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# The Netherlands Institute for Human Rights Submission

## to the UN Committee against Torture on the Examination of the 6th Periodic Report of the Netherlands in May 2013

April 2013

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## I. Introduction

The Netherlands Institute for Human Rights (hereinafter: the Institute) has taken note of the sixth periodic report of the Netherlands on the implementation of the Convention against torture and other cruel, inhuman or degrading treatment or punishment (hereinafter: CAT), dated 3 January 2012.[1] On the basis of its mandate, expertise, and activities, the Institute wishes to raise a number of issues in this submission. According to the Institute, these require further examination by the Committee and could be subject of the constructive dialogue with the Dutch Government.

The Institute opened its doors in October 2012. The former Equal Treatment Commission (*Commissie Gelijke Behandeling*) undertook preparations for its establishment and merged with this Institute. The Institute monitors and protects human rights, promotes respect for human rights (including equal treatment) in practice, policy and legislation, and increases the awareness of human rights in the Netherlands. According to the Netherlands Institute for Human Rights Act,[2] which establishes the Institute, its tasks include cooperating with international institutions, urging the Government to ratify, implement and observe human rights treaties, as well as encouraging the Government to remove the reservations to such treaties and to implement and observe international recommendations on human rights. Furthermore, the Institute has far-reaching investigative powers. The mandate of the Institute also extends to the Caribbean Netherlands: the islands Bonaire, Sint Eustatius and Saba. This applies to all the tasks of the Institute, with the exception of its task to give opinions in individual cases relating to equal treatment.

The Institute is an independent public body.[3] It receives no instructions from the Government. Its accountability to the Government is restricted to the budget and the obligation to publish its annual report. It has no accountability (in law nor in practice) with regard to its opinions on complaints or in investigations, its advisory opinions or its recommendations. Neither is there any obligation to account for its policy in making choices for investigations or enquiries. The Institute currently holds the National Human Rights Institute B-status with the International Coordinating Committee of national institutions for the promotion and protection for Human Rights (ICC). As the Institute is confident that it is already fully compliant with the Paris Principles, an application for A-status is foreseen for late 2013.

## II. Reading guide

This submission was written on the basis of the list of issues prepared for the Netherlands.[4] In chapter IV of this submission, the number preceding the title of each topic, refers to the paragraph in this list of issues. In addition, the submission begins with a few general remarks regarding the implementation of the Convention and the information provided by the Government in the Caribbean part of the Netherlands. Where relevant, a **suggestion for a question** has been included for the purpose of the preparation of the Committee members for the dialogue with the Dutch Government.

The submission does not provide information on all the issues mentioned in the list of issues. This does not imply that the Institute is of the opinion that the topics it does not comment on are sufficiently implemented by the Netherlands or do not merit further discussion by the Committee.

[1] UN Doc. CAT/C/NLD/6.
[2] *Stb*. 2011, 573.
[3] Article 4 of the Netherlands Institute for Human Rights Act.
[4] UN Doc. CAT/C/NLD/Q/6.

## III. General remarks – Caribbean part of the Netherlands

As of 10-10-2010 the Caribbean islands Bonaire, Sint Eustatius and Saba have become an integral part of the Netherlands. The islands have been designated as 'public bodies'. This status is very similar to that of a municipality but it allows for specific regulations to be applied to these bodies. In fact, in the Caribbean part of the Netherlands much of the legislation and policies differ from those in the European part. According to the Government, essentially specific factors (*wezenlijk onderscheidende factoren*) exist, which distinguish these islands from the European part of the Netherlands.[5] At the same time the Dutch Constitution applies equally in both territories, as do various international human rights treaties, including CAT. Article 1 of the Constitution sets out the principles of equal treatment and non-discrimination. With reference to CAT, this means that the Dutch national Government is obliged to fully implement all provisions of CAT in the Caribbean Netherlands, although it may be reasonably and objectively justified to accomplish this through different means.[6] Essentially specific factors include the insular character, the large distance to the European part of the Netherlands, the small surface and population. The climate, too, may be a reason to justify different legislation and regulations applying to the Caribbean part of the Netherlands.[7] What ultimately counts, however, is that the same level of protection is guaranteed to the population in both territories.

A specific issue that arises is the detention situation in the Caribbean part of the Netherlands. To date, on both Saba and Sint Eustatius there are no detention facilities. Only on Sint Eustatius police cells are available. Suspects who are arrested on Saba are transferred to a police cell on Sint Eustatius within 24 hours. Detained suspects from both islands, in detention for longer than eighteen days, are transferred to the detention centre on Bonaire.

The detention system of the former Netherlands Antilles had various shortcomings, as was noted by the Human Rights Committee, the Committee against torture and the European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT).[8] The Netherlands national Government made an effort to improve this situation with regard to the Caribbean islands now under its jurisdiction. However, there is not much up to date information available, neither in the Government's report to your Committee, nor in other public reports.

