnicity, national origin or religion raise the question as to their conformity with the principle of non-discrimination."<sup>108</sup> The former Special Rapporteur also expressed concern "that profiling based on stereotypical assumptions may bolster sentiments of hostility and xenophobia in the general public towards persons of certain ethnic or religious background,"<sup>109</sup> and that profiling practices that rely on "ethnic appearance and national origin as proxies for religion . . . affect a great number of individuals who are in no way linked to terrorism."<sup>110</sup>
- In its general recommendation No. 30, the Committee on the Elimination of Racial Discrimination emphasized that counterterrorism measures must not "discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin."<sup>111</sup> The Committee on the Elimination of Racial Discrimination has also asked states to ensure that application of counterterrorism measures "does not lead to negative consequences for ethnic and religious groups, migrants, asylum-seekers and refugees, in particular as a result of racial profiling."<sup>112</sup>
- The former Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance also expressed concern that the proliferation of xenophobic and Islamophobic rhetoric, especially in cases where Muslim identity is racialized or cast as foreign, "has resulted in an atmosphere of fear towards

<sup>104</sup> See Open Society Justice Initiative, *International Standards on Ethnic Profiling: Decisions and Comments from the UN System*, OPEN SOCIETY FOUNDATIONS (Nov. 8, 2013), <https://www.opensocietyfoundations.org/sites/default/files/case-digests-ethnic%20profiling-un-110813.pdf>.

<sup>105</sup> See e.g., A/RES/61/171.

<sup>106</sup> A/RES/72/180.

<sup>107</sup> A/HRC/6/17/Add.3, para. 65.

<sup>108</sup> A/HRC/4/26, para. 40.

<sup>109</sup> A/HRC/4/26, para. 40.

<sup>110</sup> A/HRC/4/26, para. 50.

<sup>111</sup> CERD/C/64/Misc.11/rev.3.

<sup>112</sup> A/57/18, para. 338.

immigrants, Muslims and those perceived as Muslim.”<sup>113</sup> The Special Rapporteur observed that “the rhetoric and fear contribute to the legitimization of violence and discriminatory acts of State officials. In many countries, affected groups and communities thus experience an increased incidence of racism and xenophobia, including hate crimes. Furthermore, the constant surveillance experienced by many minority and migrant communities has a chilling effect on their freedom of expression and undermines interpersonal and familiar relationships, as well as religious practice.”<sup>114</sup>

- The former Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance has emphasized that “counter-terrorism measures imposing [exceptional and legitimate] limitations [on the exercise of some rights] must not be discriminatory in nature.”<sup>115</sup> In addition, the former Special Rapporteur has highlighted that principles of equality and non-discrimination must be realized in legislation, policies, and implementation,<sup>116</sup> and has stressed “that the principles of equality and non-discrimination have been recognized as norms of jus cogens from which no derogation is permitted, even in a state of emergency.”<sup>117</sup> The Special Rapporteur observed that counter-terrorism policies very often threaten equal and non-discriminatory enjoyment of the rights to nationality, to freedom of movement and residence, and the right to leave any country, each of which are protected by ICERD and other international human rights law instruments.<sup>118</sup> The former Special Rapporteur further concluded that “[s]trict immigration and border control measures, overly broad counter-terrorism policies and surveillance have contributed to fuelling racism, xenophobia and racial discrimination.”<sup>119</sup>

53. Even in the absence of discriminatory intent on the part of the Netherlands in its use of the mono-/dual-nationality distinction, this distinction is incompatible with international human rights law notwithstanding the counterterrorism context. Yet the Netherlands’ counterterrorism laws currently authorize and result in discrimination on the basis of dual nationality. The discriminatory character of the mono-/dual-nationality distinction cannot be reconciled with the Netherlands’ international human rights law commitments.

54. The mono-/dual-nationality distinction violates ICERD and the ICCPR. The distinction entails disproportionate effects against racialized and stigmatized groups in the Netherlands. In particular, the distinction will have a disproportionate impact on Dutch-Moroccan and Dutch-Turkish dual citizens. This distinction will also discriminate against dual citizens of “non-Western origin” and entrench forms of discrimination already present in the Netherlands. Because of these discriminatory aspects, the Netherlands cannot both maintain its citizenship-stripping policies and observe its fundamental international human rights duties

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<sup>113</sup> A/72/282, para. 43.

<sup>114</sup> A/72/287, para. 43.

<sup>115</sup> A/72/287, para. 47.

<sup>116</sup> A/72/287, para. 57.

<sup>117</sup> A/72/287, para. 47.

<sup>118</sup> A/HRC/35/41, para. 77.

<sup>119</sup> A/HRC/35/41, para. 96.

to achieve racial equality and combat racial discrimination. The Netherlands must therefore eliminate these policies.

*Conclusion*

55. The Netherlands citizenship revocation policies rely on a mono-/dual-nationality distinction. Recent jurisprudence within the UN human rights system strongly suggests that such a distinction directly discriminates on the basis of “national or social origin” and is per se incompatible with the Netherlands’ international human rights law obligations. These policies are also discriminatory because they effectively establish classes of citizenship, with Dutch mono nationals holding full citizenship and Dutch dual nationals holding a less secure, contingent form of citizenship. This tiered citizenship is incompatible with the Netherlands’ human rights law obligations to realise equal protection of the law and equality before the law.
56. This tiered citizenship is further impermissible because it discriminates on the basis of ethnicity, national origin and descent. Because Dutch dual nationality is typically held by specific national origin or ethnic origin groups, the Netherlands’ citizenship revocation policies and their resulting classes of citizenship establish a regime of differential treatment on the basis of descent, or national or ethnic origin. This discriminatory result violates the Netherlands’ human rights law obligations to ensure racial equality and prevent all forms of indirect racial discrimination.
57. Under international human rights law, the prohibition on racial discrimination—including de facto racial discrimination—applies equally in the context of national security and counterterrorism measures. The fact that dual nationals stripped of Dutch citizenship may not be at risk of statelessness does not justify their treatment as second-class citizens, in effect on account of their national origin, ethnicity and descent.

