

**Mandates of the Special Rapporteur on extreme poverty and human rights; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; and the Special Rapporteur on the human rights of migrants**

REFERENCE: OL  
NLD 1/2016:

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on extreme poverty and human rights; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; and Special Rapporteur on the human rights of migrants pursuant to Human Rights Council resolutions 26/3, 25/17 and 26/19.

We hereby reply to the letter received from your Excellency's Government on 9 July 2015 (reference: GEV/PA 155/2015). That letter was in response to our urgent appeal letter of 12 December 2015 (UA NLD 1/2014) regarding the **failure by your Excellency's Government to provide emergency assistance to homeless migrants in an irregular situation**.<sup>1</sup> The current reply is by way of follow-up to the letter of 9 July 2015 in order to more clearly explain our position and to respond to some of the positions taken by your Excellency's Government in this context, taking into account recent developments in this area in the Netherlands.

### 1. Introductory remarks

Before responding to the substance of your letter, we want to thank your Excellency's Government for the level of detail of the reply. This facilitates a constructive and meaningful dialogue between the undersigned United Nations Special

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<sup>1</sup> In this letter, we will consistently refer to this group as migrants in an irregular situation or irregular migrants. It is however important to note that an important percentage of the migrants in the Netherlands who do not have access to any form of shelter or housing provided by the central government are not 'irregular', but awaiting a final decision relating to their legal residence in the Netherlands. See: <http://www.logogemeenten.nl/nieuws/item/171/bed-bad-brood-discussie-haagse-wenselijkheid-vs-lokale-realiteit>

Rapporteurs and your Excellency's Government. Such dialogue is essential to be able to promote and protect human rights worldwide, pursuant our respective mandates established by the Human Rights Council.

Please find below a substantive response to your letter of 9 July 2015.

## **2. Recent developments**

On 15 April 2015 the Committee of Ministers of the Council of Europe ("Committee of Ministers") adopted two resolutions in the cases of *Conference of European Churches (CEC) v. the Netherlands* and *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*. In the resolutions, as is standard practice, the Committee of Ministers refers to the decisions by the European Committee of Social Rights ("ECSR") in the above-mentioned cases, in which the ECSR found various violations of the European Social Charter ("ESC" or "Charter") by the Netherlands, including in relation to the shelter of migrants in an irregular situation. In the brief, four paragraph, dictum, the Committee of Ministers:

"1. takes note of the report of the ECSR and in particular the concerns communicated by the Dutch Government (see appendix to the resolution);

2. recalls that the powers entrusted to the ECSR are firmly rooted in the Charter itself and recognizes that the decision of the ECSR raises complex issues in this regard and in relation to the obligation of States parties to respect the Charter;

3. recalls the limitation of the scope of the European Social Charter (revised), laid down in paragraph 1 of the appendix to the Charter;

4. looks forward to the Netherlands reporting on any possible developments in the issue."

According to our information, the dictum of the resolutions was the outcome of a long process of negotiations in the context of the Council of Europe in which the Ministry for Security and Justice of the Netherlands sought to reverse the decisions by the ECSR through the political resolutions of the Committee of Ministers. It is noteworthy that there is an interval of almost a year between the decisions by the ECSR of July 2014 and the resolutions by the Committee of Ministers of April 2015. In any event, the language used in the final resolutions differs significantly from the standard terminology normally used in such resolutions. These differences have been used by some to suggest that the Committee of Ministers reached a different result and effectively changed the ECSR's legal interpretation of the European Social Charter. We do not believe this to be the case.

Because of the confusion generated by these competing interpretations and of political disagreements within the Dutch Government, the resolutions ignited a week-long

debate between the two coalition parties in government. This eventually led to the so-called '*Bed, Bad en Brood compromise*' of 22 April 2015. The compromise has been explained in a letter to Parliament of 22 April 2015 (640647) by the State Secretary for Security and Justice, the Minister of Foreign Affairs and the Minister for Social Affairs and Employment, as well as in a letter to Parliament of 30 April 2015 (875) by the State Secretary for Security and Justice, the Prime Minister, the Minister of Foreign Affairs and the Minister for Social Affairs and Employment.

The letters of 22 and 30 April 2015 argue that the Committee of Ministers shares the position of the Dutch Government that migrants in an irregular situation ('vreemdelingen zonder rechtmatig verblijf') do not fall within the scope of the European Social Charter, and suggest that the Committee of Ministers disagrees with the ECSR on this point. We believe that no such conclusion can reasonably be drawn from the resolutions cited above, as we will explain in detail in our legal analysis further below.

The main elements of the 22 April 2015 compromise are as follows.

