



WHO'S RIGHT(S)?

*International Monitoring of Compliance with
Human Rights of Migrants
in the Netherlands 2000-2008*

Dominique van Dam

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INTERNATIONAL MONITORING OF COMPLIANCE WITH
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2000-2008

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Centre for Migration Law

Nijmegen 2009

Foreword

It was internationally renowned Humanist Erasmus who lay the foundation for Human Rights in the Netherlands. It is his work, which made this country a safe haven for minorities and also an important multicultural economic force in the Golden Age. And this legacy of rationale and tolerance were the basis on which The Hague's Peace Conferences of 1899 and 1907 were held; the events where the first steps to codify international law were taken.

The prominent role of the Netherlands in the promotion of Human Rights is not overstated when we take into account the exceptional position this country has chosen to take in relation to international conventions and treaties. The Netherlands, as most know, will accept international law above its own; even before ratification.

It is for this reason that the Netherlands welcomes and actively cooperates with different national and international organisations and NGO's in the examination of our laws and policies against the backdrop of Human Rights.

However, while this is the case, it is prudent to consider that the results of these examinations are not always as satisfactory as we would expect. In the past years NGO's have found that the implementation of laws and policies are at odds with one or more Human Rights.

The mission of FORUM, the Dutch National Knowledge Institute for Multicultural Affairs, is to promote social cohesion, shared citizenship and a multi-ethnic society based on the principles of the Rule of Law, Human Rights and Equality of all citizens. For this reason we commissioned this research and report titled "Who's right(s): International monitoring of compliance with human rights of migrants in the Netherlands 2000-2008".

This report demonstrates that, despite good intentions, the implementation of laws and policies may be at odds with Human Rights. And that it takes time and political will before a government acknowledges this and adjusts legislation or policies that are not in accordance with human rights. The report also concludes that the efforts of (inter)national organisations, NGO's and media lack coordination.

FORUM applauds the good work of these organisations and hopes that their comments and recommendations will not fall on deaf ears. We await, with great expectations, the inauguration of the new National Institute for Human Rights.

Sadik Harchaoui

Chairman of the Board of Directors FORUM

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FORUM is an independent knowledge institute in the field of multicultural affairs from the perspective of the democratic constitutional state, social cohesion and shared citizenship. FORUM gathers knowledge in the broad field of integration, disseminates this and converts it into methods and products that can be used by policy makers and practitioners.

For further information: www.forum.nl/international

ISBN: 978-90-5850-4791

Publishers: Willem-Jan en René van der Wolf

Production/Lay-out: Jook van der Snel

Translated by: Wilkens c.s. Translators & Interpreters

Legal copy-editing by: R. Eertink, Editing Proofreading Translation

Published by:

 Wolf Legal Publishers (WLP)

P.O. Box 31051

6503 CB Nijmegen

The Netherlands

Tel: +31 (0)24-3551904

Fax: + 31 24 355 48 27

E-Mail: info@wolfpublishers.nl

www.wolfpublishers.nl

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Abbreviations

ABRvS	Administrative Law Division of the Council of State
AC procedure	Registration Centre procedure
ACVZ	Advisory committee for Alien Affairs
AD	Algemeen Dagblad
AI	Amnesty International
AMA	unaccompanied minor asylum seeker
AMV	unaccompanied minor alien
CAT	Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDA	Christian Democratic Party
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CEV	Commission for the Evaluation of the Aliens Act
CGB	Dutch Equal Treatment Commission
CPT	European Committee for the Prevention of Torture
CRC	Committee on the Rights of the Child
D66	Democraten '66
DJI	National Agency of Correctional Institutions
DJZ	Legal Affairs Department
EC	European Commission
ECRI	European Commission against Racism and Intolerance
ECSR	European Committee of Social Rights
EEA	European Economic Area
EC	European Community
EHRM	European Court of Human Rights
ESH	European Social Charter
EU	European Union
EUMC	European Monitoring Centre on Racism and Xenophobia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EVVM	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
FORUM	Institute for Multicultural Affairs
FRA	Fundamental Rights Agency
HRC	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
IND	Immigration and Naturalisation Service
IVBPR	International Covenant on Civil and Political Rights
LBD	National Bureau for Discrimination Cases
MAPP	Centre for Asylum seekers with Psychological Problems
Mvv	authorisation for temporary residence
NAV	Newsletter Asylum and Refugee law

NGO	non-governmental organisation
NJCM	Netherlands Legal Committee for Human Rights
NRC	NRC Handelsblad
OC-procedure	Detention Centre procedure
OHCHR	Office of the United Nations High Commissioner for Human Rights
PAVEM	Participation of Women from Ethnic Minorities
PR	public relations
PvdA	Labour Party (Partij van de Arbeid)
PvdD	Party for the Animals (Partij voor de Dieren)
PVV	Freedom Party (Partij voor de Vrijheid)
RAVA	Steering group Immigrant Women and Employment
RSJ	Council for the Application of Criminal Law and Juvenile Protection
RvS	Council of State
SP	Socialist Party
SRAN	Netherlands Foundation for Legal Aid in Asylum Cases
Stb.	Bulletin of Acts and Decrees
Stcrt.	Netherlands Government Gazette
UNHCR	United Nations High Commissioner for Refugees
VAJN	Dutch Association of Asylum Lawyers
VN	United Nations
VVD	People's Party for Freedom and Democracy (Volkspartij voor Vrijheid en Democratie)
Wib	Civic Integration Abroad Act
Win	Integration of Newcomers Act

Preface

by Kees Groenendijk

Why this research now?

This book describes a study into the viewpoints of international human rights organisations since 2000 on a number of aspects relating to the treatment of migrants in the Netherlands. It also explores reactions from the press and in political circles to these often critical viewpoints. Was the criticism taken to heart? Or was it considered incorrect, irrelevant or unusable?

Why are these questions particularly relevant now? Three circumstances illustrate the urgency of this subject. *Firstly*, government policy regarding immigrants has changed radically since 2002: from relatively liberal to extremely restrictive. Since the introduction of its ethnic minority policy in 1981, Dutch policy used to be a shining example in Europe of a rational government policy. It was a policy which kept track of the long term goals in a diverse and open society, enabled immigrants to actually participate and opposed stigmatisation and exclusion.

Since 2002, however, government policy has been dominated by fear and the call for restrictive measures, regardless of the actual effects of these measures. Rights have been curtailed, facilities replaced by coercion and sanctions. In many cases, civic integration has become synonymous with selection and exclusion. A relatively liberal policy was soon replaced by a policy involving many restrictions. The Netherlands shows little concern for the extreme position which our country has rapidly adopted in the EU in this area. A typical example is the civic integration examination abroad, introduced by the Netherlands in 2006. With the exception of Germany, which implemented a lighter version in 2007, the Dutch example has not yet been followed in any other EU member state. In 2008, France introduced French language courses abroad to migrant families, if necessary with follow-up courses in France. The British government decided not to introduce a language test abroad because of insufficient English language education in the countries of origin. Within the EU, Denmark resembles the Netherlands in its extremely restrictive policy. This is possible because the country does not have to comply with many of the EU regulations in this field. In 2007 the Danish legislator decided to follow the Dutch example, but the plan was abandoned by the Danish government in 2008. The relevant Act was passed but not implemented. It was decided to make it compulsory for migrant families to follow a Danish language course in Denmark. On this point, the Netherlands is fairly isolated in Europe.

A *second* circumstance which illustrates the urgency of this study is the fact that since 2002 subsequent governments have consciously been testing the boundaries of what is still permitted in this area according to the minimum norms adopted by the various human rights treaties. Minister Verdonk repeatedly stated in and outside of parliament that her citizenship policy was aimed at

consciously testing the boundaries of the permissible. We will see what happens. We'll just wait and see if we will be reined in by the Court in Strasbourg or in Luxembourg. This attitude not only applied to citizenship policy and family reunification, but also to asylum policy and the detention of aliens. Meanwhile, the European Courts have issued a number of judgements making it clear that human rights treaties and other European regulations set boundaries to democratic states in Europe and that the Netherlands has exceeded those minimum norms in recent years. Typical for this attitude and for the relevance of these treaties was the government's proposal in 2006 to make a distinction in the Civic Integration Act between born, naturalised and Antillean Dutch residents and to treat these three groups of citizens, based on ethnic origin, differently. Ultimately that part of the Bill was rejected in the Second Chamber as it was clearly in conflict with international and European rules against racial discrimination.

A *third* circumstance which also shows the relevance of international monitoring of compliance with human rights in the Netherlands is the remarkable consensus between the political parties which prevailed in the years after 2002. Despite differences of opinion about modalities, the most important measures were eventually supported by (nearly) all political parties. The definition of the problem, causes and the kind of measures which were therefore required was widely supported in parliament. As a result, there was less willingness to take the legitimacy of the measures and their effects seriously. With the disappearance or dysfunctioning of internal control mechanisms, the role for external control on the functioning of democracy in the Netherlands became more important. Human rights treaties make it clear that the majority is not always right in a democracy and that even widely supported decisions taken by representative bodies must fulfil certain minimum requirements. This particularly applies to the rights of minorities.

What has been the effect of that international monitoring of rules and policy in the Netherlands? This study highlights several effects of that monitoring but also shows that it is not easy to view those effects separately from the impact of the behaviour of other actors: national human rights organisations, MPs, advisory bodies, individual citizens and judges. Furthermore, those effects often only become visible in the longer term.

In the 1970s, I discovered that in the basement of Nijmegen University Library all official UN documents were kept. Here too were all the reports by the committee monitoring compliance with the UN covenant governing the elimination of racial discrimination (CERD). In these reports I read that, in response to criticism from that committee on the occurrence of racial discrimination in Dutch nightlife, in 1975 the Dutch representative announced that legislation on this point would be amended. The government had already made that same pledge to the Second Chamber back in 1973. The criticism and the announcement in Geneva had not produced a visible result in The Hague. A letter to Ed

van Tijn, then a member of the Second Chamber, about this strange discrepancy, resulted in him posing parliamentary questions on three occasions in 1979 and 1980.¹ The promised amendment to the implementation decree of the Alcohol Licensing and Catering Act was eventually implemented two years later (Stb. 1981, 292). In the draft minorities memorandum of that year, the government congratulated itself on this amendment. However, the change to the decree attached so many conditions to the imposition of a sanction that, as far as I know, no catering business ever lost its licence as a result of this regulation. But it did put the theme on the political agenda and various other sanctions were developed over the years. In particular, those sanctions applied by municipalities based on their licences appeared to have some effect.

For me, this was a good lesson that actual compliance with human rights treaties always meets with resistance and requires patience, and can only have any effect in the reality of today thanks to the active efforts of many different people and organisations, both in the Netherlands and abroad. In this study, Dominique van Dam explores whether this principle still applies thirty years later.

We are very grateful to FORUM, the Institute for Multicultural Affairs, for their cooperation.

¹ Appendix to Proceedings II 1973-1974, no. 255, 1978-1979, no. 1407, 1979-1980, no. 1220 and 1980-1981, no. 539.

Chapter 1. Background and structure

This research report focuses on international monitoring of Dutch immigration and integration policy, which also includes Dutch citizenship policy since the first Cabinet under Prime Minister Jan Peter Balkenende in 2002. On the one hand, government policy on this issue differed considerably from the policy pursued during the previous government's term in office. The new measures, which often received wholehearted support from the States-General, were sometimes significantly different from policy or legislation in neighbouring countries. On the other hand, scope for policy-making has been increasingly restricted by international standards and obligations during the past decades, particularly as a result of the series of measures implemented under EC law, which have been adopted since the Treaty of Amsterdam came into force in 1999. Most of these measures became binding upon the Netherlands with effect from 2004.

The Dutch government monitors compliance with international standards in a number of ways. If there are no relevant competent international authorities, the government sometimes leaves this monitoring to national authorities, such as the court or Parliament. However, international supervisory bodies have been established in many cases. The way in which these bodies perform their supervisory duties depends on the relevant treaty concluded. In some cases, the Contracting States have to report regularly to the supervisory body, who then publishes an opinion on compliance with the obligations arising under the treaty. In other cases, the relevant body (regularly) visits the Contracting State and subsequently publishes a report.

In other cases, supervisory bodies are also authorised to give a decision on individual or collective complaints on compliance with international standards. According to the European Convention on Human Rights (ECHR), persons and organisations may lodge complaints with an international court, the European Court of Human Rights, which can give a binding decision. Besides the European Commission, the European Court of Justice (ECJ) is also responsible for monitoring compliance with EC law. At the request of a Dutch court or of the European Commission, the ECJ can give a binding decision on the question of whether the Netherlands fulfils its obligations pursuant to the EC treaty and to the secondary EC legislation based on this treaty.

Private organisations are playing an increasingly significant role in monitoring compliance with international regulations, either as sources of information for international supervisory bodies or as supporters or initiators of procedures at international organisations or at international courts (as applicants, as legal counsel or as disinterested advisors in legal proceedings).

This research report primarily examines the criticism that international organisations have levelled at the new Dutch immigration and integration policy, and

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the responses to this criticism. How are reports on Dutch policy dealt with? How can we explain these responses? And what effects do such international viewpoints have in the Netherlands?

1.1 Assumptions

The first assumption is that the Netherlands regards itself as a country that faithfully fulfils its obligations under human rights treaties. The second assumption is that the Netherlands is viewed in the same light by other countries too. Both assumptions were recently confirmed when Jean-Paul Costa, president of the European Court of Human Rights, made the following observation during a speech in Leiden in May 2008:

‘The Dutch government has, it must be recognised, a very good record when it comes to executing judgments of the Court. In particular, when general measures – e.g. legislative reform – are called for. Equally important is the willingness of national courts to apply the Convention and the Strasbourg case law directly.’

This statement is certainly not a mere polite phrase; it must also have been inspired by the comparative perspective held by the president of the European Court of Human Rights, which deals with individual complaints from 47 Council of Europe member states.

The question is whether these general assumptions apply equally to all areas. With respect to certain areas or certain periods, they may possibly apply to a lesser extent, while the assumptions might be truer of some human rights than of others. For example, there is a remarkable discrepancy concerning the considerable importance that Dutch human rights policy attaches to other countries' compliance with the basic social rights in human rights treaties, even though the relevant provisions in these treaties have a limited significance in the Netherlands because some national courts do not consider them to have a direct effect, and consequently the Dutch government sometimes takes little note of such treaty provisions, since there is no effective judicial supervision.² Another possibility is that reactions to international criticism vary over time. The initial response is to adopt a defensive attitude, although this criticism is taken to heart after further consideration, and even results in changes in legislation or policy.

¹ J.P. Costa, *The Netherlands and the European Convention: A View from the Court*, Dutch Section of the International Commission of Jurists (NJCM) Bulletin 2008, pages 719-724.

² F.M.C. Flemminx, *‘De januskop van Nederland en de convergentie van mensenrechten onder het EVRM’* Netherlands Law Journal (NJB) 2008, pages 1572-1579.

1.2 Aim

The aim of this research was to discover any patterns in the reactions to international criticism, and to account for these if possible. We have also examined the nature of the role played by this criticism in political or public debates, as well as any intentional, non-intentional or maybe even counterproductive effects of the criticism. Furthermore, we have investigated a number of the relevant international organisations' experiences with respect to their reports on the Netherlands, and their responses to the results of this research. The latter took place during a conference held after the publication of this research report.

1.3 Research questions

This report focuses on three questions:

1. Which public or private international organisations explicitly and openly expressed a viewpoint on Dutch legislation or Dutch government policy with respect to immigration and the integration of immigrants?
2. What were the reactions to these viewpoints in Parliament, the government and the press in the Netherlands?
3. Have these public viewpoints resulted in any changes in the relevant policy or legislation?

1.4 Research methods

The research was carried out from September 2008 to the end of July 2009. Since the time and resources available for this research were limited, we had to impose certain restrictions on each of the three research questions. First of all, the little time at our disposal played a role. Our research concerned reports and other viewpoints openly expressed by international organisations or institutions between 2000 and 2008. We included 2000 and 2001 because we also wanted to obtain an impression of the reports published before the Balkenende I government came to power.

The answer to the first question has been limited to reports and statements published by the following 15 international institutions and organisations:

*United Nations*³

1. High Commissioner for Refugees (UNHCR).

³ The terminology has been borrowed from Parliamentary Papers II 2007-2008, 31 263, no. 1. The government does not use unambiguous terminology. The European Human Rights Agency's annual report for 2005 refers to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the Committee against Torture for short: it is sometimes referred to as the Anti-Torture Committee. Moreover, official government publications sometimes use the name Commission against Torture to describe the CPT. See e.g. Parliamentary Papers II 2007-2008, 31 263, no. 6 page 10. Another example can be found in Parliamentary Papers II 2008-2009, 31 001, no. 69, where the CRC is referred to as the UN Children's Rights Committee.

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2. Committee on the Elimination of Racial Discrimination (CERD).
3. Human Rights Commission.
4. Convention on the Rights of the Child (CRC).
5. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

*Council of Europe*⁴

1. European Committee for the Prevention of Torture (CPT).⁵
2. European Committee of Social Rights (ECSR).⁶
3. Commissioner for Human Rights.⁷
4. European Commission against Racism and Intolerance (ECRI).⁸
5. European Court of Human Rights.

European Union

1. Fundamental Rights Agency, formerly the European Monitoring Centre on Racism and Xenophobia (FRA, formerly EUMC).
1. European Court of Justice.

NGOs

1. Human Rights Watch.
2. Amnesty International.

Investigation of the viewpoints

We compiled the published viewpoints by consulting a number of digital databases, and we also consulted other sources in order to verify and supplement these viewpoints. When studying the relevant reports, we only examined those passages relating to Dutch policy on immigration and integration. For the viewpoints published by the relevant UN Committees, we consulted the database at the Office of the United Nations High Commissioner for Human Rights (OHCHR).⁹ In cases where the database did not give links to the documents in question, we were able to fall back on the UNHCR's Refworld database.¹⁰ We also used this database to compile the UNHCR's viewpoints. Finally, we asked

⁴ Different names are also used for the Council of Europe's organisations and institutions. One advantage to this Council's organisations and institutions (with the exception of the Commissioner for Human Rights), compared to the various UN commissions (with the exception of the UNHCR), is that the abbreviations are frequently used.

⁵ Terminology borrowed from Parliamentary Papers II 2007-2008, 31 263, no. 1, page 25.

⁶ E.g. Parliamentary Papers II 2004-2005, 29 941, no. 5, page 2.

⁷ Not to be confused with the United Nations High Commissioner for Human Rights.

⁸ Terminology borrowed from Parliamentary Papers II 2007-2008, 31 263, no. 1, page 25, see also Parliamentary Papers II 2001-2002, 27 223, no. 22 page 1.

⁹ 'Treaty body document search', tb.ohchr.org/default.aspx.

¹⁰ 'Refworld', www.refworld.org.

UNHCR Nederland to complete the list of viewpoints we had found in the Refworld database.

We took the Council of Europe's website as a starting point for viewpoints published by this Council's organisations.¹¹ This website can be used to access the websites of the Council's various organisations and institutions, and we verified this data by checking with the Refworld database mentioned above. In addition, we consulted the online knowledge bank at FORUM International Institute for Multicultural Affairs in Utrecht to obtain the selection of relevant rulings delivered by the European Court of Human Rights.¹²

For the viewpoints published by the two EU institutions (the FRA and the European Court of Justice), we took the European Union's portal site as our point of departure.¹³ This portal provides access to both these organisations' own websites. We verified this data by asking the FRA if any independent viewpoints on the Netherlands had been published in addition to the annual reports and the other comparative reports: this did not turn out to be the case. For the selection of relevant rulings delivered by the European Court of Justice, we used the FORUM online knowledge bank referred to above.

With respect to the two European Courts, we only examined the rulings in proceedings instituted from or against the Netherlands, in which such rulings were delivered from 2000 onwards. We compiled the viewpoints published by the two private organisations by consulting these organisations' websites,¹⁴ and likewise made use of the UNHCR database Refworld.org to verify and supplement these viewpoints.

Investigation of reactions in the press

Furthermore, we investigated whether the Dutch national daily newspapers devoted attention to international viewpoints during the month following publication of these viewpoints, and if so, to what extent. To this end, we used the LexisNexis electronic newspaper database, which includes the following Dutch newspapers: (1) *Het Algemeen Dagblad*, (2) *Het Financieele Dagblad*, (3) *NRC Handelsblad*, (4) *Het Parool*, (5) *Trouw*, and (6) *De Volkskrant*. In principle, we confined our research to the publication of articles during the first month after the reports or statements were communicated to the public. In some cases, we also examined a number of newspaper articles published before or after this period, although we were unable to carry out a systematic check due to the limited time available.

¹¹ 'Council of Europe', www.coe.int.

¹² 'FORUM', www.migratieweb.nl.

¹³ 'European Union', www.europa.eu/index_nl.htm.

¹⁴ 'Human Rights Watch', www.hrw.org and 'Amnesty International', www.amnesty.org.

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Investigation of reactions from politicians

We investigated reactions in parliamentary documents by studying Parliamentary questions, Parliamentary Papers and Proceedings: these are included in the official publications on the www.overheid.nl website. Our research focused on the two months after the viewpoints were published. If we came across any reactions outside this two-month period during our research, we examined these as well. In some cases we also looked at the longer term, although we did not conduct systematic research here.

Reactions in the longer term

We answered the third research question by carrying out a case study based on field research and literature search. The case study concentrated on the issue of the 'detention of aliens pending deportation'. For the purposes of this study, we contacted the Ministry of Justice, the National Agency of Correctional Institutions (DJI), the Council for the Administration of Criminal Justice and Youth Protection (RSJ), Amnesty International and the Dutch Refugee Council.

We also endeavoured to analyse longer-term reactions to the other issues wherever possible. To this end, we submitted draft chapters to organisations and individuals specialising in the (specific) fields of immigration and integration. We then asked them if the picture was complete, and whether they were aware of longer-term effects. However, in view of the limited time and resources at our disposal, we were unable to conduct systematic research into these effects.

We submitted the chapter on integration policy to two academics: one at the VU University Amsterdam and one at Leiden University. We showed the chapter on Dutch asylum policy to two academics at the Centre for Migration Law at Radboud University Nijmegen, as well as to the Dutch Refugee Council and the UNHCR office in the Netherlands. We submitted the chapter on the detention of aliens pending deportation to the Dutch Refugee Council and the UNHCR office in the Netherlands.

Limiting methodology

While compiling the data, it became evident that the press, politicians, law courts and literature all use different terms to refer to public international organisations. This might mean that responses from the press, politicians or the law courts were left out of our research by mistake. After all, the results of digital queries depend entirely on the search terms used, and we only used a limited number of variations on the organisations' names as search terms.

With respect to politicians' responses, it emerged during our research that often some time elapsed before parliamentary documents were posted on the www.overheid.nl website. This also affected the research results. Both restrictions mean that some of the reactions may not have been included.

1.5 Structure of the book

In the next chapter, we endeavour to provide insight into the way in which the various organisations execute their supervisory task. The international criticism of Dutch immigration and integration policy relates to different aspects of this policy.

After analysing the viewpoints, we arrived at four main themes:

1. integration policy;
2. policy against discrimination, racism, xenophobia and Islamophobia;
3. asylum policy;
4. detention of aliens pending deportation.

Dutch integration policy is examined in Chapter 3, while Chapter 4 deals with the international organisations' viewpoints on discrimination, racism, xenophobia and Islamophobia. Chapter 5 discusses international criticism of Dutch asylum policy, while Chapter 6 looks at the viewpoints on the detention of aliens in the Netherlands pending their deportation.

Besides the four themes listed above, we also examined the case law of two European Courts, the European Court of Human Rights and the Court of Justice of the European Communities. The case law of these Courts is discussed in Chapter 7. This section is relatively short compared to the other chapters. We included these organisations' viewpoints in our research because we assumed that the impact of the court rulings differs from the impact of other international organisations' viewpoints, partly as a result of mediation on the part of legal counsels.

The final chapter contains a brief summary and the main research findings. We conclude Chapter 8 with a number of recommendations for specific target groups.

Chapter 2. Overview of organisations and viewpoints

For this research, we looked at criticisms of Dutch immigration and integration policy. The viewpoints of fifteen different public and private international institutions and organisations were studied. This chapter reviews how and how often the various organisations made their viewpoints known in the period 2000-2008.

2.1 Public organisations

United Nations

The United Nations (UN) is an international organisation with over 190 member states. The organisation was founded in 1945 and is based in Geneva. It is a global organisation of governments which work together in the field of international law, global security, the preservation of human rights, the development of the world economy and research into social and cultural developments.¹

Within the framework of the UN, treaties have been signed. For some of these treaties or conventions, committees have been appointed to monitor that the contracting parties comply with the treaties. These UN committees regularly publish concluding observations or comments on compliance with the UN treaties.

Five UN committees

For this research, we studied the concluding observations and recommendations of the following five UN committees in the period 2000-2008:

1. Committee on the Elimination of Racial Discrimination (CERD);
2. Human Rights Committee;
3. Committee on the Elimination of Discrimination against Women (CEDAW);
4. Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
5. Committee on the Rights of the Child (CRC).²

These UN committees monitor compliance by the Kingdom of the Netherlands with the various treaties. For this research, however, we only studied the statements about Dutch immigration and integration policy. These statements only concern the European part of the Kingdom. Viewpoints relating to policy in the overseas regions of Aruba and the Netherlands Antilles were not included.

¹ www.dewereldvandevn.nl/de_verenigde_naties/vn_algemeen/vn_algemeen#dossierart89, last consulted on 18 June 2009.

² In total there are eight UN committees. Besides the UN committees mentioned, these are the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on Migrant Workers (CMW) and the Committee on the Rights of Persons with Disabilities (CRPD). The Netherlands did not ratify the treaties for which the last two committees were appointed. The UN Convention on migrant employees has not been signed by the Netherlands either.

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*The working method of UN committees*³

The various UN committees generally work in the same way. The periodic reports which the contracting parties have to submit form the basis for the concluding observations and recommendations of these committees. The frequency with which these parties are required to submit their reports varies per treaty.⁴ The Netherlands is consistently late in submitting its periodic reports. Out of the more than fifty reports which our country was required to submit until 2007, only one was submitted in time.⁵

The UN committees are not authorised to impose sanctions for this negligent approach. Based on the periodic reports, the relevant committee compiles a list of issues to which the contracting party must respond in writing. The report and the (written) reply to the questions are then discussed by the committee in one or more of its meetings. The UN committees then invite delegations from the contracting parties. After these meetings, the committee issues its concluding observations and recommendations. The UN committees are also allowed to use other information in order to supplement the information received from the government. This might be information from other UN committees, non-governmental organisations (NGOs), academics or the press.

Depending on when this information is received by the relevant UN committee, the list of issues may concern this supplementary information which was not provided by the State party.⁶ Sometimes the committee asks a contracting party to provide an interim report about a certain issue. In that case, the contracting party must provide a follow-up to the latest report. If this is not specifically requested, the contracting party must respond to the concluding observations and recommendations of the UN committee in the next periodic report. In principle, the dialogue is confidential and the reports as well as the resulting concluding observations and recommendations are only published by the committee if the contracting party agrees.

The concluding observations and recommendations of the UN committees all have the same structure. The criticism is constructive: after a brief introduction,

³ See fact sheet No. 30, 'The United Nations Human Rights Treaty System, An Introduction to the core human rights treaties and the treaty bodies'. In addition, the UN Committees each have their own fact sheets. The fact sheets can be consulted on the website of the Office of the United Nations High Commissioner for Human Rights, www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx, last consulted 22 June 2009.

⁴ The frequency with which contracting parties are required to submit their reports is included in the discussion of the individual committees.

⁵ See the questions posed by Member of Parliament Van Dam, Appendix to Proceedings II2006-2007, no. 1298. In his answer, the Minister obviously does not take into account that the Netherlands only reports to CERD once every four years, instead of every two years as prescribed.

⁶ Shadow reports are regularly drawn up and sent to the UN committee.

the positive aspects are first addressed. This is followed by the principle areas of concern and recommendations.⁷

We will now look at the five UN committees used in this research in more detail. We will try to outline how the different committees fulfilled their monitoring function relating to compliance by the Netherlands in the period 2000-2008. The five UN committees are:

1. Committee on the Elimination of Racial Discrimination (CERD);
2. Human Rights Committee;
3. Committee on the Elimination of Discrimination against Women (CEDAW);
4. Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
5. Committee on the Rights of the Child (CRC).

1. Committee on the Elimination of Racial Discrimination (CERD)

The first of the UN committees, the Committee on the Elimination of Racial Discrimination, was founded in 1969. The CERD monitors compliance with the International Convention on the Elimination of all Forms of Racial Discrimination. Based on this convention, the affiliated States are required to report every two years to the CERD on their compliance with the convention.

In the period 2001-2008, the CERD only produced two sets of concluding observations and recommendations in response to the reports submitted by the Netherlands regarding compliance with the International Convention on the Elimination of all Forms of Racial Discrimination. These appeared in 2001 and in 2004.⁸ The main reason for this is because the Netherlands submits the reports too late.

For this reason, the Netherlands combined the 13th and 14th report. The same applied to the 15th and 16th report. The tardy submission of the reports resulted in a reprimand from the CERD in 1998. In 2003, Art. 1 – then still the National Bureau for Discrimination Cases (LBD) – urged Minister of Foreign Affairs, Jaap de Hoop Scheffer, to improve compliance with the obligations pursuant to the Convention on the Elimination of all Forms of Racial Discrimination.⁹ On 3 March 2008, the Netherlands submitted a combined report of the 17th and 18th periodic reports.¹⁰ The CERD has yet to issue its concluding observations and recommendations on these reports.

⁷ The periodic reports can be consulted at www.ohchr.org.

⁸ In 2001 arising from the 13th and 14th periodic Dutch reports (CERD/C/304/ Add.104). In 2004 arising from the 15th and 16th periodic reports of the Netherlands (CERD/C/64/CO/7).

⁹ 'Nederland te laks bij VN-verdrag tegen rassendiscriminatie', www.art1.nl/artikel/6523-Nederland_te_laks_bij_VN-verdrag_tegen_rassendiscriminatie.

¹⁰ 17th and 18th reports (CERD/C/NLD/18).

2. *Human Rights Committee*

The Human Rights Committee, not to be confused with the Human Rights Council, was founded in 1976. The Human Rights Committee monitors compliance with the International Covenant on Civil and Political Rights. Usually abbreviated to ICCPR.

States parties are required to provide a report if requested to do so by the Human Rights Committee. According to the information on the website of the Office of the United Nations High Commissioner for Human Rights (OHCHR), this normally occurs every four years.

In the period 2000-2008, the Human Rights Committee only issued concluding observations and recommendations in response to a report submitted by the Netherlands about its compliance with the ICCPR on one occasion. The committee did that in 2001.¹¹ The third periodic report submitted by the Netherlands related to the 1986-1996 period and therefore goes back some time. In May 2007, the Netherlands submitted its fourth periodic report.¹² On 25 November 2008, the Human Rights Committee published a list of issues following the Dutch report, although the concluding observations and recommendations have yet to be adopted.

3. *Committee on the Elimination of Discrimination against Women (CEDAW)*

Since 1982, the Committee on the Elimination of Discrimination against Women has been responsible for monitoring compliance with the Convention in the Netherlands on the Elimination of All Forms of Discrimination against Women, which is sometimes simply referred to as the UN Women's Convention. In 2001 and 2007, the CEDAW issued concluding observations and recommendations regarding compliance with the convention by the Netherlands.¹³

4. *Committee Against Torture (CAT)*¹⁴

The fourth committee is the Committee Against Torture. This Committee was founded in 1987 and monitors compliance with the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In the Netherlands, this is also known as the *Anti-folterverdrag*.¹⁵

State parties are required to submit a report every four years regarding compliance with the convention. In the period 2000-2008, the CAT issued two sets of concluding observations and recommendations about compliance with the

¹¹ Third periodic report of the Netherlands (CCPR/CO/72/NET).

¹² Fourth periodic report of the Netherlands (CCPR/C/NET/4).

¹³ In 2000, CEDAW issued its concluding observations and recommendations regarding the second and third periodic Dutch reports (A/56/38). In 2007 concluding observations and recommendations regarding the fourth periodic report of the Netherlands (CEDAW/C/NLD/CO/4).

¹⁴ Since 22 June 2006, based on the optional protocol (OPCAT), it is also possible for the subcommittee to visit the countries. This subcommittee has not been included in the study.

¹⁵ There is no official Dutch translation for the various UN treaties, so different titles are used. This also applies to the other UN treaties.

Convention by the Netherlands, in 2000 and 2007.¹⁶ In 2000, the committee only issued one recommendation which was not related to immigration or integration and which is therefore disregarded. In 2007, the CAT made sixteen recommendations to the Kingdom of the Netherlands.¹⁷ Four of these explicitly addressed the Netherlands. Three recommendations are within the scope of this research. Besides these conclusions specifically aimed at the Netherlands, the CAT recommended including systematic information about age, gender and ethnic origin with regard to the asylum procedure (consideration 16) in future reports. We will discuss this recommendation in more detail in Chapter 5. The Netherlands is due to submit its next report on 30 June 2011.

5. *Committee on the Rights of the Child (CRC)*

Finally, there is the Committee on the Rights of the Child. This Committee (CRC) has been monitoring compliance with the implementation of the Convention on the Rights of the Child by the associated State parties since 1990. 193 states have ratified this convention.¹⁸ In the period under review, the CRC only issued concluding observations and recommendations about implementation in the Netherlands on one occasion (in 2004).¹⁹ In May 2002, the Dutch government submitted its report relating to the situation up to 1 October 2001. In the introduction of the second periodic report, the Netherlands also announced a shadow report by non-governmental organisations. This shadow report was (partially) subsidised by the Dutch government. On 22 May 2007, the Netherlands submitted its third periodic report.²⁰ On 27 March, the CRC published its concluding observations and recommendations. These concluding observations and recommendations are not included in the analysis as they were published after the research period.

(Semi) adjudication

In Chapter 1, we mentioned that international organisations can also fulfil their monitoring function in a different way, namely by issuing a judgement about compliance by a member state regarding complaints. Four of the five UN committees studied exercise this (semi) judicial task. Under certain conditions, the Human Rights Committee, CEDAW, CAT and CERD are authorised to give judgement on individual complaints claiming (alleged) violation of their rights under the relevant UN treaties. The main condition is that the States parties must expressly recognise the jurisdiction of the UN committees. This can be done by making a statement under the applicable treaty article or by accepting the relevant optional protocol. The Netherlands expressly recognised the juris-

¹⁶ Arising from the third periodic report submitted by the Netherlands (CAT/C/44/Add.4 A/55/44, paras.181-188) and arising from the fourth periodical report (CAT/C/NET/QO/ 4), adopted on 14 May 2007 at the 774th meeting (CAT/C/SR/774).

¹⁷ The Dutch report was submitted in 2004 and relates to the period 1995-2002.

¹⁸ www2.ohchr.org/english/bodies/crc/index.htm, last consulted on 18 June 2009.

¹⁹ Arising from the second periodic report submitted by the Netherlands (CRC/C/15/add. 227).

²⁰ The third periodic report was submitted by the Netherlands in 2007 (CRC/C/NLD/3).

diction of these four committees to deal with individual complaints against the Netherlands. The Office of the United Nations High Commissioner for Human Rights, which acts as the secretariat for these committees, received a total of 29 complaints against the Netherlands between 2000 and 2008.²¹ According to the information in its database, the CEDAW did not receive any complaints against the Netherlands in these eight years. The Human Rights Committee considered eighteen complaints in the eight year period. Of these eighteen complaints, the committee dismissed thirteen complaints, rejected four as unfounded and upheld one as founded. However the complaint upheld as founded does not fall within the scope of immigration and integration. In addition, in the period 2000-2008 the CAT considered ten complaints against the Netherlands. None of these complaints were upheld. The CERD handled one complaint. This was also dismissed.

Given the few complaints considered by the various UN committees (of which only one was upheld), we can conclude that this method of monitoring, at least for the Netherlands, plays a very limited role. For this reason, we will not consider the semi-judicial function of the UN committees any further.

Research on own initiative

The CAT and the CEDAW can initiate research in a certain State party of their own accord. In such cases, they must have reliable information that a member state is systematically violating the treaty. Also for this procedure, member states must explicitly recognise the legal authority of the committees on this point. During the research, neither the CAT nor the CEDAW appeared to have used this authority with regard to the Netherlands.²²

United Nations High Commissioner for Refugees (UNHCR)

Besides the concluding observations and recommendations of the above-mentioned UN committees, we also included the viewpoints of the United Nations High Commissioner for Refugees (UNHCR) in this research. The UNHCR is part of the United Nations and fulfils the tasks formulated in the Statute of the UNHCR. Moreover, pursuant to Article 35 of the 1951 Convention relating to the Status of Refugees, the UNHCR monitors compliance with this convention by the States parties. In addition, the UNHCR is involved in a more general sense in the protection of refugees.²³

In the period 2000-2008, the UNHCR made its views known on various aspects of Dutch immigration and integration policy. The UNHCR does so in the form of letters to the Dutch government, the parliament or as *amicus curiae* (friend of the Court) during hearings before the European Court of Human Rights.²⁴ The

²¹ 'Treaty body document search', tb.ohchr.org/default.aspx, last consulted on 18 June 2009.

²² For more information about this procedure, see fact sheet no. 30, pages 34-35.

²³ www.unhcr.org for more information about the mandate of UNHCR.

²⁴ The literally translation of *amicus curiae* is friend of the court. This refers to someone who is not a party to a case but who volunteers to offer information to assist the court in deciding a matter before it.

UNHCR does not have its own database on these kinds of interventions which makes it more difficult to gain insight into these viewpoints. The viewpoints discussed in this report are derived from various databases, such as Refworld and Vluchtweb.

Council of Europe

The Council of Europe was founded in 1949 and is considerably smaller than the United Nations. The Council of Europe consists of 47 member states and has its headquarters in Strasbourg.

The Council of Europe was founded to:

- Defend human rights, pluralist democracy and the rule of law;
- To prepare and negotiate treaties at European level aimed at aligning social and legal practices in the member states and creating awareness of a European identity based on shared values and which transcends cultural differences.²⁵

Like the United Nations, the Council of Europe has committees which monitor compliance with the treaties by the member states. Other organisations are engaged in compliance with various treaties entered into in the framework of the Council of Europe.

We looked at the public viewpoints of:

- A. the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);
- B. the European Committee of Social Rights (ECSR);
- C. the Human Rights Commissioner;
- D. the European Commission against Racism and Intolerance (ECRI).

Like the United Nations, the Council of Europe has committees which monitor compliance with the treaties by the member states. Other organisations are engaged in compliance with various treaties, entered into in the framework of the Council of Europe.

