



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



Strasbourg, 11 March 2009

Restricted  
CommDH(2009)2  
Original version

## **REPORT BY**

**THE COMMISSIONER FOR HUMAN RIGHTS  
MR THOMAS HAMMARBERG**

**ON HIS VISIT TO THE NETHERLANDS**

**21 - 25 September 2008**

For the attention of the Committee of Ministers  
and the Parliamentary Assembly

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## Executive Summary

Commissioner Thomas Hammarberg and his delegation visited the European part of the Kingdom of the Netherlands from 21 to 25 September 2008. In the course of his visit the Commissioner held discussions with the authorities, parliamentarians, representatives of civil society and members of the judiciary, and he and his delegation visited several institutions.

**I. National system for protecting human rights.** The Netherlands ratified almost all Council of Europe Conventions and other key international human rights treaties. It has made reservations to the UN Convention on the Rights of the Child. Fundamental rights in the Netherlands are anchored in the Constitution and international treaties are directly applicable. The Commissioner welcomes the legislative proposal to allow courts to assess domestic laws in the light of the fundamental rights provisions of the Dutch Constitution.

The Netherlands has a dense net of complaints bodies and human rights structures, among them the Office of the National Ombudsman, the Equal Treatment Commission and the Data Protection Authority. The Commissioner welcomes the decision of the government to set up a national human rights institute. He notes the current debate about the scope of the powers of the Ombudsman regarding non-state actors fulfilling public tasks and recommends that this lacuna be filled. The Commissioner notes that persons obliged to remain with the police should have the right to notify a third party immediately and allow attendance of a lawyer during the initial stage of police interrogation.

The Commissioner is aware that human rights in the Netherlands are reflected in cross-cutting goals of education. He believes that human rights education should be firmly anchored in a comprehensive manner in primary and secondary school education. The Commissioner notes that more coordination and cooperation between the ministries could be established. Human rights law should be a touchstone for policies and legislation, which could for example be achieved by creating a national human rights action plan.

**II. Treatment of asylum seekers.** The Netherlands faces criticism of its current asylum procedure, mainly for the lack of safeguards, a potential risk of refoulement and excessive length. The Commissioner notes the proposed change of the asylum procedure, but is concerned about the risk that the current proposal may not provide enough safeguards for asylum seekers and in particular for vulnerable groups. The Commissioner is aware that judicial review of asylum decisions is currently subject to marginal scrutiny by domestic courts. Thus, the Commissioner notes with satisfaction the new proposal that courts will be allowed to take new circumstances and policy changes into account in the appeal stage. He remains, however, concerned that the reformed appeal procedure will not allow for a complete assessment in both law and fact.

Asylum seekers in the Netherlands, including people who have suffered traumatic experiences, can face long detention, lasting on average more than 90 days. The Commissioner notes the concerns expressed about the access to essential medical care, education, lack of employment and the few occupational activities in facilities and reiterates that administrative detention must be kept to a strict minimum. He welcomes the measures taken to reduce the number of children in administrative detention, but regrets that there are still many detained unaccompanied minors and urges the authorities to find alternative solutions. The Commissioner notes the decision to review an asylum request of a "1F" family member after a period of 10 years. He calls upon the authorities to ensure that in particular children will benefit from this policy change. The Commissioner is concerned about stateless children in the Netherlands, albeit a relatively small number, and recommends that this problem be resolved with priority. There are internationally agreed standards to reduce statelessness and to ensure that children are not made victims of statelessness.

**III. Immigration.** The Netherlands requires a certain group of aliens to pass a test before coming to the country. The Commissioner notes that this test has been criticised, because of its possibly discriminatory elements. As a result of the strict family and formation regulations, children are often under threat of separation from their parents. The Commissioner believes that the 'integration abroad' test and the requirements for family formation and reunification could amount to a disproportionate obstacle and urges the Dutch authorities to review the requirements. Having heard that one of the biggest problems related to health care for irregular migrants is the existing lack of information about

how the system works, the Commissioner welcomes the legislative reform currently under way to establish one fund for financing care for undocumented migrants and (failed) asylum seekers.

**IV. Trafficking in human beings.** The Commissioner notes with satisfaction that the Government fully complies with the minimum standards for the elimination of trafficking and continues to address trafficking through law enforcement, expanded victim protection and the establishment, as the first country, of an independent National Rapporteur on Trafficking in Human Beings. He welcomes that legislation which also opens for ratification of the Council of Europe's Convention on Action against Trafficking in Human Beings. He recalls that the Convention requires that under age victims be given the benefit of the doubt so long as their age cannot be established. Accordingly he urges the authorities to redouble their efforts to ensure a thorough and speedy identification of victims to avoid keeping under age victims detained. The Commissioner appreciates the broadened scope for all forms of exploitation and increased maximum penalties, nonetheless he regrets that 'labour exploitation' is not defined in law and urges the authorities to close this gap.

**V. Children's rights.** The Commissioner notes with concern that juvenile offenders and children institutionalised with a civil title still share the same institutions in the Netherlands and questions the detention of children with civil protection orders in custodial institutions. He further notes some shortcomings in the juvenile justice system including an low age of criminal responsibility, only 12, and the application of adult criminal law to minors who can be subject to detention in adult prisons. The Commissioner urges the authorities to ensure the highest standards for the protection of children's rights, including the full prohibition of corporal punishment, in the whole of the Kingdom of the Netherlands. He warns against new measures taken to address problematic youth, such as the "Mosquito" and the use of curfews.

**VI. Discrimination.** The Commissioner is concerned about the fragmented data collection systems in place and recommends that better coordination and cooperation between the anti discrimination bodies is established and data collection procedures be streamlined. He also expressed his concerns regarding the General Equal Treatment Act (GETA) and recommends that the exemptions for associations based on religion or belief are removed from GETA and to abolish the 'sole fact' construction. In relation to the situation of women, the Commissioner encourages the government to continue to support services for the victims of domestic violence and to exploit all avenues to take speedy and appropriate measures against female genital mutilation. Regarding the situation of persons with disabilities, the Commissioner recommends the Dutch authorities to sign and ratify the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities and to extend the anti-discrimination legislation to all forms of education, goods and services, public transport and social protection, and to provide full access to all forms of public transport without applying financial impediments for persons with disabilities.

The Commissioner is concerned about the current sterilisation and other compulsory medical (hormone/surgery) treatment required for legal recognition of a person's gender identity. Finally, the Commissioner notes the continuing discussion on ethnic profiling. He recommends that the Roma and Sinti be recognised as a minority under the Framework Convention for the Protection of National Minorities.

**VII. Racism, xenophobia, anti-Semitism and intolerance against Muslims.** The Commissioner expresses his concerns about racist, anti-Semitic and other intolerant tendencies in the Netherlands, notably intolerance against Muslims. He encourages the authorities to take a firm stand against anti-Islamic undercurrent in society and to promote public the national action plan against racism and xenophobia and monitor its implementation in close cooperation with civil society.

**VIII. Integration.** The Commissioner understands that 'integration' has become a prominent issue in national politics and debates in the Netherlands and notes that some parts of the integration policies are problematic from a human rights perspective. Regarding segregation in the housing market and in neighbourhoods, he recommends the government review and evaluate the Special Measures Act 'Urban Areas' as well as the Housing Act to ensure that segregation on the housing market is efficiently combated.

**IX. Freedom of expression.** The Commissioner commends the proposal of the government to abolish the criminal code article on blasphemy.

**X. Anti-terrorism measures and respect for human rights.** The Commissioner notes that various anti-terrorism measures have been adopted in the Netherlands in recent years and finds that a review of such measures is necessary to ensure their full compliance with international human rights standards and principles. He notes with concern the use of broad and vague concepts lacking the level of precision required by the principle of legality and urges the authorities to amend legislation in order to ensure the precision and clarity necessary to enable any individual to regulate his or her conduct. Furthermore, measures used to combat terrorism which may have a restrictive impact on human rights should be subject to a preceding judicial authorisation and suspects should be granted effective procedural guarantees.

## I. Introduction

1. From 21 to 25 September the Council of Europe Commissioner for Human Rights Mr Thomas Hammarberg conducted an official visit to the European part of the Kingdom of the Netherlands upon invitation by the Dutch Government.<sup>1</sup> The visit was part of a continuous process of country missions by the Commissioner to all Council of Europe member states to assess their effective respect for human rights.<sup>2</sup>
2. The focus of the visit was on policies affecting migrants, refugees and asylum seekers, integration, children's rights and the fight against discrimination and intolerance. In the course of his visit the Commissioner met with the Deputy Prime Minister and Minister for Youth and Families, Mr Rouvoet, the Minister of Justice, Mr Hirsch Ballin and the State Secretary for Justice, Ms Albayrak, the Minister of the Interior and Kingdom Relations, Ms Ter Horst, the Minister for Housing, Communities and Integration, Ms Vogelaar and the Minister for Social Affairs and Employment, Mr Donner. He also met with Parliamentarians and representatives of civil society as well as with the National Ombudsman, members of the Equal Treatment Commission and the National Rapporteur on Trafficking in Human Beings and held discussions with representatives of local authorities and institutions and with members of the judiciary. As the Commissioner did not visit the overseas territories, his comments in this respect are naturally not comprehensive.
3. The delegation visited a shelter for trafficked women, asylum seekers reception and detention facilities in the vicinity of Amsterdam and Rotterdam as well as a juvenile detention centre in Sassenheim and a secondary school in Rotterdam. There the Commissioner also visited a mosque, accompanied by the local ombudsman. The office members completed the visit on 25 September, meeting with representatives of the Ministry of Education, Culture and Science as well as with representatives of the Association of Netherlands Municipalities. They also visited a forensic psychiatric institution in Utrecht.<sup>3</sup>
4. The Commissioner expresses his great appreciation for the co-operation of the Dutch authorities in facilitating the visit and wishes to thank the Minister of Foreign Affairs and his Department for their commitment to the objectives of the mission. Moreover, he extends his gratitude to all people met during the visit for their exchange of views. The Commissioner is also pleased to have had the opportunity to meet with many civil society representatives who shared their expertise and valuable insights regarding the human rights situation in the Netherlands.
5. The purpose of this report is to identify opportunities for improving the protection and promotion of human rights in the Netherlands. The Commissioner considers that in continuation of the open dialogue with the relevant authorities during his visit, this report should serve as a tool for progression, future co-operation and follow-up. He calls upon the authorities and institutions

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<sup>1</sup> The Commissioner was accompanied by Ms Silvia Grundmann, Ms Rita Patricio and Mr Dennis van der Veur, members of his Office.

<sup>2</sup> See the Commissioner's mandate – especially Article 3(e), Resolution (99) 50 on the Council of Europe Commissioner for Human Rights.

<sup>3</sup> A full list of people, institutions and facilities visited can be found in the appendix to this report.

concerned to contribute their collective expertise for further strengthening of human rights protection in the Netherlands.

6. This report begins with a brief assessment of the national system for human rights protection in the Netherlands and is followed by chapters dealing with specific human rights concerns the Commissioner wishes to highlight. It is based on information acquired during the visit along with statements, reports and statistics provided by the authorities and civil society organisations in the Netherlands. Naturally, relevant reports prepared by human rights monitoring mechanisms of the Council of Europe and other international organisations are also referred to. The report does not provide an exhaustive analysis of the human rights situation in the Netherlands but rather reflects what the Commissioner considers to be the priorities for improving the protection of human rights in the country.

## II. National system for protecting human rights

### 2.1 *Status of international human rights standards*

7. The Netherlands ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1954, and all Additional Protocols to the convention with the exception of Additional Protocol 7 relating to mass expulsion, the right to appeal in criminal matters, compensation for wrongful conviction, the right not to be punished twice and equality between spouses, which it signed in 1984. The ECHR is directly applicable in Dutch national law and prevails over domestic law in cases of conflict.<sup>4</sup> The Netherlands ratified most of the other Council of Europe and other international key human rights treaties, including the Framework Convention for the Protection of National Minorities and the Revised Social Charter to which it has made reservations only to articles 6A with respect to military personnel in active service and civil servants employed by the Ministry of Defence, 19 A and L (in that the Charter only applies to the Kingdom in Europe). It agreed to be bound by the collective complaints procedure under the Revised Social Charter. It also signed and ratified the Convention on Cyber crime but not the Additional Protocol. On 13 August 2008, the Netherlands ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism to enter into force 1 December 2008. It has signed but not ratified the Convention on the Prevention of Terrorism.
8. In 2005 the Netherlands signed the Convention on Action against Trafficking in Human Beings and in 2007 the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. The Commissioner welcomes these steps and strongly encourages the Netherlands to speedily ratify these two instruments, as it has with the Convention on Cybercrime. Likewise, the Commissioner calls upon the Dutch authorities to ratify the Convention on the Prevention of Terrorism, the Convention on the Exercise of Children's Rights and the Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (the latter now being approved by the Parliament).
9. Among UN treaties, the Netherlands ratified the UN Convention on the Rights of the Child (UN CRC) in 1995 with some reservations. It has signed but not yet ratified the Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT). The Netherlands ratified the Convention on the Participation of Foreigners in Public Life at Local Level and the Convention on the Legal Status of Migrant Workers. It has however neither signed nor ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The Commissioner encourages the Netherlands to ratify this convention as well as the UN Convention on the Rights of Persons with Disabilities including its optional protocol.<sup>5</sup> The Commissioner welcomes the signature of the UN Convention on Enforced Disappearances in April 2008, which has now 72 signatures and 4 state parties and encourages its ratification. He

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<sup>4</sup> Art. 94 of the Dutch Constitution.

<sup>5</sup> The optional protocol is not yet signed.

regrets the reservations made to the UN Convention on the Rights of the Child and calls upon the authorities to withdraw them.

## 2.2 *The judiciary and access to justice*

10. The Dutch judiciary consists of higher and lower courts. There are sub-district (magistrate-like) and district courts as well as courts of appeal. The Netherlands has no constitutional court. The Supreme Court (*Hoge Raad*) of the Netherlands as the last instance in criminal and civil matters examines questions of law, the facts being deemed to be as established by the lower courts. Likewise, the Administrative Jurisdiction Division of the Council of State (*Raad van State*) is the country's highest general administrative court. The Central Appeals Tribunal is the highest instance of justice in social security matters and the civil service.<sup>6</sup> Apart from its judicial function as a court of cassation, the Council of State also acts as an advisory body to the government to be consulted on proposed legislation before a bill is submitted to parliament.
11. Based on Article 18 of the Dutch Constitution and Article 6 of the ECHR, the Netherlands needs to provide for a system of legal aid to ensure an effective access to justice. In cases of subsidised legal aid or mediation the state compensates wholly or in part the costs of a lawyer or mediator. NGOs have not mentioned substantial shortcomings of the system. They advocate, however, free legal aid for victims of domestic violence in the form of paid 2 hours' assistance by a lawyer after which the victim could resort to the regular legal aid system.<sup>7</sup> The government stresses that free legal aid is provided to victims of sexual offenses and domestic violence if the case is brought to trial and the victim qualifies for compensation.

## 2.3 *The Dutch constitution: envisaged reforms and status of international treaties*

12. Chapter one of the Dutch Constitution provides a number of fundamental rights. However, Article 120 prevents domestic courts from scrutinizing domestic laws for their compatibility with these rights.<sup>8</sup> In recent years, a number of proposed legislative reforms have touched on constitutional issues,<sup>9</sup> among them a proposal to reform Art. 120.
13. As long as Art. 120 remains unchanged, international human rights treaties play a special role in the Dutch legal order in adjudicating conflicts relating to fundamental rights. Article 94 of the Dutch constitution allows courts to review the compatibility of domestic law provided the respective provisions of international treaties are binding or self-executing. Dutch NGOs<sup>10</sup> and the Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee on Economic Social and Cultural Rights (CESCR) have raised the issue of unclarity with regard to the interpretation of whether provisions of international treaties are self-executing or not. The government has informed the Commissioner that a national commission will be established to examine ways of strengthening the constitution and to consider the effect of international treaties in the Dutch legal order.
14. Due to the dispute on direct applicability, different domestic courts can arrive at different interpretations, an example being the anti-discrimination Article 2 of the UN CRC<sup>11</sup> or the

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<sup>6</sup> The Trade and Industry Appeals Tribunal passes the final decision in the area of social-economic administrative law such as disputes over the Competition or Telecommunications Act.

<sup>7</sup> NGOs commentary on the 4<sup>th</sup> periodic report of The Netherlands on the International Covenant on Civil and Political Rights (ICCPR), 8 August 2008, p. 26.

<sup>8</sup> Art. 120 provides that "The constitutionality of acts of parliament and treaties shall not be reviewed by the courts".

<sup>9</sup> Their topics included corrective referendums, online voting, extension of Article 1 with 'disability' and 'sexual orientation' and fundamental rights. Some of these proposals are now bills before the Dutch parliament.

<sup>10</sup> Dutch NGOs contribution to the First Universal Periodic Review of the Netherlands by the Human Rights Council, November 2007, p.5.

<sup>11</sup> In cases in which children without a residence permit invoked Article 2 of the CRC, the article is not applied by the Administrative Law Division of the Council of State. However the Central Appeals Tribunal, ruled it is applicable for Dutch children. For details see Dutch NGO Coalition for Children's Right, Third report on the CRC, July 2008, p. 23.

dispute in the case of the SGP party.<sup>12</sup> In his meetings with representatives of the Supreme Court and the Council of State, the Commissioner learned that potential conflicts are usually solved in an informal way, attempting to arrive at a harmonized interpretation by taking into account the expertise and case law of the respective court leading in a particular domain.<sup>13</sup> While the Commissioner acknowledges the efforts made to avoid different interpretations, he believes that a formal procedure would better guarantee a uniform interpretation. In the interest of legal certainty, the Commissioner encourages the Dutch authorities to ensure a uniform interpretation of the application of international treaties and welcomes the proposal to reform the Dutch constitution. He believes that implementing this change would strongly promote the knowledge of fundamental rights in the Netherlands and would strengthen human rights in the Dutch legal order.