**The Institute calls upon the Committee to ask the Dutch Government:**

- **To transparently and expressly motivate any difference in legislation and regulations applying to the Caribbean and to the European part of the Netherlands, bearing in mind the obligations under CAT, by explaining why those differences are objectively and reasonably justified.[9]**

[5] Article 1, paragraph 2 of the Statute for the Kingdom of the Netherlands.
[6] Human Rights Committee General Comment No. 18, 1989, UN Doc. HRI/GEN/1/Rev.8, paras. 7 – 13, pp. 187, 188.
[7] Article 1, paragraph 2 of the Statute for the Kingdom of the Netherlands.
[8] Concluding observations of the Human Rights Committee to the Netherlands, 25 August 2009, UN Doc. CCPR/C/NLD/CO/4; Conclusions and recommendations of the Committee against Torture to the Netherlands, 3 August 2007, UN Doc. CAT/C/NET/CO/4; Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in July 2007 (hereafter: CPT report 2008).
[9] For a more extensive explanation of the applicable frame of reference, the Institute recently published an advice in which this is explained in more detail: Netherlands Institute for Human

- **To give further information on how any shortcomings in the implementation of the CAT in the Netherlands Antilles have been taken on by the Dutch Government, with respect to Bonaire, Sint Eustatius and Saba.**
- **To specify outstanding concerns in the detention system related to the CAT provisions.**

## IV. Comments of the Institute based on the list of issues

### 1. Access to a lawyer

*Draft legislation*
The right to access to a lawyer for accused persons is a fundamental element of the right to a fair trial. At the moment, the right of access to a lawyer during police interrogation is regulated by an instruction of the Board of Procurators General.[10] As indicated in the Government's report, a draft bill is being prepared about the right to counsel during police interrogations. At the same time, negotiations at European Union level are ongoing about a directive on the right to access to a lawyer. Concern was expressed by several Dutch stakeholders on the position the Netherlands took in these negotiations.[11] It appeared that the Netherlands were lobbying for an exception which would, in the Dutch criminal law system, exclude a large number of suspects from the right to access to a lawyer in that stage of the proceedings. In January 2013 the Minister of Security and Justice sent a letter to Parliament clarifying the Government's position in these negotiations.[12] The Institute is pleased to read in that letter that the Netherlands intends to keep this right applicable to all persons suspected of an indictable offence (*misdrijf*), including those cases where the person is not detained, and/or if the case is dealt with without the interference of a court (*buitengerechtelijke afdoening*). The Institute thus assumes the implementation of the future directive will follow this intention in law and practice.

**The Institute advises the Committee to invite the Government, when implementing future EU-legislation, to do so in conformity with the right to a fair trial.**

*Caribbean part of the Netherlands*
The instruction of the Board of Procurators General is also applicable in the Caribbean part of the Netherlands. However, more practical problems exist there. On Bonaire, four advocates have set up offices, three of whom act in penal law cases. No advocates are presently based on Sint Eustatius and Saba. Suspects from the latter islands mostly refer to lawyers based on Sint Maarten.[13] Contact is possible through telephone and video conference. A lawyer may have a limited number of return tickets reimbursed, but no accommodation costs.

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Rights, 'Gelijke behandeling bij de toepassing van het Kinderrechtenverdrag in Caribisch Nederland', March 2013, to be found at: http://www.mensenrechten.nl/publicaties/detail/18047.
[10] Aanwijzing rechtsbijstand politieverhoor, *Stcrt.* 2010, 4003.
[11] See, for example, the Commissie Meijers, note of 28 November 2012, to be found at: http://www.commissie-meijers.nl/assets/commissiemeijers/CM1219%20Notitie%20Commissie%20Meijers%20tbv%20het%20AO%20TK%20Commissie%20V%26J%20op%205%20december%20as.%20over%20de%20JBZ%20Raad%20op%206%20en%207%20december%202012.pdf, and T. Spronken, 'The Dutch exception', *NJB* 2012, 37, p. 2607.
[12] Parliamentary documents 2012/2013, 32317, nr. 152.
[13] Sint Maarten was formerly part of the Netherlands Antilles, but is now a separate country within the Kingdom of the Netherlands.

Detained suspects in police custody on Sint Eustatius are informed of their right to have a lawyer present during the first police interrogation. They often sign a waiver of this right. As a result, normally there is no lawyer present during the first police interrogation. Minor suspects are usually not interrogated before one of their parents is present and/or their lawyer attends the interrogation by telephone.

The present situation raises questions to the way in which the right of access to a lawyer is guaranteed in practice.

**The Institute calls upon the Committee to ask the Dutch Government for information about the way in which the right of access to a lawyer is guaranteed for all detained suspects in the Caribbean part of the Netherlands.**

## 2. Absolute time limit detention under migration law

For the administrative detention of a foreign national under migration law, with a view to expulsion or return to his home country, the Netherlands is bound by the maximum time limit of eighteen months, based on the EU Return Directive[14] and implemented in article 59 of the Alien Act. In practice, however, it is possible for aliens to undergo administrative detention for a period longer than eighteen months. This is the case when an alien is administratively detained several times because he or she has no valid residence papers and is apprehended by the police after he or she is released from detention the first time. During the time period of 2001 to 2010, 27 percent of alien detainees were administratively detained more than once.[15] In some cases, repeated administrative detention exceeded the absolute time limit of eighteen months.

Another concern regarding the absolute time limit of aliens in detention is the bill on penalisation of irregular migrants (*Wetsvoorstel strafbaarstelling illegaal verblijf*). This draft contains the possibility to punish a foreign national under migration law whose status is irregular. Sanctions include a fine, or a substitute imprisonment when the particular migrant is unable to pay the fine. Substitute imprisonment based on the Penal Code, together with the administrative measure of alien detention, may increase the absolute time limit of eighteen months of detention of a foreign national under migration law as well. In practice this could lead to situations of continuous or repeated detention, which an alien can only escape by cooperating with the authorities on his return, although it cannot be excluded that this return may bring the alien in a situation contrary to Article 3 CAT (*cf.* point 6).

