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COMMISSAIRE AUX DROITS DE L'HOMME



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# **REPORT**

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**COMMISSIONER FOR HUMAN RIGHTS OF THE  
COUNCIL OF EUROPE**

**FOLLOWING HIS VISIT TO THE NETHERLANDS  
FROM 20 TO 22 MAY 2014**

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## SUMMARY

Commissioner Nils Muižnieks and his delegation visited the Netherlands from 20 to 22 May 2014. In the course of the visit the Commissioner held discussions with state authorities and non-governmental, national and international organisations. The present report focuses on the following human rights issues:

### **Legal and institutional framework for the protection and promotion of human rights**

The Netherlands possesses a well-established system for promoting and protecting human rights. The Commissioner welcomes that, since the report of his predecessor in 2009, the country has ratified a number of international and European conventions of relevance to human rights. However, he urges the Dutch authorities to ratify several additional human rights instruments including the UN Convention on the Rights of Persons with Disabilities and the Council of Europe Convention on preventing and combating violence against women and domestic violence. He stresses that the current status and rank of international human rights treaties as provided in the Constitution should not be undermined in the future and that the economic, social and cultural rights provided for in such treaties should be applicable and justiciable in the Dutch domestic legal system.

The Netherlands' human rights infrastructure has recently been reinforced through the establishment of a Children's Ombudsman in 2011 and of the Netherlands Institute for Human Rights (NIHR) in 2012, and the adoption of the first National Action Plan on Human Rights (NAPHR) in 2013. Emphasising the crucial role that human rights structures play, notably in times of economic crisis, the Commissioner strongly recommends that the Dutch authorities ensure adequate funding for these structures in the Netherlands, refrain, in particular, from cutting the budget of the NIHR and consider strengthening the financial independence of this institution.

Welcoming the adoption of the NAPHR, the Commissioner invites the authorities to reinforce the participation and consultation of civil society in its implementation, evaluation and future development. An independent evaluation of the implementation of the NAPHR, based on clear benchmarks and timeframes, is also essential. The Commissioner furthermore calls on the Dutch authorities to include more ambitious and measurable goals in its future action plans on human rights. More generally, the Commissioner invites the Dutch authorities to adopt more systematically a human rights-based approach to their policies at the national and local levels.

As regards human rights education, the Commissioner invites the Dutch authorities to explicitly include human rights in the attainment targets for primary and secondary education and to take measures to ensure that civil servants working at central and local levels are trained on human rights issues.

In recent years, various areas of responsibility with important human rights implications have been transferred from central government to local authorities. The Commissioner stresses that this decentralisation process should be accompanied by measures to ensure that the local authorities are properly trained in human rights and have sufficient financial and human resources to accomplish their new tasks. The Dutch authorities should also provide the necessary coordination and guidance on the provision of services and monitor the impact of the decentralisation process on the practical enjoyment of human rights.

The legal framework for the oversight of the Dutch intelligence and security activities is currently undergoing significant reform. This framework includes the 2002 Intelligence Service Act, which provides the legal basis for the use of powers, including special powers, by the intelligence and security services and establishes an independent Review Committee for the Intelligence and Security Services mandated to review the latter's core activities. In this context, the Commissioner stresses that the new legislation should take into consideration the quick evolution of technologies (such as use of metadata) available to the relevant services and fully comply with the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights concerning the protection of privacy and personal data.

### **The human rights of asylum seekers and immigrants**

The Commissioner is concerned at the extensive use of administrative detention by the Dutch authorities with regard to asylum seekers and immigrants and recalls that these persons should not be treated as criminals. He calls on the Dutch authorities to ensure that detention of asylum seekers and migrants is used as last resort, for the shortest possible period of time and only after first reviewing all other alternatives and finding that there is no effective alternative, in accordance with international standards.

As concerns detention at the border, all asylum seekers who arrive at external borders are systematically detained for a period of up to 14 days, during which their asylum claim is processed. While an exception is made for unaccompanied migrant children, no such exemption exists for families with children. While welcoming the measures announced by the government aiming at reducing the number of families with children detained at the border, the Commissioner urges the Dutch authorities to stop the detention of all asylum seeker children. In addition, the Commissioner stresses that asylum seekers in particularly vulnerable situations should not be kept in border detention.

Concerning foreigners who are staying irregularly in the country who can be detained for the purpose of deportation (this includes rejected asylum seekers), the law allows for the detention of families with children who indicate that they will not co-operate and, in exceptional cases, unaccompanied migrant children. In view of reports according to which persons in a situation of particular vulnerability are sometimes detained for immigration purposes, the Commissioner urges the Dutch authorities not to place such persons in detention. The Commissioner is also concerned at reports according to which immigrants have been repeatedly detained for periods of several months with only short periods of time in between during which they are free. Some immigrants are reportedly deprived of their liberty despite the fact that it is known in advance that the objective for which this deprivation of liberty is allowed, i.e. deportation, is not feasible.

Under the current regime applicable to detention pending deportation, foreigners are exposed to serious punitive measures, such as the placement in an isolation cell. Their access to meaningful activities during detention is limited. Access to healthcare for immigrants detained pending deportation should also be improved.

Another issue of serious concern to the Commissioner is the situation of legal limbo for many persons in an irregular situation, including children. An unidentified number of irregular immigrants end up in destitution on the streets or in camps as they do not manage to access existing emergency shelters. The Commissioner recalls that anyone, irrespective of whether their stay in a country is lawful, has the right to an adequate standard of living for himself and his family, including adequate food, clothing and shelter.

The Commissioner welcomes the steps taken by the government to grant residence permits to some of the immigrants who cannot be returned, notably through the so-called “no-fault” procedure, as well as to child asylum seekers whose applications were rejected but who have been living in the country for a certain period of time (Children’s Pardon). However, he invites the Dutch authorities to review the conditions applying to these schemes which are very restrictive. Where return is impossible or particularly difficult, the Dutch authorities should find solutions to authorise the relevant person to stay in the Netherlands in conditions which meet their basic needs and respect their human rights.

As concerns stateless persons living in the Netherlands, the Commissioner calls upon the Dutch authorities to improve legislation and practice relating to the identification and determination of statelessness. In particular, he strongly recommends that the Dutch authorities establish an accessible and efficient statelessness determination procedure and rescind the requirement of lawful stay for the acquisition of Dutch nationality by stateless children born in the Netherlands.

### **The human rights of children**

In the field of juvenile justice, the Commissioner calls on the Dutch authorities to increase the current minimum age of criminal responsibility (currently at 12 years) and change the law which allows, by way of exception, that some 16 or 17-year-old children are treated as adult criminals. As concerns pre-trial detention, recalling that the arrest, detention or imprisonment of a child should only be used as a measure of last resort, the Commissioner urges the Dutch authorities to ensure that alternatives to pre-trial custodial settings are fully used in practice. The Commissioner also considers that there is a need to ensure that police custody of juveniles better complies with child-friendly justice.

The Commissioner is concerned at the negative impact of growing child poverty on the enjoyment of children’s rights in the Netherlands. He stresses that in times of economic crisis, the Dutch government has the duty to protect the most vulnerable from a reduction in the enjoyment of their human rights, in particular social and economic rights. Anti-poverty policies specifically geared to children should be developed by municipalities,

and the central government should monitor these policies with a view to ensuring that no child is left outside the scope of these measures and that they are effective.

The occurrence of child abuse in the context of domestic violence, through the social media or bullying at school remains an issue of concern for the Commissioner. While welcoming the measures already taken to combat different forms of child abuse, the Commissioner invites the Dutch authorities to ensure a proactive implementation of the existing tools against child abuse. In addition, in view of the current decentralisation process, the work of the municipalities in this field should be monitored by the central authorities to ensure that the decentralisation does not impact negatively on the right of children not to be victims of abuse.

The Commissioner is seriously concerned about the fact that many children with disabilities are segregated from their peers in the Dutch education system. He considers that the Appropriate Education Act which entered into force in 2014 represents a step in the right direction. However, the Commissioner is of the opinion that the new arrangements fall short of adopting inclusive education as a fundamental principle. He encourages the Dutch authorities to develop access to inclusive education beyond the framework of “appropriate education”.

The report contains the Commissioner’s conclusions and recommendations addressed to the Dutch authorities and is published on the Commissioner’s website along with the authorities’ comments.

## INTRODUCTION

1. The present report follows a visit to the Netherlands by the Council of Europe Commissioner for Human Rights (“the Commissioner”) from 20 to 22 May 2014.<sup>1</sup> The visit focused on the legal and institutional framework for the protection and promotion of human rights, the human rights of asylum seekers and immigrants, and the human rights of children.
2. During his visit, the Commissioner held discussions with the Dutch authorities, including the Deputy Prime Minister and Minister of Social Affairs and Employment, Mr Lodewijk Asscher; the Minister of the Interior and Kingdom Relations, Mr Ronald Plasterk; the Minister of Security and Justice, Mr Ivo Opstelten; and the Secretary of State of Security and Justice and Minister of Migration, Mr Fred Teeven. He also met the Director of Secondary Education in the Ministry of Education, Culture and Science, the Deputy Director of the General Intelligence and Security Services and the Deputy Director of the Military Intelligence and Security Services. The Commissioner also held discussions with members of the Parliamentary Committee of the Interior of the House of Representatives and of the Review Committee for the Intelligence and Security Services. The Commissioner met the Acting National Ombudsman, Mr Frank Van Dooren; the Children’s Ombudsman, Mr Marc Dullaert; the Chair of the Netherlands Institute for Human Rights, Ms Laurien Koster; and the Vice-Chair of the Advisory Committee on Migration Affairs, Mr Hans Sondaal.
3. The Commissioner also met with several representatives of national and international non-governmental organisations active in the field of human rights. He visited Schiphol airport’s migrant detention centre and a disused church in The Hague, where irregular immigrants had been living in camp-like conditions for more than a year.
4. The Commissioner wishes to thank sincerely the Dutch authorities in Strasbourg and in The Hague for their assistance in organising his visit and facilitating its independent and smooth execution. He also extends his thanks to all his interlocutors for their willingness to share with him their knowledge and views.
5. The Commissioner notes that in recent years, the Dutch authorities have been paying increased attention to the domestic dimension of human rights, in addition to their foreign policy dimension, not least by reinforcing the general framework for the protection and promotion of human rights in the Netherlands. Nonetheless, there are a number of issues concerning the human rights infrastructure and the human rights of asylum seekers, immigrants and children that remain to be addressed with determination by the Dutch authorities, as further detailed in this report.
6. The Commissioner invites the authorities to step up their efforts in addressing the issues analysed in this report and looks forward to continuing a constructive dialogue with them to this end. He trusts that this dialogue will be facilitated by the present report and its recommendations.

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<sup>1</sup> The Commissioner was accompanied by Mr Giancarlo Cardinale, Deputy to the Director of his Office, and Ms Claudia Lam, Adviser.

## 1 LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

7. The Netherlands possesses a well-established system for promoting and protecting human rights. The institution of the National Ombudsman was established in 1982 and enshrined in the constitution in 1999. It is supplemented by several ombudsmen at the local level. The Netherlands has ratified most of the Council of Europe and other international human rights treaties. The constitution gives a high status to the European Convention on Human Rights (hereinafter: ECHR) and other human rights treaties, and their application by Dutch courts shows that they generally have a direct effect within the domestic legal system.
8. This human rights infrastructure has recently been reinforced through the establishment of a Children's Ombudsman in 2011 and of the Netherlands Institute for Human Rights (NIHR) in 2012, and the adoption of the first National Action Plan on Human Rights (NAPHR) in 2013. However, certain improvements could be made to this solid human rights architecture in order to fulfil its potential in securing better outcomes for the promotion and protection of human rights in the Netherlands.

### 1.1 HUMAN RIGHTS TREATIES

9. Since the report of the previous Commissioner in 2009, the Netherlands has ratified a number of international and European conventions of relevance to human rights, including: the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified on 28 September 2010); the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ratified on 1 March 2010); the Council of Europe Convention on Action against Trafficking in Human Beings (ratified on 22 July 2010); the Council of Europe Convention on the Prevention of Terrorism (ratified on 22 July 2010); and the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ratified on 22 July 2010).
10. However, the Commissioner notes that a number of human rights conventions have not yet been ratified. A notable gap concerns the UN Convention on the Rights of Persons with Disabilities (hereinafter: UNCRPD), which the Netherlands signed on 30 March 2007. The Commissioner notes that an Act of Parliament for its ratification is under preparation. The government has indicated that it would determine its position on accession to the optional protocol to this Convention (enabling alleged victims of violations to file communications with the Committee monitoring the implementation of the UNCRPD for its consideration) only once the convention is ratified.
11. The Council of Europe Convention on preventing and combating violence against women and domestic violence was signed by the Netherlands on 14 November 2012 and the government has reported that it is preparing its ratification.
12. As for the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Dutch authorities have indicated in their national report for the Universal Periodic Review that they do not intend to ratify this instrument.<sup>2</sup>
13. The Dutch authorities have not yet ratified the Convention on Human Rights and Biomedicine (signed on 4 April 1997), the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, or the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (which enables alleged victims of violations to file communications with the Committee monitoring the implementation of the Covenant for consideration).

<sup>2</sup> UN Human Rights Council, Universal Periodic Review, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21, Netherlands, A/HRC/WG.6/13/NLD/1, paragraph 37.

14. As concerns the status of international treaties in the domestic legal system, pursuant to Article 93 of the Dutch Constitution,<sup>3</sup> the Netherlands is a monist state as far as the relationship between international law and national law is concerned. Accordingly, international and national laws form a single legal order and international treaties and resolutions binding on all persons are applicable by national judges without prior incorporation through national legislation. In addition, by virtue of Article 94 of the Dutch Constitution, “statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons”. This means that currently individuals can invoke international human rights standards in a Dutch court and the court can assess whether the application of national laws and rules complies with them. In this respect, it should be kept in mind that in the Netherlands, judicial review by national courts of the compatibility of Acts of Parliament with the Constitution, including the fundamental rights therein, is prohibited under Article 120 of the Dutch Constitution.
15. The Commissioner notes that there have been discussions in recent years concerning the relationship between international and national law in particular in connection with international human rights and the way they are implemented by national courts.<sup>4</sup> For instance, a private bill was introduced in 2012 with the objective to amend Article 94 of the Constitution. The proposed amendment, which was still pending at the time of preparing this report, aims at restricting the possibility for the national judges not to apply statutory provisions when they are in conflict with international provisions. The NIHR<sup>5</sup> and human rights NGOs have raised concern that the proposed amendment would undermine the protection of fundamental rights in the Dutch legal system, particularly in a context where there is no judicial review of the constitutionality of statutory legislation.
16. The Commissioner welcomes the fact that international human rights treaties are part of the Dutch legal order, and that the Dutch courts regularly apply these, in particular the ECHR. He notes, however, that treaty provisions concerning economic, social and cultural rights are usually considered by the domestic courts as not being specific enough to be applied directly. This position stems from the time the International Covenant on Economic, Social and Cultural Rights was submitted to the Dutch Parliament for approval in the mid-1970s. Civil society organisations have indicated that this situation is also the result of the prevalence given in the Netherlands by the government and the general public to civil and political rights. They have stressed that this perception of economic, social and cultural rights deserving less attention should change. The Committee on the Elimination of Discrimination against Women<sup>6</sup> and the Committee on Economic, Social and Cultural Rights<sup>7</sup> have urged the Dutch authorities to consider adopting all necessary measures, legislative or otherwise, to ensure that the relevant rights are applicable and justiciable in the Dutch domestic legal system.

## 1.2 THE CHILDREN’S OMBUDSMAN

17. Following the establishment of the Children’s Ombudsman by law in June 2010, the first Children’s Ombudsman was appointed by the House of the Representatives and started his mandate on 1 April 2011. This institution is part of the National Ombudsman which exists since 1982, the Children’s Ombudsman being one of the two Deputies to the National Ombudsman.
18. The Children’s Ombudsman operates independently to promote observance of the rights of the child both by administrative authorities and by organisations constituted under private law in the field of education, youth care, child care and health care, on the basis of the UN Convention on the Rights of the

<sup>3</sup> Under Article 93 of the Dutch Constitution, “provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.”

<sup>4</sup> See in particular Nick S. Efthymiou and Joke C. de Wit, “The role of Dutch Courts in the Protection of Fundamental Rights”, *Utrecht Law Review*, vol. 9, Issue 2 (March) 2013.

<sup>5</sup> See NIHR, Letter to the Parliament on the Taverne Bill for the amendment of Article 94 (Brief wetsvoorstel Taverne: afschaffing artikel 94 Grondwet, in Dutch only).

<sup>6</sup> See CEDAW, Concluding Observation on the Netherlands, 5 February 2010, paragraph 12.