#### 2.4 *Complaints bodies and human rights structures*

15. The Office of the National Ombudsman was set up in 1982 as an independent non-judicial body appointed for six years by the Lower House of Parliament to which it reports annually. Since 1999, the institution has been enshrined in the Dutch Constitution. Anyone may request the Ombudsman to investigate the conduct of a government body, and he may launch his own investigations. His decisions, which are made public, are not legally enforceable. In 2007, the Office of the National Ombudsman made a total of 2 899 interventions on behalf of individuals.
16. In addition to the national ombudsman, Dutch municipalities may choose to appoint a local ombudsman; approximately half of the municipalities have done so, some of them jointly. The Commissioner observes that this possibility enhances human rights and is particularly valuable in larger entities such as the city of Rotterdam, where the Commissioner met with the local ombudsman.
17. The Commissioner notes that at present there is no children's ombudsman in the Netherlands. The National Ombudsman informed the Commissioner that he set up a special investigation team in 2007 to deal with cases involving children.<sup>14</sup> The Ombudsman suggested as a most practical and efficient solution to make one of his two deputies the Children Ombudsman.
18. The Commissioner regrets that the Dutch government currently sees no reason to establish an ombudsman for children. He welcomes the initiative taken by members of parliament who have submitted a private members' bill to establish a children's ombudsman in the Netherlands. The Commissioner believes that the Netherlands would benefit from establishing a children's ombudsman as this would greatly enhance coordination and visibility of children's issues. Therefore, the Commissioner urges the Dutch authorities to ensure that ombudswork for children is undertaken within the ombudsman office or through a separate institution.
19. After long delays and criticisms<sup>15</sup> and a joint initiative launched in 2005 by the National Ombudsman, the Equal Treatment Commission, the Data Protection Authority and the Study and Information Centre on Human Rights (SIM),<sup>16</sup> the government in July 2008 decided to set up a national human rights institution, affiliated with the National Ombudsman. The competences of the new institution have to be decided on but will most probably include giving advice to parliament, government and other competent bodies as well as treaty monitoring and serving as an international contact point. The institute might also play a role in providing human rights education and increasing public awareness.

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<sup>12</sup> The Reformed Political Party (Staatkundig Gereformeerde Partij (SGP) does accept women only as exceptional members which means they do not have a right to vote nor have other electoral capacities (the right to run for election) and are excluded from executive functions. In a dispute over state funding of this party, the case has been brought before different courts (civil and administrative) and led to different decisions in respect of constitutional rights. The case is now on appeal at the Supreme Court.

<sup>13</sup> E.g. the interpretations of the Supreme Court in areas of criminal law or of the Council of State in aliens law.

<sup>14</sup> In particular in the areas of immigration policy, health care and youth welfare, where they see deficits.

<sup>15</sup> Dutch NGOs contribution to the First Universal Periodic Review of the Netherlands by the UN Human Rights Council, November 2007.

<sup>16</sup> The centre is part of the University of Utrecht.



20. The Commissioner welcomes this development and looks forward to the establishment of the new institution. The Commissioner trusts that the decision of the government not to set up an entirely new institution, but to attach the institution to the office of the National Ombudsman will nevertheless foresee a dedicated budget for the new institution and will result in efficiencies within the framework of adequately resourced human rights structures.
21. To combat discrimination, the Equal Treatment Commission (*Commissie Gelijke Behandeling, CGB*), in response to a written request, examines whether or not discrimination, within the meaning of e.g. the Equal Treatment Act and the Equal Treatment (Men and Women) Act, is taking place or has taken place. The Commission can also, on its own initiative, decide to investigate whether or not such discrimination is systematic.<sup>17</sup>
22. The Data Protection Authority primarily monitors the protection of personal data. It can advise on legislation, review codes of conduct and regulations and make decisions on exemptions from the ban on processing particular types of personal data. The Authority has special powers of enforcement, such as administrative enforcement and the ability to impose monetary penalties and administrative fines and can also mediate in conflicts.<sup>18</sup>

## 2.5 Police

23. The Commissioner attaches great importance to the role of the police authorities in protecting human rights. He notes with appreciation that both the 2002 and the 2007 visits of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) found no credible allegations of ill-treatment by law enforcement officials. Nevertheless, on both visits, the CPT found that the wording of Section 62(2) of the Code of Criminal Procedure permitting postponement of notification "in the interests of the investigation" was not sufficiently precise. The Commissioner feels that safeguards against ill-treatment should be improved in the light of these findings and recommends that persons obliged to remain with the police should have the right to notify a third party immediately.
24. The Commissioner is aware of the criticism expressed by the CPT in 2002 and 2007 and by the UN Committee against Torture in relation to the initial stage of police interrogation, during which a detainee is not entitled to have access to a lawyer for up to 6 hours. As the period between midnight and 9am is not taken into account, the total period without access to a lawyer could amount to 15 hours. The Dutch authorities informed the Commissioner that the Minister of Justice has opted in favour of video and/or audio registration of interviews conducted by police officials instead of the mandatory attendance of a lawyer during the first police interrogation.
25. The Commissioner learned of a pilot project started on 1 July 2008 in Amsterdam and Rotterdam whereby, subject to certain conditions, the lawyer can attend the first questioning of a person suspected of murder or manslaughter. The goal of this project is to generate information on the basis of which a sound decision can be made about a possible revision of the relevant legal provisions. However, the legal profession has already expressed criticism about this experiment. For example, the lawyers may not make any remarks, may not consult with their client and must remain outside their client's view. Acknowledging this pilot project as a first step, the Commissioner stresses that the right of access to a lawyer for persons detained by the police for interrogation should be guaranteed from the very outset of the deprivation of liberty. He calls upon the Dutch authorities to modify their legislation in such a way that detainees can enjoy this right.
26. The European Commission against Racism and Intolerance (ECRI) notes that there is still a rather low number of ethnic minority police officers, but that the situation is improving. At the same time, a disproportionately high number of ethnic minority officers have been leaving the service. Possible reasons appear to be the prevailing police culture, stereotypes/prejudices and the perception of lack of career prospects. Some measures have been taken aiming at improving staff diversity. The National Ombudsman is investigating possible patterns of

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<sup>17</sup> See for further information part on anti-discrimination.

<sup>18</sup> The competences are established in the Personal Data Protection Act (*Wet bescherming persoonsgegevens, Wbp*), and for police in the Data Protection (Police Files) Act (*Wet politieregisters, Wpolr*).

discrimination in police members' career paths.<sup>19</sup> In a meeting with the chief of police of the city of Rotterdam, the Commissioner learned that in the Rotterdam-Rijnmond region with an alien population of 31%, 10.7% police officers come from ethnic minorities. The Commissioner hopes that in the interest of effective police work close to the public, the number of ethnic minority officers can be improved.

27. The Commissioner is aware that internal police complaint mechanisms exist through the Public Order and Safety Inspectorate (POS)<sup>20</sup> and the National Police Internal Investigations Department (*Rijksrecherche*).<sup>21</sup> As is the case with all acts of the Dutch authorities, the National Ombudsman can also investigate when approached by an individual or upon his own initiative. Likewise, the public prosecutor investigates in cases of alleged criminal behaviour. In a 2007 study, the POS Inspectorate concluded that there were substantial differences in the various forces' approach to complaints handling. The Inspectorate considers it beneficial to introduce uniform, national complaints handling procedures that are applicable to all forces. The Inspectorate also advises the development of a (national) complaint registration system within the near future. The National Ombudsman writes in his annual report that the internal complaint mechanism has to be improved for most of the different forces. In 2007 the Ombudsman had more than 900 complaints about the police and their internal way of dealing with complaints.
28. The Commissioner discussed models of best practice with the Minister of the Interior and Kingdom Relations, describing the Irish Police Ombudsman Commission, established in 2007 as an independent external police complaint mechanism which might serve as a role model.<sup>22</sup> He encourages the Dutch authorities to consider the creation of an independent external mechanism as such a body would be more easily accessible and thus lower the threshold for reporting police misconduct. Police would benefit as this would allow for early reaction and interaction, thereby promoting confidence in cases of conflict.

## 2.6 *Civil society and Human Rights Defenders*

29. In the course of the visit, the Commissioner met with various human rights' NGOs. He is very grateful for having been able to share their expertise and valuable information. The Commissioner noted that although some NGOs act mainly as service providers and are funded to a large extent by the Government, they manage to remain critical. The Commissioner underlines that a constant, critical and constructive dialogue between the authorities and civil society is imperative for effective human rights protection. He thus encourages the Dutch authorities to safeguard, facilitate and promote this dialogue on all levels.
30. The Commissioner notes with appreciation that the Ministry of Foreign Affairs has developed a human rights defenders' policy, supporting human rights defenders with the help of their embassies practically and financially. Since 2008, the 'Human Rights Defender Tulip' as a special recognition for Defenders' work is awarded.

## 2.7 *Human rights education*

31. The Commissioner reiterates that human rights education is an essential part of a national human rights policy. It is a cornerstone for society, ensuring that individuals have an understanding of their human rights and those of others, thereby promoting critical thinking and mutual respect.<sup>23</sup> During his meetings with numerous stakeholders, including members of the judiciary, civil society and representatives of various authorities the Commissioner learned that

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<sup>19</sup> 3<sup>rd</sup> Report on the Netherlands, ECRI (2008)3, Strasbourg, February 2008.

<sup>20</sup> The POS Inspectorate supervises the quality of the performance of public tasks of police, police training institutes, fire brigade and disaster relief and crisis control organisations. It is part of the Ministry of the Interior and Kingdom Relations. The Inspectorate, with its workforce of around 50, was founded in 2002.

<sup>21</sup> The department is responsible for examining complaints concerning the conduct of government officials and public servants. It also routinely investigates cases involving injury or death following the use of firearms by the police. The same applies in the event of a detainee's death in prison, information provided by the Dutch authorities in July 2008.

<sup>22</sup> For details see the Commissioner's report on his visit to Ireland, 26-30 November 2007, paragraph 25.

<sup>23</sup> See also the viewpoint of the Commissioner "Human rights education is a priority – more concrete action is needed", 6 October 2008, available at [www.coe.int/commissioner/viewpoints/](http://www.coe.int/commissioner/viewpoints/).

in general, knowledge of the Dutch constitution, its fundamental rights and human rights in the Netherlands is not well developed. The government is trying to address this problem in several ways, for example through initiatives in the area of human rights and citizenship education and making the constitution more accessible.

32. NGOs active in the field have been lobbying policy makers to make human rights education mandatory.<sup>24</sup> The Netherlands Platform on Human Rights Education informed the Commissioner that many schools voluntarily, often supported by Platform members, do pay attention to human rights education on a voluntary basis.
33. The Commissioner notes the government's statement that it has commissioned guidelines for schools, which mention human rights as an integral part of civic education, though it cannot make human rights education mandatory in schools as this might contradict freedom of education as guaranteed by Article 23 of the Dutch Constitution. The Commissioner believes that human rights education should be firmly anchored in a comprehensive manner in primary and secondary school education. The UN World Programme for Human Rights Education launched in 2005 and the Council of Europe initiative "Education for Democratic Citizenship and Human Rights" may provide valuable guidance in this respect.

## 2.8 *National coordination of human rights issues*

34. Since 1999, the Netherlands has a human rights ambassador to strengthen the human rights component in foreign policy. In November 2007, the Minister of Foreign Affairs presented a new human rights strategy for foreign policy, "Human dignity for all", placing human rights at the centre of Dutch foreign policy.
35. There appears to be no national action plan or any other visible human rights mainstreaming approach nor a comprehensive effective coordinating mechanism among the domestic authorities within the executive. NGOs expressed their concerns at the lack of clarity as to how human rights are considered and whether they are consequently monitored and evaluated. They further alleged that international human rights law is rarely taken as a touchstone for policies and legislation in the Netherlands.<sup>25</sup>
36. The Commissioner believes that a national human rights action plan could serve as a key tool to improve the protection and promotion of human rights through a comprehensive and coherent approach involving all stakeholders including representatives of civil society.<sup>26</sup> The Commissioner is convinced that the Netherlands would benefit from such an in-depth analysis as it would be useful for identifying and assigning the respective responsibilities and may thus save resources and minimize overlap, in particular in reporting obligations. Furthermore, the Commissioner encourages the authorities to ensure effective interministerial coordination for domestic human rights matters consisting of representatives from all relevant ministries and agencies.

## 2.9 *Protection of human rights in the overseas territories*

37. The Kingdom of the Netherlands currently has three parts, the European, the Aruban and the Antillean part. The Netherlands Antilles and Aruba are semi-autonomous areas of the Kingdom. Due to a process of constitutional change which is close to final conclusion, two of the Netherlands Antilles, Curaçao and St. Maarten, will become semi-autonomous as is Aruba. The three other Antilles, Bonaire, Saba and St. Eustatius, opted to become municipalities of the

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<sup>24</sup> The Commissioner received a letter dated 17 April 2008, that two umbrella organisations, the Netherlands Platform on Human Rights Education and the Child Rights Collective had sent to various institutions, including the Minister of the Interior, the Minister of Education, the Dutch Ombudsman, the SIM (Study and Information Centre on Human Rights), the CGB (Committee for Equal Treatment) and the CBP (Dutch Data Protection Authority), expressing their concerns on the topic of human rights education. A reply had not been received at the time of writing.

<sup>25</sup> Dutch NGOs contribution to the First Universal Periodic Review of the Netherlands by the Human Rights Council, November 2007.

<sup>26</sup> See also the Commissioner's viewpoint "Concrete and comprehensive action plans are needed to ensure implementation of human rights", 3 November 2008.

Netherlands, that is the European part of the Kingdom. As a consequence, they may decide whether or not to come into the territorial remit of the national ombudsman, which is currently not the case.

38. As to the Caribbean parts of the Kingdom that remain semi-autonomous, NGOs have flagged the lack of or delayed and incomplete reporting on international obligations for the overseas territories. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), while acknowledging some progress in its 2007 report, criticised *i.a.* prison conditions, excessive length of pre-trial detention, restricted access to lawyers and limited alternatives to the detention of children.<sup>27</sup> Furthermore, there had been allegations in a report by the UN Committee against Torture of assaults committed by Aruban law enforcement officials.<sup>28</sup> The UN Committee on the Rights of the Child (CRC) expressed concern that in Aruba children are vulnerable to trafficking for the purpose of transporting illegal drugs or sexual exploitation, including sex tourism. They recommended, inter alia, to undertake an in-depth study of the issue.<sup>29</sup> During his visit, the Commissioner learned that in some areas different standards than in the European part of the Kingdom seem to apply, an example being the difficulties that same sex legally married couples face in the recognition of their marriages in the Caribbean parts of the Kingdom.
39. The Commissioner recommends that the Dutch authorities seek ways of ensuring uniformity in all parts of the Kingdom of the Netherlands with a view in particular to extend the application of the Revised Social Charter to the Netherlands Antilles and Aruba.

### III. Treatment of asylum seekers

#### 3.1 *The asylum framework and its proposed reform*

40. Dutch aliens law is shaped by EU law. In the field of migration and asylum, the Aliens Act 2000 (*Vreemdelingenwet 2000 (Vw 2000)*) in force since 2001, stipulates the conditions for foreign nationals to enter the Netherlands, the issue of residence permits and removal, for both the asylum and non-asylum (immigration) categories. The act is elaborated in different types of secondary legislation; the most important are the Aliens Act implementation guidelines 2000 (*Vreemdelingencirculaire 2000 (Vc 2000)*). There are also operating instructions which are in principle made public.<sup>30</sup> Since the introduction of the new law in 2001, the number of new asylum claims declined sharply: 10 000 asylum seekers in 2004 compared to 43 000 in 2000. In 2007 most asylum seekers came from Iraq, Somalia and Afghanistan. Up to June 2008, 6 237 asylum seekers arrived at Dutch application centres. The Commissioner learned that the authorities revoked the general scheme to grant temporary residence for refugees from Central and South Iraq as of 22 November 2008. In view of the continued difficult situation in Iraq, the Commissioner urges the Dutch authorities to reconsider this decision.
41. The Commissioner commends that the Netherlands recognises sexual orientation as a potential ground for persecution and thus possibly asylum under the UN Refugee Convention. However, gender identity is not explicitly recognised as a ground for persecution in line with the UNHCR Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity. The Commissioner encourages that this be explicitly recognised.
42. The current asylum procedure begins with an initial assessment of the asylum request in an application centre<sup>31</sup> run by the IND. A maximum of 48 working hours will be needed in order to

<sup>27</sup> CPT report on its June 2007 visit, made public by the Netherlands Government on 30 January 2008, CPT/Inf (2008) 2, Strasbourg 5 February 2008; see also the Response of the Authorities of the Kingdom of the Netherlands to the report of the CPT on its visits to the Kingdom in Europe, Aruba, and the Netherlands Antilles, CPT/Inf (2009) 7, Strasbourg 4 February 2009.

<sup>28</sup> UN Committee against Torture (CAT), thirty-eight session 30 April – 18 May 2007, CAT/C/NET/CO/4, 3 August 2007

<sup>29</sup> UN Committee on the Rights of the Child (CRC), thirty-fifth session, 26 February 2004; reiterating the need for a comprehensive study, CRC, fiftieth session 30 January 2009. .

<sup>30</sup> Access to the instructions may be restricted on grounds laid down by Act of Parliament.