**The Institute advises the Committee to urge the Dutch Government:**

- **Not to exceed the absolute time limit for the administrative detention of foreign nationals under migration law at all, including through repeated detention.**
- **To clarify its position about both criminal as well as administrative detention of irregular migrants based on the Penal Code as well as under administrative legislation which will exceed the absolute time limit of eighteen months of detention of a migrant under migration law.**

[14] Article 15, paragraphs 5 and 6 of EU directive 2008/115/EG.

[15] Custodial Institutions Agency (DJI), 'Een profielschets van vreemdelingen in bewaring', 1 February 2012. Cases of repeated detention are also mentioned in the report of the National Ombudsman, (2012/105) of 7 August 2012: 'Vreemdelingenbewaring: strafregime of maatregel om uit te zetten, Over respect voor mensenrechten bij vreemdelingenbewaring', p. 32.

## 3. Pre-trial detention

A relatively large percentage of the population in detention in the Netherlands consists of pre-trial detainees.[16] To issue an order for pre-trial detention, there have to be 'grounds' and 'serious indications' (*ernstige bezwaren*) against the suspect.[17] First, the investigative judge (*rechter-commissaris*) will decide on this. At most fourteen days later, the council chamber (*raadkamer*) will decide on the continuation of the order. Often, the motivation of the court decision to order continuation of pre-trial detention is minimal. The Institute believes decisions concerning pre-trial detention require adequate motivation, so as to provide insight into the reasons for the decision and to be able to institute habeas corpus procedures. In these cases, a more elaborate motivation by the courts would be beneficial for understanding the decision.

A bill is currently discussed in Parliament which may lead to the extension of grounds for pre-trial detention.[18] It aims to provide the possibility to keep someone in pre-trial detention for up to seventeen days, before a hearing takes place. This would apply to those who are suspected of violent crimes in public places or against persons with a public duty, in situations not covered by the current law but which cause "public disorder" (*maatschappelijke onrust*). "Public disorder", however, is not defined clearly and the added value of the bill has been questioned by advisory bodies. This bill should be seen in the current political and societal context in the Netherlands, which results in a tougher climate, with more focus on a tougher criminal justice system. However, as long as a suspect is not yet convicted, his or her right to be presumed innocent should be at the heart of the investigation and the trial against him or her. A punitive character for pre-trial detention is not in line with human rights standards. The Institute emphasises that pre-trial detention should always and only be used as an *ultimum remedium* and urges the relevant authorities to be restrictive in issuing these orders.

**The Institute advises the Committee:**

- **To ask the Government how it intends to ensure improvement of the motivation of decisions on pre-trial detention.**
- **To emphasise that pre-trial detention should only be used as an *ultimum remedium*.**

## 5. National human rights institution

For information regarding the Institute, please see the introduction to this submission.

## 6. Asylum

The Dutch Government introduced a bill into Parliament on rearranging the existing asylum grounds (*Wetsvoorstel herschikking asielgronden*).[19] With this bill, the Government is planning to abolish the section where an asylum seeker can obtain a residence permit on

[16] Statistics Netherlands (CBS), 'Criminaliteit en rechtshandhaving 2011', pp. 170-174.
[17] Article 67 of the Code of Criminal Procedure determines in which cases an order for pretrial detention can be issued. Its last paragraph reads: "The previous paragraphs are only applied when it appears from the facts or circumstances that there are serious indications against the suspect".
[18] Parliamentary documents 2011/2012, 33360, nr. 2.
[19] Parliamentary documents 2011/2012, 33293, nr. 2.

the ground of the policy of categorical protection.[20] The reason for doing so, is to counter the perceived abuse of the law. This means that in the future, an asylum seeker has to prove that he or she has grounds to fear persecution, cruel or inhuman treatment due to their individual situation, in order to receive protection of the Dutch Government. The Institute is concerned, just as the Advisory Committee on Migration Affairs[21] and Amnesty International[22] that this means there will be an increased risk that certain asylum seekers, who cannot prove their individual situation but who nevertheless are at risk due to the overall situation in their country of origin, will not be protected sufficiently by the Dutch Government.

**The Institute advises the Committee to ask the Dutch government how it will safeguard the right to protection of asylum seekers in individual cases under Article 3 CAT, when the asylum seeker originates from a country where widespread generalised violence exists.**

## 13.a Appropriate regime for immigration detainees

In response to the recommendations of the CPT in the report of the visit to the Netherlands in June 2007,[23] the Government answered that it endorsed the principle that the alien detention regime should be distinguished from the penitentiary regime for persons detained under criminal law.[24] Although the Government has set up special buildings for detention of aliens, the legal regime in alien detention centres is not different from the legal regime in penal detention centres. This is what the CPT concluded in the report on its visit of 10-12 October 2011. As a result of that observation, the CPT invited the Government to examine the possibility of drawing up a distinct set of rules for alien detention centres.[25]