<sup>7</sup> See Committee on Economic, Social and Cultural Rights, Concluding Observations on the Netherlands, 9 December 2010, E/C.12/NDL/CO/4-5, paragraph 6.



Child –hereinafter: UN CRC). He or she shall do this by: promoting respect for the rights of children and young people by administrative authorities and organisations set up under private law; issuing recommendations, upon request and on its own initiative, on issues relating to the rights of young people; actively informing the public on children’s rights; dealing with complaints against administrative authorities and relevant private law organisations and investigating possible violations of children’s rights in the Netherlands.

19. In 2012, the Children’s Ombudsman began publishing a yearly Children’s Rights Monitor which provides a thematic overview of the implementation of the UN CRC in the Netherlands, including new research, policy developments and analyses of available data. It is divided into six chapters: (i) family situation and alternative care; (ii) protection against exploitation and violence; (iii) deprivation of liberty and juvenile justice; (iv) adequate standards of living; (v) education; (vi) young immigrants.<sup>8</sup> The Children’s Ombudsman also publishes thematic reports, some of which are mentioned in the section below on the human rights of children.

### 1.3 THE NETHERLANDS INSTITUTE FOR HUMAN RIGHTS

20. The Netherlands Institute for Human Rights ([\*College voor de rechten van de mens\*](#)) was set up by law in December 2011 on the basis of the UN Paris Principles<sup>9</sup> and the relevant Recommendation of the Committee of Ministers of the Council of Europe.<sup>10</sup> It is an independent administrative body consisting of (at most) 12 members, appointed by Royal Decree upon recommendation by the Minister of Security and Justice. The Equal Treatment Commission (the former equality body of the Netherlands) has been incorporated into the NIHR and all its powers have been taken over by the latter. In March 2014, the NIHR was granted the “A” status with respect to the Paris Principles by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.
21. The aim of the NIHR is to protect and promote the observance of human rights in the Netherlands, including the right to equal treatment, and to increase awareness of these rights. One of the main duties of the NIHR<sup>11</sup> is to conduct investigations into the protection of human rights and publish its findings. However, the NIHR is not competent to deal with individual complaints about violations of human rights, other than those relating to equal treatment. The NIHR is also tasked to: report on and make recommendations about the protection of human rights in the Netherlands; provide advice; provide information and encourage and coordinate human rights education; encourage research into the protection of human rights; co-operate on a systematic basis with civil society human rights organisations and with national, European and other international human rights institutions; press for the ratification, implementation and observance of human rights treaties and for the withdrawal of reservations to such treaties; press for the implementation and observance of binding resolutions of international organisations on human rights; and press for observance of European or international recommendations on human rights.
22. As indicated above, following the incorporation of the Equal Treatment Commission into the NIHR, the latter supervises compliance with the equal treatment legislation prohibiting discrimination on grounds of religion, belief, political opinion, race, citizenship, sexual orientation, civil status, gender, pregnancy status, age, disability or chronic illness. It can receive individual complaints about discrimination on these grounds occurring at work, in education or in access to goods and services. The Municipal Anti-Discrimination Services, created in 2009 and to which any person can apply to report a case of alleged discrimination and/or to ask for help and advice, can also refer cases to the NIHR.

<sup>8</sup> See [2012 Kinderrechtenmonitor](#), and [2013 Kinderrechtenmonitor](#), available in Dutch only.

<sup>9</sup> [Principles](#) relating to the Status of National Institutions (The Paris Principles), adopted by UNGA Resolution 48/134 of 20 December 1993.

<sup>10</sup> [Recommendation](#) R(97)14 of the Committee of Ministers of the Council of Europe of 30 September 1997 on the establishment of independent national human rights institutions.

<sup>11</sup> See Article 3 of the 2011 Netherlands Institute for Human Rights [Act](#).

23. The Ministry of Security and Justice is responsible for the primary financing of the NIHR. Other Ministries finance activities of direct relevance to their duties via the Ministry of Security and Justice. The budget of the Institute was €6 442 000 for 2012. A financial evaluation to assess whether the allocated resources are sufficient for the NIHR's work is planned for the second half of 2014. However, the Commissioner notes that the Ministry of Security and Justice has decided to reduce the resources for the NIHR even before this evaluation takes place on account of general budgetary cuts imposed on the whole ministry. This could mean that the NIHR's resources would be reduced to the level of the budget of the former Equal Treatment Commission, which had a considerably less extensive mandate than the NIHR.
24. The NIHR published its first annual status report on human rights in the Netherlands in December 2013.<sup>12</sup> It also publishes an annual activity report.<sup>13</sup> It has decided to devote particular attention to three themes in its first years of existence: (i) care of the elderly and human rights, (ii) migration and human rights, (iii) access to work.<sup>14</sup>
25. Dutch NGOs have welcomed the establishment of this long-awaited institution and the active role it already plays within the Dutch human rights system. They have stressed that, after less than two years of existence, the Institute has proved to be open to broad consultations, and able to produce sound analyses and advice to the government and the parliament. The Commissioner notes that the NIHR also works effectively as a platform for the exchange of knowledge, and stimulates public and political debate on several human rights issues.

#### 1.4 THE NATIONAL ACTION PLAN ON HUMAN RIGHTS

26. The Commissioner welcomes the launching by the Dutch government on 10 December 2013 of the first National Action Plan on Human Rights (hereinafter: NAPHR),<sup>15</sup> which deals with the protection and promotion of human rights in the Netherlands (including the three special municipalities of Bonaire, St. Eustatius and Saba in the Caribbean). It was adopted following a recommendation made by several international human rights institutions, including the Commissioner's predecessor in his 2009 report on the Netherlands.<sup>16</sup> The NAPHR was prepared and adopted by the Ministry of the Interior and Kingdom Relations in consultation with various institutions, advisory bodies and civil society organisations. As explained in the plan itself, the NAPHR is not meant to be exhaustive and addresses five main topics: (i) further improvement of the human rights infrastructure; (ii) tackling discrimination, (iii) the protection of privacy and personal data in an information society; (iv) immigration and asylum; detention of migrants; (v) domestic violence, child abuse and human trafficking.
27. The NAPHR announces a number of concrete steps, including the adoption of bills to be tabled before Parliament in the course of 2014, in order to further protect and promote human rights in the Netherlands. It also refers to forthcoming awareness-raising campaigns, for instance in the field of combating discrimination.
28. The NAPHR does not explicitly foresee an assessment of its implementation. However, the Minister of Interior and Kingdom Relations has announced that a first evaluation will take place before the end of 2014 and that regular consultations with civil society and relevant independent public bodies would also be organised during the whole implementation phase.
29. The NAPHR was generally well received among human rights NGOs and independent national institutions as a step marking increased attention by the Netherlands to the domestic dimension of human rights, in addition to their foreign policy dimension. However, the NAPHR was also criticised for

<sup>12</sup> Netherlands Institute for Human Rights, 2012 Annual Status Report on Human Rights in the Netherlands.

<sup>13</sup> Netherlands Institute for Human Rights, 1 October 2012-1 October 2013 Annual Activity Report.

<sup>14</sup> Netherlands Institute for Human Rights, October 2012, Strategic Plan.

<sup>15</sup> The National Action Plan on Human Rights is available in Dutch and English on the website of the Dutch Government.

<sup>16</sup> Report by Mr Thomas Hammarberg, Commissioner for Human Rights, on his visit to the Netherlands, 21-25 September 2008, CommDH(2009)2, 11 March 2009.

being based on only limited consultations with members of civil society. NGOs have stressed that it would therefore be important to consult all relevant stakeholders during the implementation phase.

30. An inter-ministerial human rights consultative committee serves as a platform for ministries to help to ensure the observance and promotion of human rights in the development of legislation and policy, and to ensure that the accountability procedures such as the drafting of mandatory reports prescribed by human rights conventions and for the United Nations Universal Periodic Review are conducted properly. Over the next few years, this committee will also be addressing the implementation of the NAPHR. Human rights NGOs have stressed the importance of this committee meeting regularly and working in a transparent way in order to enable members of civil society to provide input.
31. The Dutch authorities have announced that they will compile a list of all the international recommendations that have been made to the Netherlands in the field of human rights. Human rights NGOs have stressed that such a list should establish, for each ministry, clear lines of responsibility for the implementation of these recommendations.
32. The Lower Chamber of the Parliament (the House of Representatives) discussed the NAPHR, together with the first status report on human rights compiled by the Netherlands Institute for Human Rights (see above section 1.3) on 10 April 2014, in the framework of a general discussion on the human rights situation in the Netherlands. This general discussion was well received by human rights NGOs and the Institute. They expressed the hope that this initiative would be repeated on a regular basis.
33. In addition to the NAPHR, there are several national action plans or strategies which have a link with the protection of human rights of some groups or apply to specific spheres of activity. As indicated below one of them is the new Action Plan ("Children Safe") to tackle child abuse.<sup>17</sup> The Dutch authorities have also adopted an Action Plan on tackling trafficking in human beings.<sup>18</sup> In addition, the National Action Plan for Human Rights and Business ("Knowing and Showing"), approved on 20 December 2013 by the Dutch Government and based on the Ruggie Principles,<sup>19</sup> aims at drawing the attention of businesses to the risks of human rights violations in their activities and providing clear guidelines on how to respect corporate social responsibility and international human rights standards. The Netherlands Institute for Human Rights welcomed this initiative, but stressed that more needs to be done to combat exploitation and other abuse of workers by Dutch companies and employment agencies and that this National Action Plan on Business and Human Rights should be followed up and continued.
34. A more general criticism of human rights practice in the Netherlands that has been conveyed to the Commissioner is that the Dutch authorities do not systematically apply a human rights-based approach to their policies in different areas. Recently, the Netherlands Institute for Human Rights has raised this issue in connection with the issue of gas extraction in Groningen, a province in the north of the Netherlands, where, as a result of such extraction, earthquakes occur with significant impact on the human rights of those who live in the area. Although the Institute has urged the Dutch government on several occasions to use the human rights framework to inform future policy on gas extraction in Groningen, the human rights dimension has apparently been largely neglected in the public debate around this issue.<sup>20</sup>

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<sup>17</sup> See section 3.3 on child abuse.

<sup>18</sup> See GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands, 18 June 2014, GRETA(2014)10.

<sup>19</sup> UN Guiding Principles on Business and Human Rights, (Implementing the United Nations "Protect, Respect and Remedy" Framework) developed by the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises and endorsed by the Human Rights Council in its Resolution 17/4 of 16 June 2011.

<sup>20</sup> See in particular the NIHR 2013 Annual Status Report on Human Rights in the Netherlands (in Dutch).

## 1.5 HUMAN RIGHTS EDUCATION

35. The Commissioner notes that since 2006 Dutch schools have been legally obliged to promote citizenship and social cohesion. However, while the non-binding guidelines from the government specify that human rights is an integral part of citizenship education, schools remain free to decide whether to include human rights or not in the broader concept of citizenship education. Human rights are not yet included in the attainment targets for primary and secondary education, despite the NIHR's recommendation in this sense.<sup>21</sup> In 2012 the attainment targets of primary and secondary education were changed in order to include as a compulsory subject the discussion of sexuality and sexual diversity at schools. The aim of the arrangement is to promote the acceptance of sexual diversity and increase the assertiveness of youths.<sup>22</sup>
36. In reaction to a report of the Education Council of the Netherlands which provided recommendations as to how schools could be given more support in fulfilling their responsibility for citizenship education, including human rights education, the State Secretary of Education sent a Letter to the House of Representatives in December 2013, indicating that he would examine in which ways human rights education could become a part of the attainment targets defined for primary and secondary education. The position of the State Secretary on citizenship education, including human rights education, is to be shared with the Parliament in October 2014.
37. It is generally agreed among human rights experts in the Netherlands that there is a clear need for human rights education in primary and secondary schools. According to the NIHR, Dutch youths know relatively little about human rights. A survey conducted in the context of the 2009 Eurobarometer indicated that only 39% of the youths in the Netherlands ever heard about children's rights. This is the lowest score within the entire EU, where the average figure is 65%.<sup>23</sup> The NIHR also stressed that Dutch adults also usually know little about human rights and do not know how they can contribute to protecting human rights.<sup>24</sup> The [Netherlands Platform for Human Rights Education](#), a group composed of human rights and other NGOs, has constantly asked for measures to be taken in this field.
38. As concerns civil servants working in central and local institutions, in his report, the previous Commissioner already stressed the need to enhance knowledge of human rights among these professional categories. During the visit, the Commissioner learnt that, despite several initiatives to improve the situation, this need persisted and that there was a risk of the problem being compounded by the process of decentralisation of powers (see below section 1.6). Even if human rights education of certain groups of professionals is referred to in the NAPHR, no concrete steps on how to improve human rights awareness-raising among civil servants are mentioned.

## 1.6 DECENTRALISATION AND HUMAN RIGHTS

39. In recent years, various tasks have been transferred from central government to local authorities.<sup>25</sup> For example, powers in the field of social security, youth care, long-term care and employment support are being transferred to municipalities. In some cases, the transfer of power is accompanied by deregulation and budget cuts linked to the economic crisis.
40. As stressed by the Dutch authorities, one of the advantages of such decentralisation is the possibility of supplying services in a manner that is more adapted to local specificities and individual needs. However, it is essential that such a goal be reached without encroaching on the human rights of the individuals concerned. The Children's Ombudsman, for instance, has warned the Dutch authorities that decentralisation of youth mental health care could lead to a number of difficulties and stressed the need

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<sup>21</sup> Ibid., p. 141.

<sup>22</sup> Ibid., p. 13.

<sup>23</sup> Flash Eurobarometer 2009, The Rights of the Child, Analytical Report.

<sup>24</sup> See Netherlands Institute for Human Rights, 2012 Annual Status Report on Human Rights in the Netherlands, p. 13.

<sup>25</sup> There are 12 provinces and 415 municipalities in the Netherlands.

to ensure proper monitoring of the municipalities' work in this respect by developing a standardised monitoring tool that keeps track of the welfare and safety of all Dutch youths.<sup>26</sup> The NIHR has also stressed that decentralisation in the field of healthcare may have an impact on the enjoyment of the right to adequate healthcare. Therefore, the government must monitor that health services, facilities and support will be provided according to these human rights standards.<sup>27</sup>

41. While welcoming initiatives in favour of enhancing the application of human rights at local level, several interlocutors have stressed that the government itself does not sufficiently ensure that the transfer of powers is accompanied by the relevant transfer of human rights expertise. In addition, there are no specific provisions for the monitoring of the human rights implications of the decentralisation process. In its NAPHR, the Dutch government acknowledged that local expertise on the application of human rights was fairly limited and that there was an increasing need to raise awareness on these issues within municipal authorities in the context of the growing trend toward decentralisation. The Dutch government stressed that there is a "Local Human Rights Network" established by the Association of Netherlands Municipalities, the Municipality of Utrecht, the University College Roosevelt, the NIHR and Amnesty International Netherlands. Within this network, a range of activities are devised to enhance awareness and the application of human rights at local level. In addition, a website has been developed in order to encourage the observance of human rights at local level ([www.mensenrechtenlokaal.nl](http://www.mensenrechtenlokaal.nl)). The NAPHR indicates that the Ministry of the Interior and Kingdom Relations is exploring ways of supporting the Network.

## 1.7 HUMAN RIGHTS AND THE INTELLIGENCE AND SECURITY SERVICES

42. During his visit, the Commissioner had an opportunity to address the need to protect human rights in the context of intelligence and security activities. He met in particular with the two Dutch intelligence and security services and bodies entrusted with overseeing their activities. As stressed by the European Court of Human Rights (hereinafter: the Court) in its leading Judgment *Klass and Others v. Germany* and ensuing case-law, while some legislation granting powers of secret surveillance over mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime, states do not enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance.<sup>28</sup>
43. In the Netherlands, there are two intelligence and security services: the General Intelligence and Security Service (Dutch acronym: AIVD), under the responsibility of the Minister of the Interior and Kingdom Relations, and the Military Intelligence and Security Service (Dutch acronym: MIVD) under the responsibility of the Minister of Defence. The 2002 Intelligence Service Act (hereinafter: ISA)<sup>29</sup> provides the legal basis for the use of powers, including special powers, by these services by spelling out all the requirements to be fulfilled. The law provides in particular for a limited list of tasks of these services, the corresponding intelligence means they can use and the requirement of permissions in particular for the use of special powers. It also establishes a monitoring and control system applying to these services' activities, consisting of both non-judicial and judicial review.
44. There is a *post factum* judicial review of the activities of the Dutch intelligence and security services.<sup>30</sup> In particular, administrative courts are competent to review some decisions, such as requests for access to data. An official working for the intelligence and security services can also be called to account as a defendant or summoned as a witness before a criminal court in some cases. The Court of Audit is competent for supervising the two intelligence and security services in particular as concerns financial

<sup>26</sup> Children's Ombudsman, Marc Dullaert, Decentralising Dutch child mental health care: "Lessons from Denmark", ESCAP.