- The system in place before the 22 April 2015 compromise only offered shelter to irregular adult migrants without minor children if they were willing to cooperate with their own expulsion. If this willingness could be shown, the Netherlands offered access to a 'Vrijheidsbeperkende Locatie (VBL)', a 'freedom-limiting location' (a detention center). No such access was granted to irregular migrants if it was to be expected that expulsion could not be effectuated within 12 weeks.
- The new system introduces the following changes. The Netherlands plans to open 5 additional 'pre-phase VBLs' in the 5 biggest cities. All irregular migrants have access to this facility for 'a limited number of weeks'. After those few weeks, they have to express a willingness to cooperate with their expulsion that is 'genuine and demonstrable' ('oprecht en aantoonbaar') or they are put back on the street. Where they decide to cooperate, they are brought to the 'regular VBL' in Ter Apel. The expectation that expulsion has to be effectuated within 12 weeks is interpreted liberally, by 'not applying that period of 12 weeks too strictly'.
- Municipalities, which have thus far often offered shelter for homeless irregular migrants, are expected to close their existing municipal shelters and risk having the budget they receive from the central government cut if they do not comply. Further negotiations between the central government and municipalities are supposed to fill in further details about the role of municipalities.
- The government promises to spend an additional 26 to 30 million (not entirely clear) euros for the functioning of the new system.

- The government refers to an expected judgment by the Council of State later in 2015, which judgment may influence the compromise.

In our view, it is relevant to note that many municipalities have been critical of the compromise. According to news reports, after the presentation of the compromise many municipalities responded by announcing that they would continue to offer ‘bed, bath and bread’ at the local level to irregular migrants living on the streets in their jurisdictions.<sup>2</sup> These municipalities have criticized the compromise as “impossible to implement, based on short-term thinking and pathetic”. A coalition of municipalities described the compromise as “the reality of the Hague versus the realities at the local level”. Local politicians have termed the compromise “insane”.<sup>3</sup>

On 26 November 2015, two of the highest courts in the Netherlands ruled in three separate cases related to the ongoing discussion about the provision of shelter to homeless irregular migrants. The two courts, the Council of State (‘Raad van State’) and the Administrative High Court (‘Centrale Raad van Beroep’), appear to have coordinated their judgments and ensured their publication on the same day.

The case before the Council of State (no. 201500577/1/V1) dealt with a request to the State Secretary for Security and Justice by an irregular homeless migrant to offer him shelter or a subsistence allowance. The Council of State sidesteps the European Social Charter and the interpretation of the Charter by the ECSR, because the provisions of the ESC are considered not to have direct effect in the Dutch legal order and the decisions of the ECSR are considered not to have binding effect. The only relevance of decisions of the ECSR, according to the Council of State, is through the influence they have on the interpretation of article 3 and 8 of the European Convention on Human Rights (“ECHR”) by the European Court of Human Rights (“ECtHR”). The Council of State concludes that article 3 and 8 ECHR can force the State to offer shelter to irregular adult migrants only in ‘special circumstances’. Such special circumstances arise when the irregular migrant in question proves that, because of his psychological condition, he cannot be expected to foresee the consequences of his actions. In that situation, an irregular migrant cannot be held responsible for his refusal to cooperate with his expulsion. In this case, the Council of State concludes that the State Secretary was in principle justified in refusing to offer the homeless irregular migrant in question access to a VBL because he had refused to cooperate with his expulsion. However, in this particular case, in which the concerned migrant had offered evidence of psychological problems as a result of living on the streets, the State Secretary should have made a further assessment of his psychological state before making the offer of shelter in the VBL conditional on cooperation with expulsion.

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<sup>2</sup> <http://fd.nl/economie-politiek/1101423/gemeenten-uiten-harde-kritiek-op-bed-bad-en-brood-compromis>

<sup>3</sup> <http://www.volkskrant.nl/opinie/het-compromis-over-bed-bad-en-brood-is-een-krankzinnig-akkoord~a3976781/>

The two cases before the Administrative High Court (no. 14/4389 WMO and 15/4189 WMO) deal with requests by adult irregular migrants for shelter to the city of Amsterdam under the Law on Social Assistance (“WMO”). The Administrative High Court follows the interpretation of the ESC and ECHR by the Council of State, as explained above. The High Court further refers to the conclusion by the Council of State that access to shelter in a VBL can be made conditional on cooperation with expulsion. Based on that reasoning, the city of Amsterdam was justified in refusing to offer local shelter under the WMO, because conditional access to shelter in a VBL was a feasible alternative that complied with the obligations of the Netherlands under international law. In case no. 15/4189 WMO, the High Court furthermore rules that local shelters for irregular migrants offered by municipalities can no longer be qualified as shelter under the WMO. It declares that any local shelter for irregular migrants can no longer be justified by municipalities as having their legal basis in the WMO and are therefore considered ‘extra-legal’. The result is that the High Court, which has the authority to interpret the WMO, will henceforth refuse to take up appeals that deal with local shelter based on the WMO.

### **3. The facts: Migrants in an irregular situation in the Netherlands are often in need of shelter without having access to government-run or government-financed shelters**

Your Excellency’s Government, in its letter of 9 July 2015, explains at length the various forms of shelter it provides to non-citizens. The description of the system does not mention, however, that, despite all these arrangements, adult irregular migrants in the Netherlands often end up living on the street. In that case, only civil society and some municipalities take responsibility for these homeless irregular migrants. According to information in the media and provided by municipal bodies, there are thousands of irregular adult migrants in the Netherlands that need shelter.<sup>4</sup> These individuals do not qualify for shelter offered by the central government.