The National Ombudsman investigated the regime in the alien detention centres and arrived at the same conclusion.[26] The Ombudsman stated that the regime has many penal elements which are not suitable for the goal of alien detention, which is the expulsion of the foreign national under migration law. For example, foreign nationals who are detained under migration law, are locked in their cells with other detainees, have to deal with severe security measures if they arrive in or are transported out of the detention centre (such as strip searches and the use of handcuffs) and have no daytime activities.[27]

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[20] Article 29, paragraph 1 section d Aliens Act: "A residence permit can be issued to an alien for whom return to the country of origin would, in the opinion of the Minister, constitute an exceptional hardship in connection with the overall situation there."
[21] Advisory Committee on Migration Affairs (ACVZ), Advice 2006/19, p. 10. 'Categoriaal beschermingsbeleid, een 'nood zaak''. The Advisory Committee on Migration Affairs is an independent advisory body, established by law.
[22] Letter from Amnesty International to the Minister of Immigration and Asylum, 13 September 2011.
[23] CPT report 2008.
[24] Parliamentary documents 2007/2008, 24587, nr. 245.
[25] Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 21 October 2011, paragraph 59: "Detention centres are not covered by specific regulations; instead, detention and expulsion centres for foreign nationals are governed by the same rules as those applicable to the prison system'.
[26] Report of the National Ombudsman, (2012/105) of 7 August 2012: 'Vreemdelingenbewaring: strafregime of maatregel om uit te zetten, Over respect voor mensenrechten bij vreemdelingenbewaring', p. 37.
[27] With regard to daytime activities, see also: Advisory Committee on Migration Affairs (ACVZ), 'Verloren tijd', pp. 81-84.

The Government responded to the Ombudsman report by stating that it endorses the principle that detaining people is a measure of last resort.[28] This statement is closely connected with the question whether there are effective alternatives for alien detention. Different organisations investigated whether detention is used as a measure of last resort and they all concluded that this was not the case.[29] They all recommended the use of alternative and less invasive measures. This resulted in a pilot of the Government in which some groups of irregular migrants were considered suitable for alternative measures.[30] However, the group of foreign nationals under migration law that is considered suitable to be subject to an alternative measure, is small and the conditions for using the alternatives are strict.[31]

**The Institute advises the Committee to ask the Dutch Government:**

- **To underline the conclusion that alien detention should be subject to a legal regime that is suitable for the goal of alien detention and differs from the penitentiary regime.**
- **To put into practice the use of alien detention as a measure of last resort and to use less invasive alternative measures for alien detention for all foreign nationals under migration law.**

## 14.a Children in detention

Normally, families with children are held in special freedom restricting locations. Only if the expulsion is due within fourteen days, families with children can be detained in detention centres for a maximum of 28 days. CPT observed that in the detention centre its delegation visited, there were families with children present whose stay exceeded the time limit of 28 days.[32] The Government has yet to respond to the CPT report, despite the request of the CPT to send a response before 6 October 2012, six months after the report was submitted to the Government.

**The Institute advises the Committee to ask the Dutch Government to respond to the observation and to put in practice the principle that children should not be detained or separated from their families.**

[28] Letter from the State Secretary of Security and Justice to the National Ombudsman, 21 December 2012, to be found at: http://www.nationaleombudsman-nieuws.nl/sites/default/files/reactie_van_de_staatssecretaris_december_2012.pdf

[29] Amnesty International, 'Vreemdelingendetentie: in strijd met de mensenrechten', November 2010 and Amnesty International, 'Vreemdelingendetentie in Nederland; het kan en moet anders, alternatieven voor vreemdelingendetentie', 11 October 2011; Justitia et Pax, 'Humaniteit in vreemdelingenbewaring', May 2010; Council for the Administration of Criminal Justice and Protection of Juveniles (RSJ), advice, 16 June 2008, parliamentary documents 2008/2009, 19637, nr. 1222; report of the National Ombudsman, (2012/105) of 7 August 2012: 'Vreemdelingenbewaring: strafregime of maatregel om uit te zetten, Over respect voor mensenrechten bij vreemdelingenbewaring', p. 29-31.

[30] Parliamentary documents 2011/2012, 19637, nr. 1483.

[31] Report of the National Ombudsman, (2012/105) of 7 August 2012: 'Vreemdelingenbewaring: strafregime of maatregel om uit te zetten, Over respect voor mensenrechten bij vreemdelingenbewaring', p. 31.

[32] CPT report 2012, paragraph 61.

## 21. Domestic violence

The Institute notes that domestic violence is the subject of dialogue between the Dutch Government and several UN treaty bodies. The Committee on the Elimination of Discrimination against Women (CEDAW) recently requested more information from the Netherlands on this issue by July 2013.[33] In line with recommendations from CEDAW, the Institute encourages the development of a new comprehensive National Action Plan on violence against women, including domestic violence, taking fully into consideration the special aspects of domestic violence targeting women.[34]

The Institute welcomes the signing of the Council of Europe Convention on preventing and combating violence against women and domestic violence (CAHVIO) on 14 November 2012. The Convention seeks to improve the protection of and support for victims of violence, through a large range of measures to be taken by the State Parties. The Institute is pleased to learn that the Dutch Minister of Education, Culture and Science announced recently that the Netherlands hope to ratify the Convention in 2013.[35] As this Convention contains a comprehensive framework to prevent domestic violence, protect victims and provide for legal remedies, the Institute urges the Dutch Government to ratify this Convention in a timely manner without reservations, and to take the necessary steps to implement the Convention.