<sup>27</sup> Netherlands Institute for Human Rights, 2012 Annual Status Report on Human Rights in the Netherlands, p. 78.

<sup>28</sup> See European Court of Human Rights, *Klass and Others v. Germany*, paragraph 56, and *Kennedy v. the United Kingdom*, Application No. 26839/05, 18 May 2010, paragraph 167.

<sup>29</sup> An English version is available on the CTIVD website: <http://www.ctivd.nl/?English>.

<sup>30</sup> See European Court of Human Rights, Judgment of 22 November 2012, *Telegraaf Media and others versus the Netherlands*, Application No. 39315/06, paragraph 73.

issues. Lastly, civil courts can also be competent where an intelligence or security service has committed an unlawful act in respect of a person or an organisation.

45. As concerns the non-judicial review, the Parliament exercises democratic oversight in several ways. In particular, in the House of Representative there are two committees competent to deal with activities of intelligence and security services: the permanent Parliamentary Committee on Interior Affairs and the non-permanent Parliamentary Committee for the Intelligence and Security Services. While the first functions in an open manner, the latter (composed of heads of political parties represented in the House of Representatives) meets in camera and does not communicate on the result of its work.
46. The Review Committee for the Intelligence and Security Services (CTIVD) was established in 2002 by the ISA. The Committee is an independent public body composed of three members. Its role is to conduct in-depth investigations resulting in public review reports containing conclusions and recommendations with secret appendices and reporting via the minister to the House of Representatives. It investigates the core activities of and developments within the two services. The Committee can conduct investigations on its own initiative or upon request by one of the two relevant Ministers or one of the two Chambers of the Parliament. It is supported by a staff composed of a secretary, five review officers and an administrative adviser. It also acts as an advisory committee in the case of individual complaints lodged before the relevant ministers about these services.<sup>31</sup> The CTIVD has been given strong investigation powers by law for both its own in-depth investigation and the individual complaint procedures. The CTIVD reports enable the Parliament to exercise a control and, if necessary, to call the Minister to account.
47. The CTIVD publishes a comprehensive annual report on its monitoring activities and investigations, which is a good practice in terms of accountability of oversight bodies. It also meets regularly with the two abovementioned parliamentary committees.
48. The National Ombudsman is competent for receiving individual complaints relating to actions of the two intelligence and security services as indicated in Articles 83 and 84 of the ISA. The complainant must first inform the relevant minister that he/she intends to lodge a complaint with the National Ombudsman. The minister will then obtain the advice of the CTIVD before the National Ombudsman takes a decision on the complaint. The Dutch National Ombudsman will investigate the complaint using his/her investigation powers which are similar to those of the CTIVD in relation to the intelligence and security services. It will then communicate its decision on the complaint in writing to the person filing the complaint and, insofar as the security or other vital interests of the state do not dictate otherwise, stating his reasons. The independence of the ombudsman institution is an asset in this review procedure but it has been observed that, as a general institution, it lacks sufficient expertise and resources to conduct full oversight of intelligence and security activities.<sup>32</sup>
49. The Data Protection Authority (DPA), whose role is to supervise the enforcement of laws that regulate the use of personal data, is not competent to oversee the collection and use of personal data by Dutch intelligence services.
50. Finally, it should be noted that the AIVD and MIVD publish annual reports where they identify areas on which they have focused in the past year and on which they will focus in the coming year. This reporting exercise is a duty under the ISA to enhance the transparency of the intelligence and security services' use of their powers. These annual reports are a good example of the provision of comprehensive and useful information without compromising national security.
51. The legal framework for the oversight of the Dutch intelligence and security activities is currently undergoing significant reform, partly in response to the 2012 *Telegraaf Media* Judgment of the Court of (see below) and because of the need to take into account the development of new technologies since

<sup>31</sup> For instance, from 1 April 2012 to 1 April 2103, the Committee handled eight of such complaints against the AIVD.

<sup>32</sup> Overseeing Intelligence Services: A Toolkit, Editor(s): Hans Born, Aidan Wills, DCAF 2012, DCAF Handbooks, p. 22.

the adoption of the ISA more than 10 years ago. To that aim, the government is preparing a draft law which is to be tabled in Parliament by the end of 2014.

52. The Court's judgment of 22 November 2012, *Telegraaf Media v. the Netherlands*, concerned the protection of journalistic sources against the use of special powers by the AIVD. Under current law, to use such powers with respect to journalistic sources, the AIVD must obtain authorisation from the Minister of the Interior and Kingdom Relations only and there is no prior review by an independent body with the power to prevent or terminate it. As indicated above, while there is a possibility of review post factum, whether by the CTIVD, the Parliamentary Committee for the Intelligence and Security Services of the House of Representatives or the National Ombudsman, it cannot restore the confidentiality of journalistic sources once it is destroyed.<sup>33</sup> Therefore, in that case, the Court concluded that the law did not provide appropriate safeguards in respect of the use of powers of surveillance against journalists with a view to discovering their sources. Articles 8 (right to respect for private and family life) and 10 (freedom of expression and information) were concurrently violated, as regards the use by the secret services of special powers against two journalists.<sup>34</sup>
53. The Dutch authorities submitted an [Action Plan](#) for the execution of this judgement and other judgements by the Court. The Plan foresees amendments to the ISA and the Code of Criminal Procedure in order to reinforce the protection of journalistic sources including from the use of special powers by intelligence and security services. In particular, the amended law will provide for a prior judicial assessment by the Hague District Court when the Dutch intelligence and security services intend to use special powers against journalists in order to identify journalistic sources directly or indirectly.
54. In December 2013, a temporary committee set up by the government for the evaluation of the ISA, the so-called Dessens Committee, recommended that the legal framework regulating the activities of the intelligence and security services be updated to take account of technological advances and that the supervision of the powers of these services be strengthened to ensure that they are not used excessively.
55. In reaction to recent revelations on mass surveillance by the US National Security Agency (NSA), in July 2013 the Dutch Parliament asked the CTIVD to conduct an investigation concerning the activities of the Dutch services. In March 2014 the Committee published its findings on the processing of telecommunications data by the two Dutch intelligence and security services.<sup>35</sup> One of the conclusions of CTIVD was that the current potential infringement of privacy by these services goes further than was possible in 2002. The Committee therefore recommended the incorporation of additional safeguards in the ISA, including specific rules on metadata processing and on storage period for raw data. The Committee also made a number of recommendations concerning the need to be more cautious when co-operating with foreign counterparts and better check whether they respect the minimum human rights standards of personal data protection.<sup>36</sup>
56. In its 2013 human rights status report,<sup>37</sup> the NIHR recommended that the Dutch authorities provide for judicial review prior to all infringements of the privacy of telecommunications and enhance the

<sup>33</sup> See European Court of Human Rights, Judgment of 22 November 2012, *Telegraaf Media and others versus the Netherlands*, Application No. 39315/06, paragraph 73.

<sup>34</sup> In this case, the Court also referred to Recommendation R(2000)7 of the Committee of Ministers on the rights of journalists not to disclose their sources of information.

<sup>35</sup> CTIVD, Review Report on the processing of telecommunications data by GISS and DISS, CTIVD No. 38, 5 February 2014. The report is available in English on the website of the CTIVD: <http://www.ctivd.nl/?English>.

<sup>36</sup> In its report, the CTIVD stressed that AIVD and MIVD generally trust that the foreign services respect human rights and act within the parameters of their own national laws and regulations, unless they have evidence to the contrary. According to the CTIVD, "the recent revelations can be considered to be such evidence and make it desirable to verify whether the trust is still justified. In this connection the Committee also recommends that the ministers concerned reassess the cooperation relationships (also in international groups) for transparency and set out the considerations underlying the cooperation in more concrete terms."

<sup>37</sup> See NIHR 2013 Annual Status Report on Human Rights in the Netherlands, (in Dutch), see p. 99-102.

independent supervision of the intelligence and security services by making the CTIVD opinions legally binding and by providing for advance or accelerated reviews of the legitimacy of large-scale interceptions of data.

57. In November 2013, also in reaction to the revelations about the NSA, a coalition of citizens and organisations initiated civil law proceedings against the government with a view to restore the right to privacy of every citizen in the Netherlands.<sup>38</sup> Invoking among others Articles 8 and 10 of the ECHR and the related case-law of the Court, the applicants requested that the inflow and use of illegal foreign intelligence on Dutch soil be instantly brought to a halt. Furthermore, the coalition demanded that the Dutch government notify all citizens whose personal data have been illegally obtained and that these data also be deleted. In its ruling of 23 July 2013, the court rejected all the claims of the plaintiffs.<sup>39</sup> At the time of drafting this report, the case was pending before the Court of Appeal of The Hague.
58. The Dutch authorities have informed the Commissioner that as part of the ongoing reform, they intend to extend the powers of the intelligence and security services in particular as concerns the possibility to intercept cable-bound communications but also that they would reinforce the safeguards against abuse of powers including by ensuring that the CTIVD would be competent for examining whether these powers have been used in accordance with the law.
59. In the Netherlands, the subjects of personal data collection (especially by surveillance) are to be notified that personal information has been collected about them *ex post facto*, and subject to certain limits. This practice allows for the possibility of retrospective challenge and places a check upon the intelligence services' decision to open a file on the subject. However, the notification procedure has recently been put into question for being cumbersome and time-consuming for those who have to apply it.

## 1.8 CONCLUSIONS AND RECOMMENDATIONS

60. The Commissioner welcomes the solid legal and institutional framework in place for the protection and promotion of human rights in the Netherlands and its recent strengthening through the adoption of the country's first National Action Plan on Human Rights and the establishment of the Netherlands Institute for Human Rights and the Children's Ombudsman.
61. The Commissioner wishes to emphasise that in times of economic crisis it is particularly important for member states to refrain from cutting the budgets and staff of national human rights structures, such as national human rights institutions, equality bodies or Ombudsmen.<sup>40</sup> Given the crucial role that these structures play in providing accessible protection to victims of human rights violations and expert advice to governments on securing a human rights-compliant response to the economic crisis, the Commissioner calls instead on member states to ensure that these structures have stable and sufficient funding and independence to carry out their mandates fully, as further detailed in an Issue Paper he prepared on safeguarding human rights in times of economic crisis in 2013.<sup>41</sup> The Commissioner therefore strongly recommends that the Dutch authorities ensure adequate funding for these structures in the Netherlands and refrain, in particular, from cutting the budget of the Netherlands Institute for Human Rights. Consideration should also be given to strengthening the financial independence of this institution.

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<sup>38</sup> See <https://www.privacyfirst.eu/actions/item/604-lawsuit-against-the-dutch-government-on-account-of-illegal-data-espionage.html> from Privacy First which is member of this coalition. See also the press release: Dutch subpoena against Minister of the Interior due to cooperation with NSA, 6 November 2013.

<sup>39</sup> Privacy First, "District court of The Hague wide off the mark in Citizens v. Plasterk case", press release, 23 July 2014.

<sup>40</sup> Council of Europe Commissioner for Human Rights, National Human Rights Structures can help mitigate the effects of austerity measures – Human Rights Comment, 31 May 2014.

<sup>41</sup> Council of Europe Commissioner for Human Rights, Safeguarding human rights in times of economic crisis – Issue Paper, November 2013.



62. The Commissioner also welcomes the adoption of the Netherlands' first National Action Plan on Human Rights (NAPHR). He considers that such action plans can make a real contribution to the promotion and protection of human rights, provided that they rest on sound baseline studies, ensure genuine participation of a wide range of stakeholders at all stages of their development and enjoy visible political ownership. He invites the Dutch authorities to draw inspiration from his predecessor's [Recommendation](#) on systematic work for implementing human rights at the national level, which provides extensive guidance on these issues.
63. In particular, the Commissioner calls on the Dutch authorities to include more ambitious and measurable goals in its future Action Plans on Human Rights. He strongly encourages them to reinforce the participation of civil society in the implementation and evaluation of the NAPHR and its future development by ensuring a wider, more systematic and regular consultation. An independent evaluation of the implementation of the NAPHR, based on clear benchmarks and timeframes should also be carried out.
64. The Commissioner welcomes the debate which took place in the House of Representatives on the NAPHR and recommends that such parliamentary debates take place on a regular basis in order to strengthen the Parliament's involvement in the discussions concerning the systematic work for implementing human rights.
65. The Commissioner is pleased to note that the Dutch authorities have ratified a significant number of human rights treaties and urges them to also ratify the UN Convention on the Rights of Persons with Disabilities and its additional protocol, the Council of Europe Convention on preventing and combating violence against women and domestic violence and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The Dutch authorities should also ratify the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESRC) and the Convention on Human Rights and Biomedicine.
66. The Commissioner calls on the Dutch authorities to ensure that the status currently enjoyed by human rights treaties by virtue of Articles 93 and 94 of the Constitution is maintained.
67. The Commissioner regrets that, so far, the Netherlands has not been willing to reconsider its position according to which economic, social and cultural rights only contain general guidance for the Dutch government. He notes that the Committee on Economic, Social and Cultural Rights (CESCR), in view of the Dutch courts' case law on the status of the ICESRC provisions, has urged the Netherlands to consider all remedial measures, legislative or otherwise, to ensure that the Covenant rights were applicable and justiciable throughout the country. The CESCR also referred to its General Comment No. 9 (1998) on the domestic application of the Covenant.<sup>42</sup> The Commissioner calls upon the Dutch authorities to reconsider their position on this matter in light of the CESCR recommendations.
68. The Commissioner stresses that the Dutch authorities, when decentralising a sector with important human rights responsibilities, should always accompany the process by making sure that the local authorities are properly trained in human rights and have sufficient financial and human resources to accomplish their new tasks, in full line with the [Recommendation](#) CM/Rec(2011)11 of the Committee of Ministers to member states on the funding by higher-level authorities of new competencies for local authorities. The Dutch authorities should provide the necessary guidance and co-ordination on provisions of services to ensure respect of international human rights standards on the ground and avoid disparities in the protection of rights across regions and municipalities. They should also organise a central monitoring of the quality of these services on the basis of human rights standards. The Commissioner stresses that the authorities have the duty to protect human rights at stake when they take action to implement existing policies and devise new policies. More generally, he invites the Dutch

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<sup>42</sup> See Committee on Economic, Social and Cultural Rights, Concluding Observations on the Netherlands, 19 November 2010, E/C.12/NDL/CO/4-5, paragraph 6.

authorities to adopt more systematically a human rights-based approach to their policies at the national and local levels.

69. The Commissioner reiterates the recommendation that human rights education be firmly anchored in a comprehensive manner, therefore including children's rights, in primary and secondary school education. Therefore, he invites the Dutch authorities to include explicitly human rights in the attainment targets for primary and secondary education. In addition, schools should be provided with concrete guidelines as how best to teach the subject of human rights. The Commissioner also believes that further efforts are needed to ensure that civil servants be trained on human rights issues.
70. The Commissioner welcomes the existence of a general framework for the democratic oversight of the secret services activities in the Netherlands notably thanks to the existence of the Review Committee for the Intelligence and Security Services (CTIVD). The Commissioner encourages the Dutch authorities in their efforts to strengthen the existing legal framework, in particular the 2002 Intelligence Service Act (ISA), for overseeing and reviewing the activities of the intelligence and security services in order to ensure that human rights are fully protected against any abuse by these services.
71. When amending the ISA, the authorities should ensure in particular that the new legislation takes into consideration the evolution of technologies (such as use of metadata) available to the relevant services and fully complies with the ECHR as interpreted by the Court concerning the protection of privacy and personal data. As the Commissioner stressed in his human rights comment entitled "[Human rights at risk when secret surveillance spreads](#)", first of all, the law must be precise and clear as to the offences, activities and people subjected to surveillance, and must set out strict limits on its duration, as well as rules on the disclosure and destruction of surveillance data. Secondly, rigorous procedures should be in place to order the examination, use and storage of the data obtained, and those subjected to surveillance should be given a chance to exercise their right to an effective remedy. Thirdly, the bodies supervising the use of surveillance should be independent, and appointed by and accountable to parliament, rather than the executive.
72. The Commissioner strongly recommends that additional safeguards be included in the current legislation on intelligence and security services' activities in light of the above-mentioned human rights principles. In particular, the Dutch authorities should ensure that specific rules on metadata processing are added and that specific storage periods for raw data are set. The Commissioner also stresses the need for the Dutch authorities to take the utmost care, when co-operating with foreign intelligence and security services, to ensure that the human rights standards of personal data protection are respected.
73. The Commissioner invites the Dutch authorities to reinforce the legal framework for the supervision of the intelligence and security activities, including the use of all the new surveillance technologies available, notably by considering strengthening the role of the CTIVD and the authority of its decisions on the lawfulness of the activities supervised. While the procedure of notification to subjects of personal data collection has recently been criticised for being cumbersome and time-consuming for those who have to apply it, the Commissioner considers that it also plays the role of safeguard and should therefore be maintained.
74. The Commissioner also draws the attention of the Dutch authorities to the set of guidelines, called [Necessary and Proportionate](#) and put together by a large number of civil society groups, industry and international experts, which can be helpful in this regard. Also, the Global Network Initiative, GNI, has set out practical steps to protect human rights online in the report on [Digital Freedoms in International Law](#).