We looked at the public viewpoints of five institutions of the Council of Europe:

1. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);
2. European Committee of Social Rights (ECSR);
3. Human Rights Commissioner;
4. European Commission against Racism and Intolerance (ECRI).

We also looked at the case law of:

1. European Court of Human Rights.

²⁵ For more information about the Council of Europe, see the website www.coe.int/t/nl/com/about_coe/.

Working method

The working method of the organisations mentioned above differs significantly from that of the various UN committees. These organisations do not base their reports on the periodic reports submitted by the governments, as is the case with the UN committees. Rather, they are based on information collected during their visits to the countries of the Council of Europe.

Exceptions are the European Committee of Social Rights (ECSR) and the European Court of Human Rights. Like the various UN committees, the ECSR (mainly) relies on written reports from the country in question. Incidentally, the number and nature of the visits vary per organisation. There is no uniform working method and the reports each have their own structure. We will now look at the working method of each organisation in further detail. As we will see, the European Court of Human Rights plays a unique role.

1. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT)

The European Committee for the Prevention of Torture monitors compliance with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1989). In order to fulfil its task as a monitoring organisation, the CPT regularly visits member states of the Council of Europe.

In the period 2000-2008, the CPT paid two visits to the Netherlands, the first in February 2002 and the second in June 2007. During its visit in 2002, it did not visit any detention centres for foreign nationals. The findings of that visit are therefore not relevant to this research. During its visit to the Netherlands from 4 to 14 June 2007, the CPT talked to various people at the Ministry of the Interior and Kingdom Relations, the Ministry of Justice, the National Agency of Correctional Institutions, the National Ombudsman, the Dutch section of Amnesty International and the Dutch section of Defence for Children.²⁶

The CPT sends its findings via reports to the Dutch government. In principle, these reports are confidential, unless the relevant member state requests publication of the report (and the response from the state to the report). The reports of the CPT visits to the Netherlands are public.²⁷

2. European Committee of Social Rights (ECSR)

The European Committee of Social Rights is responsible for ensuring compliance with the European Social Charter (1961). Every year, the committee issues its conclusions. As with the UN committees, these are based on periodic na-

²⁶ For a full overview, see appendix II to the report, p. 53-54, www.cpt.coe.int/documents/nld/2008-02-inf-eng.pdf.

²⁷ www.cpt.coe.int/en/visits.htm, last consulted on 22 June 2009.

tional reports.²⁸ In these conclusions, the committee uses a series of articles from the European Social Charter to establish whether domestic law and policy complies with the European Social Charter.²⁹

In the period 2000-2008, the ECSR reports on several occasions that Dutch law or policy is not consistent with the European Social Charter. One example is its family reunification policy. Because the Netherlands requires both partners to be at least 21 years of age, it applies a qualifying period of three years before allowing family formation. According to the ECSR, this stipulation is not consistent with Article 19(6) of the European Social Charter.³⁰ The same applies to requirements imposed in the Netherlands on earnings with regard to family reunification. Since 2000, the ECSR has judged that the requirements imposed by the Netherlands on the origin of earnings are inconsistent with Article 19(6) of the European Social Charter. Six years later, the ECSR came to the same conclusion.³¹

We have chosen to limit the research to four themes. Family reunification policy does not fall under any of these. We will therefore not discuss the conclusions of the ECSR any further in this report.

3. Human Rights Commissioner

In September 2008, the European Human Rights Commissioner paid an assessment visit to the Netherlands for the first time in order to determine the effectiveness of human rights protection in the Netherlands. During his visit, the Human Rights Commissioner met members of government, members of parliament, the Council of State, the National Ombudsman, the Dutch Equal Treatment Commission, the Dutch UNHCR representative and 35 non-governmental organisations. The Human Rights Commissioner also visited various detention and reception centres.³²

A report of the visit totalling 180 paragraphs with 37 recommendations was published in March 2009.³³ Although formally speaking, the report falls outside the research period, we used it as far as possible in the research because it re-

²⁸ The Netherlands submitted at least three reports in the period 2000-2008. One report covering the period 1 January 2001 through 31 December 2004, one report covering the period 1 January 2004 through 31 December 2006 and a report about the amended European Social Charter.

²⁹ The conclusions of the ECSR in the years 2000, 2001 and 2002 can only be consulted by article in the 'European Social Charter Database' hudoc.esc.coe.int/esc/search/. The conclusions from 2003 can be consulted both by article in the European Social Charter Database and by country and by year.

³⁰ Conclusion arising from compliance with Article 19(6) European Social Charter of 1 January 2001, c-15-1-en-add, repeated in 2002 and 2004. The conclusion of 31 October 2006 (c-18-1-en2) indicates that the criterion has now been abandoned and that the situation in the Netherlands is now in agreement with the European Social Charter.

³¹ Conclusion arising from compliance with Article 19(6) European Social Charter of 31 October 2006 (c-18-1-en2).

³² See Appendix 1 to the report of the Human Rights Commissioner for the full list.

³³ www.coe.int/t/commissioner/Activities/visits_en.asp, last consulted on 18 June 2009.

lates to a visit which took place in 2008 and we were aware of the visit through a press release on the website of the Human Rights Commissioner.

Unlike the reports by the CPT, reports drawn up by the Human Rights Commissioner are not confidential. His website states:

'The reports are presented to the Council of Europe's Committee of Ministers and the Parliamentary Assembly. Subsequently they are published and widely circulated in the policy-making and NGO community as well as the media.³⁴

The Human Rights Commissioner generally revisits the states several years after the official visit. Again a report is drawn up, which is widely distributed via the website of the Human Rights Commissioner.³⁵

4. *European Commission against Racism and Intolerance (ECRI)*

The European Commission against Racism and Intolerance was set up in 2002 by the Council of Europe's Committee of Ministers.³⁶ This is an independent monitoring body entrusted with the task of combating racism, racial discrimination, xenophobia, antisemitism and intolerance in greater Europe from the perspective of the protection of human rights, in the light of the European Convention on Human Rights, its additional protocols and related case law.³⁷ Like the CPT, the ECRI visits the countries in the Council of Europe. It does this in cycles of four to five years. Every year, it visits nine or ten countries.

'ECRI's reports are not the result of inquiries or testimonial evidences. They are analyses based on a great deal of information gathered from a wide variety of sources. Documentary studies are based on an important number of national and international written sources. The in situ visit allows for meeting directly the concerned parties (governmental and non-governmental) with a view to gathering detailed information. The process of confidential dialogue with the national authorities allows the latter to propose, if they consider it necessary, amendments to the draft report, with a view to correcting any possible factual errors which the report might contain. The national authorities may request, if they so wish, that their viewpoints be appended to the final report of ECRI.³⁸

³⁴ www.coe.int/t/commissioner/Activities/mandate_en.asp, last consulted on 18 June 2009.

³⁵ In the NJCM bulletin of 2009, extensive attention is devoted to the report. Editorial, 'Nederland door de ogen van de Europese Mensenrechtencommissaris', NJCM?bulletin 2009, no. 3, page 245.

³⁶ Res. (2008)8 on the Statute of the European Commission against Racism and Intolerance of 13 June 2002.

³⁷ See Art. 1 of the ECRI Statute and www.coe.int/T/E/human_rights/Ecri/1-ECRI/.

³⁸ See preface to third report issued in 2008 (CRI (2008) 3), www.coe.int/ecri.

Before the ECRI publishes a report, it gives the government of the visited state the opportunity to respond. In the period 2000-2008, the ECRI published two reports about the Netherlands: the second and the third report. These reports were adopted by the Council of Europe's Committee of Ministers on 13 November 2001 and 12 February 2008, respectively.³⁹ At the request of the Netherlands, the viewpoint of the Dutch government was appended to the third report.

The 2001 report consists of two parts. It starts with an 'overview of the situation' and then proceeds to address specific issues of concern. The third periodic report (from 2008) consists of three parts. In the first part, the ECRI discusses the follow-up measures after the second report. In the second part, it focuses on a new development: the tone of the political and public debate. In the third part, the report concentrates on Islamophobia as a special issue.

5. *European Court of Human Rights*

The European Court of Human Rights is a judicial body which makes binding decisions based on complaints of violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Court thus contributes to monitoring compliance with this Convention. The Court is based in Strasbourg. The relevant jurisprudence of this Court is discussed in Chapter 7. For this research, we looked at cases against the Netherlands and at cases in which the Netherlands was involved as a (third) party.⁴⁰

European Union

Since 2007, the European Union consists of 27 member states. It is only since the entry into force of the Treaty of Amsterdam in 1999 that the European Union has had Community authority in the field of migration and the legal status of citizens from countries outside the European Union. Since the entry into force of the Treaty of Amsterdam, various measures have been adopted in this field. Most of these measures became binding for the Netherlands in 2004.

We will now discuss two European Union institutions: the Fundamental Rights Agency (FRA) and the Court of Justice.

1. *European Monitoring Centre on Racism and Xenophobia (EUMC/FRA)*

Every year, the European Monitoring Centre on Racism and Xenophobia published a comparative report on the policy of European Union member states on racism, xenophobia and intolerance. In 2007, the EUMC was incorporated into

³⁹ The second report (CRI (2001) 40) relates to ECRI's visit to the Netherlands from 5-7 June 2000. The third report 2008 (CRI (2008)3) relates to ECRI's visit in March 2007 and has 41 pages, www.coe.int/jecri.

⁴⁰ The judgements of the European Court of Human Rights can be consulted via "HUDOC", www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/. For this study, however, the Migratie-web database was used as the main source; HUDOC only played a supplementary role.

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the Fundamental Rights Agency (FRA).⁴¹ The aim of the FRA is to publish EU-wide reports for policy-makers in the institutions of the European Union and its member states.

When the FRA was created, it was decided not to draw up country reports, partly to avoid overlap with the Council of Europe (for example, the ECRI).⁴² The FRA mainly relies on reports from national contact points – a government department or a private organisation in a member state – (*RAXEN National Focal Points*). Besides the annual reports, the FRA publishes themed reports. We asked the FRA if any other reports had been published which were relevant to our research, in addition to the annual reports. According to the FRA, this was not the case.

2. *Court of Justice*

Together with the European Commission, the Court of Justice is responsible for monitoring compliance with EC law. At the request of the European Commission, the Court of Justice can issue a binding judgement about whether the Netherlands fulfils its obligations pursuant to the EC Treaty and any secondary EC legislation based on that treaty. Furthermore, at the request of a Dutch judge, the Court can explain the meaning of regulations in EC law. With the Treaty of Amsterdam which came into force in 1999, a new title IV was incorporated in the EC Treaty. This title provides the European Union with the basis for accepting binding measures on the legal position of foreign nationals from outside the EU, the 'third country nationals'.

2.2 Private organisations

Amnesty International

Amnesty International is one of the biggest non-governmental organisations for human rights.⁴³ It has been involved in human rights since 1961.⁴⁴ Every year, Amnesty International publishes a book about the human rights situation worldwide. The yearbooks 2000 up to and including 2004 contain no mention of the Netherlands. Yearbook 2005 devotes attention to the human rights situation in the Netherlands for the first time in nine years. The Netherlands is also mentioned in 2006 and 2007.

Besides the yearbook, Amnesty International regularly publishes specific reports about different countries. In June 2008, Amnesty International published a specific report about the detention policy in the Netherlands. This was the first time that Amnesty International published such a report about the Netherlands.

⁴¹ Both the EUMC and the FRA report can be consulted via www.fra.europa.eu/fraWebsite/products/publications_reports/annual_report/annual_report_en.htm.

⁴² According to the organisation Art. 1.

⁴³ www.amnesty.nl/encyclopedie_lemma/1405.

⁴⁴ For more information about Amnesty International: www.amnesty.org en www.amnesty.nl.

Besides the yearbook and the specific reports, Amnesty International publishes public statements about a range of subjects on its website www.amnesty.org. In the period 2000-2008, these public statements included statements about the Schiphol fire and deportation of the survivors. This research, does not discuss these public statements.

Amnesty International documents can be consulted via the library at www.amnesty.org. Amnesty International publishes standard press releases on its website to publicise its viewpoints. The organisation also has a Dutch section. In the period 2002-2008, this section wrote over 27 letters to various Dutch government members. In addition, it provided a response to the evaluation of the Aliens Act 2000. In this report, we will not further explore these letters and responses from the Dutch section of Amnesty International, as this research is aimed at international viewpoints. However, we will make one exception. As discussed in Chapter 7, criticism about Dutch detention policy was initially expressed at international level, but the follow-up seems to have been taken up by the Dutch section. In the context of the case study, we therefore include the letters of the Dutch section in the research.

Human Rights Watch (HRW)

Like Amnesty International, Human Rights Watch is a big international non-governmental human rights organisation. The organisation was created in 1988 from the merger of Helsinki Watch (1978) and Americas Watch (1980).⁴⁵ Like Amnesty International, Human Rights Watch publishes reports on a range of subjects related to human rights.

In the period 2000-2008, Human Rights Watch adopted various viewpoints about Dutch immigration and integration policy. In April 2003, the human rights organisation published a detailed report about the Dutch asylum procedure. In May 2008, HRW published a report about the Dutch Civic Integration Act Abroad. The organisation also writes various letters to the State Secretary and Ministers of Foreign Affairs, Justice and Integration. Each report and each letter is announced through a press release on its website.⁴⁶ On this site, Human Rights Watch clearly indicates the importance it attaches to media interest in its publications.

⁴⁵ For more information about the Human Rights Watch: www.hrw.org.

⁴⁶ www.hrw.org.

Main events 2000-2008

- 2002 Minister for Alien Affairs and Integration advocates expulsion of “young criminal Moroccans with a Dutch passport”
- 2003 New strict naturalization test into force; 50% reduction of persons naturalized
- 2005 Bill to extend grounds for withdrawal of Dutch nationality of persons with dual nationality; withdrawn in 2007
- 2006 Introduction of ‘integration exam abroad’ as a condition for admission of family members from most non-EU countries; sharp reduction of visa requests for family reunification
- 2006 Withdrawal of Dutch nationality of Ayaan Hirsi Ali, Member of Dutch Parliament
- 2007 Integration Act enters into force: compulsory integration exam after entry; most immigrants have to pay for courses; administrative, financial and immigration law sanctions; sharp reduction of new participants in language and integration courses
- 2007 Bill on expulsion of young Dutch nationals of Antillean origin; Bill is withdrawn after eleven months
- 2008 Several amendments of the 2007 Integration Act; government resumes payment for courses

Chapter 3. Integration and citizenship policy in the Netherlands

3.1 Viewpoints adopted by international organisations

If we look at international organisations' criticism of Dutch integration policy, which includes citizenship policy, we see that three of the organisations we have investigated openly took a stand against Dutch integration policy between 2000 and 2008. These organisations are the United Nations High Commissioner for Refugees (UNHCR), the European Commission against Racism and Intolerance (ECRI), and Human Rights Watch (HRW). We will be examining these organisations' positions in this chapter.

United Nations

United Nations High Commissioner for Refugees (UNHCR)

The United Nations High Commissioner for Refugees expressed its views on Dutch integration and citizenship policy on two occasions between 2000 and 2008. The first time was in June 2004 with respect to the Outline Policy Memorandum on Integration,¹ and the second time was in June 2006 concerning the legislative proposal for the Civic Integration Abroad Act ("Wib").²

Outline Policy Memorandum on Integration

On 29 June 2004, the UNHCR sent a letter on the Outline Policy Memorandum on Integration to the Integration and Asylum spokesperson for the Standing Committee for Justice.³ This memorandum was under discussion in the Second Chamber at that moment. In its letter, the UNHCR said that it was favourably disposed towards Minister Verdonk's plan to exempt refugees' partners and families from the civic integration examination abroad.⁴ However, the UNHCR was less positive about the fact that, generally speaking, the memorandum did not recognise refugees' specific situations. According to the UNHCR, the Outline Policy Memorandum did not sufficiently fulfil the obligation to facilitate the integration of refugees: this obligation arises under Article 34 of the Geneva Convention on Refugees.

¹ Parliamentary Papers II 2003-2004, 29 543, no. 2.

² Parliamentary Papers II 2005-2006, 30 308, no. 2.

³ Letter dated 29 June 2004, comprising 2 pages, 'Dutch Refugee Council Portal', www.vluchtweb.nl

⁴ Directive 2003/109/EC, OJ L251, explicitly stipulates in Article 7 subsection 2 para 2 that member states may only apply the conditions for integration as referred to in Article 7 subsection 2 para 1 with respect to refugees' families after family reunification has been granted to the relevant persons. In my opinion, the fact that refugees' families are exempt from the civic integration examination is therefore a direct result of Community law.

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Civic Integration Act

In June 2006, the UNHCR put forward comments on the bill for the Civic Integration Act.⁵ The organisation once again drew attention to refugees' specific situations, and proposed that special attention be devoted to six points during the debate on this bill:

1. facilities for making integration easier;
2. financial consequences for refugees;
3. commencement of integration;
4. exemption from the obligation to integrate or from administrative penalties;
5. refusal to grant a residence permit for an indefinite period;
6. facilitating naturalisation and limiting the costs of such naturalisation.

The UNHCR cited positive as well as negative points in the (proposed) integration policy for refugees. On the one hand, the organisation was pleased that Minister Verdonk did not plan to keep refugees at the reception facilities during the entire integration procedure; on the other hand, the UNHCR indicated that 'the facilities provided do not appear to meet the Dutch State's responsibility to facilitate the integration of refugees into society as specified in the Qualification Directive'. The UNHCR further stated that 'integration facilities must always be made available to refugees'. The organisation proposed including a provision in the law stating that municipalities must provide integration facilities for refugees in all cases, even if the refugees in question hold a residence permit for an indefinite period.⁶

Council of Europe

European Commission against Racism and Intolerance (ECRI)

The European Commission against Racism and Intolerance (ECRI) devoted attention to Dutch integration and citizenship (III) policy in its second report in 2001, as well as in its third periodic report in 2008. These reports criticised the Civic Integration (Newcomers) Act, the Civic Integration Abroad Act, and the tone of the debate on integration.

Civic Integration (Newcomers) Act/Civic Integration Abroad Act

Dutch integration policy underwent a number of changes between 2000 and 2008. The Civic Integration (Newcomers) Act ("Win") took effect on 30 September 1998. Unlike the regulations which had previously been in force, the Win made it compulsory for refugees to participate in integration programmes: those who did not take part in these programmes could incur a fine.

⁵ Comments made by the UNHCR on the bill relating to the regulations governing integration into Dutch society (Civic Integration Act), June 2006, comprising 5 pages (www.vluchtweb.nl). It is not clear whether these comments are addressed to the government or to Parliament.

⁶ The UNHCR proposed amending Article 17 of the bill, which sets out the municipal offer to provide integration to specific groups.

The ECRI dealt with the Win in its second periodic report in 2001.⁷ ‘The ECRI urges the Dutch authorities to carefully monitor the social effects of this element of compulsion’.

The ECRI referred here to the changed policy of participation in integration programmes.

In its third periodic report published at the beginning of 2008, the ECRI pointed out that the compulsory nature of integration courses had considerably increased since its last report, although the Commission did not draw any direct conclusions from this. The ECRI did however call on the Dutch government to supervise the new integration measures strictly. These measures were introduced with the Civic Integration Abroad Act and the Civic Integration Act in order to monitor the consequences of increasing the charges for applying for a residence permit, as well as the effects of the civic integration examination abroad.

According to *Art. 1*, the Dutch national association for the prevention and combating of discrimination on all grounds, the ECRI’s report stated that the Civic Integration Abroad Act ‘is not consistent with international principles of equal treatment’.⁸ But this report only contained the ECRI’s recommendation to the Dutch authorities to ‘review the Civic Integration Abroad Act from the point of view of its conformity with the prohibition of discrimination on grounds of nationality, notably as concerns the system of exemptions’.⁹

We may therefore conclude that the ECRI questioned conformity with international principles of equal treatment, although the Commission formulated this in diplomatic terms.

Integration as a two-way process

A second issue, which was discussed in the second as well as the third periodic report published by the ECRI, was integration as a two-way process. In its second periodic report, the Commission urged the Dutch authorities to ensure that integration programmes fitted in with the relevant refugees’ personal circumstances as much as possible. The ECRI emphasised here that integration is a two-way process: the Commission was of the opinion that this approach should be reflected in Dutch integration policy. The ECRI made a further reference to this in its third report.

‘ECRI welcomes the fact that the Dutch authorities have repeatedly confirmed their understanding of integration as a two-way process, involving both majority and minority communities. ECRI considers, however, that

⁷ ECRI, Second Periodic Report on the Netherlands, Strasbourg, 13 November 2001, point 22, www.coe.int/t/e/human_rights/ecri.

⁸ D. Houtzager, ‘*Internationale kritiek op Wet inburgering buitenland terecht*’, 15 May 2008, www.art1.nl.

⁹ ECRI, Third Periodic Report on the Netherlands (ECRI (2008) 3), Strasbourg, 12 February 2008, points 57 and 58. This report may be perused via www.coe.int/t/e/human_rights/ecri.

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this approach has not been reflected in the concrete integration measures taken since ECRI's second report, which have been aimed essentially at addressing actual or perceived deficiencies among the minority population.'

'In ECRI's opinion, a credible policy at central government level in the Netherlands, which attempts to address with comparable energy and determination the integration deficit of the majority population, for instance in terms of genuine respect for diversity, knowledge of different cultures or traditions or as concerns deep-rooted stereotypes about cultures and values, is still lacking.'¹⁰

The Commission recommended

'that the Dutch authorities genuinely reflect in their policies the idea of integration as a two-way process.'

'To this end, ECRI strongly recommends that the Dutch authorities develop a credible policy at central government level to address the integration deficit among the majority population.'¹¹

The tone of the integration debate

In its third periodic report, the ECRI pointed out that the Dutch public debate had focused on integration and measures for promoting integration since the publication of the second ECRI report. The Commission observed that the tone of this debate was a negative one, and concluded that

'there has been a dramatic change in the tone of political and media debate in the Netherlands around integration and other issues relevant to ethnic minority groups.'¹²

The ECRI expressed its concern about this development and urged the Dutch authorities to take the lead in promoting a

'public debate on issues of integration and other issues of relevance to ethnic minority groups that avoids polarisation, antagonism and hostility among communities.'

and in which the stereotyping of cultures in particular must be guarded against. The ECRI was also of the opinion that

¹⁰ Ditto, point 55.

¹¹ Ditto, point 61.

¹² Ditto, p. 35 et seq.

‘in order to further emphasise the integration responsibilities of the majority population,(..)this focus against discrimination should be explicitly and consistently presented to the public as forming an integral part of integration policy.’¹³

Private organisation

Human Rights Watch (HRW)

Besides the United Nations High Commissioner for Refugees (UNHCR) and the European Commission against Racism and Intolerance (ECRI), Human Rights Watch (HRW) also gave its opinion on Dutch integration and citizenship policy between 2000 and 2008. In May 2008, HRW published a report entitled ‘The Netherlands: Discrimination in the Name of Integration. Migrants’ Rights under the Integration Abroad Act.’¹⁴

In this 40-page report, HRW advocated *inter alia* abolition of the civic integration examination abroad and decreasing the income requirement in the event of family reunification.

According to HRW, the civic integration examination abroad did not contribute to the integration of immigrants. HRW argued that this examination delayed admittance to the Netherlands and therefore slowed down integration. In addition, according to HRW, the integration requirement involved a risk of alienation from society because it created the impression that family members were not welcome.

Like ECRI, Human Rights Watch also raised the issue of exemption policy. The obligation to take the civic integration examination abroad is linked to the obligation to apply for an authorisation for temporary stay (“MVV”), a visa for family reunification, at the Dutch Embassy in the applicant’s country of origin. Immigrants from Australia, Canada, Japan, New Zealand, South Korea and Switzerland are exempt from the obligation to apply for an MVV. Under the Civic Integration Abroad Act, such immigrants do not have to take a civic integration examination before coming to the Netherlands. Grounds given for this exemption are that demanding a civic integration examination in such cases would create administrative problems, and that immigrants from these countries do not usually have any difficulties in integrating.

However, while the ECRI called on the Dutch government to test its integration policy, and especially its exemption policy, in relation to discrimination on the grounds of nationality, HRW took the view that the civic integration examination abroad did indeed violate international human rights. According to HRW, the

¹³ Ditto, point 56.

¹⁴ ‘Human Rights Watch’, www.hrw.org/backgrounder/2008/netherlands0508/.

arguments advanced by the Dutch government were not sufficient to justify this discrimination.

Furthermore, HRW established that people of Turkish and Moroccan origin were disproportionately affected by these integration measures. The organisation also advised the Dutch government to charge a fee for the examination once only instead of charging for each new attempt.

3.2 Attention from the press

On investigation, it emerged that six Dutch daily newspapers had devoted attention to the ECRI's two reports and to the Human Rights Watch report. These newspapers did not mention the UNHCR's views regarding the implementation of the new Dutch integration and citizenship policy.¹⁵

ECRI reports

This meant that both the ECRI's reports were in the news. With respect to the second report, the newspapers did not discuss the viewpoints on integration and citizenship policy. The press only dealt with the Commission's criticism of Dutch anti-discrimination policy, especially discrimination on the Dutch labour market; we will be examining this issue in the next chapter. The length of the articles varied considerably; in order to clarify these differences in length, we have stated the relevant number of words each time in the notes to this section.

However, the newspapers did devote attention to the ECRI's criticism of Dutch integration policy after the Commission's third report was published in 2008. *NRC Handelsblad*'s headline on 12 February 2008 ran: 'European Council denounces tone of integration debate',¹⁶ while *Trouw*,¹⁷ *Het Financieele Dagblad*¹⁸ and *De Volkskrant*¹⁹ followed suit the next day. *NRC Handelsblad* published a further article on the report the day after that,²⁰ and a number of newspapers continued to elucidate the report until the end of May.²¹ In August, *Trouw* discussed the government's response to the ECRI report. This newspaper wrote:

¹⁵ It should be noted here that the search term UNHCR resulted in a large number of hits. We looked at the titles of the articles about the UNHCR, but we were unable to conclude from these that the newspapers published articles on the letter dated June 2004 or the remarks made in June 2006.

¹⁶ 'European Council denounces tone of integration debate', *NRC Handelsblad*, 12 February 2008, front page: 264 words.

¹⁷ 'Dutch policy gives Islamophobia a free rein', *Trouw*, 13 February 2008, page 9: 472 words.

¹⁸ 'Watchdog: growing Islamophobia in the Netherlands', *Het Financieele Dagblad*, 13 February 2008, page 4: 58 words.

¹⁹ 'Racism considerably on the increase', *De Volkskrant*, 13 February 2008, National News, page 3: 478 words.

²⁰ 'The return of differentiation to the Netherlands; Reactions to Council of Europe's report on tough tone in integration debate', *NRC Handelsblad*, 13 February 2008, page 2: 720 words.

²¹ 'A random selection from a few days' news about Muslims, by Elma Drayer', *Trouw*, 14 February 2008, page 11: 591 words; 'Rose-coloured spectacles and wishful thinking', *NRC Handelsblad*, 14 February 2008, Opinion, page 9: 489 words; 'This week in 3 minutes', *Het Financieele Dagblad*, 16 February 2008, Weekend page 18: 492 words; 'Daily exclusion of Muslims an insidious poison; VVD

‘In a response to the ECRI’s criticism, which the cabinet also sent to Parliament yesterday, the Ministers write that the sharp tone may even contribute to a satisfactory debate. According to (Minister of Housing, Communities and Integration) Ella Vogelaar, this sharp tone has resulted in problems being placed on the agenda: “Issues on integration which are difficult and maybe even awkward are now being put forward and dealt with”.²²’

In May 2008, the ECRI was also referred to in articles on the Human Rights Watch report on the civic integration examination abroad. *Trouw* wrote:

‘ECRI, the European Commission against Racism and Intolerance, had already arrived at the same conclusion earlier on. (...) “Dutch politicians were quick to sweep the ECRI’s warning under the carpet. I hope that the government in The Hague will examine the matter more closely now. But if they ignore this report as well, lawyers and judges will know how to act,” says legal sociologist Kees Groenendijk, of Radboud University Nijmegen.²³’

On 16 May 2008, *De Volkskrant* also published an article on the findings of HRW and the ECRI in the “Forum” section. This article, entitled ‘More criticism for the Netherlands’, lashed out at the authors of the ECRI report,²⁴ although the newspaper added that HRW’s findings were not entirely unexpected.

‘However, there is still a difference between the two documents. The ECRI’s report was a chaotic piece of bungling that drew conclusions after a number of random ‘working visits’, without quoting any sources, but HRW did its job more thoroughly. No allegations have been made without reference to reports studied or relevant legislation, and full details of contacts with the ministers involved are given.’

HRW Report

A number of newspapers also devoted attention to the HRW report. On 15 May 2008, an article appeared in *Trouw De Verdieping* entitled ‘Integration exam discriminatory: abolish it!’ *NRC Handelsblad* published an article under the

dismisses report as “allegations from the left”, *Het Parool*, 18 February 2008, page 17: 842 words; ‘Extremists more influenced by poverty than by Islam; Professor Rik Coolhaas, advisor to the European Commission, says that the Netherlands is in error with integration debate’, *NRC Handelsblad*, 19 February 2008, page 3: 685 words; ‘Furtive sniggers at reprimand for the Netherlands; criticism in European report on treatment of Antillean youngsters creates commotion on Curaçao’, *NRC Handelsblad*, 20 February 2008, page 3: 610 words; ‘Sharp debate does not lead to hatred of Muslims’, *Trouw*, 27 February 2008, Podium, page 8: 804 words; ‘Integration exam discriminatory: abolish it!’, *Trouw*, 15 May 2008, pages 6-7: 337 words; ‘Sharp debate actually does help integration’, *Trouw*, 20 August 2008, pages 4-5: 402 words.

²² ‘Sharp debate actually does help integration’, *Trouw*, 20 August 2008, pages 4-5: 402 words.

²³ ‘Integration exam discriminatory: abolish it!’, *Trouw*, 15 May 2008, pages 6-7: 337 words.

²⁴ ‘More criticism for the Netherlands’, *De Volkskrant*, 16 May 2008, page 11: 759 words.

headline: 'Integration test discriminates', and even referred to the HRW report on the front page. *Het Parool* also wrote an article on the report: 'Admittance procedure discriminatory'. On 16 May 2008, one day after the report was published, *De Volkskrant* printed two articles: 'Dutch integration exam discriminates' and 'More criticism for the Netherlands'.²⁵ On 16 May 2008, *Trouw* wrote: 'Vogelaar has no doubts about civic integration abroad', while *Spits* also published an article on the report, entitled 'Integration exam discriminates'. Several international newspapers even discussed the HRW report as well.²⁶ In its article 'More criticism for the Netherlands' (16 May 2008), *De Volkskrant* complimented HRW on the way in which it compiled its report. 'However, this kind of approach doesn't guarantee an intelligent conclusion,' editor Nausicaa Marbe commented.

3.3 Attention in political circles

In this section we will be examining whether the political debate devoted attention to the views on Dutch integration and citizenship policy described above, and if so, to what extent. Who started the debate: the government, Parliament, or individual MPs? And was the attention given to any of the viewpoints during the political debate influenced by the reports in the press?

Letters from the UNHCR

As far as we can ascertain, the letter from the UNHCR (June 2004) on the Outline Policy Memorandum on Integration did not give rise to a political debate,²⁷ although politicians did pay attention to the UNHCR's comments (June 2006). During the debate in the Second Chamber on the bill for the Civic Integration Act, GroenLinks MP Naïma Azough asked Minister of Aliens Affairs and Integration Rita Verdonk for her response to the UNHCR's criticism. Azough was of the opinion 'that the facilities provided do not appear to fulfil the Dutch State's responsibility to make it easier for refugees to integrate.' She also wanted to know the Minister's views on the UNHCR's proposal to amend Article 17 of the

²⁵ More criticism for the Netherlands', *De Volkskrant*, 16 May 2008, page 11: 759 words.

²⁶ 'Rights group attacks Dutch immigration policy', Associated Press Online, 15 May 2008; 'Rights group criticizes Dutch immigration policy as discriminatory', Associated Press Worldstream, 15 May 2008; 'Human Rights Watch criticizes Dutch government on immigration policy', Associated Press Worldstream, 15 May 2008; 'Netherlands: Discrimination in the Name of Integration', Targeted News Service, 15 May 2008; 'Rights group criticizes Dutch immigration policy as discriminatory against émigrés from developing countries', The Associated Press, 15 May 2008; 'Human Rights Watch criticizes Dutch Government on immigration policy', Turkish Daily News, 16 May 2008; 'World-NGO condemns 'discriminatory' Dutch language test', Morning Star, 16 May 2008; 'Islamofascism in the Netherlands: Dutch fail to protect individual rights', The Washington Times, 21 May 2008, AD page 18: 878 words; 'Rights: Dutch offer a discriminatory welcome', Inter Press Service, 24 May 2008.

²⁷ It should be noted here that the search term 'UNHCR' results in far more hits than the search terms 'ECRI' or 'HRW'. Since tracing all the relevant documents was an impossible task, we searched for the title of the document in question. In addition, we used the search term 'Outline Policy Memorandum on Assimilation'. This means that attention may well have been devoted to the UNHCR's letters in the political debate, although we did not find any references to this on the Internet.

bill.²⁸ But Minister Verdonk did not respond to Azough's questions during this debate, nor have we been able to find any reaction from the Minister in later documents.

On 27 June 2006, MPs Mirjam Sterk (CDA), Ursie Lambrechts (D66), Jeroen Dijsselbloem (PvdA) and Tineke Huizinga-Heringa (ChristenUnie) tabled an amendment to modify Article 17 in such a way that municipalities would have to provide all persons entitled to asylum with integration facilities, including those with residence permits for an indefinite period.²⁹ Although this proposal corresponds with the UNHCR's proposal in its letter dated June 2006, the official documents do not disclose that the organisation's comments in this letter gave rise to the amendment. Be that as it may, the amendment was included in the Civic Integration Act.

ECRI

Both the ECRI reports came up for debate in political circles, although this debate did not start until two months afterwards. The debate on the second ECRI report mainly focused on the ECRI's views on Dutch anti-discrimination policy, not on the organisation's opinions on Dutch integration and citizenship policy. For this reason, we will not be examining politicians' reactions to the second ECRI report in more detail in this chapter.³⁰

On 21 May 2008, the third ECRI report was discussed during a general consultation on the Annual Memorandum on Integration Policy for 2007-2011. During this consultation, MP Cynthia Ortega-Martijn (ChristenUnie) asked members of the cabinet to give their opinions on this ECRI report.³¹ On 19 August 2008, Minister of Housing, Communities and Integration Ella Vogelaar sent a letter containing her response to the President of the Second Chamber.³²

In her letter, Minister Vogelaar expressed her appreciation of the ECRI's work. With respect to the substance, the government's response primarily concentrated on 'the deterioration in the climate regarding public opinion on Muslims since 2000'. The Minister also specified what steps the government was already taking to combat racism and discrimination. The government admitted that the debate was intensifying: 'In the government's view, the debate has (however) resulted in a considerable increase in the urgency with which problems and solutions are placed on the agenda. (...)'.³³ Furthermore, the government indicated that:

²⁸ Proceedings II 2005-2006, no. 95, pages 5845-5874.

²⁹ Parliamentary Papers II 2005-2006, 30 308, no. 85, altered amendment tabled by MP Sterk et al. in substitution for the one printed under no. 33.

³⁰ See the following chapter.

³¹ Parliamentary Papers II 2007-2008, 31 268, no. 7, page 2.

³² Parliamentary Papers II 2007-2008, 30 950, no. 12.

³³ Ditto, page 3.

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'since a good command of the Dutch language is essential for newcomers to enable them to participate in society, they now have to comply with the obligation to integrate, for example.'

The government's response did not discuss the ECRI's specific recommendations for (monitoring) the Civic Integration Act as a mutual recognition process. In October 2008, the General Committee for Housing, Communities and Integration and the Standing Committee for the Interior and Kingdom Relations held consultations with Minister Vogelaar on the government's reaction to the third ECRI report. During these general consultations, the Minister said that although the report did hold a mirror up to Dutch policy from the human rights angle, she nevertheless did not agree with the ECRI's views on a number of points, especially the implementation of the Civic Integration Act. Minister Vogelaar did not specifically indicate on which points she disagreed with the ECRI. She said:

'We discussed this endlessly during the drafting of the Civic Integration Act. A number of recommendations have been made in respect of this Act, and we have established that the Act does not violate the ECHR. And as far as I'm concerned, the line we've taken is clear, even if experts and lawyers do maintain that the act contravenes the ECHR.³⁴

HRW

On the day on which the HRW report on the Dutch Civic Integration Act was published, MP Sadet Karabulut (SP), supported by GroenLinks, asked the Minister of Housing, Communities and Integration and the Minister of Justice to give a written response to the HRW report.³⁵ The ministers sent this letter on 17 June 2008. The following day, MP Boris van der Ham (D66) put questions to Minister Vogelaar. Van der Ham asked the Minister what she thought of certain specific conclusions drawn by HRW, and more particularly, he asked her opinion of the discriminatory effect and the costs of the civic integration examination, and the fact that the civic integration examination abroad constituted an obstacle to integration instead of promoting it. The Minister responded in June 2008.³⁶ Since her answers summarise the aforesaid letter dated 17 June 2008, we will only examine the letter here.

In this letter, which was also written on behalf of Secretary of State for Justice Nebahat Albayrak, Minister Vogelaar stated that she did not agree with a number of HRW's conclusions. The Minister also criticised the quality of the report, and indicated that HRW had based its conclusions on combined research data. She argued that there was a danger that this would lead to the wrong conclusions being drawn. However, since this method is normally a commendable

³⁴ Ditto, no. 13, page 23.

³⁵ Proceedings II 2007-2008, no. 84, pages 5923-5924.

³⁶ Proceedings II 2007-2008, no. 2687, page 5423.

one in scientific research, it is unclear what the Minister actually meant by her criticism.

HRW responded to Minister Vogelaar's letter to the Second Chamber a month later by sending an extensive letter to the Minister. In this reply, HRW dwelt on the exemption of persons from certain countries of origin, why speaking English was not considered sufficient, and the disproportionate effect of the Act on Turkish and Moroccan migrants in particular.³⁷

In its report, HRW states that the Netherlands would serve as a better example within the EU if it pursued a modified integration policy which did not discriminate on the grounds of nationality and which was in conformity with international treaties. Minister Vogelaar's reaction was as follows:

‘The Netherlands already (pursues) an integration policy that is in conformity with European and international legal treaties.’³⁸

According to the Minister, and in contrast to HRW's conclusions, the civic integration examination abroad does not make any illegal distinction on the basis of nationality. In support of her statement, the Minister cited recommendations made by the Advisory Committee on Aliens Affairs (“ACVZ”). The main argument in favour of the Minister's conclusion seemed to be that those immigrants who were exempted from the obligation to apply for an MVV came from countries that – in the Minister's opinion – are comparable with the Netherlands in a socio-economic and societal sense, and who therefore have a head start with respect to other aliens from non-EU member states (known as third-country nationals). The Minister added that knowledge of English was also an important factor, since this would facilitate integration in the Netherlands.