<sup>31</sup> Schiphol (arriving by air or sea) and Ter Apel and Zevenaar (arriving by land).

carry out this assessment, known as the “48-hour accelerated procedure”. These 48 hours will be spread across a number of working days, amounting to around five working days.<sup>32</sup>

43. When the IND decides during the 48-hours procedure that further investigation is necessary the procedure continues in the reception centre, known as the “prolonged/extended” or “general” procedure. Generally, the IND is required to take a decision within six months. If the IND concludes that the asylum seeker meets the conditions for an asylum residence permit, a temporary residence permit will be granted. After five years the asylum seeker may apply for a permanent residence permit. In about 40% of the applications for asylum, the IND takes a decision within three to five days,<sup>33</sup> that is in the accelerated procedure. Processing some 60% of the applications requires more time, usually about six months. If difficulties occur in establishing the language or dialect of the asylum seeker or the country of origin, the six months are exceeded. An appeal or a second asylum application based on new facts can further prolong the procedures.
44. Numerous stakeholders such as UNHCR and NGOs have criticised the current accelerated procedure mainly for lack of safeguards and for excessive length. The 48-hours accelerated procedure is seen as not providing sufficient safeguards and creating excessive time pressure with a potential risk of refoulement and a detrimental effect on vulnerable groups such as women who do not immediately inform the authorities that they have been subjected to violence or sexual persecution.<sup>34</sup> NGOs note that the general asylum procedures are quite long due to a capacity problem at the IND and the District Courts.<sup>35</sup> In July 2006 there were 2 154 people staying four to five years and 1 818 staying three to four years in reception centres. On 1 August 2008, a total of 18 900 people were living in reception centres.
45. In June 2008, the Ministry of Justice in a letter to parliament, proposed changes to the current procedure. According to the Ministry, the reform aims towards a more effective asylum procedure and return policy. Its core is to extend the current 48-hours accelerated procedure (five working days) to eight days and to process more asylum claims within this period. A rest and preparation period is introduced to be used for registration, information to the applicant by the Dutch Refugee Council and legal aid providers as well as for a medical examination. The Commissioner is aware of the detailed concerns expressed by UNHCR, stating *inter alia* that the rest period should not be used for investigations before a sufficient degree of trust has been established and asylum seekers have benefited from legal advice.<sup>36</sup>
46. In view of the strong criticism already expressed against the current accelerated procedure, the Commissioner is surprised that the government wants to process more claims within a somewhat enhanced accelerated procedure, including vulnerable groups such as unaccompanied minors. The Commissioner is aware that civil society representatives fear that the enhanced accelerated procedure could become the norm for the majority of cases. A fast procedure is certainly suitable for clear-cut cases, such as manifestly unfounded or well-founded claims, but it can be detrimental to all other cases and is clearly unsuitable for vulnerable groups such as victims of violence and unaccompanied children. The Commissioner feels that the reform proposal insufficiently addresses the criticism raised towards the current law when it comes to providing better safeguards for asylum seekers. He therefore urges the Dutch authorities to limit the enhanced accelerated procedure to clear-cut cases and to provide for a general procedure that gives the authorities sufficient time to diligently establish the facts of the case while allowing the asylum seeker to discharge the burden of proof by submitting suitable evidence.

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<sup>32</sup> The assessment is carried out in 8 steps; reporting, registration, the initial interview, the initial assessment, the detailed interview, the report and intended decision, the response of the asylum seeker to the intended decision, the decision in the application centre, residence or departure.

<sup>33</sup> IND Immigration and Naturalisation Service Asylum leaflet April 2008, available via [www.ind.nl](http://www.ind.nl)

<sup>34</sup> In the past, the Netherlands has been criticized for forcible returns to countries where their safety may not be secured, i.e. Iraq, Somalia, and Congo. See also ECRI, 3<sup>rd</sup> Report on the Netherlands.

<sup>35</sup> Report Refugee Council. Vreemdelingenwet 2000, *Een ontspoorde asielwet*, September 2007, p. 42; Submission to the UN Universal Periodic Review (AI Index: EUR 35/001/2007).

<sup>36</sup> UNHCR Comments on the plans of the Government of the Netherlands for “a more careful and faster” asylum procedure, UNHCR Regional Representation Brussels, September 2008.

### 3.2 Judicial review of asylum decisions

47. Asylum decisions of the IND are partly based on information from the Ministry of Foreign Affairs contained in official reports (*ambtsberichten*) the accuracy of which have been questioned by the NGO Refugee Council,<sup>37</sup> the national ombudsman and in one case also by the ECtHR.<sup>38</sup> Under the accelerated procedure, appeals must be lodged within one week with the District Court and on appeal with the Council of State. The courts do not make an assessment on the merits but only examine points of law. Appeals under this procedure do not have suspensive effect<sup>39</sup> and applicants are not allowed to await the outcome of the procedures in the Netherlands but must leave the country. UNHCR has consistently taken the position that the suspensive effect of asylum appeals is a critical safeguard to ensure respect for the principle of non-refoulement.<sup>40</sup> The applicant can apply to a district court for an injunction to prevent expulsion.
48. Asylum seekers do not have a right to stay in the reception facilities during the appeal procedure. Under current Dutch law, decisions of the IND are subject to a limited scrutiny by the courts, the facts largely deemed to be established as found by the State Secretary, including the credibility assessment of the applicant. Evidence that theoretically could have been brought forward earlier may not be taken into account at the appeal stage. This leads to a considerably high number of repeat applications.<sup>41</sup> The Council of State may deliver a judgment without a reasoning and frequently does so.
49. During his visit the Commissioner was pleased to learn of a reform proposal, namely to provide reception facilities during the appeal stage, albeit for a limited duration of four weeks. While in principle welcoming this proposal, the Commissioner questions what will happen to those applicants whose appeal might take longer. He believes that the authorities should not stop short and only remedy the currently unsatisfactory situation in part, leaving a certain number of asylum seekers again without accommodation in the future. The Commissioner calls upon the authorities to provide reception facilities to asylum seekers until the final closure of their case.
50. The Commissioner notes with appreciation that the current limitations to the introduction of further evidence will be abolished. The courts will then be allowed to take new circumstances and policy changes into account in the appeal stage and the IND will of its own accord weigh new circumstances put forward in the appeal stage and see if these could lead to another outcome. The Commissioner understands that evidence will be considered by the courts even if it could have been brought forward at an earlier stage. The Commissioner welcomes this proposal, but he remains concerned that the reformed appeal procedure will still not allow for a complete assessment of the first instance decision in both law and fact, including the credibility of the applicant. He calls upon the Dutch authorities to reconsider and expand their reform proposal in that respect as well as to consider the introduction of a suspensive effect for such cases in which the asylum seeker can establish that he or she would be subject to bodily harm. He welcomes the repeated assurance by the Government that Article 3 of the ECHR has an absolute character and will always be respected.

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<sup>37</sup> Refugee Council. Summary Report on the Aliens Act (*Vreemdelingenwet*) 2000, 'Een ontspoorde asielwet', September 2007, p. 5. National Ombudsman, 'De geloofwaardigheid van ambtsberichten, Hoe asielverhalen worden bevestigd of ontkracht', 27 September 2007.

<sup>38</sup> Case of *Salah Sheekh v. the Netherlands*, judgment of 11 January 2007 final on 13 May 2007.

<sup>39</sup> Guideline 5 para 3 of the Twenty guidelines of the Committee of Ministers of the Council of Europe on Forced Return, adopted May 2005 provides that there should be a suspensive effect when the returnee has an arguable claim that he or she would be subject to infliction of bodily harm.

<sup>40</sup> UNHCR Comments on the plans of the Government of the Netherlands for "a more careful and faster" asylum procedure, UNHCR Regional Representation Brussels, September 2008.

<sup>41</sup> Already in 2003, UNHCR expressed concern about the limited scope of judicial review, submitting detailed observations on the Aliens Act, UNCHR paper of July 2003 "Implementation of the Aliens Act 2000: UNCHR's observations and recommendations".

### 3.3 Administrative detention of asylum seekers

51. Every year several thousand irregular migrants and asylum-seekers are detained in the Netherlands.<sup>42</sup> Asylum seekers arriving by plane are routinely subjected to border detention during and immediately following the accelerated asylum determination procedure at the Schiphol Application Centre. If further investigations are deemed necessary beyond the 48-hours accelerated procedure and in certain other circumstances, asylum seekers may face continuous border detention, lasting on average almost 100 days (including investigation, objection and appeal procedure), and in some cases as long as 381 days. This includes people who have suffered traumatic experiences, including victims of trafficking, unaccompanied minors and people who fall under the Dublin Regulation.<sup>43</sup> In the view of the Dutch government, the administrative detention of asylum seekers is designed to guarantee a fair and speedy determination of their asylum claims. However, there is no evidence supporting this belief.<sup>44</sup> The Netherlands and the UK are the only countries in Europe where there is no maximum term to hold an alien in detention.<sup>45</sup> The CPT criticised this policy in its last report, inviting the Netherlands to introduce a maximum period. The Dutch authorities informed the Commissioner that with the implementation of the EU-return directive, generally alien detention will be limited to six months with a maximum stay of up to 18 months under specific circumstances.
52. As to detention conditions, the CPT in 2007, with some exceptions, reported a generally still satisfactory standard.<sup>46</sup> However, the CPT delegation noticed a deterioration in the way in which immigration detention centres were operated, as compared to 10 years ago. The Dutch approach to administrative detention of immigration detainees has changed, and now duplicates the prison system without immigration detainees having access to a full community regime. NGOs as well as the Dutch Council for the Administration of Criminal Justice and Protection of Juveniles<sup>47</sup> have also expressed their concerns as only essential medical care is available and access to education and employment are lacking.<sup>48</sup>
53. The Commissioner visited the *Noord-Holland* Detention Centre "*Oude Meer*" near Schiphol and the closed application centre at Schiphol airport. He also visited the open reception centre '*Gravendeel*' where he met with the General Director of the Central Agency for the Reception of Asylum Seekers (COA), Ms Nurten Albayrak. In all three facilities, the Commissioner held talks with staff members and was shown around the premises, making use of the possibility to talk to detainees in private and to meet with residents in the open facility. On the positive side, the Commissioner notes that the material conditions were of a high standard. In the closed application centre, women and men spend the night in separate dormitories with sanitary facilities, as do unaccompanied minors. The applicants are not allowed in these rooms during daytime but must be present in waiting rooms where only a TV is available.
54. The Commissioner spoke in private with some unaccompanied male minors in the closed application centre and with detainees in the expulsion centre. On both occasions, the Commissioner was given the impression that the detainees did not understand the application

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<sup>42</sup> Report Amnesty International, The Netherlands: The Detention of irregular migrants and asylum seekers, June 2008, p. 5; according to the Dutch authorities, since 2005, the number of aliens detained in a year has been closer to 10,000 than to 20,000.

<sup>43</sup> Annual Report 2007, Dutch Council for Refugees, p. 12.

<sup>44</sup> The Council for Administration of Criminal Justice and the Protection of Juveniles concluded that the effectiveness of the detention of foreign nationals is limited; less than half of all detentions actually lead to deportation. The Council believes that the Dutch government could do more to avoid detention, see Recommendations of the Council for the Administration of Criminal Justice and the Protection of Juveniles, Summary, 'Detention of foreign nationals', issued to the State Secretary for Justice, 16 June 2008.

<sup>45</sup> In June 2008, the European Council decided that there will be a maximum term of six months and in specific cases of up to eighteen months detention.

<sup>46</sup> CPT Report on the Netherlands 2007, *supra*.

<sup>47</sup> The Council was set up in 2001 and consists of 60 expert members. It is an independent body with two tasks: administering justice and giving advice on youth protection and the enforcement of sentences and non-punitive orders.

<sup>48</sup> Report Amnesty International, The Netherlands: The Detention of irregular migrants and asylum seekers, June 2008, p. 17; Dutch Council for the Administration of Criminal Justice and Protection of Juveniles, *supra*, 16 June 2008.

procedure and they expressed anxiety as to their detention. While the Commissioner appreciates the close cooperation with NGOs and legal aid providers, he calls upon the authorities to make sure that all asylum seekers, including those whose claims have been rejected, are informed in an adequate manner and in a language they understand.

55. During his visit to the expulsion centre, the Commissioner noted that women are being detained together with men in the same detention facilities, their cells communicating to the same corridor where they spent their daytime together unless they decide to stay in their own cell. Staff members of the institution told the Commissioner that so far, they had not encountered problems with this policy of mixed detention but thought it beneficial for the general climate. However, three detained women, one of them a Muslim, expressed a strong feeling of discomfort for lack of privacy to female members of the Commissioner's delegation, in particular as they claimed to have found men in their showers. The government authorities have informed that women objecting to live with men can request to be moved to a different centre.
56. The Commissioner regrets that few occupational activities appear to be available in all three facilities he visited. While children in the open reception centre in 's *Gravendeel* attend a regular school, there is little extra curricular activity for them in the centre. The Commissioner learned that the programme for adults is even more limited due to budgetary cuts and that language courses have been abolished. Dutch authorities have pointed out that 's *Gravendeel* is a return centre and no Dutch language classes are given at such centres. This was a problem for a family that the Commissioner met which had stayed several years in the centre with a child (before being given a permit to stay in the country).
57. The Commissioner reiterates that administrative detention must be kept to a strict minimum and that detention conditions should not be worse than in criminal detention. He therefore urges the Dutch authorities to make a variety of meaningful activities available to all detainees in the asylum and expulsion process. The Commissioner is aware that some asylum seekers spend a considerable length of time in open reception centres. The Commissioner calls upon the Dutch authorities to expand meaningful activities and to reintroduce language courses in such facilities. The Commissioner welcomes the newly introduced possibility to seek employment for 24 hours per week and urges the authorities to promote this possibility in the respective municipalities, helping the asylum seekers to find occupation.
58. The Commissioner recalls that the general legal principle of proportionality requires an individual assessment of each case as well as consideration of alternatives to detention. This is particularly true for vulnerable groups of asylum seekers, e.g. unaccompanied minors and victims of trafficking. The Commissioner believes that the current scheme to detain all asylum-seekers entering the Netherlands by air is not in line with these principles and urges the authorities to consider modifying this practice.
59. Individuals have the right to appeal their detention and its continuation before a district court. Pursuant to Article 59 Aliens Act 2000, the detention and its continuation is generally lawful, if expulsion is foreseeable, e.g., if the authorities are actively pursuing to expel the person concerned within a reasonable time, or when that person actively obstructs or frustrates this process. The interests of the asylum-seeker are only taken into account in so far as a possibly burdensome situation exists but no full proportionality assessment is made. This limited possibility of judicial review has faced criticism<sup>49</sup> and may be in contradiction with the case law of the European Court of Human Rights.<sup>50</sup>
60. The Commissioner believes that a full judicial review is a core instrument to safeguard the due application of law by the authorities. In view of the severity of a detention decision, the question whether this balance has been struck, must be subject to an effective judicial review. The Commissioner therefore calls upon the Dutch authorities to use the reform discussion and

<sup>49</sup> Report Amnesty International, The Netherlands: The Detention of irregular migrants and asylum seekers, June 2008, pp. 18-19, see also the Recommendations of the Council for the Administration of Criminal Justice and the Protection of Juveniles, supra, 16 June 2008.

<sup>50</sup> See the case of *Saadi v. UK*, judgment of 29 January 2008 (Grand Chamber) in which the Court required that when detaining an alien for the purpose of expulsion, a balance must be struck between the interest of the society and the right to liberty of the individual.



change the current law allowing for a full judicial review of the detention decision as well as the continued detention by domestic courts.

### 3.4 *Children in the asylum procedure*

61. Children coming to the Netherlands with their family are generally included in the asylum procedure of their parents. There is no organisation making sure that the decision is in the best interest of the child in contrast to other areas of Dutch law such as family law, where the Council for Child Protection (*'Raad voor de Kinderbescherming'*) is involved. The IND verifies the aspects directly related to the asylum request.<sup>51</sup> Children from the age of twelve and above may be heard, and from the age of fifteen they have to be heard by the IND. On 1 August 2008 there were 18 900 asylum seekers in reception centres, including 6 102 children (up to 18 years of age).

### 3.5 *Administrative detention of children*

62. Until January 2008, the Dutch authorities were widely criticised for detaining about 240 children and their families, for an average time of 59 days and a maximum of 244 days.<sup>52</sup> In response to this criticism and a parliamentary motion, on 29 January 2008 the Dutch government publicized its new policy regarding administrative detention of children and their families. The aim is to reduce the detention period for children by introducing a maximum of two weeks detention prior to expulsion, the creation of more alternative accommodation for children and their families, and the improvement of detention conditions. Furthermore, the government announced that it would add 12 weeks to the 28-day period given to asylum seekers and migrants to leave the country voluntarily after their application has been rejected. In the case of children with two parents, only one of them would be detained, to allow the other parent and the child(ren) to remain outside a detention setting until their effective return. One NGO, albeit criticising this choice as illusory as families choose to stay united with their children resulting in the detention of the children, reports that the number of children and their parents in administrative detention already decreased significantly in 2007.<sup>53</sup>
63. The Commissioner welcomes the measures taken to reduce administrative detention for children with parents. He calls upon the Dutch authorities to provide further alternatives to detention, keeping families united, and not to detain children, except in extraordinary circumstances precisely defined in law in accordance with the standards of the ECHR and the CRC.

### 3.6 *Unaccompanied minors/separated children, "1F children" and stateless children*

64. Unaccompanied minors<sup>54</sup> may be seeking asylum because of fear of persecution or the lack of protection due to human rights violations, armed conflict or disturbances in their own country. They may be the victims of trafficking for sexual or other exploitation, or they may have travelled to Europe to escape conditions of serious deprivation. Since the introduction of the Aliens Act 2000, the number of unaccompanied minors seeking asylum declined sharply from 6 681 in 2000 to 585 in 2007.<sup>55</sup> The definition of unaccompanied minors seeking asylum was changed in July 2004, and now refers to a person below the age of 18 who is not married and is not accompanied by a parent or guardian.<sup>56</sup> A minor applying for asylum initially follows the same procedure as adult asylum seekers. Most of the unaccompanied minors are coming from Asia (China and India) and Africa (Angola and Somalia). In 2007, there were 658 unaccompanied

<sup>51</sup> Unicef Nederland, *'Vreemdelingenkinderen in Nederland'*, 2008, p. 17.

<sup>52</sup> Amnesty International, *The Netherlands: The Detention of Irregular Migrants and Asylum-seekers*, June 2008, p. 47.

<sup>53</sup> Ibid.

<sup>54</sup> In international terms, unaccompanied minors are defined as children under the age of 18 who have been separated from both parents, or from their previous or customary primary caregiver, but not necessarily from other relatives.

<sup>55</sup> Third Report on the CRC of the Dutch Coalition for Children's Right, July 2008, p. 30.

<sup>56</sup> Ministerial circular concerning aliens C2/7. 1.2. and 7.1.3 - Third Report on the CRC of the Dutch Coalition for Children's Right, July 2008, p. 27.

minors registered in the Netherlands; the figure for 2008 is 739.<sup>57</sup> During his visit, the Commissioner learned that an NGO founded about 10 years ago, the Nidos Foundation, serves as a guardian for unaccompanied minors, the actual guardian seeing the individual child every six to eight weeks.