Some publicly available information makes it clear that there is a difference between the system on paper as described in the letter of the government and the system as it functions in practice. Municipalities are left to fill the gaps in the national system, although the central government wants to stop local governments from performing this gap-filling role. One of the reasons for the existence of these gaps is that not all migrants who are supposed to leave the Netherlands are actually able to leave.<sup>5</sup> As the

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<sup>4</sup> See: <http://nos.nl/artikel/2071438-kabinet-mag-bed-bad-broodopvang-weigeren.html>;  
<http://www.logogemeenten.nl/nieuws/item/171/bred-bad-bood-discussie-haagse-wenselijkheid-vs-lokale-realiteit>

<sup>5</sup> “The Dutch authorities assume that aliens who have exhausted all the procedures and wish to return to their country of origin can actually do so. Practice sometimes proves to be less simple. Some aliens are required under current policy to leave but cannot do so. The ‘not-at-fault-policy’ does not always offer

Government's Advisory Committee has observed, it is highly relevant that irregular migrant are not always at fault in those cases, and that part of the problem lies with countries of origin<sup>6</sup> as well as a lack of efforts on the part of the Netherlands.<sup>7</sup> In addition, there are irregular migrants who do not want to cooperate with their expulsion, for a great number of reasons, and are therefore not eligible for shelter in a VBL.<sup>8</sup>

We will explain below why the Netherlands has a legal obligation under international and regional human rights law to offer shelter to irregular migrants. There is however also a very practical reason to offer shelter to this group. We are talking about thousands of individuals who are either unable or unwilling to leave the territory of the Netherlands. Presented with this fact, the Netherlands is not only required under international law to offer this group shelter, it also has pragmatic reasons for doing so. As many municipalities have argued, it puts a heavy burden on the local police to patrol cities and towns where a great number of homeless migrants live on the streets, often under unsafe conditions, and leaving them to their own devices is not a very wise course of action. Offering basic and dignified shelter to this group is not a costly proposition, and it seems reasonable to conclude that the additional 26 to 30 million euros the government intends to spend on 'pre-phase VBLs' might have more appropriately been spent on offering basic and unconditional shelter for this group. This would not undermine the policy objective of sustainable migration management and we have seen no evidence that offering such minimal shelter would lead to the additional influx of migrants,<sup>9</sup> which seems all the more unlikely given the fact that neighboring countries

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these aliens a solution, because they cannot always demonstrate that the authorities in their country of origin will not issue travel documents." Adviescommissie voor Vreemdelingenzaken, 'Recht op Menswaardig Bestaan' (March 2012), English summary, p. 119-120.

<sup>6</sup> "Nevertheless, there are still a number of countries that fail to cooperate or do not cooperate fully in forced return." Adviescommissie voor Vreemdelingenzaken, 'The Strategic Country Approach to Migration' (July 2015), p. 8.

<sup>7</sup> "Whenever an evaluation takes place between return policy and other Dutch interests, the outcome is often unfavourable for return. Though good reasons may underlie these choices, the ACVZ notes that there is a discrepancy here between the lip service paid to return in the political debate and the importance it is given in practice." Adviescommissie voor Vreemdelingenzaken, 'The Strategic Country Approach to Migration' (July 2015), p. 10.

<sup>8</sup> It should be noted here that human rights organizations have criticized the treatment of irregular migrants in such VBLs. See, for example, Amnesty International, 'The Netherlands: The Detention of Irregular Migrants and Asylum-Seekers' (June 2008).

<sup>9</sup> "While tightening border security may change migration patterns, migration policies are unlikely to influence the volume of people migrating (de Haas, 2011c, p. 26 C-3). Czaika and Hobolth (2014, p. 19 SO-4) report that, while increasing the restrictiveness of asylum policy appears to reduce the number of asylum applications, it also appears to increase the number of people migrating irregularly to the extent that 'the deflection effect may balance out or even exceed the deterrence effect'. According to Mbaye (2014, p. 14 PS-7), 'restrictive immigration policies may be less effective in staving off illegal migration and can incite potential migrants to turn to illegal methods'. Similarly, the Clandestino Project (Duvell, 2009, p. 2 SO-4) argue that inefficient or complicated regulations and policies for managing migration contribute to migrants choosing to ignore formal systems and entering via irregular means instead." Overseas Development Institute, 'Why people move: understanding the drivers and trends of

have more humane reception policies for irregular migrants.<sup>10</sup> All in all, the fiscal consequences of offering access to shelters to this group in compliance with international human rights law, are not prohibitive. In fact, in light of policing, public health, and other costs associated with homeless populations, ensuring access to shelters is likely to be a cost-saving measure.

#### **4. The obligations of the Netherlands under international law**

*4.1 General principles: the right of the State under international law to control entry, residence and expulsion of non-citizens is subject to general limitations deriving from international law*

In its reply of 9 July 2015, the Netherlands underlines the right of States under international law to control the entry, residence and expulsion of aliens, and adds that its policies on dealing with aliens should be primarily dealt with at the domestic level. The Netherlands adds that it “would run counter to this principle if States were obliged to recognize the economic, social and cultural rights of those who reside in their territories unlawfully, thereby facilitating the prolongation of an illegal situation.”