## 2 THE HUMAN RIGHTS OF ASYLUM SEEKERS AND IMMIGRANTS

75. Over the last decade, international and national human rights bodies, including the Commissioner's predecessor, have extensively focused on the asylum and immigration legislation and practice of the Netherlands, criticising the successive introduction of restrictive measures and laws. While in some cases, the Dutch authorities have taken positive steps to respond to these criticisms, there are a number of issues that remain of concern to the Commissioner. In September 2013, the Minister for Migration explained that the aim of the government was to devise a "restrictive immigration policy that is implemented humanely, within the parameters of the Coalition Agreement" ([Building Bridges](#)) of October 2012.<sup>43</sup> Another feature of this policy is that immigrants, including unaccompanied migrant children, who arrive or stay irregularly in the Netherlands, will in principle have to return, be it voluntarily or not: as indicated in the Coalition agreement, "those who are not permitted to reside here must leave, or they will be expelled". This overall approach has translated in practice into an extensive use of administrative detention with regard to asylum seekers and immigrants and a situation of legal limbo for many persons in an irregular situation, including children, with the human rights of the persons concerned coming under threat, as detailed below.

### 2.1 ADMINISTRATIVE DETENTION OF ASYLUM SEEKERS AND IMMIGRANTS

76. One of the areas of concern to the Commissioner is the extensive use of administrative detention of asylum seekers and immigrants. Dutch law provides both for detention at the border upon arrival (Article 6 of the 2000 Aliens Act) and detention in view of deportation (Article 59 of the 2000 Aliens Act).
77. Several serious incidents have occurred in recent years in detention centres for migrants including the suicide of an asylum seeker in January 2013 while in the Rotterdam detention centre, and a hunger strike by asylum seekers in the new administrative detention centre of Schiphol airport in May 2013. These incidents have attracted the general public's attention and the Minister of Security and Justice announced in 2013 that a more humane policy towards detention of immigrants would be put in place. The Commissioner has been informed that a draft law on migrant detention and return published by the government at the end of 2013 is to be tabled in the Parliament sometime in the autumn of 2014. However, as indicated below, the current draft text has been criticised by a number of stakeholders because it does not address all the existing shortcomings and in some cases introduces additional issues of concern as indicated below.

#### 2.1.1 DETENTION OF ASYLUM SEEKERS AT THE BORDER

78. Article 6 of the 2000 Aliens Act provides for the possibility of detaining at the border any third-country nationals who arrive at the Dutch external border without fulfilling the requirements for entering the Netherlands as laid down in Article 5 of the [Schengen Borders Code](#) and Article 3 of the Dutch 2000 Aliens Act. As these persons may be refused entry when arriving at the external borders of the Netherlands (airports and ports), in principle, they also have to leave immediately. If this is not possible, these persons may be required to stay in a place designated by a border control officer. In such cases, the Dutch authorities consider that they have not entered Dutch territory. Most persons arriving at the border without fulfilling the necessary visa requirements ask for asylum. In such cases, this claim is assessed under the normal asylum procedure lasting 8 days (preceded by a rest and preparation period of 6 days) and the border detention also applies to asylum seekers.
79. Current practice shows that all asylum seekers who arrive at external borders are systematically detained under Article 6 of the 2000 Aliens Act, for a period of up to 14 days, during which their asylum claim is processed. No exception is made for families with children.<sup>44</sup> The only exception concerns

<sup>43</sup> See "Families with children in aliens detention only by exception", News 13/09/13, on Dutch government website.

<sup>44</sup> See No Child in Detention –NGO Coalition, "Dad, have we done something wrong?" Children and parents in immigration detention, January 2014, p. 26.

unaccompanied migrant children who, since a change in policy in 2010, are not detained upon arrival at the external border and are immediately redirected to a special reception centre.

80. After this initial period of up to 14 days, asylum seekers are generally transferred to an open reception centre. In 2013, according to figures from the Ministry of Security and Justice, 780 persons were held in border detention, and 600 of those were admitted to the territory later either because they were granted asylum or because further enquiries were needed to determine their status in the context of asylum proceedings. According to the NGO *Vluchtenlingenwerk*, 76 of the 780 detained were children below the age of 15. In 2014, 48 children were held in border detention up to the end of May. Despite the strong criticism expressed by human rights stakeholders who underline the traumatic experience for children kept in such detention facilities even for a few days and with their parents, at the time of the Commissioner's visit, children with their families were still being systematically detained at the border in the Netherlands for a period of up to 14 days.
81. The Commissioner welcomes that, following the call he made at the end of his visit for children in particular not to be detained at border, the Minister of Migration announced on 23 May 2014 and confirmed in a subsequent letter to the Parliament that he endorses the basic premise in principle that a child should not be kept in detention. The Minister for Migration has stated that, from 1 September 2014, families with children will no longer be detained at the border, except in very exceptional circumstances. These families will be screened within a few hours of arrival in order to check risks of trafficking in human beings and will be sent right after to the asylum application centre of Ter Apel, where families who arrive through land borders are already sent. Human rights NGOs have welcomed this decision, stressing however that there should be no exception to the principle of non-detention of children. The government has indicated that, as of the beginning of 2015, the few families with children who will nonetheless stay in border detention in exceptional cases will be placed in a new closed reception centre for families with children and separated children which will not look like a prison. The family will be able to move freely within the closed facility and will not be locked in a cell anymore. The staff will not wear uniforms and will be specifically trained to deal with families with children.
82. There is a possibility to extend the detention of adult asylum seekers without children from 14 days to up to six weeks (so-called closed extended procedure). When the immigration authorities are not able to make a decision within 6 weeks, the procedure is again extended and the asylum seeker remains in detention but only if the border detention is due to the conduct of the asylum seeker. In recent years, the number of cases where border detention was extended has decreased significantly: it concerned 62 cases in 2010, 59 in 2011, and 50 in 2012. UNHCR and the Dutch NGO *Vluchtenlingenwerk* have called upon the Dutch authorities to abolish or at least reconsider the closed extended procedure.<sup>45</sup>
83. The current detention regime applying to border detention is regulated by the Border Accommodation Regime Regulations and differs from the one applying to detention pending deportation. In its draft law on migrant detention and return, the government is proposing to merge these two regimes into a new one. However, while the new regime proposed would constitute a slight improvement for detention pending deportation (see below), it would regrettably also make the current regime for border detention stricter than it is today.
84. The Commissioner visited the administrative detention centre in Schiphol airport within the Schiphol Justice Complex, which opened at the beginning of 2013. He met with the staff working there and several migrants detained in the context of border detention, including a 14 year-old asylum seeking girl from Syria who was there with her family. The Commissioner notes that, while the overall conditions of detention at the centre are satisfactory, it remains a detention facility. For instance, all members of a family are accommodated in a cell unit with a hatch on the door, where they are locked in for the night. During the day, they can get out of the cell unit freely and have access to a number of common facilities. The Commissioner was informed that when single parents are interviewed about their asylum claim, the

<sup>45</sup> See *Vluchtenlingenwerk* Netherlands and ECRE, Asylum Information database (AIDA), National Country Report, The Netherlands, 3 May 2013, p. 44.

child will stay with the parent as no child care is available during that time. This is problematic as this experience may be traumatising for the child and the parent may be less inclined to speak about his/her situation.

85. The main argument put forward by the Dutch authorities for establishing and maintaining systematic border detention is that the Schengen Border Code *oblige*s the Netherlands to refuse access to the territory to asylum seekers and to detain them, if they do not fulfil the necessary visa requirements. However, Article 5§4 of the Code permits states to provide access on humanitarian grounds and practice shows that not all states which are bound by this code systematically detain foreigners who do not fulfil the requirements for entering the country. It should also be noted that in the Netherlands asylum seekers arriving through land borders are not detained and are sent directly to an open reception centre pending the processing of their application for asylum.
86. The Commissioner notes that as far as adult asylum seekers without children are concerned, for the time being, the principle of their detention when they arrive at Schengen borders without the relevant documents remains applicable. The draft law on migrant detention and return to be tabled in the Parliament does not foresee any change that would assist in using detention only as last resort in practice. In particular, the UNHCR and the Dutch NGO *Vluchtenlingenwerk* have criticised the fact that there seems to be no intention to develop alternatives to border detention for adults without children.<sup>46</sup>

### 2.1.2 DETENTION PENDING DEPORTATION

87. Article 59 of the 2000 Aliens Act provides for the possibility of detaining foreigners with a view to their deportation for reasons of public interest or national security. In principle, the maximum duration of detention is six months plus 12 months, i.e. 18 months altogether.
88. In 2011, more than 6 000 foreigners were detained pending deportation. In 2012, 5 420 foreigners were detained (900 out of them for more than 6 months). According to NGOs working with detained migrants, 3 600 persons were detained in 2013. The government has indicated that the total number of detention places will be reduced from 2,000 to 933 by 2016.<sup>47</sup>
89. In March 2010, the government introduced a new policy regarding the detention of children and their families in view of deportation, providing for a maximum of two weeks of detention for minors and families with children (with a maximum extension to 28 days if deportation is obstructed). From 1 January 2013 to 13 September 2013, approximately 80 families, with 160 children, were placed in pre-deportation detention. Since 13 September 2013, families with children who are to be deported are detained only if they indicate that they will not co-operate. Since then, approximately 10 families with 10 children have been placed in detention. Families with children are in principle offered reception in restricted-regime accommodation ("family locations") which is a semi-open centre with a daily duty to report. Six such family locations are operational.
90. Following a change in the government's policy, since March 2011, unaccompanied migrant children are only placed in detention as a measure of last resort and for the shortest appropriate time. As a result, the number of unaccompanied minors detained has decreased, with 220 unaccompanied minors placed in detention in 2010 and 90 in 2011. According to NGOs, during the first half of 2012, 20 unaccompanied migrant children were detained for 50 days on average.<sup>48</sup> However the possibility to keep unaccompanied migrant children in detention remains due to the existence of a number of exceptions. Detention may be applied in one of the following circumstances: the child is suspected of or convicted

<sup>46</sup> [Report](#) by UNHCR and Vluchtenlingenwerk Nederland, *Pas nu weet ik: vrijheid is het hoogste goed' Gesloten Verlengde Asielprocedure 2010-2012*, with a summary in English, 2013.

<sup>47</sup> Press release, Dutch government, 13 September 2013, "Families with children in aliens' detention only by exception".

<sup>48</sup> NJCM, NGOs Commentary on the first periodic report submitted by the Kingdom of the Netherlands on the implementation of the UN Convention for the Protection of All Persons from Enforced Disappearance, CED/C/NLD/1, 28 February 2014, p. 21.

for having committed a crime; it is expected that the return can be carried out within two weeks; and the child has previously left a reception facility with unknown destination or has not complied with an imposed duty to check in or with a measure restricting his/her freedom. In a recent case, the highest administrative court, the Administrative Jurisdiction Division, confirmed that an unaccompanied migrant child can be detained for a period longer than two weeks as long as the duration of detention is “as short as possible”.<sup>49</sup>

91. The current regime for detention pending deportation is regulated under the Custodial Institutions Framework Act which is intended for the detention of persons who have been sentenced for a crime and also stipulates their punishment. As a result, pre-deportation detainees are subjected to various safety measures: frequent security searches, body searches, cuffs during transport and disciplinary punishments and measures such as placement in an isolation cell. Various institutions consider that the regime is disproportionate and that it is sometimes applied in an even more severe way than in the case of criminal detention.<sup>50</sup> The Commissioner’s predecessor criticised the fact that the current regime has more a punitive than an administrative nature.<sup>51</sup> The CPT, the National Ombudsman and the NIHR have asked for separate and specific rules for the administrative detention of foreigners. The Commissioner notes that in its NAPHR the government underlined that it wished to “make clearer that foreigners’ detention (was) a measure adopted under administrative law rather than a punitive measure”.<sup>52</sup> As for body searches more particularly, the Ministry of Security and Justice announced in September 2013 that it intended to change the current practice and was exploring alternatives such as body scans.<sup>53</sup>
92. In his 2009 report, the previous Commissioner urged the Dutch authorities to make a variety of meaningful activities available to all detainees in the asylum and expulsion process.<sup>54</sup> However, conditions of detention are still reported to be harsher for foreigners in administrative detention than for convicted prisoners, particularly because the detention of foreigners is monotonous and they do not have access to enough activities during the day. According to the National Ombudsman, unlike criminal detainees, administrative detainees have to stay in their cells for two persons from 16:30 to 8:00. They do not have the right to work or to receive education.<sup>55</sup> Following a number of reforms, the situation improved to some extent as immigrants in administrative detention have now access to the internet and their visiting hours have been extended. The draft law on migrant detention and return foresees more recreational activities and shorter time during which immigrants are detained in their cells. However, human rights NGOs consider that these improvements generally remain insufficient.
93. As mentioned above, the draft law on migrant detention and return aims at introducing a new harmonised regime of detention for both border detention and detention pending deportation. However, the draft introduces a two-tier system: a fairly open regime (*verblijfsregime*) and a more controlled and restricted regime (*beheersregime*) for those who pose a threat to public order and safety. It is envisaged that the restricted regime will apply automatically to every person entering migrant detention for up to two weeks. When commenting the draft law, the NIHR criticised this solution as it considered that migrants should be placed on arrival in the more open regime instead.<sup>56</sup> The current draft text also provides that the restrictive regime will be applied to persons with behavioural problems

<sup>49</sup> Administrative Jurisdiction Division, 27 June 2013, ABRvS 201303374/1/V3, quoted in Separated Children in Europe Programme, newsletter no 40, Fall 2013, p. 15.

<sup>50</sup> See in particular NIHR, Human Rights in the Netherlands, 2012 Status Report, p.54. NJCM, NGOs Commentary on the first periodic report submitted by the Kingdom of the Netherlands on the implementation of the UN Convention for the Protection of All Persons from Enforced Disappearance, CED/C/NLD/1, 28 February 2014, p. 18.

<sup>51</sup> Report by Mr Thomas Hammarberg, Commissioner for Human Rights, on his visit to the Netherlands, 21-25 September 2008, CommDH(2009)2, 11 March 2009, paragraph 58.

<sup>52</sup> [National Action Plan on Human Rights](#), Ministry of the Interior and Kingdom Relations, December 2013, p. 43.

<sup>53</sup> Press release, Dutch government, 13 September 2013, “Families with children in aliens’ detention only by exception”.

<sup>54</sup> Report by Mr Thomas Hammarberg, Commissioner for Human Rights, on his visit to the Netherlands, 21-25 September 2008, CommDH(2009)2, 11 March 2009, paragraph 57.

<sup>55</sup> NIHR, Human Rights in the Netherlands, 2012 Status Report, p.53.

<sup>56</sup> See the Opinion of the NIHR on the draft law, available in Dutch on NIHR’s publication [webpage](#): “Advies aan staatssecretaris Teeven over de Wet terugkeer en vreemdelingenbewaring”, published on 24 February 2014.

due to psychological or psychiatric issues, a factor that would increase their vulnerability. In addition, the detention regime foreseen in the draft law remains very strict and retains the possibility to separate and isolate detainees and to inflict other punitive measures similar to those applying in criminal detention.