65. Children who disappear from reception facilities are registered as having left with unknown destination.<sup>58</sup> Although the absolute number of minors leaving for an unknown destination has decreased, the percentage of unaccompanied minor aliens leaving for an unknown destination is still very high at 84.3%. In 2007, 122 unaccompanied minors left a reception centre with unknown destination. Protection measures have since been taken for a limited group, such as the earlier assignment of a guardian and placing the unaccompanied minor in closed high security reception centres referred to as "warded reception centres".<sup>59</sup>
66. NGOs report that the new policy for asylum-seeking children in administrative detention has not yet led to an equally significant decrease in unaccompanied migrant minors in detention, estimating in June 2007 that some 40 unaccompanied minors were at the time detained in juvenile detention centres.<sup>60</sup> In a letter to Parliament, the Ministry of Justice explained that they see detention of unaccompanied minors as a measure of public order since the risk to let these children free is sufficiently higher than for children with parents, referring also to the danger of being trafficked. Nevertheless, the government started a pilot project, providing semi-closed secure shelter facilities to unaccompanied minors considered to be at risk of trafficking. The Dutch authorities informed the Commissioner that they always seek alternatives to detention when faced with an unaccompanied minor and that in 2007, about 150 unaccompanied minors were placed in detention.<sup>61</sup>
67. Unaccompanied minors who have been in the Netherlands for less than three years, have to leave the country, when they turn eighteen. The government seeks to repatriate them, albeit with little success as most of them prefer illegal residence over repatriation to their country of origin, with all of the consequences this may entail, including exploitation.<sup>62</sup>
68. The Commissioner commends the first steps taken to reduce administrative detention of unaccompanied minors. He encourages the Dutch authorities to expand these measures and provide alternatives to detention for all unaccompanied minors in order to provide equal treatment for all asylum-seeking children being in the country with or without their parents. He believes that providing a child friendly supportive accommodation as well as establishing a concept of guardianship with regular frequent visits will also reduce the number of children absconding and thus their risk of becoming victims of trafficking. Reiterating that the principle of taking into account the best interest of the child should also prevail in asylum decisions, the Commissioner calls upon the Dutch authorities to find a solution for unaccompanied minors turning eighteen, who grew up in the Netherlands, having lost the ties to their country of origin.
69. Foreign nationals that come under Article 1F of the Geneva Convention on Refugees (suspected war criminals) cannot obtain a residence permit in the Netherlands as they are considered to be a threat to public order. Also their relatives, including their children, cannot get such a permit unless they themselves are recognized as refugees. In some cases, the asylum seekers and their families cannot be expelled due to a risk of being subjected to torture or to inhuman or degrading treatment or punishment.<sup>63</sup> Also signs of trauma can, according to the

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<sup>57</sup> <http://www.coa.nl/NED/website/page.asp?menuid=101>

<sup>58</sup> Containing children leaving/disappearing from a reception centre, but it can also be unaccompanied minors of who the guardian organisation, after signalling the disappearance by the COA, noticed that the minor is safely somewhere with family in the Netherlands or elsewhere.

<sup>59</sup> Children's Rights in the Netherlands, The third report of the Dutch Coalition for Children's Rights on the implementation of the Convention on the Rights of the Child, July 2008.

<sup>60</sup> *Ibid.* p. 48.

<sup>61</sup> NGOs report 160 detained unaccompanied minors between Jan. and Nov. 2007, NGO Commentary ICCPR 2008, *supra*, p. 8.

<sup>62</sup> ECPAT, *Minderjarigen in de prostitutie in Nederland, een quick scan*, Amsterdam, August 2003, p. 30.

<sup>63</sup> According to information provided by the Dutch government this concerns a group of 40 persons out of a total of 350.

Government, be a ground for residence permit. Due to a lack of criminal evidence, this category of asylum seeker cannot be prosecuted and eventually resides illegally in the Netherlands.

70. In June 2008, the Ministry of Justice explained their new policy concerning 1F cases.<sup>64</sup> There are currently 350 foreign nationals falling into the 1F category and 550 family members. Regarding the 550 family members, 260 have a residence permit or have been naturalized. For 80 persons the proceedings are still pending. 210 family members are residing unlawfully in the Netherlands as they are obliged to return.<sup>65</sup>
71. The Dutch government remains firm on not issuing a residence permit for suspected war criminals but seeks a solution for family members. After a period of 10 years an asylum request would be considered for 1F family members.
72. While generally welcomed, the new policy is subject to some criticism. NGOs consider the ten years period too long for children and object to the requirement that the family members must so far have co-operated with their departure process as this cannot be reasonably expected from children. NGOs are also concerned with possible separation of siblings if some family members may stay and others are expelled.
73. The Commissioner commends the new policy as a measure to rectify the currently unsatisfactory situation in particular for children. In the light of the requirements of the policy, he wonders whether all so-called "1F children" can benefit from this policy change and calls upon the Dutch authorities to ensure that this will be the case.
74. The Commissioner learned that on 1 January 2007 there were 1 463 stateless children in the Netherlands. NGOs have expressed their concerns about an unknown number of children being registered with an 'unknown' nationality, in most cases the nationality being disputed for lack of relevant documents.
75. NGOs argue that two groups of children are particularly affected. The first group consists of stateless children without a residence permit as no rules are available to help them to acquire a nationality. The second group consists of children whose nationality is not established. For example, refugees who are granted refugee status and have children born in the Netherlands, may have no possibilities to register their child in their country of origin. In such cases, the child has neither his parent's nationality, nor Dutch nationality.<sup>66</sup>
76. In view of the grave consequences a stateless individual faces, the Commissioner trusts that a solution be found for the relatively small number of children who have spent most of their lives in the Netherlands but have no clear citizenship status. There are internationally agreed standards to reduce statelessness and to ensure that children are not made victims of statelessness.<sup>67</sup>

## IV. Immigration

### 4.1 *Legislative framework*

77. Based on the Aliens Act and subsequent law, the Netherlands has five primary types of immigration status, which are further subdivided into more specific categories. The five main categories are: family-related immigration, studies or training, seasonal work, employment<sup>68</sup> and self-employment. Additionally, Dutch law recognises other immigration statuses, such as: migrants for medical treatment, victims of human trafficking, au pairs, and former Dutch

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<sup>64</sup> Letter from the Minister of and the State-Secretary for Justice to Parliament, 9 June 2008.

<sup>65</sup> Written information provided by the Dutch authorities in July 2008.

<sup>66</sup> Children of a parent residing in the Netherlands who him or herself is a child of a parent having resided in the country would acquire Dutch nationality at birth ('third generation rule').

<sup>67</sup> Examples are the UN Convention relating to the Status of Stateless Persons 1954, the Convention on the Reduction of Statelessness and the CoE Convention on Nationality 1997 ratified by the Netherlands.

<sup>68</sup> Including migrants who will be working for a religious organization, e.g. imams.

nationals.<sup>69</sup> Aliens wanting to stay in the Netherlands for more than three months must first apply to a Dutch embassy or consulate in their own country for an 'authorisation for temporary stay' (*machtiging tot voorlopig verblijf* or *MVV*). Since 2006, certain foreign nationals need to take a basic test before they may join their partner in the Netherlands or take up a position as a religious leader.<sup>70</sup> According to the Dutch authorities the test aims at ensuring that immigrants already have a basic knowledge of the Dutch language and Dutch society before they arrive in the Netherlands. This should enable the long process of integration to take place more efficiently and more effectively. The test costs a fee of € 350 each time it is taken. It applies to foreign nationals from the age of 18 to 65 years, with the exception of nationals from certain countries believed to have levels of economic, social and political development prevailing comparable to Dutch ones.<sup>71</sup> Since March 2008, candidates need to answer more questions correctly to pass the Dutch language test.

78. The 'integration abroad' test has faced numerous criticisms from NGOs and academics. It is considered to be discriminatory as it affects migrants from poorer countries although no evidence has been provided that the level of a country's development is a reliable indicator of the skills, capacity, or willingness of a potential individual migrant to integrate.<sup>72</sup> Opportunities to learn Dutch outside the country are far more limited than the opportunities to learn English, and people living in the countryside are particularly disadvantaged for lack of possibilities. Furthermore, people with little education are more affected, having to invest more time and money than highly educated ones.<sup>73</sup> The test is believed to hamper family reunification and formation to an extent that can amount to a violation of Article 8 ECHR, if a family member is unable to pass the test and there is no other country where the spouses can reasonably be expected to live together, or the spouse in the EU cannot be expected to give up the life he or she has built up in the country of residence.<sup>74</sup>

#### 4.2 Family life: reunification and formation

79. In the Netherlands several categories of person are entitled to family reunification such as holders of temporary or permanent residence permits for asylum or other reasons.<sup>75</sup> The rules on family reunification only apply if the family ties already existed abroad. The main requirement is that the person with whom the migrant will reunite has sufficient financial means. This means that the person already resident in the Netherlands must have a net income that equals 100 per cent of the social welfare norm for the kind of family they will constitute (with or without children); on 1 January 2007 this was € 866 per month for a single parent.
80. The requirement for family formation is stricter. Family formation is only an option for sponsors who have reached the age of 21 years, despite the fact that the marriageable age in the Netherlands is 18. The rules on family formation only apply if the family tie did not yet exist abroad. Apart from the requirement that both partners must be over 21 years of age, again the person with whom the migrant will form a family is required to have sufficient financial means. This means that the person residing in the Netherlands must have a net income that at least

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<sup>69</sup> For details see the European Parliament report, Comparative study of the laws in the 27 EU Member States for legal immigration, February 2008, p. 356.

<sup>70</sup> Civic Integration Abroad Act (*'Wet inburgering buitenland'*, or *Wib*) of 15 March 2006.

<sup>71</sup> Exempted from the examination are citizens of those countries for which an authorisation for temporary stay is not required, i.e. citizens of all EU member States, Australia, Canada, Iceland, Japan, Liechtenstein, New Zealand, Norway, South Korea, Switzerland and United States. More specific exemptions are given to persons of Surinamese nationality who have completed primary education in the Dutch language in Surinam or the Netherlands, as well as to migrants for a temporary reason, such as study, au pair work or medical treatment. Other categories that are exempted are persons with a work-permit, self-employed persons, skilled immigrants and family members of a person in possession of an asylum residence permit.

<sup>72</sup> Human Rights Watch; *The Netherlands: Discrimination in the Name of Integration, Migrants' Rights under the Integration Abroad Act*, 2008, p. 1-2.

<sup>73</sup> Prof. Groenendijk, Integration tests abroad as a condition for family reunification in the EU, 1 May 2007.

<sup>74</sup> Prof. Groenendijk, *supra*. The latter was the case in *Sen v. the Netherlands*, ECHR judgment of 21.12.2001, final 20 March 2002 in which a violation of Art. 8, the right to family life was found.

<sup>75</sup> European Parliament report, Comparative study of the laws in the 27 EU Member States for legal immigration, February 2008, p. 359.

equals 120 per cent of the minimum wage of a 23-year-old-worker which was set at 1 484 EUR per month on 1 January 2007.<sup>76</sup>

81. The Aliens Chamber of the District Court of Amsterdam ruled on 15 July 2008 that it is unlawful to require an illiterate Moroccan woman wishing to come to the Netherlands for family formation to pass the “integration abroad” test before being allowed into the country. The Court found that the Aliens Decree does not serve as a legal base for such a requirement being an extra condition as it is not stated in the articles of the decree. The Minister of Justice appealed, noting that the Court is not judging the requirement as such, but the way it is regulated in the law. In October 2008, the European Commission, evaluating the disposition of the family reunification directive in the member States, expressed detailed criticism via the Netherlands for the high income thresholds, the “integration abroad” test, high fees<sup>77</sup> and too strict document requirements for refugees.<sup>78</sup>
82. As a result of family reunification and forming regulations, children in the Netherlands are often under threat of separation from their parents legally in the country when children above 18 years of age have arrived in the Netherlands without the necessary authorisation for temporary stay (*Machtiging tot Voorlopig Verblijf, MVV*) or when the children are legally in the country but their parents are not. In addition, children who lost contact with their parents due to war in their home countries are not allowed to enter the country to reunify with their parents as quickly as possible.
83. The Commissioner recalls that Article 7(2) of Directive 2003/86/EC on the right to family reunification only permits “integration measures” before entry, not “integration conditions”. The directive allows prospective immigrants to be required to undertake a language course, if there are such courses in the country of origin, but not to pass an exam as a condition for admission.
84. The Commissioner is aware that the first collective complaint lodged against the Netherlands under the Revised Social Charter was declared admissible. It concerns the alleged discrimination against children not residing lawfully in the Netherlands. An NGO submits that such children, approximately 25,000 to 60,000 individuals, are not entitled by law to receive the social assistance benefits (Article 13) which could help them enjoy adequate housing (Article 31). The NGO maintains that the denial of the right to housing hinders the proper protection of the right to health (Article 11), the right to develop fully, both physically and mentally (Article 17) as well as the right to the full development of the family (Article 16). The NGO considers that illegal children are discriminated against in the enjoyment of these rights because of their residence status and that by denying adequate housing to these children, Dutch legislation contributes to increasing extreme poverty and social exclusion (Article 30).<sup>79</sup>
85. The Commissioner wonders about the age requirement of 21 years for foreign nationals wishing to unite with a partner residing abroad to form a family in the Netherlands, when the marriageable age for Dutch citizens is 18. He finds it difficult to understand why the financial requirement for family formation is higher than the one for reunification. He calls upon the Dutch authorities to assess carefully the current immigration laws, including those denying social benefits to children not possessing a residence permit.
86. The Commissioner notes that irregular migrants are entitled to health care provided the treatment is medically necessary while they are in the Netherlands. Yet, civil society organisations, health care providers and local authorities stress that one of the biggest problems in the Netherlands is the existing lack of information about how the system works. The existing confusion and aptitude of some health care providers, particularly hospitals, is also creating a misconception among undocumented migrants, who believe that they do not have

<sup>76</sup> European Parliament report, supra, p. 361.

<sup>77</sup> The total fee amounts to € 1 368 (visa € 830, integration test € 350, residence permit € 188) in the Netherlands while on average the fee is between € 50 and € 150. See Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86/EC on the Right to Family Reunification, Brussels, 8 Oct. 2008, COM(2008)610 final, p. 10.

<sup>78</sup> Ibid.

<sup>79</sup> Defence for Children International (DCI) v. the Netherlands, complaint no. 47/2008, decision on admissibility of 23 September 2008.

the right to seek health care they cannot pay for.<sup>80</sup> The Commissioner welcomes the legislative reform adopted by Parliament in January 2009 to secure financing of care for undocumented migrants and (failed) asylum seekers.

87. The Commissioner notes with appreciation that the Netherlands under their penal law has a special scheme for people who have committed serious offences and suffer from a psychiatric illness or disorder, commonly known as TBS. Offenders are detained under a hospital order in forensic institutions, receiving treatment to enable them to return to society. A delegation of the Commissioner's office visited the *Van der Hoeven Stichting* in Utrecht, a forensic psychiatry under the TBS scheme. The members of the delegation were impressed by the modern and well kept facilities offering a wide range of training and occupation to the inmates and by the devotion of staff to their difficult task. The Commissioner notes with appreciation the reform under way to expand the system and make it more flexible. He is, however concerned that no policy change is envisaged for the three foreign detainees who have been declared undesirable aliens pursuant to article 67 of the Aliens Act. It seems that they do not benefit from rehabilitation treatment under the TBS scheme and do not have any prospects to be released if they cannot be repatriated to their country of origin for lack of suitable facilities or treatment.<sup>81</sup> The Commissioner calls upon the Dutch authorities to include a solution for them in their reform proposals.

## V. Trafficking in human beings

88. As many European countries, the Netherlands is a source, transit, and destination country for men, women, and children trafficked for the purposes of commercial sexual exploitation and forced labour. In 2006, a total number of 579 victims were registered at the Coordination Centre for Human Trafficking (Comensha), mainly coming from the Netherlands, Nigeria, Bulgaria, Romania and China.<sup>82</sup> Of the 579 victims in 2006, 103 were minors and 30 were male victims among them 5 minors. 310 were referred by the police, 104 by NGOs and 56 by the border security forces (Kmar).<sup>83</sup>
89. The Government fully complies with the minimum standards for the elimination of trafficking and continues to address trafficking through vigorous law enforcement and expanded victim protection.<sup>84</sup> Since 2000, prostitution is legal in the Netherlands. Currently it is the responsibility of the municipalities to decide whether sex businesses require a licence. A 2007 study found that such businesses, in particular escort services, were relocating to municipalities with less strict regulations.<sup>85</sup> Reacting to these findings, the government announced a new policy to tackle situations of abuse in the prostitution sector. Its central pillar is a proposed "Framework act on prostitution licences" which will incorporate a compulsory licensing system for municipalities, expected to come into force in 2010. The possibility of penalizing clients of non-registered prostitutes is also discussed. The Commissioner also learned that information campaigns on labour laws and health are being carried out by several ministries and that a programme targeting those wanting to leave prostitution is being developed.
90. Under the Foreign Nationals (Employment) Act (*Wet arbeid vreemdelingen*) no work permits may be issued to non-EU nationals for activities in the prostitution sector. Police regularly inspect places of legal and suspected places of illegal prostitution and have liaison officers all over the world to cooperate with local authorities in source countries. Since 2005 a multi-disciplinary Expertise Centre for Human Trafficking and Smuggling under the authority of the

<sup>80</sup> For details, see report 'Access to Health Care for Undocumented Migrants in Europe', The Platform for International Cooperation on Undocumented Migrants (PICUM), November 2007, p. 65.

<sup>81</sup> For details, see the study WODC Research, Undesirable aliens detained under a hospital order (TBS measure), 2008, <http://english.wodc.nl/onderzoeksdatabase>. According to the Dutch authorities, two aliens are currently in the situation described above. For a third alien efforts for his expulsion are currently being made.

<sup>82</sup> The figures for 2005 were 424 victims and for 2004 403 victims, see Trafficking in Human Beings. Supplementary figures. Sixth report of the Dutch National Rapporteur. The Hague, July 2008.

<sup>83</sup> Sixth report of the Dutch National Rapporteur, supra.

<sup>84</sup> U.S. "Trafficking in persons" report 2008. The report therefore classifies the Netherlands as a tier 1 country.