It is remarkable that the Minister used the ACVZ's recommendations to justify her dismissal of the criticism, since the Committee's recommendations did not comment on the compatibility of exemptions on the grounds of nationality with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The Minister pointed out that HRW only referred to migrants' origins, whereas the migrants in question all wanted to join their partners in the Netherlands. In connection with this, she added that the Civic Integration Abroad Act (Wib) applied to all Dutch citizens who wanted to bring their partners to the Netherlands, with the exception of EC nationals.³⁹ We may conclude from this that the Minister did not consider that there was any question of illegal distinction on the basis of nationality, since Dutch citizens' families were also subject to the Wib.

³⁷ Letter from Holly Cartner, Executive Director of the HRW's Europe and Central Asia Division, dated 16 June 2008.

³⁸ Parliamentary Papers II 2007-2008, 29 700, no. 56, page 3.

³⁹ Ditto, page 4.

In contrast to HRW, Minister Vogelaar was moreover of the opinion that the civic integration examination abroad did not set disproportionately stringent requirements for Turkish and Moroccan migrants. She based this conclusion on data from the Civic Integration Examination Monitor in April 2008. From this data, it emerged that 37% of the candidates were of Turkish and Moroccan origin, and that the examination pass rate for these groups barely deviated from the average pass rate. The Minister said that HRW's conclusion that the civic integration examination slowed down migrants' integration was premature, and added that she first wanted to await the results of the evaluation of the Civic Integration Abroad Act. According to the Minister, the HRW report

'merely assesses legal equality with a biased focus on immigrants who have to apply for an MVV. Unfortunately, Human Rights Watch does not take into consideration that it is in new migrants' own interests to prepare themselves for the Dutch language and Dutch society before they come to the Netherlands, nor what effect this can have on these migrants' (civic) integration in the Netherlands.'

The Minister explicitly stated that she did not intend to put forward proposals to repeal the Civic Integration Abroad Act or to abolish the examination fees for people who had to re-sit the examination. However, she did say that she would take the examination fees into account during the evaluation of the Civic Integration Abroad Act, as well as the question of how this Act related to Article 8 of the ECHR in practice.⁴⁰ HRW extensively discussed the Minister's response in an open letter dated 15 July 2008; this letter can be perused on her website.

3.4 The Wib on the political and public agenda

In the preceding sections, we looked at short-term reactions to international attitudes expressed by the press and politicians. The ECRI's third periodic report and the HRW report did not escape the notice of the daily papers we investigated, and both reports attracted attention in the political debate as well. The relevant politicians did not commit themselves to introducing any specific policy changes.

Integration has been one of the Minister of Housing, Communities and Integration's policy areas since 2007. Minister Vogelaar, who was also speaking on behalf of the Secretary of State for Justice, stated that she did not endorse HRW's conclusions. She added that some of these conclusions were too premature, and that she first wanted to await the results of the evaluation of the Civic Integration Act Abroad.

⁴⁰ Ditto, page 6 and Parliamentary Papers II 2008-2009, 31 143, no. 37, page 4.

The external investigations for the comprehensive evaluation of the Act were published in July 2009.⁴¹ According to the Directorate-General, international criticism was included in the evaluation of the Act, and no policy changes had taken place to date. The Directorate-General added that any alterations had likewise been included in the evaluation, and the Minister clearly stated this in her response to the HRW report as well.

A motion was tabled in the Second Chamber which was intended to abolish the distinctions between countries of origin outside the EU when applying the Wib. However, this motion was rejected.⁴² As a result of the HRW report, Open Society Justice Initiative started looking for an appropriate pilot case that could serve as an example of the nationality issue in order to submit it to the European Court of Human Rights. After it emerged that *Art. 1* (the Dutch national association for the prevention and combating of discrimination on all grounds) had also written a letter on the Wib to the United Nations Committee on the Elimination of Racial Discrimination (CERD) in 2007, *Art. 1* and Open Society Justice Initiative decided to pool their resources. Although Justice Initiative placed a notice appealing for pilot cases in the professional journal *Migrantenrecht*, hardly anyone responded to this. However, a lawyer eventually came forward at the beginning of June 2009 and reported that certain proceedings were pending which might be interesting to take as a pilot case.⁴³ Incidentally, *Art. 1* has not received any reply from the CERD to this very day.

3.5 Effect of the criticism

It emerged that the six Dutch daily newspapers we investigated completely ignored the UNHCR's viewpoints, although the printed media did discuss the ECRI's reports and HRW's report. A possible explanation of this discrepancy might be the relevant international organisations' publicity policies: the UNHCR does not issue press releases on its interventions, whereas HRW does.

If we look at reactions from politicians, we notice that attention in the national daily newspapers was not a critical factor when answering the question of whether international criticism formed part of the political debate. After all, the UNHCR's viewpoints were not discussed in the newspapers we investigated. The proposal made by the UNHCR in June 2006 to provide integration facilities to all asylum seekers was included in the Civic Integration Act after MPs tabled an amendment to this effect. However, we were unable to deduce from the official documents whether this amendment was a direct result of the UNHCR's letter.

⁴¹ Parliamentary Papers II 2008-2009, 32 005, no. 1.

⁴² J.H. van der Winden, *Wet inburgering in het buitenland*, The Hague: SDU Uitgevers 2006, page 78.

⁴³ NOTICE: Wib and discrimination, *Migrantenrecht* 2008, page 199. For an overview of court decisions on the Wib, see C.A. Groenendijk's note in *Rechtspraak Vreemdelingenrecht* 2008, 50.

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Reports in the press are only one of the means of ensuring attention in the parliamentary debate. Another way to do this is to send communications directly to Members of Parliament or the cabinet. This is the UNHCR's normal procedure, which ensures that MPs are kept informed of the UNHCR's viewpoints. In this case, a number of MPs apparently found the UNHCR's letter sufficient justification for tabling a motion and asking the Minister for her reaction.

As far as the ECRI was concerned, the press only dealt with certain points in the organisation's criticism. This raised the question of how the press obtains its information, but unfortunately the available time for research turned out to be too short to answer this question. The government's response also only discussed part of the criticism: the government primarily indicated what initiatives it had already taken. This could be explained by the diplomatic language used in the ECRI's conclusions and recommendations. This makes it difficult to obtain a satisfactory idea of the government's compliance with these conclusions and recommendations.

With respect to the HRW's report, it is remarkable that the press devoted a great deal of attention to this report, and that politicians also extensively discussed the criticism during the political debate.

Were the viewpoints publicly adopted by the UNHCR, the ECRI and HRW on Dutch integration and citizenship policy responsible for changes in legislation and policy? Apart from the above amendment to the Civic Integration Act after the UNHCR put forward its suggestion, this has not been the case to date. Although the ECRI's reports came up for discussion, this seems to be the only response. The same applies to the HRW's report, which was discussed in great detail by the Minister of Housing, Communities and Integration, but it has not resulted in any (proposals for) amendments to policy or legislation to date. This state of affairs might well change after the comprehensive evaluation of the Civic Integration Abroad Act has been carried out, since the Minister considered the drawing of certain conclusions – such as the conclusion on the examination fees – to be premature, because the evaluation had not yet been completed. Minister Vogelaar initially rejected HRW's viewpoint (that the civic integration examination abroad constituted an illegal distinction based on nationality), thereby referring *inter alia* to the Advisory Committee on Aliens Affairs. *Art. 1* however stated that this point would be included in the comprehensive evaluation of the Act. Unfortunately, we cannot say very much about the effect of the international organisations' criticism until the Act has been evaluated.

Main events 2000-2008

- 2001 Strong anti-Muslim sentiments after 11/9; arson of mosques and Islamic primary schools
- 2002 Murder of Pim Fortuyn, leader of LPF party with clear anti-Muslim program; his LPF party receives 17% of the votes at the Parliamentary Elections two weeks after the murder
- 2003 Increase of maximum penalties for some forms of racial discrimination in Penal Code
- 2004 Murder of Theo van Gogh
- 2006 Discontinuation of Act obliging employers to survey and if necessary improve share of immigrant workers in their companies (SAMEN Act)
- 2008 Introduction of Bill on municipal anti-discrimination offices

Chapter 4. Dutch policy on discrimination, racism, xenophobia and Islamophobia

4.1 Viewpoints adopted by international organisations

In this chapter, we discuss international criticism. We look at six international organisations which responded to Dutch policy between 2000 and 2008. Policy aimed at combating discrimination and racism as well as manifestations of xenophobia and Islamophobia.

The following organisations were involved:

United Nations

1. Committee on the Elimination of All Forms of Discrimination against Women (CEDAW);
2. Committee on the Elimination of Racial Discrimination (CERD);
3. Committee on the Rights of the Child (CRC);
4. Human Rights Committee (HRW);

Council of Europe

5. European Commission against Racism and Intolerance (ECRI);

Private organisation

6. Amnesty International.

United Nations

1. CEDAW

Discrimination

The Committee on the Elimination of All Forms of Discrimination against Women specifically monitors compliance with the Convention on the Elimination of All Forms of Discrimination against Women. In 2001, the committee observed fact that, despite government efforts, discrimination against women from migrant groups still persisted. It referred to *multiple discrimination*, based both on their sex and on their ethnic background, in society at large and within their communities, particularly with respect to education, employment and violence against women.¹ The CEDAW expressed its concern and urged the Dutch government to take effective measures. In 2007, the continued existence of discrimination in and of this specific group of women led to the same conclusion from the CEDAW.² Furthermore, in the same year CEDAW expressed its concern about the existence of gender-role stereotypes in the labour market. The committee urged the Netherlands to undertake research into the impact of gender-role stereotyping for the effective implementation of all the provisions of

¹ A/56/38 (supp) par. 205 bis, via tb.ohchr.org/default.aspx?country=nl.

² CEDAW/C/NLD/CO/4, par. 27, via tb.ohchr.org/default.aspx?country=nl.

the Convention.³ The committee was further concerned that many women were unable to qualify for independent residence permits because of stringent requirements in Dutch law and policy.⁴ The committee specified several points of concern. Firstly, the Dutch requirement that female victims of domestic violence must press charges against their partners before they could be considered for an independent residence permit. Secondly, the requirement that women must follow expensive integration courses and pass an integration test. The third point of concern was increasing the income requirement for family reunification. The CEDAW was also concerned that, with the exception of female genital mutilation, sexual and domestic violence was not recognised generally as grounds for asylum. It also urged the Netherlands to take measures to eliminate discrimination of women. The committee also asked the Netherlands to conduct impact assessments of the law and policies and to include data and analyses in its next report. This report was to include information about the number of women who were granted a residence permit as well as how many women were granted asylum status on the grounds of domestic violence.⁵

Racism and xenophobia

In 2001, the CEDAW expressed its concern about the manifestation of racism and xenophobia in the Netherlands. It urged the government to eliminate xenophobia and racism by increasing its efforts to prevent acts of racism or xenophobia in the Netherlands. In 2007, the CEDAW expressed its concern again, this time about the persistence of racism in the Netherlands, particularly against women and girls. The committee urged the Dutch government to do more to prevent racism.⁶

2. CERD

Discrimination

In 2001 and 2004, the Committee on the Elimination of Racial Discrimination also expressed its concern about discrimination in the labour market. The CERD did not restrict itself to the position of women, but observed inadequate protection of ethnic minorities against discrimination in general in the labour market. It recommended the Netherlands to take effective policy measures to provide a true reflection of ethnic minorities in the labour market. According to CERD, the abolition of the Employment of Minorities (Promotion) Act might have negative consequences for the participation of minorities in the labour market.⁷ In the years referred to above, the committee also expressed its concern about the representation of ethnic minorities in the police force.⁸ The CERD observed that a disproportionate percentage of people belonging to a minority group left the

³ Ibid., par. 15 and 16.

⁴ Ibid., par. 27.

⁵ Ibid., par. 28.

⁶ Ibid., par. 27 and 28.

⁷ Report 2001 (CERD/C/304/Add.104), par. 12, report 2004 (CERD/C/64/CO/7), par. 13.

⁸ Ibid., par. 13, *ibid.*, par. 15.

police force. The CERD urged the government to create a police force which reflected the total population.

Another point of concern was the situation of de facto racial segregation in schools in some parts of the country. This concern is expressed in the concluding observations of both 2001 and 2004. In 2001, the CERD urged that this segregation should be reduced and that a multicultural education system should be promoted. In 2004 the committee regretted that no reference was made in the Dutch report to Article 3 of the Convention in relation to segregation. It invited the Netherlands to provide information in its next periodic report about action undertaken on this point.⁹

More generally, the CERD expressed its concerns in 2004 about manifestations of discriminatory attitudes towards ethnic minorities. It recommended the promotion of general awareness of diversity and multiculturalism at all levels of education, paying particular attention to respect for the cultural rights of minorities. According to the committee, the Netherlands must take effective measures to facilitate the integration of minority groups in Dutch society.¹⁰

Racism and xenophobia

In 2004, the CERD also expressed its concerns about the occurrence of racist and xenophobic incidents, particularly of an anti-Semitic and Islamophobic nature. The committee urged the Dutch government to continue monitoring all tendencies which might give rise to racist or xenophobic behaviour and to combat the negative consequences of such tendencies.¹¹

3. Human Rights Committee

Like the CEDAW and the CERD, in 2001 the Human Rights Committee of the United Nations also adopted a viewpoint concerning Dutch efforts to combat discrimination of minority groups in the labour market. It welcomed recent government legislative and policy efforts aimed at increasing participation of ethnic minorities in the labour market. At the same time, however, the committee indicated that the Netherlands still had to achieve some important results. It also expressed its concern about the underrepresentation of children from ethnic minorities in higher education.¹² The Human Rights Committee further urged the Netherlands to provide information about results achieved in practice.

4. CRC

In 2004 the Committee on the Rights of the Child noted that the Netherlands had taken important measures to combat discrimination. Where the CEDAW

⁹ Report 2004, par. 12.

¹⁰ *Ibid.*, par. 10.

¹¹ *Ibid.*

¹² *Ibid.*, par. 14.

had concerns about women, the CRC expressed its concerns about children. The committee observed the persistence of discrimination of children from ethnic minorities and the children of asylum seekers.¹³ The CRC also expressed its concern about segregation in schools. The committee requested the Netherlands to do more to combat discrimination and to develop a proactive strategy for this purpose.¹⁴

Council of Europe

5. ECRI

As a monitoring body for human rights, the European Commission against Racism and Intolerance specialises in issues relating to racism and intolerance. As mentioned earlier, the ECRI issues reports about the members of the Council of Europe every four or five years. These issues fully reflect the theme discussed in this chapter. The 2001 report contained 59 considerations. The 2008 report contained 147. The scope of this research does not permit discussion of all the points mentioned by the ECRI. We will therefore discuss the main findings and recommendations.

The 2001 report consisted of two parts: an overview of the situation and issues of concern. The 2008 report consisted of three parts. Firstly, the follow-up measures after the second report; secondly the tone of the political and public debate and finally Islamophobia as a special issue.

Discrimination

In its periodic report of 2001, the ECRI referred to the persistence of discrimination in the Netherlands. It also mentioned the labour market as a specific area and one that required urgent attention.

‘ECRI believes that employment is one of the areas where a more active role of the Dutch authorities in the enforcement of legal antidiscrimination provisions (...) would have more impact.’¹⁵

Like the CERD, in 2001 ECRI devoted attention to the representation of ethnic minorities in the police force.

‘Emphasis is also put on the need to ensure that the police service reflect, in a durable manner, the multicultural reality of the Dutch society.’

Incidentally, the ECRI acknowledged that the Netherlands had previously developed initiatives to expand the representation of ethnic minorities in the police

¹³ Par. 30, CRC also refers to the Conclusions of CEDAW on this matter.

¹⁴ Par. 31.

¹⁵ Par.50.

force. Apparently, these initiatives had been insufficient. More generally, the committee expressed its concern about the general climate regarding asylum seekers and immigrants, which, according to the committee, sometimes resulted in manifestations of hostility towards these people.

Racism, xenophobia and Islamophobia

In its second and third reports, the ECRI noted the persistence of racism and xenophobia and the related problems. According to the committee, the effectiveness of legislation aimed at combating racism and discrimination was limited. This was mainly due to problems with enforcement. In 2001, the ECRI therefore recommended that the Dutch authorities take further action to combat racism, xenophobia, discrimination and intolerance in a number of areas.

In the same report, the ECRI urged improvement in the effectiveness of the implementation of the criminal law provisions in force in the field of combating racism and discrimination, in particular with respect to enforcement. The (announced or undertaken) initiatives of the Netherlands in this area were apparently insufficient.

In its third report, the ECRI also pointed to the fact that, despite them not (ultimately) being implemented, controversial policy proposals led to discrimination of ethnic minorities.

‘The Muslim, and notably the Moroccan and Turkish, communities have been particularly affected by these developments, which have resulted in a substantial increase in Islamophobia in both the political arena and other contexts. The climate of opinion around members of other groups, notably Antilleans, has also clearly worsened, as reflected in policies and practices targeted at them in different fields. The situation of Roma and Sinti groups has not yet been given the necessary attention at central government level.¹⁶

Private organisation

6. Amnesty International

In April 2008, Amnesty International noted that the responsibility for developing anti-discrimination policy had been delegated to the municipal authorities. Research by Amnesty International has shown that less than ten percent of the municipalities have developed policy aimed at combating discrimination in general, while less than twenty percent of the municipalities have developed policy to combat discrimination in certain areas. Amnesty International there-

¹⁶ Summary of report.

fore urged the Netherlands to develop anti-discrimination policies at both local and national levels and to implement, monitor and evaluate these policies.¹⁷

4.2 Attention from the press

In the month after the introduction of Dutch policy concerning discrimination, racism, xenophobia and Islamophobia, the six national daily newspapers failed to devote any attention to the criticism of UN committees CEDAW, CERD, Human Rights Committee and CRC. However, they all responded to the ECRI reports and the criticism of Amnesty International about the discrimination and racism policy of the municipalities.

ECRI

On 13 November 2001, the day of its publication, Trouw devoted two articles to the second ECRI report: one article in the *Binnenland* (Home) section and one in *de Verdieping* (In Depth).¹⁸ Four newspapers followed their example a day later. The articles in Het Parool, De Volkskrant and Algemeen Dagblad were virtually the same.¹⁹ However, we observe a difference in the priority given to the report. De Volkskrant and Algemeen Dagblad published the short version of the article on pages 19 and 21. By contrast, Het Parool placed the contribution on page 3. In its article, NRC Handelsblad also noted that the National Association of Anti Discrimination Agencies and Centres questioned the ECRI figures. According to board member T. Cheijn, the Netherlands appeared to score badly, but that was because the Netherlands registers reports of discrimination better.²⁰ On 15 November 2001, an article followed in Het Financieele Dagblad.²¹ Besides the specific point of concern of the ECRI, the newspaper also devoted attention to the position and concern of the committee. The committee felt that the Dutch police should recruit more migrant officers. It expressed its concern about the 'general climate for asylum seekers and immigrants', because of the frequent manifestations of hostility towards these groups.

Five of the six national newspapers investigated featured the third ECRI report of 12 February 2008. NRC Handelsblad and Het Parool did so immediately on the day the report was published. Trouw, Het Financieele Dagblad and De Volkskrant followed a day later. Trouw and NRC Handelsblad devoted more

¹⁷ 'Netherlands: Submission to the UN Universal Periodic Review: First session of the HRC UPR Working Group 7-18 April 2008', repeated in the Yearbook 2008.

¹⁸ 'Discriminatie op de arbeidsmarkt; Europees rapport inventariseert stand van zaken van jaar geleden', Trouw 13 November 2001, p. 4; 'Politie moet alerter zijn op discriminatie', Trouw 13 November 2001, page 16.

¹⁹ 'Racisme op de werkvloer', Het Parool 14 November 2001, page 3; 'Racisme in Nederland vooral op werkvloer', De Volkskrant 14 November 2001, page 19; 'Te veel racisme op werkvloer', Algemeen Dagblad 14 November 2001, page 21.

²⁰ 'Racisme op werk blijft', NRC Handelsblad 14 November 2001, page 3.

²¹ 'Veel discriminatie op Nederlandse arbeidsmarkt', Financieele Dagblad 15 November 2001, page not indicated.

attention to the report on 14 February 2008. In the subsequent weeks, the report was regularly featured in the newspapers reviewed.²² *Algemeen Dagblad* was the only one of the six daily newspapers which failed to devote any attention to the report.

Amnesty International

On 28 May 2008, *De Volkskrant* devoted a short paragraph to the yearbook:

‘The Netherlands is also subject to criticism in the country overview. Apparently, fewer than twenty percent of Dutch municipalities have developed policy to combat discrimination and racism in problem areas.’²³

A day later, *Trouw* followed with the sentence:

‘According to Amnesty, most municipalities do not consider discrimination to be a problem in their community. Consequently too few measures are taken to combat discrimination and racism within education and in employment.’²⁴

4.3 Attention in political circles

Was any attention devoted in political circles to the above viewpoints of international bodies concerning Dutch policy on discrimination, racism, xenophobia and Islamophobia? And if so, who took the initiative for this debate? The answers are given below.

In the two months following the appearance of the viewpoints, attention in the political debate was limited. The only attention in political circles was for the concluding observations of the CEDAW from 2007. During a General Meeting between the standing committee for Social Affairs and Employment and Minister De Geus of Social Affairs and Employment about Dutch emancipation policy, which took place several days after the publication of the CEDAW report, those involved indicated that it was high time that there was a government posi-

²² ‘De week in 3 minuten’, *Het Financieele Dagblad* 16 February 2008, page 20; ‘Alledaagse uitsluiting moslims is sluipend gif; VVD heeft rapport afgedaan als ‘een links verhaal’ (Mening Harry Polak)’, *Het Parool* 18 February 2008, page 17; ‘Armoede beïnvloedt extremist sterker dan islam’; Hoogleraar en adviseur van de Europese Commissie Rik Coolsaet vindt dat Nederland fout maakt met integratiedebat’, *NRC Handelsblad* 19 February 2008, page 3; ‘Besmuikt lachen om standje voor Nederland; Kritiek in Europees rapport over behandeling Antilliaanse jongeren leidt tot ophef op Curaçao’, *NRC Handelsblad* 20 February 2008, page 3; ‘Scherp debat leidt niet tot moslimhaat’, *Trouw* 27 February 2008, page 8; ‘Racisme is geen mening’, *Trouw* 1 March 2008, page 16; ‘Repercussies volgen op film Wilders’, *De Volkskrant* 13 March 2008, page 3.

²³ ‘Amnesty: onwil Westen inzake crises’, *De Volkskrant* 28 May 2008, page 5.

²⁴ ‘Amnesty kritisch over VS, maar ook over Nederland’, *Trouw* 29 May 2008, pages 8-9.

tion about the recommendations of the CEDAW and for a 'national report about all recommendations'.²⁵

On 28 March 2008, Minister De Geus sent the concluding observations to Second Chamber. The Minister promised that he would produce a government position before the summer recess.²⁶ The (requested) government response followed in July 2008.²⁷ It provided a limited response to the concluding observations made by the CEDAW, namely only to the concerns of the CEDAW about discrimination in the labour market of black, migrant and refugee women. The position did not address the concern that it was impossible for many women to acquire an independent residence permit and the other points of concern.

With respect to discrimination in the labour market, the government position mainly discussed what initiatives had already been taken.

'The CEDAW committee is concerned about the position of black, migrant and refugee women in the Netherlands. The committee feels that measures should be taken in order to eliminate discrimination of these women. With regard to the labour market, the Netherlands does not have a specific anti-discrimination policy solely focused on black, migrant and refugee women. This group is addressed through the general anti-discrimination policy. One example of a recent policy measure of a general nature is the establishment of a national network of anti-discrimination facilities. The Cabinet has made € 6 million available annually for this purpose since 2006. Core tasks of these provisions are complaint support, complaint settlement and registration and monitoring. A statutory regulation is currently being prepared which will require municipal authorities to offer their citizens access to a professional and low-threshold anti-discrimination facility. This general measure is expected to benefit black, migrant and refugee women as it will provide an anti-discrimination facility at municipal level, thus expanding the accessibility and availability to the group in question. Also with respect to the labour market policy, the emphasis is on general measures which benefit everyone, combined with tailored measures at individual level. Supplementary initiatives are always temporary and innovative.

Considering the low participation of migrant women in employment, various specific measures for black, migrant and refugee women have been developed in recent years. The most prominent initiative is the appointment of the Participation of Women from Ethnic Minority Groups (PaVEM) Committee and – as an extension – the Steering Committee

²⁵ Parliamentary Papers II 2006-2007, 30 420, no. 39, page 2.

²⁶ *Ibid.*, no. 41.

²⁷ *Ibid.*, no. 46, page 3.

Migrant Women and Work (RAVA) in February 2006. The steering committee plays a role in translating agreements made between 2003 and 2005 by PAVEM with municipal authorities and employers about the participation of migrant women in employment regarding results. Together with eight municipalities, the committee is also experimenting with methods to help migrant women find work. The members are using instruments like coaching, opening up networks, empowerment training programmes, etc. and have commissioned research to find out which instruments are most effective for the target group.

The initiative of the PAVEM committee to stimulate the social participation of migrant women with the help of voluntary work organisations has been included in the government's Policy Programme. The aim is to activate 50,000 migrant women through the project.²⁸

The government position also addressed the request of the CEDAW to include figures in the next report about the number of women granted a residence permit (asylum or standard) as a result of domestic violence. On this matter, the Cabinet said:

'This type of detailed information cannot be retrieved directly from the IND registration system. To obtain these figures therefore requires extra work. This recommendation will be acted upon by providing all the available figures relating to standard cases in which residence is granted on the grounds of domestic violence. With respect to figures relating to asylum, we will investigate whether it is possible to count cases in which domestic violence was the deciding factor in granting asylum and what is required for this.'²⁹

The fact that no attention was devoted in political circles to the international criticism within two months of it being published does not mean that it was not given any attention at all. On this point, we must make a few comments. Firstly, it takes some time before a written or General Meeting with the Second Chamber takes place in parliament. Furthermore, during the research it became apparent that it could take some time before a response was given. Moreover, not all the meeting documents are posted on www.overheid.nl. If we extend the period reviewed to one year, we see that reactions to the viewpoints of the CEDAW (2001), the Human Rights Committee (2001) and CRC (2004) have also been published in that year. Both ECRI reports (2001 and 2008) were also addressed in the political debate. That attention is discussed below in the same order as the viewpoints, starting with the UN committees and then the Council of Europe.

²⁸ Ibid.

²⁹ Ibid., page 4.

CEDAW (2001)

In the list of issues and answers regarding the 2002 Emancipation Policy Letter, with respect to the concluding observations of the CEDAW (2001), the state secretary of Social Affairs and Employment indicated that ...

'In my letter of 30 May 2001, I wrote that I was striving to create a more structural basis for funding projects to implement the UN Women's Convention. In this context, it became possible in 2002 to request funding for the theme "gender sensitivity of human rights policy, aliens policy, newcomer's policy, integration policy and repatriation policy". This has been done partly in response to recommendations by the CEDAW committee that more attention be devoted to the position of black, migrant and refugee women.³⁰

Human Rights Committee

On 5 November 2001, nearly four months after the publication of the concluding observations of this committee, the standing committee for Justice requested a response to the recommendations. The response of Minister Korthals and the State Secretary of Health, Welfare and sports, Ms Vliegenthart, followed in January 2002.³¹ Other Ministers had responded earlier to the recommendations concerning the euthanasia legislation. In their response, however, the Minister and State Secretary did not specifically address the viewpoint discussed earlier in this chapter of the Human Rights Committee (that important results still needed to be achieved in the field of legislation and policy in order to expand the participation of ethnic minorities in the labour market). Nor did the government members address the concern expressed by the Human Rights Committee about the underrepresentation of children of ethnic minorities in higher education.

CRC

With respect to the concluding observations of the CRC (2004) the government only replied that these would be addressed in the next report.³²

ECRI (2001)

In November 2001, in the same month as the publication of the second ECRI report, MPs Bussemaker (PvdA) and Rehwinkel (PvdA) posed questions about this report to Minister Van Boxtel for Urban Policy and Integration of Ethnic Minorities and Minister Vermeend of Social Affairs and Employment. Incidentally, it appears from the answer to those questions that the Dutch government had already received the report from the ECRI in September 2001. Bussemaker and Rehwinkel requested a response to the report.³³ These questions were only

³⁰ Parliamentary Papers II 2001-2002, 28 009, no. 2, page 32.

³¹ Parliamentary Papers II 2001-2002, 28 000 VI, no. 54, page 5.

³² Parliamentary Papers II 2003-2004, 29 540, no. 89 43.

³³ The questions are not included separately in database overheid.nl.

added to the official publications on www.overheid.nl after two months, together with an initial answer from Minister Van Boxtel for Urban Policy and Integration of Ethnic Minorities. This makes it seem as though that parliament did not respond immediately while in fact it did. A substantive reply to the Parliamentary Questions was only given on 11 March 2002.³⁴ Mr Van Boxtel also replied on behalf of Minister Vermeend of Social Affairs and Employment.³⁵

The reply to the Parliamentary Questions revealed that the standing committee for Social Affairs and Employment also asked the Minister of Social Affairs and Employment (by letter dated 15 November 2001: two days after approval of the report) to respond to the second ECRI report before the budget discussions of that Ministry in December 2001. Of course, insofar as it concerned discrimination in the labour market. The Minister replied at the start of December 2001. In his reply, he referred among others to the letter to the standing committee for Social Affairs and Employment. But this response was not included in the database containing official publications on www.overheid.nl, nor was the letter containing the request by the same committee for a response.

The same applies to the request from the standing committee of the Interior and Kingdom Relations. From the (further) reply to the Parliamentary Questions, it appears that this standing committee had requested a wider response to the ECRI report in a letter dated 20 November 2001. Minister Van Boxtel for Urban Policy and Integration of Ethnic Minorities mentioned that the reply to the Parliamentary Questions from Ms Bussemaker and Mr Rehwinkel should be seen in connection with that response.

The Cabinet criticised the quality of the ECRI report. It claimed that the ECRI had used outdated figures and that the organisation had not sufficiently taken into account the response of the Dutch government in the preliminary stage.³⁶ In the further answer to the Parliamentary Questions, the Cabinet said that

‘It should be clear that the problem found by the ECRI of persistent forms of direct and indirect discrimination in various areas of social life is acknowledged by the Dutch government, but that the Dutch government is consistently continuing its work to combat discrimination.’³⁷

On 20 March 2002, a meeting took place between the standing committee for Social Affairs and Employment, the standing committee for the Interior and Kingdom Relations and Ministers Vermeend of Social Affairs and Employment and Van Boxtel for Urban Policy and Integration of Ethnic Minorities. Also dur-

³⁴ Appendix to Proceedings II 2001-2002, 1059, no. 505.

³⁵ Appendix to Proceedings II 2001-2002, 1679, no. 800.

³⁶ Parliamentary Papers II 2001-2002, 28 198, no. 3, page 4 and 6/7.

³⁷ Appendix to Proceedings II 2001-2002, no. 1681.

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ing that meeting, various MPs discussed the quality of the ECRI report. Mr Kamp (VVD) pointed out that the figures were outdated and therefore of little significance. Moreover, according to Kamp, the ECRI had been too quick to conclude that there was discrimination in the Dutch labour market. Although the quality of the second ECRI report was also criticised by MPs Bussemaker (PvdA), Verburg (CDA), Van Gent (GroenLinks) and Ravesteyn (D66), they felt that the quality argument was insufficient to disqualify the report as a whole.

The MPs devoted serious attention to the various viewpoints of the ECRI and asked the Ministers several critical questions. Ms Bussemaker (PvdA), for example, requested a follow-up with respect to various initiatives announced by the government such as the directive to combat racism and discrimination. She asked when the promised results of the study would be available. Bussemaker also felt that it was time to be more 'decisive'. She particularly addressed the discrimination in the labour market observed by the ECRI and expressed her concern about the overrepresentation of migrants in low jobs and the high outflow from the government.

Also Ms Van Gent (GroenLinks) and Ms Ravesteyn (D66) addressed the criticism of the ECRI about discrimination in the labour market. Ms Van Gent pointed to several 'hard statements about racism, xenophobia and discrimination' in the report. In her view, the fact that the information was outdated did not detract from that.

'The fact that migrants have more difficulty finding a place in the labour market is certainly related to discrimination in the labour market. The extra obstacles for migrants must be removed. The ECRI report refers to the Equal Treatment Act. Can concrete agreements be made with employers about discrimination in the labour market?'

Van Gent also pointed out that you can continue to investigate this ad infinitum and asked what measures the Cabinet was planning to take. Like Ms Bussemaker, Ms Van Gent highlighted the representation of ethnic minorities in government jobs and asked what the government had done about it. Ms Bussemaker and Ms Van Gent also referred to the criticism of extra training and diploma recognition for acknowledged refugees.

Ms Ravesteyn (D66) claimed that the aim to halve the difference in unemployment between immigrants and native Dutch job seekers had been achieved.

'However it is difficult to say how far this is due to general economic growth or to specific measures.'

Ms Ravesteyn pointed out that much had happened recently and referred to concrete agreements with industry, the successful SME covenant and the framework covenant with large companies. She had previously claimed that

discrimination was an important factor explaining the higher unemployment rate among immigrants. It did not therefore surprise her that the ECRI had found the problems of racism, xenophobia and discrimination to be most widely present in the labour market. She asked the Minister whether the criticism of the ECRI was founded, or whether he felt that it was ‘easy criticism from outside, without knowledge of the measures planned or taken in the Netherlands’?

Minister Van Boxtel for Urban Policy and Integration of Ethnic Minorities was ‘not particularly worried by the ECRI report’.

‘The figures are from 1998. The fact that there are relatively many low-skilled jobs says nothing about discrimination. This is often related to education and the possibilities of finding a job. You cannot consider it to be a form of discrimination. In the Labour Foundation, employers and employees are made agreements on combating discrimination. Employers and employees are therefore aware that discrimination exists, that this is unacceptable and that it must be tackled.’

ECRI (2008)

On 12 February 2008 – on the day that the third ECRI report was adopted by the Committee of Ministers – the Second Chamber requested a response to the report from the Cabinet. The requested Cabinet response came over six months later, on 19 August 2008.³⁸ Following the response, on 23 October 2008 a General Meeting took place between the general committee for Housing, Communities and Integration, the standing committee for the Interior and Kingdom Relations and Minister Vogelaar for Housing, Communities and Integration.³⁹ During this meeting, Mr Kamp (VVD) again expressed his disappointment with the report. He felt it gave a ‘one-sided and coloured picture’. The other parties did not agree and again considered the criticism of the ECRI seriously. They interrogated the Minister in detail.

4.4 Effect of the criticism

The press devoted limited attention to the international criticism in the area of discrimination, racism, xenophobia and Islamophobia described above. The viewpoints of the various UN committees seem to have completely escaped the attention of the six national daily papers investigated. However, the newspapers did devote attention to both ECRI reports and the 2008 year report by Amnesty International. In the short term, there was only attention in political circles for the 2007 CEDAW report. If we look at responses in the longer term, we see that there was also attention in political circles for the viewpoints of other UN com-

³⁸ Parliamentary Papers II 2007-2008, 30 950, no. 12.

³⁹ Parliamentary Papers II 2008-2009, 30 950, no. 13.

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mittees, even if this attention seems limited. If the viewpoints led to a debate, that debate was restricted to certain concluding observations which were not always related to immigration and integration. Although various politicians criticised the quality of the ECRI reports, particularly the use of outdated figures, serious attention was devoted in the political debate to the viewpoints of the ECRI regarding discrimination of ethnic minorities in the labour market. It is interesting that the government responses only addressed the criticism in a general sense.

The viewpoints of the various organisations did not result in a change of legislation or policy, to the extent that we were able to discover this within the period studied. Although Cabinet responses to the reports did refer to policy measures taken, these policy measures did not seem to be concrete responses to international criticism. It should be noted that this is a wide policy area. Discrimination, racism, xenophobia and Islamophobia cannot only be addressed at state level.

Main events 2000-2008

- 2001 Aliens Act 2000 into force: introduction single asylum status; simplification of asylum procedure; introduction of a form of appeal to the State Council
- 2004 Permanent residence permit for admitted refugees only after 5 years (in the past 3 years)
- 2007 Judgment of European Court of Human Rights in the Salah Sheekh case criticizes asylum procedures and State Council case law; nine immigration judges openly criticize that case law
- 2007 Regularization of 28,000 former asylum seekers having applied for asylum before 2001
- 2007 State Council first national court to refer questions on the EU Refugee Directive to the EU Court of Justice

Chapter 5. Dutch asylum policy

Various international organisations gave their opinions on Dutch asylum policy between 2000 and 2008. These organisations mainly expressed doubts concerning the compatibility of the 48-hour procedure (also known as the registration centre procedure) with international law. Other points criticised were the use of medical reports during the asylum procedure, the fear of genital mutilation as grounds for asylum, compliance with the non-refoulement principle (i.e. the ban on sending refugees back to a country where they could be persecuted within the meaning of the Geneva Convention on Refugees), reception facilities for refugees, minor asylum seekers' exceptional position and circumstances, the concepts of 'safe third country' and 'safe country of origin', and judicial reviews of asylum cases. A number of international organisations also criticised the custody policy in asylum cases. We will be discussing this issue in the following chapter.

5.1 Viewpoints adopted by international organisations

United Nations

UNHCR

The UNHCR gave its opinions on Dutch asylum policy at least five times between 2000 and 2008.¹ In 2000, the organisation commented on the definition of 'safe third country' and 'safe country of origin' in the draft text of the 2000 Aliens Act. In 2003, the UNHCR wrote a letter on asylum procedure in connection with the implementation of the 2000 Aliens Act. In 2005, the UNHCR expressed concern that Dutch asylum policy was not entirely compatible with the non-refoulement principle. In 2007, the organisation expressed its concern about the safeguarding of asylum seekers' legal rights, and in 2008 the UNHCR wrote a letter in reaction to the proposal to introduce a new asylum procedure. We will discuss these letters and documents below.