94. The Commissioner was informed that access to healthcare of persons held in immigration detention leaves much to be desired. In 2012, the Healthcare Inspectorate received complaints from detainees about the fact that they did not have appropriate access to medical care. The NGO *Stichting LOS*, which has opened a hotline for immigrants who wish to complain about detention conditions, has also received a number of complaints relating to access to healthcare. The main criticism is that health problems of detainees are underestimated and that hospital treatments that are necessary from a medical point of view do not take place. The CPT was also critical in its 2012 report, considering that the detention centre in Rotterdam was not equipped to treat all prisoners and a medical inspection of the detainees was not carried out within 24 hours of their arrival in the centre. The CPT also expressed concern about psychiatric patients detained for the purpose of deportation who did not benefit from any special facilities or appropriate activities.<sup>57</sup> The government announced in September 2013 that it had taken measures to improve access to healthcare notably by facilitating the transfer of medical information between the detention centres and the Asylum Seekers Health Centre<sup>58</sup> However, this will not be sufficient to solve all the above-mentioned problems.
95. The Commissioner received worrying information according to which persons in a situation of particular vulnerability can be detained for immigration purposes. Neither the current legislation nor the draft law prepared by the government adequately address the situation of vulnerable persons in detention. The draft law only indicates that minors, unaccompanied migrant children, persons with disabilities, elderly persons, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other forms of serious psychological, physical or sexual violence are to be considered as vulnerable and that their situation will be taken into consideration in secondary legislation. It is however important that the rights of these persons be better safeguarded. There seems to be no clear intention to avoid detaining these persons (except maybe for children) or to use detention in their case as a last resort only. The Commissioner is particularly worried at this situation in the context of information according to which access to healthcare, and in particular psychological healthcare, remains an area where further improvements are needed.
96. Both the National Action Plan on Human Rights and the draft law on migrant detention and return foresee that detention pending deportation will only occur as an exception to the general principle of non-detention. This would constitute a step in the right direction as the current policy and practice is to envisage detention as the principle rather than as a last resort. However, for this new policy to be successful, the draft law will have to be accompanied by the relevant changes in subsidiary regulations and administrative practice. In particular, the Dutch authorities will have to develop all possible alternatives to detention if the new policy of detention as a last resort is to be duly implemented.
97. On average the duration of administrative detention under Article 59 of the Alien Act is of six months. The research conducted by the Advisory Committee of Migration Affairs (ACVZ) indicated that after six months of detention only 17% of the detainees demonstrably left the country. In this respect, the Commissioner shares the view of the ACVZ that the longer detention continues, the smaller the chance of departure becomes.<sup>59</sup> Moreover, in 2013, the UN Committee against Torture expressed its concern at reports that the maximum duration of 18 months for detention pending deportation is not strictly observed in practice. There have been reports according to which about 30% of immigrants have been detained for periods longer than 18 months. The explanation is that once they have been released from previous detention, they are again being apprehended by the police and placed in detention due to the

<sup>57</sup> CPT, [Report](#) to the Government of the Netherlands on the visit to the Netherlands, from 10 to 21 October 2011, published in 2012.

<sup>58</sup> See "Families with children in aliens detention only by exception", [News](#) 13/09/13, on Dutch government website.

<sup>59</sup> Advisory Committee of Migration Affairs (ACVZ), "Aliens' detention or a less intrusive measure?", May 2013, p. 83.



absence of a valid residence permit.<sup>60</sup> The Commissioner, during his visit to a disused church in The Hague where irregular immigrants were living in extremely difficult conditions, met with persons who indicated that some of them had been placed in detention several times for several months without this detention resulting in deportation. According to Dutch human rights NGOs, this practice amounts to making the duration of foreigners' detention *de facto* unlimited.

98. The Commissioner notes with particular concern reports according to which some immigrants are deprived of their liberty despite the fact that it is known in advance that the objective for which this deprivation of liberty is allowed, i.e. deportation, is not feasible.<sup>61</sup> This raises question of compatibility with Article 5§1 of the ECHR, and in particular with the Court's case law according to which detention is to be considered arbitrary if it is not closely connected to the ground of detention, including if an alien is detained for the purpose of expulsion although the latter cannot reasonably be carried out.<sup>62</sup>
99. The Commissioner is also worried by the fact that alternatives to migrant detention are seldom considered by the Dutch authorities before deciding to place an immigrant in detention.<sup>63</sup> According to the ACVZ, due to a range of legal, policy and practical problems, it cannot be guaranteed in current practice that detention pending deportation will only be used as a last resort.<sup>64</sup> Alternatives to migrant detention for the purpose of deportation have been the subject of four pilot projects started by the government in 2012.<sup>65</sup> These included: 1) the introduction of the obligation to report to the Aliens Police; 2) measures to restrict the movement of ex-unaccompanied migrant children; 3) testing the obligation for third country nationals required to leave, to pay a deposit which will be given back once they have left EU territory, and; 4) financing return projects run by NGOs in co-operation with municipalities and church bodies.<sup>66</sup> However, according to several stakeholders including the ACVZ and Dutch human rights NGOs, these projects were very limited in scale as the requirements to benefit from these schemes are very stringent to the extent that almost no foreigner is eligible.<sup>67</sup>

### 2.1.3 CONCLUSIONS AND RECOMMENDATIONS

100. The Commissioner calls on the Dutch authorities to ensure that detention of asylum seekers and immigrants is used as last resort, for the shortest possible period of time and only used after first reviewing all other alternatives and finding that there is no effective alternative, in accordance with the [Resolution 1707\(2010\)](#) of the Parliamentary Assembly of the Council of Europe. He notes the expressed intention of the Dutch authorities to make progress towards using administrative detention, both at the border and pending deportation, only as a measure of last resort.
101. As a first step in this direction, the Dutch authorities should stop the detention of all asylum seeker children. The Commissioner reiterates that any decision taken in the field of immigration detention concerning a child with or without his/her family should be taken in full compliance with the UN CRC and in particular Article 3 under which the best interests of the child shall be a primary consideration in

<sup>60</sup> UN Committee against Torture, Concluding observations, Netherlands, 20 June 2013, CAT/C/NLD/CO/5-6, paragraph 14. See also National Ombudsman, Immigration [Detention](#): penal regime or step towards deportation? About respecting human rights in immigration detention, 7 August 2012.

<sup>61</sup> See NIHR, Human Rights in the Netherlands, 2012 Status Report, p.53, and Advisory Committee of Migration Affairs (ACVZ), "Aliens' detention or a less intrusive measure?", May 2013, p. 83.

<sup>62</sup> See European Court of Human Rights, [Louled Massoud v. Malta](#), App. N°24340/08, judgment of 27 July 2010, §67.

<sup>63</sup> See National Ombudsman, Immigration [Detention](#): penal regime or step towards deportation? About respecting human rights in immigration detention, 7 August 2012, p.29.

<sup>64</sup> Advisory Committee of Migration Affairs (ACVZ), "Aliens' detention or a less intrusive measure?", May 2013, p. 81.

<sup>65</sup> NIHR, Human Rights in the Netherlands, 2012 Status Report, p.55. National Action Plan on Human Rights, Ministry of the Interior and Kingdom Relations, December 2013, p. 43.

<sup>66</sup> Country factsheet [Netherlands](#) 2012, European Migration Network, European Commission.

<sup>67</sup> Advisory Committee of Migration Affairs (ACVZ), "Aliens' detention or a less intrusive measure?", May 2013, p. 81. NJCM, NGOs Commentary on the first periodic report submitted by the Kingdom of the Netherlands on the implementation of the UN Convention for the Protection of All Persons from Enforced Disappearance, CED/C/NLD/1, 28 February 2014, p. 18.



all actions. Moreover, asylum seekers and immigrants belonging to vulnerable groups should not be kept in administrative detention according to the Commissioner.

102. The Commissioner wishes to stress that, according to the Court's case-law, administrative detention of asylum seekers and rejected asylum seekers is to be considered arbitrary if it continues for an unreasonable length of time.<sup>68</sup> It is also to be considered arbitrary if it is not closely connected to the ground of detention,<sup>69</sup> for instance if an alien is detained for the purpose of expulsion although the latter cannot reasonably be carried out.<sup>70</sup> The detention of a rejected asylum seeker with a view to his/her expulsion is justified under Article 5§1(f) only for as long as deportation proceedings are in progress.<sup>71</sup>
103. The Commissioner invites the Dutch authorities to apply all possible less intrusive measures than detention in the period before deportation. The Commissioner encourages the authorities to make the requirements for the few existing alternatives to detention less stringent and ensure that these alternatives can be used for foreigners who are to be returned or removed from the country on the basis of an individual assessment.
104. The Commissioner notes the intention of the Dutch government to merge the current detention regimes applicable to border detention and detention pending deportation into one single regime. He recalls the principle that immigrants should not be treated as criminals and urges the Dutch authorities to abandon the current criminal detention regime applicable to detention pending deportation and to opt for a non-punitive regime in all cases of administrative detention of foreigners. In particular, the Commissioner urges the authorities to reconsider their plans of applying a very restrictive regime for the first two weeks of administrative detention, considering that the decision to apply such a regime should always be based on an individual assessment and be taken only where absolutely necessary.
105. The Commissioner urges the Dutch authorities to continue and strengthen their efforts in improving access to healthcare of immigrants in administrative detention. Finally, the Commissioner stresses that the 2011 [CPT Standards](#) offer useful guidelines on respect for human rights in the context of migrant detention.<sup>72</sup>

## 2.2 HUMAN RIGHTS OF IRREGULAR IMMIGRANTS

106. As indicated above, the point of departure of the government's policy is that irregular migrants should leave the Netherlands as soon as possible, preferably by their own means, and if need be, through forced return (including administrative detention). Thus, the current immigration policy of the government aims at discouraging irregular immigrants from staying in the country. The 2012 Coalition Agreement went as far as envisaging the criminalisation of irregular stay. On this basis, the government prepared a draft law in 2013 that would have subjected foreigners without a residence permit to criminal detention in addition to administrative detention. The Commissioner is pleased to note that the Dutch government finally decided to withdraw this draft law in April 2014. However, the Dutch government remains of the opinion that "immigration policy should be geared towards discouraging unlawful residence"<sup>73</sup> and has taken steps in that direction which have threatened the enjoyment of

<sup>68</sup> See inter alia, European Court for Human Rights, [Saadi v United Kingdom](#), App. No. 13229/03, Grand Chamber judgment of 29 January 2008, §72 and [Suso Musa v. Malta](#), App. No. 42337/12, judgment of 23 July 2013, §91.

<sup>69</sup> See European Court for Human Rights, [Kanagaratnam and others v. Belgium](#), App. No. 15297/09, judgment of 13 December 2011, §93; [A. and Others v. the United Kingdom](#), App. No. 3455/05, Grand Chamber judgment of 19 February 2009, §164.

<sup>70</sup> See European Court for Human Rights, [Louled Massoud v. Malta](#), App. No. 24340/08, judgment of 27 July 2010, §67.

<sup>71</sup> See European Court for Human Rights, [Chahal v. United Kingdom](#), App. No. 22414/93, Grand Chamber judgment of 15 November 1996, §113.

<sup>72</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment, CPT Standards, revised in 2013, see Chapter IV on immigration detention.

<sup>73</sup> [Submission](#) of the Dutch Government relating to the Conference of European Churches (CEC) v. The Netherlands, Complaint No 90/2013 lodged with the European Committee of Social Rights, case doc. No 4.

some human rights, such as the right to shelter, by irregular immigrants, and consequently attracted national and international criticism.

107. According to the Dutch Research and Documentation Centre (WODC), there are between 60,000 and 133,000 undocumented migrants living in the Netherlands.<sup>74</sup> Under current Dutch law, immigrants staying in the Netherlands in an irregular situation are entitled to necessary medical care, legal assistance and, for children, education. As concerns other rights, the 1998 Benefit Entitlement (Residence Status) Act (the so-called “Linkage Act”) links foreigner’s entitlement to benefits and facilities to their residence status. The objective of that law is to discourage irregular residence and to prevent irregular immigrants from becoming settled in the Netherlands through the granting of benefits and facilities that would make expulsion at a later stage impossible.<sup>75</sup> Under the law, foreigners who find themselves in an irregular situation, for instance rejected asylum seekers at the end of the procedure, are given 28 days to leave the country during which they have access to reception facilities. In case the authorities consider that a return is possible within a short term, a foreigner may stay in immigration accommodation even after these 28 days while awaiting his/her departure for a total period of 12 weeks maximum. After this period, they are in principle not entitled to shelter, clothing or food.
108. As a result, today an unidentified number of irregular immigrants end up in the streets in destitution. Some of them have been living for several years in legal limbo, particularly when they cannot be returned for whatever reason. In reaction, some of these immigrants have initiated protests and encampments in public places in order to make their living conditions and precarious status known to the general public with the hope that the Dutch authorities reconsider their policy or, at least, the situation of the most vulnerable irregular immigrants. Progressively, the general principle of linking shelter to residence status has been reconsidered for some of the persons concerned who have been granted access to emergency accommodation on an exceptional basis. One of the solutions found is the granting of an exceptional residence permit to certain categories of foreigners living in an irregular situation.

### 2.2.1 SPECIAL RESIDENCE PERMITS

109. Rejected asylum seekers may receive temporary residence permits, which include access to accommodation, under strict conditions: notably that the person accepts to be returned as soon as possible and co-operates with the authorities to that aim. These permits include the so-called ‘no-fault residence permit’ (*buitenschuldvergunning*) and a residence permit on medical grounds.
110. The no-fault residence permit (*buitenschuldvergunning*) is a temporary permit that can be granted to undocumented migrants who are unable to leave the Netherlands through no fault of their own. The permit is granted on condition that the immigrant will leave the Netherlands as soon as this becomes possible. The applicants have to meet four stringent cumulative requirements. They must prove that they have tried independently to leave the Netherlands; the International Organisation for Migration (IOM) must have indicated that it is not able to assist them in leaving due to lack of travel documents; mediation by the Return and Departure Services to obtain the necessary travel documents must have been unsuccessful, and; the applicant must show that he or she cannot leave the Netherlands through no fault of his or her own. After three years, the holder of the no-fault residence permit becomes eligible for another type of residence permit for a limited time.
111. While the possibility of granting a residence permit to immigrants who cannot be returned is to be welcomed, the conditions applying have been criticised for being too stringent, mainly because the

<sup>74</sup> As quoted by the CEC in its Response to the Submission of the Dutch Government relating to the Conference of European Churches (CEC) v. The Netherlands, Complaint No 90/2013 lodged with the European Committee of Social Rights, Case doc. No 6.

<sup>75</sup> See ACVZ, “Right to protection of human dignity”, Advisory [report](#) on reception and assistance for aliens residing illegally in the Netherlands and for aliens who have residence rights but no entitlement to benefits and facilities, March 2012.

burden of proof lies too heavily with the applicant.<sup>76</sup> The NGO Dutch Refugee Council recommended that each case should be looked at individually and that an individual plan of action be agreed between the Return and Departure Services and the foreigner concerning his/her return. One of the main problems lies in the requirement that the immigrant has to prove that the country of origin or another country refuses to grant the necessary travel documents. Therefore, the NIHR, the ACVZ, human rights NGOs and others have asked that, if the country of return does not respond within one year to a request for travel documents, a residence permit on the grounds of non-removability should be granted.

112. Apart from the no-fault permit, irregular migrants can be granted a special residence permit if they cannot be removed from the country for medical reasons. This residence permit does not grant access to work (even for the healthy family members) during the first three years, but during the first year the person has to stay in an asylum centre and the two following years, he/she can rent a house and receive social benefits. Only a small number of persons have been granted such residence permits in recent years.
113. As concerns children, in 2013, the Dutch authorities introduced the so-called Children's Pardon (*Kinderpardon*), a residence permit specifically intended for children who are rejected asylum seekers (and members of their families) and who do not benefit from a residence permit on another ground although they have lived in the Netherlands for a certain time. In total 3,260 persons applied for this residence permit and, as of April 2014, a total of 675 children and 775 of their family members were granted one.
114. While the Children's Pardon constitutes a step in the right direction, this procedure was heavily criticised by the Children's Ombudsman and the mayors of several hundred municipalities in the Netherlands for being too restrictive. The conditions to be met for obtaining a residence permit on the basis of the Children's Pardon scheme are that the applicants should have applied for asylum before their 13th birthday and lived in the Netherlands for at least five years; they should be no older than 21 when applying for the residence permit; they should not have evaded central government supervision for more than three months; and they should not have lied about their identity to officials more than once.
115. One of the main concerns is that the condition of not having evaded central government supervision is almost impossible to meet for children who were not accommodated in reception centres (run by central authorities), but were, for example, attending schools and living in municipal shelters, or who did not have a legal guardian appointed. In addition, given all the cumulative conditions to meet, several groups of persons fall outside the scope of the Children's Pardon, in particular children who have never applied for asylum but for a regular residence permit, children of parents who are deemed a "threat to public security", and those who have already turned 21, despite the fact that they may have lived for a long period of time in the Netherlands.
116. The Ministry of Security and Justice stated in April 2014 that not more than 800 children were to be eligible for the Children's Pardon and that 674 already received the residence permit in question. It is not in the government's intention to extend this amnesty rule despite the strong calls from numerous mayors, NGOs and the Children's Ombudsman for the adoption of a less restrictive approach. During his discussion with the Minister on Migration, the Commissioner was informed that while the Minister was ready to review a few additional individual files and grant on a case-by-case basis and in a discretionary way some more of these residence permits, no extension of the procedure was envisaged.
117. More generally, the position of the Dutch authorities according to which immigrants who are not lawfully staying in the country must leave does not sufficiently take into account the fact that there are a considerable number of factors making departure from the country impossible. As stressed by the ACVZ, practice shows that even those who wish to return to their country of origin are sometimes unable to do

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<sup>76</sup> See in particular, ACVZ, "Where there is a will but no way", Advisory [report](#) on the application of the policy on aliens who, through no fault of their own, cannot leave the Netherlands of their own accord, July 2013.

so.<sup>77</sup> The reasons can be the lack of co-operation of the country concerned in letting the person enter the country or the fact that the immigrant is stateless (see below the section 2.3 on stateless persons and persons with unknown nationality). In such cases, under the current system, these persons are left in legal limbo as they do not necessarily receive a residence permit allowing them to stay and to work in the country. In the Commissioner's view, only an individual and thorough assessment of each situation in light of human rights obligations could enable the Dutch authorities to take a decision in this matter taking all the factors into account.