<sup>85</sup> *Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Prostitution in the Netherlands since the lifting of the brothel ban, 2007.*

national public prosecutor for trafficking in human beings collects, analyses and disseminates information to all its partners, namely the national police, the Royal Military Constabulary, the IND and the Social Security Information and Investigation Services. The Netherlands was the first country to establish an independent National Rapporteur on Trafficking in Human Beings in the year 2000 whose numerous recommendations, made in six reports, have led to several amendments in law and policy. Examples are the Action Plan of 2004 and the Human Trafficking Task Force of February 2008, although NGOs are not represented in the latter as recommended by the National Rapporteur.

91. The Commissioner commends the continuous and impressive efforts of the authorities on all levels to combat trafficking in human beings. He appreciates that the legislation of January 2005 broadened the scope of Article 273f of the Dutch Criminal Code to all forms of exploitation and increased maximum penalties. Yet he is aware that "labour exploitation" is not defined in the law. Consequently, it is left to the courts to develop a definition through case law. NGOs expressed criticism, stating that the main focus is still on trafficking for the sex industry, leaving victims of labour exploitation unrecognised and unprotected.<sup>86</sup> The Dutch authorities have not yet defined the term "labour exploitation" precisely despite a recommendation of the National Rapporteur in her third report. The Commissioner urges the Dutch authorities to follow this recommendation speedily to end ambiguity thereby enhancing the protection for victims of labour exploitation and thus relieve the judiciary from rather complex trials.
92. The Commissioner notes with appreciation that in April 2006 the Board of Procurators General formulated guidelines for the investigation and prosecution of offences against trafficking in human beings, giving highest priority to cases involving sexual exploitation, exploitation of minors and trafficking in human organs. As legislation is already pending in Parliament for the purpose of adopting and implementing the Council of Europe Convention on Action against Trafficking in Human Beings, the Commissioner encourages the Dutch Authorities to complete speedily the procedure.
93. The Commissioner commends the three months reflection period granted to victims of trafficking and appreciates that it exceeds the minimum requirement of the Council of Europe's Trafficking Convention. He welcomes the elaborate and recently extended B9 regulation scheme, giving a temporary residence permit, including a working permit, to such victims who cooperate with investigation and prosecution of their traffickers as well as the possibility of continued residence on humanitarian grounds.
94. The Commissioner commends that the Dutch authorities, in close cooperation with NGOs, provide special accommodation for victims of trafficking. He visited such a specialized shelter in Amsterdam and met with staff, residents and a member of the police force specialised in trafficking. He learned that despite measures taken to ensure early identification of victims, such as an easy to use system developed jointly by police and NGOs<sup>87</sup> and regular police training, problems still exist. As a result, victims spend some time in detention for aliens before being brought to a shelter, a policy that was endorsed by the Council of State and strongly criticised by the National Rapporteur and NGOs. Due to shortage of specialized shelters, detention is also sometimes used as an interim solution. Furthermore, it appears that there is a risk that even trafficked children may spend some time in aliens' detention if they are not identified as under age victims.
95. The Commissioner recalls that the Council of Europe Trafficking Convention requires that under age victims be given the benefit of doubt so long as their age cannot be established. He urges the authorities to give young victims the benefit of doubt when it is difficult to establish whether they are under-age or not and to avoid further traumatising by keeping them detained. He

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<sup>86</sup> The Commissioner learned from the National Rapporteur that in the first five cases concerning hemp picking, restaurant personnel, cleaning staff and a soja factory, the defendants were acquitted in the first instance, and that one appeal and one Supreme Court hearing are still pending. The National Rapporteur does not regard the two cases that led to convictions, both concerning domestic staff, as examples of an effective legislation as the cases were extreme, the victims facing excessive working conditions coupled with physical and emotional violence and limitations of personal freedom.

<sup>87</sup> The system contains over 70 risk factors and a list of specific work areas at risk such as construction, agriculture and cleaning services.

calls upon the authorities to increase the capacity of specialized shelters to accommodate victims of human trafficking in an adequate and timely fashion. Regarding repatriation, the Commissioner is aware that the current policy that an alien has to prove that her country of origin is not safe, also applies to victims of trafficking. In view of existing criminal networks in such countries, the Commissioner recommends that the authorities reconsider this policy for victims of trafficking and in particular for those who are under age.

96. The Commissioner notes that little seems to be known about youth prostitution<sup>88</sup> and that more research seems to be required. Such research should assess the effectiveness of the measures taken to combat the special form of youth prostitution described as the “lover boy” phenomenon<sup>89</sup> and the measures taken to better protect unaccompanied minors. The Commissioner encourages the authorities to strengthen their efforts and support the municipalities in their activities to combat trafficking. He joins the National Rapporteur in calling for the provision of adequate capacity within the police force to ensure that the legalised as well as the underground sex industry can be monitored closely.

## VI. Children’s Rights

97. Children in the Netherlands are generally defined as all persons below the age of 18, in line with the UN Convention on the Rights of the Child to which the Kingdom of the Netherlands is a state party. In the course of the visit, the Commissioner discussed children rights’ policy and practice with the Minister and the State-Secretary for Justice, the Ministers of the Interior and for Youth and Families and representatives of the Ministry of Education. The issue was further explored with the Dutch National Rapporteur on Trafficking in Human Beings, the National Ombudsman and in Rotterdam with the Mayor, the Municipal Ombudsman and with the Chief Commissioner of the Rotterdam-Rijnmond Police Region. The Commissioner visited the City college St. Franciscus in Rotterdam and the Youth Forensic Centre Teylingereind in Sassenheim.
98. The Commissioner urged the Ministers of Justice and Youth and Families to withdraw the reservations made in respect of the United Nations Convention on the Rights of the Child (CRC) regarding entitlement to social security (Art.26), application of adult penal law to children from age 16 (Art. 37c), and trial for minor offences without the presence of legal assistance (Art.40).
- 6.1 *National Youth Policy and Combat to Child Abuse*
99. NGOs met by the Commissioner during the visit expressed concern with the fragmentation of responsibility for the Dutch National Youth Policy, in particular as regards civil and criminal youth care which, despite the many crossing points, fall under the responsibility of the Ministers for Youth and Families and of Justice, respectively.
100. The Commissioner welcomes the introduction in 2007, of the full prohibition of corporal punishment in all settings in the Netherlands, but notes with concern that Aruba and the Netherlands’ Antilles have yet to introduce the prohibition in the home, schools and in care settings. He appreciates that the May 2008 Action Plan on Child Abuse “Children Safe at Home” includes administrative measures applicable in cases of grave suspicion of domestic violence and child abuse. Noting the absence of a professional obligation to report child abuse, the Commissioner recommends the introduction of such obligation in the law, notably for social workers, teachers and medical professionals.
101. Based on the power to maintain public order, mayors are increasingly taking new administrative measures to address youth related problems, despite criticism with respect to the proportionality, necessity and legality of the measures. In a meeting with the Commissioner, the Ombudsman of Rotterdam questioned the use of curfew measures for children after 9 pm, in force in some Rotterdam neighbourhoods, as well as the use of the so-called “Mosquito”. This

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<sup>88</sup> See the WODC study, Prostitution in the Netherlands since the lifting of the brothel ban, 2007.

<sup>89</sup> Young men who seduce vulnerable girls and lure them into prostitution.



device emits ultrasonic tones which can produce pain and discomfort to youths below the age of approximately twenty-five. It is used by numerous municipalities, police forces and housing associations to prevent “troublesome” youths from remaining in certain areas. In 2008, the Ministers of the Interior and Youth and Families recognised that it was not “wise to stay longer than one hour in a distance of about two metres of the Mosquito”. During a Parliamentary session in November 2008, the Minister of the Interior admitted the lack of legal basis for its use, and that it could infringe upon basic rights. However, the Minister did not wish to push for the prohibition of the “Mosquito” prior to a court’s ruling.

102. During the meeting with the Minister of Justice, the Commissioner expressed concern in respect of the impact of the “Mosquito” on the health of children. Moreover, the Commissioner finds that the use of the device arbitrarily restricts the freedom of movement and freedom of assembly of all children and young adults within the range of the device and urges the government to ban, as a priority, the use of the “Mosquito”.
103. The Commissioner further notes the stances against the use of the “Mosquito” taken by various Child Commissioners and Ombudsmen, notably in Belgium and in the United Kingdom, questioning the legality of its use, the restrictions on freedom of movement and assembly, and the impact to the health of children. In Ireland, the Garda Commissioner, who heads the national police, considered the use of the device as potentially of criminal nature.

## 6.2 Youth Care

104. The Youth Care Act regulates civil law youth care including voluntary and judicial youth care, mental health care, and care for slight mental disabilities. Youth care is provided mostly on a voluntary basis but mandatory forms are also foreseen. Juvenile courts issue child protection orders that restrict and transfer the authority from the parents to a Youth Care Office.
105. The Minister for Youth and Families informed the Commissioner of the lack of capacity of the youth care institutions, shortage of psychiatrists, untrained staff and long waiting periods preceding voluntary or mandatory care. By 1 July 2008, 3 911 children waited longer than 9 weeks without any interim care.<sup>90</sup>
106. A 2008 amendment to the Youth Care Act allowed for accommodation in closed youth residential institutions of youths under 21 years of age who had been subjected to a placement order at the moment they attained majority. Those youths are considered to be minors by the Act. The Commissioner notes with concern that the consent of the individual is not necessary for the continuation of such placement and that young adults may be therefore detained against their will.
107. The Youth Care Act, as amended in 2008, also determined that children on child protection orders should be placed in closed youth care residential institutions, and not any longer in custodial institutions. Under the previous system, both children on child protection orders and on criminal titles would be placed in the same juvenile detention centres. According to the Dutch Government however, due to insufficient places in (semi-)open institutions, separate placement will in principle be guaranteed in the Netherlands by 2010 only. Meanwhile, children on civil titles can still be held in youth custodial institutions. According to the Government, on 1 October 2008, 831 children stayed in youth custodial institutions under a civil title for closed and secure youth care, from whom 348 waited for treatment and 483 received treatment in the custodial facilities. In the first nine months of 2008, children waited for treatment for an average of 72 days.
108. The Commissioner finds the mixed detention of children on civil and criminal grounds to be highly problematic. Not only is such mixed placement stigmatising for non criminal offenders, it is also counterproductive and potentially threatening to the child, in particular when victim and perpetrator are accommodated in the same institution. During a meeting with the Commissioner, the State-Secretary for Justice assured that children previously involved in child

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<sup>90</sup> See Letter from Mr Rouvoet, Minister for Youth and Families, to President of Parliament, ‘*Stand van zaken wachtlijsten in de jeugdzorg en invoering nieuwe financiering jeugdzorg*’, 5 September 2008.

prostitution would not be mixed with adults and would be placed in a special section. Notwithstanding, in the Forensic Centre Teylingereind, the Commissioner found that the majority of the girls there were victims of prostitution and were detained under civil child protection orders. They shared facilities and activities with young offenders below the age of 23, male and female and did not receive adequate treatment. The Commissioner is seriously concerned with the lack of security and adequate care for child victims and finds it unacceptable that such mixed placement will be prolonged until 2010. The Commissioner urges the authorities to ensure, in legislation and in practice, that all child victims of abuse receive adequate treatment, support and effective protection with a view to their full recovery and reintegration.

109. Furthermore, the Commissioner questions the legality of the detention of children under child protection orders in custodial institutions in the absence of a criminal conviction, as well as the respect for the right to no punishment without a law since it appears that they are subject to the same regime as young offenders.

### 6.3 *Juvenile Justice*

110. In the Netherlands, children aged 12 bear criminal responsibility, which is a distinctively low age as compared with other European countries where the average age of criminal responsibility is 14 or 15. Although some political parties argue to lower the age even further, the State-Secretary for Justice confirmed to the Commissioner that such decrease was not being considered. The Commissioner recommends to considerably increase the age of criminal responsibility, in line with other European countries.
111. When a child is arrested, the parents and the Council for Child Protection are informed. The police can arrest and interrogate children of any age, without the presence of parents, guardian or a lawyer, during the initial six hours period of detention. The denial of access to a lawyer during that period was noted by the CPT following its 2007 visit to the Netherlands. In addition, police interviews are not recorded, although the Government informed the Commissioner that, with respect to children below the age of 16, a change of policy is contemplated to make registration of the interview compulsory. During its visit in 2007, the CPT further noted that the police may apply a regime of "all restrictions" which does not allow for the notification of a third party following the deprivation of liberty. According to the Government of the Netherlands, the police follow special protocols when detaining and interrogating suspects under the age of 18. Still, the Commissioner urges the 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, as well as to be accompanied by a lawyer during police interrogation.
112. Children detained by the police are held under similar conditions as adults and are usually kept alone in a cell. Children under the age of 12 may be held for interrogation at the police station for six hours, which can be extended by other six hours if the child does not give his/her identity. Children aged 12 to 15 may be remanded in a police cell for three days until transport to a youth custodial institution is arranged. Police custody of youths between 16 and 18 can last up to three days and may be extended by three days, or even up to ten days when waiting for placement in a youth custodial institution, according to the Youth Custodial Institutions Act. During its 2007 visit, the CPT found that juveniles aged between 16 and 18 years appeared to spend 10 to 14 days detained in a police cell due to capacity problems in juvenile detention facilities. Since police facilities do not offer suitable accommodation for lengthy periods of detention, particularly for children, the Commissioner finds that the authorities should ensure, as a priority, the prompt transfer of youths to the appropriate institutions.
113. Following apprehension, the police can issue a warning, take no further action and/ or refer the case to child support services. Cases of vandalism or minor property offences should be referred to 'Halt', a service for first offenders between the ages of 12 and 18, where juveniles who plead guilty can carry out up to 20 hours of restorative and other activities, or provide for damage compensation. The police can also issue a summons for the further handling by the public prosecutor who can seek an out-of-court settlement. For common criminal conducts punishable up to a maximum of 6 years, Art. 257a of the Code of Criminal Procedure enables the Public Prosecutor to order children from age 12 with a fine, community service up to 60

hours, or financial compensation. The youth can complain against the order before a criminal judge, within two weeks. It is unclear for the Commissioner how fundamental guarantees such as the presumption of innocence are guaranteed in such procedures.

114. The youth section of the Criminal Code applicable to juvenile offenders from age 12 foresees various types of sentences, including youth detention and the measure of placement for treatment (PIJ) applicable to children who are not fully accountable for the crime, for instance due to development disorders.<sup>91</sup> Both are executed in closed youth custodial institutions, under the supervision of the Ministry of Justice. Equally, young adults below the age of 21 may be sentenced under youth provisions and held in youth custodial institutions.
115. The Commissioner welcomes a 2008 amendment to the criminal code of the Netherlands that no longer allows life imprisonment sentences to minors. Notwithstanding, he notes with concern the stiffening of the penalties for juveniles over the last years. According to NGOs, alternative measures to detention are limited and the maximum length of youth detention has increased from six to twelve months for 12-15 years' old, and from six months to two years for those aged 16 to 17. Reportedly, 4 726 children were detained in 2007 due to criminal conduct.<sup>92</sup> During the visit, the Commissioner stressed that detention of children in closed institutions should be used as a measure of last resort and for the shortest period, and that preference should be given to non-custodial alternatives.
116. Youth custodial institutions are divided in institutions for detention (judicial youth institute) which accommodate youths in pre-trial detention, detention and juveniles on the waiting list for treatment; and treatment centres for those sentenced to a PIJ-measure. Some institutions function as both a detention and a treatment centre.
117. Youths sentenced to a treatment measure should start treatment within three months, according to the Youth Custodial Institutions Act. Yet, NGOs report that it may take one year before a suitable place becomes available. According to the Ministry of Justice, an average of 73 youths detained in custodial youth institutions awaited placement in a treatment facility between January and June 2008. During the second half of 2008, the average waiting period for placement in the correct treatment facility was 93 days. Courts in the Netherlands have found breaches of Articles 5(1)(d) of the ECHR and 37 of the CRC and have granted compensation to children for psychological damages caused by such delays, ordering, in some cases, the State to provide the adequate treatment facility.<sup>93</sup>
118. The Commissioner visited the Forensic Centre Teylingereind in Sassenheim, a private institution under the responsibility of the Ministry of Justice with a capacity for 120 children and young adults up to 23 years of age. On the day of the visit, there were 24 girls and 96 boys, under civil protection orders, on pre-trial detention (27%) and serving criminal sentences (6%). Most girls (85%) were held mainly due to child prostitution, and 45% of the boys were detained with civil child protection orders. Children and young adults held on civil and criminal grounds were mixed in all the facilities and activities.
119. Children complained to the Commissioner about the quality and irregularity of contacts with guardians, restricted contacts with their families and difficulties to obtain authorised leave. Children on waiting lists for civil institutions claimed they did not receive specialised treatment, some already for one year. Regrettably, the schooling programme was considered to be incomplete as compared with the one offered in regular schools. After release, children would need extra courses to obtain the necessary school equivalence. Conversely, the Government informed that the school programme offered in closed institutions was equivalent to the one in regular schools and that equivalent official diplomas were given to those staying long enough. Accordingly, youths who leave the institution can get extra guidance for one year, financed by the Ministry of Education.

<sup>91</sup> Other possible options for underage offenders include fines; alternative sanctions; youth probation; behaviour therapy programmes; forfeiture; confiscation of the offender's driving licence; confiscation of property; confiscation of the proceeds of crime, and the payment of damages.

<sup>92</sup> Commentary on the Fourth Periodic Report of the Netherlands on the International Covenant on Civil and Political Rights (ICCPR), 8 August 2008.

<sup>93</sup> Decisions of the Groningen District Court on 20 December 2006 and on 17 November 2006.

120. The Commissioner urges the government to ensure that all children in detention have access to the same quality of education as in the regular school system. In this respect, the Committee of Ministers recommendation on the rights of children living in residential institutions calls on member states to recognise the right of the child to maintain regular contact with the family and other significant people, except where necessary in the child's best interest, as well as to ensure the right to equal opportunities and the right to have access to all types of education under the same conditions as for all other children.<sup>94</sup>

#### 6.4 *Application of adult criminal law and detention of minors in adult prison establishments*

121. Pursuant to the Kingdom of the Netherlands' reservation under Article 37 (c) of the CRC, juveniles aged 16 and 17 can be tried under adult criminal law and condemned to prison sentences of up to 30 years. The judge decides on the application of adult criminal law by considering the nature of the offence and the shock caused to society (Art. 77b of the Criminal Code). Such sentences are executed in an institution for adults.