**The Institute advises the Committee:**

- **To encourage the Dutch Government to develop a new, comprehensive National Action Plan on violence against women, including domestic violence.**
- **To ask the Dutch Government what the expected timeline is for the ratification and implementation of the Council of Europe Convention on preventing and combating violence against women.**

## 22. Trafficking in human beings

The Institute welcomes the fact that the current Government considers combating trafficking in human beings a priority for its work.[36] The Institute considers a human rights based approach essential to an effective policy to combating trafficking in human beings. At the moment, the focus of the measures initiated by the Government is on repression, mostly aimed at the criminal justice system. In contrast, little is known about the possible effect of preventive measures to combat trafficking in human beings. The National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children has repeatedly advised the Government to conduct research into the actual impact of

[33] Letter from the Rapporteur for Follow-up on Concluding Observations by CEDAW to the Permanent Representative of the Netherlands to the United Nations, 26 November 2012.
[34] Committee on the Elimination of All Forms of Discrimination against Women, Concluding Observations on the Netherlands, 5 February 2010, UN Doc. CEDAW/C/NLD/CO/5, para. 27.
[35] Mentioned in the speech of the Minister of Education, Culture and Science during the 57th session of the Commission on the Status of Women, 4 and 5 March 2013, to be found at: http://www.rijksoverheid.nl/ministeries/ocw/documenten-en-publicaties/toespraken/2013/03/06/toespraak-57th-session-of-the-commission-on-the-status-of-women.html
[36] Coalition agreement of 29 October 2012, to be found at: http://www.government.nl/government/coalition-agreement/vi-from-good-to-excellent-education and http://www.government.nl/government/coalition-agreement/viii-security-and-justice, confirmed later in answer to parliamentary questions on this topic, to be found at https://zoek.officielebekendmakingen.nl/ah-tk-20122013-1239.html.

prevention programmes.[37] The results of such research could be used to establish a more evidence-based approach to measures to prevent trafficking in human beings. To the knowledge of the Institute, no such research has been conducted or commissioned to date.

**The Institute advises the Committee to ask the Dutch Government to conduct research into the impact of measures to prevent trafficking in human beings, with the aim of implementing them if research shows those measures are likely to be effective.**

## 26. Optional Protocol to the Convention

The Optional Protocol to the Convention against torture and other cruel, inhuman or degrading treatment or punishment (hereafter: OPCAT) was ratified by the Netherlands on 28 September 2010, entering into force thirty days later.[38] The Institute is pleased to see the ratification of OPCAT, as it is an important instrument in the prevention of torture, inhuman and degrading treatment. With the ratification of OPCAT, the Netherlands has the obligation to maintain, designate or establish one or several independent national preventive mechanism(s) (hereinafter: NPM).[39] This NPM can examine the treatment of persons deprived of their liberty, make recommendations to improve the treatment and conditions of those persons and submit proposals and observations concerning bills that will be introduced into Parliament.[40]

*National preventive mechanism*
The Dutch Government designated six existing institutions as NPM in December 2011: the Inspectorate for the Implementation of Sanctions (ISt), the Public Order and Safety Inspectorate (IOOV), the Health Care Inspectorate (IGZ), the Inspectorate for Youth Care (IJZ), the Supervisory Commission on Repatriation (CITT) and the Council for the Administration of Criminal Justice and Protection of Juveniles (RSJ).[41] The coordination of the NPM lies with the former Inspectorate for the Implementation of Sanctions, now the Inspectorate of Security and Justice (IVenJ).

On the basis of research and interviews with several stakeholders, the Institute notes a few areas of concern.

The first concern relates to the appointment of the NPM. The Netherlands chose to designate existing bodies as NPM. It is unclear whether these bodies would have to change their tasks, priorities or methods to fit the OPCAT-requirements. This consideration is essential for the appointment process. It should be clear for each body whether the appointment as NPM has consequences. If it does, these consequences should not only be identified, but where relevant dealt with in terms of the shifting of priorities or changes in budget.

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[37] 5th report of the Dutch National Rapporteur on Trafficking in Human Beings (2007), recommendation 20, to be found at: http://www.dutchrapporteur.nl/Images/NRM%20Fifth%20Report%20Rapporteur%20def_tcm64-102040.pdf; 8th report of the Dutch National Rapporteur on Trafficking in Human Beings, page 40, to be found at: http://www.dutchrapporteur.nl/Images/8e%20rapportage%20NRM-ENG-web_tcm64-310472.pdf
[38] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en and Article 28, paragraph 2 OPCAT.
[39] Article 17 OPCAT.
[40] Article 19 OPCAT.
[41] Nowadays only five institutions form the NPM, as two of them (the Inspectorate for the Implementation of Sanctions and the Public Order and Safety Inspectorate) merged after their appointment and became the Inspectorate of Security and Justice (IVenJ).

The second point the Institute would like to raise concerns about is the perceived independence of the NPM. Several of the bodies that form the NPM, including the coordinator, are inspectorates that are organisational divisions of Ministries. At the Inspectorate of Security and Justice, for example, personnel are appointed by the Minister's Secretary General and the Minister of Security and Justice adopts its annual inspection plans. While the Institute has no reason to doubt the integrity and independence of the work of these inspectorates at this moment, it still remains concerned about the perceived lack of independence. It is, for example, unclear whether the Regulation Inspectorate for the Implementation of Sanctions (*Regeling ISt*) continues to apply now that the ISt has merged with the IOOV into the Inspectorate of Security and Justice. The Institute urges the Government to create more guarantees for the independence of these bodies.