We believe this position displays an untenably narrow reading of international law as it currently stands. This is all the more concerning since it comes from a country with a proud tradition of contributing to the development of international law, a tradition that the Netherlands understandably proclaims in other contexts.<sup>11</sup>

It is clear that States have the right to control the entry, stay and expulsion of non-citizens on their territory under international law. It is, however, also a principle of modern international law that States have an obligation to respect and protect the human rights of all non-citizens on its territory. The way States treat non-citizens is therefore not purely a domestic matter that is left to the discretion of States. In this area, the rights of the State are subject to general limitations deriving from international law.

The acknowledgment of the rights of non-citizens under international law is certainly not a recent phenomenon. It was the famous Dutch international lawyer, Hugo Grotius, who wrote in *De Jure Belli ac Pacis* (1625) that non-citizens have a right to temporarily stay in another State.<sup>12</sup> Another founding father of modern international law,

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migration to Europe’, December 2015, p. 28 ;

<sup>10</sup> Adviescommissie voor Vreemdelingenzaken, ‘Recht op Menswaardig Bestaan’ (March 2012), English summary, p. 119; See also: <http://www.logogemeenten.nl/nieuws/item/171/bred-bad-bood-discussie-haagse-wenselijkheid-vs-lokale-realiteit>

<sup>11</sup> <http://www.nlinunsc.nl/what-we-do/justice>

<sup>12</sup> “Persons that pass either by Land or Water, on Account of their Health, or for any other just Cause, make some Stay in the County, this being likewise an innocent Utility.” Richard Tuck (ed.), *The Rights of War and Peace, Book II, Hugo Grotius* (Liberty Fund, 2005), p. 446. Grotius also wrote that “it belongs to Barbarians only to drive away Strangers [...]” *Ibid*, p. 447.

Emer de Vattel, recognized in his great work, *The Law of Nations* (1758), that States have a duty to protect non-citizens on its territory.<sup>13</sup>

Even before the codification of international human rights law in the second half of the 20<sup>th</sup> century, the right of a State to expel non-citizens was limited under international law by general principles relating to the prohibition of the abuse of rights, the principle of good faith, the prohibition of arbitrariness and standards on the treatment of non-citizens.<sup>14</sup> In more recent times, the rights of non-citizens and the concomitant duties of host States have been further developed in the context of international human rights law. This development has, for instance, been captured in General Assembly Resolution 40/144 (1985), which recognized “that the protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live”.<sup>15</sup> Resolution 40/144 contains a broad definition of the term ‘alien’, which includes any individual who is not a national of the State in which he or she is present.<sup>16</sup>

#### 4.2 *The rights of non-citizens under international human rights law*

International human rights law defines the protection States are obliged to offer to adult migrants in an irregular situation.

We should start by clarifying that the recognition of and respect for the inherent dignity of all members of the human family underlies the entire body of international human rights law. Respect for human dignity is a fundamental value that should guide States in all their actions. What is at stake in this particular case is the inherent dignity of adult migrants in an irregular situation who are present on the territory of the Netherlands and whose dignity is threatened by situations of homelessness and related despair. The lawfulness of their presence is irrelevant for the protection of their dignity, since that dignity is inherent to all human beings regardless of the circumstances in which they find themselves. This has been reflected, for example, in the *Draft Articles on the Expulsion of*

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<sup>13</sup> “The sovereign ought not to grant an entrance into his state for the purpose of drawing foreigners into a snare: as soon as he admits them, he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him.” Knud Haakonssen (ed.), *The Law of Nations, Emer de Vattel* (Liberty Fund, 2008), p. 313. De Vattel, like Grotius, acknowledged also that the proper treatment of non-citizens was a matter of civilization: “Hospitality was in great honour among the ancients, and even among barbarous nations, such as the Germans. Those savage nations who treated strangers ill, that Scythian tribe who sacrificed them to Diana, were universally held in abhorrence; and Grotius justly says that their extreme ferocity excluded them from the great society of mankind.” Knud Haakonssen (ed.), *The Law of Nations, Emer de Vattel* (Liberty Fund, 2008), p. 313-314.

<sup>14</sup> International Law Commission, ‘Memorandum by the Secretariat on the Expulsion of Aliens’, 10 July 2006, A/CN.4/565, para. 201.

<sup>15</sup> General Assembly, Declaration on the human rights of individuals who are not nationals of the country in which they live, Resolution 40/144, 13 December 1985, preambular paragraph 7.

<sup>16</sup> General Assembly, Declaration on the human rights of individuals who are not nationals of the country in which they live, Resolution 40/144, 13 December 1985, article 1.

*Aliens* (2014) of the International Law Commission, which state that “[a]ll aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.”<sup>17</sup> These articles further state that these aliens “are entitled to respect for their human rights”.<sup>18</sup>

What is at stake for migrants in an irregular situation in the Netherlands is, at a very minimum, their rights in relation to what can best be described as access to emergency shelter in circumstances of homelessness. The Netherlands refuses to grant unconditional access to shelters to this group as a matter of human rights. Those irregular migrants on the territory of the Netherlands who, as a result of various circumstances, do not have housing and the ability to feed and otherwise take care of themselves, have a legal claim on the Dutch State to respect and protect their rights to housing, to food and to other basic necessities that are relevant to their situation. These human rights of irregular migrants are spelled out in various international instruments.