122. In the discussions with the authorities, the Commissioner argued for the separation of minors and adults in all detention facilities and for the application of juvenile criminal law even in serious offences. In addition, he finds that the wide margin given to the criminal judge under article 77b of the criminal code falls short of the precision and certainty that criminal law should guarantee. Moreover, the policy to incarcerate juveniles in prisons for adults contravenes international treaties and standards, notably the CRC and the Havana Rules, setting the Kingdom of the Netherlands aside from the practice in most European states.<sup>95</sup>

## VII. **Prevention of discrimination**

### 7.1 *Legal and institutional framework*

123. The legal basis of equality and anti-discrimination, as embodied in Article 1 of the Netherlands' Constitution, is found in criminal law Articles 429 and Article 137 c-g as well as in civil law: the General Equal Treatment Act (GETA). The GETA outlaws any direct or indirect distinction between people on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status in the field of employment, liberal professions, by organisations of employees, employers or professionals and in providing goods or services, in concluding, implementing or terminating agreements thereon and in providing educational or careers guidance. The Equal Treatment Commission oversees the implementation of the GETA.

124. The Commissioner notes the number of different governmental and non-governmental bodies that collect and publish statistics on the scale of discrimination and intolerance in the Netherlands.<sup>96</sup> Some of the bodies collect data on all grounds of discrimination, whereas others only focus on particular grounds or particular sectors where discrimination occurs. The Commissioner is concerned about the rather fragmented data collection systems in place and recommends that better coordination and cooperation between the anti discrimination bodies is established and data collection procedures be streamlined.

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<sup>94</sup> Rec(2005)5 of the Committee of Ministers to Member States on the Rights of Children living in Residential Institutions, 16 March 2005.

<sup>95</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990, in particular Rule 29.

<sup>96</sup> Apart from the statutory responsibilities of the Police and judiciary, the Equal Treatment Commission publishes data on discrimination cases under the Equal Treatment Legislation, the Anti-discrimination Agencies collect statistics on complaints on discrimination received from people, the Dutch Complaints Bureau for Discrimination on the Internet collects information on discrimination cases on (Dutch) Internet sites, the National Ombudsperson collects information on complaints received from citizens about governmental bodies, the Social Cultural Plan Bureau (SCP) and Statistics Netherlands provide annual figures on the use and application of the discriminatory felony by the police. Moreover, the Racial Discrimination Monitor bi-annually monitors matters concerning racial discrimination and the national Monitor on Racism and extreme right monitors extremism.

125. Civil society representatives, parliamentarians and academics raised concerns regarding the GETA. The Commissioner also notes the European Commission's 'reasoned opinion' about the lack of full implementation of Directive 2000/78/EC in GETA regarding the definition of indirect discrimination, the ban on discrimination which does not apply to personal services, the general exception for internal affairs of churches and other spiritual congregations and the exemptions for organisations based on religion or belief.<sup>97</sup> Regarding the latter, the European Commission argues that the GETA allows for exemptions which are broader than authorised by the Directive. Insofar as the conditional exemptions for organisations based on religion or belief leave some scope for discrimination on grounds other than religion or belief, they can be regarded as incompatible with the Directive. The Dutch Equal Treatment Commission also advised the government that the GETA is not in conformity with the EC Directive and needs to be changed.<sup>98</sup>
126. The Commissioner noted the government's response to the European Commission and learnt that the Netherlands' government will propose some changes to the GETA, following an inter-ministerial evaluation already finalised in 2006.<sup>99</sup> However, based on the oral information he received during his meeting with the authorities, the Commissioner is concerned that the government regards the arguments of the European Commission mainly as an exercise to clarify some wording in GETA while he believes the concerns expressed are rather a matter of principle.
127. The Commissioner is particularly concerned about the exemptions regarding employment in an association (for example a school) based on religion or belief which may impose requirements on the occupancy of a post which, in view of the organisation's purpose, are deemed necessary to live up to its founding principles. Despite the fact that the GETA stipulates that "such requirements may not lead to distinction on the sole grounds of political affinity, race, sex, nationality, heterosexual or homosexual orientation or civil status", those requirements may, however, be based on additional circumstances that relate to the religious ethos of the organisation but which are not further specified.<sup>100</sup> The Commissioner is concerned that some educational associations indeed interpret the GETA in a way to allow schools to lawfully refuse to employ a homosexual teacher. The Minister of Education has pointed out in a letter to these associations that this approach is in his opinion not compatible with the GETA.
128. The Commissioner believes that the freedom for associations based on religion or belief as laid down in the GETA is currently too broad and interpreted too broadly. The Commissioner calls upon the Dutch authorities to remove the exemptions for associations based on religion or belief. The Commissioner particularly recommends the Dutch legislature to abolish the '*sole fact construction*', also taking into account that denominational schools are part of the publicly funded education system which should guarantee full accessibility in a non discriminatory way both in admitting pupils and in recruiting teachers.

## 7.2 *Anti-discrimination policy and prosecution of discrimination*

129. Combating discrimination and all forms of intolerance is a policy spearhead for the Dutch government. Six ministries share the responsibility in order to secure an integral approach under the lead of the Minister of Social Affairs and Employment although some other official documents from the authorities suggest it is the Ministry of the Interior and Kingdom Relations taking the lead. NGOs expressed concern about the lack of information and political coordination of anti-discrimination policies.
130. The government submitted the bill 'Municipal Anti-discrimination Provisions' to Parliament which aims to improve the system for recording complaints and to increase cooperation between police and the prosecutor's in this respect. The law is expected to enter into force in 2009 and

<sup>97</sup> Reasoned Opinion of the European Commission, 31.01.2008, no. 2006/2444, C(2008)0115.

<sup>98</sup> Advisory opinion on the letter of formal notice to the Netherlands from the European Commission in connection with the incorrect transposition of Directive 2000/78/EC, Equal Treatment Commission, March 2008.

<sup>99</sup> Letter sent by the Netherlands authorities to the European Commission, 18 March 2008.

<sup>100</sup> Article 5(2) of the GETA; this is commonly referred to as the '*sole fact construction*'.

involves the extension of the network of antidiscrimination bureaus to a nationwide coverage. Currently only 33 bureaus covering half the territory of the European part of the Kingdom of the Netherlands are operational. One NGO questions the capacity of municipalities to take on the increased tasks under the new law.<sup>101</sup> Concerns have been expressed by NGOs about the lack of appropriate funding that goes along when introducing the bill. The Commissioner considers the new law as a good step forward but stresses that efficient implementation is crucial as registration and recording of and reporting on cases of discrimination is indispensable for adequate monitoring.

131. The *Discrimination Instruction* (guidelines of the Prosecutors-general on the handling of discrimination cases by the police) requires the Prosecutor to prosecute discrimination as a matter of principle, and to request a sentence increased by 25% in case of an offence with racist or discriminatory motivation or background. However, he was informed by civil society representatives that the 25% increase in the sentence is not often used or not visibly used. The Commissioner recommends that, in line with ECRI's General Policy Recommendation n° 7 the public prosecutor and the Courts should specify the particular aggravating or mitigating circumstances they have taken into account including the relevant criminal law provisions.<sup>102</sup> The Commissioner encourages the Dutch authorities to raise awareness within the legal professions and police on the need to recognize aggravated circumstances specific to hate crimes and discrimination on all levels of prosecution and criminal procedures.
132. The Commissioner is concerned about the lack of official statistics on common criminal offences with a discriminatory motive despite the legal obligation to register these offences. The Prosecutor Office informed the Commissioner that only as of 2008 the police have started to register these cases. In the absence of data, the Prosecutor estimates that such offences amount to between 750 and 1000 per year. Police statistics show that in the period January-June 2008 1512 'discriminatory incidents' were detected and it is expected that this number will double for the entire year 2008.<sup>103</sup> Data from the Prosecutor's office show that in 2007 216 discrimination offences were reported to the Public Prosecution Service. This number has been rather constant over the last few years: approximately 220 cases per year. In 2007, in 89 cases the suspect was found guilty. This rather low number of cases reported to the Prosecution Office compares with a much higher number of discrimination complaints received by the Anti-discrimination Agencies (4 247 in 2007). One explanation that could account for the differences in data is that the Anti-Discrimination Agencies, Police, Public Prosecution Service and Courts use different data collection systems and terminology. The Commissioner considers that this incompatibility of systems makes it hard to monitor the 'progress' of a particular case and recommends to streamline the data collection procedures.

### 7.3 *Discrimination in the Netherlands*

#### 7.3.1 *Discrimination based on sex and gender*

133. The Commissioner welcomes the governmental policy document '*More opportunities for women: Emancipation policy 2008-2011*' and he commends the government for regularly evaluating the implementation of each Ministry's women's equality policy.<sup>104</sup> He considers this an example of good practice.
134. The Commissioner notes that despite the decreasing pay gap between men and women, men still earn on average 11.8% more than women for the same job<sup>105</sup> and that the participation rate of women on the labour market is low. The biggest fall in labour market participation is among young and single women and the activity rate of migrant women is lower than that of indigenous women. Research shows that discrimination is one of the reasons why the participation of

<sup>101</sup> Amnesty International, Anti-discrimination policies by Netherlands municipalities: 443 chances, May 2007.

<sup>102</sup> ECRI general policy recommendation N°7 on national legislation to combat racism and racial discrimination.

<sup>103</sup> Police, Reportage *homofoob geweld. Politiegegevens. Periode 1 januari – 1 juli 2008*, p. 6. Police statistics don't include Article 429quater cases.

<sup>104</sup> All reports are available at [www.emancipatieweb.nl/mainstreaming#2366](http://www.emancipatieweb.nl/mainstreaming#2366).

<sup>105</sup> Paymentindex 2008 as well as information provided by the NGO Equality. The Netherlands ranks 9th in the 2008 Global Gender Gap Index.

migrant women is lagging behind.<sup>106</sup> Several reports have expressed the presumption that employers select trainees and job applicants on ethnic origin and that in particular Muslim women wearing a headscarf suffer from this type of discrimination.<sup>107</sup> The Commissioner discussed this with the Minister of Social Affairs and Employment and welcomes the anti-discrimination campaign currently being set up. The Commissioner encourages the Dutch authorities to continue combating structural and persistent inequality of women on the labour market, including the pay gap and the lack of participation of migrant women.

135. The Commissioner notes that of all complaints in 2007, the Equal Treatment Commission received 17% related to discrimination based on sex. The Anti-discrimination Agencies received 6.7% of all complaints on 'sex'. The persistence of violence against women, including domestic violence also remains an area of concern, in particular against the most vulnerable groups, like migrant women. Almost 85% of the victims of domestic violence are women. The Commissioner encourages the Dutch authorities to continue to support services for victims of domestic violence to ensure that all victims of violence, including migrant women and children can access them effectively.
136. As of January 2009, the Minister of Justice will introduce a new law on temporary restraining orders for perpetrators of domestic violence. The Commissioner discussed this law and one of its pilot projects with the Rotterdam police and the responsible Public Prosecutor at national level. Stressing that the new law must afford sufficient safeguards for the alleged perpetrators, the Commissioner welcomes the law, which enables each mayor to impose a denied access period of 10 days to a perpetrator of domestic violence (with extension to 4 weeks subject to judicial scrutiny by the District Court) during which a support and counselling therapy is set up for all involved.
137. The Commissioner is concerned about NGO and media reports on female genital mutilation in the Netherlands. Despite the fact that it is prohibited by law, approximately 50 to 500 girls are illegally mutilated each year. The government announced that special educational programs are developed against female genital mutilation and honour related violence. The Commissioner urges the government to further exploit all avenues to take speedy and appropriate measures against female genital mutilation and send out the unequivocal message that female genital mutilation is an attack on the integrity of the human body and as such a violation of women's human rights.

### *7.3.2 Discrimination based on disability*

138. The Commissioner welcomes the signature of the UN Convention on the Rights of Persons with Disabilities and understands that ratification is underway. He recommends that the Dutch authorities adopt the Optional Protocol. The Commissioner underlines that policies should not only be directed at persons with physical disabilities but also at persons with intellectual, mental and psychological disabilities.
139. The Equal Treatment of Disabled and Chronically Ill People Act (2003) implements EC Directive 2000/78/EC and forbids discrimination in the fields of employment, occupation and education (only vocational training). The scope to which the Act is applicable will gradually be increased and for this reason is criticised by NGOs because it is not (yet) applicable to supply of goods and services, social protection and access to public transport.<sup>108</sup> Regarding the latter, persons with disabilities face problems since the government can't guarantee full access to all public transport before 2030. Until then local authorities are expected to provide transport within the municipal boundaries and national authorities for interregional transport. The current system in place entails a maximum number of kilometres that a person with a disability can travel and have reimbursed. The Commissioner believes that this so-called 'personal kilometre budget'

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<sup>106</sup> "Ethnic Minorities on the Labour Market", Ministry of Social Affairs and Employment (2005).

<sup>107</sup> The Dutch organisation of employers and employees in education notes for instance an alarming number of students from ethnic minorities who drop out from teacher training colleges and relates this to the difficulties in finding a place as a trainee. See Annual Report 2006 of the Equal Treatment Commission available at [www.cgb.nl/downloadables.php](http://www.cgb.nl/downloadables.php).

<sup>108</sup> NGOs commentary on the 4th periodic report of the Netherlands on the International Covenant on Civil and Political Rights (ICCPR), 8 August 2008, p. 21.

puts limits on the full exercise of their freedom of movement. He notes The Hague's' District Court ruling that it "deemed it not unlikely (that) these limitations imposed on people with disabilities with regard to their possibilities to travel were to be considered as constituting an infringement of their human rights."<sup>109</sup> The Commissioner urges that full access to all forms of public transport is guaranteed without applying financial impediments for persons with disabilities and that the anti-discrimination legislation is extended to all forms of education, goods and services, public transport and social protection.

140. The Equal Treatment Commission received 13% of all complaints related to disability in 2007 and the Anti-discrimination Agencies 3.9%. The complaints mainly referred to employment. Young people with disabilities (including chronically ill persons) are dependent on the Disablement Assistance Act for Young Persons with Disabilities (*Wajong*) to gain an income.<sup>110</sup> The Commissioner is concerned by NGO reports that the financial situation of this group of persons is very difficult, especially when they cannot find employment. The Commissioner discussed this with the Minister of Social Affairs and Employment and he commends the government to continue taking measures to improve their financial situation.

### 7.3.3 Discrimination based on age

141. The Equal Treatment Commission received 26% of all complaints in 2007 on age discrimination (32% in 2006). The Anti-discrimination Agencies received in 2007 22.7% of all their complaints on ground of age (18% in 2006), mainly concerning the labour market, including explicit age limits in job ads and 'last-in-first-out'-principle during collective job dismissal. Governmental measures for the elderly are described in the report 'Policy for older persons in the perspective of an ageing population.'<sup>111</sup> Promoting social participation is the key aim of the policy, e.g. various measures are taken to allow older persons to work longer and maintain their independence. The Commissioner is concerned about the weak position of older employees and unemployed elderly and calls upon the authorities that measures are taken to prevent the elderly from suffering disproportionately. He is also concerned about elderly persons with health problems, single elderly persons with few social contacts and elderly persons in a weak financial position. The Commissioner welcomes the measure that under the new Social Support Act local authorities will be responsible for the provision of information to the public and to provide guidance, care and concrete help to those in need.

### 7.3.4 Discrimination based on sexual orientation and gender identity

142. Equality between heterosexuals and homosexuals is the legal and social norm in the Netherlands as reflected in the official policy paper 'Simply Gay – Dutch government's LGBT Policy Document 2008-2011'. The Commissioner considers such a policy plan and a LGBT focal point within the government administration as an example of good practice. However, the Commissioner observes a number of worrying trends in the Netherlands despite the low number of complaints related to sexual orientation or gender identity received by anti discrimination bodies. Social acceptance and safety of LGBT persons are under pressure and the Commissioner discussed this with victims of anti LGBT violence and the 'pink' network of the Amsterdam police, who report a growing number of LGBT persons being insulted, discriminated against or physically assaulted. The police recorded 150 homophobic incidents in the period January-June 2008 nationwide, which represents 10% of all discriminatory incidents. Other data show that in 2007, in Amsterdam alone 201 cases of homophobic incidents were recorded, representing an increase of the number of police registrations of anti-LGBT violence since 2006.<sup>112</sup> The Commissioner commends the government for prioritizing combating violence against LGBT persons in its policies and piloting projects on homophobic hate crime and

<sup>109</sup> District Court The Hague 09-07-2004, LJN AP9816 r.o. 3.7. However, the judge considered it beyond his judicial power to make a judgement.

<sup>110</sup> The maximum income (for those who face an occupational disability of 80% or more) is 75% of the statutory gross minimum (youth) wage. This could be their lifelong fate. At present times only about 25% of the concerned group of persons is employed.

<sup>111</sup> Publication of the Ministry of Health, Welfare and Sport, February 2006.

<sup>112</sup> University of Amsterdam, *Als ze maar van me afblijven – een onderzoek naar anti-homoseksueel geweld in Amsterdam*, November 2008.



suggests that research on homophobic and transphobic hate crimes is continued, nationwide with regular intervals.