Response to the draft text of the 2000 Aliens Act

In July 2000, the UNHCR commented on the definition of 'safe third country' and 'safe country of origin' in the draft text of the 2000 Aliens Act. According to the UNHCR, these concepts must be implemented in such a way as to be in line

¹ This number is based on our own research. From our contacts with Mr R. Bruin, the UNHCR Netherlands' National Officer, it emerged that after 2006, the UNHCR commented a further seven times on the evaluation of the 2000 Aliens Act, Dutch asylum procedure (December 2006), the repatriation of Iraqis as a result of abolition of the protection policy based on categories (30 January 2006), the implementation of the Qualification Directive (12 March 2007), the implementation of the Procedure Directive (30 March 2007), prosecution in the event of entry with false travel documents (16 October 2007), resettlement of refugees (22 September 2006 and 26 October 2007), the situation of refugees from Afghanistan (application of exclusion clause 1F, 14 November 2007, and the structure and organisation of the KhAD/WAD in May 2008). We did not include these viewpoints in our investigations.

with internationally-accepted principles on asylum and refugee protection. Countries may not automatically be regarded as safe third countries or safe countries of origin merely because they have formally acceded to international instruments for the protection of human rights or refugees. Moreover, according to the UNHCR, a clear distinction must be made between these two concepts, since they serve different purposes and are applied at different stages of refugees' flight.²

Letter resulting from implementation of the 2000 Aliens Act

In July 2003, the UNHCR wrote a letter containing recommendations for the implementation of the 2000 Aliens Act. This concerned the accelerated asylum procedure, and the UNHCR pointed out that application of this procedure must be motivated by the merits of the case, not by statistical aims. Applications from vulnerable groups such as traumatised refugees and unaccompanied minor asylum seekers should be dealt with in the normal procedure, not in the registration centre procedure. According to the UNHCR, there was moreover a lack of essential confidence in the accelerated procedure.

Contribution in the Isfahani case

The UNHCR sent a written communication to the European Court of Human Rights stating its position in the case of Isfahani versus the Netherlands, in which it expressed its concern about a number of stipulations in the 2000 Aliens Act.³ The UNHCR argued that there was a danger that valid fears of persecution or a real need for international protection were not assessed properly. This might result in refugees not being recognised as such and therefore running the risk of refoulement, which would contravene Article 33 of the Geneva Convention on Refugees. Other issues criticised by the UNHCR were Dutch case law with respect to the onus of proof (credibility of refugees' accounts of the reasons for their request for asylum), the judicial test of reasonableness, the higher standard of proof on asylum-seekers who do not submit sufficient documentary evidence and the lack of sufficient guarantees for vulnerable groups of asylum seekers.

Letter resulting from Van der Ham's legislative proposal

The UNHCR had already criticised the judicial test in its contribution in May 2005, which we have discussed in the foregoing. In December 2007, the UNHCR again emphasised the importance of a full *ex nunc* test (in which the court examines the current situation) as a result of the legislative proposal submitted by MPs Alexander Pechtold and Boris van der Ham.⁴ According to the UNHCR, the judicial test of reasonableness does not fully comply with the standard laid down in Conclusions 8 and 30 of the UNHCR Executive Commit-

² 2000/07/12 UNHCR comments to draft Aliens Act, www.vluchtweb.nl.

³ Submission by the United Nations High Commissioner for Refugees in the Case between Mr Isfahani and the Netherlands - application 31252/03, May 2005.

⁴ Parliamentary Papers II 2006-2007, 30 830, nos. 1-3.

tee. The ruling in the Salah Sheekh case was also advanced against the Netherlands as an additional argument.⁵

Comments on the new asylum procedure

The UNHCR put forward fourteen recommendations for improving the new Dutch asylum procedure. The organisation had already made a number of these recommendations at an earlier date, including those concerning the legal protection phase and the reception facilities. With respect to the appeal phase, the UNHCR repeated that it was essential that the facts and the credibility of refugees' accounts of the reasons for their request for asylum be tested by a court. The UNHCR reiterated its viewpoint that the court must hold a full *ex nunc* test. With respect to the reception facilities, the UNCR reiterated its previous viewpoint that these facilities must be made available before the definitive decision. The letter also contained a number of recommendations concerning the limiting of the asylum procedure and improving the degree of care taken. The UNHCR expressed doubts as to whether the eight-day period ensured sufficient scope for careful consideration: the proposals made by the Advisory Committee on Aliens Affairs met this to a greater extent.⁶ The eight-day procedure should only apply in clearly valid cases, clearly unfounded cases, and cases that obviously abuse the short-term procedure. Moreover, asylum seekers should be assisted by the same legal counsel throughout the procedure, and the Immigration and Naturalisation Service ("IND") should not be allowed to commence its investigations until after the legal counsel has established contact with the refugee. In addition, appeals lodged against decisions during the eight-day period must have a suspensive effect by operation of law.

Human Rights Committee

The United Nations Human Rights Committee put forward conclusions and recommendations on one occasion between 2000 and 2008: these related to a periodic report on observance of the International Covenant on Civil and Political Rights (ICCPR) submitted by the Netherlands.⁷

The Committee expressed itself favourably with regard to the IND's new procedures, whose purpose was 'drawing the competent officials' attention to specific aspects of female asylum seekers' statements peculiar to their gender'. Nevertheless, the Human Rights Committee was still concerned about the fact that valid fears of genital mutilation, or other traditions and customs in the country of origin which violate the integrity or the health of women, do not always result in a positive decision on granting asylum.⁸ The Committee indicated

⁵ European Court of Human Rights, 11 January 2007.

⁶ Advisory Committee on Aliens Affairs, *Secuur en Snel* (precise and fast). Proposal for a new asylum procedure, The Hague 2007.

⁷ The Netherlands also submitted a fourth periodic report (see Chapter 1), but the Human Rights Committee has not yet put forward any conclusions and recommendations on the basis of this report. It did, however, draw up a list of points.

⁸ Conclusions and recommendations based on the third periodic report (CCPR/CO/72/NET), 27 August 2001, para 11.

that the Netherlands must adjust its policy in order to ensure that women receive the protection that is intended in Article 7 of the ICCPR. This article contains the prohibition on torture and on cruel, inhuman or degrading treatment or punishment.

Committee on the Rights of the Child (CRC)

In February 2004, the CRC published conclusions and recommendations on the Netherlands' observance of the Convention on the Rights of the Child. The CRC pointed out that the definition of unaccompanied minor asylum seekers was not in line with international standards, and that this impeded access to basic facilities. The CRC recommended that the Netherlands revised the 2000 Aliens Act and ensured full compliance with international standards with respect to refugees and the CRC.⁹

Like other international organisations, the CRC also called on the Netherlands to reconsider an accelerated asylum procedure. This was because the assessment and rejection of a considerable and increasing number of asylum applications during the 48-hour procedure did not comply with Article 22 of the United Nations Convention on the Rights of the Child or with other international standards.

Committee against Torture (CAT)

Following the example set by the above-mentioned organisations, the CAT also expressed concern about the Dutch registration centre procedure in August 2007.¹⁰ The CAT pointed out that the registration centre procedure made it difficult for asylum seekers to substantiate their claims to asylum. This might result in violation of the non-refoulement principle under Article 3 of the ECHR, especially with respect to vulnerable groups such as children and undocumented applicants. The CAT was also dissatisfied with the short time (five hours) provided for legal assistance between the issuance of the report from the first interview and the IND's decision. In addition, the CAT criticised the fact that asylum seekers could not always be assisted by the same legal counsel during the procedure.

The Dutch government announced its intention of revising the asylum procedure, and the CAT advised it to take the position of vulnerable groups into account when doing so. This might mean that the government would draw up criteria which would be used to determine which groups of asylum seekers came under the accelerated procedure and which groups came under the normal procedure. The CAT also pointed out that all asylum seekers must have access to adequate legal assistance, that they must be assisted by the same lawyer throughout the entire procedure, and that procedures relating to evidence to be produced must be made clearer.

⁹ Para 54 (r), CRC/C/15/Add. 227, CRC 2004.

¹⁰ CAT/C/NET/CO/4, 3 August 2007, point 7.

In addition, the CAT expressed concern about the limited role of medical reports in the asylum procedure, and about the fact that compliance with the Istanbul Protocol was not encouraged.¹¹ The Istanbul Protocol is a set of international guidelines for the assessment of persons who allege torture and ill-treatment. The CAT advised the Dutch government to include medical reports as a comprehensive part of the procedure, and to promote the application of the Istanbul Protocol in the asylum procedures as well.

Council of Europe

European Commission against Racism and Intolerance (ECRI)

In 2008, the ECRI advised the Dutch government to reconsider the registration centred procedure. Like the UNHCR in 2003, the Commission explicitly stated that application of the registration centre procedure may not be motivated by statistical aims: it must be based on substantive grounds.¹² The Dutch government responded by saying that it did not maintain any targets for the percentage of applications dealt with through the accelerated asylum procedure. However, the ECRI pointed out that the government had publicly expressed its intention to do so.¹³

Human Rights Commissioner

In March 2009, the Human Rights Commissioner published a critical report in which he put forward recommendations with respect to the registration centre procedure, the safeguarding of asylum seekers' legal rights, and the position of minors in the asylum procedure.¹⁴ In view of the continuing unsafe situation in Iraq, the Human Rights Commissioner requested the Netherlands to review its decision to abolish the protection policy based on categories for Iraqi refugees.¹⁵

He also examined the proposal for the new registration centre procedure. In view of the criticism voiced by the UNHCR and NGOs, he expressed astonishment that the Dutch government intended to deal with more applications in the 'somewhat enhanced accelerated procedure'. These also included applications from vulnerable groups such as minor asylum seekers. He felt that the new procedure did not sufficiently meet the demand for improved guarantees. The report urged the Dutch authorities to restrict the proposed accelerated procedure to clear-cut cases, such as those which were obviously either valid or unfounded, and to apply the normal procedure when resolving all other cases. The longer procedure would give the government enough time to establish the rele-

¹¹ Ditto, point 8.

¹² Para 45 ECRI 2008.

¹³ Ditto, para 42.

¹⁴ He also criticised the detention of aliens pending deportation. We will be examining this criticism in the following chapter.

¹⁵ CommDH (2009) 2, point 40, page 12.

vant facts, which in turn would ensure that asylum seekers had the opportunity to provide suitable evidence.

With respect to judicial reviews in the registration centre procedure, the Human Rights Commissioner urged the Dutch government to stay the procedure in cases where asylum seekers could argue convincingly that they ran the risk of physical danger if they were repatriated. The Commissioner cited the UNHCR's viewpoint in this regard.¹⁶ Like the UNHCR, he also requested the Dutch government to provide reception facilities during the appeal phase. And finally, he expressed concern about the fact that the new appeal procedure, like the old one, did not permit considerations of both facts and law. He requested the Dutch authorities to review and broaden the new procedure. However, he welcomed the government's reiterated guarantees that Article 3 of the ECHR was of an absolute nature and that it would always be respected.

Private organisations

Human Rights Watch (HRW)

Human Rights Watch gave its opinions on Dutch asylum policy on a number of occasions between 2000 and 2003. In April 2003, it published a report on the Dutch asylum procedure. Besides this report, HRW sent several letters in order to prevent the deportation of individuals or groups of asylum seekers. The organisation also brought Dutch asylum policy up in the 2007 and 2008 World Reports.

Fleeting Refuge Report

In its report published in April 2003 and entitled *Fleeting Refuge*, HRW expressed concern about the compatibility of certain basic aspects of Dutch asylum policy and asylum practices with international and regional human rights.¹⁷ We will discuss HRW's viewpoints on four aspects of Dutch asylum policy below.

The Registration Centre Procedure

HRW was concerned about the Dutch authorities' application of the registration centre procedure. The organisation pointed out that there is no clear criterion for dealing with asylum applications in the registration centre procedure.¹⁸ HRW was of the opinion that asylum applications submitted by certain groups of asylum seekers ought to be handled in the full determination procedure, i.e. the reception centre procedure. This referred to asylum applications from unaccompanied minor asylum seekers, asylum seekers with physical or psychologi-

¹⁶ Ditto, points 47-50.

¹⁷ Report: *Fleeting Refuge: The triumph of efficiency over protection in Dutch Asylum Policy*, vol. 15, 3 April 2003, www.hrw.org/reports/2003/netherlands0403/.

¹⁸ Ditto, page 6.

cal problems, and complex cases such as internal flight options and cases where there was a danger of persecution as members of social groups.

Legal protection

Since HRW was of the opinion that the available time for legal aid was too short in some cases, it advocated more flexibility during the preparatory period.¹⁹ Asylum seekers are generally assisted by two different lawyers during the registration centre procedure. After the preliminary interview, the first lawyer has two hours in which to explain the procedure to the asylum seeker and to prepare him for the second interview. Following this, the second lawyer is given three hours to discuss the reports of both interviews and the Minister of Justice's resolution, and to contest these documents.

'Human Rights Watch believes that this rigid framework of deadlines fails to allow meaningful access to legal counsel and raises serious risks of re-foulement.'

HRW recommended the Minister of Justice to examine ways in which more flexibility could be introduced into the registration centre procedure, so that legal counsel would have enough time to prepare proper asylum applications and appeals against resolutions.

To qualify for a residence permit, it is of the utmost importance that asylum seekers give a credible account of the reasons for their request for asylum. HRW criticised the assessment of the credibility of this account: the organisation was of the opinion that the Dutch government must instruct the IND officials to take into consideration the limited options available to asylum seekers to corroborate their accounts with the relevant documents when assessing these accounts.²⁰

Minors

There was a marked decrease in the number of asylum applications submitted by minors between 2000 and 2003. This decrease was attributed to the entry into force of the 2000 Aliens Act and the changes in the policy on unaccompanied minor asylum seekers implemented in January and November 2001. According to HRW, these policy changes appeared to violate international children's rights.²¹ Investigations carried out by HRW showed that minors' basic rights were often ignored or declared inapplicable. The organisation was especially concerned about the fact that minors were interviewed in the absence of a lawyer or other representative. Moreover, the authorities did not take sufficient account of the consequences of traumas and of the fact that young asylum seekers have less developed faculties of thought. This makes it more difficult for them to give a structured account in support of their request for asylum. HRW

¹⁹ Ditto, page 10.

²⁰ Ditto, page 13.

²¹ Ditto, page 16.

also referred to an inappropriately broad definition of 'accompanied minors' under Dutch law. The organisation was of the opinion that the Dutch government must devise new policy to ensure that minors were assisted by one person throughout the asylum procedure, and that no interviews may be conducted without this person being present.

In cases of minors who arrived in the Netherlands together with a number of siblings, the oldest of whom was an adult, the younger children's applications must be dealt with as part of the adult sibling's asylum application. However, this would only be possible if the adult sibling was able and willing to speak on behalf of the others.

The organisation, referring to the Convention on the Rights of the Child, expressed concern about the Council of State's interpretation of this Convention.²² According to the Council of State, the Convention did not apply to children whose parents were not legally resident in the Netherlands. HRW described this as a 'dangerous precedent', and called on the Dutch government to make it clear to all officials that the Convention applied to all migrant children regardless of whether they were legally resident in the Netherlands.

Reception facilities

Reception facilities for asylum seekers formed another point for criticism in the HRW report. This report stated that Dutch reception policy was not in line with international law. HRW urged the Netherlands to pass immediate laws entitling asylum seekers whose applications were still awaiting a definitive decision, to basic reception facilities including shelter, food and access to health care: these facilities must also be available during the appeal proceedings. Moreover, people showing signs of serious traumas must be given the necessary help and support, even if their asylum application was rejected. HRW called on the Dutch authorities to devise a system that met these requirements. It also urged the authorities to unlink rulings on asylum applications from termination of the reception facilities in order to ensure that failed asylum seekers were able to receive social assistance during the deportation proceedings. As it was, asylum seekers were automatically deprived of their right to shelter 28 days after the definitive ruling on their right to residence, and exceptions to this could only be made on humanitarian grounds. HRW deemed it essential that this category of exceptions be expanded to include vulnerable persons such as families with children, elderly persons, persons with physical or psychological problems, and traumatised asylum seekers.²³

Letters from HRW

'26,000 failed asylum seekers'

In 2004, HRW once more expressed concern about Dutch asylum policy. This concern was due to the proposed deportation of 26,000 asylum seekers. The

²² Ditto, page 16-17.

²³ Ditto, page 31.

organisation feared that the non-refoulement principle would be violated, and called on the Dutch government to ensure that all cases were individually assessed in conformity with the non-refoulement principle laid down in the ECHR and in Article 3 of the Convention against Torture. HRW expressed its concern in a letter to Minister Rita Verdonk, which ran as follows:

‘The current deportation proposals represent a further degradation of the Netherlands’ commitment to the right to seek asylum and the principle of non-refoulement, which prohibits the return of people to countries where their lives or freedom could be threatened.’

This letter dealt specifically with the treatment of minors in connection with the deportation of failed asylum seekers. HRW again indicated that the Netherlands could not just ignore its obligations with respect to the protection and care of minor asylum seekers, and urged the Dutch authorities to apply ‘the interests of children’ as the norm when considering deportation.

HRW concluded as follows:

‘Dutch authorities have stated that the new deportation scheme is “safe and humane”. Human Rights Watch has serious concerns, however, that the proposals will put failed asylum seekers at risk, both in the Netherlands – in the form of evictions, cessation of social assistance, and detention, among other things – and potentially upon return, as noted above. No matter how the Dutch authorities characterize the proposed deportations, they give rise to serious concerns that they do not conform with the Netherlands’ international obligations. Human Rights Watch urges the government to ensure compliance with international law in all procedures related to the removal of failed asylum seekers.’

Diplomatic guarantees in the event of deportation

HRW wrote three letters to Minister Verdonk between May and December 2004 concerning the proposed deportation of Nuriye Kesbir to Turkey.²⁴ HRW was of the opinion that, in view of their general nature, the diplomatic guarantees issued by the Turkish government had no significance, and that Nuriye Kesbir would run the risk of torture if she was deported to Turkey.

Homosexual Iranians

In 2006, HRW wrote two letters to Minister Verdonk as a result of her announced intention to lift the moratorium on repatriation of homosexual asylum seekers to Iran, which was in effect at that time.²⁵ Repatriation of homosexual

²⁴ The first letter was dated 23 May 2004, the second letter 28 October 2004, and the third letter 16 December 2004.

²⁵ Letter dated 8 March 2006 and letter dated 5 October 2006.

Iranians contravened the Dutch government's obligation to prevent torture and persecution of asylum seekers in their countries of origin.

Amnesty International

Amnesty International gave its opinions on Dutch asylum policy on three occasions between 2000 and 2008: twice in articles contributed to the United Nations Universal Periodic Review in November 2007 and April 2008, and once in a report on the detention of aliens pending deportation (2008).

Universal Periodic Review

In its contributions to the Universal Periodic Review, Amnesty International referred to the Evaluation Committee's report, and stated that it shared the Committee's concern about the 48-hour procedure.²⁶ The Evaluation Committee published a report on the Dutch asylum procedure in 2006, in which it indicated that the registration centre procedure and the reception centre procedure had grown too far apart from each other. The registration centre procedure was 'too short', which, according to the Committee, would have a negative effect on the degree of care taken. And the reception centre procedure was 'too long'. Amnesty International urged the Dutch government to implement a fair and efficient procedure that provided sufficient scope for full assessment of asylum applications. Another important point was that the procedure must allow enough time to be able to deal with appeals against negative decisions. The organisation furthermore referred to the Abd al-Rahman al-Musa case.²⁷ Amnesty International regarded this Syrian asylum seeker as a refugee on the grounds of his religious convictions. Despite repeated warnings concerning his safety, the Dutch authorities did not allow him to submit an application for asylum. Amnesty International called on the Netherlands to take all the necessary measures to prevent refoulement. The organisation recommended application of the Istanbul Protocol in asylum procedures, with an explicit reference to the conclusions drawn by the Committee against Torture.²⁸

2008 Report

In this report, Amnesty International urged the Dutch government to provide traumatised asylum seekers and victims of human rights violations with the necessary time and means to enable them to prepare their asylum applications.²⁹ The organisation also called on the Dutch authorities to provide failed asylum seekers and illegal migrants with shelter and other facilities pending their repatriation.

²⁶ Amnesty International, 'The Netherlands: submission to the UN Universal Periodic Review', November 2007, page 3, EUR 35/001/2007.

²⁷ 'Netherlands: Submission to the UN Universal Periodic Review: First session of the HRC UPR Working Group, 7-18 April 2008'.

²⁸ Amnesty International, 'The Netherlands: submission to the UN Universal Periodic Review', November 2007, page 2, EUR 35/001/2007.

²⁹ 2008 report, page 56.

5.2 Attention from the press

If we look at the attention given in the media to international criticism of the Dutch asylum procedure, and to the various organisations' concerns and recommendations, we see that the six Dutch newspapers we investigated only cite the Committee against Torture's conclusions and recommendations, the Human Rights Watch report, and the Human Rights Commissioner's report during the month following their publication. Two articles on the Committee against Torture's conclusions and recommendations appeared in the press.³⁰ On 19 May 2007, *NRC Handelsblad* devoted attention in a front-page article to the Committee's criticism of the 48-hour procedure, followed by a more in-depth article further on in the paper.

Four articles on the Human Rights Watch report were published during the month in which this report was published. *NRC Handelsblad* cited HRW's criticism of the fact that young asylum seekers were interviewed without a lawyer being present. The Dutch authorities were reproached for barely allowing 'seriously traumatised asylum seekers' the opportunity to tell their story or to consult a lawyer during the 48-hour procedure. *NRC Handelsblad* also cited HRW's criticism that 'keeping the influx of refugees into the Netherlands under control has taken priority over humane treatment of asylum seekers'.

This newspaper also discussed HRW's criticism of the poorly-regulated reception facilities for minor asylum seekers. HRW claimed that the IND did not make sufficient efforts to trace minor asylum seekers' relatives or to repatriate these minors. The Ministry of Justice responded to this by stating that it was unable to acknowledge the veracity of this criticism. According to a Ministry spokesperson, the courts tested asylum policy 'in relation to the same international treaties as those on which HRW bases its allegations'. The spokesperson added that a protocol was observed when interviewing asylum seekers aged up to 12; this protocol was drawn up after consultations with human rights organisations and the Youth Services and Youth Protection Inspectorate.

In March 2009, *Algemeen Dagblad*, *Trouw* and *De Volkskrant* likewise devoted attention to HRW's criticism of the Dutch asylum procedure. Four articles discussed the report published by Human Rights Commissioner Thomas Hammarberg. Three of these articles dealt with Hammarberg's criticism of Dutch asylum policy.³¹ On 11 March, the day on which Hammarberg's report was pub-

³⁰ On 9 May 2007, *NRC Handelsblad* also devoted attention to the Committee against Torture's visit to the Netherlands, and the Committee's concern about the accelerated procedure in the Netherlands. The headline of this article ran: '48 hours last for more than 5 days in the Netherlands; UN torture experts concerned about accelerated Dutch procedure for asylum seekers'.

³¹ *NRC Handelsblad*, 11 March 2009; *Het Parool*, 11 March 2009; *Trouw De Verdieping*, 12 March 2009. One article discusses Hammarberg's critical remarks on the tone of the public and political debate on immigration and the increase in racism, xenophobia, antisemitism and intolerance towards Muslims.

lished, an article entitled 'Council of Europe criticises asylum policy' appeared in *NRC Handelsblad*, and a similar article was published in *Het Parool*: 'Council of Europe critical of asylum policy'. *NRC Handelsblad* announced its article on the front page, and *Trouw* followed suit the next day with an article entitled 'The Netherlands violates asylum seekers rights, says Council of Europe'.

5.3 Attention in political circles

Did the Second Chamber devote any attention to the views outlined above regarding asylum policy in the Netherlands? And if there was a debate, who initiated it? In the two months following the publication of the report, the political debate only focused on the criticism of Dutch asylum policy expressed by two of the eight international organisations described above. This concerned some of the viewpoints of Human Rights Watch and the report of the Human Rights Commissioner. These are the same international reports which received attention in the national daily papers we investigated.

Limited attention for international criticism in the political debate

On 10 April 2003, the Standing Committee for Justice asked the Minister of Alien Affairs and Integration for a reaction to the HRW report.³² The Minister agreed to this request on 20 May 2003. In a letter to the Second Chamber, Minister Nawijn responded to the recommendations of HRW in detail. However, not one of the recommendations of HRW was adopted. From this letter, it is apparent that a conversation had taken place several weeks previously with the executive director of HRW and one of the authors of the report. This was in response to the report.

In the letter, Minister Nawijn writes:

'This was an open and constructive discussion during which the Ministry expressed its appreciation of the attention devoted by HRW to asylum procedures in the Netherlands. Although in general we do not endorse all the critical points of HRW, we agreed to include some of HRW's attention points and ideas as expressed in the report in future policy making.'³³

On 18 June 2004, with respect to the asylum procedure, Minister Verdonk produced a response to the recommendation of the Advisory Committee on Alien Affairs. The letter also addressed criticism expressed by the UNHCR regarding the implementation of the Aliens Act 2000. In this memorandum, Minister Verdonk wrote that there would be no further explicit response to the HRW

³² This letter cannot be found on overheid.nl.

³³ Parliamentary Papers II 2002-2003, 19637, no. 738, p. 2; During a round table discussion, HRW discusses this reaction from Nawijn. Human Rights Watch Commentary on Dutch Asylum policy, 25 September 2003.

recommendations, but that the various attention points and ideas of HRW had been considered in the memorandum.³⁴

The letters from HRW relating to the deportation of homosexual Iranians also received attention in the political debate. On 13 March 2006, MP Wim van Fessum (CDA) questioned the Ministers of Foreign Affairs and Alien Affairs and Integration regarding an article in the *Volkskrant*.³⁵ The letter from HRW about the planned deportation of 26,000 asylum seekers did not result in a political debate, nor did the three letters from HRW about the proposed deportation of Nuriye Kesbir. Incidentally, with respect to this deportation, on 14 May 2004 parliamentary questions were put to the Ministers of Justice and Foreign Affairs by MP Harry van Bommel (SP).³⁶ On 28 May 2004, MPs Jan de Wit (SP) and Marijke Vos (Groenlinks) also tabled Parliamentary Questions.³⁷ However, they did not refer to the criticism of HRW in this case.

Finally some attention?

As mentioned, in the two months after the publication of the report, attention was only paid to the viewpoints of HRW, the UNHCR and the Human Rights Commissioner. No attention was initially paid to the views of other organisations. During the Evaluation of the Aliens Act in 2007, attention was devoted in the political debate to the criticism expressed by the CRC, the UNHCR, HRW and Amnesty International. The criticism expressed by these organisations was mentioned in the same breath as criticism from national organisations like *VluchtelingenWerk Nederland* (Dutch Council for Refugees) and the Netherlands Legal Committee for Human Rights.

Following a letter from the Minister of Alien Affairs and Integration (13 October 2007), the Standing Committee for Justice tabled questions in the framework of the Evaluation of alien policy. The Minister answered these questions in writing. The report³⁸ states:

‘The members of the SP party are now asking the Minister to respond in detail and substantively to existing criticism of the registration centre procedure and then to provide arguments and reasons explaining why the Minister considers that the registration centre procedure is satisfactory. Can the Minister further explain why he has not chosen a substantive criterion by which to decide whether a case will be handled in the AC? The members of the SP party feel that only manifestly unfounded asylum

³⁴ Parliamentary Papers II 2003-2004, 19637, no. 826, page 1.

³⁵ Appendix to Proceedings II 2005-2006, no. 2897.

³⁶ Parliamentary Papers II 2003-2004, Questions 2030414350. No answer found in Parliamentary Questions on overheid.nl.

³⁷ Appendix to Proceedings II 2003-2004, no. 2311, page 4897, further answer Second Chamber, Appendix to Proceedings II 2003-2004, no. 2311, page 4077.

³⁸ Parliamentary Papers II 2007-2008, 30 846, no. 2, page 15.

applications and cases where the asylum procedure has clearly been abused should be speeded up (in 48 court hours). This reflects the view of the UNHCR, Stichting Rechtsbijstand Asiel Nederland (SRAN) and NJCM. Vulnerable groups such as children and traumatised asylum seekers should certainly not be included in a registration centre procedure, as Amnesty International also agrees. These members would like the Minister to respond to this. In view of the existing criticism of the registration centre procedure and the findings of the CEV, the members of the SP party feel that an opportunity has been lost to use the evaluation to improve the registration centre procedure.'

'The members of the SP party are shocked by cabinet plans to change certain points in the normal asylum procedure in accordance with the registration centre procedure, despite hard evidence that this procedure is not careful enough. If these plans become reality, this will mean that the asylum seeker in question – who also has a case which cannot be handled in 48 court hours! – has much less time for legal assistance than now. The members of the SP party are very concerned about this. This means that the normal procedure is immediately susceptible to the same criticism as the registration centre procedure. Does the Minister really feel that, for complex cases, several hours are sufficient to discuss the first hearing and prepare for the next? Furthermore, is it not the case that when applying the registration centre procedure to complex cases, these asylum seekers will also be faced with several legal aid officials and all the problems that entails? Is the Minister familiar with the criticism to these proposals from the Netherlands Bar Association, the SRAN, the UNHCR, Amnesty International and VluchtelingenWerk Nederland (Dutch Council for Refugees)? Is the Minister prepared to respond extensively to this criticism?'

'The members of the SP party ask how the Minister assesses the proposal of the UNHCR to limit the application of the registration centre procedure to manifestly unfounded cases and cases where there is clear abuse of the asylum procedure, and not to handle asylum requests from people from vulnerable groups (unaccompanied minors, victims of torture and trauma) in the registration centre procedure at all.'

On 5 November 2001, over four months after the publication of the conclusions and recommendations of the Human Rights Committee, the Standing Committee for Justice asked the Minister for a reaction to the recommendations. The response from Minister Korthals and the State Secretary of Health, Welfare and Sport followed in January 2002.³⁹ The committee expressed its concern that grounded fears of circumcision or other traditional practices which affected the

³⁹ Parliamentary Papers II 2001-2002, 28 000 VI, no. 54 page 5.

physical integrity of women did not always result in asylum being granted. The government considered the demonstrable risk of being circumcised as a grounded fear for persecution pursuant to the Convention on Refugees. The main circumstances: it has been established that the woman in question does not want to continue the tradition of circumcision at all; she has no alternative place of residence in the country of origin; the woman will become a social outcast if she refuses circumcision. According to the Convention on Refugees, these circumstances may result in granting an application for political asylum. The application is officially tested against Article 3 ECHR, which forbids torture and degrading or inhumane treatment. Also a parent who fears genital mutilation of his or her daughter(s) can, under the stipulated conditions, be eligible with the child in question for a residence permit on humanitarian grounds. The question whether the applicant may face inhumane or degrading treatment on return to his/her homeland is thus part of the assessment. The instructions of the Aliens Circular which relates to asylum applications from women are currently being evaluated. The State Secretary of Justice will inform the Second Chamber further about the results of this evaluation.⁴⁰

5.4 Effect on legislation or policy

Have the viewpoints of various international organisations regarding Dutch asylum policy led to a change in legislation and policy? In view of the scant attention these viewpoints have received in political circles, the effect seems limited. This certainly applies in the short term. As we have seen, no attention was given to the criticism expressed by many of the organisations (the letters from UNHCR and HRW and the reports by HRC, CRC, CAT, Amnesty International and ECRI) in the two months after the publication of the viewpoints in the political debate. This could lead to the conclusion that the public viewpoints had no effect on legislation and policy. However, this conclusion is not automatically justified.

The restriction in time imposed by us when looking for political reactions appears (too) short. This creates the impression that little was done with the criticism. However, something may still be done with the criticism later on. The international monitoring does seem to have an effect on Dutch asylum policy in the long term. However, it is not easy to attribute a change in legislation or policy to the criticism, due to the lack of explicit reference thereto. There is the impression that international criticism does have some effect. As an example, we mention the new asylum procedure. Changes in this procedure include the extending of the 48 hour term to eight days, the introduction of a rest and preparation period to give the asylum seeker time to access documents, and amendments in asylum seeker access to legal assistance so that they can use it at an earlier stage. However, there has already been criticism of

⁴⁰ Parliamentary Papers II 2001-2002, 28 000 VI, no. 54 page 5.

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the new asylum procedure by the UNHCR (see paragraph 5.1) and by national organisations.

In any event it is obvious that national organisations play an important role in highlighting international criticism. International criticism is regularly used by national organisations to lobby for changes to legislation and policy. An example is the recommendation of the Committee Against Torture regarding the inclusion of medical reports in the asylum procedure and the application of the Istanbul protocol. In 2006, Amnesty International Nederland, Vluchtelingen-Werk and Pharos organised an international expert meeting on this theme. A document was subsequently drawn up and sent to State Secretary Albayrak.⁴¹ The accompanying letter referred to the criticism expressed by the Committee Against Torture.⁴²

Legal literature also devotes attention to the criticism from various international organisations.

⁴¹ CARE FULL Medicolegal reports and the Istanbul Protocol in asylum procedures.

⁴² Letter dated 20 September 2007 to State Secretary Albayrak, signed by Amnesty International, Vluchtelingen Werk Nederland and Pharos.

Main events 2000-2008

- 2001 Aliens Act 2000 into force: less strict conditions for immigration detention; review of detention decision of immigration authorities by a court at the latest after seven days
- 2001 State Council jurisprudence reduces scope of judicial control
- 2004 Minister for Aliens Affairs and Integration announces intention to expel 26,000 former asylum seekers and to open special detention centers in order to return illegal immigrants
- 2004 Aliens Act amended: review of detention by court postponed: after 28 days detention
- 2004 First boat for large scale detention of immigrants opened in Rotterdam harbor
- 2005 State Council reduces judicial control on living conditions in detention centers
- 2005 Eleven detained immigrants die in fire in detention centre at Schiphol Airport
- 2008 Decision of Minister of Justice to close detention boat in Rotterdam

Chapter 6. Detention of aliens

Between 2000 and 2008, a number of organisations criticised the detention of aliens pending deportation in the Netherlands. Amnesty International, the Committee Against Torture (CAT) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) made critical comments on various aspects of Dutch detention policy, as did the Committee on the Rights of the Child (CRC), the United Nations High Commissioner for Refugees (UNHCR) and the Commissioner for Human Rights.

6.1 Viewpoints adopted by international organisations

United Nations

The United Nations High Commissioner for Refugees (UNHCR)

The UNHCR stated its viewpoint on the detention of aliens on at least three occasions between 2000 and 2008.

UNHCR's viewpoint on the detention of aliens pending deportation (2001)

At the request of the Dutch Refugee Council, the UNHCR gave its viewpoint in a letter (May 2001).¹ Referring to this viewpoint in the Executive Committee Conclusion No. 44 (1986) and the UNHCR guideline on detention dated 10 February 1999, the UNHCR stated that:

1. asylum seekers may not be placed in detention on the sole grounds that they are illegally resident, or have illegally arrived, in the Netherlands;
2. each case must be individually studied to see whether the asylum seeker in question should be placed in detention;
3. asylum seekers may only be placed in detention on legal grounds, for specific and restricted purposes and for as short a period as possible.

From these three principles, we can clearly deduce that the detention of aliens should only be used as a last resort and should not be undertaken lightly. The UNHCR explicitly pointed out that it considered the detention of aliens to be undesirable, and that states should select different measures wherever possible; the organisation cited the duty to report as an example. These principles apply to all asylum seekers during all phases of the procedure.

With respect to minor asylum seekers, the High Commissioner stated that they should not be placed in detention as a general rule, regardless of whether they are alone or form part of a family.

¹ Letter to Mr P. van Geel of the Dutch Refugee Council, dated 18 May 2001, reference HO/01/121-50/14, in response to letters sent by this Council and dated 14 and 18 December 2000.

The UNHCR added that it was aware that it is not in the interests of children to release them if an adult member of the family has been placed in detention. In such cases, a possible solution would be to release one adult member of the family.

Detention of alien families with minor children

On 29 November 2005, the UNHCR sent a letter to Minister of Justice Piet Hein Donner in which the organisation set out its viewpoint on the detention of aliens with minor children. This letter was sent as a result of the inspection report published by the Inspectorate for the Implementation of Sanctions in August 2005 and the Minister's response on 13 October 2005. The inspection report concentrated on two centres which were also visited by the UNHCR: the Grenshospitium holding centre on Tafelbergweg and the Rotterdam deportation centre.

The UNHCR asked the Minister whether 'the Dutch system provides options for increasing the number of alternative measures, particularly for families with minor children'. The organisation put forward a number of possible alternatives, such as housing asylum seekers at open locations with a frequent duty to report, electronic tagging, and enlarging the target group for departure centres. The UNHCR commented that it was unable to find any indications in Minister Donner's written response to the inspection report that the Minister was considering instigating a thorough investigation into these possible alternatives.

Finally, the UNHCR commented on the lack of proper education, which it described as 'a serious problem which violates the rights of children in detention'. The organisation pointed out that Minister Donner did not pay any attention '(...) to the Inspectorate's conclusion that the education provided in the institutions is not in accordance with international regulations. The UNHCR suggests that the Minister investigate the possibilities of education outside the centres'.

Comments on the new asylum procedure

After the Dutch government proposed revising its asylum procedure, the UNHCR stated its viewpoints on this matter in September 2008.² The organisation remarked that the Dutch government intended to continue its existing policy of placing asylum seekers in detention in order to prevent them from entering the Schengen area. In principle, asylum seekers may not be placed in detention: the UNHCR referred to Article 18(1) of EC Directive 2005/85, adding that asylum seekers may only be placed in detention if this is necessary and legitimate. According to the UNHCR, the possibility that asylum seekers might go into hiding was insufficient reason to justify systematic detention, and detention should not automatically be used in Dublin Convention cases.

² UNHCR Comments on the plans of the Government of the Netherlands for 'a more careful and faster' asylum procedure as set out in the letter of the Ministry of Justice to the Second Chamber of the States General dated 24 June 2008.

The UNHCR urged the Dutch government to review its use of detention and to adopt other measures. It also advised against the detention of children, victims of torture and sexual violence, and traumatised persons, and called on the government to review the detention of those applying for asylum under the Dublin Convention and to come up with alternatives. Finally, the UNHCR urged the government to abolish the closed reception procedure.

Committee on the Rights of the Child (CRC)

The CRC published a report on compliance with the Convention on the Rights of the Child in 2004. In this report, the CRC expressed concern about the fact that children whose applications for asylum were rejected were being detained in closed camps that only provided limited opportunities for education and leisure activities.³ The CRC recommended that detention of children whose refugee application has been rejected is used only as a last resort, and that all children awaiting expulsion receive adequate education and housing.⁴

The Committee Against Torture (CAT)

The CAT similarly expressed its concern about the plight of young asylum seekers in 2007,⁵ and noted that the Netherlands must devote special attention to this point. Like the CRC, the CAT indicated that detention should only be used as a last resort. In addition, the committee recommended that the Netherlands ensure adequate housing and education for young asylum seekers awaiting deportation. The CAT was particularly concerned about the fact that unaccompanied minor asylum seekers were placed in detention centres if there were any doubts about their age. According to the CAT, the Netherlands must first establish the ages of unaccompanied minor asylum seekers in case of doubt before placing them in detention.