The third matter concerns the assessment framework used by the bodies that form the NPM. Although international human rights and international standards in the field of monitoring places of detention, such as the European Prison Rules and the CPT Standards, have existed for quite some time, it is now more than ever relevant that the bodies that form the NPM use these standards. While it is clear that some of them do, not all of them are equally aware of the possibilities that these standards have to offer and those bodies thus refrain from using them in practice.

**The Institute advises the Committee to ask the Dutch Government:**

- **To provide insight into the consequences of being appointed as NPM for the bodies concerned.**
- **To look into the (perception of) independence of the NPM bodies which are organisational divisions of Ministries and ensure possible future safeguards.**
- **To emphasise towards the bodies that make up the NPM that international human rights standards can and should be used beside their usual assessment framework.**

*Caribbean part of the Netherlands*

At this moment it is unclear whether or not OPCAT applies to the Caribbean part of the Netherlands (Bonaire, Sint Eustatius and Saba). As these islands are a part of the Netherlands, as explained in the introduction of the state report and chapter III of this submission, it seems that OPCAT would be applicable to those islands. However, no reference to the islands was made when appointing the NPM, nor does the annual report of the NPM contain any indications as to the work of the Dutch NPM on the islands. In the event that OPCAT applies to the Caribbean part of the Netherlands, the Institute would like to know what the role of the Dutch NPM is on these islands. The islands have their own inspectorate, the Law Enforcement Council (*Raad voor de rechtshandhaving*), but the relationship between this Council and the Dutch NPM is not clear.

In the event that OPCAT does not apply to the Caribbean part of the Netherlands, it should be made clear by the Government what the objective justification for this differentiation between the Carribean part and the European part of the Netherlands is. Such an objective justification can only exist if a legitimate aim is pursued, and the differentiation is a fitting and necessary measure to pursue that aim. This justification should furthermore be clear and foreseeable.

**The Institute advises the Committee to ask the Dutch Government what the legal status of OPCAT is for the Caribbean part of the Netherlands (Bonaire, Sint Eustatius and Saba). In the event that OPCAT applies, the Institute would like to know what is foreseen to cover this territory by the NPM. Should the Government indicate that**

**OPCAT does not apply, the Institute urgently asks it to make clear what the objective justification for this differentiation is and which steps are being taken to ensure that OPCAT will apply to the Caribbean Netherlands in the near future.**

*Commissions of oversight*

While not officially part of the NPM, an important system of supervision exists in the Netherlands, consisting of the commissions of oversight.[42] Each penitentiary institution (prisons, juvenile detentions centres, forensic care institutions and detention centres for irregular migrants) has its own independent commission of oversight. At the moment, 71 of these commissions exist.[43] A commission consists of civilians, with at least one judge, one lawyer, one medical expert and one expert in social work. These commissions of oversight can decide on complaints brought by persons serving their custodial sentence or detention order; they can keep oversight on the detention centre and speak to the persons present there; and they can give advice and information to the Minister of Security and Justice, the Council for the Administration of Criminal Justice and Protection of Juveniles (*Raad voor de Sanctietoepassing en Jeugdbescherming*, hereinafter: RSJ) and the Director of the penal institutions. These commissions of oversight are regularly present at the institution and thus form a very important part of the system of oversight in the Netherlands.

Up to 2013, the commissions of oversight had to write their annual report and send it to the Minister of Security and Justice and the RSJ, without publishing it. Not all commissions of oversight would even do this: in 2011, the RSJ received only two thirds of the annual reports.[44] The Institute welcomes the recent decision to publish the annual reports of the commissions of oversight on the website of the Custodial Institutions Agency (*Dienst Justitiële Instellingen*) in conformity with rule 93.1 of the European Prison Rules. These annual reports can provide a useful insight into the valuable work of these commissions of oversight. Furthermore, the Institute hopes that the publication of the annual reports will have as a consequence that all commissions of oversight will write such a report. Finally, it can serve as a basis for these commissions of oversight to learn from each other's work, as long as the annual reports contain substantive information on the work of the commissions, aside from statistics.

After speaking to several stakeholders, the Institute noted a few points of interest which merit the attention of the relevant authorities.

Firstly, each commission of oversight seems to operate autonomously. Exchange of knowledge and experience is improving thanks to initiatives such as the Knowledge Centre (*Kenniscentrum*).[45] However, members of the commissions of oversight rarely discuss the experiences and decisions of other commissions. This is not only inefficient, since problems that occur in more than one institution will each time have to be figured out by the relevant commission of oversight, but it may also lead to inequality, since one commission of oversight might approach a problem in a very different manner from another commission of oversight. It would be an important improvement if each commission of oversight would collect and publish their (most important) decisions for the other commissions of oversight, so as to exchange (good) practices and create more equality.

[42] Note that the commissions of oversight for penitentiary institutions are an 'additional associate' (*toehoorder*) to the NPM through their Sounding Board (*Klankbordgroep*), which is a delegation of members from commissions of oversight. As this Sounding Board does not have any legal status, it could not be designated as NPM.
[43] Dutch national preventive mechanism, Annual report 2011, p. 33.
[44] Council for the Administration of Criminal Justice and Protection of Juveniles (RSJ), Annual report 2011, p. 59.
[45] The Knowledge Centre is a website with information for the commissions of oversight, to be found at: www.commissievantoezicht.nl.