Article 25 (1) of the Universal Declaration of Human Rights (“UDHR”)<sup>19</sup> provides that *everyone* “has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), ratified by the Netherlands, echoes this provision in the UDHR: “The States Parties to the present Covenant recognize the right of *everyone* to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

Article 2 (2) ICESCR obliges each State party to “guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status.” The Committee on Economic, Social and Cultural Rights (“CESCR”) has held that non-discrimination is “an immediate and cross-cutting obligation in the Covenant”,<sup>20</sup> which means that this is an obligation on the Netherlands, as a State party to this Covenant, that allows for no delay in its implementation. The CESCR has clarified that the “Covenant rights apply to everyone, including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers, and victims of international trafficking, *regardless of legal status and documentation*.”<sup>21</sup>

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<sup>17</sup> ILC, Draft Articles on the Expulsion of Aliens, with commentaries (2014), article 13 (1).

<sup>18</sup> *Ibid.*, article 13 (2).

<sup>19</sup> The Netherlands voted in favor of General Assembly resolution 217 A (III) of 10 December 1948 by which the UDHR was adopted.

<sup>20</sup> CESCR, ‘General Comment No. 20: Non-discrimination in economic, social and cultural rights’, 2 July 2009, E/C.12/GC/20, para. 7.

<sup>21</sup> CESCR, ‘General Comment No. 20: Non-discrimination in economic, social and cultural rights’, 2 July 2009, E/C.12/GC/20, para. 30.

Of central importance for migrants in an irregular situation living in the Netherlands, although certainly not their exclusive concern, is access to emergency shelters as a component of their right to housing. The human right to adequate housing derives from the right to an adequate standard of living in article 11 ICESCR, as well as other relevant sources of international law, including the UDHR. As is clear from the text of article 11 ICESCR, this right, as all other rights in the Covenant, applies to *everyone*.<sup>22</sup> The right to housing is integrally linked to the fundamental principles upon which the Covenant is premised, including the inherent dignity of the human person.<sup>23</sup> Read in conjunction with article 2 (2) ICESCR, article 11 provides that the right to adequate housing also applies to migrants in an irregular situation.

Article 5 (e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), ratified by the Netherlands in 1971, furthermore obliges States Parties to undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of *everyone*, without distinction as to race, colour, or *national or ethnic origin*, to equality before the law, notably in the enjoyment of economic, social and cultural rights, in particular the right to housing. That the protection in the ICERD against discrimination in the area of housing extends to irregular migrants has been confirmed by the Committee on the Elimination of Racial Discrimination (“CERD”), which has recommended that States “[g]uarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens [...]”.<sup>24</sup>

The foregoing clarifies that international human rights law, including the right to housing, also applies to migrants in an irregular situation in the Netherlands. Thus, in contrast to the conclusion proposed by your Excellency’s Government in its letter of 9 July 2015, the Netherlands is obliged to recognize the human rights of everyone residing on its territory, including irregular migrants.

#### *4.3 The ambivalence towards economic, social and cultural rights*

Although your Excellency’s Government acknowledges the existence of the right to housing (as well as other relevant rights in the context of the need for emergency shelter) and its applicability to migrants in an irregular situation in its letter of 9 July 2015 (para. 22), the letter nevertheless expresses a clear ambivalence on the part of the Netherlands to accept the obligations on the Dutch State that derive from that right. The letter observes (in para. 16) that it would run counter to the sovereign rights of the Netherlands in the area of dealing with irregular migrants if it were “obliged to recognize the economic, social and cultural rights of those who reside in [its] territories unlawfully [...]”.

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<sup>22</sup> CESCR, ‘General Comment No. 4: The right to adequate housing’, 1991, para. 6.

<sup>23</sup> CESCR, ‘General Comment No. 4: The right to adequate housing’, 1991, para. 7.

<sup>24</sup> CERD, ‘General recommendation 30 on discrimination against non-citizens’, 2004, para. 32.

The letter thus seems to suggest that the Netherlands formally recognizes the economic, social and cultural rights of irregular migrants, but that in practice there is a clear reluctance to give effect to those rights. Before we discuss the implications of the obligations of the Netherlands that result from the right to housing, water and sanitation, food and other related human rights of irregular migrants, we think it is necessary to take note of the status of economic, social and cultural rights under international law and the specific obligations that States have in relation to these rights.

First, the Netherlands was one of the 171 States that adopted the Vienna Declaration and Programme of Action in 1993. The Vienna Declaration declares that “[a]ll human rights are universal, indivisible and interdependent and interrelated.” That language captures the idea that all human rights, whether civil, political, economic, social or cultural, must be treated “in a fair and equal manner, on the same footing, and with the same emphasis”. The universality, indivisibility, interdependence and interrelatedness of all human rights were already clearly expressed principles in the 1948 Universal Declaration of Human Rights (“UDHR”), which the Netherlands endorsed at the time of adoption. Formal adherence by the Netherlands to *all* human rights furthermore follows from the fact that it has ratified both the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and the International Covenant on Civil and Political Rights (“ICCPR”), as well as numerous other treaties and instruments that recognize all human rights on an equal footing.