Council of Europe

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

On 5 February 2008, the CPT published a report which was compiled as a result of a visit to the Netherlands,⁶ when members of the committee inspected the Stockholm and Kalmar detention boats and the Rotterdam Deportation Centre.⁷

³ 'Concluding observations on the second report of the Netherlands and the initial report of Aruba', 30 January 2004, CRC/C/15/Add. 227, para 53.

⁴ *Ibid.*, para 54.

⁵ 'Concluding observations on the fourth report of the Netherlands', 3 August 2007, CAT/C/NET/CO/4, page 4.

⁶ Report to the authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe, Aruba, and the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT/Inf (2008). The Dutch government made this report public on 30 January 2008; it was subsequently published on the Council of Europe's website on 5 February 2008, <http://cpt.coe.int/en/>.

⁷ In addition, the CPT paid visits to a number of police cells in The Hague and Rotterdam, units for

The CPT observed that it had not received any recent complaints on the ill-treatment or abuse of detainees in general, however it referred to three incidents which had been reported at an earlier date. Two of these incidents related to asylum seekers in detention. The committee advised the Dutch government to draw up a clear complaints procedure for dealing with reports of ill-treatment or abuse, and pointed out that an independent authority must be responsible for this and not the National Agency of Correctional Institutions. The CPT also commented that there was no maximum term for detention under Dutch law, and requested the government to incorporate this term into the law. Most member states already have a maximum term.⁸

The committee criticised the Stockholm and Kalmar detention boats as well. Although the CPT considered that living conditions on these boats were acceptable in most respects, their low ceilings and narrow passages nevertheless resulted in a cramped environment. Moreover, the CPT added that the boats were not properly ventilated, which caused problems with humidity and a lack of fresh air on the boats. The committee referred to case law which stated that aliens may not be detained on the boats for more than six months; it emerged that in practice, these people were sometimes detained for longer periods, despite the fact that the boats are unsuitable for long-term detention.⁹ The CPT recommended that the Dutch government discontinue the use of detention boats as soon as possible, and take measures to improve atmospheric humidity and general conditions on the boats in the meantime.

The CPT observed that the attitude towards the detention of aliens had changed since the committee's last visit in 1997: the regime was now in line with the regime in remand prisons. Although the CPT had praised the Netherlands in the past for its varied and stimulating regime for asylum seekers in detention, the committee arrived at a different conclusion after its visit in 2007. Many of the activities had been abolished, while others were restricted to a minimum. The CPT asked the Dutch government to give its arguments in favour of classifying detention centres for asylum seekers with remand prisons, and urged the government to revise its attitude towards the detention of aliens: there was no reason why aliens should be detained under prison conditions with a limited regime. The CPT was of the opinion that aliens must be housed in specially-designated places where the regime was consistent with their status as asylum seekers. However, the organisation did acknowledge that certain situations permitted restrictions on freedom of movement, e.g. as a punishment or for health reasons.¹⁰

terrorists in Vught and Rotterdam, and a young offenders' institution in Spijkenisse.

⁸ 'Report in connection with the visit to the Netherlands in June 2007,' 5 February 2008, CPT/Inf. (2008) 2, point 56.

⁹ Ibid., points 57 and 58.

¹⁰ Ibid., point 61.

The committee also expressed criticism of the training given to private staff and the availability of medical staff. This training was inadequate, and moreover, somebody – preferably a qualified nurse – should be present 24 hours a day to give first aid, while a doctor should be on call as well.¹¹

The CPT was extremely critical of the use of isolation cells without any medical grounds for longer periods of time: ‘such a practice could very well be considered as ill-treatment’.¹² Further restrictions in addition to the use of isolation cells should never be used as a punishment: such restrictions were only permissible in the case of violent individuals, and should not exceed a few hours. Any additional restrictions should be imposed by a doctor, if medical reasons necessitated this; permanent supervision must be available in such cases.

Commissioner for Human Rights

On 11 March 2009, the Commissioner for Human Rights published a report on his visit to the Netherlands in September 2008. This report likewise devoted attention to Dutch policy on the detention of aliens pending deportation.¹³ In his report, the Commissioner referred to the CPT’s points of criticism, although he did not draw any conclusions from these. The Commissioner regrets that few occupational activities appear to be available in all three facilities he visited.¹⁴

He also pointed out that conditions in detention centres should not be worse than in criminal detention, and in connection with this, he called on the Dutch government to organise a number of useful activities for all persons detained during the asylum procedure or the deportation proceedings. In addition, he stated that the detention of aliens must be kept to a strict minimum.¹⁵ He added that detention should be based on an individual assessment of each case; it was important to seek possible alternatives, particularly in the case of vulnerable groups such as unaccompanied minor asylum seekers or victims of human trafficking. Since the Dutch policy of detaining all asylum seekers who arrived in the Netherlands by plane was not consistent with the general legal proportionality principle, the Commissioner for Human Rights urged the Dutch government to adjust this policy.¹⁶

He criticised the limited options for judicial reviews in the event of detention. The Aliens Act stipulates that 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. This is not fully reviewed by the courts. The

¹¹ Ibid., point 67.

¹² Ibid., point 69.

¹³ Report by the Commissioner for Human Rights (CommDH(2009)2), 11 March 2009, sections 3.3 and 3.5.

¹⁴ Ibid., point 56.

¹⁵ Ibid., point 57.

¹⁶ Ibid., point 58.

Commissioner for Human Rights commented that this limited possibility of judicial review may be in contradiction with the case law of the European Court of Human Rights.¹⁷ He called on the Dutch government to amend the present legislation in order to allow for a full judicial review in the event of detention of aliens pending deportation.

The last point of criticism was the detention of minor asylum seekers forming part of a family. The Commissioner praised the first steps taken by the Dutch government in this respect, and encouraged the government to extend these measures to apply to all unaccompanied minor asylum seekers.

The report concluded with a list of recommendations, which were formulated in such a way as to make it easy for the government to respond solely to these recommendations. The government did indeed do this, as we will be discussing further on.

Private organisation

Amnesty International

In June 2008, Amnesty International published a critical report on the detention of illegal migrants and asylum seekers in the Netherlands. This was the first time that this organisation had published a report on the situation in the Netherlands. The reason for the report was the increasing number of complaints about the length of detention and the way in which aliens were treated during detention. Amnesty International concluded that certain aspects of Dutch policy were at odds with international human rights standards.¹⁸ A press release summarised these conclusions as follows:

'Amnesty International has established that the Netherlands has come to regard the locking up of asylum seekers as a matter of course, although international law and international standards prescribe that the detention of aliens should only be used as a last resort. Members of vulnerable groups such as children, elderly persons and victims of torture and human trafficking are also placed in detention. There are hardly any attempts to seek less drastic measures, such as a duty to report or paying a surety.

Amnesty International is of the opinion that asylum seekers are detained too long. There is no legal maximum term for detention in the Netherlands, and some people are detained for longer than a year. Some people are apprehended again and shut up a second or a third time, which means that they spend an extremely long time in detention.

Moreover, the regime in force in detention centres is intended for people serving prison sentences. Illegal residence in itself is not an offence, and everyone has the right to seek asylum. The conditions in detention cen-

¹⁷ One of the notes referred to the Saadi/VK case, 29 January 2008.

¹⁸ Amnesty International, June 2008, EUR 35/02/2008, page 5.

tres for aliens are even more austere than in penal institutions, since there are no activities focusing on re-socialisation such as education, work and leave.

Amnesty International is also of the opinion that the grievance procedures for asylum seekers in detention are not effective. Complaints are not investigated properly or soon enough. During its investigations, Amnesty International also observed a serious absence of reliable data on all aspects of the detention of aliens, such as figures on duration, repeated detention, the number of deportations from detention centres to specific countries, use of isolation cells, and complaints about disproportional violence'.¹⁹

6.2 Attention from the press

It is remarkable that the six Dutch daily newspapers we investigated did not devote any attention to the various UN bodies' viewpoints. However, the Council of Europe reports (CPT and the Commissioner for Human Rights) as well as the Amnesty International report did not escape the attention of the press.

The CPT report

On 31 January 2008, one day after the Dutch government made the CPT report public, *Het Parool* printed an article on the CPT's visit, entitled 'European Committee for the prevention of inhuman punishment considers situation wholly unacceptable'.²⁰ This article also examined the Minister of Justice's reaction to the report in the Second Chamber. *Trouw* published an article on the report more than five months after its publication.²¹ This article discussed the conclusions of Amnesty International and the Council for the Administration of Criminal Justice and Youth Protection (RSJ) with respect to the detention of aliens. *Trouw* wrote: 'Secretary of State Nebahat Albayrak can add the recommendations put forward by Amnesty and the RSJ to the report published by the European Committee for the Prevention of Torture (CPT) at the beginning of this year (...)'.²²

The Commissioner for Human Rights

Although a number of newspapers devoted attention to the Commissioner for Human Rights's report, only *NRC Handelsblad* and *Het Parool* referred to the criticism of Dutch detention policy.²² These newspapers dealt briefly with the

¹⁹ Press release dated 27 June 2008 on the Amnesty International Nederland website, www.amnesty.nl

²⁰ 'Europees Comité ter voorkoming van onmenselijke bestraffing vindt situatie 'totaal onacceptabel'', *Het Parool*, 31 January 2008, page 6.

²¹ 'EU-richtlijnen stellen Albayrak voor dilemma; Kritiek op illegaldetentie stapelt zich op', *Trouw*, 5 July 2008, pages 6-7.

²² *Trouw*, 12 March 2009, pp. 6-7; 'Kamer is dringend aan bezinning over eigen bestaan toe; de wijk', *Trouw* 13 March 2009, pages 28-29: article on the Commissioner for Human Rights's concern about increased racism, xenophobia, anti-Semitism and intolerance towards Muslims, and the tone of the debate on integration. "Our reports are not always welcome"; Council of Europe's Deputy Secretary

criticism. *NRC Handelsblad* wrote: 'Thomas Hammarberg has also ascertained that aliens are placed in detention for more than three months on average, in living conditions that must be improved'.²³ *Het Parool* wrote that improvements must be made in asylum seekers' living conditions, and that communal showers for men and women must be abolished. Although no explicit reference was made, this statement concerned the living conditions in detention centres.²⁴ *Het Parool* also indicated that although young asylum seekers in the Schiphol detention centre were well looked after, they had no idea what was going to happen to them. 'This is unacceptable: children are entitled to an explanation at their own level and in their own language'.

The Amnesty International report

Trouw and *De Volkskrant* devoted attention to the Amnesty International report shortly after its publication.²⁵ On 3 July 2008, a brief article appeared in *Trouw* which once more, referred to the criticism.²⁶ *Het Parool* followed this up on 16 July 2008 by publishing the opinion of a lawyer: 'The detention of illegal aliens should be more humane; they only get a couple of hours' exercise a day in a cage on the quayside'. On several occasions, the press mentioned the report in connection with the report of the Council for the Administration of Criminal Justice and Youth Protection (RSJ), which was published a week after the Amnesty International report.²⁷

6.3 Attention in political circles

It was also remarkable that reactions from the government and parliament did not include any responses to the relevant United Nations bodies' viewpoints on Dutch detention policy during the two months following publication. Their reactions were confined to the reports compiled by the CPT, the Commissioner for Human Rights and Amnesty International.

The CPT report

Response from the government

Minister of Justice Ernst Hirsch Ballin submitted the CPT report to parliament

General concerned about the Netherlands' image', *De Volkskrant*, 28 March 2009, page 2, with reference to the ECRI's 2008 report on the tone of the integration debate and the increase in racism, xenophobia and Islamophobia.

²³ Articles on the report appeared in *Het Parool* on 11 March 2009, *Trouw* on 12 March and 13 March 2009, and *De Volkskrant* on 28 March 2009.

²⁴ See point 55 in the Commissioner for Human Rights's report.

²⁵ 'Amnesty: Nederland misbruikt vreemdelingendetentie', *Trouw*, 28 June 2008, pages 4-5; 'Amnesty: detentie illegalen te zwaar', *De Volkskrant*, 28 June 2008, page 3.

²⁶ 'Helft vreemdelingen blijft na detentie', *Trouw*, 3 July 2008, pages 4-5.

²⁷ 'Kritiek op vreemdelingenbewaring zwelt aan', *Trouw*, 4 July 2008, pages 6-7; 'EU-richtlijnen stellen Albayrak voor dilemma; Kritiek op illegalendetentie stapelt zich op', *Trouw*, 5 July 2008, pages 6-7; 'We moeten waken voor tortuur van vreemdelingen', *NRC Handelsblad*, 15 July 2008, page 2.

on 29 January 2008. In his accompanying letter, the Minister dealt exhaustively with each of the CPT's recommendations on the detention of aliens.²⁸

Length of the detention

The Minister stated that he did not intend to incorporate an absolute time limit into the law because there was a danger that 'aliens may possibly refuse to cooperate fully in their repatriation if they are aware that there is a time limit, since they know that repatriation is not easy to achieve without their cooperation, and that the measure will be revoked if they remain in detention for the entire term'. He referred to the proposal to introduce the European Return Directive, which gave a six-month term for detention: this term could be extended to eighteen months if required.²⁹

Closing of the detention boats

In response to the recommendation to close the detention boats, the Minister said that the Stockholm detention boat would no longer be used after mid-2009, and added that the Kalmar detention boat fulfilled all the requirements. The government did not have any concrete plans to discontinue the use of this boat.

The nature of the detention of aliens

Minister Hirsch Ballin stated that he intended to 'examine whether more uniformity could be introduced into the different regimes which apply to measures depriving asylum seekers of their liberty'. He agreed that it was important to ensure that the nature of the detention of aliens was expressed in the regime pursued, and added that the CPT's recommendations would be included when devising policy. The Minister announced that policy proposals would be drawn up during the course of 2008.

Training of staff

The Minister did not endorse the CPT's viewpoint that staff members were not sufficiently trained.

Restrictive measures during detention

Asylum seekers placed in detention are not handcuffed as a punishment. Minister Hirsch Ballin said that 'in response the CPT's comments (...), asylum seekers who threaten to destroy the fire sprinkler, or who attempt to do so, will henceforth be immediately transferred to an institution where the isolation cell does not have a fire sprinkler'.

²⁸ Parliamentary Papers II 2007-2008, 24587 and 31 200 VI, no. 245, pages 7-10.

²⁹ This directive (2008/115/EC) was adopted on 16 December 2008, OJ L 348/98. Member states are obliged to comply with the directive no later than 24 December 2010, with the exception of Article 13 paragraph 4: member states have been given another year to comply with this article.

Medical care

The Minister commented that the CPT's medical care requirements were fulfilled in practice. Nurses were present at each detention centre between 7.30 and 22.00 hours, while a doctor held consulting hours seven half-days a week. Outside these hours, the executive staff was responsible for giving first aid or arranging for a doctor and/or an ambulance. Moreover, the Minister added, an emergency doctor was on call, and people could always dial the emergency number 112.

Extending visiting arrangements

The Minister expressed his intention of investigating the options for extending visiting arrangements to two hours.

Extending telephone communications

At that time, asylum seekers were issued with a 5-euro telephone card on arrival in the Netherlands. They were able to make telephone calls every day during recreation time, since they could buy telephone cards at reduced prices out of their pocket money (EUR 7.50 a week). Asylum seekers could also make collect calls at the Zestienhoven deportation centre and on the Stockholm detention boat. The Minister said that he considered this to be sufficient.

Response to CPT

The CPT asked the Dutch government to respond to the report within six months, and the government published its response on the Council of Europe website on 4 February 2009.³⁰ Although this reaction was largely the same as the response in parliament which we have discussed above, further details were added to a number of points.

The government had implemented the CPT's recommendations with respect to some of the points. Areas for daily exercise had been improved, including shelters for use in rainy weather. If detainees tampered with the fire sprinkler system, they would from then on be transferred to a cell without a fire sprinkler system immediately. In addition, the Dutch government stated that it had resolved to extend the visiting arrangements, and intended to adopt a flexible attitude towards visiting hours for visitors from overseas. Another measure was to increase asylum seekers' weekly pocket money from EUR 5 to EUR 10 to enable asylum seekers in detention to buy more telephone cards.

The government added that it examined the possibilities for complying with the CPT's viewpoints on other issues. The Minister of Justice had said previously that policy proposals would be drawn up during the course of 2008 in response to the CPT's request that the Dutch government review its attitude towards the detention of aliens. The Minister cited three projects: the Regime and Day Programme sub-project, the Placement and Internal Differentiation sub-project, and the Care and Assistance sub-project.

³⁰ CPT/Inf (2009) 7.

The first sub-project involved investigations into how to increase the available range of activities, e.g. by increasing access to libraries and sports facilities, allowing free access to the exercise area, and extending the visiting arrangements.

The purpose of the second sub-project was to investigate the usefulness and necessity of internal differentiation, while the third sub-project focused on the introduction of a Legal Desk for providing aftercare to asylum seekers with special medical records. Consulting hours were held once a week in all detention centres.

The government stated that all these sub-projects had been completed in December 2008. However, on inquiry at the National Agency of Correctional Institutions (DJI), it emerged that reorientation was still going on in June 2009; the results were not expected until after the summer recess. Finally, the government expressed its intention of examining options for increasing the number of visits from voluntary workers.

The government said that it did not endorse the CPT's criticism on a number of points, and therefore did not intend to implement some of its recommendations. These included the training of private staff, the degree of humidity on the Kalmar detention boat, and the maximum term of detention of aliens.

Response from parliament

In the two months following publication of the CPT report, no parliamentary questions were asked on this report. During a debate on the modernisation of the prison system on 12 February 2008, MPs Krista van Velzen and Naïma Azough tabled a motion to prevent new asylum seekers from being placed on the Stockholm detention boat and to close this boat as soon as possible, and in any event before 1 May 2008. This motion was tabled as a result of the CPT's conclusions. The MPs also requested the government to discontinue use of the Kalmar detention boat as soon as possible.³¹ Secretary of State Nebahat Albayrak advised the Second Chamber against carrying this motion. She said that she had already announced her intention of discontinuing the use of detention boats in November 2007, although 'proper care must be taken when phasing out the boats. Financial and personnel aspects must be considered here.' She added that no new asylum seekers would be housed on the Stockholm boat with effect from 1 April 2008, while the Kalmar boat in Dordrecht would be phased out after the opening of the detention centre in Rotterdam. Use of the Kalmar boat could probably be discontinued in 2010.³² The motion was rejected.³³

³¹ Parliamentary Papers II 2007-2008, 24 587, no. 252.

³² *Ibid.*, p. 3809. From the Minister of Justice's response to the CPT report, it emerged that the new detention centre was scheduled to be ready for occupation in July 2010 (Parliamentary Papers II 2007-2008, 24 587 and 31 200 VI, no. 245, page 6).

³³ Second Chamber, votes, 14 February 2008, TK 54, 3944/3945.

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Ms Van Velzen and fellow MP Jan de Wit asked Albayrak if she shared their opinion that Dutch practice with respect to the detention of aliens was not in conformity with CPT standards. Albayrak replied that the CPT report on its visit in June 2007 had not yet been published, but previous reports had not given any cause for concern:

'The CPT's reports have been making specific recommendations to the Dutch government on the further improvement of conditions in detention centres for a number of years. These recommendations have also had an impact on policy-making as well as on actual implementation in practice. On reading these reports, however, I am unable to recognise the picture presented in the question that in practice, the detention of aliens in the Netherlands is not in conformity with the standards monitored by the CPT. The CPT has not presented any such alarming picture in its previous reports. This does not alter the fact that the Dutch government is only too pleased to take advantage of the useful recommendations made by an expert committee like the CPT. In this connection, the government will examine the possibilities of further improvements to the facilities for the detention of asylum seekers after it has received the report on the CPT's visit this year. I shall inform parliament of all further developments on the matter.³⁴

The Commissioner for Human Rights

The Minister of Foreign Affairs sent the Commissioner for Human Rights's report to the Second Chamber on the day of its publication. The accompanying letter stated that the government's response would follow as soon as possible.³⁵ This response came on 27 April 2009.³⁶ No parliamentary questions were asked either on the report or on articles in the press.

The government's response was very brief and only dealt with the recommendations. Three of these concerned the detention of aliens. The government did not devote any attention to the remainder of the report. The Commissioner for Human Rights called on the Dutch government to introduce more activities into the daily programme, and the government's response was as follows:

'The government is of the opinion that its present policy meets this recommendation. (...) Activity programmes are provided in detention and deportation centres, but no (vocational) education is given in view of the aliens' imminent departure from the Netherlands.'

³⁴ Appendix to the Proceedings II 2007-2008, no. 843, pages 1801-1804.

³⁵ Parliamentary Papers II 2008-2009, 31 700 V, no. 85.

³⁶ *Ibid.*, no. 95.

According to the Commissioner for Human Rights, the detention of all asylum seekers arriving in the Netherlands via Schiphol Airport was not in accordance with the proportionality principle. He urged the government to change this situation.³⁷ ‘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’. The government responded to this recommendation as follows:

‘The government has taken note of this recommendation. Our current policy with respect to the external borders of the Schengen area is based on European legislation. (...)’

In its reaction, the government ignored the Commissioner for Human Rights’s criticism that, since the proportionality principle required individual assessments, asylum seekers may not automatically be placed in detention. This same criticism was also expressed by the UNHCR, the CPT and Amnesty International. Moreover, the government did not respond to criticism from various organisations to the effect that the limited options available to courts for the reviewing of decisions to place asylum seekers in detention could well contravene the legislation of the European Court of Human Rights.

The Amnesty International report

No parliamentary questions were asked after the publication of Amnesty International’s report on the detention of aliens, or at least not during the first year following publication of this report. The Parliamentary Standing Committee on Justice did however ask the Minister for a reaction on 1 July 2008.³⁸

Secretary of State for Justice Albayrak gave her response to the report on 25 September 2008. This response was addressed to Amnesty International, not to the Second Chamber,³⁹ although a copy of the response was sent to parliament. In her reaction, Albayrak pointed out that a great deal of attention was being paid to the asylum seekers detention issue, both at national and at international level. She referred to the CPT’s report and to the recommendation given by the Council for the Administration of Criminal Justice and Protection of Juveniles.⁴⁰ Albayrak said that the Dutch government attached importance to such investigations, and that she was actively cooperating for that very reason. She added

³⁷ Point 58 in the report.

³⁸ See Parliamentary Papers II 2007-2008, 19 637, no. 1216 for the Minister’s reaction on 2 July 2008. Unfortunately, we were unable to find the Parliamentary Standing Committee’s letter in the Parliamentary Papers.

³⁹ The response was however included on the Ministry of Justice website, www.justitie.nl.

⁴⁰ In June 2008, the Council for the Administration of Criminal Justice and Protection of Juveniles gave recommendations on its own initiative concerning Dutch policy on the detention of aliens pending deportation. The reason for these recommendations was continuing concern about the application and implementation of detention of aliens in the Netherlands. The Council carried out investigations between August 2007 and June 2008. The recommendations corresponded with the criticism expressed by the CPT and Amnesty International on a significant number of points. The recommendations can be perused on the RSJ website, www.rsj.nl.

that such investigations often resulted in recommendations that the government was very pleased to receive.

'The Amnesty International report also contains a large number of recommendations on the policy pursued with respect to the detention of aliens and the implementation of this policy. It goes without saying that I take this report and its recommendations extremely seriously. The report contains some specific reference points for the further development and tightening up of a number of current and proposed policy adjustments.'

In her response, Albayrak also cited the CPT's viewpoints. She had obviously examined both reports as well as the RSJ report in relation to one another. Albayrak dealt with each of Amnesty International's recommendations separately. The response was 28 pages long.

On 29 September 2008, the Minister of Justice issued a press release announcing his intention of improving detention conditions. These improvements were introduced partly as a result of the Amnesty International report, and comprised the following measures:

- a new approach to the detention of aliens;
- opening new detention centres and closing the detention boats;
- instituting basic principles for medical care;
- introducing consulting hours at the legal desk at all detention locations for aliens;
- establishing a single judicial organisation for unaccompanied minor aliens.

6.4 The detention of aliens on the political and public agendas

The Parliamentary Standing Committee for Justice held a Round-Table Consultation on 18 February 2009 to discuss the detention of aliens and the relevant problem areas. This meeting was organised in response to the Amnesty International report; the outcome is unknown.⁴¹ The conference was attended by MPs from the CDA, VVD, PvdA, ChristenUnie, GroenLinks and SP political parties, and by representatives from the Dutch Refugee Council, Bonko, the National Support Centre for Undocumented Persons (*Landelijk Steunpunt Ongedocumenteerden*), Samah, Exodus, Kerk in Actie, Amnesty International, the Criminal Procedure Council (*Raad voor Strafrechtspleging*), Professor Anton van Kalmthout, Defence for Children, the UNHCR, Bonded Labour in Nederland (BLinN) and the Commissioner against Human Trafficking.⁴²

⁴¹ This was last consulted on 9 June 2009.

⁴² This emerged from a press release issued by the Dutch Humanist League: 'Parliamentary session on dilemmas posed by aliens detention', www.allepersberichten.nl.

According to the press release, the MPs exhibited concern and involvement; the Dutch Humanist League concluded that the detention of aliens was a very topical issue in parliament.

Round-Table Consultations are open to the public, although no report is generally made of these consultations. This explains why we were unable to find any documentation on the meeting in the Parliamentary Papers.⁴³ The Dutch Refugee Council stated that consultations in writing were held after the Round-Table Consultation, during which a number of parliamentary questions were asked. No report was drawn up at that stage, although a General Consultation between the Second Chamber and the government is expected to take place after the 2009 summer recess.

It is manifestly clear that the aliens detention issue is high on the political agenda. Many individuals and organisations in the Netherlands have taken a stand on this issue. Anton van Kalmthout, professor of criminal law and aliens law at Tilburg University, published an article on the regime for the detention of aliens in the *Justitiële Verkenningen* (Judicial Surveys) journal in 2007.⁴⁴ The problem areas that he identified corresponded with the points of criticism voiced by the Council of Europe and Amnesty International. He observed that there was increasing international attention for and concern about the way in which illegal aliens in Europe are marginalised and treated like criminals, and the laxness of prevailing attitudes in this respect.⁴⁵ 'This has merely resulted in non-binding yet morally imperative recommendations, resolutions and draft regulations to date. Moreover, in view of the marginal protection enjoyed by illegal aliens based on national legislations in Europe, we may anticipate that a number of these international standards will become binding in the near future. However, one might expect a state governed by the rule of law like the Netherlands, which is always at the forefront of the human rights debate, to have already incorporated these standards and principles into its policy and legislation, instead of waiting until international organisations compel it to do so'.⁴⁶

This article led to questions on aliens' circumstances being asked in parliament.⁴⁷ In her reply, the Secretary of State for Justice referred to the CPT's visit. She was of the opinion that 'the way in which the detention of aliens is currently implemented fulfils all the relevant requirements', although she considered that 'there is room for improvement in some aspects'.

⁴³ This type of non-official document is sometimes included on Parlando: www.parlando.nl, last consulted on 1 July 2009.

⁴⁴ A.M. van Kalmthout, '*Het regiem van vreemdelingenbewaring, de balans na 25 jaar*', *Justitiële Verkenningen* 2007-04, pages 89-102.

⁴⁵ *Ibid.*, page 101.

⁴⁶ *Ibid.*, pages 101-102.

⁴⁷ Appendix to the Proceedings II 2007-2008, no. 843, pages 1801-1804.

In May 2009, a special issue of the *Migrantenrecht* journal was published on the detention of aliens, including an interview with Van Kalmthout. He remarked that the State of the Netherlands seemed to be becoming 'more and more sensitive' to criticism. According to Van Kalmthout, the Dutch government's response was increasingly apologetic, and it also said it was working on changes and reform.⁴⁸ Van Kalmthout cited the closing of the detention boats in Rotterdam as an example, which, he wrote, 'was very obviously the result of the CPT request and the Amsterdam District Court ruling, which stated that a stay of more than six months on a detention boat was unacceptable. This could be construed as the first step towards awareness of the Dutch government about the human rights situation'.

Attention from the press

The Amnesty International report in particular did not escape the media's attention: Amnesty International's criticism was discussed on television and the Internet as well as in the newspapers.

Television

On 27 June 2008, the NOVA current affairs programme devoted attention to Amnesty International's viewpoints. MPs Krista van Velzen (SP) and Hans Schepman (PvdA) were guests in the studio. Both MPs gave their opinions on Amnesty International's findings. Mr Schepman said he was pleased with the report, because this had finally resulted in 'hard facts' coming to light. Ms Van Velzen however was critical, and said that alarming reports had been published long before this. She referred to the Council of Europe's criticism, among others, and the motion she had tabled as a result of this criticism.

This was not the first time that NOVA had devoted attention to the detention of aliens. An episode on the medical situation in detention institutions was broadcast on 4 March 2008 in connection with complaints from a GP working in the detention centre in Alphen aan den Rijn. During this episode, NOVA observed that international organisations had taken the Netherlands to task before for the rigidity of its detention system for aliens. This programme was partly responsible for the Secretary of State for Justice's announcement that an inspection scheduled to be carried out by the Health Care Inspectorate would be extended to include the detention centres. As a result of the programme, Ms Van Velzen asked questions in parliament on 6 March 2008.⁴⁹ The Minister replied to these questions on 18 April 2008.

Internet

A number of websites devoted attention to the CPT's findings, including '*Werken van barmhartigheid, project van de Raad van Kerken te Schiedam*' (Acts of mercy, a project set up by the Council of Churches in Schiedam). On 24 February 2008, a press release was published on the website, entitled 'European

⁴⁸ 'Anton van Kalmthout and detention conditions', *Migrantenrecht* 2009/4, page 147.

⁴⁹ Appendix to the Proceedings II 2007-2008, no. 2121, pages 4345-4346.

committee severely criticises Dutch detention of aliens'. This press release also discussed Minister Hirsch Ballin's reaction:

'He flatly disregarded the CPT's urgent request to put a stop to detention on boats, and rechristened the boats in Zaandam as 'detention platforms'. He denied the CPT's assertion that the boats were too damp, or that staff training was inadequate, and added that he would take the CPT's other recommendations 'into consideration'.'

The Dutch Humanist League posted a notice on its website on 27 February 2008 demanding attention for the humane treatment of aliens in detention. The notice referred to the CPT report.⁵⁰

Vigils for aliens in detention were also organised at regular intervals, during which attention was devoted on several occasions to the viewpoints adopted by the CPT and Amnesty International. For example, a vigil was held on 13 December 2008 on Catharinaplein in Eindhoven. The announcement made a reference to the Amnesty International report dated 24 October 2008 on the commemoration of victims of the Schiphol fire in Eindhoven. Amnesty International urged the Dutch government to bring its refugee policy into line with international treaties, and referred to a number of main features of the Amnesty International report. Two organisations that look after refugees' interests – *Stichting Vluchtelingen in de Knel* and *Netwerk Humaan Omgaan met Vluchtelingen* – organised a vigil on 21 June 2008. The notice announcing the vigil stated that 'the UN, the Council of Europe and the Committee for the Prevention of Torture (CPT) argue that aliens who are illegally resident in a country may not be treated as criminals'. On 26 April 2008, Jean-Paul Smits, of the Schiphol Oost visitors' group, informed passers-by of 'the (...) CPT's tough conclusions'.

On 11 March 2009, Defence for Children issued a press release on the Commissioner for Human Rights's report,⁵¹ and an article on Dutch detention of aliens in practice appeared on the www.verspers.nl website on 17 March 2009.⁵² This article was based on telephone interviews with Professor Van Kalmthout, Sabine Park of Amnesty International, Marco Leidekker of the CPT, and MP Krista van Velzen (SP). Ms Van Velzen said that since she felt that the government attached no importance to the CPT report, she did not expect the Secretary of State for Justice to introduce many changes:

'If you look at her plans, what specific measures does she propose? Well, maybe a bit more fresh air, but that's it. I am sure that many illegal aliens are well-intentioned, and I think other options for the detention of aliens,

⁵⁰ www.humanistischverbond.nl

⁵¹ 'European Human Rights Commissioner criticises children's rights in the Netherlands', www.defenceforchildren.nl

⁵² Mirella Obdam, 'The Netherlands disregards European aliens detention regulations', 17 March 2009.

such as ankle bracelets, are perfectly feasible. To me it is quite inhuman that illegal aliens are often treated as criminals.'

Wikipedia also referred to Amnesty International's criticism and Secretary of State Albayrak's response to Amnesty International on 25 September 2008. The Wikipedia article cited the measures for improvement announced by Albayrak as well.⁵³

Attention in national case law

The Dutch Association of Asylum Lawyers (VAJN) instituted interlocutory proceedings in which it requested the State of the Netherlands to implement a separate and uniform regime for aliens in detention, which would apply to all detention institutions. The VAJN referred to international reports in this respect,⁵⁴ and cited a number of passages from these reports and from the recommendations of the Council for the Administration of Criminal Justice and Protection of Juveniles. The claim was rejected. The court ruled that no direct effect could be attributed to reports and recommendations drawn up by international organisations. The court gave its decision as follows:

'With respect to the VAJN's invoking recommendations made in the CPT report, the advice given by the RSJ, and the Amnesty International report, no direct effect can be attributed to these recommendations either. The sole argument put forward by the VAJN that the State has failed to implement these recommendations (to a sufficient extent), insofar as this is correct, does not, therefore, automatically mean that the State has acted unlawfully. This does not alter the fact that, when assessing the VAJN's allegations that the State is acting unlawfully in the implementation of the detention of aliens, the court in interlocutory proceedings will also take account of the aforesaid reports and recommendations, insofar as these have been invoked by the VAJN. However, the starting point here must be that the State is entitled to a certain discretionary power when carrying out the recommendations. With respect to the administrative and political decision-making process, it behoves the court in interlocutory proceedings to exercise a certain degree of restraint.⁵⁵

'The court in interlocutory proceedings considers the reference made by the VAJN to the CPT and RSJ reports to be insufficient to conclude that there is any question of degrading treatment within the meaning of Article 3 of the ECHR. The content and tenor of the recommendations made by the CPT and the RSJ, including the recommendations for implementing a general community regime, may not carry such a far-reaching con-

⁵³ www.wikipedia.org, last consulted on 25 May 2009.

⁵⁴ Haarlem Court in Interlocutory Proceedings (civil), 20 March 2009, 153876/ KG ZA 09-43, JV 2009/197, UJN BH6928.

⁵⁵ *Ibid.*, point 4.5.

clusion as that the regime in detention centres for aliens contravenes Article 3 of the ECHR where the State does not deem it necessary to introduce a general community regime. Moreover, the State has made it sufficiently plausible that efforts are being made to introduce changes within the existing limited community regime, which comply with the recommendations put forward by the CPT and the RSJ to the greatest possible extent.⁵⁶⁷

6.5 Effect of the criticism on Dutch policy

A number of international organisations expressed views between 2000 and 2008 on the Dutch practice of detention of aliens. We can distinguish here between the detention of minor asylum seekers and the detention of all other aliens. The CRC, the UNHCR, the CAT, the Commissioner for Human Rights and Amnesty International called particular attention to the plight of minor asylum seekers. However, the UNHCR, the Commissioner for Human Rights and Amnesty International did not limit their views to the detention of minor children, while the CPT also published a report on detention conditions in the Netherlands.

There is a clear difference in the attention devoted to the various international viewpoints in the press and political circles. The viewpoints expressed by the UNHCR, the CRC and the CAT received no attention whatsoever immediately after publication. One explanation of this could be that dialogue on compliance with UN treaties takes place between the relevant organisation and the Dutch government. The press is (intentionally) excluded. The reports of the CPT and the Council of Europe Commissioner for Human Rights were compiled after their respective visits to the Netherlands. Since a number of individuals and organisations were consulted, many people were aware beforehand that these reports would be published. Presumably this meant that these particular reports were more readily picked up by politicians, NGOs and the media than the reports compiled by the UN committees.

As far as the Amnesty International report is concerned, this organisation pursues an active PR policy, so the report would not slip by unnoticed by politicians and the media. The result of this was that NOVA also devoted a programme to the report, and two MPs entered into a debate which, incidentally, was not continued in parliament.

Only a limited amount of attention was paid to the reports in political circles. The reports published by the CPT and the Commissioner for Human Rights were sent to the Second Chamber together with an official government viewpoint, and a copy of Amnesty International's response was also sent to the Sec-

⁵⁶ Ibid., point 4.8.

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ond Chamber. Secretary of State Albayrak made frequent references to the CPT's criticism in her reaction to the Amnesty International report.

The government implemented changes in the policy for the detention of under-age children at the beginning of 2008, and a number of the CPT's points of criticism likewise resulted in policy changes. It would be incorrect to ascribe these changes in policy and legislation solely to international criticism, since national organisations actively lobbied as well. Nevertheless, it is clear that international criticism played a significant role. The viewpoints adopted by the various organisations were largely similar. National organisations probably derived moral support for their own campaigns from the international organisations' critical viewpoints.

One other remarkable fact is that the government appeared to be impervious to national and international arguments that the detention of aliens should only be used as a last resort, that serious endeavours to seek alternatives must be made, that judicial reviews must be extended, and that a maximum term for detention must be set. The government obviously felt that the Netherlands was above reproach on these points.

Chapter 7. Decisions of European Courts

In this chapter, we study rulings of the European Court of Human Rights and the European Court of Justice in cases against the Netherlands in the period 2000-2008. We also look at cases in which a Dutch court posed a preliminary question and cases against other countries where the Netherlands was involved as a (third) party. The selection is in principle limited to rulings related to immigration and integration. Moreover, we only study the extent to which the judgements of both Courts were given attention in Dutch case law, the press and in political circles, without analysing the contents of these decisions.

7.1 Decisions by the European Court of Human Rights

The European Court of Human Rights (ECHR) has its own database: Hudoc.¹ In the period 2000-2008, this database recorded 73 judgements (rulings) and over 100 decisions (reasoned decisions for inadmissibility) against the Netherlands. For the selection of rulings by the European Court of Human Rights, we used the Migratieweb database. We assume that all the relevant rulings related to immigration and integration are included in this database. In the period 2000-2008, Migratieweb contained 48 rulings by the ECHR related to immigration and integration.

In seven of the 48 cases, the ECHR established a violation by the Netherlands. In five cases, there was a violation of Article 8 ECHR, and in two cases the Court established a violation of Article 3 ECHR. In the 41 other cases, the Court concluded either that there was no violation of the ECHR, a complaint was disallowed as being apparently unfounded, the ruling only related to a decision regarding the inadmissibility of the case or the case was removed from the cause list. The latter occurred most frequently either because a residence permit had meanwhile been granted or because the applicant no longer wished to continue proceedings for another reason.²

The following 48 rulings (judgements and decisions) were found in Migratieweb:

A. Violation Article 8 ECHR

- Cili - The Netherlands, 11 July 2000
- Sen - The Netherlands, 21 December 2001
- Tuquabo Tekl - The Netherlands, 1 December 2005
- Rodrigues Da Silva and Hoogkamer - The Netherlands, 31 January 2006
- Sezen - The Netherlands, 31 January 2006

¹ www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+thatabase/.