While this is already encouraged by the Knowledge Centre, it is not very often done in practice. Another example where the exchange of good practices could be important, has to do with the presence of the institution's Director during meetings of the commission of oversight, which could potentially be of (negative) influence on the independence of the reflections of the commission. The attendance of the Director is currently approached in various manners by the commissions of oversight: in some cases the Director is always present during all meetings, whereas other commissions first meet amongst themselves, and afterwards invite the Director to discuss any relevant points. In learning from each other's experiences, a more effective approach can be sought, taking into account all relevant factors.

Another concern of the Institute is the lack of awareness of (international) human rights standards. While there are, of course, members of commissions of oversight who are aware of these standards, the majority of these commissions only make use of Dutch regulations in their work. However, international human rights standards can give them the tools to deal with situations more effectively, as those standards generally provide for a wider scope of interpretation. At the same time it is possible that using Dutch regulations can lead to an undesirable result, whereas international human rights standards can also indicate what situation the Netherlands should strive for. The Institute understands that terms like 'torture' might lead to hesitance. However, human rights also forbid inhuman or degrading treatment, which are more accessible concepts. Examples of such treatment include prolonged stays in isolation, strip searches during which all clothes have to be removed at the same time, or inadequate or untimely access to health care.[46] And, given the increasing number of elderly detainees, the (non-)accessibility of detention facilities for detainees with disabilities is also an issue within the ambit of the prohibition of degrading treatment that deserves attention of both the relevant authorities and the commissions of oversight. The recently published code of conduct of the commissions of oversight does fortunately contain a reference to fundamental rights and human rights conventions.[47] However, as training is lacking in general and in particular on this subject, it could be more actively promoted among members of commissions of oversight. The Institute would thus encourage the authorities to make the commissions of oversight aware of these human rights standards, and to provide them with mandatory training on this subject.

Thirdly, the commissions of oversight as such are not part of the NPM. However, their Sounding Board (*Klankbordgroep*) is an additional associate (*toehoorder*) to the NPM. The Sounding Board consists of members from commissions of oversight. It was founded in 2009 by those members themselves. It has no official status. Without such an official status, it cannot have an official role within the NPM. As the commissions of oversight can provide the NPM with very relevant information and insight, it seems appropriate that they would be represented in the NPM, in order to guarantee that their information is taken into account. This would mean the Sounding Board should receive an official status, preferably endorsed by all commissions of oversight.

**The Institute advises the Committee:**

- **To ask the Dutch Government to consider how commissions of oversight can exchange experiences and information on a regular basis. One such way could be the publication of substantive annual reports, but more exchange of information and good practices is desirable.**

[46] CPT standards, CPT/Inf/E (2002) 1 - Rev. 2011.
[47] Code of conduct commissions of oversight, to be found at: http://www.commissievantoezicht.nl/files/file.php5?id=560.

- **To encourage the Dutch Government to set up training for commissions of oversight on all relevant (international) human rights standards.**
- **To suggest the Government to look into providing the Sounding Board for the commissions of oversight with an official legal status.**

## 47. Other relevant information

*Criminalisation of irregular stay*
In the Netherlands, a bill is being discussed on the criminalisation of irregular migrants.[48] The Institute examined the effects this bill will have on the effective exercise of the human rights of irregular migrants.[49] One of the conclusions was that migrants without a residence permit may in practice be withheld from seeking protection under Article 3 CAT once their stay in the Netherlands is deemed to be irregular.

**The Institute advises the Committee to ask the Dutch Government to ensure the access to authorities to ask for protection under Article 3 CAT.**

*The use of restrictive measures in care institutions*
In the Netherlands, the issue of restrictive measures in care situations was in the public eye at several occasions over the last few years. This was mostly caused by the media attention for an adolescent with a mental disability who had been chained in an empty room for years, because his caretakers did not know how to handle his aggression. As it turned out, he was not the only one undergoing such treatment. In 2011, research showed that 28 comparable cases of long term restriction of freedom existed.[50]

This caused the Government to take several measures. For instance, the Government stimulated care facilities to gradually phase out the use of restrictive measures through different projects. Also, in 2008 stakeholders in long term care signed the declaration of intention "Care for freedom, together to fewer restrictive measures". This seems to show results: it lead to a reduction of 30% of restrictive measures at facilities participating in these projects.[51]

This reduction cannot (yet) be seen in the number of reports to the Health Care Inspectorate (*Inspectie voor de Gezondheidszorg*) on the use of restrictive measures, comparing the figures for 2010 and 2011. It seems to depend on the type of restrictive measure whether its use was reduced or increased. However, the Inspectorate does conclude that management and staff in care institutions "are making demonstrable efforts to avoid the use of both physical restraints and other restrictions of a patient's freedom,