Second, article 26 of the Vienna Convention on the Law of Treaties, to which the Netherlands acceded in 1985, expresses the principle of *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” It is, however, not easy to reconcile this approach with the analysis by which the Netherlands, reflecting both its official policies and the recent jurisprudence of its courts, accords a clearly second-rate status to economic, social and cultural rights, at least insofar as they concern irregular migrants.

Third, the ICESCR imposes clear and immediate obligations on the Netherlands as a State Party to the Covenant. Article 2 (1) ICESCR requires each State Party to the Covenant “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” Based on its analysis of article 2 (1) ICESCR, the CESCR has explained that “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights, is incumbent upon every State party”. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of *basic shelter and*

*housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.*<sup>25</sup> The CESCR has further held that article 2 (1) obligates each State party “to take the necessary steps ‘to the maximum of its available resources.’ In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”<sup>26</sup> Moreover, “the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.”<sup>27</sup>

#### *4.4 Implications of the foregoing on the obligations of the Netherlands vis-à-vis irregular migrants*

The foregoing analysis leads to the conclusion that if the Netherlands is to perform its ICESCR obligations in good faith, it is required to have applied the maximum of its available resources to achieving progressively the full realization of ESC rights, to ensure non-discrimination as an immediate and cross-cutting obligation and to fully acknowledge and act upon its minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights in the Covenant. This applies to all the rights in the Covenant, but special emphasis is given here to the right to housing, including access to emergency shelters which is central to the plight of homeless adult migrants in an irregular situation in the Netherlands.

The UN Special Rapporteur on the human rights of migrants has noted in this context that “States should, at a minimum, provide migrants in irregular situations at risk of homelessness with a level of housing which ensures their dignity and allocate resources to shelters which provide assistance to migrants in irregular situations.”<sup>28</sup>

However, as we have seen above, an adult irregular migrant in the Netherlands who is not in one of the exceptional circumstances noted in the letter of 9 July 2015 (para. 6 to 14), and who refuses to cooperate with his or her expulsion, receives no assistance from the Dutch State when he or she becomes homeless.<sup>29</sup> It is therefore clear that the Netherlands does not currently ensure the right to housing in article 11 ICESCR for adult irregular migrants in need of emergency shelter and that the Netherlands is therefore, *prima facie*, failing to discharge its obligations under the Covenant. In other

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<sup>25</sup> CESCR, ‘General Comment No. 3: The nature of States parties’ obligations’, 1990, para. 10.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, para. 11.

<sup>28</sup> Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, 16 April 2010, A/HRC/14/30, para. 88.

<sup>29</sup> Not counting the few weeks in the ‘pre-phase VBL’.

words, the Netherlands appears to be violating the right to housing of these irregular migrants.

The undersigned Special Procedures are not the first to point out that the Netherlands is failing to meet its obligations under international law in this context. In its 2010 Concluding Observations, the CESCR regretted “that undocumented migrants, including families with children, are not entitled to a basic right to shelter and are rendered homeless after their eviction from reception centres.”<sup>30</sup> The CESCR urged the Netherlands to meet “its core obligations under the Covenant and ensure that the minimum essential level relating to the right to housing, health and education is respected, protected and fulfilled in relation to undocumented migrants.”

In contrast to the Netherlands’ claims in paragraphs 15 and 22 of the letter of 9 July 2015 and with what appears to follow from the judgments of the Council of State and Administrative High Court of 26 November 2015, the Netherlands cannot make basic shelter conditional on cooperation with expulsion. A *prima facie* violation of its obligation to provide a minimum essential level of the right to housing can only be justified if the Netherlands can demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>31</sup> This argument has not been made by the authorities and it would be difficult if not impossible for a developed country to sustain, given the limited costs involved in offering access to existing shelters. The Netherlands is not able to rely on article 4 ICESCR since the conditionality the Netherlands imposes on access to shelters is, as we have seen above, incompatible with the nature of the right to housing and is discriminatory contrary to article 2(2)<sup>32</sup> The same position was taken by the Netherlands Institute for Human Rights (College voor de Rechten van de Mens) in a letter to Dutch Parliament of 17 November 2014.<sup>33</sup>

#### 4.5 *European human rights law*

The undersigned Special Procedures, mandated by the Human Rights Council, are not prevented from taking account of the obligations on the Netherlands *vis-à-vis*

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<sup>30</sup> CESCR, Concluding observations on the Netherlands (2010), E/C.12/NDL/CO/4-5, para. 25. We acknowledge that changes have been made to relevant policies since 2010, but the situation for homeless adult irregular migrants without children has remained, in essence, unchanged since 2010.

<sup>31</sup> CESCR General Comment No. 3, para. 10.

<sup>32</sup> Such a limitation of the right to housing should furthermore be ‘determined by law’, which is not the case according to the Administrative High Court in its decision of 26 November 2015 (no. 14/4389 WMO, paragraph 5.12): “Uit het vorenstaande vloeit voort dat een plaatsing in een VBL in het algemeen aangemerkt kan worden als een voldoende voorziening in het bieden van opvang voor personen als appellanten. Weliswaar is die voorziening niet gebaseerd op een wettelijke bevoegdheid onderdak en andere voorzieningen te bieden [...]”