143. The Commissioner is concerned about the exemption from the equal treatment rule granted to civil servants who are in charge of conducting civil marriages. They may opt out of their duty to marry same-sex couples if they have conscientious objections.<sup>113</sup> The Equal Treatment Commission ruled in April 2008 that local authorities have the duty to implement the law which provides that all civil wedding proceedings should be conducted without discrimination and the Association of Netherlands Municipalities also expressed this opinion.<sup>114</sup>
144. The Commissioner welcomes the government's support to invest in LGBT-friendly environments at school, at work and in sport. He learnt that the situation at many schools is worrying: the attitude of the youth is negative and hostility towards LGBT teachers and pupils occurs frequently. The Commissioner welcomes the initiative of the government to make homosexuality more of a topic for dialogue and debate in different population groups in society as homosexuality is still a taboo in certain ethnic and religious communities. The Ministry of Health is currently funding projects in four cities offering emergency shelters for LGBT youth who are not accepted by their parents and left to their own devices.
145. The Commissioner is concerned about the obligatory legal conditions for change of a person's registered gender on birth certificates, in particular the requirement of sterilisation and medical (hormone/surgery) treatment.<sup>115</sup> The Commissioner learnt that this condition is now under review. He calls for abolishing the sterilisation and medical treatment requirements. He recalls the Yogyakarta Principles, which the Dutch government considers as authoritative for its policies, that "No one shall be forced to undergo medical procedures, including (...) sterilisation (...) as a requirement for legal recognition of their gender identity".<sup>116</sup>

### 7.3.5 Discrimination based on race and ethnicity, racial violence and ethnic profiling

146. Racial discrimination on the labour market, in particular relating to the recruitment process is one of the most pressing problems, especially for young people from certain ethnic minority communities.<sup>117</sup> Only one third of Dutch-Moroccans and half of Dutch-Turks have paid employment. The Minister of Social Affairs and Employment proposed a Plan of Action particularly focusing on combating discrimination on the work floor, including a campaign to combat negative perceptions and discrimination in relation to ethnic minority job-seekers.
147. Figures on racial violence and violence incited by the extreme right are difficult to obtain as there is a lack of data. NGOs and academics pointed out that the registration of racist incidents (alike homophobic incidents until recently) by police and judiciary has serious shortcomings. It appears that more and better use could be made of criminal law in this field.
148. A large number of civil society representatives, human rights experts and ECRI drew the attention of the Commissioner to the Reference Index Antilleans. The Minister for Housing, Communities and Integration decided to introduce this Index in 2006 as a temporary reference system (database) which includes 'reference and identifying data' concerning 'problematic' young Antilleans and Arubans who are not registered in the Municipal Database and meet one or more of other so-called *bottleneck-criteria*. The authorities informed the Commissioner that the Index only includes reference information and is only available to local authorities, police

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<sup>113</sup> The 'opt out' possibility is an explicit part of the Government Action Plan (*Regeerakkoord*), Chapter VI, para. 11.

<sup>114</sup> Ruling of the Equal Treatment Commission available at [www.cgb.nl/opinion-full.php?id=453056852](http://www.cgb.nl/opinion-full.php?id=453056852); Association of Netherlands Municipalities, *Een nieuwe koers ten aanzien van de gewetensbezwaarde ambtenaar*, May 2008.

<sup>115</sup> The legal requirements are described in Article 1:28 of the Civil Code. NGOs commentary on the 4th periodic report of the Netherlands on the International Covenant on Civil and Political Rights (ICCPR), 8 August 2008.

<sup>116</sup> Human dignity for all. A human rights strategy for Foreign Policy. Ministry of Foreign Affairs, p. 54.

<sup>117</sup> This is also confirmed by the Equal Treatment Commission and the Anti-discrimination Agencies: the majority of registered complaints of discrimination continue to concern employment, mainly in relation to ethnicity and gender (for example pregnancy). The unemployment rates are 27% for Dutch Moroccans and 21% for Dutch Turks, as compared to 9% for the indigenous Dutch.

and care institutions to identify and reach Antillean 'risk youth' in a timely manner. Since this Index contains the processing of sensitive personal data, the Data Protection Authority granted an exemption to the prohibition of the registration of ethnicity in December 2006 for a period of two years on grounds that the necessity of the problems justified the use of the Index. This case was brought before the court in The Hague, which declared the Reference index not to be in conformity with Dutch law. The Council of State in September 2008 overruled the judgement of the Hague court.

149. The Commissioner is concerned about the Index as it involves a form of ethnic profiling. The distinction to target Antillean youth is based on ethnicity, since the other persons who meet the bottleneck criteria are indigenous Dutch, who are not registered in the Index. The Netherlands is under international obligations not to engage in acts of racial discrimination. The Commissioner raised his concerns during meetings with the (then) Minister for Housing, Communities and Integration and with the Council of State. During both meetings the aspect of 'non registration of the Antillean youth' in the Municipal Database was cited as the most important argument to introduce the Index.
150. The Commissioner notes that the government referred in the past to alternatives for the Index, such as to improve its municipal registration systems and to use existing instruments such as the «Police Discussion network». He is not convinced that a special Index should be used while there are alternatives. The Commissioner commends the government for the decision of December 2008 to discontinue the Reference Index Antilleans, The Commissioner notes the introduction of a more general Register of At Risk Juveniles (VIR) which, according to information from the authorities, does not list the ethnicity of those registered.

### 7.3.6 Discrimination against National Minorities and Roma and Sinti

151. The Framework Convention for the Protection of National Minorities applies to the Frisians but not to the Roma and Sinti since the latter are not recognized as a national minority in the Netherlands. NGOs disagree with this restrictive point of view, which will be discussed in the context of the first report submitted by the Netherlands under the Convention. He urges the Dutch authorities to give recognition to the Roma and Sinti as a minority under the Convention. He also notes that the Frisian and Romanes language are recognised under the European Charter for Regional or Minority Languages. The State report under the Charter pointed out that the Frisian language in primary and secondary schools in the province of Fryslân needs more attention. Regarding the Romanes language the Committee of Ministers recommends that the authorities "ensure that a structured dialogue is developed with the representatives of the Romanes-speakers and (that) measures to protect and promote Romanes (are taken), in particular in the field of education, in co-operation with the speakers".<sup>118</sup>
152. The Commissioner received worrying though fragmented reports about the situation of Roma and Sinti in the Netherlands, including information about problems with housing, high unemployment rates, health, school drop-out, discrimination on the labour market, problems with delivery of goods and services and a negative image among the police and justice system. However, he notes a low number of complaints submitted by Roma and Sinti to the Anti-discrimination Agencies.
153. The Commissioner was informed that number of competences regarding Roma and Sinti policies have been transferred from national to the local authorities. While the Commissioner acknowledges the rationale behind transferring competencies to the local authorities he also notes ECRI's recommendation "that the Dutch authorities draw up, at the central government level and in close co-operation with the Roma, Sinti and Traveller communities, a comprehensive strategy aimed at reducing the disadvantage and discrimination these face and make available adequate resources to implement it". The Commissioner urges that national authorities involve Roma and Sinti in all levels of political decision-making. He is concerned about the termination of funding for Roma and Sinti organisations which could impede dialogue with Roma and Sinti. A government funded *multifunctional centre*, which main purpose will be to

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<sup>118</sup> Recommendation of Committee of Ministers, adopted July 9, 2008.

offer best practices and practical services to local authorities, should not be considered as a substitute for funding organisations of Roma and Sinti.

## VIII. Racism, xenophobia, anti-Semitism and intolerance against Muslims

154. Racism, xenophobia, intolerance against Muslims and anti-Semitism remain areas of concern in the Netherlands. Racism, including Muslim hatred topped the statistics of the discrimination on the Internet together with complaints about anti-Semitism. A new action plan against racism, xenophobia and intolerance plan was due to appear in 2008. The Commissioner encourages the authorities to publish and promote publicly the national action plan and to monitor its implementation in close cooperation with civil society.
155. A particular group affected by intolerance is the Muslim community. Hate against Muslims (with sub-category 'Moroccans') is one of the two largest categories of online hate speech. The Anti-discrimination Agencies list Dutch Moroccans as one of the largest groups of victims of discrimination and ECRI observed that "Muslims in the Netherlands have been subject of stereotyping, stigmatising and sometimes outright racist political discourse and of biased media portrayal." The Commissioner is concerned about these phenomena, in particular as some participants in the social and political debate claim that Dutch and Muslim lifestyles are irreconcilable. He discussed with some members of the Muslim community in Rotterdam and noted that, apart from polarising developments in Dutch society, there are also concrete attempts by civil society and authorities to improve relations and mutual understanding between population groups, for example projects to promote dialogue between Muslims and non Muslims as well as projects that stimulate discussion within the own ethnic-religious circles. The Commissioner encourages the authorities to take a firm stand against anti-Islamic undercurrent in society.

## IX. Integration

156. 'Integration' has become a prominent issue in national politics, mainly referring to immigrants from non-Western background and notably Muslims. In response to ECRI's concerns regarding the toughening debate the government has stated that it "takes the view that the debate reflects real concerns of citizens, which cannot simply be ignored".<sup>119</sup> The government notes that certain parts of the population feel a level of alienation with Dutch society. The Commissioner recognises that there is a need for such a debate but urges that this debate is conducted based on careful and precise use of language as sweeping distinctions such as 'immigrant' versus 'indigenous' may be counterproductive.
157. The authorities have issued an Integration Memorandum containing 56 policy initiatives on integration for 2007-2011. A special Ministry for Housing, Communities and Integration was set up to implement the policy. One aspect of the Integration policy is the Civic Integration Exam which consists of a compulsory 'language and culture' exam for newcomers (who have already successfully taken the 'integration abroad' test) as well as persons who have been residing in the Netherlands since before the Civic Integration Act of 1 January 2007. Candidates must pay 270 Euro for the preparatory integration courses for the exam, organised by the municipalities. NGOs expressed concern about the limited supply of integration courses and the discriminatory nature of the test as nationals from some countries are exempted from the obligation to do the Exam. The authorities informed the Commissioner that almost 7 000 candidates passed the exam. The Commissioner wonders whether the Civic Integration Exam in practice promotes integration and recommends that the effectiveness and side-effects of the Civic Integration Exam be thoroughly evaluated.
158. A second aspect of the Integration policy is combating segregation in housing and neighbourhoods. Ethnic segregation in the housing market is a reality in the four largest Dutch

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<sup>119</sup> Government's response to the Third report on the Netherlands by the Council of Europe's European Commission against Racism and Intolerance, ECRI (2008)3, Strasbourg, February 2008.

cities. For this reason the government identified 40 neighbourhoods with a high concentration of immigrants, lower income families, high unemployment rates, high rate of school drop-out and high crime rates. Several instruments, including extra financial support, stimulation of a mix of residents, improving living standards, and promotion of employment and education, are applied to combat segregation. The introduction of the *Special Measures Act 'Urban Areas'* serves as the legal basis for municipalities to enable them to put extra conditions to 'newcomers' on the housing market. The authorities informed the Commissioner that Rotterdam is the only municipality using the Act. The initial condition imposed by Rotterdam to demand 120% of the minimum wage as a criterion to allocate housing in some parts of the city has been replaced by 'income from labour' (as opposed to income from social security) after an Equal Treatment Committee ruling in July 2005. Nonetheless, NGOs criticised that this implies that people without employment are excluded from living in certain areas. The Commissioner is concerned that poor and/or unemployed people may be discriminated against by this legislation. He recommends to evaluate and review the Special Measures Act 'Urban Areas' as well as the Housing Act to ensure that segregation on the housing market is efficiently combated.

159. Another effect of segregation in the housing market is the *de facto* racial segregation in schools. Almost 10% of all primary and secondary schools belong to the category of so-called 'black schools' (70% of all pupils are from a non-western immigrant background). In the four big cities 50% of the schools belong to that category. As the Constitution guarantees the freedom of choice of parents to select the school, many parents choose a school which is known as a 'white school'. This is known as the *white flight* and it creates *de facto* segregated schools. The National Ethnic Minorities Consultative Committee expressed concerns that segregation in education continues rapidly and that children from minority groups are attending the worse performing schools.<sup>120</sup> Nevertheless, the Commissioner notes the improvement of the education level of ethnic minorities and that the number of students attaining secondary and higher education qualifications is slowly but surely increasing. This was also the impression he was given during a visit to a secondary school in Rotterdam. While the government decided not to make structural changes to combat the *white flight*, it urges municipalities to work in close cooperation with schools and focus their policy on eliminating educational disadvantage.
160. The Commissioner learned about so-called "intervention teams", which coordinate the combat against fraud in the social security system and for that purpose also visit private homes. He was informed that respect for the right to privacy was not always ensured in the course of such visits. The Commissioner appreciates the improvements made in Rotterdam following an investigation by the Rotterdam Ombudsman which contributed to the introduction of a protocol and to reducing the number of team members when visiting. While the Commissioner commends that the government takes a multidisciplinary approach to combat segregation, he urges that this is done in a non discriminatory and non intimidating way. Intervention teams should be subjected to a formalised way of supervision.

## X. Freedom of expression

161. Freedom of expression is guaranteed in the Dutch Constitution. Restrictions, laid down in the Criminal Code, can only be imposed if the expression thereof incites to discrimination, racial hatred or violence or if the expression thereof is needlessly injurious or insulting. Members of Parliament have immunity for their statements in the public debate. Case law shows that artistic expressions or expressions based on a religious belief enjoy a wider margin of appreciation and lawsuits are unlikely to be successful. Sometimes the right to freedom of religion or belief, the right to freedom of speech and the ban on discrimination can thus clash, as in a number of complaints filed against religious or political spokesmen who publicly condemned homosexuality. The government realises that fundamental rights can clash, but believes that the existing relationship between the various fundamental rights provides adequate scope for dealing with these kinds of conflicts, to the disappointment of some civil society organisations which argue that freedom of religion has a higher ranking than other fundamental rights.

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<sup>120</sup> This Committee serves as a platform advising on governmental policies affecting ethnic minority groups, all ethnic minority communities are represented.

162. Freedom of expression has been under pressure in the Netherlands after the paralyzing impact of the politically and religiously motivated violence that led to the death of Theo van Gogh and the death threats against former MP Ayaan Hirsi Ali and other politicians. Protective security measures for politicians are a new reality in the Netherlands. The government realises that the number and gravity of incidents where freedom of expression has been impeded by (the threat of) violence appear to have increased. The Commissioner is concerned that the debate on freedom of expression is influenced by fears of terrorism, as well as a fear of growing self-censorship in cultural and social life.
163. After offensive discourses against believers and other minority groups, the government is trying to balance Freedom of Expression with the non discrimination principle. On 31 October 2008 it announced its intention to submit to Parliament a proposal to abolish Article 147 Criminal Code (blasphemy) but to strengthen the anti-discrimination provision in the Criminal Code in a way that reinforces the protection against slander and insult of minority or religious groups.<sup>121</sup> The Commissioner commends the government for abolishing the blasphemy law, which is in line with Recommendation 1805 of the Council of Europe Parliamentary Assembly and the recent report of the Venice Commission.<sup>122</sup>

## **XI. Anti-terrorism measures and respect for human rights**

164. The Commissioner discussed the impact of anti-terrorism measures on human rights with the Ministers of the Interior and of Justice, with members of the Supreme Court and the Council of State and with the National Ombudsman. While recognising the duty of every state to provide security and protection to its population, the Commissioner is concerned with various criminal and administrative measures adopted in the Netherlands to combat terrorism and recommends an evaluation with a view to ensure full compliance with international human rights standards.

### *11.1 Measures of criminal nature*

165. Broad definitions can be found in the *Crimes of Terrorism Act* in force since 2004, which introduced terrorist crimes in Dutch criminal law.<sup>123</sup> The presence of a terrorist aim on the commission of an existing offence made the offence a terrorist crime subject to tougher penalties. "Terrorist aim" is broadly defined as the aim to seriously intimidate the population or part of the population of a country, and/or to unlawfully force a government or international organisation into acting, to refrain from acting or to tolerate, and/or to seriously destroy or disrupt the political, constitutional, economical or social structure of a country or international organisation (article 83 Criminal Code). More severe punishments apply to offences committed with the objective of preparing or facilitating terrorist offences. Certain crimes were separately defined as terrorist crimes, for example conspiracy to commit a terrorist offence, membership of terrorist organisations and threatening to commit a terrorist crime. During the meeting with the Minister of Justice, the Commissioner recommended avoiding vague and broad definitions of crimes and its elements as they may lead to unjustifiable restrictions on the exercise of human rights and freedoms.
166. Another anti-terrorism measure raising human rights concerns is the *Witness Identity Protection Act*. In force since 1 November 2006, the Act broadens the use of official reports of the General Intelligence and Security Service (AIVD) by allowing the investigation of information contained in those reports through the questioning of intelligence agents by an examining judge. According to the Government, the defence retains the right to interview witnesses since it can submit questions, which may be posed through the intervention of the examining judge. However, the Commissioner notes with concern that, in the interest of national security, the

<sup>121</sup> Letter of Minister of Justice to Parliament, 31 October 31 2008. The current version of Article 137c only applies when someone makes an insulting or discriminatory statement about a particular group rather than that a statement is insulting for a particular group.

<sup>122</sup> See Report on the relationship between freedom of expression and freedom of religion adopted by the Venice Commission at its 76<sup>th</sup> plenary session, Venice, 17 -18 October 2008.

<sup>123</sup> Act adopted on the basis of the EU Council Framework Decision 2002/475 on combating terrorism.

defence cannot always attend the examination of the witness. He finds that the position of the defence is weakened, considering that the witness remains anonymous in most cases and has a decisive say in the decision as to whether the official report of the investigating judge will become part of the case file and accepted as evidence. The Commissioner questions how the principle of equality of arms, an essential guarantee of the right to fair trial, is safeguarded by the Act and recalls the right of the individual to know the full case against him or her.