[48] Parliamentary documents 2012/2013, 33512, nr. 2.
[49] Netherlands Institute for Human Rights, Advice 'Strafbaarstelling illegaal verblijf', 14 March 2013, to be found at: http://www.mensenrechten.nl/sites/default/files/20130314_advies_strafbaarstelling_illegaal_verblijf-College-voor-de-Rechten-van-de-Mens.pdf
[50] Health Care Inspectorate (IGZ), 'Kwaliteit van zorg bij langdurige vrijheidsbeperking van mensen met een verstandelijke beperking: vooral de dialoog ontbreekt', November, 2011, parliamentary documents 2011/2012, 24170, nr. 126, annex.
[51] Letter from the State Secretary of Health, Welfare and Sport to parliament, 13 March 2011, to be found at http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2012/03/14/beantwoording-kamervragen-over-de-1e-termijn-van-het-wetsvoorstel-zorg-en-dwang/beantwoording-kamervragen-over-de-1e-termijn-van-het-wetsvoorstel-zorg-en-dwang.pdf.

such as segregation".[52] These conclusions match the findings in another study, in which the conclusion is drawn that there is a decrease in the use of restrictive measures for people with dementia in care institutions between 2009 and 2011.[53] In 2009, in 50% of the investigated housing situations use was made of physical restraints, whereas this decreased to 30% in 2011.

A 2012 report by the Health Care Inspectorate shows that greater diligence is called for in the decision-making procedures surrounding the use of restrictive measures. External experts are not always used in time and often a time schedule to phase out restrictive measures is lacking. Reporting on the use of restrictive measures is inadequate.[54] The Institute emphasises that the use of restrictive measures is an interference with the human rights of the persons involved and the decision to use them should be diligently made.

The use of restrictive measures in care facilities in the Caribbean part of the Netherlands, Bonaire, Sint Eustatius and Saba, remains unclear. It is important to gain insight into the use of restraint in care facilities in this part of the Netherlands as well.

The use of restraint is one of the areas the Institute will be looking into in the coming two years, as part of the project 'Care of elderly people and human rights'. In the Institute's preliminary investigation into possible human rights concerns within the care sector, increasing numbers of neglect and injury of elderly people were established. Residents of residential and nursing homes, including those in closed facilities (*gesloten instellingen*) and cases of compulsory admission to a psychiatric hospital (*gedwongen opname*), are often more vulnerable than when living at home, due to their higher age and weaker condition. The Institute has the impression that within the sector of care for elderly people one is often insecure in terms of precise human rights norms. At the same time there is a need for clarity and improvement of the situation. Therefore, the Institute will provide for a human rights analysis, based on its own research into the policies and practices in residential and nursing homes. The project aims to bring about change in policy and practice of politicians, managers, health professionals as well as clients, in view of the progressive realisation of human rights of elderly people living in residential and nursing homes.

**The Institute advises the Committee:**

- **To urge the Government to continue its policy to reduce the use of restrictive measures in care facilities.**
- **To ask the Government how it intends to improve the decision-making procedures surrounding the use of restrictive measures in care facilities, in order to create more diligence.**
- **To request information on the use of restrictive measures in care facilities on Bonaire, Sint Eustatius and Saba.**

*Closed youth care institutions*

The Institute would like to draw the attention of the Committee to the position of children in closed youth care institutions (*Jeugdzorg Plus*). These children are placed in care institutions for pedagogical reasons, so they are not convicted under criminal law but nevertheless face severe restrictions in their personal freedom. Supervision of these closed

[52] Health Care Inspectorate (IGZ), 'Extra inspanning noodzakelijk voor terugdringen vrijheidsbeperking in langdurige zorg; Meer inzet externe deskundigen en betere focus op afbouw', 20 December 2012, p. 35.
[53] Trimbos Instituut, 'Monitor woonvormen dementie', 2012.
[54] Health Care Inspectorate (IGZ), 'Extra inspanning noodzakelijk voor terugdringen vrijheidsbeperking in langdurige zorg; Meer inzet externe deskundigen en betere focus op afbouw', 20 December 2012, p. 16.

youth care institutions is no longer ensured by a commission of oversight, but instead the 'clients' are entitled to a confidant (*vertrouwenspersoon*). The confidants are generally on the pay roll of a private foundation, the Advisory and Complaints Bureau Youth Care (*Advies- en Klachtenbureau Jeugdzorg*). At the moment, it is unclear how these confidants function in practice. An evaluation of their work in practice seems relevant to effectively monitor and where necessary adjust the policy for closed youth care.

Complaints of children in closed institutions are heard by a complaints committee (*klachtencommission*). These complaints committees are only mandated to look at complaints and thus have a narrower mandate than commissions of oversight in detention institutions, which may also provide advice and supervise the institution they belong to. Yet, the children in closed youth care institutions are similarly limited in their fundamental right to freedom as detainees. Adequate supervision should thus be guaranteed.

**The Institute advises the Committee to ask the Dutch Government to conduct research on the functioning, including the aspect of independence, of the confidants and complaints committees for the closed youth care institutions (*Jeugdzorg Plus*) in practice.**

*Budget cuts in the Dutch prison system*
On 22 March 2013, the Government agreed to the Masterplan Custodial Institutions Agency (*Masterplan Dienst Justitiële Instellingen*), which contains a large number of measures aimed at diminishing the costs of the Dutch custodial institutions and simultaneously implementing several policy plans of the government. These measures affect both detainees and staff of custodial institutions. While the Institute acknowledges the necessity to look carefully at the efficiency and effectiveness of the system of custodial institutions, it would like to underline that austerity measures cannot serve as an excuse for the lowering of human rights standards.

**The Institute advises the Committee:**

- **To urge the Government to only take austerity measures regarding the Dutch system of custodial institutions when they do not negatively affect the level of human rights protection of those concerned.**