<sup>33</sup> Available from: <http://crvdm-zoeken.stippacceptatie.nl/StippWebDLL/Resources/Handlers/DownloadBestand.ashx?id=2437>.

irregular migrants that flow from regional treaties. As is clear from General Assembly Resolution 60/251 (2006) establishing the Human Rights Council, the Council was set up to “[p]romote the full implementation of human rights obligations undertaken by States”, not distinguishing between international and regional human rights obligations. In reply to the observations of your Excellency’s Government in its letter of 9 July 2015, it therefore seems appropriate to make a few observations on relevant European human rights law. In our view, European human rights law, as does international human rights, imposes a clear obligation on the Netherlands to provide, at the very least, a minimum essential level of the right to housing as well as other related economic, social and cultural rights for irregular adult migrants on its territory.

First, we note that the interpretation by your Excellency’s Government of the two decisions by the European Committee of Social Rights in the cases of the *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands* and the *Conference of European Churches (CEC) v. the Netherlands* is not consistent with the facts. In the letter of 9 July 2014, it is stated (in para. 21) that “[...] the reports by the ECSR [do not give] rise to an obligation to provide illegal aliens with accommodation and other services unconditionally.” However, the ECSR has unequivocally stated in paragraph 117 of its decision in *CEC v. the Netherlands* that “the provision of emergency assistance cannot be made conditional upon the willingness of the persons concerned to cooperation in the organisation of their own expulsion”.

Second, the interpretation of the European Social Charter by the ECSR does give rise to obligations for the Netherlands, despite the argument of the Netherlands to the contrary. The Netherlands has not only ratified the ESC, it has also ratified the Additional Protocol of 1995 providing for a system of collective complaints that sets up the ECSR. In the Additional Protocol, article 8 in particular, the State Parties to the Protocol give the ECSR an explicit role in interpreting the obligations of the ESC: “it shall [...] present its conclusions as to whether or not the Contracting Party concerned has ensured the satisfactory application of the provision of the Charter referred to in the complaint.” If the Committee’s interpretations and conclusions could be ignored, then the rationale for having reformed the Charter (“to improve the effective enforcement of the social rights guaranteed by the Charter”) would be effectively undermined. The Committee of Ministers, in its resolutions of April 2015, recognizes the role of the ECSR when it “recalls that the powers entrusted to the ECSR are firmly rooted in the Charter itself”.

Third, the Netherlands misinterprets the role of the Committee of Ministers, the status of its resolutions and the text of its resolutions of April 2015. Article 9 of the 1995 Additional Protocol reads as follows:

“On the basis of the report of the Committee of Independent Experts, the Committee of Ministers shall adopt a resolution by a majority of those voting. If the Committee of Independent Experts finds that the Charter has not been applied in a

satisfactory manner, the Committee of Ministers shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned.”

In the Explanatory Statement to article 9 of the Additional Protocol, it is noted:

“The Committee of Ministers cannot reverse the legal assessment made by the Committee of Independent Experts. However, its decision (resolution or recommendation) may be based on social and economic policy considerations.

Based on the foregoing, it is clear that the Committee of Ministers has no role in relation to the interpretation of the legal obligations of State Parties under the ESC, a role which is reserved in the 1995 Additional Protocol to the ECSR. The resolutions or recommendations of the Committee of Ministers on the other hand have no formal legal status.<sup>34</sup>

There is furthermore nothing in the two resolutions of the Committee of Ministers of 15 April 2015 that merits the conclusion by the Netherlands that they endorse (as the Netherlands claims in para. 20 of its letter) “the position by the Netherlands during the procedures that aliens who are not lawfully resident within the State Party do not fall within the scope of the Charter”. As already noted, the Committee of Ministers has no authority to reverse the legal assessment of the scope of the ESC by the ECSR, which clearly concluded that “[w]hen human dignity is at stake, the restriction of the personal scope should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter [...]” (*CEC v. the Netherlands*, para. 66). More importantly, the brief, four paragraph resolutions by the Committee of Ministers, merely “recall[...] the limitation of the scope of the European Social Charter (revised), laid down in paragraph 1 of the appendix to the Charter”. Recalling the limitation of the scope of the ESC in the appendix to the Charter, as the ECSR has done itself in its legal analysis, does not in any way lead to the conclusion that non-citizens who are not lawfully present within the State Party do not have rights under the Charter. This was the clear conclusion the Committee of Ministers reached in its resolution of 7 July 2010 in the case of *Defence for Children International (DCI) against the Netherlands*, in which it held that the scope of the Charter in terms of persons protected does not relieve States “[...] from their responsibility to prevent homelessness of persons unlawfully present in their jurisdiction.”<sup>35</sup> Despite the arguments robustly presented by your Excellency’s Government, in an effort to persuade the Committee of Ministers to reject the approach adopted by the ECSR in July 2014, nothing in the

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<sup>34</sup> As an academic article in the foremost European journal on international law notes: “All commentators are agreed, however, that any recommendations or resolutions adopted by the Committee of Ministers are not legally binding.” Robin R. Churchill and Urfan Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’, *EJIL* (2004), Vol. 15 No. 3, p. 439.