## 2.2.2 AD HOC SOLUTIONS FOR ENSURING ACCESS TO BASIC HUMAN RIGHTS

118. Beside the above mentioned special residence permits that can offer a solution to persons who have been living irregularly on Dutch territory, a number of persons are granted access to shelter, food and clothing on the grounds of their particular vulnerability or of the existence of some exceptional circumstances.
119. Unaccompanied migrant children have been granted access to reception facilities following a Decision of the European Committee of Social Rights (ESCR), which found that the situation in the Netherlands violated Articles 31§2 (prevention of homelessness) and 17§1 (protection for children deprived of their family's support) of the Revised Social Charter as States Parties are required under these provisions to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction.<sup>78</sup> On 21 September 2012, the Dutch Supreme Court, referring to the ESCR's decision, ruled that shelter should also be provided to destitute undocumented families with children. Therefore, under the current state of affairs, irregularly staying unaccompanied migrants children and immigrant families with children are placed, respectively, in special centres for unaccompanied minors and in reception facilities, called family locations. In both cases, the freedom of movement of the person concerned is restricted (see above: section 2.1.2 detention pending deportation).
120. In addition, in several individual cases, Dutch courts considered that undocumented adult immigrants without children and in an extremely vulnerable situation should also be granted shelter. However, in other cases, adult undocumented immigrants who were also in a very dire situation and with health problems were refused access to a shelter, with such denial being subsequently upheld by national courts. For instance, the denial of assistance to a 61 year old man with diabetes, reduced heart functions and other illnesses, was reported as being considered to be in accordance with Dutch law by a domestic court.<sup>79</sup> In addition, some municipalities are facilitating emergency reception, a situation which has been said to have created tensions between these municipalities and the central government.<sup>80</sup>
121. Finally, the government also decided that extreme winter conditions, the prevention of security problems due to protests and encampments and the need to end a deadlock could justify in some exceptional cases temporary emergency shelters for undocumented adults. It should also be noted that some municipalities and private charity organisations also provide shelter, clothing and food to irregular migrants.
122. The fact remains that in principle irregular immigrants do not have an explicit right to shelter under Dutch law. As many fail to fulfil the requirements for receiving a temporary residence permits or even only for accessing ad hoc public emergency shelters, they are left in practice destitute in the streets or at best, dependent on charity. In reaction to this state of affairs, in 2011 and 2012 various groups of undocumented migrants (in particular from Somalia and Iraq) camped at several public places in the

<sup>77</sup> See ACVZ, Right to protection of human dignity, Advisory report on reception and assistance for aliens residing illegally in the Netherlands and for aliens who have residence rights but no entitlement to benefits and facilities, March 2012.

<sup>78</sup> Decision DCI v. Netherlands, [Complaint No. 47/2008](#), 20 October 2009.

<sup>79</sup> Central Administrative Court 16 May 2012, LJN BW7019, as reported in Conference of European Churches (CEC) v. The Netherlands, Collective Complaint No 90/2013 lodged with the European Committee of Social Rights, case doc. No 1.

<sup>80</sup> See ACVZ, "Where there is a will but no way", Advisory [Report](#) on the application of the policy on aliens who, through no fault of their own, cannot leave the Netherlands of their own accord, July 2013.

Netherlands. At one point, one of these encampments in Amsterdam hosted almost 400 people. In general, the camps were tolerated for several weeks but some were eventually forcibly evicted by the police without any adequate alternative accommodation being provided. In November 2012, undocumented immigrants living in the camp “We are here” in Amsterdam were evicted by force, and some hundreds of them went to live in a disused church, the so-called ‘Refuge Church’ (*Vluchtkerk*). Currently some of them are staying in a former prison in Amsterdam on the basis of an agreement between the central authorities and the municipality but a recent court decision ruled that they should leave this place, while no alternative has been found to accommodate them so far. The rest of the group went to live in a garage, the so-called “Refuge Garage” (*Vluchtgarage*), which is a private initiative, and at the time of preparing this report, around one hundred irregular immigrants were still there. After having visited the garage in June 2014, the NIHR rang the alarm bell, calling the situation of the persons living there “inhumane” to the extent that it was provoking tensions and quarrels among them. It asked the Dutch authorities to find solutions in compliance with the human rights obligations binding the Netherlands. Unfortunately, since then, the situation there has continued to deteriorate leading to the death of one of the inhabitants in a fight at the end of August 2014.

123. The Commissioner had an opportunity to witness some of the difficulties described above during a visit he carried out to a disused church in The Hague, where some 65 irregular immigrants had taken shelter, and to discuss their situation with some of them. There, he could note the insalubrious and very difficult conditions in which these persons were living, for some of them, for nearly two years. Some had worked for years in the Netherlands before finding themselves in this situation. Since the Commissioner’s visit, most of the persons who had been living in the church were relocated in September 2014 to another location made available by the municipality of The Hague.
124. The situation of irregular immigrants raises other issues of concern. As indicated above, it is apparently not rare that some of them are repeatedly arrested and placed in immigration detention without being removed from the country. The National Ombudsman indicated in a report published in October 2013 that in practice irregular immigrants living on the streets were confronted with manifold obstacles in accessing medical care, in contrast with what was stated in the law.<sup>81</sup> Irregular immigrants who recently went to hospital for medical care were reportedly sent away on the grounds that they did not have health insurance. Another significant problem these immigrants are confronted with is their vulnerability to exploitation and trafficking in human beings as they do not have the right to work. The risk of being arrested, detained, and eventually deported prevents them from contacting the Dutch authorities to report the abuse they suffer from unscrupulous employers or any other criminal behaviour against them or which they have witnessed.
125. The European Federation of National Organisations working with the Homeless (FEANTSA) and, subsequently, the Conference of European Churches (CEC) organisations lodged collective complaints with the European Committee of Social Rights concerning access to emergency shelters by undocumented adults claiming that the denial of this access was in breach with Article 13§4 (right to social and medical assistance) and Article 31§2 (prevention of homelessness) of the Revised Social Charter. For the first time since the introduction of the collective complaint procedure, the ESCR adopted on 25 October 2013 and on the basis of Rule 36 of the Rules of the Committee, decisions on immediate measures,<sup>82</sup> pending the decisions on the merits. These decisions invite the government to adopt all possible measures with a view to avoiding serious irreparable injury to the integrity of persons at immediate risk of destitution, through the implementation of a co-ordinated approach at national and municipal levels ensuring that basic needs (shelter, clothes and food) are met and to ensure that all the

<sup>81</sup> National Ombudsman, “Medische zorg vreemdelingen - Over toegang en continuïteit van medische zorg voor asielzoekers en uitgeprocedeerde asielzoekers”, 3 October 2013, [Report 2013/125](#) (available in Dutch only).

<sup>82</sup> European Committee of Social Rights, [Decision on immediate measures](#), Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013 and Decision on immediate measures, European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands, Complaint No. 86/2012.

relevant public authorities are made aware of the decisions.<sup>83</sup> The European Committee of Social Rights adopted the decisions on the merits during its 272<sup>nd</sup> session (30 June-4 July) which remain confidential at the time of drafting this report.

### 2.2.3 CONCLUSIONS AND RECOMMENDATIONS

126. The Commissioner is concerned at the current human rights situation of immigrants staying irregularly in the Netherlands. He recalls that, in accordance with international standards binding on the Netherlands, these persons continue to be entitled to a range of human rights, including social and economic rights.
127. The Commissioner welcomes the steps taken by the government to grant residence permits to some of the immigrants who cannot be returned through the “no-fault” procedure and to child asylum seekers whose applications were rejected but who have been living in the country for a certain period of time. However, he notes that the conditions applying to these two schemes are very restrictive and invites the Dutch authorities to review these conditions. As concerns the “no-fault” residence permit, the Dutch authorities should in particular consider granting a residence permit if the country of return does not respond to a request for travel documents within a reasonable period.
128. As concerns the Children’s Pardon, the Commissioner calls on the Dutch authorities to apply the procedure in a more inclusive way. In particular, the current interpretation according to which children who were fully integrated in society but not “under the supervision of the central government” are excluded from the pardon scheme should be reconsidered. More generally, the Commissioner urges the Dutch authorities to ensure full respect of the right of children of families of irregular immigrants to have their best interests treated as a primary consideration in all decisions pertaining to residence permits or return and affecting them, including as members of their families, as required by Article 3 of the UN CRC.
129. The Commissioner is concerned at the protracted legal limbo in which some irregular immigrants find themselves, in view of the negative impact of this situation on their human rights. He calls on the Dutch authorities to assess the situation as regards the practical possibility of returning these persons thoroughly and on an individual basis. Where return is impossible or particularly difficult, the Dutch authorities should find solutions to authorise the relevant person to stay in the Netherlands in conditions which meet their basic needs and respect their human rights. Particular attention should be given to ensuring the prohibition of inhuman and degrading treatment (Article 3 of the ECHR) and the protection of the right to private and family life (Article 8 of the ECHR). Immigrants who are not removable should also be protected from being arrested and placed in administrative detention.
130. The Commissioner recalls that anyone, irrespective of whether their stay in a country is lawful, has the right to an adequate standard of living for himself and his family, including adequate food, clothing and shelter. Many international instruments to which the Netherlands is a party recognise this right which is intimately linked with human dignity. The Commissioner draws the attention of the Dutch authorities to the Parliamentary Assembly of the Council of Europe’s [Resolution 1509 \(2006\)](#) on human rights of irregular migrants where the Assembly considers that in terms of minimum economic and social rights, adequate housing and shelter guaranteeing human dignity should be afforded to irregular migrants and that social protection through social security should not be denied to them where it is necessary to alleviate poverty and preserve human dignity.
131. The Commissioner calls on the Dutch authorities to find solutions, in consultation with the persons directly concerned, human rights institutions and NGOs, to ensure that the basic needs, including shelter, clothes and food, of irregular immigrants at immediate risk of destitution are met, as also requested by the European Committee of Social Rights in its Decisions on immediate measures of 25 October 2013. He recalls that the Committee of Ministers, in its Resolution on a collective complaint

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<sup>83</sup> Decision Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013 and Decision European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands, Complaint No. 86/2012.



brought against the Netherlands under the European Social Charter, while recognising the limitation of persons protected under the Charter, notes that “this does not relieve states from their responsibility to prevent homelessness of persons unlawfully present in their jurisdiction, more particularly when minors are involved”.<sup>84</sup>

132. The Commissioner also wishes to recall that irregular immigrants should be protected from labour exploitation and trafficking in human beings in full compliance with the Council of Europe Convention on Action against Trafficking in Human Beings. He refers in particular to the first report of the Group of Experts on Action against Trafficking (GRETA) on the Netherlands, where the Dutch authorities are urged to ensure that all victims of trafficking are properly identified and can benefit from the assistance and protection measures contained in the Convention and are invited to further strengthen their efforts to identify victims of trafficking for the purpose of labour exploitation, especially among irregular migrant workers.<sup>85</sup>
133. Finally, the Commissioner notes with concern that, while irregular immigrants have access to necessary medical care, they encounter difficulties in exercising this right in practice. He urges the Dutch authorities to improve access to healthcare for these persons notably by following the recommendations made by the National Ombudsman.<sup>86</sup>

### 2.3 STATELESS PERSONS AND PERSONS WITH UNKNOWN NATIONALITY

134. The Commissioner is pleased to note that the Netherlands has ratified the main international and European treaties on statelessness.<sup>87</sup> He also notes, however, that there is no adequate procedure at present to identify stateless persons and determine statelessness in the Netherlands. As noted by the Dutch Council of State in a ruling of 21 May 2014, and stressed by several stakeholders (including UNHCR, the NIHR and the ACVZ), in the absence of such a procedure, persons without a nationality are prevented from claiming and enjoying the protection provided in the main international treaties on statelessness and in particular the 1954 UN Convention on Stateless Persons which provides rights for stateless persons in the fields of employment, healthcare, social assistance and education.
135. The lack of such a procedure also makes it impossible to give an exact account of the number of stateless persons living in the Netherlands.<sup>88</sup> Thus, on 1 January 2012, in addition to 2 005 people registered in the “municipal basic administration” register (Dutch acronym: GBA) as “stateless”, there were 88 313 persons registered as being of “unknown nationality”. In practice, this means that they are neither considered as stateless by the Dutch authorities nor do they benefit from any recognised nationality. The aforementioned figures also do not take account of unregistered stateless persons who are irregularly living in the country. However, this number could be significant in view of the latest estimates of persons living irregularly in the Netherlands as described in the section on human rights of irregular immigrants above.
136. In order for the nationality of a person to be registered in the GBA, the law requires documentary evidence of that nationality. When a person wishes to be registered as stateless, in general and by analogy, the Dutch municipal authorities ask for documentary evidence of statelessness. However, to obtain such a document from another country is often very difficult and, in the current state of affairs, the burden of proof relies too heavily on the person claiming statelessness.

<sup>84</sup> [Resolution](#) CM/ResChS(2010)6 , Collective complaint No. 47/2008, by Defence for Children International (DCI) against the Netherlands, 7 July 2010, paragraph 2.

<sup>85</sup> GRETA, [Report](#) concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands, 18 June 2014, GRETA(2014)10, paragraphs 151 and 152.

<sup>86</sup> National Ombudsman, “Medische zorg vreemdelingen - Over toegang en continuïteit van medische zorg voor asielzoekers en uitgeprocedeerde asielzoekers”, 3 October 2013, [Report 2013/125](#) (available in Dutch only).

<sup>87</sup> The 1997 Council of Europe Convention on Nationality; the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, the 1954 UN Convention Relating to the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness.

<sup>88</sup> See UNHCR, [Mapping statelessness in the Netherlands](#), 2011.

137. According to a UNHCR report,<sup>89</sup> persons originating from Somalia, the former Soviet Union and Roma (mainly from ex-Yugoslav regions), as well as those originally from Angola, Burundi, China, the Democratic Republic of the Congo, Guinea, Sierra Leone and Sudan are at particular risk of being left without both an (agreed upon) nationality and a residence permit. Worryingly, in 2012, 5,641 children born in the Netherlands who were five years old or older were still registered as being of unknown nationality.<sup>90</sup>
138. One of the main negative consequences of the absence of clear rules on statelessness identification and determination is that an undetermined number of persons who could be stateless are considered as immigrants living irregularly on Dutch territory. They are thus confronted with the daily risks of detention, difficulties in accessing basic social rights and in particular healthcare, and the situation of legal limbo described above.<sup>91</sup>
139. Another concern is that, under Dutch law, the granting of Dutch nationality to a child who would otherwise be stateless only applies to children who have been *lawfully* resident in the Netherlands for three years, contrary to the 1961 UN Convention on the Reduction of Statelessness which only requires *habitual* residence. According to the ACVZ, registration statistics suggest that at least 85 stateless children born in the Netherlands could have acquired Dutch nationality by now were it not for this added condition of lawful residence.
140. Finally, it is also worrying that, as documented by the above-mentioned 2011 UNHCR report,<sup>92</sup> even those who have been determined to be stateless do not always enjoy the rights they are entitled to under the 1954 UN Convention relating to Stateless Persons in the fields of access to healthcare and identity papers.

### 2.3.1 CONCLUSIONS AND RECOMMENDATIONS

141. The Commissioner calls upon the Dutch authorities to improve legislation and practice relating to the identification and determination of statelessness. In particular, he strongly recommends that the Dutch authorities establish an accessible and efficient statelessness determination procedure by taking due account of UNHCR's recommendations to the Netherlands in this field as well as of recommendations from other institutions such as the NIHR and the ACVZ.
142. The Commissioner stresses that states should recognise the particular vulnerability of irregular migrants who are stateless and regularise their status.<sup>93</sup> The Commissioner strongly urges the Dutch authorities to take all necessary measures to ensure that the human rights of persons who are stateless under the UN Convention on Statelessness are fully respected and reiterates in this regard the recommendations made above on administrative detention and the human rights of irregular migrants.
143. The situation of children born in the Netherlands who are stateless is of particular concern to the Commissioner. In the light of Article 7 of the UN CRC, which provides that all children have a right to a nationality, and Article 1 of the UN 1961 Convention on the Reduction of Statelessness, which requires states parties to grant nationality to a person born on their territory who would otherwise be stateless, the Commissioner strongly recommends that the Dutch authorities find solutions for stateless children born in the Netherlands, notably by rescinding the requirement of lawful stay for their acquisition of Dutch nationality. The Commissioner also recalls that in its Recommendation on the Nationality of

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<sup>89</sup> Ibid., paragraph 72.