² We suspect that the decision to remove a case from the cause list is taken more often than is apparent from the Migratieweb database.

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B. Violation Article 3 ECHR

- Saïd - The Netherlands, 5 July 2005
- Salah Sheekh - The Netherlands, 11 January 2007

C. Complaint (apparently) unfounded/ disallowed

- Tekdemir - The Netherlands, 1 October 2002
- Solomon - The Netherlands, 5 September 2000
- Knel and Veira - The Netherlands, 5 September 2000
- Javeed - The Netherlands, 3 July 2001
- Erdogan - The Netherlands, 18 September 2001
- Kaya - The Netherlands, 6 November 2001
- Ebrahim - The Netherlands, 18 March 2003
- I.M. - The Netherlands, 25 March 2003
- Chandra - The Netherlands, 13 May 2003
- Henao - The Netherlands, 24 June 2003
- Meho - The Netherlands, 20 January 2004
- Venkadajalasarma - The Netherlands, 17 February 2004
- Thampibillai - The Netherlands, 17 February 2004
- Kandomabadi - The Netherlands, 29 June 2004
- Andrade - The Netherlands, 6 July 2004
- Amara - The Netherlands, 5 October 2004
- Benamar - The Netherlands, 5 April 2005
- Üner - The Netherlands, 5 July 2005
- Haydarie - The Netherlands, 20 October 2005
- Paramsothy - The Netherlands, 10 November 2005
- Jeltsujeva-The Netherlands, 1 June 2006
- S.A. - The Netherlands, 12 December 2006
- Konstatinov - The Netherlands, 26 April 2007
- Merie - The Netherlands, 20 September 2007

D. Removed from cause list

- Samy - The Netherlands, 18 June 2002
- Mohammed Yuusuf - The Netherlands, 21 April 2005
- Samba - The Netherlands, 28 April 2005
- Useinov - The Netherlands, 11 April 2006
- Chen - The Netherlands, 15 May 2007
- Sourì - The Netherlands, 20 September 2007
- Xiao Qing Yang - The Netherlands, 27 September 2007
- El Majjaoui and Stichting Touba Moskee - The Netherlands, 20 December 2007
- Isfahani - The Netherlands, 31 January 2008

E. Statements of facts/Interim measure/judgement on admissibility

- Kandomabadi - The Netherlands, 3 March 2003
- B.- The Netherlands, 3 May 2004

- Said Botan - The Netherlands, 12 May 2005
- Ibrahim Mohamed - The Netherlands, 12 May 2005
- Bonger - The Netherlands, 15 September 2005
- Dinic - The Netherlands, 29 October 2007
- S. e.a. - The Netherlands, 16 January 2007
- Ramzy - The Netherlands, 27 May 2008

Annual reports Dutch cases

Every year, the Minister of Foreign Affairs reports to the Second Chamber about cases against the Netherlands in the European Court of Human Rights.

This report contains information about Dutch cases. It states (1) the number of petitions received by the European Court of Human Rights, (2) the number of petitions that have been disallowed or removed from the cause list (3) the number of petitions reported to the government, (4) the number of petitions that have been allowed and (5) the number of cases in which a decision has been taken.

The report also contains a summary of the rulings of the ECHR against the Netherlands or in cases involving the Netherlands as a (third) party. Reports also refer to national legal locations of the judgements, such as Case law Aliens Act (JV), and they describe what action is or has been undertaken. Since 2004, the report has also included a list of reasoned decisions for inadmissibility. Since 2006, the authors of the report have also devoted attention to the measures taken by the Netherlands in that year in response to previous rulings. The reports can be consulted on the website of the Ministry for Foreign Affairs.

For this research, we studied the reports on the years 2000-2007. The report relating to 2008 was sent to the Second Chamber on 26 February 2009, but has not yet been posted on the above website.³ The Minister notes

‘with pleasure that the Netherlands was not judged to have violated the European Convention of Human Rights and the Fundamental Freedoms in 2008.’

Besides the annual report, since 2005 the Human Rights Agency (*Agentschap Mensenrechten*), as an authorised representative of the Dutch government, has compiled annual reports about litigation in Strasbourg and Geneva.⁴

³ Letter from the Minister of Foreign Affairs accompanying the report for 2008 (Second Chamber 2008-2009, 30481, no. 4). Website Ministry of Foreign Affairs, www.minbuza.nl, last consulted on 18 June 2009.

⁴ See the Ministry of Foreign Affairs website: ‘The annual report aims to meet the apparent need for information about the agent’s work, in the first instance insofar as this extends to representation of the State in individual complaint procedures in the various international (quasi) legal bodies, but also outside’. The annual report for 2008 has not yet been posted on the website, last consulted on 18 June 2009.

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Summary of rulings

Below is a brief summary of the seven rulings of the European Court of Human Rights (ECHR), in established violation of the ECHR, the European Convention for the Protection of Human Rights and the Fundamental Freedoms.

In the Ciliz ruling of 11 July 2000, the ECHR concluded that the Dutch state had violated Article 8 ECHR. Due to insufficient coordination of the various procedures, the Dutch authorities had not acted in a way that promoted the development of family ties. The government was ordered to pay damages and legal costs.

In the Sen ruling of 21 December 2001, the ECHR judged that by giving the parents no other choice than either to relinquish the position they had acquired in the Netherlands or give up the company of their daughter, the Dutch state had failed to find the correct balance between the interests of the persons involved and the interest of the State in controlling immigration. In this case too, violation of Article 8 ECHR was upheld.

In the Saïd case, for the first time the ECHR upheld violation of Article 3 ECHR in a case against the Netherlands. The Dutch authorities did not consider the request for asylum credible and the request was rejected in the AC procedure. Within two months, the appeal and the appeal to a higher court were declared unfounded. The ECHR, by contrast, considered that the request for asylum was credible and unanimously concluded that deportation of the applicant constituted a violation of Article 3 ECHR.

In the Tuquabo-Tekle case of 1 December 2005, the ECHR concluded that the government did not correctly weigh the interests of the applicants and those of the State in controlling immigration. The Court felt that the age of the daughter should not result in a different judgement than in the case of Sen against Netherlands of 21 December 2001 when a violation of Article 8 was also upheld.

On 31 January 2006, in the Rodrigues Da Silva and Hoogkamer case the ECHR unanimously concluded that in this case the economic welfare of the State did not outweigh the justified interests of Rodrigues Da Silva and her daughter, despite the fact that she was residing and working in the Netherlands illegally. According to the Court, the fact that the Dutch authorities gave so much weight to this aspect could be attributed to excessive formalism. The Court unanimously held that there had been a violation of Article 8 ECHR.

In the Sezen case of 31 January 2006, the ECHR concluded that the Dutch State had incorrectly weighed the interests involved. The Court recognised that the applicant had committed a serious crime and that he had connections with his country of origin. However, the Court noted with concern that none of the authorities seemed to have considered the consequences for his family if the applicant was denied residence. The consequences for his family were decisive for

the concluding vote of five against two that this was a violation of Article 8 ECHR.

In the Salah Sheekh case, on 11 January 2007 the ECHR established a violation of Article 3 ECHR by the Netherlands for the second time. According to the Dutch State, the application should be declared inadmissible because the applicant had meanwhile been granted a temporary residence permit. The Court did not agree and was of the opinion that the permit granted was dependent on the ruling of the ECHR and that this permit therefore did not offer a guarantee against deportation. Furthermore, the Dutch State did not feel that the national legal remedies had been exhausted. The Court considered that, given the established case law of the Administrative Jurisdiction Division of the Council of State, an appeal would have no chance of success, in view of the applicant's claim that the risk incurred in returning to his country of origin affected all the members of his group equally and not just himself.

'The Court considers that it should not just base its judgement about the grounds of the complaint on information provided by the Government, but also on information from other objective and reliable sources. The Court subsequently argues that states may consider the possibility for aliens to find a safe refuge in their country of origin in their deportation decisions. However, the people concerned must be able to travel to those areas which are deemed safe, be granted entry and have the opportunity to settle there. If these three conditions are not present, then deportation constitutes a violation of Article 3 ECHR.'

Besides the rulings in which violation was upheld, the reports of the Ministry of Foreign Affairs also provide a summary of the rulings *Samy* 18 June 2002, *Venkadajalasarma tegen Nederland* 17 February 2004, *Thampibillai* 17 February 2004, *Mohammed Yuusuf* 21 April 2005, *Üner* 5 July 2005, *Konstatinov* 26 April 2007 and *El Majjaoui and stichting Touba Moskee* 20 December 2007. We will not address these rulings further.

Attention from the press

The six daily newspapers studied devoted attention to three of the seven judgements in which violation of the ECHR was pronounced. The ruling of the ECHR in the Salah Sheekh case of 11 January 2007 received most attention.

This ruling produced 22 articles in all six newspapers. On 11 January 2007, *NRC Handelsblad* wrote: 'Court: the Netherlands violates ban on torture'. On 12 January 2007, an article in this newspaper was headlined: 'Netherlands on trial by Somalian refugee. Solicitors and asylum lawyers regard European Court ruling as severe criticism on asylum policy'. On 12 January 2007, an article also appeared on the front page of *De Volkskrant*: 'Deportation in conflict with torture ban. European Court of Human Rights ruling may impact Dutch asylum

policy'. Elsewhere in the newspaper was another article about the ruling: 'People can't just be dumped. European bodies have to point out the human rights of aliens to the Netherlands'. In *Trouw* on 13 January 2007: 'European Court puts deportation policy under pressure; asylum policy'. Two days later, on 15 January 2007, another article appeared in *Trouw*: 'Sad that European Court doubts independence of our courts'. On 16 January 2007, another article appeared in *NRC Handelsblad*: 'Erasing the shame'. On 17 January 2007, it was *Trouw's* turn again: 'Criticism damages authority of Council of State'. Also in *Trouw* on 22 January 2007: 'A real possibility of torture Salah Sheekh'. On 3 February 2007, *Trouw* wrote: 'Minister appeals against judgement Somalian asylum seeker'. Also *NRC Handelsblad* devoted attention to the appeal of the Dutch government against the ruling. The newspaper headlined: 'Cabinet appeals against torture judgement after European Court ruling'. On 12 February 2007, the newspaper wrote: 'Council of State: surviving fossil'. *Trouw* on 19 April 2007: 'Official country reports drive asylum solicitors to distraction'. A month later, on 24 May 2007, new articles are published in various newspapers. *Trouw* wrote: 'Prohibition on deportation of Somalian upheld'. *NRC Handelsblad*: 'European Court enforces new asylum policy after rejection judgement review'.⁵

The newspapers also devoted attention to the political reaction to the judgement. In particular *NRC Handelsblad* again published several articles on the judgement. On 23 June 2007, the paper wrote: 'Cabinet plans to amend asylum policy after European Court judgement'. *Algemeen Dagblad* wrote on 24 July 2007: 'Rutte: Ignore European Court ruling on Somalians'. On 18 August 2007, an opinion was published in *NRC Handelsblad*: 'Advice and Adjudication'. On 29 September 2007, the judgement received more attention. *NRC Handelsblad*, section Opinion & Debate: 'The Dutch State and Human Rights'. On 13 October 2007, the newspaper devoted attention to the first ruling of the Council of State after the Salah Sheekh judgement: 'Personal risk remains important in asylum case'. On Monday, *Trouw* also devoted attention to this ruling of the Council of State: 'Justice in the Netherlands sticks to personal danger refugee'.

NRC Handelsblad made one reference to the ruling of the European Court of Human Rights in the Rodrigues Da Silva and Hoogkamer case. But this followed the judgement in the Salah Sheekh case, nearly a year after the ruling in the Rodrigues Da Silva and Hoogkamer case.⁶ The newspaper published a short article on the Saïd ruling on 6 July 2005: 'Asylum unjustly refused'.⁷ An article appeared in *Algemeen Dagblad* on 31 March 2006 about the Saïd case: 'Asylum

⁵ The article is announced on the front page.

⁶ 'Een beschamend vonnis voor de rechtsstaat', *NRC Handelsblad* 13 January 2007, page 19.

⁷ 'Asylum ten onrechte geweigerd', *NRC Handelsblad* 6 July 2005, page 2.

seeker Eritrea tortures deserters, but the war is over'.⁸ Neither of the articles mentions the name of Saïd, however.⁹

Attention in political circles

Four of the seven rulings of the European Court of Human Rights were addressed in the political debate. These were the rulings in the Rodrigues Da Silva and Hoogkamer case, the Sezen case, the Saïd case and the Salah Sheekh case. The ruling of the ECHR in the Salah Sheekh case received by far the most attention in political circles. In the year after its publication, the ruling was mentioned 25 times in parliamentary papers. For the VVD and PvdA parties, the ruling provoked Parliamentary Questions. The ruling was also addressed several times during debates on bills.¹⁰ In addition, the ruling was repeatedly addressed in the Second Chamber and the Senate during (written and general) consultations.¹¹

In response to the ruling, there was even a separate written consultation.¹² A few reactions are discussed below.

Op 17 January 2007, several days after the ruling, during the discussion of the proposed Adoption of the budget of the Ministry of Justice (VI) for the year 2007, MP Jan de Wit (SP) asked the Minister's opinion about: 'this far-reaching ruling and its consequences for daily practice'.¹³

⁸ 'Asielzoeker Eritrea martelt deserteurs maar er is geen oorlog meer', *Algemeen Dagblad* 31 March 2006, page 6.

⁹ Home section, page 2. Name of judgement not mentioned. Found on search term 'Hof voor de Rechten van de Mens & asiel'.

¹⁰ The ruling was discussed during the debate on the proposed Adoption of the budget of the Ministry of Justice for 2007, the proposed Amendment of the Council of State Act related to the restructuring of the Council of State, the proposed Amendment to the Aliens Act 2000 for the implementation of directive no. 2005/85/EC re. Minimum norms for procedures in member states to grant or revoke refugee status and the proposed Amendment of, among others, the Penal Code with respect to the change of early release in conditional parole. *Proceedings II 2006-2007*, no. 31, page 2020.

¹¹ E.g. General Consultation of 29 March 2007 regarding, among others, the Aliens Chain Report May-August 2006 *Parliamentary Papers II 2006-2007*, 19637, no. 1154, Adoption of the budget of the Ministry of Justice (VI) for the year 2007; Report General Consultation of 24 May 2007 (introductory meeting with Justice Minister Ernst Hirsch Ballin and State Secretary Nebahat Albayrak) *Parliamentary Papers II 2006-2007*, 30800 VI, no. 99; Evaluation Aliens Act 2000; Report written consultation *Parliamentary Papers II 2007-2008*, 30846, no. 2; Report General Consultation of 1 November 2007, including the subject of justification of resettlement policy *Parliamentary Papers II 2007-2008*, 19637, no. 1178; Report written consultation regarding cabinet reaction to the Groenboek about the future of the common European asylum system (COM(2007)301) *Parliamentary Papers II 2007-2008*, no. 23490.

¹² *Parliamentary Papers II 2007-2008*, 29344, no. 65.

¹³ *Proceedings II 2006-2007*, no. 31, page 2020.

A day later, MPs Edith Schippers and Han ten Broeke (both VVD) questioned the Ministers of Justice and Foreign Affairs.¹⁴ During proceedings related to the proposed Amendment of the Council of State Act related to the restructuring of the Council of State on 13 February 2007, Mr De Wit (SP) pointed out that, with regard to the Salah Sheekh case, the ruling implicitly implied that the decision had already been taken beforehand, so that an appeal to the Council of State for asylum cases could not be considered an effective legal remedy. Although the SP party saw the bill as an improvement, the party did not feel it went far enough.¹⁵ According to Justice Minister Ernst Hirsch Ballin, the ruling did not relate to the subject of the bill because the latter concerned the distinction between advice and jurisdiction.¹⁶

On 25 January 2007, MPs Hans Spekman and Bert Koenders (both PvdA) questioned the Ministers of Justice and Foreign Affairs about the further deterioration of the situation regarding human rights and safety in Sri Lanka. They asked both Ministers whether they shared the opinion that, in view of the Salah Sheekh ruling, extra caution was required when objecting to a domestic residence alternative.¹⁷ During preparations for the bill for the implementation of the Qualification Directive (2004/83/EC), the SP, PvdA and VVD parties enquired independently from one another about the government's position.¹⁸

After policy was changed through an amendment to the Aliens Act Implementation Guidelines, a written consultation took place.¹⁹ This followed the reaction of Justice State Secretary Nebahat Albayrak of 22 June 2007.²⁰ In her reaction, also on behalf of the Ministers of Justice and Foreign Affairs, she addressed three points of the ruling: the victim status, the exhaustion requirement and the 'singled out-criterion'. The VVD party asked whether the government had considered disregarding the ruling. And the PVV party asked to reverse the amended policy regarding Article 3 ECHR. Ms Albayrak clearly stated that the rulings of the European Court are binding and that the Dutch State attached importance to compliance with them.²¹

In the previously mentioned written consultation in response to the Salah Sheekh ruling, the PvdA party addressed the Saïd case.²² The letter from the State Secretary stated that the testing against Article 3 ECHR would be adapted. With respect to that passage, the PvdA had two comments. Firstly, the party

¹⁴ Appendix to Proceedings II 2006-2007, 1521, no. 708.

¹⁵ Proceedings II 2006-2007, no. 42, page 2478.

¹⁶ Proceedings II 2006-2007, no. 43, page 2502.

¹⁷ Appendix to Proceedings II 2006-2007, 1749, no. 815.

¹⁸ Parliamentary Papers II 2006-2007, 30 925, no. 6, page 3, 8 and 9.

¹⁹ Parliamentary Papers II 2007-2008, 29 344, no. 65.

²⁰ Parliamentary Papers II 2006-2007, 29 344 and 30 800 VI, no. 64.

²¹ Parliamentary Papers II 2007-2008, 29 344, no. 65, page 24 and 25.

²² Parliamentary Papers II 2006-2007, 30 830, no. 3, page 17.

members did not share the government's opinion that the whole account of the reasons for requesting asylum should be found credible. Case law from the Court, including in the case Saïd versus The Netherlands, showed that the request for asylum does not need to be found credible on all points, as long as the essence of the account is not disputed. The MPs wondered which consideration in the ruling of the Court showed that there must be a credible account of the reasons for requesting asylum. Did the government mean that this account should be found credible on all elements, or did its comment only refer to the essence of the account? Secondly, the MPs expressed their amazement about the proposal to include the general situation in the country, including the generic circumstances, in the assessment of the individual risk. 'Isn't that fixed policy and fixed case law?' Section 43 of the UNHCR Handbook on procedures and criteria for determining refugee status – which stipulates that the validity of the fear of persecution does not necessarily have to be founded on own experiences, but can also be based on what has happened to other people, friends, relatives – was repeatedly invoked by the Council of State at the end of the eighties, early nineties.²³

The Explanatory Memorandum to the bill of Boris Van der Ham (D66) to improve legal protection in asylum procedures (see section 5.1.2) also referred to the Saïd case. On 14 March 2006, MPs Klaas de Vries and Frans Timmermans (both PvdA) questioned the Minister of Immigration and Integration and the Minister of Foreign Affairs about the Sezen case and the Rodrigues Da Silva and Hoogkamer case. On 18 May 2006, Ms Verdonk responded, also on behalf of the Minister of Foreign Affairs.²⁴ Mr De Vries and Mr Timmermans asked the Ministers whether they shared the view of the Court in the Rodrigues Da Silva case that there was excessive formalism. The Minister of Immigration and Integration denied this. The MPs also asked what general consequences the Minister attached to the rulings and whether the Minister was prepared:

'to review the general policy regarding family reunification and family formation in the context of Article 8 ECHR in the light of the above mentioned rulings, so that the Netherlands would better comply with its Convention obligations?'

The Minister replied that at present she did not consider this a reason to amend the policy. However she was willing to examine whether new instructions would be sufficient or whether a policy amendment was necessary. Apparently the Minister did see a reason to change the policy. She informed the Second Chamber on this matter by letter on 28 June 2007.²⁵

²³ Parliamentary Papers II 2007-2008, 29 344, no. 65, page 5.

²⁴ Appendix to Proceedings II 2005-2006, 3169, no. 1486.

²⁵ Parliamentary Papers II 2006-2007, 19 637, no. 1162, page 2.

'Current policy assumes that there is no question of interference in family life in the sense of Article 8 ECHR if the residence of the alien is terminated and the original residence permit does not provide for exercising family life. The case law of the European Court of Human Rights no longer offers sufficient grounds for this assumption. Meanwhile, the Administrative Jurisdiction Division of the Council of State (ABRvS) has also confirmed this in a recent ruling of 23 March 2007. By assuming interference, it is by no means certain that is an unjustified interference and therefore a violation of Article 8 ECHR. European Court of Human Rights case law from recent years has shown that the decisive factor, based on the established facts, is whether the interests of the State and those of the alien are properly weighed. The European Court of Human Rights still assumes that Article 8 ECHR does not contain a general obligation to respect the choice of migrants to exercise their family life in a certain country and the State has an interpretation margin in weighing up the interests.'

The subsequent amendment to the Aliens Act Implementation Guidelines also refers to the ruling of the European Court in the Rodrigues Da Silva and Hoogkamer case.

'Even if there is no question of interference, the interests of the State and those of the alien should be considered. The fact that an alien never resided legally in the country will be taken into account to the detriment of the alien. Where there is illegal residence, the matter will only involve a violation of Article 8 ECHR in very exceptional circumstances (see the ruling of the European Court of Human Rights in the case Rodrigues Da Silva of 31 January 2006, no. 50435/99).²⁶

With an appeal on the Ciliz judgement, more than eight years after the fact, State Secretary Albayrak justified the granting of a temporary residence permit to another alien.²⁷ The research did not reveal that any attention had been devoted to that ruling in the political debate. Nor did we find the amendment to the Aliens Act Implementation Guidelines referred to in the annual report of the Ministry of Foreign Affairs in the official government publications. It is possible that a change of policy took place without an explicit reference to this judgement of the Court.

The Sen case also received little attention in the political debate. From the list of incoming documents of the Second Chamber, it appears that a letter was received from the Minister of Foreign Affairs about a request 'regarding the consequences of the ruling of the European Court of Human Rights in the Sen case'.²⁸ However, we were unable to find either the letter or the request in the

²⁶ Netherlands Government Gazette 16 October 2007, no. 200, page 8.

²⁷ Appendix to Proceedings II 2008-2009, 400, no. 189.

²⁸ Proceedings II 2002-2003, no. 24, page 1703.

official publications of *overheid.nl*. Nevertheless, the judgement did lead to a change in the Aliens Act Implementation Guidelines.²⁹

As far as we could ascertain, the ruling in the Tuquabo-Tekle case received no attention at all in the political debate.

(Announced) measures from the government

The annual reports of the Ministry of Foreign Affairs indicate which measures were taken subsequent to the ruling. According to this report, following the Ciliz case, an Aliens Act Implementation Guidelines Interim Communication was issued to clarify national policy regarding the weighing of interests in the context of Article 8 ECHR. The annual report for 2001 did not mention whether any measures were taken following the ruling of the European Court in the Sen case. This case resulted in the granting of an asylum residence permit to the applicant pursuant to Article 29b of the Aliens Act 2000. Moreover, a new chapter was inserted into the Aliens Act Implementation Guidelines 2000: ‘the asylum policy regarding Eritrea’. This included a passage about conscripts and deserters aimed at preventing a repeat of a similar complaint.

Subsequent to the ruling in the Tuquabo-Tekle case, according to the annual report 2005, the daughter of the applicant was granted residence in the Netherlands. The report also states that investigations were underway into what consequences this ruling should have for the policy on family reunification.

The overview of case law from the European Court from 2006 shows which measures were taken in 2006 in order to implement earlier rulings. It states that the policy was adjusted to the ruling. The Minister for Immigration and Integration reported this adjustment in a letter dated 23 September 2006 to the Second Chamber.³⁰ The adjustment meant that:

‘with some exceptions, in the case of the existence of a family life, in principle an actual family bond will be assumed.’

Subsequent to the Rodriguez Da Silva and Hoogkamer case, the Ministry of Foreign Affairs stated that:

‘the policy regarding the assessment of whether there has been any interference in the right to a family life in the sense of Article 8 of the ECHR in the case of termination of residence will be amended. The deciding factor is whether, based on established facts, the interests of the State and those of the alien have been properly weighed.’³¹

²⁹ Netherlands Government Gazette 5 May 2004, no. 85, page 112.

³⁰ WBV 2006/33A, Netherlands Government Gazette 233, 29 November 2006.

³¹ Indicated in the report on 2007 under measures taken in 2006 following earlier rulings, with reference to a letter from the State Secretary of Justice (Parliamentary Papers II 2006-2007, 19637, no.

The Sezen case resulted in the State Secretary of Justice amending the Aliens Act Implementation Guidelines 2000.

'In the case of a ministerial order declaring a person an undesirable alien, when weighing up the interests it should at least be considered whether, and if so how long, an alien was able to build up a family life after release before the ministerial order was issued.³²'

In the first instance, the Dutch government did not accept the ruling in the Salah Sheekh case. It requested the Grand Chamber of the European Court to hear the case. This request was rejected. After this ruling, the Ministry of Foreign Affairs reacted as follows:

'following this ruling, the test against Article 3 ECHR will be amended in such a way that in the assessment of the individualisable risk, the general situation in a country, including the generic circumstances, will be taken into account. Furthermore, when assessing asylum cases, other information besides official country reports from the Minister of Foreign Affairs will be considered more explicitly than before.³³'

Attention in national case law

National case law frequently quotes the case law of the European Court of Human Rights. Migratieweb lists eight rulings with references to the Ciliz judgement of 11 July 2000. These comprise two rulings of the Administrative Jurisdiction Division, two rulings of court in interlocutory proceedings and four court rulings.³⁴

1162). In a footnote, there is a reference to Parliamentary Questions submitted by Mr De Vries and Mr Timmermans and the answer to these questions from the Minister of Immigration and Integration, also on behalf of the Minister of Foreign Affairs.

³² Indicated in the report on 2007 under measures taken in 2006 following earlier rulings, referring to Netherlands Government Gazette (Stcr. 16 October 2007, no. 200, page 7).

³³ Annual report 2007. With respect to the last point, the Ministry of Foreign Affairs refers to a letter from the State Secretary of Justice, also on behalf of the Minister of Justice and the Minister of Foreign Affairs of 22 June 2007 (Parliamentary Papers II 2006-2007, 29344 and 30800 VI, no. 64) and to the answers of the Minister of Justice and the State Secretary of Justice on 5 December 2007 to questions and comments from several parties within the Standing Committee for Justice subsequent to the previously mentioned letter (Parliamentary Papers II 2007-2008, 29344, no. 65). DJZ also refers to the answers of 21 February 2007 from the Minister of Justice, also on behalf of the Minister of the Minister of Foreign Affairs, questions from MPs Schippers and Ten Broeke, submitted on 18 January 2007, no. 2060705650.

³⁴ ABRvS 26 August 2008, 200708903/1, JV 2008/417 note S.K. van Walsum, LJV BE9881; ABRvS 28 May 2009, 200900215/1/V2; President of the Court of The Hague hearing in Amsterdam 16 March 2009, AWB 09/06117; President of the Court of The Hague hearing in Haarlem 15 August 2008, AWB 08/1276, 08/1275, JV 2008/384, LJV BE9563; Court of The Hague hearing in Breda 20 March 2008, AWB 07/29834; Court of The Hague hearing in Zwolle 21 November 2007, AWB 07/24681; Court of The Hague hearing in Groningen 8 June 2007, AWB 06/32913, LJV BA7999; Court of The Hague hearing in Utrecht 7 July 2003, AWB 02/81299, 01/31606, LJV AM7801.

Interestingly, the first reference to the ruling only came in July 2003. This concerned a court ruling. In this case, the plaintiff invoked TBV 2001/12 issued following the Ciliz ruling.³⁵ The other references are found in case law from 2007, 2008 and 2009. It apparently takes some time before any effect in national case law becomes visible, but once that is the case, the effect continues to be visible for a long time. Eight years after the ruling, the Ciliz judgement is still cited in national case law. Migratieweb contains 22 rulings by national courts. The rulings refer to the Sen judgement of 21 December 2001. It concerned three Administrative Jurisdiction Division rulings and 19 court rulings. The first ruling dates from 17 May 2001, before the European Court of Human Rights had issued its judgement on the Sen case.³⁶ In this case, the Court of The Hague declared the plaintiff's appeal unfounded. According to the court, the request for residence was correctly rejected. In a letter dated 16 June 2004, the Minister of Immigration and Integration stated her willingness to grant the person concerned residence on the grounds of Article 8 ECHR pending the proceedings at the European Court of Human Rights in this case, in view of the Sen judgement.

The other rulings in Migratieweb date from after the ruling in the Sen case. The last ruling dates from 29 January 2009.³⁷ According to Migratieweb, reference is made in two national rulings to the ruling of the European Court of Human Rights in the Tuquabo-Tekle case of 1 December 2005.³⁸ Migratieweb lists nine rulings which refer to the Rodrigues Da Silva and Hoogkamer case of 31 January 2006.³⁹

³⁵ Court of The Hague hearing in Utrecht 7 July 2003, AWB 02/81299, 01/31606, LJN AM7801.

³⁶ Court of The Hague, AWB 00/11167.

³⁷ Court of The Hague hearing in Groningen 25 April 2002, AWB 01/27171, LJN AE3430; Court of The Hague hearing in Zwolle 23 May 2002, AWB 01/50101, LJN AE9565; Court of The Hague hearing in Arnhem 8 October 2002, AWB 02/26237, LJN AF2394; Court of The Hague hearing in Amsterdam, 18 October 2002, AWB 02/8036, LJN AF2378; Court of The Hague hearing in Haarlem 3 December 2002, AWB 01/58366, LJN AF2790; Court of The Hague hearing in Amsterdam 22 January 2003, AWB 02/29484, LJN AF6480; Court of The Hague hearing in Almelo 16 May 2003, AWB 02/60983, LJN AF9121; ABRvS 10 September 2003, 200303881/1, JV 2003/482; Court of The Hague hearing in Amsterdam 9 April 2004, AWB 03/10892, LJN AO9509; Court of The Hague hearing in Haarlem 9 July 2004, AWB 03/41616, JV 2004/S398; ABRvS 2 August 2004, 2004 03306/1, JV 2004/365; Court of The Hague hearing in Maastricht 3 November 2005, AWB 05/29560, 05/29558; Court of The Hague 30 November 2005, AWB 05/15607, 05/15608, LJN AU7464; Court of The Hague hearing in Middelburg 1 December 2005, AWB 05/28483 confirmed in appeal on 12 May 2006; Court of The Hague hearing in Haarlem 6 February 2008, AWB 07/30721; Court of The Hague hearing in Arnhem 17 April 2008, AWB 07/37139, JV 2008/234, LJN BD0057; Court of The Hague hearing in Haarlem 23 April 2008, AWB 07/28037, 07/28038, LJN BD9496; Court of The Hague hearing in Amsterdam 27 August 2008, AWB 07/26822, 07/24674, JV 2008/386; Court of The Hague hearing in 's-Hertogenbosch 29 January 2009, AWB 08/25628, LJN BH4599.

³⁸ Court of The Hague hearing in Amsterdam 6 March 2009, AWB 08/30341, JV 2009/221, LJN BH8909; Court of The Hague hearing in Amsterdam 27 August 2008, AWB 07/26822, 07/24674, JV 2008/386.

³⁹ ABRvS 30 January 2009, 200804784/1, JV 2009/148, LJN: BH2980; Court of The Hague hearing in Dordrecht 21 October 2008, AWB 06/41819, LJN: BG5802; Court of The Hague hearing in Arnhem 1 October 2007, AWB 06/53671, JV 2007/551, LJN BB6011; Court of The Hague hearing in Rotterdam 20 August 2007, AWB 07/7173, JV 2007/461 Court of The Hague hearing in Almelo 15 June 2007,

In four court rulings, reference is made to the Sezen case of 31 January 2006.⁴⁰ On the search term Saïd, we found seven rulings in Migratieweb.⁴¹

Migratieweb lists twenty rulings which refer to the Salah Sheekh judgement of 11 January 2007.⁴² Incidentally, national case law not only refers to rulings of the European Court of Human Rights in cases where violation of the convention is assumed.

7.2 Rulings by the European Court of Justice

As we saw earlier in this chapter, every year the Second Chamber receives a report of the rulings of the European Court of Human Rights against the Netherlands and in which the Netherlands was a party. The Second Chamber does not receive such a report for rulings of the European Court of Justice. We found the rulings of that Court of Justice discussed below in the Migratieweb data-

AWB 06/60576, JV 2007/401, LJN BA7652; Presiding judge. Court of The Hague hearing in Amsterdam 15 May 2007, AWB 06/47142, 06/47143, JV 2007/406, LJN BA7414; Court of The Hague hearing in Amsterdam (three-judge division) 24 April 2007, AWB 04/40607 and AWB 04/40608, LJN BA4418; President of the Court of The Hague hearing in Haarlem 7 February 2007, AWB 06/40542, LJN BA4477; VK Court of The Hague hearing in Maastricht 2 May 2006, AWB 05/33922, 05/33923, JV 2006/237, LJN AW7385.

⁴⁰ Court of The Hague hearing in Rotterdam 17 December 2008, AWB 07/44969; Court of The Hague hearing in Amsterdam 21 October 2008, AWB 07/36677, MR 2009/6, LJN BG3971; Court of The Hague hearing in Groningen 5 September 2008, AWB 07/48022, LJN BF1035; President of the Court of The Hague hearing in 's-Hertogenbosch 19 December 2006, AWB 06/51734, 06/51732, LJN AZ5104.

⁴¹ Court of The Hague hearing in Amsterdam 30 December 2008, AWB 08/30116, 08/30119, LJN BH3522; Court of The Hague hearing in 's-Hertogenbosch 9 March 2007, AWB 06/38419, 06/38422, 06/38423, JV 2007/203, LJN BA0537; Court of The Hague hearing in Haarlem 4 July 2006, AWB 05/27465, LJN AY3561; Court of The Hague hearing in Amsterdam (three-judge division) 10 March 2006, AWB 05/30412, 05/30415, JV 2006/175, LJN AV5234; Court of The Hague Amsterdam 13 January 2006, AWB 05/57721, 05/57714, JV 2006/183, UJN AV4387; Court of The Hague hearing in Arnhem 11 October 2005, AWB 05/18536, UJN AU6311; Court of The Hague hearing in Amsterdam 27 September 2005, AWB 05/12632, 05/12636, UJN AU5762.

⁴² ABRvS 8 June 2009, 200900007/1/V2, UJN BI7619; ABRvS 25 May 2009, 200702174/2/V2, UJN BI4791; Court of The Hague hearing in Haarlem (three-judge division) 18 February 2009, AWB 07/24799, UJN BH3701; ABRvS 3 July 2008, 200701486/1, JV 2008/312, UJN BD7532; ABRvS 29 April 2008, 200706114/1, UJN BD4448; Court of The Hague hearing in Utrecht (three-judge division) 1 April 2008, AWB 07/24358, UJN BC9095; Court of The Hague hearing in Assen (three-judge division) 5 February 2008, AWB 06/15254, UJN BC5526; Court of The Hague hearing in Arnhem 16 January 2008, AWB 07/7482, 07/7483, 07/7485, UJN BC1892; ABRvS 14 January 2008, 200704756/1, JV 2008/111, UJN BC2490; Court of The Hague hearing in Amsterdam 10 January 2008, AWB 07/21847, 07/21848, UJN BC8336; ABRvS 27 November 2007, 200701167/1, UJN BB9988; ABRvS 31 October 2007, 200701759/1, UJN BB7262; Court of The Hague hearing in Amsterdam 15 October 2007, AWB 06/41861, JV 2008/28, UJN BB8127; ABRvS 12 October 2007, 200701023/1, JV 2007/530 with note H Battjes, UJN BB5779; Court of The Hague hearing in Amsterdam (three-judge division) 18 September 2009, AWB 06/45533, JV 2007/486, UJN BB3954; Court of The Hague hearing in Dordrecht (three-judge division) 19 June 2007, AWB 05/39711, UJN BA7715; ABRvS 8 June 2007, 200700521/1, JV 2007/370, UJN BA7785; Court of The Hague hearing in Zutphen 7 June 2007, AWB 06/57553; President of the Court of The Hague hearing in Roermond 23 March 2007, AWB 06/43690, UJN BA1576; Court of The Hague hearing in Utrecht 22 January 2007, AWB 06/30530, JV 2007/131, UJN AZ6757.

base. There were six rulings in the period 2000-2008. The operative part of each of those rulings is described below.

Commission-Netherlands C-311/01, 6 November 2003

By refusing to allow wholly unemployed frontier workers to make use of the possibility under Article 69 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, of going, under the conditions laid down in that provision, to one or more Member States in order to seek employment there while retaining their entitlement to unemployment benefit, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 69 and 71 of the regulation.

Commission-Netherlands C-189/03, 7 October 2004

By adopting, in the framework of the Law on private security firms and detective agencies of 24 October 1997, provisions which require that:

- undertakings that wish to provide services in the Netherlands and their managers must have a permit, without taking into account the obligations to which foreign service providers are already subject in the Member State where they are established, and by charging fees for this permit, and

- members of the staff of these firms seconded from the Member State where they are established to work in the Netherlands have a proof of identity card issued by the Netherlands authorities, in so far as the checks to which cross-frontier providers of services are already subject in their Member State of origin are not taken into account for the requirement in question, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 49 EC

Oulane C-215/03, 17 February 2005

The third paragraph of Article 4(2) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services is to be interpreted as meaning that the recognition by a Member State of the right of residence of a recipient of services who is a national of another Member State may not be made subject to his production of a valid identity card or passport, where his identity and nationality can be proven unequivocally by other means.

It is contrary to Article 49 EC for nationals of a Member State to be required in another Member State to present a valid identity card or passport in order to prove their nationality, when the latter State does not impose a general obligation on its own nationals to provide evidence of identity, and permits them to prove their identity by any means allowed by national law.

A detention order with a view to deportation in respect of a national of another Member State, imposed on the basis of failure to present a valid identity card or passport even when there is no threat to public policy, constitutes an unjustified restriction on the freedom to provide services and is therefore contrary to Article 49 EC.

WHO'S RIGHT(S)?

It is for nationals of a Member State residing in another Member State in their capacity as recipients of services to provide evidence establishing that their residence is lawful. If no such evidence is provided, the host Member State may undertake deportation, subject to the limits imposed by Community law.