167. Some of the anti-terrorism measures in force in the Netherlands significantly restrict the right to privacy, an essential part of the right to respect for private life guaranteed by Article 8 of the ECHR. The Commissioner recalls that the right to privacy includes the right to “data protection” which entails protection from intrusions into one’s privacy or private life, and guards against the improper collecting, storing, sharing and use of data.<sup>124</sup>
168. Already in 2000, the *Act on Special Investigative Measures* enabled, without the consent of an investigative judge, the recording of telephone conversations of persons whom, while not being suspects of a crime, had had contacts with a suspect. The Commissioner addressed the issue of interception of calls with the Minister of Justice. The Minister informed that the General Intelligence and Security Service (AIVD) works under the Minister of the Interior who authorises the tapping by the AIVD solely in the context of intelligence-gathering.
169. It should be noted that during regular criminal investigations judicial approval of phone tapping is required and the tapping of conversations with lawyers is not allowed. Notwithstanding, the Data Protection Authority found that recordings with professionals who have a confidentiality duty, notably lawyers, are not immediately destroyed. The Commissioner recommends that the authorities ensure that all telephone tapping be preceded by judicial authorisation.
170. *The Access to Data (General Powers) Act* in force since 1 January 2006, expands the possibilities to collect data from third parties that may be relevant to the investigation of crimes, as well as to search places and objects. In order to demand certain data, the mere indication that a terrorist attack is under preparation suffices without the need for a formal suspect in the criminal sense. The public prosecutor, and no longer a judge, is authorised to demand data for identification regarding location, nature of services and traffic. The Act creates the possibility to demand data that is not yet available but will be in the future as well as sensitive data on religion, philosophy of life and political conviction. Such sensitive data however can be claimed only with a judicial order in cases of crimes that seriously threaten the legal order and that are punishable with a detention sentence of four years minimum. The Commissioner notes with concern that ‘indications’ serve as a basis for a very wide range of powers to investigate terrorist offences, and urges the Government to ensure that the processing of personal data be based on clear and specific rules and formulations. Furthermore, the Commissioner finds that the collection of data on persons not suspected of involvement in a specific crime or of posing a threat, as well as the collection of information through intrusive and secret means such as telephone tapping and the use of “profiling” techniques must be subject to a particularly strict “necessity” and “proportionality” test. The Commissioner recalls that the collection of data on individuals solely on the basis that they have a particular racial origin, religious convictions or political opinions should be prohibited. The collection of data concerning these factors may only be carried out if absolutely necessary for the purposes of a particular inquiry.<sup>125</sup>
171. Another measure raising privacy concerns is the *Investigation and Prosecution of Terrorist Offences Act*, in force since 1 February 2007. It broadens the opportunities and use of powers to investigate and prosecute terrorist crimes and simplifies the process of authorisation to use such powers. Powers can be used based on indications that a terrorist crime is being prepared rather than, as previously, a reasonable suspicion of a crime. The Act allows for detention upon mere suspicion of a terrorist crime, whereas other crimes require ‘substantial evidence’ against the suspect. The Act further authorises systematic surveillance, wiretapping, infiltration, systematic collection of information, covert installation of sound recording and video equipment in private spaces and preventive investigation. It further allows for searching individuals and

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<sup>124</sup> See the CoE Commissioner for Human Rights Issue Paper “Protecting the Right to Privacy in the fight against terrorism” CommDH/Issue Paper(2008)3.

<sup>125</sup> Recommendation R(87)15 Council of Europe Committee of Ministers recommendation on data protection in the police sector, Principle 2.4.

items without a concrete suspicion of a crime and the postponement of full access to procedural documents for a maximum period of two years. The Act also extends the maximum period of pre-trial detention from ninety days to two years, for people charged with terrorism offences. This Act met broad criticism from NGOs for its far-reaching investigative powers and vague terminology. Again, the Commissioner is concerned with a possible conflict with the right to a private life, as well as freedom of movement, since the Act lacks the sufficient precision required to regulate one's conduct. The Act may also infringe upon the principle of equality of arms since suspects may be withheld access to the information in the process file for two years.

### 11.2 Measures of administrative nature

172. Local and central government in the Netherlands have at their disposal various criminal and administrative measures to combat terrorism. The Commissioner is concerned with the trend found in the Netherlands to use administrative law and sanctions, circumventing the fundamental safeguards offered by criminal law. Such measures intervene at an earlier stage than in criminal proceedings and may affect persons who do not intend to pursue violent actions. Administrative proceedings usually offer lower safeguards, not least because the judicial oversight provided by the administrative court is possible only after appeal.
173. In the meeting with the Commissioner, the members of the Supreme Court noted that some of the recently adopted administrative measures imply that several principles of criminal law should be applied in administrative courts and noted the risk of conflicting interpretations of the law by criminal and administrative courts.
174. The Commissioner is particularly concerned with the administrative measure '*disturbance of an individual*', which aims at preventing terrorism by disturbing a person in his/her daily life. It is executed by police officers and can consist of house calls, inviting the person to the police station, approaching acquaintances or visiting public spaces where that person is present. Although the Municipality and the Police Acts give the Mayor the power to maintain public order in conjunction with the police, it is unclear under what conditions the Mayor can impose this measure. Unlike the criminal law "investigating power of observation", which is subject to the authorisation of an investigative judge, "disturbance of an individual" does not require judicial authorisation, and judicial supervision will only be provided in case of appeal.
175. NGOs question the legal basis of this measure, its interference in private life and note that the Police and Municipality Acts merely determine the task and division of powers between the Mayor and the police force. In at least one court ruling, the end to a measure of individual disturbance was ordered.<sup>126</sup> The Commissioner finds that such serious interferences and restrictions to the fundamental rights and freedoms of the individual should not be based on vague and unspecified concepts as "maintaining public order", and that the conditions required to impose the measure are unclear. Judicial authorisation of such measures should be mandatory.
176. Another controversial measure, pending before the Parliament in November 2008, is the *Bill on Administrative Measures for National Security*. The Bill provides for administrative measures to prevent terrorism related activities, to be taken by the Minister of the Interior, in agreement with the Minister of Justice, and by municipalities and administrative bodies. It authorises exclusion orders in relation to the surroundings of certain objects or parts of the country; or/ and in the immediacy of certain persons; as well as an obligation to report periodically to the police. In addition, municipalities and administrative bodies will have the power to revoke subsidies or permits of persons and organisations associated with, or facilitators of, terrorist activities. The measures can be imposed on the basis of facts and circumstances that would not in themselves be grounds for criminal prosecution. They apply to persons who, based on their behaviour, may be "associated with terrorist activities or the support "of such activities and are extendable by a maximum of 2 years. If the subject ignores the measure, a custodial punishment of up to one

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<sup>126</sup> Court of Amsterdam, 1 December 2005, AB 2006, 284. The measure of disturbance consisted of systematic police surveillance of the house, police phone calls and regular house visits. The Mayor's decision considered that the subject had changed from Christian to Islamic belief, engaged in an Islamic marriage, refused to shake the hand of a man and had contacts with a person connected to a terrorist group.

year may be imposed. The affected party may lodge a written objection with the Minister of the Interior. Only if the subject appeals, a court will review the legitimacy of the measure. One NGO reports that, since the information that led the authorities to impose a measure on a person is often from the General Intelligence and Security Agency, the data may be difficult to access.<sup>127</sup>

177. The Commissioner considers that the application of such severe custodial punishment is disproportional. Furthermore, he is concerned with the restrictive impact of such measures on freedom of movement and the right to respect for private life, especially given the lack of judicial oversight. In addition, the Bill's legal terminology is vague and unclear. Moreover, the measures may be applied on the basis of facts and circumstances insufficient for the application of regular criminal law. Given the impact of the measures on human rights, the Commissioner urges the government to reconsider the Bill on Administrative Measures for National Security.

### 11.3 *Extradition of foreign nationals suspected or convicted of terrorist crimes*

178. Pursuant to the Aliens Act 2000, the Minister of Justice can declare a foreign national an "undesirable alien" if the person constitutes a risk to the public order or national security or in the interest of the international relations of the Netherlands. Undesirable aliens can neither have legal residence nor enter the Netherlands for an unlimited period. The person will not be expelled if he/she can demonstrate a risk of being tortured or ill-treated in the country of origin. If the Minister decides to deport the foreign national, he/she can appeal to the competent judicial authorities. If the appeal is rejected, the foreign national can complain to the European Court of Human Rights. Two applications have been submitted.<sup>128</sup>
179. NGOs questioned the guarantee of the presumption of innocence in such proceedings and argue that aliens served with an exclusion order for reasons of national security face obstacles to challenge such order. The Commissioner notes with concern that the exclusion order is based on secret reports of the intelligence service, to which the alien has no access and over which the administrative judge has no full judicial scrutiny.
180. The Minister of Justice reassured the Commissioner that the Netherlands would not resort to diplomatic assurances for deportation that could contravene Article 3 of the ECHR. There are no reports of the use of extraordinary renditions in the Netherlands.

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<sup>127</sup> NJCM, Terrorism, Counter-terrorism measures and human rights in the Netherlands, background briefing on the occasion of the ICJ Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, Brussels, 2-4 July 2007.

<sup>128</sup> *Ramzy* (appl. no. 25424/05) declared admissible on 27 May 2008 and *A.* (appl. no. 4900/06).



## **XII. Recommendations**

The Commissioner, in accordance with Article 3 paragraphs b, c and e and with article 8 of Resolution (99) 50 of the Committee of Ministers, recommends that the authorities of the Kingdom of the Netherlands:

### **National system for protecting human rights**

1. Ensure a uniform application and interpretation of international treaties in national law.
2. Ensure that ombudswork for children is undertaken within the ombudsman office or through a separate institution.
3. Review current legislation for police detention and first interrogation to ensure that detainees and in particular children, have the right to notify immediately a third party and enjoy the right of access to a lawyer from the outset.
4. Review the existing mechanisms for assessing complaints against police and consider creating an independent external body.
5. Conduct a base-line study to assess the extent to which human rights are integrated into education and training, so that further needs can be identified and addressed.
6. Develop a national human rights action plan to serve as a tool for analysis and continuous improvement of the human rights situation in the Kingdom of the Netherlands.

### **Treatment of asylum seekers**

7. Ensure that authorities will have sufficient time to diligently establish the facts of the case and that asylum seekers can discharge the burden of proof within the reformed asylum procedures.
8. Provide reception facilities to all asylum seekers until the final closure of their case.
9. Provide for a full judicial review of asylum decisions as well as detention decisions taken.
10. Ensure that asylum seekers, including those whose claims have been rejected, are adequately informed of the procedure.
11. Enhance occupation and training for aliens in detention and reception facilities and promote the new scheme allowing non-detained asylum seekers to work.
12. Review the current scheme of detaining all asylum seekers arriving by air in the light of the Asylum Procedures Directive, leave families united and limit detention of children to exceptional circumstances precisely prescribed by law.
13. Introduce and ensure effective application of the principle of the best interest of the child in asylum and refugee law and policy.
14. Establish a concept of guardianship with regular, frequent visits for unaccompanied minors and ensure that each stateless child living in the Kingdom of the Netherlands can acquire a nationality.

## **Immigration**

15. Review current entry conditions for family reunification and formation to ensure that tests, fees and age requirements do not amount to a disproportionate obstacle.
16. Review proposals made to reform the TBS system to include a solution for detained aliens declared undesirable who cannot be repatriated to their country of origin.

## **Trafficking in human beings**

17. Ratify promptly the Council of Europe Convention on Action against Trafficking in Human Beings and define precisely in law the term "labour exploitation".
18. Avoid keeping victims of trafficking in aliens' detention by improving means to speedily identify victims. Give young victims the benefit of doubt when it is difficult to establish whether they are under-age or not.
19. Increase the capacity of specialized shelters to adequately and timely accommodate victims of trafficking and ensure adequate support for municipalities combating human trafficking.

## **Children's rights**

20. Expedite the ratification of the Council of Europe Convention on the protection of children against sexual exploitation and abuse as well as the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and withdraw all its reservations to the said convention.
21. Legislate on the obligation to report child abuse for professionals dealing with children, notably social workers, teachers and medical professionals.
22. Ensure that the highest standards for the protection of children's rights, including the full prohibition of corporal punishment, are a reality in the whole of the Kingdom of the Netherlands.
23. Ban the use of the "Mosquito" by state and local authorities as well as by private entities.
24. Ensure the quality and equivalence of school programmes used in all Youth Institutions, civil and custodial, to guarantee equal opportunities for detained children.
25. Ensure the speedy separation of juvenile offenders from children institutionalised with a civil title, and the separation of minors from adults.
26. Increase the age of criminal responsibility in line with the majority of European countries and apply juvenile criminal law to all minors, even in serious offences.

## **Prevention of discrimination**

27. Establish better coordination and cooperation between all anti-discrimination bodies, police, public prosecutors and courts and streamline data collection procedures.
28. Remove the exemptions for associations based on religion or belief from GETA and abolish the 'sole fact' construction.
29. Exploit all avenues to take speedy and appropriate measures against female genital mutilation.
30. Sign and ratify the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities.
31. Extend the anti-discrimination legislation to all forms of education, goods and services public transport and social protection and to provide full access to all forms of public transport without applying financial impediments for persons with disabilities.
32. Abolish the legal condition of sterilisation and other compulsory medical treatment as a requirement for legal recognition of a person's gender identity .

33. Recognise the Roma and Sinti as a minority under the Framework Convention for the Protection of National Minorities and involve Roma and Sinti in all levels of political decision making.

#### **Racism, xenophobia anti-Semitism and intolerance against Muslims**

34. Promote publicly the national action plan against racism and xenophobia and monitor its implementation in close cooperation with civil society.

#### **Integration**

35. Evaluate and review the Special Measures Act 'Urban Areas' as well as the Housing Act to ensure that segregation on the housing market is efficiently combated.

#### **Fight against terrorism**

36. Review the anti-terrorism measures implemented and proposed, notably the Bill on Administrative Measures for National Security, in order to ensure that they fully comply with international human rights standards and principles.
37. Ensure that anti-terrorism measures, such as telephone tapping and disturbance of an individual, are subject to full judicial oversight and offer effective procedural safeguards to suspects.

## **Appendix 1: List of authorities, civil society organisations and institutions met or consulted**

### **Authorities**

#### **Members of Government**

Ms G. ter Horst, Minister of the Interior and Kingdom Relations  
Mr J.P.H. Donner, Minister of Social Affairs and Employment  
Mr E.H.M. Hirsch Ballin, Minister of Justice  
Ms N. Albayrak, State-Secretary for Justice  
Ms E. Vogelaar, Minister of Housing, Communities and Integration  
Mr A. Rouvoet, Minister for Youth and Families and Deputy Prime Minister  
Mr P. van der Werve, Head of department Multilateral Affairs, Ministry of Education, Culture and Science

#### **Board of Procurators-General**

Mr H.J. Bolhaar, Member of the Board of Procurators-General  
Ms H.W. Samson-Geerlings, Member of the Board of Procurators-General  
Mr W.J.B. ten Kate, Public Prosecutor

#### **Parliament**

Ms G. Verbeet, President of House of Representatives  
Ms prof.dr. M.L. Bemelmans-Videc (CDA)  
Mr J.S. Voordewind (ChristenUnie)  
Ms C.W.A. Jonker (CDA)  
Ms M.L. Pater-van der Meer de (CDA)  
Mr P.H.Omtzigt (CDA)  
Mr S. van Haersma Buma (CDA)  
Ms F.Joldersma (CDA)  
Mr J.H. ten Broeke (VVD)  
Mr B. van der Ham (D66)

#### **Supreme Court**

Mr W.J.M. Davids, President  
Mr G.J.M. Corstens, incoming President  
Ms W.M.E. Thomassen, Judge

#### **Administrative Jurisdiction Division of the Council of State**

Mr P. van Dijk, President  
Mr H.G. Lubberdink, State Councillor  
Mr B. Vermeulen, State Councillor

#### **National Ombudsman**

Mr Dr Prof A.F.M. Brenninkmeijer

#### **Equality Treatment Commission**

Ms L.J.L. Koster, President

#### **Dutch Rapporteur on Trafficking in Human Beings**

Ms C.E. Dettmeijer-Vermeulen

#### **The Association of Netherlands Municipalities**

Ms A. Wissink  
Mr B. van der Meijden

#### **City of Rotterdam**

Mr I. Opstelten, Mayor of Rotterdam  
Mr A. J. Meijboom, Chief of Police of Rotterdam-Rijnmond  
Mr M. van Kinderen, Municipal Ombudsman of Rotterdam  
City college St. Franciscus, Secondary School

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### **Civil Society**

#### **Non-governmental organisations**

- o Aim for Human Rights
- o Amnesty International
- o Anne Frank House
- o Art. 1, the national association against discrimination
- o Bonded Labour in Nederland (BLinN) (Oxfam Novib/Humanitas)
- o Broad Human Rights Council, Breed Mensenrechten Overleg (BMO)
- o Buro Jansen & Janssen
- o Dutch Council of Chronically Ill and Disabled People, Chronisch Zieken en Gehandicapten Raad Nederland (CG Raad)
- o Centre Information and Documentation on Israel (CIDI)
- o Centre for Culture and Leisure, Cultuur en Ontspannings-Centrum, (COC)
- o Comensha, coordination centre Human Trafficking, La Strada Netherlands
- o Contact Body for Muslims and Government, contactorgaan Moslims en Overheid (CMO)
- o Defence for Children International (DCI)
- o Dutch National Foundation 'Roma Emancipatie'
- o E-Quality, knowledge centre for gender, family and diversity issues, kenniscentrum voor emancipatie, gezin en diversiteit
- o FORUM, the Institute for multicultural development, Instituut voor multiculturele ontwikkeling,
- o Forum for Democratic Development, Forum voor Democratische Ontwikkeling
- o The Johannes Wier Foundation, human rights organisation for doctors, dentists, nurses and paramedics, Johannes Wier Stichting
- o Justitia et Pax, Justice and Peace Netherlands, Catholic organization working for justice and peace
- o Open Society/Justice Initiative
- o Coalition for Child Rights, Kinderrechtencollectief
- o The National Ethnic Minorities Consultative Committee, Landelijk Overleg Minderheden (LOM)
- o National organisation for Sinti and Roma, Landelijke Sinti en Roma Organisatie (LRSO)
- o Magenta Foundation, foundation to combat racism, and other forms of discrimination
- o Dutch Complaints Bureau for Discrimination on the Internet, Meldpunt Discriminatie Internet
- o MOVISIE, centre for social development, kennis en advies voor maatschappelijke ontwikkeling
- o Netherlands Transgender Network
- o NIDOS, independent guardianship and family supervision agency
- o Netherlands Committee of Jurists for Human Rights (Dutch section of the International Commission of Jurists (ICJ), Nederland Juristen Comité voor de Mensenrechten (NJCM)
- o Pharos, knowledge and advisory centre on refugees, migrants and health
- o Forum for Human Rights Education, Platform Mensenrechten educatie
- o SPIOR, Platform Islamic Organisations Rijnmond, Stichting Platform Islamitische Organisaties Rijnmond
- o National Support Point for Undocumented Migrants Stichting Landelijk Ongedocumenteerden Steunpunt (Stichting Los)
- o Unicef
- o Dutch Refugee Council, Vluchtelingenwerk Nederland

#### **Institutions and Sites**

- o Application Centre Schiphol, Amsterdam
- o Mental Health Institute 'Van der Hoeven Kliniek, Utrecht
- o Detention Centre Schiphol 'Oude Meer', Amsterdam
- o Women Shelter 'De Roggeveen', Amsterdam
- o COC Amsterdam
- o Forensic Centre, 'Teylingereind', Sassenheim
- o Asylum seekers centre (reception centre) 's Gravendeel

#### **International Organisation**

Mr Rene Bruin, National Officer, Office of the UN High Commissioner for Refugees (UNHCR) in the Netherlands