<sup>90</sup> ACVZ, "No country of one's own", Advisory Report, December 2013.

<sup>91</sup> See above: Human rights of irregular immigrants.

<sup>92</sup> See UNHCR, [Mapping statelessness in the Netherlands](#), 2011., paragraph 147.

<sup>93</sup> See Commissioner for Human Rights [Issue Paper](#), The Human Rights of Irregular Migrants in Europe, 17 December 2007, paragraph 12 of the conclusions.



Children, the Committee of Ministers stressed that member states should register children as being of unknown nationality only for as short a period of time as possible.<sup>94</sup>

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<sup>94</sup> Recommendation [CM/Rec\(2009\)13](#) of the Committee of Ministers to member States on the Nationality of Children, paragraph 8.

### 3 THE HUMAN RIGHTS OF CHILDREN

144. Child well-being in the Netherlands is considered to be generally satisfactory. In the 2013 UNICEF Index of child well-being in 29 nations of the industrialised world, the Netherlands ranks first.<sup>95</sup> However, the situation must be monitored, especially with respect to some children who might be more exposed to a risk of human rights infringements. This section focuses on juvenile justice, children living in poverty, child abuse and access to education for children with disabilities. Certain aspects of the situation of migrant children, including unaccompanied minors, and stateless children are discussed in the previous section on the human rights of asylum seekers and immigrants.

#### 3.1 CHILDREN IN CONFLICT WITH THE LAW

145. In his 2009 report on the Netherlands, the previous Commissioner expressed concern at a number of human rights-related issues in the field of juvenile justice. Since then, the number of young offenders in detention has been decreasing as a result of, inter alia, a reduction in youth crime and the increasing use of alternatives to detention. As a consequence, six youth custodial institutions have closed down. In addition, in 2010 the government created new secure institutions for the care of young people with severe behavioural problems with a view to separating child protection and youth justice placements, as also recommended by the previous Commissioner. Improvements have been noted in the field of restorative justice, including a stronger focus on the rights of juvenile victims and enhanced mechanisms of mediation between victims and offenders. While welcoming these positive steps, the Commissioner considers that there is room for further improvement in the field of juvenile justice in the Netherlands, in particular as concerns the age of criminal responsibility and pre-trial deprivation of liberty of children.

##### 3.1.1 AGE OF CRIMINAL RESPONSIBILITY

146. The Commissioner notes that in the Netherlands children aged 12 bear criminal responsibility (Article 486 of the Code of Criminal Procedure), which is a distinctly low age if compared with the average of 14-15 years in other European countries. The Commissioner's predecessor called on the Dutch authorities to significantly raise the minimum age of criminal responsibility, in line with the position of the Committee on the Rights of the Child, which encourages states to increase their lower minimum age of criminal responsibility to a higher level than 12 years.<sup>96</sup> However, the Commissioner has been informed that, for the time being, the Dutch government has no plans to introduce changes in this field.
147. The Commissioner also notes that while in principle Dutch juvenile criminal justice applies to children (i.e. until their 18<sup>th</sup> birthday) and adult criminal justice to those who are 18 or older, Article 77b of the Criminal Code introduces an exception. Pursuant to this article, the children's court can impose a sentence under adult criminal law to 16-17 year old children on the grounds of the seriousness of the offence committed, the personality of the perpetrator or the circumstances in which the offence was committed. As a result, the child concerned has to serve the sentence in an adult facility and could therefore be placed in prison together with adults. The execution of the sentence is also supervised by the adult probation service. According to figures provided by the Ministry of Security and Justice, in the years 2011, 2012 and 2013, 56, 50 and 56 juveniles, respectively, were sentenced to such a penalty. These figures represent 0.9%, 0.8% and 1.2% of the total number of convicted minors.<sup>97</sup>
148. Article 37(c) of the UN Convention on the Right of the Child (UN CRC) provides that "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so".

<sup>95</sup> UNICEF Office of Research (2013), [Child Well-being in Rich Countries: A Comparative Overview](#), Innocenti Report Card 11, Florence.

<sup>96</sup> See General Comment No 10 on Children's rights to juvenile justice.

<sup>97</sup> See Fourth Periodic [Report](#) of the Kingdom of the Netherlands concerning the implementation of the International Convention on the Rights of the Child (October 2006-December 2012), 2013, paragraph 446.

When it became a party to that Convention in 1995, the Netherlands entered a reservation according to which this provision shall not prevent the application of adult penal law to children of sixteen years and older, provided that certain criteria laid down by law are met. In its 2009 Concluding Observations, the Committee on the Rights of the Child reiterated that this reservation should be withdrawn and that legislation should be reviewed with the aim to eliminate the possibility of trying children as adults.<sup>98</sup> The Commissioner's predecessor expressed the same concern in his 2009 report. However, the Dutch authorities consider that retaining the possibility of trying juveniles under ordinary criminal law in exceptional cases enables them to better comply with the requirements of the UN CRC, as such a possibility makes it unnecessary to increase juvenile sanctions disproportionately in order to be able to punish juveniles who have committed very serious offences appropriately.<sup>99</sup>

149. On the other hand, the Commissioner is pleased to note that, under Article 77c of the Criminal Code, a judge can impose a sentence under juvenile criminal law to young adults between 18 and 22 years of age, taking into account the personality of the perpetrator or the circumstances in which the offence was committed. Before the entry into force of the Adolescent Criminal Code on 1<sup>st</sup> April 2014, this was only possible for young adults aged between 18 and 20.

### 3.1.2 POLICE CUSTODY AND PRE-TRIAL DETENTION OF CHILDREN

150. In his 2009 report, the Commissioner's predecessor urged the Dutch authorities to ensure that the special needs of children are guaranteed during police detention, enabling them to immediately call their parents or a responsible adult and to be accompanied by a lawyer during police interrogation. According to the Children's Ombudsman and children's rights NGOs, there is still room for improvement concerning pre-trial detention of children, in particular in police cells.
151. While the number of minors held in police custody has progressively decreased from over 9 000 in 2010 to slightly less than 7 000 in 2013, a significant number of children still spend nights in police cells in the Netherlands, a problem which was also raised in the Children's Rights Monitor published by the Children's Ombudsman in 2013. In a 2011 report, Defence for Children raised a number of concerns relating to police custody of children.<sup>100</sup> Since then, some improvements have been brought. In particular, instructions for police on how to deal with police custody of minors were published in March 2013. However many of the issues mentioned by Defence for Children remain problematic even today.
152. Firstly, as noted by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), police custody (*in verzekeringstelling*) in the Netherlands can last up to three days and may, exceptionally, be extended by a further three days. In addition, since 2002, juveniles between 16 and 18 years of age can be remanded in police stations for up to ten days. Children between the ages of 12 and 15 may also be remanded in a police cell for three days for the sole purpose of arranging transport to a youth institution. Information gathered by the CPT's delegation during its visits to a number of police stations indicated that a significant number of juveniles between 16 and 18 years persons spent between 10 and 14 days detained in a police cell. The CPT recommended in its 2007 report on the Netherlands that particular efforts be made to ensure that juveniles were not detained in police cells for prolonged periods and were transferred to appropriate juvenile detention facilities expeditiously.<sup>101</sup> However, in 2014, Dutch children's rights NGOS remained concerned at the

<sup>98</sup> Committee on the Rights of the Child, Concluding Observations: Netherlands, 27 March 2009, CRC/C/NLD/CO/3, paragraphs 11 and 78.

<sup>99</sup> See Fourth Periodic Report of the Kingdom of the Netherlands concerning the implementation of the International Convention on the Rights of the Child (October 2006-December 2012), 2013, paragraph 445.

<sup>100</sup> See Defence for Children, Spending a 'couple of nights' in a police cell. The UN Convention on the Rights of the Child and custody in police cells, 2011. See also Defence for Children and Unicef Netherlands, 2014 annual report on children's rights (in Dutch), June 2014, p. 20.

<sup>101</sup> CPT, Report to the authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe, Aruba, and the Netherlands Antilles by the CPT in June 2007.

number of children held in police custody and the excessive length of the maximum period during which juveniles can stay in a police cell.<sup>102</sup>

153. Other problems which remain to be tackled concern the lack of appropriate information and access to legal assistance for child suspects and the fact that there are hardly any separated facilities for detaining children in police cells. NGOs and the Children's Ombudsman have also stressed that there is no proper registration and monitoring of the number of children held in police custody, including by registering the age of the child and the length of time spent in a police cell.
154. Concerning pre-trial detention, human rights NGOs have reported that recent figures from the Custodial Institutions Agency show that in 2014 74% of all juveniles spending time in a judicial youth detention centre were under pre-trial detention, a circumstance that seems to indicate that alternatives to detention in the pre-trial phase are not used as first resort. The use of alternatives to preventive detention is sometimes hindered by practical difficulties. For instance, as concerns night detention, the distance between the judicial youth centre and the school is sometimes too high for the children to arrive at school in time. The use of alternative detention can also be delayed as a consequence of waiting lists for treatment programmes or for the performance of individual tests.

### 3.1.3 CONCLUSIONS AND RECOMMENDATIONS

155. The Commissioner draws the Dutch authorities' attention to the Council of Europe Committee of Ministers [Guidelines](#) of 2010 on child friendly justice and encourages them to make progress on their implementation. As stressed in these guidelines, a child-friendly justice system should be "accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child".<sup>103</sup> It should duly take into account the evolving capacities of the child. As the Commissioner already stressed,<sup>104</sup> juvenile justice should aim at promoting the reintegration into society of children in conflict with the law and helping them to assume a constructive role in society.
156. The Commissioner calls on the Dutch authorities to increase the current minimum age of criminal responsibility fully in line with the UN Committee of the Rights of the Child's position, according to which a higher minimum age of criminal responsibility, for instance 14 or 16 years of age, contributes to a juvenile justice system in line with the UN CRC standards.<sup>105</sup>
157. In full line with the UN Committee on the Rights of the Child's position,<sup>106</sup> the Commissioner recommends that the Netherlands take all necessary measures to withdraw its reservation to Article 37 of the UN CRC and with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years. As concerns more particularly the fact that in exceptional cases children can be placed in adult detention facilities, the Commissioner wishes to recall that international standards make it clear that children in detention must be accommodated separately from adults.<sup>107</sup>
158. The Commissioner calls on the Dutch authorities to ensure that, in accordance with Article 37 (b-d) of the UN CRC, the arrest, detention or imprisonment of a child is used only as a measure of last resort in the Netherlands. It is particularly important that alternatives to pre-trial custodial settings are made

<sup>102</sup> See Defence for Children and Unicef Netherlands, 2014 annual [report](#) on children's rights (in Dutch), June 2014, p. 20. See also Defence for Children, Spending a 'couple of nights' in a police cell. The UN Convention on the Rights of the Child and custody in police cells, 2011.

<sup>103</sup> [Guidelines](#) of the Committee of Ministers of the Council of Europe on child friendly justice, adopted on 17 November 2010.

<sup>104</sup> See: Council of Europe Commissioner for Human Rights, Speech: Child-Friendly Justice: What it means and how it is realised, [CommDH/Speech\(2014\)7](#).

<sup>105</sup> See UN Committee of the Rights of the Child, [General Comment No. 10](#), paragraph 33.

<sup>106</sup> Ibid., paragraph 38.

<sup>107</sup> In addition to Article 37(c) of the UN CRC, see, *inter alia*: Rule 29 of the United Nations [Rules](#) for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), and the CM/Rec (2008) 11, para 59.

more accessible to ensure that they are fully used in practice. The Commissioner also calls on the Dutch authorities to ensure that pre-trial detention of children is not used beyond the shortest period of time possible. To this end, he strongly encourages the Dutch authorities to consider reducing the current legal maximum duration of police custody of juveniles.

159. More generally, the Commissioner considers that there is a need to ensure that police custody of juveniles better complies with child-friendly justice as laid down in international legal standards and spelled out in the abovementioned Committee of Ministers Guidelines on child friendly justice.<sup>108</sup> The Commissioner underlines that the obligation to separate every child deprived of liberty from adults, unless it is considered in the child's best interests not to do so, also applies to police custody. Every child deprived of his or her liberty should have the possibility to exercise his/her right to prompt access to legal and other appropriate assistance.
160. In addition, the Commissioner invites the Dutch authorities to set up a comprehensive system for the registration and monitoring of the number of children held in police custody, including by registering the age of the child and the length of time spent in a police cell.

### 3.2 CHILDREN LIVING IN POVERTY

161. Although the vast majority of children grow up in good living conditions in the Netherlands, the Commissioner notes the increasing child poverty rate with concern. The number of children living in poverty in the Netherlands has increased by over 100,000 since 2007. The number of children aged up to 17 years living in poverty (according to the "modest but adequate" criterion<sup>109</sup>) rose to 384,000 in 2012 (11.4% of all children in the Netherlands). One in three poor people are aged under 18. In the provinces of South Holland and Groningen, more children grow up in poverty than in other provinces.<sup>110</sup>
162. Child poverty has a seriously damaging impact on children's rights and a potentially long-term negative effect on the enjoyment of human rights, as it tends to be one of the major root causes of poverty and social exclusion in adulthood. States have an obligation to take action in this respect under Article 27 of the UN CRC, which provides that children have the right to an adequate standard of living, and under the Revised European Social Charter, which protects the right of children, young persons and families to social, legal and economic protection. In particular, under Article 16 of the Revised Social Charter, states must implement a family policy including operating a family or child benefit scheme to guarantee an adequate standard of living.
163. According to the Children's Ombudsman who published a thematic report on children and poverty in June 2013, children are paying a high price for the crisis and government cutbacks are affecting more and more children in key areas such as education and health care. There are also increased tensions in families with financial problems, leading to difficult divorces and child neglect and abuse.<sup>111</sup> A recent report also stressed that as a result of cuts in child-care services, many children of working mothers, in particular single mothers, are not being sent to child-care providers anymore, while child care plays a critical role in supporting early education.<sup>112</sup> In response to these alarming trends, the Children's Ombudsman and the Verwey-Jonker Institute set up a hotline on "Children in Poverty" in February 2013. Children aged 6 to 17 have used this hotline to share with the Children's Ombudsman their experience of living in poverty. In addition, the Children's Ombudsman has carried out other surveys since the opening of this hotline.

<sup>108</sup> See in particular the section "children and the police".

<sup>109</sup> The National Institute for Budgetary Information has adopted a number of poverty indicators. The lowest equates to the net monthly income required to purchase 'basic goods' such as food, and housing. The higher threshold, 'modest but adequate', covers extra costs.

<sup>110</sup> CBS, [More children at risk of poverty](#), press release, 27 March 2013, and [Poverty survey 2013](#), Sharp rise in poverty in 2012, but growth expected to weaken, press release, 3 December 2013.

<sup>111</sup> Declaration made at the occasion of the publication of the 2013 Children's Rights Monitor. See [TheHagueonline.com](#), "child poverty in Netherlands unacceptable", 13 September 2013.

<sup>112</sup> Oxfam [case study](#), "the true cost of austerity and inequality, the Netherlands case study", September 2013, p. 3.

164. Under the current system and following the general process of decentralisation of responsibilities (see above, Section 1.5), municipalities receive a budget from the central government to assist persons living in poverty and have been asked to focus on children in poverty. Since 2013, around 10% of Dutch municipalities have designed and brought into practice a “children’s package” of measures aimed at fighting child poverty. The Dutch authorities have explained that this solution allows for more targeted measures. However, according to the Children’s Ombudsman, the assistance children receive significantly varies depending on the municipality in which they live, and many assistance measures rely on private initiatives.

### 3.2.1 CONCLUSIONS AND RECOMMENDATIONS

165. The Commissioner is concerned at the negative impact of growing child poverty on the enjoyment of children’s rights in the Netherlands. He stresses that in times of economic crisis, the Dutch government has the duty to protect the most vulnerable from a reduction in the enjoyment of their human rights, in particular social and economic rights. Children at risk of poverty should not be further negatively impacted by budget cuts taken by the government in response to the economic crisis. The Commissioner recommends that, in response to the increasing poverty of children and in order to avoid regression on standards achieved, any envisaged budget cuts should be carefully assessed for their impact on the particularly vulnerable group constituted by children at risk of poverty and social exclusion.
166. The Commissioner also invites the Dutch authorities to implement the recommendations made by the Children’s Ombudsman who asked municipalities to develop an integrated anti-poverty policy specifically geared to children and inform actively the families concerned about existing assistance measures.<sup>113</sup> The Commissioner underlines that policies aimed at combating poverty should not only target persons living on social benefits but also the working poor, including those who are self-employed, and their children. The central government should monitor municipal anti-poverty policies with a view to ensuring that no child is left outside the scope of these measures and that they are effective.