Commission-the Netherlands C-50/06, 7 June 2007

By not applying to citizens of the Union Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, but by applying to them general legislation relating to foreign nationals which makes it possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

Eind C-291/05, 11 December 2007

In the event of a Community worker returning to the Member State of which he is a national, Community law does not require the authorities of that State to grant a right of entry and residence to a third-country national who is a member of that worker's family because of the mere fact that, in the host Member State where that worker was gainfully employed, that third-country national held a valid residence permit issued on the basis of Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992.

When a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Article 10(1)(a) of Regulation No 1612/68 as amended by Regulation No 2434/92, which applies by analogy, to reside in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. The fact that a third-country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that national's right to reside in the latter State.

Commission-the Netherlands C-398/06, 10 April 2008

By maintaining in force national provisions under which, in order to obtain a residence permit, nationals of the European Union and of the European Economic Area who are non-active and retired must prove that they have sustainable resources, the Kingdom of the Netherlands has failed to fulfil its obligations under Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Council Directive 90/364/EEC of 28 June 1990 on the right of residence and Council Directive 90/365/EEC of 28 June

1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity;

It is interesting that four of the six judgements of the Court of Justice in this period were issued in proceedings initiated by the European Commission against the Netherlands. Only two rulings were issued in reply to preliminary questions from a Dutch court. One judgement concerned the family reunification with a Dutch person who had returned to the Netherlands (Eind). A second concerned detention of aliens (Oulane). The other two judgements relevant to our subject concerned the means of subsistence requirement and the application of a 'sliding scale' in art. 3.86 Aliens Decree 2000 in the case of criminality of migrants from other EU member states.

Attention from the press

The six national daily newspapers investigated only devoted attention to the ruling of the Court of Justice in the Oulane case. On the day that the judgement was issued, *NRC Handelsblad* wrote an article entitled 'EU Court lectures on deportation'.⁴³ According to the article, the Netherlands may 'not detain visitors from other countries in the European Union (with a view to deportation) if they cannot present a valid passport or valid identity card'. The article reported that the issue was submitted by the Court of The Hague. This is also the only one of the six judgements with a clear, distinctive name. The other judgements all related to cases brought by the European Commission against the Netherlands. Neither the search term 'European Commission against the Netherlands' nor the case numbers produced any hits, making it necessary to use alternative search terms. However, the alternative search terms failed to produce hits either.

Attention in political circles

The Oulane judgement did not lead to a political debate, but the ruling did result in an amendment of the Aliens Act Implementation Guidelines 2000.⁴⁴ The ruling is discussed in the explanation of the amendment. A year after the ruling, in its advice about a proposal to amend the Road Traffic Act, the Council of State refers to the Oulane judgement.⁴⁵

In January 2009, the Eind judgement resulted in an amendment of the Aliens Act Implementation Guidelines regarding the return of Dutch nationals who have used their freedom of movement within the EU.⁴⁶

Two months after the judgement of 7 June 2007 about the application of the 'sliding scale', in a letter to the Second Chamber, State Secretary Albayrak re-

⁴³ NRC 17 February 2005 page 7.

⁴⁴ Amendment 2005/22, Netherlands Government Gazette. 11 May 2005, no. 89, page 17.

⁴⁵ Parliamentary Papers II 2005-2006, 30438, no. 5. page 2.

⁴⁶ B10/5.3.2.1. Aliens Act Implementation Guidelines 2000, amended by WBV 2009/1, Netherlands Government Gazette. 29 January 2009, no. 1380.

ferred to that judgement saying that in that judgement the Court of Justice had confirmed that EU citizens using their freedom of movement within the EU enjoyed a high level of protection against deportation.⁴⁷ This judgement did not lead to an amendment of the Aliens Act Implementation Guidelines.

The Centre of Expertise on European Law of the Ministry of Foreign Affairs said that the judgement of 10 April 2008 relating to the means of subsistence requirement came too late in the day. After all, the Aliens Decree 2000 had already been adjusted to the Directive 2004/38/EC on the disputed point.⁴⁸

Attention in national case law

In the Migratieweb database, we found eleven hits with the search term Oulane.⁴⁹

On rechtspraak.nl we found two court rulings which referred to the case Commission/the Netherlands C-50/06 of 7 June 2007. These are rulings about the automatic application of the 'sliding scale' in decisions about whether or not to deport citizens from other EU member states in connection with (serious) crime.⁵⁰ The other four judgements did not produce any hits in the Migratieweb database.

7.3 Effect of criticism

The way in which the Netherlands deals with the rulings of the European Court of Human Rights clearly differs from how the government responds to concluding observations from the various UN committees, for example. The government actively informs the House about the judgements in cases against the Netherlands and indicates what action was taken in response to a ruling in a structured annual report. The Netherlands usually implements these rulings, although sometimes with some delay. This difference in compliance probably relates to a number of factors.

⁴⁷ Letter of 13 August 2007, Parliamentary Papers II 2006-2007, 19637, no. 1168.

⁴⁸ See the note under the judgement in JV 2008.

⁴⁹ Court of The Hague hearing in The Hague, 8 April 2005 LJN AT4480; Court of The Hague hearing in Utrecht, 18 April 2005, LJN AT5737, Court of The Hague hearing in 's-Hertogenbosch, 30 May 2006, LJN AX6829 and Court of The Hague hearing in Dordrecht 29 April 2008, LJN BD4755; Court of The Hague hearing in Amsterdam, 20 December 2007, LJN BC2204; Administrative Jurisdiction Division Council of State, 26 January 2006, JV 2006/111 note B.K. Olivier; Administrative Jurisdiction Division Council of State 9 December 2005, Court of The Hague 5 December 2005, JV 2006/64, LJN AU8661; Administrative Jurisdiction Division Council of State 28 November 2005, 20050739/1; Administrative Jurisdiction Division Council of State 25 November 2005, 200508826/1, JV 2006/22; Administrative Jurisdiction Division Council of State 23 June 2005, 200504350/1, JV2005/316.

⁵⁰ Court of Amsterdam, International Legal Assistance Division 28 December 200, point 6.35, LJN BC9789 and Court of The Hague hearing in Amsterdam, 4 July 2008, point 12, LJN BD7264.

Firstly, the rulings of the ECHR are legally binding for the associated member states. Member states must act on the rulings and then report to the Committee of Ministers of the Council of Europe about the measures taken to comply with the ruling. On this point, these rulings differ from the viewpoints of the UN committees and the Council of Europe. The rulings of other bodies in the Council of Europe we studied do have authority but are not legally binding in a formal sense. Moreover, some of these viewpoints are formulated in general terms and are less unambiguous than the judgements of the Court. These judgements generally concern individual cases, while the viewpoints of the committees tend to focus in a general sense on policy and practice in a treaty state.

In addition, solicitors in other legal proceedings use the rulings of the Court and judges will feel bound by the legal precedents those judgements create. This also forces the policy makers at the Ministry of Justice and the IND to pay serious attention to the rulings.⁵¹

The rulings of the European Court of Justice in Luxembourg are also binding. Here the same mechanisms are at work as with the Court in Strasbourg. These rulings also lead to compliance by Dutch courts and government officials. Moreover in these cases there is an extra control mechanism: the European Commission is charged with monitoring compliance with EC law by the member states. That monitoring also includes compliance with the judgements of the Court of Justice. This may be an extra motivation to take these judgements seriously. Whether this happens in practice requires further study.

In any case, it is clear that the attention devoted by the national newspapers to the rulings of the European Courts is not decisive for the government to decide to amend policy or not. The greater willingness to adjust is related to the binding nature of the rulings of the European Courts.

For both the national courts and other government bodies, there is a clear difference in the binding effect of the rulings of both Courts and the viewpoints of the international monitoring bodies. The judgements of the two European Courts are applied and followed in the same way as the rulings of higher national courts. This does not (yet) seem to apply to the viewpoints of the other international monitoring bodies, even though these rulings also have authority. This certainly applies if the body is charged with monitoring the application of the treaty in question and explaining the provisions of the treaty. The authority of these international monitoring bodies will increase as their rulings become more precisely formulated and more convincingly reasoned. The authority will increase further as both European Courts start to refer more frequently in their judgements to the rulings of those monitoring bodies.

⁵¹ L.J.J. Wijkhuijs, Administrative response to court decisions: the impact of court decisions on the asylum procedure in the Netherlands, diss. Tilburg, Nijmegen 2007.

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A final important difference is that solicitors, probably due to lack of knowledge, are less likely to make an appeal to the rulings of other authorised monitoring bodies than to the judgements of both Courts. Unknown, unloved. Lack of familiarity with the status, the working method and the rulings of those international monitoring bodies results in the significance of their rulings being underestimated. Hopefully this report will make a modest contribution in raising the profile and highlighting the usefulness of these rulings, not only in political circles, but also in legal decision making.

Chapter 8. Conclusion

8.1 Summary

This research focused on three questions:

1. Which public or private international organisations explicitly and publicly expressed a viewpoint on the Dutch government's legislation or policy on the issue of immigration and integration of immigrants?
2. How did the press, parliament and government in the Netherlands react to those viewpoints?
3. Did the public stands lead to the amendment of the legislation or policy concerned?

The answer to the first question was found by systematically consulting the automated databases of the various international organisations. The research was limited to 15 organisations. In the years from 2000 to 2008, these 15 organisations all expressed viewpoints, one or more times, with regard to the Dutch observance of international standards on the issue of immigration and integration of immigrants.

Four main themes were chosen for this research:

1. Dutch integration policy;
2. Dutch policy against discrimination, racism and displays of xenophobia and Islamophobia;
3. The asylum procedure;
4. Detention of aliens pending deportation.

In answer to the first research question, we will present an overview, by theme, of the organisations that expressed viewpoints with regard to the various themes. We will not discuss the actual viewpoints; please refer to the relevant chapters for this information.

In the overview given below, the European Committee of Social Rights (ECSR) does not appear. This Council of Europe committee, which monitors compliance with the European Social Charter, did give statements regarding the Dutch compliance with the Charter in the period 2000-2008, but these statements had no bearing on the four themes chosen for this research. For this reason, the viewpoints of that organisation are not involved in the research. The viewpoints of the Fundamental Rights Agency (FRA) – previously the European Monitoring Centre on Racism and Xenophobia (EUMC) – are not addressed in the research either. During the research, this organisation only released EU-wide reports, no country reports.

Integration and citizenship policy

The research showed that in the period from 2000 to 2008, three organisations expressed viewpoints regarding the Dutch policy on the integration of immi-

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grants: a United Nations organisation (United Nations High Commissioner for Refugees, UNHCR), a Council of Europe organisation (European Commission against Racism and Intolerance, ECRI) and a private organisation (Human Rights Watch, HRW).

Combating discrimination, racism, xenophobia and Islamophobia

More than half of the international organisations expressed a viewpoint regarding the Dutch policy in the field of discrimination, racism, xenophobia and Islamophobia in the period 2000-2008.

They included four United Nations organisations:

- Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- Committee on the Elimination of Racial Discrimination (CERD);
- Committee on the Rights of the Child (CRC);
- Human Rights Committee.

In addition, there were two bodies of the Council of Europe:

- European Commission against Racism and Intolerance (ECRI);
- Commissioner for Human Rights.

Finally, there was also a private organisation:

- Amnesty International.

Asylum policy

A majority of the international organisations (eight of the fifteen) included in the research also expressed a viewpoint with respect to the compatibility of the Dutch asylum policy with international standards.

These included five UN bodies:

- United Nations High Commissioner for Refugees (UNHCR);
- Human Rights Committee, Committee on the Rights of the Child (CRC);
- Committee Against Torture (CAT);
- Committee on the Elimination of All Forms of Discrimination against Women (CEDAW).

Another two Council of Europe organisations:

- European Commission against Racism and Intolerance (ECRI);
- Commissioner for Human Rights.

Finally, there were also two private organisations:

- Human Rights Watch (HRW);
- Amnesty International.

Detention of aliens pending deportation

Dutch policy regarding detention of aliens pending deportation also received a lot of international attention in the years 2000-2008.

Three United Nations organisations took a stand:

- United Nations High Commissioner for Refugees (UNHCR);
- Committee Against Torture (CAT);
- Committee on the Rights of the Child (CRC).

Two bodies of the Council of Europe also expressed their opinions on the Dutch policy regarding detention of aliens:

- European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);
- Commissioner for Human Rights.

One private organisation saw reason to publish an international report on the Dutch practice regarding detention of aliens:

- Amnesty International.

Jurisdiction of the two European courts

In addition to the four themes, the jurisdiction of the two European courts in the field of immigration and integration was studied:

- The European Court of Human Rights (Council of Europe);
- The European Court of Justice (European Union).

The research showed that in the period 2000-2008, the European Court of Human Rights concluded seven times that the Netherlands had violated the treaty in respect of migrants. We must note here, however, that in this period at least nine cases were removed from the case list, usually because during the procedure a residence permit was granted after all, for example. In these cases, no substantive judgment was made by the European Court of Human Rights regarding the alleged treaty violation by the Netherlands.

In the context of this research, six relevant statements by the European Court of Justice were found. Four of these statements were made as a result of violation procedures by the Commission against the Netherlands and two as a result of preliminary questions from the Dutch judge.

Reactions to the criticism

The answer to the second research question is divided into two sub-questions. The first sub-question is whether the criticism was picked up by the written press. The other sub-question is how the government and parliament reacted to the criticism. Considering the time and means available for the research, the time frame was limited. For the reactions in the written press, we allowed a response period of one month after publication of the viewpoint. For the reactions from the government and parliament, a period of two months was set. In

some cases, the period was extended. This does not, however, aim to be a systematic research. The expectation was that the greatest importance would be attached to the criticism of the monitoring organisations involved in the treaties, considering that they take an official viewpoint on the Netherlands's compliance with various treaties that the Netherlands has ratified.

Press Reaction

It is striking that the criticism from the private organisations receives the most attention in the six national newspapers investigated. The reports issued by the Council of Europe also did not go unnoticed. Only in a few cases, however, did the newspapers that were investigated pay attention to the viewpoints of the various UN organisations or the judgements of the European Courts.

We can conclude that the formal authority of an organisation is not relevant to the attention that such an organisation receives in the written press. The PR policy of the organisations and the publicity given to the viewpoints by other (national) organisations seem to play a more important role. Both of the private organisations included in the research (Amnesty International and HRW) have an active PR policy. A lot of publicity has been given to their reports, particularly the Amnesty International report on the detention of aliens.

As mentioned, this research shows that the criticism from the supervisory UN organisations received little to no attention in the press. This attention can be reduced to none. An explanation for this could be the fact that the dialogue is between the government and the supervisory committee. The committee relies on the information from the Dutch government, possibly in combination with shadow reports from non-governmental organisations. In principle, these reports are not preceded by a fact-finding visit.

This works differently with the Council of Europe. The report by the Commissioner for Human Rights was based on a visit to the Netherlands, as were the critical reports from the CPT and the ECRI. National organisations do not seem to seize the publication of reports by the UN committees to demand attention from the press for the content of the reports shortly after publication.

Political reaction

In the context of the second research question, we examined whether or not the international viewpoints led to political debate. Did parliament and the government react to the viewpoints? And if so, in what way? In general, we can conclude that the viewpoints on immigration and integration taken by the various UN committees did not lead to a political debate, at least, not in the studied time frame of two months.

By contrast, the reports from the Council of Europe organisations received more attention in parliament and therefore in political debate. The attention took the form of Parliamentary Questions, submitted motions or a written or general consultation. The government (upon request or on its own initiative) also published a government response in reaction to the various reports of the organisa-

tions of the Council of Europe (CPT, ECRI, and Commissioner for Human Rights). The government also responded to the HRW report on the Dutch civic integration examination abroad and the Amnesty International report on detention of aliens.

The judgments from the European Court of Human Rights also led to a political debate on more than one occasion. This may be explained by the fact that these judgments are legally binding and must be observed by implementing agencies and national judges. Therefore, the judgments have direct consequences for policy. Another likely factor is that parliament is periodically updated on both the Court's judgments as well as the measures taken as a result of the judgments, through the annual reports on human rights that are compiled by the Ministry of Foreign Affairs and sent to parliament.

Legislation and policy changes

Did the public viewpoints lead to changes to the legislation or policy concerned? The answer to the third research question is that the viewpoints on migration and asylum did not lead to a change in the legislation or policy in the short term. In almost all cases the government's reaction consisted of a summary of measures already taken or the promise that issues need to be looked into rather than concrete commitments to change legislation or policy.

Whether the criticism on the Civic Integration Abroad Act (*Wet inburgering Buitenland*, Wib) will eventually lead to proposals to amend legislation or policy depends on the results of the comprehensive Act evaluation of the Wib. The results are expected in the summer of 2009.¹

The international criticism of the Dutch policy relating to the detention of aliens seems to have led to policy changes on specific points. But whether these changes sufficiently meet the international criticism remains to be seen. The alien detention issue is currently on the political agenda. For that reason, we cannot indicate at this time to what extent the international criticism has led to legislation or policy changes.

There is one exception to the foregoing. The judgments of the European Court of Human Rights did lead to legislative, policy and judicial changes where necessary. Examples include the recent amendment of article 3.71 of the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*) and a proposal submitted in June 2009 to amend article 83 of the Aliens Act 2009 (*Vreemdelingenwet 2009*).²

¹ The four evaluation reports have been sent by letter dated 2 July 2009 to the Second Chamber, TK 2008-2009, 32005, no. 1. The government's response to this evaluation can be seen in the letter to the Second Chamber dated 2 October 2009, TK 2009-2010, 32175, no. 1.

² Amendment to the Aliens Decree 2000 has been included in Bulletin of Acts and Decrees 2009, 198. For the Bill, see Parliamentary Papers II2008-2009, 31 994, No. 1.

Impact of international criticism

We previously indicated that the viewpoints of the different organisations studied, with the exception of the judgements of the European Court of Human Rights, have not led to changes in legislation or policy to date. Does this mean that the impact of international criticism is limited? On the basis of this research, this cannot be argued. The fact that international viewpoints did not lead to legislation or policy changes in the short or somewhat longer term does not support the conclusion that the international criticism has no influence at all or that the Dutch government doesn't do anything in response to the criticism. There is a long procedure before legislation and policy can be changed, which involves many different actors and requires a great deal of time. In order to be able to assess whether international criticism leads to changes to legislation or policy in the long term, further research is required.

The influence of individual international viewpoints is difficult to determine, partly because various other actors in the process may have taken the criticism seriously and may have partly based their position on it. If the issue progresses to amendment of the legislation or policy, it is generally not clear what reason or decisive factor led to the change.

From this research, we can conclude that international criticism is not isolated. Various agencies refer to each others' viewpoints, although this does not seem to happen consistently. In addition, a clear influencing process can be seen between the international organisations on the one hand and national organisations on the other. International organisations often use the knowledge of national non-governmental organisations (NGOs), while the NGOs use the international viewpoints in their lobbying efforts.

8.2 Conclusions

Government monitoring of compliance with international standards is a dynamic process in which an important role is reserved for various actors at both the international and national levels.

At the international level, monitoring is done by public and private organisations. This research examined which international organisations publicly expressed a viewpoint in the period 2000-2008 in response to the Netherlands's observance of human rights in the field of immigration and integration. We can see an important difference in the manner in which international organisations fulfil their supervisory role regarding the Netherlands's fulfilment of international obligations. This is related, among other things, to the nature of the organisation and the methods it employs to determine compliance or any violation of the standards.

Although the nature and methods of the organisations differ, international organisations have a common objective: observance of human rights by the associated nations.

The viewpoints taken by the international organisations can affect the Dutch policy directly and indirectly. It is possible that the international criticism is reason for the Dutch government to implement legislation or policy changes, which are also attributed to the international criticism by the government (direct effect). However, if the government initially sees no reason to change legislation or policy, observance of international standards can be enforced at the national level in court or can still lead to legislation or policy change via a political debate (indirect effect).

A few months after publication, no effects of the international viewpoints can be seen in terms of legislation or policy change. This research gives rise to the impression that it takes some time and effort for the government to recognise or admit that the Dutch practice is not in agreement with certain international standards, and to decide to change the legislation and policy. This requires a process of raising awareness. The viewpoint of a single international organisation, no matter how authoritative, contributes to this process or starts the government on this path, but is insufficient to prompt concrete action. The only exception to this is the judgment of the European Court of Human Rights. The annual Human Rights reports by the Ministry of Foreign Affairs clearly show that the Court's judgments have a direct effect on the Dutch policy on immigration and integration.

The president of the European Court of Human Rights, Jean-Paul Costa, stated during a speech in Leiden in May 2008 that the Dutch government has a good reputation regarding the implementation of judgments by the Court (see quotation in chapter 1). Chapter 7 clearly shows that this is more than lip service. Not only does the Dutch government loyally fulfil the obligations that result from the Court's judgments, it also ensures that parliament can exercise its monitoring function more easily by actively informing parliament on the state of affairs regarding the compliance with the judgments of the European Court of Human Rights.

This research shows that the manner in which the Dutch government proceeds with the judgments of the European Court of Human Rights differs to a large degree with the manner in which it deals with criticism from other international organisations. The fact that the judgments are legally binding undoubtedly plays a role here. This also applies to the fact that the government must report to the Committee of Ministers on the way that the judgments are being implemented (Article 46 ECHR). Another possible explanation is that the European Court of Human Rights provides very detailed judgments, making it easier for the Dutch government to introduce concrete changes in legislation or policy.

Aside from the judgments of the European Court of Human Rights, international supervision does not seem to be sufficient on its own to force compliance with international standards. The dynamics between international and national supervision can clearly be seen and seems essential for the Dutch government's

observation of human rights. These dynamics do have the effect however that the influence of international supervision is difficult to determine. The international viewpoints are difficult to isolate. Different organisations speak out at the national and international levels on the compliance with international standards. If this leads to government awareness over time, the criticism mainly results in a change which is included as part of a general legislative or policy amendment.

The research shows that various international organisations mutually refer to each others' viewpoints. In addition, organisations at the national level demand attention for international criticism and use the viewpoints in their lobbying efforts. In turn, various organisations also provide input to the international organisations. The publicity that international and national organisations demand for international criticism seems to determine the attention given to the criticism in the Dutch written press. This publicity can also be influential in the context of the monitoring function of the Second Chamber.

A clear distinction can be seen in the attention paid to the different international viewpoints in political debate. The reports from the NGOs and the various bodies of the Council of Europe receive relatively a lot of attention, whereas the conclusions and recommendations of the different UN committees completely escape the notice of the members of parliament. Apparently, this can be largely traced back to the attention in the press, or lack thereof, for these viewpoints. The nature of the organisation undoubtedly plays a role in this. The private organisations, for example, employ an active PR policy, whereas the viewpoints of the different UN bodies are confidential, either initially or for a longer period.

Although the different committees do appeal to the government to give publicity to the viewpoints, they leave it to the relevant State Party to decide whether and how this appeal will be answered. The way that the bodies work will also partly determine the attention that an international viewpoint receives at the national level. The dialogue about compliance with the UN treaties takes place behind closed doors, while the various bodies of the Council of Europe and the private organisations involve the civil society in the preparation of their reports. The fact that the Council of Europe and the private organisations operate closer to home also plays a role. Various members of parliament are part of the (European) Parliamentary Assembly, making it more likely that they will be approached regarding the Netherlands's compliance. In this way, members of parliament are more easily inspired to ask ministers for clarification.

In addition to its task as co-legislator, parliament also has a monitoring role. In order to fulfil this monitoring role, members of the Second Chamber have the right to ask questions to the government members. The ministers are required to give all information requested by the Second Chamber. The research shows that the members of parliament frequently exercise this right. Publicity in the

press can prompt a member of parliament to ask questions and initiate a debate, in which case the government is bound to give a response.

The research shows that the fact that the government responds to international viewpoints, either of its own accord or at the request of parliament, does not mean that the viewpoints also lead to policy or legislative changes. The reverse is also true: if there is no response from the government shortly after the publication of the viewpoints, this does not automatically mean that policy and legislation will not be changed.

The quality of the reports does not seem to influence the attention that international criticism receives in the press or in politics. The second ECRI report, for example, was criticised by both members of parliament and former Minister Vogelaar, but did receive a lot of attention in parliament. The report by Human Rights Watch on the Civic Integration Abroad Act was also criticised, but received relatively a lot of attention in parliament and from the government. It is clear that the more specific the conclusions and recommendations are formulated, the more specific a response is provoked from the government. It makes it a lot easier to fulfil the supervisory function at both national and international levels.

We cannot argue that the Dutch government does not take human rights policy seriously. In general, we can conclude that the Netherlands is prepared to hold a mirror up to itself regarding the observance of human rights. First of all, the Netherlands invariably gives permission for the publication of (critical) reports that are in principle confidential, such as the reports from the various UN committees and the CPT. Moreover, the Netherlands is prepared to enter into a dialogue with the organisation concerned and cooperates wherever possible in the preparation of the reports. In addition, the Netherlands has voluntarily recognised the authority of the various UN committees. As a result, individuals have the opportunity to submit a complaint to the committee concerned against the Netherlands. Shadow reports, written by national NGOs, are also partly subsidised by government funding.

The willingness to hold a mirror up to oneself does not mean that one directly sees everything in the mirror. Negative points sometimes go unseen, consciously or unconsciously, and it seems in that case that the Dutch government needs a bit of a prod to see the picture clearly in specific areas. If the government, despite (repeatedly) being urged by the international organisations, fails to take action, it is important that national actors step in. This can be done in various ways. In the first place, by attempting to get the criticism on the political agenda. For this to happen it is important that there is sufficient attention for the criticism from international organisations. But attention on the political agenda does not guarantee that the matter will lead to legislation or policy change. It is clear that certain parties in the Second Chamber feel called upon to raise the matter of international criticism in parliament sooner than others. This will un-

questionably depend on the positions of the parties and the individual members of parliament or on whether or not the party is in power. But it will also be motivated by the available capacity within the parties. There is also the question whether the criticism will be picked up by parliament, in which case it is important that parliament also continues with the matter and is not put off.

Article 93 and 94 of the Constitution state that Dutch judges are obligated to test Dutch legislation and policy against every binding provision in international treaties. Another option is for compliance to be forced by means of the national judge. In this context, it is important for international viewpoints to be translated to the Dutch professional practice.

Finally, it remains important for actors other than the government to provide input to international supervisors. Taking action in the dynamics at the national level can contribute to the observance of international standards.

Although different actors at the international and national levels monitor the Netherlands's compliance with international standards, the impression is that currently, none of these actors show consistent vigilance with regard to the international criticism of the Dutch observance of human rights and the follow-up of the government in response to the criticism.

8.3 Recommendations

The results of a research into the actual state of affairs do not automatically lead to imperative recommendations for future behaviour. Facts in themselves have no normative power. They will only gain this on the strength of normative assumptions, political or legal choices. The idea that the Netherlands must fulfil its obligations pursuant to human rights treaties, or the thought that the protection of minorities or immigrants is an indicator of the quality of a democracy could lead to certain choices being linked to the results of this research. In order to emphasise this, the following recommendations are always formulated on the condition that the actors involved want to achieve a certain objective.

We formulate six recommendations relating to different actors, private (human rights) organisations, legal assistance providers, parliament, government and the international supervisory bodies.

If *private organisations* want to improve the chance that parliament, government, implementing government bodies or judges seriously take the conclusions in reports from international supervisory bodies into consideration, then those organisations must ensure that the reports and their significance for concrete situations become known among those involved. The results and conclusions of the reports must be translated in such a way that they are understandable and accessible to those involved. This 'translation' may take the form of a press release, an open letter to the Second Chamber, a newspaper article or a publication in professional journals, in which the meaning and importance of the inter-

national body's judgments or conclusions are explained for policy practice, a political debate or for the significance or validity of certain statutory rules. It is precisely the international criticism that can clarify the compliance or non-compliance with human rights treaties in the Netherlands in concrete situations. Private organisations can also encourage others to provide that 'translation'. Not only members of parliament, but also lawyers and judges will usually only occasionally be informed of the conclusion of those reports. Finding those reports and the relevant passages requires initiative and a lot of searching, and explaining their significance for the purpose of political debate or legal practice requires some creativity.

Human rights organisations, like Amnesty International, NJCM, Defense for Children and Vluchtelingenwerk (Dutch Council for Refugees) devote much time and attention to the preparation of shadow reports or other ways of informing the international bodies that monitor the Netherlands's compliance with human rights treaties. They can increase the effectiveness of these activities by systematically monitoring what the Dutch government actually does with the conclusions of these international supervisors after the release of their reports and by giving attention to this. At the national level, this follow-up requires time and perseverance.

Lawyers and other legal assistance providers who want to contribute to the Netherlands fulfilling its obligations pursuant to human rights treaties, should not only make a systematic inquiry into the judgments of the European Courts in Strasbourg and Luxembourg. They also need to become acquainted with the judgments of other international supervisory bodies in response to individual complaints, the general viewpoints of those bodies and the conclusions of the bodies on the Netherlands's compliance with the treaties concerned. The websites and publications of the Dutch human rights organisations and the relevant international bodies (www.ohchr.org under 'Human rights bodies') may help to make the relevant information more accessible.

If the *Second Chamber* or the *Senate* wants to improve the chance that the government will give serious consideration to the conclusions in reports by international supervisory bodies that the Netherlands on certain points is acting in violation of its obligations pursuant to treaties, then the Second Chamber must ask the government to produce an annual report on the conclusions of all reports by international supervisory bodies about the Netherlands. This report should also state which changes in legislation or policy have been undertaken in response to these conclusions. The annual report from the minister of Foreign Affairs on the judgments of the European Court of Human Rights in cases against the Netherlands and the consequences given to those judgments could serve as an example.³

³ Parliamentary Papers 1130481.

At the moment, the Second Chamber usually only receives information about the reports and any changes to the law or policy after it has asked for it in a concrete case. These questions are often the result of press coverage or the activities of private organisations. Our research makes it clear that the reports from various international bodies, primarily the UN committees, receive little to no attention in the press and therefore neither in parliament. Periodic, systematic reporting also offers the Second Chamber (and the Senate) the opportunity to see the connections between the reports. As a result, it may transpire that various international bodies are criticising certain rules or practices in the Netherlands, for example. These annual reports could prompt a dedicated consultation between the House and the government. Such a consultation could be preceded by a hearing for experts or relevant organisations. The Dutch Institute for Human Rights (*Nederlandse Instituut voor de Rechten van de Mens*, NIRM) yet to be established could play a supporting role in the preparation of this consultation and the hearing.

In order to improve the Netherlands's observance of human rights, the advice to the *government* is to consider the Netherlands's observance of human rights policy as a separate theme, to the extent that this is not done yet. It is important to create a central information and monitoring system. The National Institute for Human Rights may play a role in this. To this end, periodic reports should be produced that are comparable to the reports on the judgments of the European Court of Human Rights. The reports should state which national or international reports were received, what steps the government is going to take in response to the reports, which (reporting) obligations rest with the Netherlands in the year concerned and when and how they were fulfilled.

The reports – not just the accompanying letter – should be included in the Parliamentary Papers and for this purpose a set Parliamentary Paper Number should be used.

The *international supervisory bodies* can increase their effectiveness by systematically checking whether other supervisory bodies have earlier expressed similar criticism of certain rules or practices in a country. The authority and the persuasiveness of the reports increases as the authors indicate in more detail why a certain rule or practice is in violation of a human rights treaty or another standard against which the body is testing. Incidental or global reference to similar criticism is taken less seriously. When monitoring how the countries concerned have followed up on the reports, the international supervisory bodies can use their limited means and manpower more effectively by making agreements on the division of tasks among these bodies or by concentrating on certain violations in certain states.

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HRW, Fleeting Refuge: the Triumph of efficiency over protection in Dutch Asylum policy, vol. 15, 3 April 2003.

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Mirella Obdam, 'Nederland negeert Europese regels vreemdelingendetentie' (The Netherlands ignores alien detention regulations), Verspers, 17 March 2009.

WHO'S RIGHT(S)?

NJCM-bulletin 2009.

OPROEP: WIB en discriminatie (Civic Integration Abroad Act and discrimination), *Migrantenrecht* 2008, p. 199.

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Appendices

1. Organisations/persons consulted

Council for the Administration of Criminal Justice and Protection of Juveniles

Ministry of Foreign Affairs

Directorate-General for International Cooperation, Human Rights department

Ministry of Housing, Spatial Planning and the Environment

Immigration and Integration department

Directorate-General for Housing, Communities and Integration

Ministry of Justice

Migration Policy department

Asylum, Relief and Repatriation department

National Agency of Correctional Institutions

Amnesty International, the Netherlands

Senate of the Dutch Parliament, staff officer for Open Society Justice Initiative

Art.1 – prevents and combats discrimination

The Dutch Council for Refugees (VluchtelingenWerk Nederland), National Bureau Asylum procedure, Asylum department

National officer of UNHCR Nederland

Academics at Leiden University and VU Amsterdam

Member of steering committee for short-term evaluation of Civic Integration Abroad Act (Wib)

Former Chairman of Advisory Committee on Migration Affairs

2. Reports by theme¹

Theme: Dutch integration and immigration policy (chapter 3)

ECRI

Report 2001 (CRI (2001) 40 (English version)):

Item 22 (p. 10).

On 30 September 1998, the Integration of Newcomers Act (WIN10) came into force in the Netherlands with the aim to promote newcomers' swift acquisition of self-sufficiency in the Dutch society. According to the provisions of the WIN, all newcomers must apply for an integration inquiry the results of which may require the newcomer to take part in an integration programme. This programme, which is drawn up by the municipalities, includes training in the Dutch language, social orientation and vocational orientation. The lay-out of the WIN is based on the experience in the reception of newcomers made on the basis of the regulations introduced in this field in 1996. However, while, under these regulations, integration contracts were concluded primarily on a voluntary basis, the WIN introduced the obligation for the newcomer to take part in an integration programme, which should be regarded as a first step towards integration. The WIN provides that the municipality supervises compliance of the newcomers with the obligations of the act and stipulates sanctions for newcomers who fail to meet their obligations. Refusal to participate in an integration programme may lead to a fine, although the authorities have stated that in practice such fine is not applied in every case. ECRI urges the Dutch authorities to carefully monitor the social effects of this element of compulsion. There have also been complaints that the integration programmes do not always match the individual needs and specificities of the newcomer. ECRI urges the Dutch authorities to ensure that all programmes are as far as possible suited to the individual circumstances of the newcomer, a principle which is spelled out in the WIN itself. In this respect, ECRI notes that, in May 2000, a Task Force was set up by four Ministries with the aim of eliminating waiting lists for language courses for the so-called old comers; supporting local authorities in their steering and scrutinising role; and setting up a monitor for specific individual demands of newcomers. More generally, while welcoming the willingness of the Dutch government to provide counselling and language teaching to assist integration, ECRI emphasises that integration is a process demanding mutual recognition of the qualities embodied in both the host and the immigrant communities and considers that all integration policies should reflect this approach.

Report 2008 (CRI (2008) 3 (English version)):

Item 55 (p. 19).

¹ With thanks to Mick van de Loo, student assistant at the Institute for Sociology of Law, Radboud University Nijmegen.

More generally, ECRI welcomes the fact that the Dutch authorities have repeatedly confirmed their understanding of integration as a two-way process, involving both majority and minority communities. ECRI considers, however, that this approach has not been reflected in the concrete integration measures taken since ECRI's second report, which have been aimed essentially at addressing actual or perceived deficiencies among the minority population. In ECRI's opinion, a credible policy at central government level in the Netherlands, which attempts to address with comparable energy and determination the integration deficit of the majority population, for instance in terms of genuine respect for diversity, knowledge of different cultures or traditions or as concerns deep-rooted stereotypes about cultures and values, is still lacking.

Item 56 (p. 19-20).

This is not to say, naturally, that work has not been carried out in the Netherlands to address the attitudes of the majority population. In ECRI's opinion the focus on combating racial discrimination is a good illustration of this. However, in order to further emphasise the integration responsibilities of the majority population, ECRI considers that this focus against discrimination should be explicitly and consistently presented to the public as forming an integral part of integration policy. ECRI also notes that since ECRI's second report, the Dutch authorities have launched a Broad Initiative on Social Cohesion, which aims at designing plans with municipalities, civil society and religious organisations to enhance mutual ties between communities, including majority communities, and their commitment to Dutch society.

Item 61 (p. 20).

ECRI recommends that the Dutch authorities genuinely reflect in their policies the idea of integration as a two-way process. To this end, ECRI strongly recommends that the Dutch authorities develop a credible policy at central government level to address the integration deficit among the majority population, by promoting genuine respect for diversity and knowledge of different cultures or traditions and eradicating deep-rooted stereotypes on cultures and values. To the same end, it recommends that the Dutch authorities make their work against racial discrimination an integral part of their integration policy and that they consistently present it as such to the public.

Items 122-135 (p. 33-37).

II. NEW DEVELOPMENTS

The tone of political and public debate around integration and other issues relevant to ethnic minority groups

Item 122.

Since ECRI's second report, there has been a dramatic change in the tone of political and media debate in the Netherlands around integration and other issues relevant to ethnic minority groups. Events that have contributed to this change include world-scale events, such as the terrorist attacks of 11 September

2001 and the ensuing global fight against terrorism, but also circumstances that have a more national dimension. Prominently among these feature two events: firstly, the emergence on the political scene of Pim Fortuyn, a successful political leader who was very outspoken on matters of immigration and integration and vocal about his views on Muslims and who was killed in 2002 by an extreme environmentalist of Dutch origin; secondly, in 2004 the murder, by a Dutch citizen of Moroccan origin, of Theo van Gogh, a film-maker and a columnist, following the publication of a film on the subject of domestic violence against Muslim women.

Item 123.

As a result of these and other events, integration and other issues relevant to ethnic minority groups, as well as the approaches that had been taken in the Netherlands to these questions up until then, have been the subject of fundamental and deep questioning in political and public debate. Such a debate has been markedly characterised by a strong tendency to reject the exercise of responsibility in communicating on these issues and to abandon nuanced and balanced approaches to these questions that would avoid unnecessary polarisation and animosity among different segments of Dutch society. Responsible communication and a balanced approach have been consistently categorised and dismissed as sterile “political correctness” and “old politics”, and ultimately as self-censorship in an environment where freedom of expression has often been interpreted or portrayed as a freedom which should be unrestricted and all encompassing.

Item 124.

ECRI is deeply concerned about these developments, not only because they have allowed for racist and xenophobic expression to become, sometimes quite explicitly, a more usual occurrence within public debate itself, but especially because of the impact that the new political and public debate has had on public opinion and on the actions of ordinary citizens. In other parts of this report, ECRI has not failed to highlight a number of good initiatives against racism and racial discrimination that have been taken in the Netherlands at different levels since its second report. Here, however, ECRI would like to express its regret that the effect of such initiatives can only be diminished or negated by the far-reaching consequences of a public debate on integration and other issues relevant to ethnic minority groups that is as negative as that which has been taking place in the Netherlands in recent years.

Item 125.