**VI. THE NETHERLANDS MUST CEASE ITS POLICY OF CITIZENSHIP STRIPPING AS A COUNTER-TERRORISM MEASURE AND MUST REVIEW ARTICLE 14 OF ITS NATIONALITY ACT TO ENSURE IT COMPLIES WITH THE PROHIBITION ON RACIAL DISCRIMINATION**

58. On the basis of the foregoing analysis the Special Rapporteur recommends that the Netherlands cease its policy of revoking the citizenship of dual nationals in the national security context. As observed by the Committee on the Elimination of Racial Discrimination in 2010, these policies disproportionately affect dual nationals of “non-Western origin.” In light of the ethnic and national origin composition of the Dutch population of dual nationals, these counterterrorism policies effectively target Dutch-Moroccan dual nationals and Dutch-Turkish dual nationals, and risk fuelling xenophobic rhetoric that equates terrorism with racialised groups, including dual citizens, Muslims, and other individuals perceived to be of non-Dutch origin.
59. The obligation to cease existing and to guarantee non-repetition of discriminatory practices is a human rights law obligation that bears on this administrative body. Accordingly, the Special Rapporteur recommends that this administrative tribunal refrain from enforcing citizenship revocation provisions that are racially discriminatory in their effect.
60. Article 2(1) of ICERD obligates States parties to pursue all appropriate means to eliminate racial discrimination in all its forms and without delay, including by reviewing domestic legislation and policies to ensure their compliance with the Convention. Indeed, article 2(1)(c)

of the Convention imposes a concrete obligation on States parties to “take effective measures to review governmental, national and local policies, and to amend, rescind nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination whenever it exists.”<sup>120</sup> In accordance with this provision, the Committee on the Elimination of Racial Discrimination regularly urges States to review specific laws, policies, or legal provisions that raise concerns about their potential adverse impact on racial equality. Where a review reveals that such concerns are justified, States must amend, rescind or nullify the concerned law or policy so as to ensure full compliance with the Convention.<sup>121</sup>

61. As mentioned above, State obligations with regard to the elimination of racial discrimination apply to both *de jure* and *de facto* discrimination. States are obliged to review legislation and policies even when they do not explicitly discriminate on the grounds prohibited under ICERD<sup>122</sup>: having “the effect of creating or perpetuating racial discrimination”<sup>123</sup> is sufficient to require States to undertake such an inquiry. Accordingly, the Netherlands’ obligation to review its laws for compliance with ICERD applies to any law, policy, or legal provision that may have a racially discriminatory effect.
62. If credible evidence suggests that a rights violation has occurred, states have an obligation to conduct prompt, independent, impartial and thorough investigations.<sup>124</sup> These investigations should aim to establish whether a violation has occurred.<sup>125</sup> Furthermore, investigations following credible allegations should be accompanied by an accelerated review of connected policies or laws.<sup>126</sup> Such review will help to ensure that, even if there is no violation in a particular case, these policies or laws are not inflicting, perpetuating, or tolerating violations of international human rights law.<sup>127</sup>
63. The Committee on the Elimination of Racial Discrimination has emphasized that, following a credible allegation of discrimination, the burden of proof should shift to the responding party.<sup>128</sup> The Special Rapporteur acknowledges that the Netherlands has, through its in communication with the Council of Europe’s Commissioner for Human Rights, expressed an

<sup>120</sup> ICERD, art. 2(1)(c).

<sup>121</sup> In its concluding observations on Jordan, for example, the Committee not only requested that authorities review the Jordanian Nationality Act, but also recommended that the Act be amended so as to ensure that “a Jordanian mother married to a non-Jordanian man has the right to confer her nationality to her children equally and without discrimination.” CERD/C/JOR/CO/13-17, para. 11. The Committee also addresses the obligation to review legislation in its general recommendations. For instance, in its general recommendation No. 30 on discrimination against non-citizens, the Committee recommends that States “review and revise legislation, as appropriate, in order to guarantee that such legislation is in full compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in article 5, without discrimination.” Committee on the Elimination of Racial Discrimination general recommendation No. 30, para. 6.

<sup>122</sup> See, e.g., CERD/C/AUS/CO/24, para. 14; A/HRC/14/43/Add.2.

<sup>123</sup> ICERD, art. 2(1)(c).

<sup>124</sup> A/HRC/34/30, para. 53.

<sup>125</sup> A/HRC/34/30, para. 53.

<sup>126</sup> Articles 2 and 6 of ICERD require States to regularly review laws to ensure that domestic laws are not discriminatory and to provide sufficient remedies when they are found to be so.

<sup>127</sup> See CERD/C/82/D/48/2010 (recommending a review of domestic law to ensure compliance with ICERD); CERD/C/77/D/43/2008 (same).

<sup>128</sup> See Committee on the Elimination of Racial Discrimination general recommendation No. 30, paras. 23-24.



ongoing commitment to reviewing its counterterrorism policies on the bases of necessity and compliance with international human rights law.<sup>129</sup> Given the credible evidence that this policy violates international human rights law, the Netherlands must accordingly conduct such a review without delay.