### 3.3 CHILD ABUSE

167. According to estimates carried out in 2010, nearly 119,000 children suffer from abuse -- and between 40 and 80 children die from the consequences of abuse – in the Netherlands each year.<sup>114</sup> According to Dutch NGOs, the number of child abuse cases has been growing in recent years<sup>115</sup> and the Children’s Ombudsman even considers that, due to underreporting, the estimation of 119,000 children abused every year should probably be multiplied by two.
168. The Netherlands is party to the main international legally binding texts protecting the rights of child victims of abuse, including the UN CRC, whose Article 19(1) requires states to take suitable measures to protect children from all forms of physical or mental violence, injury or abuse, and the Revised European Social Charter which also requires measures to combat child abuse under Articles 7§10 and 17.
169. The Dutch authorities have taken a number of steps to tackle child abuse in the last decade. A new Action Plan (“Children Safe”) has been adopted for the period 2012-2016 under the main responsibility of the Ministry of Health, Welfare and Sport and the Ministry of Security and Justice. It contains a series of actions in the following areas: prevention, detection, stopping and minimising damage of child abuse, promoting multi-agency co-operation, special attention for guarding the physical safety of children, monitoring and inspection by the government and research. A Task Force on Child Abuse and Sexual Abuse has been set up to act as the driving force behind the implementation of the Action Plan and

<sup>113</sup> See Children’s Ombudsman, Children living in poverty in the Netherlands, 25 June 2013, (In Dutch, with an English summary).

<sup>114</sup> Estimations quoted in Mariska de Baat, Peter van der Linden, Klaas Kooijman, Caroline Vink, [Combating child abuse and neglect in the Netherlands](#), Netherlands Youth Institute, December 2011, p.5-6.

<sup>115</sup> Ibid.

monitor its implementation. Its members include representatives of the Public Prosecution Service, the relevant investigation services, the judiciary, municipal authorities, and youth and health care institutions.

170. On 1 July 2013, the Domestic Violence and Child Abuse Protocol Act entered into force. This act obliges organisations in certain sectors to have a phased plan for responding to signs of domestic violence and child abuse. It also imposes an obligation on organisations to publicise the protocol's existence and to promote its use, essentially through compulsory training for relevant professionals, including on ways of detecting child abuse. At the same time, a reporting code obligation was introduced under which professionals who suspect that child abuse has taken place are required to follow a standardised procedure. In addition, a project called "Tackling violence in the home" is being implemented primarily by the Association of Netherlands Municipalities (VNG) and the Dutch Federation of Shelters, in conjunction with the Ministry of Health, Welfare and Sport. The aim is to adopt regional strategies in order to facilitate and harmonise the work of municipalities in this field. Other recent measures taken include the establishment of Advisory and Reporting Centres for Domestic Violence and Child Abuse, organised at the regional level, and the reinforcement of the criminal law to combat child abuse.
171. Concerning sexual abuse against children, in 2010, the Netherlands ratified the Council of Europe [Convention](#) on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), which entails a number of obligations in the field of prevention, protection, prosecution and promotion of international co-operation in this field.<sup>116</sup> Furthermore, pursuant to Articles 19 and 34 of the UN CRC, the Netherlands is obliged to protect children from all forms of sexual exploitation and sexual abuse. In 2005, the Netherlands also ratified the Optional Protocol to the UN CRC on the sale of children, child prostitution and child pornography. The Dutch government launched its first National Action Plan for Combating Sexual Abuse of Children on 19 April 2000. In 2012, the National Rapporteur on Trafficking in Human Beings and Child Pornography's mandate was extended to cover sexual violence against children. Her title is now National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children.
172. In response to an increase in cases of child abuse through social media, in 2013 the Ministry of Security and Justice commissioned a film ("De mooiste chick van het Web": The best-looking chick on the web) and an accompanying teaching package to alert children, parents, friends and teachers to the risks the use of social media entails. The Children's Ombudsman started an inquiry at the end of 2013 into the ways children's right to privacy is being infringed on social media networks.
173. As concerns Dutch nationals travelling abroad to sexually abuse children, on 10 October 2013 a multi-year plan on combating child sex tourism was sent to the House of Representatives. The National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children adopted a [report](#) on "Barriers to Child Sex Tourism" in 2013 focusing on its prevention and the detection and prosecution of Dutch citizens committing sexual offences against minors abroad.
174. Following two cases of suicide by teenagers who had been bullied for years in school, in March 2013 the Dutch government adopted on 25 March 2013 and in partnership with the Children's Ombudsman an Action Plan against bullying in schools requiring schools to take action against it. At the time of drafting this report, a bill on bullying at school was being drafted to that end. Teachers will receive training on how to detect and handle bullying. Human rights NGOs have stressed that LGBTI children are particularly at risk of being bullied in schools and that there was not enough knowledge among teachers and youth care professionals on how to deal with this specific problem.
175. The Commissioner welcomes all the above-mentioned measures taken by the authorities to combat child abuse, including sexual abuse, in recent years. However, a number of problems remain to be solved. In a report published in May 2014, the Children's Ombudsman underlined that while three-

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<sup>116</sup> For more information see also the [Replies](#) to the general overview questionnaire relating to the implementation of the Lanzarote Convention from the Netherlands, T-ES(2014)GEN-NL, 22 May 2014.



quarters of the 200 Dutch municipalities surveyed had measures on paper aiming at preventing child abuse, half of them had no idea about how many abused children lived in their district. In addition, the impact of prevention programmes remained unclear in three-quarters of the municipalities. Other outstanding issues highlighted by several interlocutors include the insufficient level of prevention and recognition of cases of child abuse due to a lack of trained professionals who do not always use the existing protocols and reporting codes. At the level of local communities there are great imbalances in the quality of the services provided by the different municipal centres for youth and families, some of which do not respond quickly enough to requests for assistance from children. School teachers should also be more systematically trained on child abuse. NGOs stress that no free legal services by specialised lawyers are available for (child) victims of domestic violence who might need it in criminal law but also in other legal fields such as civil and family law. While there are action plans on abuse, including sexual abuse, of children, they generally lack a time-frame, a dedicated budget and targets and do not always clearly distribute responsibilities among the relevant authorities for their implementation.<sup>117</sup>

176. Following the decentralisation of youth care, municipalities will be responsible for the prevention, detection, registration, reporting and care relating to child abuse and domestic violence as of 1<sup>st</sup> January 2015. While the Dutch government asserts in its NAPHR that the relevant quality safeguards will be built into the legislation providing for decentralisation, NGOs remain worried at the potential negative impact of the decentralisation and financial crisis-related cutbacks on action against child abuse.<sup>118</sup>

### 3.3.1 CONCLUSIONS AND RECOMMENDATIONS

177. While welcoming all of the measures already taken to combat child abuse in all its forms, the Commissioner invites the Dutch authorities to ensure a proactive implementation of the existing action plans, protocols and reporting codes against child abuse. Particular emphasis should be put on making parenting support fully available for all parents who need it, ensuring the same quality of care in each municipality and training all relevant professionals on detecting and assisting child victims of abuse. The Dutch authorities should improve access to services for recovery, counselling and other forms of reintegration of victims, with special emphasis on adequate funding of these services. The Commissioner encourages the Dutch authorities to pursue their efforts in involving civil society and children in devising all of their policies against child abuse.
178. The Commissioner welcomes that the Dutch authorities are paying attention to protecting children on the Internet. As mentioned in a recent Human Rights Comment<sup>119</sup> on this issue, this should be done through a mix of measures aimed at: empowering children; creating a safe environment; and developing human rights education online. To this end, the Commissioner draws the Dutch authorities' attention to the Committee of Ministers' [Recommendation CM/Rec\(2009\)5](#) on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment and the Committee of Ministers' [Recommendation CM/Rec\(2014\)6](#) on a Guide to human rights for Internet users, as they give useful guidance on measures to be taken in order to protect children's rights in the digital world.
179. Noting that the municipalities will have full responsibility in implementing measures to prevent and remedy child abuse as of 1 January 2015, the Commissioner stresses that the Netherlands has the duty to ensure full compliance with its international obligations in the field of protecting children from abuse. Therefore the national authorities should monitor, with the assistance of independent institutions such as the Children's Ombudsman and the National Rapporteur on Sexual Violence against Children, the work of the municipalities in this field and take all necessary measures to ensure that the

<sup>117</sup> See in particular NGOs' Commentary on the sixth periodic report submitted by the Netherlands on the implementation of the UN CAT, 2013.

<sup>118</sup> Report by the Dutch NGO Coalition for Children's Rights, [Kinderrechten in Nederland 2008-2012](#) (Children's Rights in the Netherlands 2008-2012), 2012.

<sup>119</sup> Council of Europe Commissioner for Human Rights, [Protecting children's rights in the digital world: an ever-growing challenge – Human Rights Comment](#), 29 April 2009.



decentralisation does not impact negatively on the right of children not to be victims of abuse. The Commissioner also draws attention to the “Pact of Towns and Regions to Stop Sexual Violence against Children”<sup>120</sup> devised by the Congress of Local and Regional Authorities of the Council of Europe to guide authorities in their fight against sexual exploitation and abuse. It provides a list of practical initiatives and policies to be implemented at local and regional levels in order to develop child-friendly services, protect children and help prevent sexual violence within the community.

### 3.4 ACCESS TO EDUCATION FOR CHILDREN WITH DISABILITIES

180. The Commissioner is seriously concerned about the fact that many children with disabilities are segregated from their peers in the Dutch education system. In 2013, there were approximately 70,000 pupils in schools for special needs, corresponding to 2% of all youths. Article 24 of the UN Convention on the Rights of Persons with Disabilities (UN CRPD), which has been signed but not yet ratified by the Netherlands, provides for a number of measures to be taken by states to ensure the right to education of persons with disabilities. In particular, states are obliged to ensure an inclusive education system at all levels, whereby all children are educated in the same schools with the adequate support where necessary. The European Committee of Social Rights has stressed that the UN CRPD reflects existing trends in comparative European law in the sphere of disability policies.<sup>121</sup> It considers that “Article 15§1 of the Charter does not leave States Parties a wide margin of appreciation when it comes to choosing the type of school in which they will promote the independence, integration and participation of persons with disabilities, as this must clearly be a mainstream school”.<sup>122</sup> The Committee on the Rights of the Child has also constantly stressed the need for inclusive education in accordance with Article 23 of the UN CRC.
181. Under the Equal Treatment Disability and Chronic Illness Act, since 2009, Dutch primary and secondary schools are obliged to make reasonable accommodations for persons with disabilities or chronic illnesses if requested by the parents of the child. Schools are therefore requested to investigate whether a child with disability can be placed with them through a reasonable accommodation. However, the law provides that the school may refer the child to another school where the appropriate facilities are already in place (including a special needs school) if the necessary adaptations are considered “a disproportionate burden” for the school.
182. The Commissioner is concerned that this arrangement may give too much discretion to individual schools. In this connection, he draws the attention of the Dutch authorities to the fact that under the UN CRPD, denial of reasonable accommodation constitutes discrimination. It is also unclear to the Commissioner how enforceable the right to reasonable accommodation is in practice and how parents can effectively challenge the refusal by schools to enrol their children. The Commissioner has furthermore been informed that there have been difficulties in the implementation of this rule. He notes that the Dutch government and several specialised organisations concur that the current educational support system is too complex as it relies on a system of numerous alliances between special and mainstream schools which have their own procedures for assessing the special needs of a child, and four different clusters depending on the type of disability of the child.<sup>123</sup> Schools do not always know that they have to make reasonable accommodation for children with disabilities who ask them to do so. Parents themselves have to find a suitable school for their children, which is complicated.
183. While the Commissioner notes that the number of children with disabilities in the education system has increased considerably since 2003, he is concerned that the number of students attending special needs schools has increased in parallel. This is particularly worrying in the light of information according to

<sup>120</sup> Congress of Local and Regional Authorities of the Council of Europe, Towns and Regions: [A Pact to Stop Sexual Violence against Children](#), 2012.

<sup>121</sup> ECSR, FIDH v. Belgium, Complaint No. 75/2011, Decision on the merits, paragraph 112.

<sup>122</sup> ECSR, European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, Decision on the merits, paragraph 78.

<sup>123</sup> See Fourth Periodic [Report](#) of the Kingdom of the Netherlands concerning the implementation of the International Convention on the Rights of the Child (October 2006-December 2012), 2013, paragraph 248.

which education offered by approximately 25% of the special needs schools does not meet the Education Inspectorate's quality standards.<sup>124</sup> As concerns mainstream schools, many teachers are said to experience difficulties in supervising students with specific educational needs and in adapting their teaching to the different needs in their classrooms. On the basis of the 2013 Children's Rights Monitor, the Children's Ombudsman stresses that special education for children with autism or attention deficit hyperactivity disorder has not improved and that there are not enough funds available for adapted learning materials and specially trained teachers. In some cases, children with disabilities receive no education because they are staying at an institution or childcare centre.<sup>125</sup>

184. Acknowledging some of these problems, the Dutch government announced its intention to allow as many children as possible to go to mainstream schools, which is considered to be the best way of avoiding early school drop-out. In 2012, the legislator adopted the Act on Appropriate Education ("passend onderwijs" in Dutch), which entered into force on 1 August 2014. As of this date, Dutch schools have "a duty to care"; i.e. the responsibility to provide a suitable learning place to every child. Mainstream and special needs schools are expected to continue to co-operate in regional alliances to offer children such a learning place at one of the mainstream schools, if needed with extra support in the class room, or at a school for children with special needs.<sup>126</sup> Interlocutors of the Commissioner stressed during the visit that this law on appropriate education constitutes a step in the direction for inclusive education. However, they are concerned at the lack of preparation of teachers, parents and school boards, who often do not know what to expect or what is expected of them. A lot will depend on the way the law is implemented by all schools.
185. The Commissioner understands that the new law should provide some incentives for mainstream schools to enrol children with disabilities rather than referring them to special needs schools. It also allows parents to appeal decisions of schools, if necessary with the help of specialised consultants. While welcoming these positive steps towards inclusion, the Commissioner also notes that the Act allows school boards to continue to offer special needs schools as "appropriate education" to children with disabilities. Furthermore, given the particularly high proportion of children educated in segregated settings, the Commissioner regrets that the reform has not included the establishment of clear goals for the reduction of specialised schools in favour of more inclusive settings. While the practical implementation of the new Act (in particular teacher training, resources allocated for reasonable accommodation and individualised support) will be decisive, the Commissioner shares his interlocutors' concerns that this framework may not be sufficient to eradicate violations of the right to inclusive education by the Netherlands.

### 3.4.1 CONCLUSIONS AND RECOMMENDATIONS

186. The Commissioner underlines that the lifetime exclusion of persons with disabilities from society often begins with their exclusion from mainstream education, which further reinforces and validates their marginalisation in the later stages of their lives. Inclusive education is not only beneficial to children with disabilities – and key to their enjoyment of many other rights -- but also to their peers, teachers, and the whole community who will gain more knowledge about human diversity.
187. The Commissioner considers that the Appropriate Education Act represents a step in the right direction, and encourages the Dutch authorities to support its proper implementation through continuous monitoring and evaluation, as well as effective coordination and allocation of adequate resources.
188. However, the Commissioner is of the opinion that the new arrangements fall short of adopting inclusive education as a fundamental principle. He encourages the Dutch authorities to develop access to inclusive education beyond the framework of "appropriate education", in particular by setting clear goals to reduce reliance on segregated school settings accompanied by a clear and ambitious timetable;

<sup>124</sup> See Nynke Bosscher, [Inclusive Education](#), February 2013.

<sup>125</sup> Netherlands Institute for Human Rights, Strategic [Plan](#) (2013-2015), October 2012, p. 13.

<sup>126</sup> Nynke Bosscher, [Inclusive Education](#), February 2013.

increasing efforts to provide reasonable accommodation in education, notably through the allocation of sufficient human and financial resources for educational support, as well as through provisions establishing reasonable accommodation as a clear, enforceable obligation for mainstream schools; and fostering the full involvement of parents and, where appropriate, pupils in all relevant decisions. In this context, the Council of Europe Committee of Ministers' [Recommendation](#) Rec(2006)5 with its accompanying [Council of Europe Disability Action Plan 2006-2015](#) (Action Line No. 4: Education) and Recommendation Rec(2013)2 on [ensuring full inclusion of children and young persons with disabilities into society](#) may provide valuable inspiration and guidance.