ECRI notes that since its last report, political and media debate around integration and other issues relevant to ethnic minority groups has shifted from a more technical debate, in which different areas of disadvantage were examined and addressed, to a more general debate on cultures and values of different groups and, ultimately, on the inherent worth and mutual compatibility of such cultures and values. ECRI notes with regret that in this context, cultures have

been strongly stereotyped and values automatically and arbitrarily assigned to one or another group.

Item 126.

The debate around freedom of expression is in ECRI's opinion a good illustration of this. Freedom of expression has correctly been presented as a cornerstone of a democratic society. However, it has also been systematically portrayed as a value essentially alien to people of non-Western background, an assumption that has been favoured by the way in which this fundamental freedom has been presented. ECRI notes that freedom of expression has often been portrayed as an essentially unrestricted freedom and interpreted as automatically and inherently entailing a right to deliberately offend others. It notes that this has inevitably created antagonism and hostility among different parts of Dutch society, which has in turn legitimised in the eyes of many the perception that members of minority groups are as such less committed to this fundamental value of democracy.

Item 127.

The debate around freedom of expression represents only one example of the overall shift towards a debate based on stereotyped cultures and values. In a more general way, ECRI would like to underline that this shift in public debate has resulted in a polarisation of positions that it considers as extremely counterproductive in terms of preparing the grounds for a constructive dialogue among the different communities in the Netherlands. For instance, members of Muslim groups have reported to ECRI that they find it insulting and frustrating to have to systematically display, unlike their non-Muslim peers, anti-terrorism positions or a commitment to freedom of expression or other human rights, simply due to their Muslim background. The potentially divisive and stigmatising use currently made of the word "allochtonen" as a catch-all expression for "the other" in the Netherlands has also been highlighted.

Item 128.

While the tone of public debate has changed in respect of all issues that concern ethnic minorities directly or indirectly, including immigration, security or the fight against terrorism, it is integration that has gained the centre of attention in the Netherlands since ECRI's second report. Extensive discussions have taken place on the supposed failure of the traditional Dutch approach to integration, qualified as multiculturalism, and substantial support has been expressed for a shift in policy which many regard as more, or in some cases essentially, assimilationist in nature. ECRI notes that public debate on integration in the Netherlands in recent years has tended to disproportionately focus on actual or perceived deficiencies within the minority population and to overlook the fact that the responsibility for a successfully integrated society rests as much with that part of the Dutch population as with the rest of it. Overall, in ECRI's opinion, the tone of public debate on integration in the last few years has made integration more difficult, not easier.

Item 129.

Some of the measures finally adopted to promote integration (such as the system of integration exams and courses) are examined in other parts of this report. Here, ECRI notes that, in the framework of the heightened debate on integration, the Dutch authorities have discussed or proposed a number of policies, whose conformity with human rights and equality standards has in some cases been questionable and which, in other cases, clearly violated these standards. Although some of these policies were finally not adopted or not implemented (such as the obligation to speak Dutch in public, or the expulsion of certain Dutch citizens of Antillean origin), ECRI notes that the mere fact that these policies were proposed has resulted in discrimination and manifestations of racism in practice, as illustrated by instances where services were refused or insults directed to persons that were not speaking Dutch.

Item 130.

ECRI notes that proposals of this type have been made or have been supported by exponents of different political parties. However, it notes that more recently, the Freedom Party⁵⁴, has been particularly vocal in proposing controversial policies and in resorting to racist or xenophobic discourse, targeting above all Muslim communities. Furthermore, ECRI notes that exponents of mainstream political parties rarely take a stand against this type of discourse.

Item 131.

ECRI takes note of the Dutch authorities' position, that the change in the tone of public debate around integration and other issues relevant to ethnic minority groups experienced in the Netherlands in recent years was probably a necessary step towards a new start in integration policies in the Netherlands. ECRI welcomes the assurances of the Dutch authorities that, after years of heated debate on these questions, the time has now come to try and bring people together and to put the emphasis on people's common interests rather than their differences, as reflected in the new government's slogan "Working Together, Living Together". It also notes the stated intention to better reflect the idea of integration as a two-way process in their integration policies. ECRI has registered a welcome reception by civil society organisations to these stated intentions, although these organisations also eagerly wait for a clear change to be seen in practice. Invariably, however, they have expressed total willingness to take part in a public debate that opposes polarisation instead of fuelling it and that considers them as credible interlocutors in shaping and implementing policies on integration and other issues relevant to ethnic minority groups.

Recommendations:

Item 132.

ECRI urges the Dutch authorities to take the lead in promoting a public debate on issues of integration and other issues of relevance to ethnic minority groups that avoids polarisation, antagonism and hostility among communities. In so

doing, particular care should be taken to avoid stereotyping cultures and assigning values automatically to individuals on the basis of perceived belonging to such cultures.

Item 133.

ECRI considers that there is an urgent need for those taking part in public debate in the Netherlands, especially political parties and the media, to recognise that a responsible exercise of freedom of expression, including on integration and other issues relevant to ethnic minority groups, is a sign of respect for this fundamental freedom, which ultimately reinforces, not undermines, democracy.

Item 134.

ECRI strongly recommends that the Dutch authorities take steps to counter the use of racist and xenophobic discourse in politics. To this end it recalls, in this particular context, its recommendations formulated above concerning the need to ensure an effective implementation of the existing legislation against incitement to racial hatred, discrimination and violence⁵⁵. In addition, ECRI calls on the Dutch authorities to enforce vigorously the existing legal provisions targeting specifically the use of racist and xenophobic discourse by exponents of political parties.

HRW

<http://www.hrw.org/legacy/backgrounder/2008/netherlands0508/>,

The Netherlands, Discrimination in the name of integration. Migrants' Rights under the Integration Abroad Act, May 2008.

Theme: Dutch policy on discrimination, racism, xenophobia and Islamophobia (chapter 4)

Committee on the Elimination of Racial Discrimination (CERD)

Report 2001 (CERD/C/304/Add. 104):

Item 12.

The Committee is concerned about insufficient protection against discrimination in the labour market; it regrets the privatisation and the planned dissolution of the Women and Minorities Employment Bureau and wonders what institution is going to fill the Bureau's task in the future.

Item 13.

While acknowledging the efforts to recruit members of minorities into government service, including the police and armed forces, the Committee is concerned about the disproportionately high number of members of minorities leaving the police forces. It recommends that the State strengthen its efforts to create a police force reflective of the total population.

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Report 2004 (CERD/C/64/CO/7):

Item 10.

The Committee is concerned about the occurrence of racist and xenophobic incidents in the State, particularly of an anti-Semitic and "Islamophobic" nature, and of manifestations of discriminatory attitudes towards ethnic minorities. The Committee encourages the State to continue monitoring all tendencies which may give rise to racist and xenophobic behaviour and to combat the negative consequences of such tendencies. The Committee further recommends that the State continue to promote general awareness of diversity and multiculturalism at all levels of education, paying particular attention to respect for the cultural rights of minorities, and pursue the effective implementation of measures to facilitate the integration of minority groups in Dutch society.

Item 12.

The Committee regrets that no reference is made in the report to article 3 of the Convention in relation to racial segregation and continues to express concern about the de facto school segregation in some parts of the country.

In the light of its general recommendation XIX on the prevention, prohibition and eradication of racial segregation and apartheid, the Committee recalls that racial segregation can also arise without any initiative or direct involvement by the public authorities and encourages the State to continue monitoring all trends which may give rise to racial or ethnic segregation and take measures to minimise the resulting negative consequences. Furthermore, the Committee invites the State to provide information in its next periodic report on any action taken to address this issue.

Item 13.

The Committee notes that the Employment of Minorities (Promotion) Act (*Wet Samen*) ceased to be in force on 31 December 2003 and expresses concern about possible negative consequences that may ensue, given that the *Wet Samen* was the only legislative instrument containing regulations on the participation of ethnic minorities in the labour market and requiring employers to register the number of people from ethnic minorities employed by them.

The Committee recommends that the State take adequate policy measures to ensure proper representation of ethnic minority groups in the labour market.

Item 15.

While the Committee notes with satisfaction that the number of police officers belonging to ethnic minorities has increased in recent years, it remains concerned about the high percentage of resignations among these groups.

The Committee encourages the State to continue promoting the effective implementation of measures aimed at ensuring that the ethnic composition of the police appropriately reflects the ethnic composition of Dutch society and invites the State to include statistical information in this respect in its next report.

*Human Rights Committee**Report 2001 (CCPR/CO/72/NET):*

Item 14.

The Committee welcomes the State's recent attempts to enhance the participation of ethnic minorities in the labour market through legislation and policy, including incentives to the private sector to expand the proportion of the workforce made up of ethnic minorities. It notes, however, that these efforts to secure the rights guaranteed under article 27 of the Covenant have yet to show significant results. The Committee is also concerned that children of ethnic minorities are under-represented at higher education levels. The Committee wishes to receive further information concerning the practical results that the State's measures in this regard aim to achieve.

*Committee on the Elimination of Discrimination against Women (CEDAW)**Report 2001 (Nr. A/56/38):*

Item 205.

Despite the efforts made to combat discrimination in the Netherlands, the Committee expresses concern at the continuing discrimination against immigrant refugee and minority women who suffer from multiple forms of discrimination, based both on their sex and on their ethnic background, in society at large and within their communities, particularly with respect to education, employment and violence against women. The Committee also expresses concern about manifestations of racism and xenophobia in the Netherlands.

Report 2007 (CEDAW/C/NLD/CO/4):

Item 15.

The Committee is concerned about the persistence of gender-role stereotypes, in particular about immigrant and migrant women and women belonging to ethnic minorities, including women from Aruba. These stereotypes are reflected in the position of women in the labour market, where they predominate in part-time work, as well as in participation in public life and decision making. The Committee is also concerned about the lack of in-depth studies and analysis about the impact of such gender-role stereotypes for the effective implementation of all of the provisions of the Convention.

Item 16.

The Committee urges the State to undertake research and studies on the impact of gender-role stereotyping for the effective implementation of all of the provisions of the Convention, in particular in regard to the ability of migrant and immigrant women, women belonging to ethnic minorities and women from Aruba to enjoy their human rights. It also calls upon the State to undertake awareness-raising campaigns targeting the general public on the negative impact of such stereotypes on society as a whole.

Item 27.

The Committee is concerned that immigrant, refugee and minority women continue to suffer from multiple forms of discrimination, including discrimination with respect to access to education, employment and health and prevention of violence against them. The Committee is particularly concerned that racism persists in the Netherlands, particularly against women and girls. The Committee is further concerned that many immigrant, refugee and minority women are unable to qualify for independent residence permits because of stringent requirements in law and policy. The Committee is especially concerned about the requirement that migrant victims of domestic violence must press charges against their abusers before they may be considered for an independent residence permit, the mandatory requirement in the Civic Integration Act that women follow expensive integration courses and pass integration examinations and the increase in the income requirement for family reunification. The Committee is also concerned that, with the exception of female genital mutilation, sexual and domestic violence is not generally recognised as grounds for asylum.

Item 28.

The Committee urges the State to take effective measures to eliminate discrimination against immigrant, refugee and minority women, both in society at large and within their communities. It encourages the State to increase its efforts to prevent acts of racism, particularly against women and girls. The Committee urges the State to conduct impact assessments of the laws and policies that affect immigrant, refugee and minority women and to include data and analyses in its next report. The Committee also requests that the State include information on the number of women who were granted residence permits, as well as those who were granted refugee status on grounds of domestic violence.

Amnesty International

<http://www.amnesty.org/en/library/asset/EUR35/001/2007/en/b16aeof4-a2ee-11dc-8d74-6f45f39984e5/eur350012007en.pdf>,

Netherlands: Submission to the UN Universal Periodic Review: First session of the HRC UPR Working Group 7- 18 April 2008, November 2007.

Theme: the Dutch asylum policy (chapter 5)

Human Rights Committee

Report 2001 (CCPR/CO/72/NET):

Item 11.

The Committee appreciates the new instructions issued by the Immigration and Naturalisation Service aimed at drawing the competent officials' attention to specific aspects of female asylum seekers' statements peculiar to their gender. However, the Committee remains concerned that a well-founded fear of genital mutilation or other traditional practices in the country of origin that infringe the

physical integrity or health of women (article 7 of the Covenant) does not always result in favourable asylum decisions, for example when genital mutilation, despite a nominal legal prohibition, remains an established practice to which the asylum seeker would be at risk.

The State should make the necessary legal adjustments to ensure that the female persons concerned enjoy the required protection under article 7 of the Covenant.

Committee against Torture (CAT)

Report 2007 (CAT/C/NET/CO/4):

Item 7.

The Committee is concerned about the difficulties faced by asylum seekers in the European part of the Kingdom of the Netherlands in substantiating their claims under the accelerated procedure of the 2000 Aliens Act, which could lead to a violation of the non-refoulement principle provided for in article 3 of the Convention. The Committee is particularly concerned that:

1. the 48-hour timeframe of the accelerated procedure may not allow asylum seekers, in particular children, undocumented applicants and other people made vulnerable, to properly substantiate their claims;
2. the time provided for legal assistance between the issuance of the report from the first interview and the Immigration and Naturalisation Service's decision is allegedly only five hours and that an asylum seeker may not be assisted by the same lawyer throughout the proceedings;
3. the accelerated procedure requires asylum seekers to submit supporting documentation that they are "reasonably expected to possess," leaving a wide margin of discretion in relation to the burden of proof;
4. the appeal procedures only provide for "marginal scrutiny" of rejected applications and that the opportunity to submit additional documentation and information is restricted.

The Committee takes note of the State's intention to revise the accelerated procedure, notwithstanding which, the State should consider the following when reviewing the procedure:

1. applications from all asylum seekers, children, undocumented applicants and other people made vulnerable in particular, are processed in such a way that those in need of international protection are not exposed to the risk of being subjected to torture. This may require the State to establish criteria for cases which may or may not be processed under the accelerated or the normal procedure;
2. all asylum seekers have access to adequate legal assistance and may be, as appropriate, assisted by the same lawyer from the preparation of the first interview to the end of the proceedings;
3. the procedures with regard to required supporting documentation for asylum are clarified;
4. the appeal procedures entail an adequate review of rejected applications and permit asylum seekers to present facts and documentation which

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could not be made available, with reasonable diligence, at the time of the first submission.

Item 8.

The Committee notes with concern that medical reports are not taken into account on a regular basis in the Dutch asylum procedures and that the application of the Istanbul Protocol is not encouraged.

The State should reconsider its position on the role of medical investigations and integrate medical reports into its asylum procedures. The Committee also encourages the application of the Istanbul Protocol in the asylum procedures and the provision of training regarding this manual to relevant professionals.

Commissioner for Human Rights

Report 2009 (CommDH(2009)2):

Item 40 (p. 12).

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 allowing 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. Since the introduction of the new law in 2001, the number of new asylum claims has 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. In the first five months of 2008, 6,237 asylum seekers had 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.

Items 7-50.

Item 47.

Asylum decisions of the Immigration and Naturalisation Service (IND) are partly based on the information from the Ministry of Foreign Affairs contained in official reports (ambtsberichten), the accuracy of which have been questioned by the NGO Refugee Council, the national ombudsman and in one case also by the ECHR. 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 of the merits but only examine points of law. Appeals under this procedure do not have suspensive effect 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. The applicant can apply to a district court for an injunction to prevent expulsion.

Item 48.

Asylum seekers do not have a right to stay in the reception facilities during the appeal procedure. Under current Dutch law, IND decisions are subject to 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. The Council of State may deliver a judgment without a justification and frequently does so.

Item 49.

During his visit, the Commissioner was pleased to learn of a reform proposal 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 at only remedying 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.

Item 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 to 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 as those 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.

European Commission against Racism and Intolerance (ECRI)

Report 2008 (CRI (2008) 3 (English version)):

Item 42 (p. 16).

Since ECRI's second report, figures concerning asylum applications in the

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Netherlands have decreased dramatically – from 43,895 in 2000 to 9,782 in 2004 and approximately 14,500 in 2006. This decrease reflects in part the more restrictive approach taken by the Dutch authorities in matters relating to asylum since ECRI's second report. Since then, a new Asylum Act entered into force on 1 April 2001, with the primary objective of reducing the time for decisions on refugee status. ECRI notes that as a result of the Act, the use of the accelerated procedure, which already existed prior to the Act to deal with manifestly- unfounded claims and leads to a decision on the asylum claim in 48 hours, has been generalised. In 2006, for instance, 42% of all applications were processed through this procedure, which also applies to vulnerable categories of asylum seekers, such as traumatised persons or unaccompanied children. Although the Dutch authorities have reported to ECRI that they do not set targets for the share of claims to be examined through this procedure, ECRI notes that since its second report, the intention to increase this share has publicly been stated.

Item 45 (p. 17).

ECRI urges the Dutch authorities to ensure that the procedures in place for seeking asylum in the Netherlands enable those in need of protection to have the merits of their individual claims thoroughly examined and do not put people at risk of being returned to countries where they may be subject to serious human rights violations. To this end, it recommends in particular that they review the accelerated procedure and its use. ECRI stresses that channelling claims to any accelerated procedure in place should not be driven by statistics but strictly determined by the merits of the claims. ECRI also recommends that the Dutch authorities strengthen their efforts to shorten the waiting period for asylum decisions under the normal procedure.

Human Rights Watch (HRW)

<http://www.hrw.org/en/reports/2003/04/08/fleeting-refuge>, *Fleeting refugee*, April 2003. *Amnesty International*:

<http://www.amnesty.org/en/library/asset/EUR35/001/2007/en/b16aef4-a2ee-11dc-8d74-6f45f39984e5/eur350012007en.pdf>,

Netherlands: submission to the UN Universal Periodic Review, November 2007.

Theme: Detention of aliens pending deportation (chapter 6)

Committee against Torture (CAT)

Report 2007 (CAT/C/NET/CO/4):

Item 4.

The Committee notes with appreciation the ratification of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in 2002 and the Rome Statute of the International Criminal Court and the entry into force of its implementing act in the Netherlands in 2003.

*Committee for the Prevention of Torture (CPT)**Report 2008 (CPT/Inf (2008) 2):*

Item 56.

At present, the legislation governing the administrative detention of immigration detainees does not provide for an absolute time limit for detention pending deportation for certain categories of detained aliens. The CPT invites the Dutch authorities to introduce an absolute time limit for the detention of all foreign nationals under aliens legislation (as is already the case in the majority of European countries).

Item 57.

The detention boats were originally designed as floating hostels, providing accommodation for professionals working away from home. The official capacity of the Stockholm is 472 detainees, and for the Kalmar, 496. At the time of the visit, they were holding 422 and 107 detainees, respectively. Both boats have a similar layout: they are three storeys high, with the immigrant detainees accommodated in two, four or six-person rooms. The rooms for four persons contained a sleeping area and a living area, the latter being equipped with a table and four chairs; the rooms were sufficient in size. The two and six-person rooms were also adequate in size, with seating facilities in the centre. All rooms were equipped with toilet facilities and a refrigerator. The rooms were grouped into eight units, each of which had a recreation room.

In many aspects, living conditions could be considered acceptable. However, the narrow corridors and low ceilings on both boats created an oppressive environment and the boats were poorly ventilated, resulting in humidity problems. In addition, of the four outdoor yards on each boat, none provided shelter from inclement weather. Moreover, the outdoor exercise yards used by inmates in solitary confinement were totally unsuitable, providing very little access to fresh air.

Item 61.

It has been over 10 years since the CPT last visited an immigration detention centre in the Netherlands and the delegation noted the extent to which the Dutch approach to the administrative detention of immigration detainees has changed, largely duplicating the transformation in the prison system. Indeed, both forms of detention are linked by Article 9 of the Penitentiary Principles Act. Facilities used for the administrative detention of immigration detainees, such as the two detention boats, are classified as remand prisons; therefore the regime applied to immigration detainees is similar to that of remand prisoners. Moreover, the CPT understands that immigration detainees are normally held under a limited community regime [29] in conformity with Article 21 of the Penitentiary Principles Act and Article 3 of the Penitentiary Order.

The CPT would like to receive clarification as to the reason(s) for the decision to classify immigration detention centres as remand prisons.

WHO'S RIGHT(S)?

Item 67.

Private security staff told the delegation that before taking up their duties, they had to complete two courses: one was on self-defence and the other was an induction course on prison work. However, the latter course did not cover the intercultural and interpersonal aspects of working in a detention facility for immigration detainees.

Custodial staffing on the two detention boats reflected the temporary nature of these facilities and their qualification as remand prisons. In particular, the CPT has some misgivings about the training given to private security staff currently working in the detention facilities for immigration detainees. In the CPT's view, that training is insufficient to enable such staff to undertake duties other than passive security duties, thus reinforcing the carceral atmosphere already very evident on the boats. The CPT would like to receive the comments of the Dutch authorities on this point.

Item 69.

The CPT is seriously concerned by the practice of restraining detainees in isolation for lengthy periods without medical justification; such a practice could very well be considered ill-treatment. . In the Committee's view, means of restraint in addition to placement in an isolation cell should only be applied to an agitated or violent prisoner and should rarely last for more than a few hours, unless there is a medical condition requiring this. And in the latter case, the decision to resort to the use of restraints should be made by a doctor and there must always be constant, direct personal supervision of the restrained person. Restraints should be removed at the earliest opportunity; they should never be applied, or their application prolonged, as a punishment.

The CPT recommends that the Dutch authorities immediately cease the practice of applying physical means of restraint to detained persons who tamper repeatedly with the sprinkler system on the Kalmar and Stockholm detention boats; such detainees should be transferred to a suitable alternative facility without delay.

Commissioner for Human Rights

Report 2009 (CommDH(2009)2):

Par. 3.3 + 3.5.

Par. 3.3 Administrative detention of asylum seekers

Item 51.

Every year several thousand irregular migrants and asylum seekers are detained in the Netherlands. 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-hour 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, unac-

accompanied minors and people who fall under the Dublin Regulation. 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. The Netherlands and the UK are the only countries in Europe where there is no maximum term to hold an alien in detention. 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.

Item 52.

As to detention conditions, the CPT in 2007, with some exceptions, reported a standard that is generally still satisfactory. However, the CPT delegation noticed a deterioration in the way in which immigration detention centres were operated, 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 have also expressed their concerns, as only essential medical care is available and access to education and employment are lacking.

Item 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’s 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 opportunity 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.

Item 54.

The Commissioner spoke in private with some unaccompanied male minors in the closed application centre and with detainees in the deportation centre. On both occasions, the Commissioner was given the impression that the detainees did not understand the application 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.

Item 55.

During his visit to the deportation 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 spend their daytime together unless they decide to stay in their own cells. 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 stated that women objecting to live with men can request to be moved to a different centre.

Item 56.

The Commissioner regrets that few occupational activities appear to be available in the three facilities he visited. While children in the open reception centre in 's Gravendeel attend a regular school, there is little extracurricular 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).

Item 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 option in the respective municipalities, helping the asylum seekers to find occupation.

Item 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.

Item 59.

Individuals have the right to appeal their detention and its continuation before a district court. Pursuant to Article 59 of the Aliens Act 2000, the detention and its continuation is generally lawful, if expulsion is foreseeable, e.g., if the authorities are actively pursuing the expulsion of 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 insofar as a possibly burdensome situation exists but no full proportionality assessment is made. This limited possibility of judicial review has faced criticism and may contradict the case law of the European Court of Human Rights.

Item 60.

The Commissioner believes that a full judicial review is a core instrument to safeguarding 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 change the current law allowing for a full judicial review of the detention decision as well as the continued detention by domestic courts.

Par. 3.5 Administrative detention of children

Item 62.

Until January 2008, the Dutch authorities were widely criticised for detaining about 240 children and their families, for an average period of 59 days and a maximum of 244 days. In response to this criticism and a parliamentary motion, on 29 January 2008, the Dutch government publicised its new policy regarding administrative detention of children and their families. The aims are to reduce the detention period for children by introducing a maximum of two weeks detention prior to expulsion, to create more alternative accommodation for children and their families, and improve 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 had already decreased significantly in 2007.

Item 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 the law in accordance with the standards of the ECHR and the CRC.

WHO'S RIGHT(S)?

Amnesty International

http://www.schipholwakes.nl/rapport_vreemdelingendetentie.pdf, The Netherlands: The detention of irregular migrants and asylum seekers, June 2008.

Committee for the Prevention of Torture, CPT (everything on detention of aliens pending deportation)

4. Facilities for immigration detainees

A. Introduction

Item 54.

As stated above, the CPT's delegation visited the Stockholm detention boat in Rotterdam, the Kalmar detention boat in Dordrecht and the Rotterdam Airport Deportation centre. On the detention boats, aliens are held for the purpose of establishing their identity and nationality. In principle, immigration detainees for whom there are no remaining administrative impediments to expulsion are transferred to the Deportation centre at Rotterdam Airport or Schiphol Airport.

At the time of the visit, the two detention boats, both moored to the quay, were holding male detainees, while the Rotterdam Airport Deportation centre was accommodating single women and couples, as well as men. The CPT's delegation was pleased to note that it did not encounter children in any of the facilities visited, in conformity with a recent decision by the State Secretary of Justice.

Item 55.

According to the Netherlands authorities, the two detention boats serve as temporary accommodation in cases of unexpected overcrowding; the Stockholm boat will close in 2010 and the Kalmar boat in 2012. The boats were selected for the detention of immigration detainees as they could be made operational more quickly and with fewer administrative formalities than any land facility.

The location of the Rotterdam Airport Deportation centre is also considered temporary and should move from its current site in about two years. The CPT would like to receive detailed information concerning the plans to relocate the Rotterdam Airport Deportation centre.

Item 56.

At present, the legislation governing the administrative detention of immigration detainees does not provide for an absolute time limit for detention pending deportation for certain categories of detained aliens. The CPT invites the Dutch authorities to introduce an absolute time limit for the detention of all foreign nationals under aliens legislation (as is already the case in the majority of European countries).

B. Material conditions

Item 57.

The detention boats were originally designed as floating hostels, providing accommodation for professionals working away from home. The official capacity of the Stockholm is 472 detainees, and for the Kalmar, 496. At the time of the visit, they were holding 422 and 107 detainees, respectively. Both boats have a similar layout: they are three storeys high, with the immigrant detainees accommodated in two, four or six-person rooms. The rooms for four persons contained a sleeping area and a living area, the latter being equipped with a table and four chairs; the rooms were sufficient in size. The two and six-person rooms were also adequate in size, with seating facilities in the centre. All rooms were equipped with toilet facilities and a refrigerator. The rooms were grouped into eight units, each of which had a recreation room.

In many aspects, living conditions could be considered acceptable. However, the narrow corridors and low ceilings on both boats created an oppressive environment and the boats were poorly ventilated, resulting in humidity problems. In addition, of the four outdoor yards on each boat, none provided shelter from inclement weather. Moreover, the outdoor exercise yards used by inmates in solitary confinement were totally unsuitable, providing very little access to fresh air.

Item 58.

The CPT is aware of the ongoing discussions with respect to the suitability of boats as detention facilities in the Netherlands. For instance, the Stockholm was inspected jointly by the Inspectorate for the Implementation of Sanctions and the Council for the Application of Criminal Law and Youth Protection in April 2006. Their report made several recommendations, such as the installation of more spacious outdoor exercise yards. The report also referred to the maximum length of stay on the boats; it stated that, due to the conditions, immigration detainees should not be held on the boats for longer than six months. Following the report, several improvements were made. Judicial decisions of 11 December 2006 and 26 April 2007 specified that immigration detainees should not be accommodated on the boats for longer than six months. The NACI has also applied the rulings to detainees held on the Kalmar. Indeed, the delegation did not meet any detainees who had stayed on the boats for longer than six months.

The CPT agrees that the boats are unsuitable for long-term detention and that they cannot easily be transformed into acceptable detention facilities. The CPT recommends that the Dutch authorities cease, at the earliest opportunity, the use of boats as facilities for immigration detainees. In the meantime, it recommends that measures be taken to decrease the humidity on the Stockholm and Kalmar, to allow detainees in solitary confinement to have access to more suitable outdoor exercise yards and to install shelters against inclement weather in all the exercise yards.

Item 59.

The Rotterdam Airport Deportation centre is housed in a former hangar directly adjacent to Rotterdam Airport. With a capacity of 212, on the day of the delegation's visit, the Centre was accommodating 110 detainees in single and double rooms, grouped into several units. Overall, the material conditions in the Centre were significantly better than on the detention boats. That said, the outdoor exercise yards were not ideal; they were long, narrow cages, shielded from public view by plastic sheeting, which resulted in a somewhat confined atmosphere. The Deportation centre has a medical unit with three rooms, where detainees with mental disorders are accommodated. This unit has been allocated additional time from a nurse.

C. Regime

Item 60.

In the past, Dutch authorities have been commended by the CPT for providing a varied and stimulating regime for immigrant detainees, including work, recreation, language or computer education, sports, library, music and handicraft. In 2007, the findings were markedly different; many activities were no longer available while others were reduced to a strict minimum. The regime on the two detention boats was particularly meagre, with detainees having a total of 18 hours of activities a week, including one hour of daily outdoor exercise, library visits (one hour a week), outdoor activity (three hours a week) and the option of visiting the shop three times a week. There were no educational activities, and work (cleaning and laundry) was available for only a few detainees. However, on the Kalmar the regime was slightly more developed as detainees could benefit from the presence of a sports instructor during outdoor exercise and there was a full-time librarian.

Within their units, detainees were generally free to leave their rooms and visit the unit's recreation room. However, a more restrictive regime was in operation in the admission department of both boats. In these departments, detainees were required to remain in their rooms for 10 days when they were not participating in activities, in order to be available for administrative arrangements linked to their expulsion. Consequently, they spent some 21 hours or more per day confined to their rooms.

Item 61.

It has been over 10 years since the CPT last visited an immigration detention centre in the Netherlands and the delegation noted the extent to which the Dutch approach to the administrative detention of immigration detainees has changed, largely duplicating the transformation in the prison system. Indeed, both forms of detention are linked by Article 9 of the Penitentiary Principles Act. Facilities used for the administrative detention of immigration detainees, such as the two detention boats, are classified as remand prisons; therefore the regime applied to immigration detainees is similar to that of remand prisoners. Moreover, the CPT understands that immigration detainees are normally held

under a limited community regime in conformity with Article 21 of the Penitentiary Principles Act and Article 3 of the Penitentiary Order. The CPT would like to receive clarification as to the reason(s) for the decision to classify immigration detention centres as remand prisons.

Item 62.

The CPT is aware that it may be necessary to deprive persons of their liberty for a period under aliens legislation in order to facilitate their expulsion. However, it is concerned by the linkage of two dissimilar forms of detention and sees no reason for immigration detainees to be held in prison facilities under a limited community regime. In the view of the CPT, such persons should be accommodated in specifically designed centres, offering material conditions and a regime appropriate to their legal status. The CPT recognises that special precautions might have to be taken vis-à-vis certain foreign nationals detained under aliens legislation (e.g. for disciplinary, health or security reasons). However, to apply a limited community regime indiscriminately to all detained aliens cannot be justified.

The CPT recommends that the Netherlands authorities reconsider their approach towards the detention of immigration detainees, in the light of the above remarks. Immigration detainees should have access to a full community regime and the additional restrictions for detainees in the admission departments should be reviewed.

Item 63.

The Rotterdam Airport Deportation centre has a slightly different regime, as it is governed by the Border Accommodation Regime Regulations (*Reglement Regime Grenslogies*). Immigration detainees are allowed to move around their unit freely for most of the day, and have a well-equipped recreation room at their disposal. Further, each unit has access to a large interior court for half the day. In addition, one hour of outdoor exercise per day is guaranteed. Although few activities were organised, the regime was more lenient and therefore somewhat better adapted to the needs and status of migrant detainees.

D. Staffing

Item 64.

The staff of centres for immigration detainees have a particularly onerous task. Firstly, there will inevitably be communication difficulties caused by language barriers. Secondly, many detained persons will find it difficult to accept that they have been deprived of their liberty when they are not suspected of any criminal offence. Thirdly, there is a risk of tension between detainees of different nationalities or ethnic groups. Consequently, the CPT places a premium upon the supervisory staff in such centres being carefully selected and receiving appropriate training. Staff should possess both well-developed qualities in the field of interpersonal communication and cultural sensitivity, given the diverse backgrounds of the detainees. Furthermore, at least some of them should have rele-

WHO'S RIGHT(S)?

vant language skills. In addition, they should be taught to recognise possible symptoms of stress reactions displayed by detained persons and to take appropriate action.

Item 65.

On the two detention boats and in the Rotterdam Airport Deportation centre, the staff consisted of employees of a private security company and regular prison officers attached to the so-called NACI-prison officers pool, a unit that provides officers to prisons with a staff shortage. On the day of the visit, the Stockholm had 220 custodial staff (110 prison officers from the pool and 110 employees from a private security company), and the Kalmar had a complement of around 155 (of whom 66% were employed by a private security company). Of the 130 custodial staff at the Rotterdam Airport Deportation centre about 50% were employed by a private security firm. Each of the three facilities also employed specialised staff, such as social workers, spiritual counsellors and psychologists.

Item 66.

There is a certain division of tasks between regular prison officers and private security staff and some senior posts are reserved for regular NACI-staff. However, in principle all functions could be carried out by any custodial staff. As a rule, on every unit, there should always be at least one NACI-prison officer on duty; nevertheless, the delegation observed that this was not always the case.

Item 67.

Private security staff told the delegation that before taking up their duties, they had to complete two courses: one was on self-defence and the other was an induction course on prison work. However, the latter course did not cover the intercultural and interpersonal aspects of working in a detention facility for immigration detainees.

Custodial staffing on the two detention boats reflected the temporary nature of these facilities and their qualification as remand prisons. In particular, the CPT has some misgivings about the training given to private security staff currently working in the detention facilities for immigration detainees. In the CPT's view, that training is insufficient to enable such staff to undertake duties other than passive security duties, thus reinforcing the carceral atmosphere already very evident on the boats. The CPT would like to receive the comments of Dutch authorities on this point.

E. Use of restraints

Item 68.

On the detention boat Kalmar, the delegation found that an immigration detainee, placed in isolation as a punishment for tampering with the sprinkler installation, had had his arms and legs restrained after he had once again tam-

pered with the fire safety devices in the isolation cell itself. He remained restrained until transferred to the isolation department at Vught Prison, some 24 hours later. Although, the isolation cells were equipped with CCTV in order to ensure visual supervision, there was no continuous and direct monitoring by staff of the detained person whilst restrained.

The director confirmed the delegation's findings and explained that restraining a detainee until his transfer to Vught Prison was standard practice on both the Kalmar and the Stockholm, whenever a detainee placed in isolation was found tampering with the sprinklers. She also stated that the length of time a detainee would be kept restrained depended on how long it took to transfer him to Vught Prison.

Item 69.

The CPT is seriously concerned by the practice of restraining detainees in isolation for lengthy periods without medical justification; such a practice could very well be considered ill-treatment. In the Committee's view, means of restraint in addition to placement in an isolation cell should only be applied to an agitated or violent prisoner and should rarely last for more than a few hours, unless there is a medical condition requiring this. And in the latter case, the decision to resort to the use of restraints should be made by a doctor and there must always be a constant, direct personal supervision of the restrained person. Restraints should be removed at the earliest opportunity; they should never be applied, or their application prolonged, as a punishment.

The CPT recommends that the Dutch authorities immediately cease the practice of applying physical means of restraint to detained persons who tamper repeatedly with the sprinkler system on the Kalmar and Stockholm detention boats; such detainees should be transferred to a suitable alternative facility without delay.

F. Medical care

Item 70.

In general, the level of medical care provided on the boats and at the Rotterdam Airport Deportation centre was acceptable. There was access to a wide range of health care staff (a medical doctor, nurses, a dentist and a psychiatrist, as well as other medical specialists) and they were sufficient in number. Furthermore, all new arrivals were medically examined within 24 hours. However, during the night neither a doctor nor a nurse was present or even on call in any of the three facilities visited. Instead, in the event of a medical need, an external emergency service was called.

The CPT recommends that someone competent to provide first aid, preferably a person with a recognised nursing qualification, always be present on the premises of the detention boats and the Rotterdam Airport Deportation centre, including at night. Furthermore, a medical doctor should always be on call.

Item 71.

The delegation was somewhat concerned by the arrangements in place with respect to detainees with psychiatric illnesses. For instance, on the Stockholm, the delegation met a man who appeared to be suffering from a serious psychiatric disorder. Due to his erratic behaviour, he was kept in isolation and visited daily by a medical doctor and psychologist and weekly by a psychiatrist. There were ongoing attempts by the management of the Stockholm to arrange a transfer to a more suitable environment, such as an Individual Support Department (Individuele Begeleidingsafdeling) in a regular prison. However, due to lack of space elsewhere, this man was finally accommodated in the medical unit of the Rotterdam Airport Deportation centre. Here, the CPT's delegation met with him a few days later; his condition was unchanged.


In the light of the above remarks, the CPT would like to receive the comments of the Dutch authorities on the arrangements for psychiatric care for immigration detainees.

G. Contact with the outside world

Item 72.

On the two boats, as well as in the Rotterdam Airport Deportation centre, detainees were entitled to a one-hour weekly visit. The CPT's delegation was told that, on the Stockholm, the initiative had been taken to make use of external volunteers to visit immigration detainees who would otherwise not receive visits. This is a very welcome initiative which, if deemed successful, should certainly be considered by other immigration detention facilities. The CPT also invites the Dutch authorities to explore the possibility of increasing the visiting entitlement to at least two hours a week.

There was unlimited access to a telephone to make a ten-minute call. However, there was no option to make a reverse-charge call, considerably limiting the possibilities for contact for detainees without sufficient means. The CPT recommends that the Dutch authorities verify the situation regarding the cost of telephone calls and the possibility of other communications.



Who's Right(s)?

What viewpoints have international human rights organisations adopted since 2000 on a number of aspects relating to the treatment of migrants in the Netherlands? How have politicians and the press responded to these viewpoints? And have any steps been taken as a result of international criticism? Three circumstances serve to illustrate the importance of these questions. Government policy on immigrants has undergone continuous change since 2002, and successive governments have been exploring limits ever since that year. One interesting question is how recent measures relate to international human rights treaties. We also see a remarkable consensus among all political parties. For instance, politicians in (almost) all political parties supported the most important measures proclaimed between 2000 and 2008, in spite of their differences of opinion about modalities. However, treaties on human rights make it quite clear that resolutions passed by representative bodies and enjoying wide support must also fulfil certain minimum requirements, especially with respect to protecting minorities' rights. Dominique van Dam studied the effects of international monitoring of legislation and policy relating to migrants in the Netherlands. One of the facts that have emerged from her research is that it is not easy to view these effects separately from the impact of the behaviour of actors such as national and international human rights organisations, members of Parliament, advisory bodies, individual citizens, and specialised lawyers. The report concludes by making recommendations to the Dutch government, the Dutch House of Representatives, and the major players in the civil society.