<sup>35</sup> Resolution CM/ResChS (2010) 6, paragraph 2.

resolutions of 15 April 2015 reverses the clear and straightforward language in the 2010 resolution in the case of *Defence for Children International (DCI) against the Netherlands* or the legal decisions of the ECSR of July 2014.

Fourth, it is problematic that your Excellency's Government, as well as the Dutch courts, appear to have effectively marginalized economic, social and cultural rights by embracing the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR), while all but ignoring the ESC and the case-law of the ECSR. The ECHR is, as the letter of the Netherlands of 9 July 2015 also makes clear, essentially directed at the protection of civil and political rights. It is therefore hardly surprising that the case-law of the ECtHR has, generally speaking, not guaranteed economic, social and cultural rights in a comprehensive way. The bulk of the cases decided by the ECtHR regarding migrants have been complaints based on article 3 ECHR (prohibition of torture) and article 8 ECHR (right to privacy and family life), and have led to interpretations that only occasionally take into account economic, social and cultural rights, such as the right to housing. Nevertheless, there are examples in the case-law of the ECtHR, to which the reply of the Netherlands makes no reference, that recognize that leaving irregular migrants without any protection violates the principle of human dignity and human rights protected in the ECHR.

For example, in the case of *V.M. and Others v. Belgium* of 7 July 2015 (appl. no. 60125/11), the ECtHR held that article 3 of the ECHR was violated by Belgium when it refused to offer shelter to a Serbian family that had been expelled from a reception center after their asylum request had been refused, determining that the Belgian authorities did not properly take into account the vulnerability of the applicants as asylum seekers with children. Notwithstanding the fact that the crisis was an exceptional situation, the Court ruled that Belgium must have violated their obligation by exposing the applicants to conditions of extreme deprivation for four weeks, and except for two nights, having left them in the street without resources, without access to sanitation facilities, and having no way to meet their essential needs.<sup>36</sup>

In the case of *Tarakhel v. Switzerland* of 4 November 2014 (appl. no. 29217/12) the ECtHR held that in the absence of guarantees by the Swiss authorities that suitable living conditions would be available for a family that was about to be deported to Italy would be a violation of article 3 of the ECHR. The following observation by the Court was crucial in that regard: "In the present case, as the Court has already observed..., in view of the current situation as regards the reception system in Italy, and although that situation is not comparable to the situation in Greece which the Court examined in *M.S.S., the possibility that a significant number of asylum seekers removed to that country may be left without accommodation* or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded. It is

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<sup>36</sup> Unofficial translation of the judgement in French.

therefore incumbent on the Swiss authorities to obtain assurances from their Italian counterparts *that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together.*” (Emphasis added.)

## 5. Conclusion

It would seem to follow from the foregoing analysis that neither the 22 April 2015 compromise, nor its blessing by national courts on 26 November 2015, change the fact that the Netherlands is confronted with thousands of adult irregular migrants in need of housing who are not eligible for such housing based on current government policies.

As we conclude above, international human rights law imposes a clear obligation on the Netherlands to provide, at the very least, a minimum essential level of the right to housing as well as other related economic, social and cultural rights for irregular adult migrants on its territory. The provision of these human rights cannot be made conditional on cooperation with expulsion.

We believe that a similar obligation flows from regional human rights law and that the interpretation by your Excellency’s Government and domestic courts of this law is unduly narrow and suggests that only international obligations relating to civil and political rights need to be given effect. This is all the more problematic given the relatively minor financial implications of providing adult irregular migrants on Dutch territory who are at risk of homelessness a level of housing which ensures their dignity and allocating resources to shelters which provide assistance to migrants in irregular situations.

Given that many of the arguments invoked to justify a refusal to provide such housing have focused on the magnitude of the cost, the large numbers of persons involved, and the consequences in terms of encouraging ever larger numbers of irregular migrants, it would seem especially incumbent on the government to ensure that accurate data is available as a foundation for informed debate and decision-making. It would appear, however, that such information is not available. International human rights law requires the Netherlands to monitor the extent of the realization, and non-realization, of economic, social and cultural rights. While acknowledging that there are obstacles to obtaining in-depth and accurate information as to the number of irregular migrants in need of shelter and the conditions in which they live, those obstacles do not justify a lack of effort to acquire such information. The Netherlands should do everything in its power to assess the situation adequately. The fact that many irregular migrants are currently sheltered by municipalities and civil society organizations provides a clear starting point to identify, at least partially, the number of irregular migrants in the Netherlands in need of shelter and the conditions in which they currently live. On the basis of what is currently known, there does not appear to be strong evidence that offering such minimal shelter would lead to a significant additional influx of migrants. This seems all the more

unlikely given that neighboring countries have more humane policies in relation to shelter for irregular migrants. We continue to strongly urge your Excellency's Government to provide emergency assistance to homeless migrants in an irregular situation.

The current communication and your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Philip Alston  
Special Rapporteur on extreme poverty and human rights

Leilani Farha  
Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

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